THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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SC Court of Appeals

Jean H. Toal, Circuit Court Judge
DeAndrea G. Benjamin, Circuit Court Judge
James P. Kelly, Arbitrator

Appellate Case No. 2017-000994
Case No. 2014-CP-40-06017

Rajinder Parmar, ...Respondent,

v.

Balbir S. Minhas, Midlands Gastroenterology, PC,
and Midlands Endoscopy Center, LLC,.. Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES

1. The MG Shareholder's Agreement conclusively demonstrates that Parmar has no "compensation" claim, or any other claim, for any interest in the bank accounts or accounts receivable of MG or MEC

2. The circuit court erred in compelling arbitration of Parmar's claim to an interest in the companies' accounts receivable and bank accounts

3. The circuit court erred in failing to vacate the arbitrator's award of an interest in the defendant companies' accounts receivable and bank account

4. The arbitrator exceeded his power under S.C. Code Ann. § 15-48-130(a)(3)

5. The arbitrator exceeded his power, because he failed to obey the AHLA Rules specifically chosen by the parties as governing any arbitration between them

6. Assuming that Parmar's claim for an interest in the companies' accounts receivable and bank accounts was subject to arbitration, and further assuming that the arbitrator did not exceed his power in awarding Parmar an interest in those corporate assets, the arbitrator's award of "variances" in compensation must be reduced by one-half to avoid double recovery

7. The circuit court erred in awarding prejudgment interest on the arbitrator's award, because the arbitrator denied prejudgment interest

8. The circuit erred in refusing to vacate the arbitrator's award, because the award was not timely issued, and the circuit court's waiver ruling violated the controlling arbitration rules

STATEMENT OF THE CASE

This is an appeal from an arbitration award and related circuit orders. It arises from the termination of the business relationship between two doctors and two companies that they owned jointly.

In September 2014, the plaintiff (Parmar) filed an arbitration demand against the defendants, Dr. Minhas (Minhas), Midlands Gastroenterology (MG), and Midlands Endoscopy Center (MEC). The defendants opposed arbitration. Parmar filed a declaratory judgment action in circuit court seeking an order compelling the parties to arbitration. The defendants opposed arbitration.

The circuit court compelled arbitration, and the arbitrator ultimately awarded relief to Parmar. The defendants moved in circuit court to vacate or modify the award – Parmar moved to confirm the award. The circuit court confirmed the award in its entirety, and the defendants commenced this appeal.

STATEMENT OF FACTS

The fundamental question presented in this case was the amount of money owed to Parmar upon the termination of his business relationships with Minhas and the defendant companies. The relevant facts are largely undisputed.

Prior to June 30, 2011, Minhas was the 100% owner of the defendant companies, MG and MEC. On or about June 30, 2011, Parmar purchased a 50% ownership interest in each of these companies, paying $50,000.00 for MG, and $300,000.00 for MEC over a period of two and one-half years. Under §§ 3.8 and 3.9 of the MG Shareholders' Agreement, Parmar and Minhas also agreed to a walkaway provision for the resolution of any future disputes between them. Parmar could require Minhas to purchase Parmar's 50%

interest in MG and MEC from Parmar, and Minhas could require Parmar to sell his 50% interest MG and MEC to Minhas. (R. 89-91 at §§ 3.8 and 3.9). Upon the election to do so by either of them, the purchase price was to be determined as follows:

> 1. If the election is made less than one year after the purchase by Parmar, then Minhas would repurchase for the same prices paid by Parmar, *i.e.*, \$50,000.00 and \$300,000.00. (§§ 3.8(i) and 3.9(i)).
>
> 2. If the election is made more than one year but less than three years after the purchase by Parmar, then Minhas would repurchase for the same prices paid by Parmar plus 4% interest. (§§ 3.8(ii) and 3.9(ii)).
>
> 3. If the election is made at any time more than three years after the purchase by Parmar, then Minhas would repurchase for the "fair market value" of Parmar's interests in MG and MEC. (§§ 3.8(iii) and 3.9(iii)).

(R. 89-91 at §§ 3.8 and 3.9). These provisions controlled despite any terms of any agreement relating to MEC, including anything that conflicted with these provisions. (Id.). It is undisputed that accounts receivable and bank accounts are corporate assets that would be captured and considered in determining the "fair market value" price for any sale more than three years after the purchase by Parmar.

The MG agreement controlled the compensation payable to Parmar. Compensation was based solely on "production" and was to be calculated as follows:

> 1. The compensation paid to Parmar and Minhas would be equal if their respective production numbers were within 10% of each other.
>
> 2. If there was a production difference greater than 10% but less than 20%, then compensation would be 50% equal and 50% based on personal production of each.
>
> 3. If there was a production difference greater than 20%, then compensation would be based solely (100%) on personal production of each.

(R. 92 at § 3.15). The foregoing is the only "compensation" provision in any of the agreements between any of the parties. Nothing in any of the agreements permits,

references, or implies the use of accounts receivable, bank accounts, or any other matter in determining any compensation owed to anyone for anything.

The relationship between Parmar and Minhas declined. They were unable to resolve their differences, including Parmar's contention that he was entitled to receive one-half of the companies' operating accounts (bank accounts) and accounts receivables. As a result, Minhas exercised his contractual right to purchase Parmar's interests in MG and MEC under the walkaway provisions. This election was made in or about May 2014. As a result, § 3.8(ii) of the MG Shareholders' Agreement controlled the purchase price for both purchases, *i.e.*, original purchase prices by Parmar plus 4% interest. Accordingly, Minhas purchased Parmar's interest in MG and MEC by written agreements. (R. 134-136; 137-139). Both sales agreements specified that any dispute regarding the subject matter of the agreements was subject to the "exclusive jurisdiction" of the state and federal courts in South Carolina. (R. 135 at § 10; R. 138 at § 8).

In September 2014, Parmar filed an arbitration proceeding against Minhas and the defendant companies, contending that he was entitled to additional "compensation" measured by one-half of the companies' bank accounts and accounts receivable. (R. 3-4). Parmar also filed a declaratory judgment action in circuit court, seeking a determination that the issues being pursued by Parmar were subject to arbitration. (R. 4). Minhas answered and argued that Parmar's claim was controlled by the May 2014 sales agreements and not subject to arbitration. (R. 4). The circuit court ruled that the arbitration provisions in the MG and MEC agreements required arbitration of Parmar's claims. (R. 27-29).

After a two day hearing, the arbitrator accepted Parmar's "compensation" arguments and awarded him one-half of the companies' bank accounts and accounts

receivable. (R. 25 at (A)(1)-(2)). As a result, Parmar bought his interest in the defendant companies for $350,000.00 and received $651,252.86 for surrendering that interest less than three years later. (Id., R. 134-136; 137-139).

Parmar moved in the circuit court to confirm the award, and Minhas moved to vacate or modify the award. The circuit court confirmed the award in its entirety and added an award of prejudgment interest. (R. 1-24).

ARGUMENT

I. The MG Shareholder's Agreement conclusively demonstrates that Parmar has no "compensation" claim, or any other claim, for any interest in the bank accounts or accounts receivable of MG or MEC.

The cardinal rule of contract law is that contracts are to be enforced as written, regardless of the wisdom, folly, or apparent unreasonableness of the contract, regardless of any failure by one party to protect his rights, and regardless of whether the contract proves less favorable than anticipated by a party. *E.g., Jordan v. Security Group, Inc.*, 428 S.E.2d 705, 707 (S.C. 1993). Contract provisions cannot be ignored or rewritten to afford rights or relief not set forth in the contract. Here, the plain and unambiguous provisions of the parties' agreements demonstrate that Parmar had no right to any interest in the companies' bank accounts or accounts receivable when the parties ended their business relationships.

A cursory reading of the MG and MEC agreements reveals one important and undisputed fact: nothing in any of the agreements gave Parmar any right to any interest in the companies' bank accounts or accounts receivable until he had held his ownership interest in the companies for more than three years. It is undisputed that this right sprang into existence after three years, because the agreements established a purchase price based on fair market value, which would include the accounts receivable and bank accounts.

Recognizing this, Parmar contended that the agreements were "silent" on his right to any such interest prior to this three year period, that this "silence" created an ambiguity on whether he had any such right, and that he was entitled to such interest as "compensation." This "silence / compensation" argument is manifestly without merit under the plain and unambiguous terms of the parties' written agreements.

Silence alone does not and cannot create an ambiguity in a written contract, particularly a contract (like here) with a merger clause. *Jordan*, 428 S.E.2d at 707; *accord Abu-Shawareb v. South Carolina State University*, 613 S.E.2d 757, 760 (S.C. App. 2005), *citing and applying Jordan, supra*. Moreover, the agreements were not silent on Parmar's right to any interest in the companies' accounts receivable and bank accounts.

First, the MG Shareholders' Agreement plainly established that Parmar had no right or interest in these corporate assets until after he held his ownership interest in them for more than three years. (R. 89-90 at § 3.8 and R. 90-91 at §3.9). Second, the MG Shareholders' Agreement plainly established that Parmar's "compensation" rights were limited to calculations based solely on "production." (R. 92 at § 3.15). Thus, the agreements conclusively established that Parmar had no interest in or claim to the companies' accounts receivable and bank accounts when the parties ended their business relationship.

Finally, Parmar's "silence" theory is absurd. He agrees that any claim to an interest in the companies' accounts receivables and bank accounts after three years arises under the "fair market value" pricing directive of § 3.8(iii). He posits, however, that he gets this same interest under an unwritten "compensation" theory at any time before the end of that three-year period. He makes this argument despite the provision for 4% interest being

added to the price under § 3.8(ii), which can only be viewed as a substitute for not having any interest in the corporate assets of accounts receivable and bank accounts prior to the end of the three-year period that triggers "fair market value" pricing under § 3.8(iii). This absurdity further demonstrates that the parties' agreement clearly provided that Parmar had no claim to these corporate assets except by operation of § 3.8(iii), which did not apply when Parmar sold his interests in the companies to Minhas.

II. The circuit court erred in compelling arbitration of Parmar's claim to an interest in the companies' accounts receivable and bank accounts.

The MG Shareholders' Agreement controlled any claim that Parmar could have to any interest in the companies' accounts receivable and bank accounts. There could be no "compensation" claim, because the agreement expressly limited compensation to "production." The only treatment of these corporate assets was in the walkaway provisions discussed earlier and, therefore, any claim for an interest in these assets arose (if at all) under these provisions.

The parties, however, consummated the sales under these walkaway provisions in written agreements that did not have an arbitration clause and expressly granted exclusive jurisdiction to the state and federal courts in South Carolina. Thus, assuming Parmar had any claim to any interest in these corporate assets, it had to be pursued in court, not arbitration. The circuit court therefore erred in compelling arbitration of this claim. *MNBA Am. Bank, N.A. v. Christianson*, 659 S.E.2d 209, 212 (S.C. App. 2008) (it is for the court to decide whether an agreement to arbitrate exists and, if so, when an issue or claim comes within any agreement to arbitrate).

III. The circuit court erred in failing to vacate the arbitrator's award of an interest in the defendant companies' accounts receivable and bank accounts.

A. The arbitrator exceeded his power under S.C. Code Ann. § 15-48-130(a)(3).

The arbitrator exceeded his power under § 15-48-130(a)(3) in three ways. First, as set forth above, the circuit court erred in compelling arbitration of Parmar's claim to an interest in the companies' accounts receivable and bank accounts, because this claim was not subject to arbitration. For these same reasons, the arbitrator exceeded his power by arbitrating these issues.

Second, the arbitrator's award of an interest in these corporate assets establishes a manifest disregard of the plain and unambiguous terms of the parties' agreements (see discussion above). Though no South Carolina case is directly on point, Minhas submits that an arbitrator exceeds his power under § 15-48-130(a)(3) if he, as the arbitrator did here, grants an award that fails to draw its essence from the parties' underlying agreement, manifestly disregards the plain and unambiguous terms of the agreement, is not based on a plausible interpretation of the agreement, and/or reaches an irrational result under the terms of the agreement. See, *e.g.*, *Nappa Constr. Mgmt., LLC v. Flynn*, 152 A.3d 1128, 1132-1135 (RI 2017) (arbitrator exceeds his power if the award fails to draw its essence from the parties' underlying contract, is not based on a plausible interpretation of the agreement, manifestly disregards contractual provisions, or reaches an irrational result); *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 235-237 (4th Cir. 2006) (arbitrator exceeds his power if his award fails to draw its essence from the agreement because the result is not rationally inferable from the terms of the agreement, and it disregards and contravenes the plain and unambiguous terms of the agreement); *Missouri River Servs. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 854-855 (8th Cir. 2001) (arbitrator exceeds his power when his

award fails to draw its essence from the agreement, disregards or modifies the plain meaning of unambiguous contract provisions, and where contract cannot be reasonably construed to afford the relief granted by the arbitrator).

Third, as explained more fully below, the arbitrator granted relief that contravened a controlling arbitration rule chosen by the parties. In so doing, he also exceeded his power under § 15-48-130(a)(3), because the rules chosen by the parties are binding on the arbitrator and the courts, and those rules must be strictly enforced.

B. The arbitrator exceeded his power, because he failed to obey the AHLA Rules specifically chosen by the parties as governing any arbitration between them.

The parties agreed that any arbitration would be pursuant to the arbitration rules established by American Health Lawyers Association (AHLA). (R. 102 at § 8.11; R. 71 at § 12.6). The AHLA Rules were therefore binding on the arbitrator and to be strictly enforced by the courts. See *Grant v. Magnolia Manor-Greenwood, Inc.*, 678 S.E.2d 435, 438-439 (S.C. 2009) (requiring strict adherence to AHLA Rules chosen by parties).

AHLA Rule 7.5 specifically limits the scope of relief available to "any relief authorized by contract or applicable law." As shown earlier, nothing in the law or the parties' contracts permitted the arbitrator to award Parmar any interest in the companies' accounts receivable or bank accounts. To the contrary, this relief was in manifest disregard of and contrary to the plain terms of the parties' agreements, as well as in manifest disregard of and contrary to long-standing and fundamental principles of contract law. Thus, the arbitrator exceeded his power by granting relief prohibited by AHLA Rule 7.5, even if it be assumed that the arbitrator otherwise had the power under § 15-48-130(a)(3) to grant the relief awarded.

IV. Assuming that Parmar's claim for an interest in the companies' accounts receivable and bank accounts was subject to arbitration, and further assuming that the arbitrator did not exceed his power in awarding Parmar an interest in those corporate assets, the arbitrator's award of "variances" in compensation must be reduced by one-half to avoid double recovery.

The arbitrator's award included $82,000.00 for "variances," *i.e.*, Parmar claimed and the arbitrator agreed that Parmar was entitled to $82,000.00 in additional compensations for years 2013 and 2014 under the compensation provision of the MG Shareholders' Agreement. (R. 25 at (A)(3)-(4)). The arbitrator, however, failed to deduct this amount from the accounts receivable and bank accounts before awarding Parmar one-half of those accounts. Thus, $41,000.00 of the total $82,000.00 "variance" award is an impermissible double recovery.

South Carolina has an ironclad rule against a party receiving a double recovery such that it can be raised at any time and should be raised by the court on its own motion whenever the problem presents itself, either at trial or on appeal. *E.g.*, *Inman v. Imperial Chrysler-Plymouth, Inc.*, 397 S.E.2d 774, 776-777 (S.C. App. 1990). This special treatment of the "double recovery" problem by the South Carolina courts establishes that "double recovery" is against South Carolina public policy. By awarding a double recovery, the arbitrator manifestly exceeded his power under S.C. Code Ann. § 15-48-130(a)(3), AHLA Rule 7.5, the common law rule that an arbitrator cannot act in manifest disregard of the law, and in violation of South Carolina public policy. Accordingly, the judgment must be modified to eliminate the impermissible double recovery.

V. The circuit court erred in awarding prejudgment interest on the arbitrator's award, because the arbitrator denied prejudgment interest.

The arbitrator denied Parmar's request for prejudgment interest. (R. 25 at (B)(4)). Parmar never made a motion to modify the award and challenge the arbitrator's decision

to deny prejudgment interest, but his motion to confirm the award included a request for prejudgment interest. The circuit court awarded prejudgment interest in the amount of $22,385.94, relying on the Illinois federal district court decision in *Fitigues, Inc. v. Varat Enters.,* 813 F. Supp. 1336 (N.D. Ill. 1992). (R. at 24 & n.9).

Research reveals no South Carolina authority on the issue of whether the circuit court may award prejudgment interest after the arbitrator has denied a claim for prejudgment interest. Minhas respectfully submits that this Court should adopt the following approach. First, a trial court cannot award prejudgment interest if it was denied by the arbitrator, or the arbitration award is silent on the issue. See *Blanton v.Isenhower,* 674 S.E.2d 694, 695-696 (N.C. App. 2009); *Eisinger v. Robinson*, 596 S.E.2d 831, 833-834 (N.C. App. 2004); *Palmer v. Duke Power Co.*, 499 S.E.2d 801, 806-808 (N.C. App. 1998). Second, a trial court may modify the arbitration award to include prejudgment interest as follows: (a) if the arbitrator specifically reserved the issue for the trial court to determine; or (b) if the arbitrator made no determination on awarding prejudgment interest, then the court may award prejudgment interest from the date of the award. See *Thompson v. Seller*, 808 S.E.2d 608, 612 (N.C. App. 2017); *Blanton*, 674 S.E.2d at 695-696. Here, the arbitrator denied Parmar's claim for prejudgment interest and, therefore, the circuit court erred in modifying the award to include prejudgment interest.

VI. The circuit erred in refusing to vacate the arbitrator's award, because the award was not timely issued, and the circuit court's waiver ruling violated the controlling arbitration rules.

When the parties select a particular set of arbitration rules, the courts must strictly adhere to and enforce those rules. See *Grant*, 678 S.E.2d at 438-439 (requiring strict adherence to AHLA Rules chosen by parties). Here, the parties specified that any

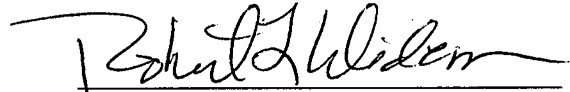
arbitration would be governed by the AHLA Rules. AHLA Rule 7.1 expressly provides that "[a]n arbitrator must issue an award within 30 days after the hearing is closed unless the arbitrator and all parties agree to extend this deadline." (R. 224 (emphasis added)). It is undisputed that the arbitrator did not issue his award within this mandatory 30-day limit, and it is also undisputed the arbitrator and parties never agreed to extend this deadline. Accordingly, the circuit court erred in refusing to vacate the arbitrator's award.

The circuit court refused to set aside the award on two grounds. First, the circuit court held that the arbitrator did not exceed his power by issuing the late award, because AHLA Rule 7.1 was merely a procedural rule that did not impact the issue of arbitrability and enforcing it would unfairly prejudice Parmar. The circuit court, however, was bound by law to enforce the AHLA Rules strictly, because the parties' specified that those rules would govern any arbitration. *Grant*, 678 S.E.2d at 438-439 (requiring strict adherence to AHLA Rules chosen by parties).

Second, the circuit court held that Minhas waived any right to contest the timeliness of the award by not objecting until after receiving the award. The circuit court relied on S.C. Code § 15-48-90(b) to justify this ruling. The circuit court erred because: (1) the AHLA rule specified the time limit, and it must be strictly enforced; (2) the AHLA was not silent on how or when to change the time limit – it could be changed by agreement – and nothing in the AHLA provided for a waiver of the time limit in any other manner; and (3) it is impermissible to use § 15-48-90(b) to amend the AHLA Rules, because the courts must strictly enforce the arbitration rules selected by the parties. *Grant*, 678 S.E.2d at 438-439 (requiring strict adherence to AHLA Rules chosen by parties). By invoking a waiver based on § 15-48-90(b), the circuit court impermissibly re-wrote the parties' arbitration

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellants complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



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agreement and AHLA Rule 7.5, rather than enforcing that agreement and rule as required by law. Accordingly, the award should be vacated.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the arbitration award should be vacated in its entirety or in part as set forth in the foregoing arguments.

Respectfully Submitted,

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