

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

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S. Jackson Kimball, Special Circuit Court Judge

JUN 14 2017

SC Court of Appeals

Appellate Case No. 2016-002317

Lloyd C. (Chad) Whitmire Respondent,

v.

Johnny C. (Carl) Hawkensen and
The Commons at Fort Mill, LLC, ... Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. The circuit court's interpretation of the Operating Agreement is not a factual finding requiring deference on appellate review

The Respondent's brief confuses the applicable standard of review. Specifically, Respondent incorrectly asserts that the circuit court's determination of arbitrability must be affirmed, regardless of the distinction between legal and factual findings, if it is "reasonably supported by the evidence." (Br. Resp. p. 5). In actuality, the S.C. Supreme Court has made it clear that this appellate deference applies only to the *factual* findings, if any, underlying an arbitrability ruling. Partain v. Upstate Auto. Grp., 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010) ("The determination whether a claim is subject to arbitration is subject to de novo review. . . . Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.").

"Arbitration is a matter of contract and controlled by contract law." S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993). "The construction of a written instrument is, in the first instance, a question of law for the court." Campbell v. Bi-Lo, Inc., 301 S.C. 448, 451, 392 S.E.2d 477, 479 (Ct. App. 1990). "Interpretation of an unambiguous agreement is for the court." Pearson v. Church of God, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (1996).

In this case, the circuit court's determination regarding the existence and scope of an arbitration agreement was not based on any factual findings regarding the parties' intentions, because the court did not hold that the

Operating Agreement was ambiguous.¹ Instead, the circuit court determined that, as a matter of law based on the plain language of the operating agreement, there was no agreement to arbitrate. Likewise, the circuit court's determination that the "notice" provision was narrow in scope was based on the court's interpretation of the plain language of the contract, and was not a factual finding as asserted by the Respondent. (Br. Resp. p. 12). These are purely legal findings, subject to de novo review.

II. The parties' written agreement is not limited to what appears after the phrase "set forth below" in the introductory paragraph

The Respondent argues that nothing appearing in the parties' Operating Agreement before the phrase "set forth below" was in fact part of the contract. This reading of the document defies well established principles of contractual interpretation and would surely surprise any reasonable party entering into the agreement.

"Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." Mishoe v. Gen. Motors Acceptance Corp., 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958). "[T]he dry words of the contract should, if possible, be so interpreted as to subserve, not subvert, such intention." Dibble v. Dibble, 248 S.C. 165, 181, 149 S.E.2d 355, 364 (1966). "An interpretation which evolves the more reasonable and probable contract should be adopted, and a construction leading to an absurd result should be avoided." Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975).

¹ The circuit court held that "there is no ambiguity in the language of the operating agreement." (R. p. 13).

“Common sense and good faith are the leading touchstones of the inquiry.” Id. at 362, 218 S.E.2d at 434.

“If practical, documents will be interpreted to give effect to all of their provisions.” M & M Grp., Inc. v. Holmes, 379 S.C. 468, 476, 666 S.E.2d 262, 266 (Ct. App. 2008). “[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.” Stevens Aviation, Inc. v. DynCorp Int'l LLC, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014). The Court of Appeals has held, for example, that even though “whereas” clauses in contracts typically serve merely to recite the background leading to a contract, a reference in such a paragraph to an agreed upon financing contingency is effective to establish a contractual condition precedent. M & M Grp. at 475-77, 666 S.E.2d at 266 (citing Horry v. Frost, 10 Rich. Eq. 109, 1858 WL 3728 (Ct.App.Eq.1858) (“A covenant may be as obligatory when expressed by way of recital as if expressed in the formal part of the agreement.”)).

“Furthermore, a court must gather the parties' intention from the contents of the entire agreement, not from any particular clause therein.” Bluffton Towne Ctr., LLC v. Gilleland-Prince, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015). Likewise, “[a] contract must be read as a whole document so that one party may not create ambiguity by pointing out a single sentence or clause.” N. Am. Rescue Prod., Inc. v. Richardson, 411 S.C. 371, 378, 769 S.E.2d 237, 240–41 (2015), reh'g denied (Mar. 19, 2015).

Here, it is undisputed that the parties signed a contract stating that “THE TERMS AND CONDITIONS OF THIS OPERATING AGREEMENT ARE SUBJECT TO BINDING ARBITRATION.” Following the touchstones of “common sense and good faith”, Farr, supra, with an eye toward assigning meaning to all of the terms of the contract, leads to only one conclusion: the phrase “set forth below” was used as part of standard introductory language to frame and introduce the agreement, and was not intended to render all of the preceding language superfluous. Under South Carolina law, the isolated phrase “set forth below” cannot be mechanically applied to cause the arbitration term to be ambiguous, much less meaningless.

On the other hand, the Operating Agreement can be read to give meaning to both the arbitration language and the phrase “set forth below; the latter is simply used to introduce the agreement and indicate, without arbitrary exclusivity, that additional detailed terms are to be found “below”. Unlike the Respondent’s interpretation, this common sense construction does not require the extraordinary assumption that the parties included contractual language, underlined and in all caps, that they did not actually intend to form part of the agreement, or that they mistakenly retained a supposedly non-substantive arbitration notice, underlined and in all caps, that they had intended to remove.

In fact, the Respondent’s argument only makes sense if the “BINDING ARBITRATION” provision is impliedly supplemented with a contingent introductory clause such as, “To the extent set forth hereinbelow”. This approach would of course constitute a rewriting of the contract. “[W]hen [a] contract is clear

and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.” Park Regency, LLC v. R & D Dev. of the Carolinas, LLC, 402 S.C. 401, 412, 741 S.E.2d 528, 534 (Ct. App. 2012).

Respondent acknowledges that “[w]here [a] contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention”, McPherson v. J. E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509–10 (1945), but then asks the Court to instead presume that the inclusion of a succinct statement on arbitration without more exhaustive arbitration terms was based on “intentional omission, negotiated revision, or mere inadvertence.” (Br. Resp. p. 8). Respondent offers no basis whatsoever to avoid the presumption that the statement that “THE TERMS AND CONDITIONS OF THIS OPERATING AGREEMENT ARE SUBJECT TO BINDING ARBITRATION” was not “employed deliberately and with intention.” McPherson, supra. “Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions.” Lee v. Univ. of S.C., 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014).

Finally, rigorous application of the Respondent’s theory to its logical conclusion leads to absurd results. The terms appearing in the agreement before the phrase “set forth below” include the name of the entity (thereafter referred to only as “the company”), the names of its three members (thereafter referred to as “Managing Member” and the “Members”), and the fact that the entity is “a single

purpose real estate holding entity”.² (R. p. 123). Faithful application of the Respondent’s construction would require, bizarrely, that these essential terms be read out of the agreement altogether. Reasonable consideration of the plain language of the contract, on the other hand, requires that the full set of terms within its four corners be taken to memorialize the parties’ mutual intentions, including their clear intention to submit to arbitration.

III. The arbitration language included in the appendix of the Respondent’s Brief supports Appellants’ position

The Appendix to Respondent’s brief quotes arbitration agreement language from the opinion of the Court of Appeals in *The Hous. Auth. of City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003). (Br. Resp. p. 20-21). The Court characterized the relevant language, which is virtually identical to the language used in the Operating Agreement in this case, as “broadly worded arbitration agreements”, *Id.* at 337, 588 S.E.2d at 622, “that covered disputes arising between [the parties]”, *Id.* at 335-36, 588 S.E.2d at 621. Specifically, the two contracts at issue in Hous. Auth. provided that “[t]his contract is subject to arbitration under S.C. Code ANN 15-48-10, ET SEQ.”, and “[t]his contract is subject to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association.” *Id.* at 337, 588 S.E.2d at 622.

² Contrary to the position he takes on the effect of the phrase “set forth below”, Respondent’s brief quotes with approval the circuit court’s finding that, “[p]er the terms of the Operating Agreement, the Company is a ‘single purpose real estate entity’”. (Br. Resp. p. 13).

This language is substantively indistinguishable from the arbitration agreement in the parties' Operating Agreement in this case. While the Hous. Auth. contracts did contain an additional single-sentence provision setting rules for submitting evidence to the arbitrator, this provides additional detail only about the intended *procedure* for arbitration, and not about the underlying *agreement* to arbitrate or the broad scope of disputes subject to arbitration.

IV. The circuit court's interstate commerce ruling was not harmless error

The circuit court's ruling that the claims in this case involve purely intrastate commerce was not harmless error, as argued by Respondent. (Br. Resp. p. 15). As discussed in the Appellants' Initial Brief, the claims are in fact enforceable under both the Federal Arbitration Act ("FAA"). 9 U.S.C. §1, et seq., and the South Carolina Uniform Arbitration Act ("SCUAA"). S.C. Code § 15-48-10, et seq. However, the circuit court ruled, and the Respondent argues on appeal, that the SCUAA somehow prohibits parties from using a single provision to serve as both the required notice and the agreement to arbitrate. (Br. Resp. pp. 9 – 10).

Appellants disagree with this construction of the SCUAA but, assuming for the sake of argument that it is correct, the FAA clearly does not impose such a restriction because it contains no notice requirement. Accordingly, in the event that the Court of Appeals adopts the circuit court's interpretation of the SCUAA notice requirement but determines that the parties did in fact agree to arbitrate the claims at issue, the interstate commerce question would be critical to determination of this appeal.

V. The Appellants were aggrieved by the circuit court's holding that it had jurisdiction over the receivership petition

The Appellants were aggrieved by the circuit court's ruling that it had jurisdiction, and specifically reserved the right to exercise that jurisdiction, to appoint a receiver and impose other equitable control over the multi-million dollar business enterprise at issue in this litigation. A party is "aggrieved by [a] judgment or decree when it operates on his rights of property or bears directly upon his interest, the word aggrieved referring to a substantial grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation." Bivens v. Knight, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970).

In asserting and retaining jurisdiction over the receivership issue, the circuit court ruled directly against the Appellants' position that the parties had contractually agreed to submit that type of issue to arbitration. In other words, the circuit court's ruling, which leaves the Appellants under continuous threat of judicial divestment of control over the business and its assets, was a denial of the Appellants' asserted right to arbitration of that issue. See S.C. Code § 15-48-200(a) (providing for direct appeal from an order denying a motion to compel arbitration).

Furthermore, leaving this jurisdictional question unresolved until the circuit court takes the next step by imposing a receivership or other drastic equitable measure would be significantly prejudicial to the Appellants. That procedural treatment of the issue would subject the parties to the time and expense of additional receivership proceedings in the circuit court and yet another appeal, and could leave the Appellants burdened by a receivership for a matter of

months, if not years, during the pendency of the appeal. Judicial efficiency and fairness to the parties favor resolution of this issue at this stage of the litigation.

These considerations also highlight that, although not expressly stated in the Respondent's brief, his position boils down to an argument that the circuit court's jurisdiction, or lack thereof, to appoint a receiver is a moot question because, even if jurisdiction is lacking, so far no receivership has been ordered. However, even a seemingly moot issue can be resolved on appeal where "the decision by the trial court can affect future events or have collateral consequences to the parties". Collins Music Co. v. IGT, 365 S.C. 544, 549, 619 S.E.2d 1, 3 (Ct. App. 2005). Here, where the circuit court expressly granted leave to Respondent to submit a subsequent petition for receivership, (R. p. 4 – 5), the underlying jurisdictional ruling clearly affects future events and could lead to collateral consequences for Appellants' legal and business interests.

VI. The Respondent's receivership petition was a request for relief premised on rights established under the terms of the Operating Agreement

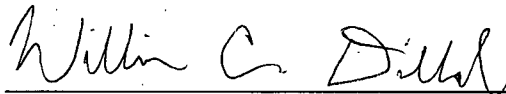
The Respondent contends that his "motions for preliminary relief were not premised upon the 'terms and conditions' of the Operating Agreement, but upon the provisions of South Carolina's receivership statute." (Br. Resp. p. 17). However, the fact that the Respondent resorted to a request for statutory relief to enforce his claims does not change the fact that he was asserting alleged rights based on the terms and conditions of the Operating Agreement (and specifically the terms governing the operations, control and finances of the company). A receivership is a remedy, not an underlying substantive basis for relief, and in

this sense no different than a request for contract damages or an accounting based on the terms and conditions of a business entity's governing agreement. Here, the parties' substantive rights must be vindicated through whatever remedies they are able to obtain through arbitration, whether the remedies are statutory or otherwise.

CONCLUSION

For the foregoing reasons, the Appellants respectfully submit that the Court of Appeals should reverse the circuit court's order denying Appellants' Motion to Compel Arbitration, should reverse the circuit court's order denying appointment of a receiver to the extent that the order asserted continuous jurisdiction and imposed a requirement for production of financial statements, and should remand this matter for entry of an order compelling arbitration of the parties' dispute.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

I certify that this Final Reply Brief of Appellants complies with Rule 211(b),
SCACR.

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