RECEIVED
Mar 08 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Bentley Price, Circuit Court Judge

Case No. 2019-CP-10-00178
App. No. 2020-000925

J. DANIEL MAHONEY…….....Plaintiff/Respondent,

v.

THE MUHLER COMPANY, INC. and HENRY M. HAY, III……. Defendants/Appellants.

FINAL REPLY BRIEF OF APPELLANTS

EPTING & RANNIK, LLC
Jaan G. Rannik, Esquire
46A State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
jgr@epting-law.com
ATTORNEY FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

ARGUMENTS IN REPLY

A. BYLAWS

Respondent J. Daniel Mahoney ("Mahoney") spends the first four pages of his brief detailing how the arbitration provision governing this dispute came to be and decrying the provision as "unfair."[1] The effectiveness of the arbitration provision and the arbitrability of the claims between Appellant The Muhler Company ("Muhler") and Mahoney are not before this Court as Mahoney did not challenge that the dispute was arbitrable, but rather challenged the method of appointment of arbitrators.[2] These pages of Mahoney's brief are of no significance to this appeal.

B. CLAIMS ARE NOT "UNRELATED"

Regarding the two lawsuits between these parties, Mahoney states: "The lawsuits were brought separately for a reason—they are unrelated and concern entirely different matters." **Respondent's Brief** at 7. Mahoney is wrong; the suits are very much related.

1. Mahoney's Breaches of His Fiduciary Obligations

Both lawsuits brought by Mahoney concern his rights following his termination as CEO of Muhler. His termination prompted a suit for wrongful termination and triggered the buyout provision in the company's Stockholder Agreement that itself prompted this lawsuit, **ROA 0210**

[1] Muhler will file a motion to strike certain items from Respondent Mahoney's designation of matter because they were not in the record before the trial court as required by Rule 210(c), S.C.A.C.R.

[2] The trial court's granting of a new method of appointment of the arbitrators is on appeal before the Supreme Court, Case Number 20-000370.

(Stockholder Agreement at 4).[3] The facts underlying each suit are the same, namely, Mahoney's conduct as CEO and shareholder of Muhler, his actions in breach of his fiduciary duties to the company and its shareholders, his termination, the justification for his termination, and whether a basis exists for him to receive compensation as a result.

The first suit filed by Mahoney against Muhler and Henry Hay ("Hay") was arbitrated, the arbitrators unanimously finding that Mahoney breached his fiduciary duties and that his termination was justified. An example of the breach of fiduciary duty presented to the panel was Mahoney drafted his employment and stockholder agreements for his own benefit instead of Muhler's.

To illustrate, the employment agreement provided that Mr. Mahoney, as CEO, would work "up to 10 days" per month, in exchange for $10,000 in salary per month, health insurance, a car allowance, and other benefits. **ROA 0231 (Employment Agreement at § 5)**. The agreement went on to provide:

> All of the time spent working by Executive will be considered as part of the time required by this Agreement, even if such time is spent off Company premises.

ROA 0230 (Employment Agreement at § 2). The agreement further inured to Mahoney's benefit by ensuring his work for Muhler would in no way interfere with his other sources of income:

> The Company [Muhler] acknowledges and agrees that Executive [Mahoney] has other business, consulting and board of directors commitments and responsibilities outside of the Company that will continue while he is employed by the Company, and such activities shall not be considered a conflict or distraction from his duties as

[3] This agreement is the basis for Mahoney's claim for and calculation of a mandatory buyout of his shares.

> CEO, nor shall they be viewed in a negative manner by the Company.

ROA 0230 (Employment Agreement at § 3).

Under the Stockholder Agreement, Mahoney obtained 25% of the company's shares without contributing capital and that the value of his shares would be:

> the greater of: (i) four times Adjusted EBITDA, divided by the number of outstanding shares, or (ii) the Corporation's Book Value (defined as the sum of the Corporation's retained earnings and paid in capital) divided by the number of outstanding shares of stock. There shall be no reduction in the valuation of stock purchased pursuant to this Agreement for minority interests, lack of control, or any other reason.

ROA 0211 (Stockholder Agreement at Article 5 § A).

These agreements were offered as evidence in arbitration that Mahoney breached his fiduciary obligations to Muhler by advancing his own interest rather than Muhler's, and the panel unanimously ruled both agreements were unenforceable acts of self-dealing:

> We find Mahoney's admission at trial that Exhibits 1 [Employment Agreement] and 2 [Stockholder Agreement] were prepared by his lawyer to protect his interests as employee and shareholder are acts of self-dealing, not enforceable, and further reason that Mahoney's claims fail.

ROA 0026 (Arbitration Award at 6).

2. Two Bites at the Apple

Mahoney argues the claims in the two suits were brought separately and are unrelated. The question though is not "were the claims brought separately?"; it is "*could* they have been brought together?" As noted in Respondent's brief, "[w]hen substituted for claim preclusion, '*res judicata* precludes parties from subsequently relitigating issues actually litigated *and those that might have been litigated* in a prior action.'" **Respondent's Brief** at 7 (quoting *S.C. Dep't*

of Soc. Servs. v. Basnight, 346 S.C. 241, 249, 551 S.E.2d 274, 278 (Ct. App. 2001)) (emphasis added).

The claims could have been litigated in one action. *See* Rule 18(a), S.C.R.C.P. ("A party asserting a cause of action . . . may join . . . as many claims, legal, or equitable, as he has against the opposing party."). Segregating remedies into separate suits in order to retry the factual determinations in the prior suit—getting two bites at the apple, in other words—is exactly what the doctrine of res judicata exists to prevent. *See, e.g.*, *Talismanic Properties, LLC v. City of Tipp City, Ohio*, 742 F. App'x 129, 131 (6th Cir. 2018) ("*Res judicata* simply means that a litigant generally does not get two bites at the apple.").

Were it not for the unique circumstances here—where the trial court ruled in favor of arbitration in both cases, but ruled to change the method of arbitrator selection in the second case[4]—Muhler would have asserted that the suits were not separate, but rather one action. In this way, the result would be binding with no possibility of inconsistent results. This appeal is Muhler's effort to come to exactly this place, though at the expense of greater time and effort.

C. ***RES JUDICATA***

1. The Award Is Confirmable Because the Issue Was Decided in the Prior Arbitration

Mahoney attempts to avoid the *res judicata* issue before this Court by saying it is for a panel of arbitrators to decide. In the unique situation here, it is the fact that the issue of the enforceability of the Stockholder Agreement was previously decided—and that the arbitration award was previously confirmed—that gives it *res judicata* effect and requires the award's

[4] The propriety of the trial court refusing to enforce these parties' arbitrator selection clause is the subject of an appeal currently before the South Carolina Supreme Court, Number 20-000370.

confirmation in this case. *See, e.g.*, *NTCH-WA, Inc. v. ZTE Corp.*, 921 F.3d 1175, 1180 (9th Cir. 2019) (a court order confirming an arbitration award has the same force and effect, including preclusive effect, as a final judgment on the merits); *Rudell v. Comprehensive Accounting Corp*., 802 F.2d 926, 929 (7th Cir. 1986) (giving claim preclusive effect to an arbitration award confirmed by the trial court); Restatement (Second) of Judgments § 84(1) (1982) ("a valid and final award by arbitration has the same effects under the rules of *res judicata* . . . as a judgment of a court"). Whether to confirm an arbitration award is unquestionably an issue for the Court. S.C. Code § 15-48-120 ("Upon application of a party, *the court* shall confirm an award . . . ." (emphasis added)).

2. Mahoney's Contention that the Court Cannot Decide *Res Judicata* Not Preserved and Belied by Prior Arguments

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004). Further, when a party prevails in an argument, it cannot subsequently assume a contrary position because it becomes in his interest to do so. *See N.H. v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814 (2001) (noting judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase" (internal citation omitted)).

Mahoney's argument that the *res judicata* effect of the prior arbitration award can only be decided in arbitration, while Muhler agrees substantively, was not argued to or ruled on by the trial court.[5] Mahoney actually argued the opposite before the trial court — that the *trial court*

[5] The issue before the trial court was a motion to confirm the arbitration award. Confirmation of arbitration awards is for the courts. The award was confirmable by the court, and indeed had

should reject Muhler's *res judicata* argument and deny confirmation of the award. At no time did Mahoney ever argue to the trial court that the question was reserved to the jurisdiction of the arbitrators. *Infra*.

a. What Mahoney Argued Before the Trial Court

During the proceedings before the trial court, Mahoney argued that Muhler's confirmation and *res judicata* efforts should be denied because:

1. Muhler's effort to confirm the arbitration award was merely an effort to delay and/or avoid proceeding in arbitration in the second suit; **ROA 0178-9**, **0181-2 (Hearing Tr.at 6–7, 9–10)**;
2. the two lawsuits filed by Mahoney against Muhler were "separate civil actions" with "separate counsel" and "different outcomes in the two motions to compel arbitration" before Judge Price; **ROA 0178-9 (Hearing Tr. at 6–7)**; and finally
3. "They [Muhler] are just trying to do an end run. They didn't like your ruling. They have tried to block us moving forward. And not they are trying to get around it by doing this. So it [the finding that the Stockholder Agreement is unenforceable] was not a primary piece of the litigation in the employment case. It was a throwaway line. And it has – it should have absolutely no impact on our lawsuit." **ROA 0181-2 (Hearing Tr. at 9–10)**.

b. Trial Court's Reasoning

To Mahoney's last argument (that the motion to confirm was an attempted "end run"), Judge Price stated "I agree. I will deny the motions." **ROA 0182 (Hearing Tr. at 10)**. No additional reasoning for denying the motion was provided by the trial court, which then entered a

---

to be confirmed pursuant to the S.C. Arbitration Act, S.C. Code § 15-48-10 *et seq.* Mahoney never argued that the issue of whether to confirm the award was not properly before the court.

form 4 order stating simply "Defendant's Motion to Confirm arbitration award agreement [*sic*] is denied."

c. Who Determines Res Judicata

Now before this Court, Mahoney argues for the first time that any *res judicata* effect of a prior arbitration award must be determined in arbitration, not the courts. **Respondent's Brief** at 6. Mahoney contends "Judge Price denied the confirmation of the arbitration award . . . because the preclusive effect of that award on the subsequent lawsuit must be determined by the arbitration panel." *Id.* at 6. This is entirely inaccurate. As demonstrated *supra*, the trial court made no statement or finding even resembling Mahoney's contention.

Nor was the trial court likely to, as this issue was not presented below. At no point in the briefing or oral argument did Respondent posit that Judge Price lacked the authority to decide the *res judicata* effect of the prior arbitration award or that such decision must be made by the arbitrators. In fact, Respondent asked the court to find the award was *not res judicata*, arguing the prior and subsequent lawsuits were "separate civil actions" with "separate counsel" and "different outcomes in the two motions to compel arbitration." **ROA 0178-9 (Hearing Tr. at 6–7)**.

Respondent did not raise this argument, and Judge Price did not rule on it. The issue is not preserved. In addition, Mahoney waived the argument by arguing the opposite to the trial court, and Respondent is estopped from arguing it to this Court.

D. MAHONEY'S OTHER CLAIMS

Pages 6–12 of Mahoney's brief argue that, if Muhler's *res judicata* argument is accepted by this Court, Mahoney nevertheless has additional remedies and claims that would not be

extinguished.[6] This argument was not presented to the trial court and is not preserved for review by this Court. In addition, whether Mahoney has other remedies and claims is an issue subject to arbitration.

CONCLUSION

The unenforceability of the Stockholder Agreement was decided in final, binding arbitration between these parties and confirmed by the trial court. The determination is *res judicata*, and the arbitration award should be confirmed in this action.

Respectfully submitted,

This 8th day of March, 2021
Charleston, S.C.

EPTING & RANNIK, LLC
Jaan G. Rannik, Esquire
46A State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
jgr@epting-law.com
ATTORNEY FOR APPELLANTS

[6] In the process, Mahoney "asserts that the claims arising out of his status as a minority shareholder in a Statutory Close Corporation cannot be subject to arbitration." **Respondent's Brief** at 9. However, this argument was waived when Respondent failed to challenge the arbitrability of this claim before the trial court in response to Muhler's motion to compel arbitration of the entire case, opposing only the manner in which the arbitrators would be selected. The argument is not preserved for appeal.