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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2020-001449

Wanderlove Travel, LLC (Respondent)

V.

Avanti Destinations, LLC (Appellant)

FINAL BRIEF OF RESPONDENT

April 1, 2021

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I. **The Trail Court did not err in denying Avanti's Motion to Compel Arbitration.**

STATEMENT OF THE FACTS OF THE CASE

Wanderlove is a limited liability company under the laws of South Carolina, with its principal place of business in Fort Mill, South Carolina. Avanti is a limited liability company under the laws of Oregon, with its principal place of business in Portland, Oregon. Avanti maintains a regional sales manger over the State of South Carolina and actively encourages sales in South Carolina. Their website targets all states and they derive a proportionate amount of business, approximately 2%, from the state of South Carolina.

This case arises from Avanti's refusal to refund money paid to them by Wanderlove on behalf of 7 customers for trips that were forced to cancel due to the COVID-19 pandemic. Avanti received refunded money from 3rd Party Vendors for trips that were cancelled for the Wanderlove clients due to the global pandemic response. Avanti then refused to refund the money to the customers, or offered vouchers for other things that were not of equal value to what the customer had originally purchased through Avanti. Avanti also refused to participate in any accounting of the monies they have in their possession. Avanti ceased all communication with Wanderlove or it's attorney until Wanderlove filed a lawsuit. Had Avanti simply returned the money for the cancelled trips, there would have been no basis for a lawsuit. Avanti maintains possession of the funds.

Avanti's website (www.avantidestinations.com) is set up to target the entire United States and requires travel agents to make bookings for their clients. Avanti uses a browsewrap

agreement which treats the use of the website as consent to the terms and conditions of the website. The arbitration clause is included in these terms and conditions, which Respondent was not informed of nor required to read prior to accessing the Website. When the agent accesses the website for the first time there is no way to view the terms and conditions. The agent must then create an account through the website to be able to use the features and book trips for her clients. At no point is the agent notified that use of the website constitutes acceptance of the terms and conditions or given access to view the terms and conditions. Once the agent has created an account and logged into their portal, the agent can access the terms and conditions under a tab labeled "Legal". The agent may review the terms and conditions if they so choose but are never prompted to review them or required to review them before using the website. At no point was Wanderlove directed to the legal terms and conditions page on the Website. Wanderlove was unaware of such terms and conditions, and the arbitration clause, until the litigation began. No signed contract exits between the two parties, electronically or in hard copy. No party has presented a copy of the Website as it existed when Wanderlove first visited the Avanti website. Wanderlove has submitted an affidavit stating they were unaware of the terms and conditions contained in the "Legal" section.

STANDARD OF REVIEW

Respondent believes the standard of review for this appeal is de novo review. Repondent would stress that if any evidence reasonably supports the trial court's finding, the appellate court will not overturn these findings. (*Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 57` S.E.2d 711 (Ct. App. 2002).

ARGUMENT

I. The Circuit Court was correct in denying Avanti's Motion to Compel Arbitration.

Respondent does not disagree with Appellant's statement of law regarding the Federal Arbitration Act and the preemption of South Carolina law. Respondent's position is Appellant has failed to show there "was a written agreement that includes an arbitration provision which proports to cover the dispute." (*Adkins v. Labor Ready, Inc*, 3030 F. Ed 496, 500-01 (4th Cir. 2002). Respondent does not disagree the Federal Arbitration Act controls and preempts South Carolina law when applicable; Respondent argues the FAA is not invoked here as any contract between Avanti and Wanderlove does not include the Arbitration clause.

The meeting of minds required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. (*Player v. Chandler*, 299 S.C. 101, 103 (S.C. July 31, 1989). When Respondent began using Avanti's website to book travel for her clients she was required to make an account before using the website's features. South Carolina contract law is governed by well-settled principles. In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. For a contract to be created, a party must accept the known offer of another party. Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer. A bilateral contract contains mutual promises and is created by an acceptance constituting a return promise by the

offeree. A bilateral contract exists when both parties exchange mutual promises. Moreover, a contract only arises when there is an actual agreement by the parties in which the parties demonstrate a mutual intent to be bound. (*Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.*, 357 S.C. 363, 365 (S.C. Ct. App. February 2, 2004).

Under South Carolina law for parties to enter into a contract there must be an offer, acceptance, consideration, and a meeting of the minds as to the terms of the agreement. Here, Avanti's terms and conditions may rise to the level of an offer, however, it was never communicated to Wanderlove. Since Wanderlove was never made aware of the offer, the party can not agree to an offer it was not aware existed. Wanderlove never made any promise to perform and was not made aware of the terms and conditions until the dispute had proceeded to litigation. Even after Wanderlove had created an account and logged in to the agent portal Respondent was never made aware of the terms and conditions or that use of the website constituted assent to the terms. Here, Wanderlove could never have agreed to the terms of the offer since Wanderlove was never made aware of the terms and conditions. Respondent also never expressly assented to the terms. Simple use of the website is not enough to symbolize an unconditional manifestation of assent to the terms of the agreement. However, even if the Courts found that Wanderlove's use of the website was an acceptance of the terms of the agreement the contract would still fail for a lack of the meeting of the minds. A meeting of the minds between the two parties cannot occur when one party is not aware of the terms and conditions of the contract. If the party is unaware of terms, that party cannot be deemed to have assented to the terms of the agreement and no contract can be found to have existed. Therefore, the contract clause for arbitration is invalid for both a lack of acceptance and a lack of the meeting of the

minds in regards to the terms of the contract, and the arbitration clause should be excluded.

A similar issue was appealed in South Carolina and the court held that "we conclude the record must demonstrate the parties agreed to arbitrate their disputes,". See *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44 ("Arbitration is available only when the parties involved contractually agree to arbitrate."). (*Berry v. Spang*, Op. No. 5792 (S.C. Ct. App. filed January 13, 2021) (Shearouse Adv. Sh. No. 1 at 55). In a recent case before the US Supreme Court it was held "that arbitration is a matter of consent, not coercion." *Lamps Plus, Inc. v. Varela*, No. 17-988, 2019 WL 1780275, at *5 (U.S. Apr. 24, 2019). Appellant makes an argument that Respondent had constructive notice of the terms and conditions and the use of the website constituted "affirmative agreement" to the terms and conditions. Respondent was never made aware of the terms and conditions nor clicked on the "Legal" tab on Avanti's homepage so could not have actual knowledge. Appellant argues that by creating an account and seeing the "Legal" tab, Respondent should have had constructive notice of the terms and conditions. Respondent disagrees. Wanderlove was never prompted or made aware of the terms and conditions at any point over four years of using the website. When Wanderlove made an account to use Avanti's website, an email was generated confirming the creation of the account. That email never mentioned "Terms and Conditions" or that use of the website constituted acceptance of those terms. At no point were users told to view the "Legal" page before use or directed there upon making an account. It was also never necessary for users to access that tab during the course of booking many travel packages over the course of four years. Since Respondent was never prompted or made aware of the terms and conditions, Respondent can not be said to have had any notice of them. Therefore, there is no writing with an arbitration clause in it to invoke the

FAA and the arbitration clause is unenforceable.

Respondent does not believe there has been a "failure, neglect, or refusal to the [Respondant] to arbitrate the dispute." (*Adkins v. Labor Ready, Inc*, 3030 F. Ed 496, 500-01 (4th Cir. 2002). Since there was no notice of the arbitration clause, it was never part of the agreement between Avanti and Wanderlove. Since there was no enforceable arbitration clause in the agreement there cannot be a failure, neglect, or refusal to abide by it. Additionally, Wanderlove has no obligation to arbitrate.

CONCLUSION

Respondent concedes that the Federal Arbitration Act would control and supersede state law if invoked. However, since the arbitration clause did not enter the agreement it was not invoked and is not applicable. Respondent concedes that Arbitration elements 1 and 3 are met as there is a dispute and the relationship involved interstate commerce; however, there is no writing with the arbitration clause in it since there was no notice to bring it into the agreement. Since it was not in the agreement there can be no refusal, neglect, or failure to enforce it. Arbitration is created by contract, not coercion. Therefore, for the reasons stated above, the Circuit Court did not err in dismissing Avanti's Motion to Compel Arbitration.

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