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 REPLY BRIEF OF APPELLANT

April 29, 2021

Morton & Gettys, LLC
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ARGUMENT

In its Initial Brief, Respondent agrees the Federal Arbitration Act preempts South Carolina law under the facts of this case. The only two points Respondent argues regarding the arbitrability of this matter are (1) that "the FAA is not invoked here as any contract between Appellant and Respondent does not include the Arbitration clause;" and (2) that Respondent has not failed, neglected, or refused to arbitrate the dispute. Initial Br. of Resp't, 6-9.

I. There is a valid and enforceable written contract containing an arbitration provision, and that arbitration provision must be enforced.

Due regard must be given to the federal policy strongly favoring arbitration, and ambiguities relating to the interpretation of an arbitration agreement must be resolved in favor of arbitration. *See Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 776 S.E.2d 91 (Ct. App. 2015). There is a strong presumption in favor of the validity or arbitration agreements because of the strong policy favoring arbitration. *Towles*, 338 S.C. at 37 (citing *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997)). A court should order arbitration, unless the court can say with positive assurance that the arbitration clause is not susceptible to any interpretation covering the dispute. *Partain v. Upstate Automotive Group*, 378 S.C. 152, 662 S.E.2d 426, 428 (Ct. App. 2008) (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001)).

Contrary to Respondent's assertions, there is a written agreement that contains an arbitration provision and covers the dispute: the terms and conditions for the use of Appellant's website ("Terms and Conditions"). The Terms and Conditions provide "[a]ny controversy or claim arising out of, or relating to, these Terms of Use or the breach thereof . . . shall be settled by arbitration in accordance with the then-current rules of the American Arbitration Association . . . . The location of arbitration shall be Portland, Oregon, USA." (R. p. 61). The entirety of Plaintiff's

claim is encompassed by the arbitration provision in the Terms and Conditions. The gravamen of Plaintiff's complaint and amended complaint is an alleged failure by Appellant to return sums paid by Respondent's customers. (R. pp. 7, 12). Paragraph three of the Terms and Conditions explicitly addresses Appellant's cancellation and refund policy, and paragraph eleven, subsection twelve, provides for arbitration of disputes. (R. pp. 54, 61).

Respondent argues extensively that there was no meeting of the minds. Initial Br. of Resp-t, 6-9. Respondent alleges it "was not made aware of the [Terms and Conditions] until the dispute had proceeded to litigation." Initial Br. of Resp't, 7. Respondent further argues "a meeting of the minds cannot occur when one party is not aware of the terms and conditions of the contract." These, and all of Respondent's arguments, are predicated on the allegation that Rachelle Settle ("Settle"), Respondent's principal, did not, in the four years she used the site in furtherance of her business, read the Terms and Conditions. In its initial brief, Respondent argues it "was never made aware of the [Terms and Conditions] *nor clicked on the "Legal" tab on Appellant's homepage . . . .*" Initial Br. of Resp't, 8.

Respondent cites the South Carolina Court of Appeals decision in *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839 (Ct. App. 1999), stating "[a]rbitration is available only when the parties involved contractually agree to arbitrate." Initial Br. of Resp't, 8. While Respondent correctly quotes the opinion, it does not address the facts, which are similar to those at bar in the present matter. In *Towles*, an employee argued that an arbitration provision contained in an employee handbook was unenforceable because he had no actual notice of the arbitration provision. *Id*, 338 S.C. at 39. The Court of Appeals held that the unilateral employment contract, comprised of an employee handbook for which the employee signed, contained an enforceable arbitration provision despite the employee's allegations that he was not aware of its

existence. *See id* (citing, inter alia, *First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.*, 276 S.C. 597, 599, 281 S.E.2d 121, 123 (1981) (holding that "in the absence of a showing of fraud, mistake, unfair dealing or the like, a party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision by simply declaring: "But I did not read the whole document."). The Court rejected the employee's claim that he was not bound by the arbitration provision simply because he was not specifically made aware of it. *Id* (holding "[the employee] cannot legitimately claim [the employer] failed to provide actual notice of the arbitration provision because the law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document.").

Respondent acknowledges in its Initial Brief that the Terms and Conditions, at the very least, constitute an offer. Initial Br. of Resp't, 7. Appellant's website makes the Terms and Conditions easily available, and their location is clearly communicated. (R. p. 51). Based Settle's affidavit and its own reply brief, Respondent clearly understands where the Terms and Conditions are located. Respondent used Appellant's website extensively to book travel packages for third parties. (R. p. 49). If Respondent's allegation that the Terms and Conditions constitute only an offer is taken as true, Respondent accepted the offer by making use of the website. Much like the employee in *Towle*, Respondent attempts to avoid its obligation to arbitrate based on the argument that it chose not to read the Terms and Conditions. Under the general principles set forth in *Towle*, this argument cannot stand.

Respondent also cites *Player v. Chandler*, 299 S.C. 101, 103, 382 S.E.2d 891, 894 (1989) for the proposition that "[t]he 'meeting of the 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.*" (emphasis added). In *Player*, the Court considered whether an alleged oral extension of a lease for real property, made during a telephone call, was enforceable. *See id.* While facts of *Player* are vastly different than those faced in this case, the Supreme Court of South Carolina echoed the general sentiment of the limited caselaw on clickwrap and browsewrap agreements cited in Appellant's initial brief: that a meeting of the minds can occur when purpose or intention has been made known *or, based on the circumstances, should have been known. Id*, 299 S.C. at 103 (emphasis added).

Assuming for the moment that Respondent's classification of the Terms and Conditions as a "browsewrap agreement" is correct, most courts analyzing the enforceability of the terms and conditions of these contracts focus on whether the user had *actual or constructive knowledge* of the terms and conditions. *Kraft Real Estate Invs., LLC v. Homeaway.com, Inc.*, No. 4:08-CV-3788, 18 (D.S.C. 2012) (citing *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 937 (E.D. Va. 2010)) (emphasis added); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2nd Cir. 2016) (citing *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 937 (E.D. Va. 2010)); *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*, 893 F.Supp.2d 1058, 1063-64 (D. Nev. 2012). Actual knowledge is not required, and courts analyzing the enforceability of an alleged browsewrap agreement have looked to screenshots of the website in question in making their determination. *See Cvent, supra*, 739 F. Supp. 2d at 937-38.

Here, Settle unsurprisingly argues she never read the Terms and Conditions, setting up an argument against actual knowledge. (R. p. 49) However, Settle makes several statements in her affidavit that establish Respondent's constructive knowledge. In paragraph six, Settle states Appellant required her to affirmatively create an account to be able to access Appellant's website to book services. (R. pp. 49). In paragraphs nine and thirteen, Settle avers she used her account

with Appellant for four years to book trips for Respondent's clients. (R. p. 49) Exhibit two to Settle's Affidavit is a screenshot of the user portal Settle, by her own admission, used for four years "during the course of booking many travel packages." Initial Br. of Resp't, 8; (R. p. 51). The portal includes, under a large, conspicuous heading titled "Legal," a link to the Terms and Conditions.

Based on her own testimony, Settle had access to the Terms and Conditions for four years, and she had free reign to review them. The Terms and Conditions are not buried at the bottom of the homepage, they are under a large icon directing the user to "Legal" information. The link to the Terms and Conditions is no different than any of the other links that Settle would have had to use in order to book trips for her clients. The link to the Terms and Conditions is the same size and color as the links to "New Quote," "View our Products," "Request a Quote," "List my Bookings," "Display a Booking," "Request a Change," and "Manage Agents," among every other link available. Settle, at the very least, had constructive knowledge of the Terms and Conditions, which means the Terms and Conditions, including the arbitration provision, are enforceable. Respondent cannot avoid its obligations under the Terms and Conditions because it simply chose not to read them.

II. Respondent has failed, neglected, and/or refused to arbitrate the dispute.

Respondent filed the underlying action in the Circuit Court for York County, South Carolina, rather than submitting the dispute for arbitration, as required by the Terms and Conditions. Respondent now argues that it cannot have failed to arbitrate because it had no knowledge of the arbitration provisions. Initial Br. of Resp't, 9. For the reasons set forth above, Respondent cannot avoid its obligations under the Terms and Conditions by simply claiming to have not read them. Further, Appellant filed a motion to compel arbitration that Respondent has

opposed in two separate hearings, and now opposes on appeal. It is clear Respondent has failed, neglected, and refused to arbitrate this dispute.

CONCLUSION

Based on the above, the Circuit Court erred in denying Appellant's Motion to Compel Arbitration, and its decision must be reversed.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the attached Final Reply Brief of Appellant complies with Rule 211 of the South Carolina Appellate Court Rules.

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PROOF OF SERVICE

The undersigned certifies that he has served this Final Replay Brief of by depositing a copy of it in the United States Mail, postage prepaid, on April 29, 2021, addressed to its attorney of record to the below address:

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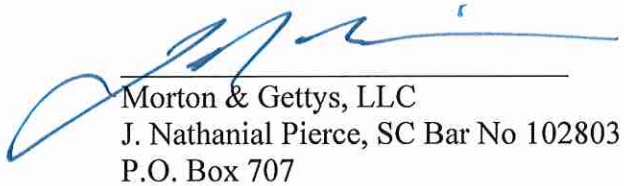

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