

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 APPELLANT

April 29 2021



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STATEMENT OF ISSUES ON APPEAL

I. **Did the Circuit Court err in denying Avanti's Motion to Compel Arbitration?**

STATEMENT OF THE CASE

Avanti Destinations, LLC ("Avanti") is a travel package broker organized as a limited liability company under the laws of the State of Oregon, with its principal place of business situated in Portland, Oregon. (R. p. 29). Avanti does not maintain offices in South Carolina, nor does it maintain employees in South Carolina. (R. p. 29). Avanti does not assign employees to manage South Carolina business specifically. (R. p. 29). Rather, the State of South Carolina is part of a regional sales territory for a traveling Regional Sales Representative. (R. p. 29). The percentage of Avanti's revenue deriving from the State of South Carolina is relatively small, constituting no more than 2.2% percent of Avanti's total gross revenue in 2019. (R. p. 29). Avanti does not target ads directly to residents of the State of South Carolina. (R. p. 29).

Avanti maintains a website located at www.avantidestinations.com. (R. p. 29). The website provides travel offerings to potential customers navigating through a series of steps in order to review travel opportunities and to formulate custom vacation ideas. (R. p. 30). The customer's local travel agent would be the party to actually book travel services. (R. p. 30). Each customer who uses Avanti's website or purchases services from Avanti affirmatively agrees to certain terms and conditions ("Terms and Conditions"). (R. p. 30). In the Terms and Conditions, Avanti expressly disclaims liability for acts of God beyond its control and provides a detailed process and standard for the issuance of refunds. (R. p. 30). The Terms and Conditions provide Oregon law governs and the sole and exclusive jurisdiction for the resolution of disputes is the appropriate state or federal court sitting in Portland, Oregon. (R. p. 30). Finally, the parties are required to

resolve any dispute through arbitration under the prevailing American Arbitration Association rules. (R. p. 30).

Wanderlove Travel, LLC (“Wanderlove”) is a limited liability company organized and existing under the laws of the State of South Carolina and based in York County, South Carolina. Wanderlove is a travel agency that serves as a booking intermediary between its customers and Avanti’s travel components. The Wanderlove travel agent, like any travel agent using Avanti’s services, must proactively reach out on the customer’s behalf to begin any business with Avanti. (R. p. 30). Avanti does not solicit the business from the customer but produces wholesale travel packages from which individual travel agents can select elements and then market or book at the retail level with their customer. (R. p. 30). Avanti does not deal directly with any end-user customers but, rather, with travel agents such as Wanderlove. (R. p. 31). Wanderlove must log in to Avanti’s website through a portal specifically designed for travel agents. (R. p. 31). By logging in to Avanti’s website, Wanderlove affirmatively agreed to the Terms and Conditions. (R. p. 31). At no point has Avanti solicited Wanderlove’s business in South Carolina. Rather, Wanderlove takes advantage of a service offered by Avanti from its principal place of business in Oregon. (R. p. 31).

Wanderlove filed its Summons and Complaint on April 6, 2020. (R. p. 7). Avanti answered with a Motion to Dismiss and Motion to Compel Arbitration, filed June 24, 2020. (R. p. 18). The Circuit Court for York County heard Avanti’s Motion to Dismiss and Motion to Compel Arbitration on August 24, 2020, and issued a Form 4 Order denying Avanti’s Motion to Dismiss and Motion to Compel Arbitration. (R. p. 1). Avanti filed a motion to reconsider pursuant to Rule 59 of the South Carolina Rules of Civil Procedure on September 7, 2020. (R. p. 39). The Circuit

Court heard Avanti's Motion to Reconsider on September 23, 2020, and denied the same on September 25, 2020. (R. p. 31). This appeal follows. (R. p. 47).

STANDARD OF REVIEW

Appeal from a denial of a motion to compel arbitration is subject to de novo review. *Simpson v. World Finance Corp.*, 367 S.C. 184, 623 S.E.2d 877 (2006) (citing *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005)). However, if any evidence reasonably supports the trial court's factual findings, the appellate court will not overturn those findings. *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002) (citing *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664-665, 521 S.E.2d 749, 753 (Ct. App. 1999)).

ARGUMENT

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

a. The Federal Arbitration Act applies and preempts South Carolina law.

Unless the parties have contracted otherwise, the Federal Arbitration Act ("FAA") applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce. *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209, 211 (Ct. App. 2008) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)). Pursuant to the Federal Arbitration Act ("FAA"):

A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2.

To fall within the scope of the FAA, the transaction must involve "interstate commerce." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 843 (1995).

To determine whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts. *See Zabinski v. Bright Acres Associates*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). The FAA has been broadly interpreted to mean Congress intended to utilize its power to regulate interstate commerce to its fullest extent. *Id.* South Carolina Courts will look to the essential character of the contract when applying the FAA. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012).

As set forth in the Affidavit of Mark Grundy, the agreement in this case contains an enforceable arbitration clause. (R. p. 31). Further, the Grundy Affidavit sets forth that this matter concerns interstate commerce between Avanti, an Oregon limited liability company, and Wanderlove, a South Carolina limited liability company. (R. pp. 29-30). Additionally, the services Wanderlove procured from Avanti, on behalf of Wanderlove's end-customer, include airline flights to Munich, Germany, Naples, Italy, Newark, New Jersey, and Charlotte, North Carolina. Avanti also arranged for a Eurail pass to be used in Germany, Italy, and other and hotel accommodations abroad. The undisputed facts of this case indicate the transaction at issue concerns interstate commerce. The undisputed facts of this case dictate interstate commerce is involved, and the FAA controls.

b. All elements allowing the trial court to compel arbitration have been satisfied.

The FAA reflects a liberal federal policy favoring arbitration agreements. *Soil Remediation Co.*, 323 S.C. 454, 476 S.E.2d 149, 251 (1996) (citing *Moses H. Cone Mem'l Hosp. V. Mercury Constr. Corp.*, 460 U.S. 124, 103 S. Ct. 927 (1983)). 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). Arbitration can be compelled by demonstrating (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and (4) the failure, neglect, or refusal to the defendant to arbitrate the dispute.” *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500-01 (4th Cir. 2002) (citing *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991)).

First, there is a dispute between the parties, as Wanderlove has filed suit against Avanti seeking damages. (R. pp. 7, 12). In its original complaint, Wanderlove asserts claims of breach of contract and violation of the South Carolina Unfair Trade Practices Act. (R. p. 7). In its amended complaint, Wanderlove asserts claims of breach of contract, breach of contract with fraudulent act, violation of the South Carolina Unfair Trade Practices Act, and unjust enrichment. (R. p. 12). As Wanderlove has alleged multiple causes of action directly against Avanti, a dispute exists between the parties sufficient to satisfy the first prong of the *Adkins* test.

Second, there is a written agreement that contains an arbitration provision and covers the dispute: the terms and conditions for the use of Avanti’s website (“Terms and Conditions”). (R. p. 53). There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Hall*, 413 S.C at 274. 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). Further, 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 Avanti to return sums paid by Wanderlove’s customers. (R. pp.

7, 12). Paragraph three of the Terms and Conditions explicitly addresses Avanti's cancellation and refund policy, and paragraph eleven, subsection twelve, provides for arbitration of disputes. (R. pp. 54, 59).

While the Circuit Court made no factual finding regarding the enforceability of the Terms and Conditions, nor any specific grounds upon which it denied the motion to compel arbitration, Wanderlove's sole argument against compelling arbitration was the enforceability of the Terms and Conditions. (R. pp 1; 71). Specifically, Wanderlove argued there was no meeting of the minds because Rachel Settle ("Settle"), Wanderlove's principal, did not, in the four years she used the site in furtherance of her business, click on the link to the Terms and Conditions. (R. p. 49). In her affidavit, filed with the court ahead of the hearing on Avanti's motion to dismiss and compel arbitration, Settle draws a distinction between "clickwrap" and "browsewrap" agreements, and she argues the alleged browsewrap agreement is unenforceable as a matter of law. (R. p. 49). However, even assuming this is a browsewrap agreement, Settle and Wanderlove misstate the law regarding these types of agreements. Most courts analyzing the enforceability of the terms and conditions of browsewrap 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).

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, at the very least, constructive knowledge. In paragraph six, Settle states

Avanti required her to affirmatively create an account to be able to access Avanti's site to book services. (R. pp. 48-49). In paragraphs nine and thirteen, Settle avers she used her account with Avanti for four years to book trips for her clients. (R. p. 49). Exhibit two to Settle's Affidavit is a copy of the portal Settle, by her own admission, used for four years to book trips for her client. (R. p. 51). The portal includes, under a large, conspicuous heading called "Legal" a link to the Terms and Conditions. (R. p. 51). 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 Settle necessarily 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 to Wanderlove. 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.

Third, the transaction is related to interstate commerce. To determine whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts. *See Zabinski v. Bright Acres Associates*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). As set forth in the Affidavit of Mark Grundy, this matter concerns interstate commerce between Avanti, an Oregon limited liability company, and Wanderlove, a South Carolina limited liability company. (R. pp. 29-30). Additionally, the services Wanderlove procured from Avanti, on behalf of Wanderlove's end-customer, include airline flights to Munich, Germany, Naples, Italy, Newark, New Jersey, and Charlotte, North Carolina. Avanti also arranged

for a Eurail pass to be used in Germany, Italy, and other and hotel accommodations abroad. The undisputed facts of this case indicate the transaction at issue concerns interstate state commerce.

Fourth, and finally, Wanderlove 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. (R. pp. 7, 12). Further, Avanti filed a motion to compel arbitration that Wanderlove has opposed in two separate hearings. Therefore, Wanderlove has failed, neglected, and refused to arbitrate this dispute.

CONCLUSION

Based on the above, each of the four elements under *Adkins* are satisfied, and Wanderlove must be compelled to arbitrate this matter.

April, 29 2021



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Appellant.

CERTIFICATE OF COMPLIANCE

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

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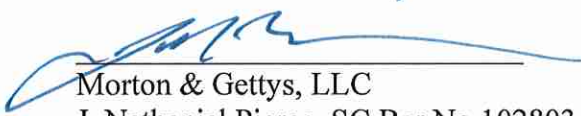
Appellant.

PROOF OF SERVICE

The undersigned certifies that he has served this Appellant's Final Brief 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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