THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

RECEIVED
May 11 2021
S.C. SUPREME COURT

Court of Appeals Case No. 2018-000171
Supreme Court Case No. 2021-000137

Cleo Sanders, Respondent

v.

Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram, Santander Consumer US Holdings Inc., Isiah S. White, Danny Anderson, and Patrick Bachrodt, Jr.
Defendants

Of whom Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram and Isiah S. White,
Petitioners/Appellants.

RESPONSE TO PETITIONERS'/APPELLANTS' PETITION FOR A WRIT OF CERTIORARI

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1. The Supreme Court will not address issues not raised to the trial court. Petitioners did not argue to the trial court that Respondent did not attack the delegation clause in addition to the contract itself. Can the Court hear arguments from Petitioners that are raised for the first time on appeal?

2. The Supreme Court can use its discretion to deny a Petition for a Writ of Certiorari when the petitioner fails to provide the Court with reasons enumerated in Rule 242 (b) SCACR. Petitioners have not provided any compelling reason for the Court to entertain their petition. Should the Supreme Court deny Petitioners' Petition for a Writ of Certiorari?

3. Once a party voluntarily and unconditionally assigns its contract rights to another, that party loses its right to enforce the assigned terms. Savannah Highway voluntarily and unconditionally assigned all its contract rights with Sanders to Santander. Can Petitioners now enforce against Sanders contractual rights they no longer have?

4. A judge who has orally ruled on one issue before an Order on a different issue is appealed does not lose jurisdiction to perform the ministerial act of filing a written order regarding his oral ruling. Judge Nicholson orally ruled on Sanders' motion to compel discovery responses. Appellants appealed Judge Nicholson's Order denying their arbitration motion before he filed his formal Order regarding Sanders' motion. Did Judge Nicholson lose jurisdiction to file his discovery Order?

ARGUMENT

Petitioners' petition for a writ of certiorari should only be granted when exceptional circumstances exist. Rule 242 SCACR. Petitioners have failed to show any such exceptional circumstances.

This case arises out of a scheme perpetrated by Petitioners to misrepresent customers' income to financial institutions so Petitioners could sell more cars. Because the customer's income was misrepresented, the financial institutions purchased retail installment sales contracts from Petitioners based on false information. Customers' income could not support the monthly payments causing the financial institutions to

repossess these cars.

Petitioners' process for selling cars includes the dealership extending credit to customers so customers can purchase the cars being sold by the dealership. The dealership then contacts third party financial institutions and negotiates a contract for the sale of retail installment sales contracts (RISC) to the financial institution. Once the financial institution agrees to purchase the RISC, the dealership assigns all its rights in the transaction to the financial institution in exchange for the outstanding balance due from the customer for the purchase price. (Appendix 143:17-21[1])

1. The Supreme Court will not address issues not raised to the trial court. Petitioners did not argue to the trial court that Respondent did not attack the delegation clause in addition to the contract itself. Can the Court hear arguments from Petitioners that are raised for the first time on appeal?

An appellate court cannot address an issue not raised to the trial court. Wilder Corp. v. Wilke, 330 SC 71, 497 S.E.2d 731 (1998) ('It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.')."

Petitioners made four arguments before Judge Nicholson: 1) The Federal Arbitration Act applied to this transaction, 2) Petitioners had standing to compel arbitration, 3) they had not waived arbitration by using the litigation machine, and 4) the contract at issue was authentic. (Appendix 131:20-135:10.) Petitioners' principal argument revolved around the validity of the arbitration clause. Mr. Sanders' never

[1] Motion to Compel Arbitration Transcript - Appendix 143:17-21
17 THE COURT: I understand the contract, but does the
18 contract reserve a right for you to enforce arbitration once
19 you've assigned it all to the lending institution?
20 MR. LAY: It is fully assigned once it goes to the
21 lending institution.

contested the validity of the clause. Petitioners never raised the delegation clause issue in its initial argument before Judge Nicholson, nor did it raise that issue during its motion for reconsideration. Petitioners have waived this issue.

2. The Supreme Court can use its discretion to deny a Petition for a Writ of Certiorari when the petitioner fails to provide the Court with reasons enumerated in Rule 242 (b) SCACR. Petitioners have not provided any compelling reason for the Court to entertain their petition. Should the Supreme Court deny Petitioners' Petition for a Writ of Certiorari?

Rule 242(b) SCACR sets forth five grounds, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered by the Court when considering a Petition for a Writ of Certiorari:

(1) Where there are novel questions of law.

Petitioners have not provided the Court with a novel question of law. The issue that was decided by the trial court and the Court of Appeals was whether Petitioners have any right to enforce a contractual agreement which they knowingly, voluntarily, and unconditionally assigned to Santander. South Carolina law is clear that they do not. Petitioners have not provided any case law or other authority to the contrary.

(2) Where there is a dissent in the decision of the Court of Appeals.

The Court of Appeals' decision to affirm Judge Nicholson's Order was unanimous.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

The Court of Appeals' decision deals with the assignment of a contract. Petitioners have not provided any case to show a conflict with a prior Supreme Court

decision related to the assignment of a contract as one does not exist.

(4) Where substantial constitutional issues are directly involved.

Petitioners have not alleged a constitutional issue is involved in this matter.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

While the Federal Arbitration Act has been asserted by Petitioners, the trial court's Order and the Court of Appeal's Opinion do not conflict with a decision of the United States Supreme Court. In fact, it is in line with the Supreme Court's precedence.

"Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012). "In deciding whether a valid, enforceable and irrevocable arbitration agreement exists, we apply general principles of state contract law." Doe v. TCSC, LLC, 430 S.C. 602, 611, 846 S.E.2d 874, 878 (Ct. App. 2020). "[T]he court, rather than an arbitrator, will decide 'gateway' issues related to arbitration, including whether the arbitration agreement is valid and enforceable and whether it covers the parties' dispute." Id. at 608, 846 S.E.2d at 877. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)..." (State law governing the formation of contracts, not the F.A.A., determines whether a valid arbitration agreement exists between parties.) "It is well settled in both commercial and labor cases that whether parties have agreed to 'submi[t] a particular dispute to arbitration' is typically an 'issue for judicial determination.' Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (quoting AT&T Technologies, Inc. v.

Communications Workers, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)); see John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-547, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964). It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide. See, e.g., First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) ('When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary . . . principles that govern the formation of contracts')." Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847, 177 L.Ed.2d 567, 561 U.S. 287 (2010).

Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement. Zabinski v. Bright Acres Associates, 346 S.C. 580, 553 S.E.2d 110 (2001); Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007); " Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 270 (1995)("arbitration under the [Federal Arbitration Act] is a matter of consent, not coercion.").

"The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties, and, in determining that intention, the court looks to the language of the contract." Stott v. White Oak Manor, Inc., 426 S.C. 568, 828 S.E.2d 82 (Ct. App. 2019). (quoting Watson v. Underwood, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)). "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." Id. (quoting Watson, 407 S.C. at 455, 756 S.E.2d at 161).

The document in question is an adhesion contract constructed by Petitioners. It must be viewed with "'considerable skepticism.'..." Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 373 S.C. 14 (2007). Additionally, "ambiguities arising within a contract must be construed against the drafter. This rule applies with particular force in cases involving a contract of adhesion." Southern Atlantic Financial v. Middleton, 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002).

The question before the trial court and the Court of Appeals was whether there is a contract between the parties. Due to Petitioners' assignment of the contract, the answer must be "no".

On page 9 of Petitioners brief, they argue that the Court of Appeals failed "to heed the analytical sequence required by Prima Paint". This is incorrect. Petitioners are the ones that are analyzing this matter backwards. They ignore that the Court has to first determine if there is a contract between the Parties before the Court has to send the matter to an arbitrator for a decision on the validity of the arbitration agreement. Again, validity is not the issue. The existence of a written agreement between the Parties is. Until the issue of the existence of a contract between the Parties is resolved, the issue of the validity of the clause must be put to the side.

Of particular note is that Petitioners have never addressed the assignment issue. Petitioners have not shown to the trial court, the Court of Appeals, or this Court that Savannah Highway did not assign the Parties' contract, nor have they shown that they retained any rights under the contract, specifically arbitration rights, even after being directly asked the same by Judge Nicholson. Instead of answering the Judge Nicholson's question, they quickly returned to their argument that because there was an

arbitration clause in a contract, the issue of compelling arbitration had to be submitted to an arbitrator. (Appendix 143:12-144:11.)

12 THE COURT: I understand that, but do you reserve any
13 right for Hendrick's to enforce that contract once it's been
14 assigned?
15 MR. LAY: Through the arbitration agreement, that
16 clause which says --
17 THE COURT: I understand the contract, but does the
18 contract reserve a right for you to enforce arbitration once
19 you've assigned it all to the lending institution?
20 MR. LAY: It is fully assigned once it goes to the
21 lending institution.
22 THE COURT: That's correct. So the contract itself has
23 to give you certain rights after the assignment, does it
24 not, and does it do that?
25 MR. LAY: The arbitration agreement itself -- there are

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1 two cases that we point to. One is the AT&T case, and what
2 it says is that if there's an issue about whether if
3 there has been an assignment, and whether there's an issue
4 about whether they're standing on that, it still has to be
5 sent to the arbitrator to make the ultimate decision about
6 whether or not you can enforce that arbitration clause.
7 That's what that AT&T case says. So even if there is an
8 issue like he's saying, which I don't believe there is,
9 because it recognizes third parties as well, it still has to
10 go to the arbitrator to make the ultimate decision about
11 whether that arbitration clause

Thus, Petitioners have admitted that the assignment was valid and covered the entire agreement, including the arbitration clause. Consequently, they have admitted that they do not have any rights to compel arbitration.

3. Once a party voluntarily and unconditionally assigns its contract rights to another, that party loses its right to enforce the assigned terms. Savannah Highway voluntarily and unconditionally assigned all its contract rights with Sanders to Santander. Can Petitioners now enforce against Sanders contractual rights they no longer have?

In its opinion, the Court of Appeals stated that, under South Carolina law, an

assignment has three elements: "'(1) an assignor; (2) an assignee; and (3) transfer of control of the thing assigned from the assignor to the assignee.' Donahue v. Multimedia, Inc., 362 S.C. 331, 338, 608 S.E.2d 162, 165 (Ct. App. 2005). 'An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.' Moore v. Weinberg, 373 S.C. 209, 219–20, 644 S.E.2d 740, 745 (Ct. App. 2007) (quoting Restatement (Second) of Contracts § 317(1) (1981)), aff'd, 383 S.C. 583, 681 S.E.2d 875 (2009). 'The principle is well settled that a valid assignment operates to pass the whole right of the assignor, and that thereafter the assignee stands in the place of the assignor, possessing all rights or remedies available to the assignor.' duPont de-Bie v. Vredenburgh, 490 F.2d 1057, 1061 (4th Cir. 1974). '[W]here a party assigns agreements that include an arbitration clause, the assignor's '"right to compel arbitration under those agreements is extinguished."' In re Wholesale Grocery Prods. Antitrust Litig., 97 F. Supp. 3d 1101, 1106 (D. Minn. 2015) (quoting HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys., Inc., 590 F. Supp. 2d 677, 684–85 (D.N.J. 2008) (internal quotation omitted)), aff'd, 850 F.3d 344 (8th Cir. 2017), amended (May 1, 2017)."

Petitioners' petition fails to address the assignment issue. When questioned about it by Judge Nicholson, they stated that the contract was assigned. (Appendix 143:17-21.) Savannah Highway has never alleged that it retained any rights in the contract, even though specifically asked by Judge Nicholson. Therefore, they have admitted that they do not have any rights in the contract, including the arbitration clause.

Instead, Petitioners would have the court do mental gymnastics to enforce an

arbitration agreement to which it has no rights. Petitioners' argument was that because rights flowed to the assignees, those same rights flowed back to Petitioners. By analogy, it is like saying that since a stream flows downhill, it must also flow uphill. Petitioners never provided any authority for this point, nor have they pointed to any language in the contract that states they retained any rights in the contract. Acceptance of Petitioner's argument would radically change the law of assignment in South Carolina. Petitioner's contention is that when you fully assign your rights in a contract, you do not fully assign all your rights in a contract.

Besides creating an inherent contradiction in contract terms commonly used in commerce, their position puts arbitration clauses on a higher level than other contract provisions, in this case the assignment clause. That position is contrary to all the case law on that issue from Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) to Palmetto Constr. Grp. v. Restoration Specialists, LLC, Op. No. 28010 (S.C. Sup. Ct. filed March 10, 2021)(Shearouse Adv. Sh. No. 8 at 34).

As has been made clear from the beginning, Mr. Sanders has not challenged the validity of the arbitration agreement. Mr. Sanders has only challenged whether Petitioners can enforce a contractual provision which they voluntarily, knowingly, and completely assigned to Santander. Petitioners continue to try to muddy the waters by claiming Mr. Sanders is contesting the validity of the arbitration agreement. Petitioners have not provided any evidence of this. Neither the trial court nor the Court of Appeals accepted this argument from Petitioners.

Petitioners misread Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597

(Ct. App. 2012). Mr. Sanders has brought a tort case. Pearson was a breach of contract case. In analyzing when a non-signatory can enforce an arbitration clause, the Pearson Court discussed the third-party beneficiary theory, where a court must look to the intentions of the parties at the time the contract was executed and the equitable estoppel theory, where a court looks to the parties' conduct after the contract was executed.

At the time of the sale, Petitioners intended to assign all Savannah Highway's rights in the contract to Santander. Petitioners have not put forth a different position. In fact, Mr. Sanders pointed out at least ten times when Petitioners stated they fully assigned the contract, including the arbitration clause. (Appendix 68-70.) This has not been disputed by Petitioners.

The Pearson Court further held, "Existing case law demonstrates that equitable estoppel allows a non-signatory to compel arbitration in two different circumstances. *First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory*. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. *Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.*"

Mr. Sanders has not made a contract claim against Petitioners. (See Complaint

Appendix 164-177.) Therefore, Petitioners cannot claim that Mr. Sanders is relying on the contract while at the same time repudiating it. Additionally, Petitioners have not alleged that Mr. Sanders has raised allegations of "substantially interdependent and concerted misconduct" by Petitioners and Santander because he has not made such a claim.

Desperate to win, Petitioners now argue for a "gotcha" moment to apply. They want Respondent's position that the entire contract was assigned, which necessarily includes the arbitration clause, to fail because Respondent did not specifically state that the assignment included the arbitration clause. Petitioners, however, have sought arbitration. Petitioners bear the burden of proving the existence of an arbitration agreement between them. It has failed to do so. Separating out the arbitration clause from a contract in which Petitioners do not have any rights so that Petitioners can seek arbitration to which it is not entitled would be unconscionable. This is even more improper since Petitioners never raised or received a ruling on this issue before the trial judge.

Petitioners' second argument asserts that the assignment of the contract involves an interpretation of the arbitration agreement. Neither the trial court nor the Court of Appeals reached this issue as both determined Petitioners did not have any rights in the subject contract. Thus, the interpretation of the clause is irrelevant.

Further evidence that Petitioners know they do not have any arbitration rights is shown through Petitioners' use of the litigation machinery to request extensions of time to answer the Complaint and to respond to discovery. (See Appendix 247-248.) Petitioners have argued motions and are continuing to use the appellate litigation

machinery to stretch out this case. Petitioners' ultimate goal being to forum shop as it believes it can get a better result in arbitration while also trying to wear Mr. Sanders out emotionally and financially.

Petitioners can not enforce a contract to which it is not a Party. They have not shown any evidence or law that stands for their proposition. The only evidence is that Petitioners assigned the contract in question to Santander. They did not retain any rights in the contract. They cannot enforce the arbitration clause which now belongs to Santander.

4. A judge who has orally ruled on one issue before an Order on a different issue is appealed does not lose jurisdiction to perform the ministerial act of filing a written order regarding his oral ruling. Judge Nicholson orally ruled on Sanders' motion to compel discovery responses. Appellants appealed Judge Nicholson's Order denying their arbitration motion before he filed his formal Order regarding Sanders' motion. Did Judge Nicholson lose jurisdiction to file his discovery Order?

A trial court does not lose jurisdiction to file a written order where the trial judge orally ruled and directed a party to prepare a formal order, but a party appealed before the trial judge signed the order. Doe v. Berkeley Publishers, 322 S.C. 307, 471 S.E.2d 731 (Ct. App. 1996) rev'd on other grounds, Doe v. Berkeley Publishers, 496 S.E.2d 636, 329 S.C. 412 (1997); Jean Hoefer Toal et al., Appellate Practice in South Carolina, 339 (3rd ed. 2016). The direction of a judge to an attorney to prepare an order is as much an order of the judge as the order itself and the two must be taken together. Thornton v. Atl. Coast Line R. Co, 13 S.E.2d 442, 196 S.C. 316 (1941). "The clerk is the officer of the court, and any mere ministerial act he does by the order of the court is the act of the court itself." Thornton v. Atl. Coast Line R. Co, 13 S.E.2d 442, 196 S.C. 316 (1941); McCants v. West Virginia Pulp & Paper Co., 76 S.E.2d 614, 223 S.C. 467

(1953) (Entry of a judgment is merely a ministerial act and for the purposes of notice, lien, and enforcement.); Henderson v. Summerville Ford Mercury Inc., 405 S.C. 440, 748 S.E.2d 221 (2013) (filing of Court Order confirming an arbitration award is a ministerial act).

In Henderson v. Summerville Ford Mercury Inc., 405 S.C. 440, 748 S.E.2d 221 (2013), the Court held that the filing of an Order confirming an arbitration award was a ministerial act. The mere filing of a discovery order is the same. Judge Nicholson heard the motion to compel discovery responses before Petitioners' appeal. At the end of the hearing, he ordered Petitioners to respond to discovery. He then filed his Order memorializing his oral Order. Discovery has not proceeded. Petitioners have not responded to discovery and Mr. Sanders has not moved to enforce Judge Nicholson's Order.

The Court should not entertain Petitioners appeal regarding the Discovery Order is not appealable.

"An appeal ordinarily may be pursued only after a party has obtained a final judgment." Ex parte Capital U Drive It, Inc., 369 S.C. 1, 630 S.E.2d 464, (2006); S.C. Code Ann. § 14 3 330 (1976); Rule 72, SCRCP; Rule 201(a), SCACR. "Any intermediate judgment, order or decree in a law case involving the merits" may be appealed. S.C. Code Ann. § 14 3 330 (1976). The phrase "involving the merits" means the order "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." Mid State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993).

Once there is a final judgment, Petitioners will have standing to appeal Judge

Nicholson's Discovery Order. Currently, the discovery issue is irrelevant. If the Court denies the petition, Petitioners have to respond to discovery. If the Court orders this matter into arbitration, then the trial court's discovery order will be stayed.

CONCLUSION

Petitioners have not shown any need for the Court to hear their appeal. They have continually stated that Savannah Highway assigned the contract to Santander. They have continually failed to show to any Court that they retained any rights in the subject contract. They have not presented any law that states that the trial court cannot file its ministerial order regarding discovery. As a result, Petitioners' petition should be denied.

Respectfully submitted,
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