

Oct 14 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 BVW Holding AG,)
)
) Plaintiff,)
)
 vs.)
)
 Hoowaki, LLC,)
)
) Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

**ORDER DENYING DEFENDANT’S
MOTION TO DISMISS AND COMPEL
ARBITRATION**

C.A. No.: 2021-CP-23-01191

This matter comes before the Court by way of a Motion to Dismiss and to Compel Arbitration filed by Hoowaki, LLC (“Hoowaki”) on August 2, 2021 on the grounds that certain Agreements existed between Hoowaki and BVW Holding AG (“BVW”) which contemplate that any dispute between the parties shall be resolved through Alternate Dispute Resolution.

A hearing was held on August 2, 2021, at the Greenville County Court of Common Pleas. Present at the hearing were James H. Cassidy and Amber Glidewell of Roe Cassidy Coates & Price, P.A., attorneys for BVW and Vincent A. Sheheen of Savage, Royall & Sheheen, LLP, attorneys for Hoowaki. Prior to the hearing, both parties filed with the Court legal memoranda with exhibits.

Having carefully considered the entirety of the record in this matter, including the Motion, the pleadings, the legal memoranda and supporting documents, and the arguments of counsel, the Court hereby finds that Defendants Motion to Dismiss and Compel Arbitration should be **DENIED.**

BACKGROUND

This action was brought by BVW by the filing of a complaint on March 10, 2021 against Hoowaki for failure to pay a promissory note. Hoowaki executed and delivered a promissory note

to BVW dated October 16, 2018, containing a promise to pay the principal sum of One Hundred Nineteen Thousand and 00/100 Dollars (\$119,000.00) (the “Note”). A copy of the Note was attached to BVW’s complaint and reviewed by the Court. BVW also filed a verified statement of account as certifying the amount due as of February 27, 2021 to be One Hundred Thirty-Three Thousand Six Hundred Eighty-Six and 50/100 Dollars (\$133,686.50). Hoowaki filed a Motion to Dismiss and Compel Arbitration on April 29, 2021.

STANDARD OF REVIEW

A defendant may move to dismiss a complaint based on a plaintiff’s failure to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCP; Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). A court's decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. Spence, 368 S.C. at 116, 628 S.E.2d at 874; Clearwater Trust v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006).

In reviewing a motion to dismiss, the court must accept as true the well-pleaded facts in the complaint. See Gressette v. S.C. Elec. & Gas Co., 370 S.C. 377, 379, 635 S.E.2d 538, 538 (2006). Essentially, the plaintiff must describe each element of the cause of action in terms of the facts of the case. “The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action.” McCormick v. England, 328 S.C. 627, 494 S.E.2d 431, 433 (Ct. App. 1997). The Court is required to “construe the complaint in a light most favorable to the nonmovant.” Freemantle v. Preston, 398 S.C. 186, 192, 728 S.E.2d 40, 42 (2012).

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that “where one party denies the

existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013). Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007).

ANALYSIS

After reviewing the Note, I find that BVW's complaint has sufficiently stated the facts in order to constitute its cause of action for a suit on the Note. The Note is dated October 16, 2018 and specifically provides that the Note was made and executed under, and is to be construed by, the laws of South Carolina.

Hoowaki contends that a Cooperation and License Agreement (the "Agreement") entered into between the parties and made effective January 10, 2012 requires that any dispute between the parties be controlled by the "Dispute Resolution" provisions of the Agreement and therefore BVW should be required to participate in the dispute resolution terms of the Agreement.

I find that Hoowaki's obligations to repay the Note do not arise out of the Agreement and is a wholly unrelated obligation of Hoowaki to BVW. The Agreement grants licenses for certain patents and dictates the collaborative relationship between the parties for development of certain products. The Agreement is a stand-alone agreement which is separate and distinct from the Note. The Note is devoid of any reference to the Agreement, or of any other contract or transaction between BVW and Hoowaki. Likewise, the Agreement is devoid of any reference to a note or any

other obligation of repayment on a loan. Neither the Note nor the Agreement identify or link the Note as an obligation arising out of the Agreement.

I find that the language of the Note provides for its remedies. The Note is governed by the laws of the State of South Carolina and further contains no requirement to arbitrate or reference to the Federal Arbitration Act. A disclosure that the document is subject to arbitration is notably absent from the face of the Note. In addition, the Note provides that the maker agrees to pay reasonable attorney's fees in case of a suit or collection by an attorney or litigation involving the debt or any security therefore reasonably requiring employment of counsel to protect or enforce any right or remedy of the holder. The maker also waived presentment, demand, protest, and notice of dishonor. The Note clearly contemplates that any action for collection will be brought pursuant to the terms provided therein, not based on another document or agreement between the parties. There are no facts to suggest that the Note is governed under the Agreement.

By contract, the Agreement is governed by New York law and includes a specific dispute resolution procedure for resolving disputes between the parties which arise out of the Agreement. The dispute resolution procedures dictated in the Agreement are inconsistent with the terms of the Note. Section 11.2 references dispute resolution under "this Agreement" and does not include or contemplate the Note or any other agreement between the parties in the definition of "this Agreement." Section 11.2(a) of the Licensing Agreement requires that each party first provide a "Dispute Notice" to summarize the dispute, set forth the party's position, and provide relevant material. In contrast, the Note, governed by South Carolina Law, explicitly waives any requirement to follow the dispute resolution procedure contained in the Agreement, and states that the maker waives presentment, demand, protest and notice of dishonor. The dispute resolution procedures provided in the Agreement cannot be reconciled with the Note's explicit language for resolution

of the payment terms. The obligation of repayment by Hoowaki is not determined by the Agreement, but is instead contained within the Note itself.

Having carefully considered all of the facts and evidence presented, I find that BVW has properly plead sufficient facts to constitute a cause of action for suit and Note, that there is no valid and enforceable arbitration requirement for the Note and, therefore, the Motion to Dismiss and Compel Arbitration is DENIED.

IT IS, THEREFORE, ORDERED, ADJUGED, AND DECREED that there, the Defendants' Motion is hereby **DENIED**.

AND IT IS SO ORDERED.

(JUDGES SIGNATURE PAGE TO FOLLOW)



Greenville Common Pleas

Case Caption: BVW Holding Ag vs. Hoowaki Llc

Case Number: 2021CP2301191

Type: Order/Other

So Ordered

s/Alex Kinlaw, Jr., #2763