THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2021-000986

Tony's Garage, LLC, Appellant,

v.

UniFirst Corporation Respondent

INITIAL BRIEF OF APPELLANT

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DESIGNATION OF MATTER TO BE INCLUDED ON THE RECORD OF APPEAL

Appellants propose that the following be included on the Record on Appeal:

1. Order Granting UniFirst Corporation's Motion to Confirm Arbitration dated August 23, 2021 and filed in the Office of the Clerk of Court on August 23, 2021.
2. Order Denying Plaintiff's Motion to Vacate dated August 6, 2021 and filed in the Office of the Clerk of Court on August 6, 2021.
3. Transcript of Proceedings from July 28, 2021.
4. Contract dated September 27, 2018.
5. Letter to Respondent from Plaintiff dated February 10, 2021.

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STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL JUDGE ERRED IN FAILING TO VACATE THE ARBITRATION AWARD FOR FAILING TO SATISFY THE CONDITION PRECEDENT CONTAINED IN THE CONTRACT.

II. THE TRIAL JUDGE ERRED IN VACATING THE ARBITRATION AWARD AS THE AWARD WAS PROCURED BY UNDUE MEANS.

III. THE TRIAL JUDGE ERRED IN NOT VACATING THE ARBITRATION AWARD AS THE ARBITRATION SHOULD NOT HAVE OCCURRED DUE TO THE FAILURE OF RESPONDENT TO MEET THE TERMS OF THE AGREEMENT.

IV. THE TRIAL COURT ERRED IN GRANTING THE MOTION TO CONFIRM ARBITRATION AWARD AS CONDITIONS PRECEDENT WERE NOT MET TO ALLOW THE ARBITRATION TO PROCEED AND THERE WAS NO ORDER COMPELLING THE APPELLANT TO ARBITRATE UNDER THE AGREEMENT.

STATEMENT OF THE CASE

The Appellant, Tony's Garage entered into a contract with the Respondent, UniFirst Corporation, on or about April 27, 2018 for the delivery of uniforms on a scheduled basis. The term of the contract was for a period of sixty (60) months. On or about April 2, 2020, the Appellant became dissatisfied with the Respondent's services. A disagreement resulted based upon the quality of the services provided and payment for these services.

On several occasions, a representative of Respondent would routinely show up at Appellant's business to discuss the issues. These were not scheduled or agreed upon visits. The parties were never able to resolve the issues regarding the services and payment during these unscheduled visits.

On or about October 7, 2020, Respondent sent Appellant a demand letter and further advising that they would pursue arbitration pursuant to the contract if Respondent did not agree within ten (10) days. Appellant did not respond to this letter.

On or about October 20, 2020, Respondent commenced arbitration proceedings.

On or about November 18, 2020, Appellant sent an email to Respondent contesting Respondents' claims and indicated "[o]n our final contact with UniFirst we again attempted to resolve the ongoing issues we were experiencing and were given an offer of reduced fees."

Respondent continued with the arbitration process and the American Arbitration Association ("AAA") appointed an arbitrator, retired South Carolina Circuit Court Judge Kristi L. Harrington ("arbitrator" or "Judge Harrington"). Respondent did not participate or agree with the selection of an arbitrator. An arbitration date was scheduled.

On or about February 10, 2021, counsel for Appellant sent a letter to UniFirst's counsel advising that Appellant was "not agreeable to engaging in arbitration, do not believe the arbitration clause...is valid and enforceable" and do not believe the prerequisites to invoke the arbitration clause had been satisfied. The letter further "respectfully ask[ed] that [UniFirst] suspend the arbitration proceeding..."

Respondent did not respond to this letter nor was the arbitration suspended.

On February 16, 2021, Judge Harrington conducted a final conference call with counsel for UniFirst as Appellant nor counsel attended this conference.

An award was issued against the Appellant on March 1, 2021. Respondent's counsel contacted Appellant's counsel the following day inquiring about Appellant's payment of the arbitration award.

On May 24, 2021, Appellant filed a Motion to Vacate the Arbitration Award.

On June 23, 2021, Respondent filed a Motion to Confirm the Arbitration Award.

A hearing on the Motion to Vacate the Arbitration Award was held on July 28, 2021 before the Honorable Daniel D. Hall.

On August 6, 2021, the Honorable Daniel D. Hall denied Appellant's Petition to Vacate the Award via a Form 4 Order.

A subsequent order granting Respondent's Motion to Confirm Arbitration Award was filed on August 23, 2021.

This appeal is a result of the August 6, 2021 order and the August 23, 2021 order.

A Notice of Intent to Appeal was filed on September 1, 2021.

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 123, 713 S.E.2d 799, 803 (Ct. App. 2011) (quoting Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)). "'Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.' " Id. (quoting Simpson, 373 S.C. at 22, 644 S.E.2d at 667).

Lucey v. Meyer, 401 S.C. 122, 736 S.E.2d 274 (S.C. App. 2012)

ARGUMENTS

V. THE TRIAL JUDGE ERRED IN FAILING TO VACATE THE ARBITRATION AWARD FOR FAILING TO SATISFY THE CONDITION PRECEDENT CONTAINED IN THE CONTRACT.

"A condition precedent to a contract is 'any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.'". Byrd v. Livingston, 398 S.C. 237, 240, 727 S.E.2d 620, 623 (S.C. App. 2012) citing, Brewer v. Stokes Kia, Isuzu, Subaru, Inc., 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct.App.2005) (quoting Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct.App.1994)). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ". Brewer, 364 S.C. at 449. A condition precedent entails something that is essential to a right of action..." Worley, 317 S.C. at 210, 452 S.E.2s at 624. If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises. McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571 (2009).

In the case before this Court, the applicable provision of the contract that establishes the condition precedents are as follows:

'If a dispute arises from or relates in any way to this Agreement or any alleged breach thereof at any time, the parties **will first attempt to resolve the claim or dispute by negotiation at agreed time(s) and location(s)...**Any matter not resolved through direct negotiations within 30 days shall be resolve exclusively by final binding arbitration, **conducted in the capital city of the state where Customer has its principal place of business (or some other location mutually agreed)**:...The **parties will agree upon one (1) arbitrator** to settle the controversy or claim...The Arbitrator shall have no power to vary or ignore the provisions hereof..." **Emphasis**

added. (R. p. __)

A. **Will first attempt to resolve the claim or dispute by negotiation at agreed time(s) and location(s).**

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. McGill v. Moore, 381 S.C. 179, 672, S.E.2d 571 (2009).

At the motion hearing, Respondent argued that the allegation that that conditions precedent did not take place was not supported by the facts. (T. p. 16, ll. 7-8). The support this contention by submitting to the lower court that Respondent's employees tried for nearly eight months to discuss and work things out with the Appellant for a period of over thirty days and that is all they were required to do pursuant to the contract. (T. p. 16, ll.12-15). Respondent further argues that there was no formality required in the clause regarding the time and location. They submit to the trial court that the language of the contract did not require a formality that letters be exchanged, and the hotel conference rooms be booked. (T. p. 16, ll. 16-23).

Although there was no formality in the clause as argued by the Respondent the clause also does not allow for the Respondent to show up at Appellant's business at their convenience to discuss the situation. This clause is clear and unambiguous. When a contract is clear and unambiguous, the language alone determines the contracts force and effect. McGill at 381 S.C. at 179, 672 S.E.2d at 574. The language in the contract clearly states that the negotiations will occur at agreed times and locations. Furthermore, if it is deemed that an ambiguity does exist, the ambiguity would be construed in favor of the non-drafting party, the Appellant. Id. There is no evidence in the record that Appellant and Respondent agreed on any time or location to discuss the claim or dispute.

Respondent was made aware of Appellant's position regarding the condition precedent and request for the arbitration to be postponed until the condition precedent could be satisfied. (R. p. (Letter to Counsel), T. p. 5, ll. 15-25). Respondent failed to respond or postpone the arbitration. (T. p 6, ll. 1-21)

It was improper for the Respondent to commence arbitration proceedings as they failed to satisfy the condition precedent. As a result of the condition precedent not being met, Appellant's duty to submit to the arbitration never arose and any resulting award from the arbitration that occurred should be vacated.

B. The parties will agree upon one (1) arbitrator to settle the controversy or claim.

Pursuant to 9 U.S. Code §5, "[i]f in the agreement provision be made for a method of naming or appointing an arbitrator...such method **shall** be followed...". **Emphasis added.** If no method has been established in the agreement of if when a method is provided but a party fails to avail himself of that method, then only upon application can a court designate or appoint an arbitrator. 9 U.S. Code §5 Courts have routinely interpreted 9 U.S. Code§5 and have held that the parties' method of appointing arbitrators must be followed. See: Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp., 814 F.2d 1324 (9th Cir. 1987) (parties had the opportunity to comply with their agreement but were unable to do so and court appointed an umpire upon application); ATSA of California v. Continental Insurance Co., 754 F.2d 1394 (9th Cir. 1985)(Ordered the parties to comply with their agreement regarding appointment of an umpire); Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos, 25 F.3d 223 (4th Cir. 1994)

In the case before this Court, it is apparent that the method by which an arbitrator was to be appointed was specifically stated in the contract. In fact, the contract does not even provide a method in the event the parties are unable to agree on an arbitrator. Respondent had no authority to have an arbitrator appointed without the consent of the Appellant. (R. p. ____ (Contract). Not only did the Appellant not agree to an arbitrator, but he was also never even given the opportunity to agree or disagree because Respondent took it upon themselves to appoint the arbitrator. (T. p. 7, ll. 20-25, p. 8, ll. 1-5). The Respondent acknowledges that the American Arbitration Association ("AAA") appointed the arbitrator, Judge Kristi L. Harrington, a retired South Carolina Circuit Court Judge. The contract did not contemplate or allow the appointment of an arbitrator in this manner. (R. p. ___ UniFirst Response).

The Respondents did not comply with the terms of the contract which set forth the procedure to appoint an arbitrator and in fact blatantly violated the terms of the contract. The requirements are clear, unambiguous and simple: the parties will agree.

As a result of Respondents blatant failure to comply with the appointment of an arbitrator, the arbitration award should be vacated.

C. **The final and binding arbitration shall be conducted in the capital city of the state where Customer has its principal place of business (or some other location mutually agreed).**

When a contract is clear and unambiguous, the language alone determines the contracts force and effect. McGill at 381 S.C. _____. The language of this clause determines where the final and binding arbitration is to be conducted. Based upon the location of Appellant's principal place of business the final and binding arbitration should have been conducted in Columbia, South Carolina or another mutually agreeable location. Appellant acknowledges that this matter

occurred during COVID-19 and different procedures were necessary to comply with State mandates. However, Appellant submits to this Court that he should have been given the opportunity to agree to the final and binding arbitration being conducted by conference call. The Respondent continuously handled the entire arbitration procedure how they deemed appropriate rather than complying with the terms of the Contract or even with the input of the Appellant. Even after they discovered Appellant's objections, they still proceeded with the arbitration as they deemed appropriate.

VI. THE TRIAL JUDGE ERRED IN VACATING THE ARBITRATION AWARD AS THE AWARD WAS PROCURED BY UNDUE MEANS.

In reviewing a lower court's decision regarding an arbitration award, this Court must review for clear errors in the trial court's finding of fact and review de novo its conclusion of law, including the decision not to vacate the arbitration award. MCI Constructors, LLC v. City of Greensboro, 610 F.3d 849, 857 (4th Cir.2010) citing, Choice Hotels Int'l v. SM Prop. Mgmt., LLC, 519 F.3d 200, 207 (4th Cir.2008). The term "undue means" has generally been interpreted to mean something similar to fraud or corruption. MCI, 610 F.3d at 858. Undue means has been described as underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either. Id. There are three elements that the party seeking vacatur must prove to determine whether an award was procured by undue means: they must show that the fraud or corruption was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence. Id. There also must be some causal relation between the undue means and the arbitration award. Id.

First, Appellant advised the Respondent that he was objecting to the arbitration and asked that it

be postponed. (R. ___ letter) Appellant had no reason to believe that Respondent would ignore his position and proceed with the arbitration. Appellant had no way of knowing that Respondent would not honor his request after raising his legal arguments until he received the arbitration award. Each and every action of the Respondent in the improper handling of the arbitration by failing to comply with the contract materially related to the ultimate damages in this matter. Respondent underhandedly created a situation where he excluded the Appellant from selecting an arbitrator, having a negotiation at an agreed upon time and place, agreeing to a conference call as the mediation and even participating in the arbitration. Each and every one of the Respondents actions are supported by the record in this matter. (R. _____). As Appellant did not participate in the arbitration (which Respondent and the arbitrator were aware of the objection to the arbitration proceeding), the Appellant did not proffer any evidence regarding the basis of this contractual dispute or any defenses they may have to it. (T. p. 13, ll. 18-23) It is clear the trial judge erred in not deeming the actions of the Respondent as underhanded and thus erred in denying the motion to vacate.

The final order in this matter was issued on a Form 4 and as a result did not state any findings of fact that the trial court relied upon in reaching its decision to deny the motion to vacate the arbitration. Additionally, the Form 4 also did not state any conclusion of law. Appellant is relying upon arguments made at the motion hearing, as well as Respondent's Memorandum and Motion to speculate as to what ground the trial judge based his decision to deny the Motion to Vacate.

VII. THE TRIAL JUDGE ERRED IN NOT VACATING THE ARBITRATION AWARD AS THE ARBITRATION SHOULD NOT HAVE OCCURRED DUE TO THE FAILURE OF RESPONDENT TO MEET THE TERMS OF THE AGREEMENT.

Appellant acknowledges that "the Court's function in confirming or vacating an arbitration award is severely limited". Trident Technical College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 103, 333 S.E.2d 781, 784-85 (1985). In Palmetto Constr. Group., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150 (2021), the Supreme Court indicated that the law "favoring" arbitration simply means that courts must respect the contractual provision to arbitrate as it respects and enforces all contractual provisions. In Gissel v. Hart, 382 S.C. 235, 676 S.E.2d 320 (2009), the Court indicated that because an arbitration is a matter of contract and a party therefore cannot be required to submit to arbitration any dispute he has not agreed upon. In the matter before this Court, the contract between the Appellant and Respondent clearly states not only what matters the parties agreed upon were to be submitted to arbitration but also what actions needs to be taken to invoke the arbitration clause. The Appellant did not agree to waive any of the conditions required to implement the arbitration clause and therefore he should not be bound by a decision resulting from the arbitration that should not have occurred in the first place. The contract between the parties was an adhesion contract that was prepared and presented by the Respondent for the Appellants review and signature. The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. McGill, 381 S.C. 179, 672 S.E.2d 571 (2009). It is clear from the language of the contract that there were conditions that needed to be met before the actual arbitration proceeding could be commenced. This was not done. As a result, the lower court erred in refusing to vacate the arbitration award because it was improper for the arbitration to occur. The lower court had an obligation to consider and enforce the terms of the contract. Palmetto Constr. Grp., LLC, 432 S.C. at 638. The lower court ignored the contractual language of requiring a condition precedent and thus committed error.

VIII. THE TRIAL COURT ERRED IN GRANTING THE MOTION TO CONFIRM ARBITRATION AWARD AS CONDITIONS PRECEDENT WERE NOT MET TO ALLOW THE ARBITRATION TO PROCEED AND THERE WAS NO ORDER COMPELLING THE APPELLANT TO ARBITRATE UNDER THE AGREEMENT.

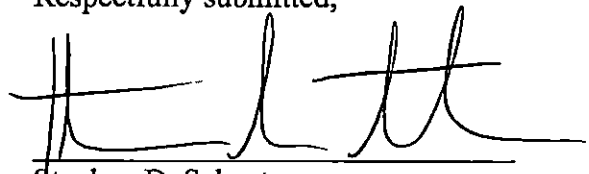
As previously discussed, the Respondents violated numerous provisions of the contract but still proceeded to commence and participate in the arbitration to the detriment of the Appellant. The arbitration should not have proceeded and thus an award should not have been rendered against the Appellant.

There are safeguards in the law when a party refuses to arbitrate under a written agreement. Any party that is aggrieved by the refusal of another party to arbitrate under a written agreement has provision in the law to seek a court to compel the other party to participate. 9 U.S. Code §4. Pursuant to 9 U.S. Code §4, an aggrieved party can petition a court for an order directing that the arbitration proceed in the manner provided for in the agreement. Rather than proceeding under this protection, the Respondent created a situation where they could ignore the requirements of the contract and proceed as they deemed appropriate to ensure a positive result.

CONCLUSION

Based upon the aforementioned arguments, Appellants submit to this Court that the arbitration award against him should be vacated due to the conditions precedent contained in the contract not being met and the award being procured through undue means.

Respectfully submitted,



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December 23, 2021

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

In the Circuit Court

Daniel D. Hall, Circuit Court Judge

Appellate Case No.: 2021-000986

Tony's Garage, LLC.....Appellant,

v.

Unifirst Corporation.....Respondent.

CERTIFICATE OF SERVICE

I certify that I have served the Initial Brief of the Appellant on the Respondent by depositing it in the United States Mail, postage prepaid, on December 23, 2021, addressed to the attorney for Respondent, Mr. S. Nelson Weston and Mr. Caleb M. Riser, Esq., Post Office Drawer 7788, Columbia, South Carolina 29202.

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Stephen D. Schusterman

December 23, 2021

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Tony's Garage, LLC v. Unifirst Corporation
Case #: 2021-000986

Dear Ms. Kitchings:

Enclosed please find a copy of the Appellant's Initial Brief along with a Certificate of Service.

If you have any questions or concerns please feel free to contact my office.

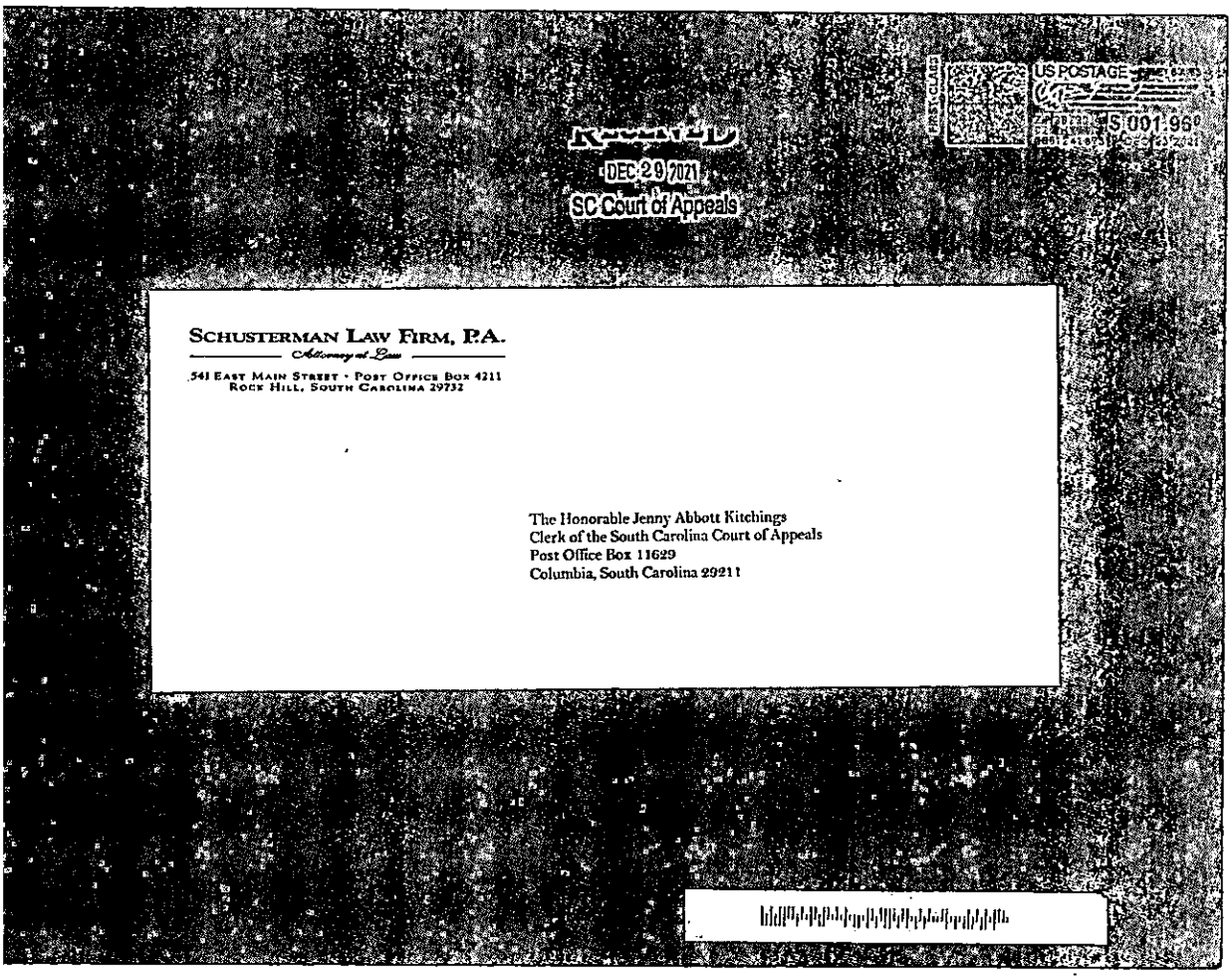
With best regards, I am

Sincerely yours,

Stephen D. Schusterman

Enclosure
SDS/as

Cc: Caleb Riser, Esq
S. Nelson Weston, Esq.



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