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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Alex Kinlaw, Jr., Circuit Court Judge

Case No. 2021-001168

BVW Holding AG ……..... Respondent,

v.

Hoowaki, LLC …..... Appellant.

INITIAL BRIEF OF RESPONDENT BVW HOLDING AG

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STATEMENT OF THE CASE

On March 10, 2021, BVW Holding AG ("BvW") filed a Summons and Complaint in the Court of Common Pleas in Greenville County against Hoowaki, LLC ("Hoowaki"), asserting a collection action for debt owed by Hoowaki under a note. (Complaint). BvW served the Summons and Complaint on March 15, 2021 and filed an affidavit of service on March 16, 2021. (Affidavit of Service). Thereafter, on April 29, 2021, Hoowaki filed a Motion to Dismiss and Compel Arbitration. (Mot. to Dismiss). BvW filed a Memorandum in Opposition to the Motion to Dismiss on July 29, 2021. (Memo in Opp'n to Mot. to Dismiss). On July 30, 2021, Hoowaki filed a Memorandum in Support of the Motion to Dismiss and Compel Arbitration alleging a separate agreement between the parties required arbitration of the dispute. (Memo. in Support of Defendant's Mot. to Dismiss).

On August 2, 2021, a hearing was held before the Honorable Alex Kinlaw, Jr. That same date, the Court issued a Form 4 Order advising the parties the matter was under advisement. (Form 4 Order). On September 1, 2021, the Court issued an Order denying Hoowaki's Motion to Dismiss and Compel Arbitration. (Order). On September 10, 2021, Hoowaki filed a Motion to Alter or Amend and for Reconsideration. (Mot. for Reconsideration). On September 20, 2021, the Court denied Hoowaki's Motion for Reconsideration. (September 20, 2021 Order). On October 13, 2021, BvW filed an affidavit of default, stating that Hoowaki had not served an answer as required by the Summons and the South Carolina Rules of Civil Procedure. (Aff. of Default). On October 14, 2021, Hoowaki filed a Motion to Vacate the Affidavit of Default and a Notice of Appeal. (Notice of Appeal).

STANDARD OF REVIEW

"Generally, the denial of a motion to dismiss under Rule 12(b)(6), SCRCP, is not immediately appealable." Burkey v. Noce, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012) (citing Huntley v. Young, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995)). "The denial of a Rule 12(b)(6) motion does not establish the law of the case nor does it preclude a party from raising the issue at a later point or points in the case." Huntley v. Young, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995). "However, an order that is not directly appealable will be considered if there is an appealable issue before the court." Cox. v. Woodmen of the World Ins. Co., 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001).

Unless the parties otherwise provide, "question of the arbitrability of a claim is an issue for judicial determination." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Arbitrability determinations are subject to *de novo* review." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citing Wellman, Inc. v. Square D Co., 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005)). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id. (citing Thornton v. Trident Med. Ctr., LLC, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003) (emphasis added)).

FACTS

On October 16, 2018, Hoowaki executed and delivered a promissory note to BvW containing a promise to pay the principal sum of One Hundred Nineteen Thousand and 00/100 Dollars ($119,000.00) (the "Note"). (Complaint, Ex. A). The terms of the Note provided that "on

failure to pay any installment of either principal or interest, or any portion thereof when due, then the whole principal sum and accrued interest, shall … become due and payable without further notice. (Id.). The Note also said "the maker…further contracts and agrees to pay a reasonable attorney's fee in case of suit or collection by attorney or litigation involving this debt." (Id.). Hoowaki failed to pay in accordance with the terms of the Note, and BvW declared the entire outstanding indebtedness due and payable. (Id. at p. 3).

In its motion to dismiss and compel arbitration, Hoowaki introduced an earlier agreement between the parties, a Cooperation and Licensing Agreement dated January 10, 2012 (the "Cooperation and Licensing Agreement"). (Memo in Support of Mot. to Dismiss, Ex. A). The Cooperation and Licensing Agreement grants licenses for certain patents and dictates the collaborative relationship between the parties for development of certain products. This Cooperation and Licensing Agreement was amended in 2017 (the "Addendum"), over a year prior to the parties entering into the Note. (Memo in Support of Mot. to Dismiss, Ex. B). Hoowaki argues any dispute regarding the Note should be resolved pursuant to the terms of the Alternate Dispute Resolution section in the Cooperation and Licensing Agreement. However, the Cooperation and Licensing Agreement and Addendum are separate and distinct from the Note, and the Note is the sole source of the dispute and the subject of BvW's Complaint.

ARGUMENT

1. THE TRIAL COURT PROPERLY ADDRESSED THE "GATEWAY MATTER" OF WHETHER THE PARTIES HAD A VALID ARBITRATION AGREEMENT GOVERNING THE DISPUTE.

The Trial Court concluded that "there is no valid and enforceable arbitration requirement for the Note" and denied the motion to dismiss and motion to compel arbitration. (Order, p.5). In

doing so, the Trial Court used the correct standard for the initial inquiry whether an arbitration agreement even existed that would govern the claim of non-payment of the Note by BvW. "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). While aspects of an arbitration clause may be subject to the Federal Arbitration Act ("FAA"), "South Carolina law applies to the initial determination of whether an arbitration agreement exists." MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008).

Requiring the party seeking arbitration to produce some arbitration agreement applicable to the controversy is not improper burden shifting. "The South Carolina Uniform Arbitration Act (UAA) generally provides 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." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citing S.C. Code Ann. § 15-48-20(a)) (emphasis added). As noted by the U.S. Supreme Court, whether the parties have an arbitration agreement at all, or whether an arbitration clause applies to a certain type of controversy are "gateway matters" that are proper for the Trial Court to determine. Id. at 23, 644 S.E.2d at 668 (citing Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed. 2d 414 (2003)). "Arbitration will be denied if a court determines no agreement to arbitrate existed." Id. at 24, 644 S.E.2d at 668 (emphasis added).

The denial by BvW of the existence of an arbitration agreement that applies to the claims of non-payment of the Note required the Trial Court to assess the gateway matter of whether a valid arbitration provision exists. Hoowaki seeks to link the broadly-worded arbitration provision of the Cooperation and Licensing Agreement to BvW's claim against Hoowaki for failure to pay the Note. (Memo. in Support of Defendant's Mot. to Dismiss, p.5; see also Initial Brief of

Appellant, p.9). Hoowaki specifically states that "[t]he parties would not have entered into the promissory note ***but for*** the overarching Agreement between the parties as it provided Hoowaki capital to engage in the transactions contemplated by the Agreement." (Initial Brief of Appellants, p.4 (citing Tr., P. 6)) In contrast, BvW argues that the Note and the Cooperation and Licensing Agreement are distinct and separate agreements between the parties, and that there is no significant relationship that links the arbitration provision of the Cooperation and License Agreement to the Note.

In determining this gateway matter, the Supreme Court of South Carolina noted that generally, when broadly-worded arbitration agreements are to be enforced, there must be a "significant relationship [that] exists between the asserted claims and the contract in which the arbitration clause is contained." Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007). In Aiken, the defendant sought to enforce an arbitration agreement against the plaintiff, arguing that ***but for*** the agreement being in place between the plaintiff and defendant, plaintiff's cause of action would not have arisen, thus the claims had a significant relationship to the agreement and its arbitration provision. See Id. at 149-150, 644 S.E.2d at 708. The Supreme Court of South Carolina found this line of reasoning unpersuasive. See Id. "Applying what amounts to a 'but-for' causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them." Id. at 150, 644 S.E.2d at 708. The Supreme Court of South Carolina went on to note that "[s]uch a result is illogical and unconscionable." Id. (citing Seifert v. U.S. Home Corp., 750 So.2d 633, 638 (Fla. 1999) ("[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement."); see also The Vestry and Church

Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., Inc., 356 S.C. 202, 209, 588 S.E.2d 136, 140 (Ct. App. 2003) ("[T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties.")).

The Trial Court properly addressed the gateway matter of whether the parties had a valid arbitration agreement governing the claim of non-payment of the Note by BvW. Further, while exercising its authority under South Carolina law to determine the gateway matter, the Trial Court was correct in finding 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." (Order, p.3).

2. BVW'S CAUSE OF ACTION UNDER THE NOTE IS NOT GOVERNED BY AN ARBITRATION CLAUSE

In this Court's de novo review, it should similarly find there was no arbitration clause governing this dispute. "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." New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 627, 667 S.E.2d 1, 4 (Ct. App. 2008). "Where there has been no agreement to arbitrate, a party cannot be forced into compulsory arbitration." Id. at 631, 667 S.E.2d at 6.

"[E]ven the most broadly-worded arbitration agreements still have limits founded in general principles of contract law." Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007); see also Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."). Looking to contract construction rules, "[t]he 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." Watson v. Underwood, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." Ashley River Props. I, LLC v. Ashley River Props. II, LLC, 374 S.C. 271, 280, 648 SSe.E.2d 295, 299 (Ct. App. 2007). "When a contract is unambiguous, a court must construe its provision according to the terms the parties used as understood in in their plain, ordinary, and popular sense." Id.

In evaluating the Note and the Cooperation and Licensing Agreement, it is clear they are separate and distinct agreements, each with its own terms and its own agreed-upon method of dispute resolution. The Trial Court found the Note "provides for its own remedies" and "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." (Order p.4). The Note has no reference to arbitration and contemplates an entirely different method of dispute resolution. By the unambiguous terms of the Note, Hoowaki waives presentment, demand, protest, and notice of dishonor. (Complaint, Ex. A). The terms and conditions of the Note contradict Section 11.2 regarding the dispute resolution provision of the Cooperation and Licensing Agreement (governed by New York law), which requires the aggrieved party to work through a multi-step process, beginning with the delivery of a "Dispute Notice," mediating the issue, and finally submitting to arbitration. The Trial Court found that the differences in choice of law and the lengthy and stepwise dispute resolution requirement in the Cooperation and Licensing Agreement "cannot be reconciled with the Note's explicit language for resolution of the payment terms." (Order, p.4-5). "The obligation of repayment by Hoowaki is not determined by the Agreement, but is instead contained within the Note itself." (Order, p.5).

Next, the Note was entered into between the parties in 2018, and the Cooperation and

Licensing Agreement containing the arbitration clause was entered into in 2012. A cardinal rule of contract construction is to determine the parties' intention, and "[t]he courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes, *at the time the contract was entered into*." Masters v. Kol, Inc., 431 S.C. 28, 38, 846 S.E.2d 893, 898 (Ct. App. 2020). In 2012 when the parties agreed to conduct complicated dispute resolution for disputes under the Cooperation and Licensing Agreement, they could not have anticipated or intended those provisions to cover a Note entered six (6) years later. Even if the parties did initially contemplate that every dispute between them would be governed in accordance with the Cooperation and Licensing Agreement, the parties unambiguously modified that arrangement with the terms and conditions explicitly stated in the Note in 2018.

Last, by its own terms the dispute resolution section in 11.2 of the Cooperation and Licensing Agreement applies to disputes under that agreement only. It states, the "procedures outlined in this Section 11.2 will be the sole and exclusive process for dispute resolution between the Parties and *relating to this Agreement*," (Memo. in Support of Defendant's Mot. to Dismiss, Ex. A Cooperation and Licensing Agreement, Section 11.2(e)) (emphasis added). The clear and unambiguous language limits the dispute resolution to disputes under and relating to the Cooperation and Licensing Agreement only, which does not mention or contemplate any loan or promise to pay. The loan was between the parties in a separate and distinct agreement with a separate and distinct method of resolution and a different choice of law (South Carolina).

The Trial Court found 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." (Order, p.3). The Trial Court found it notable that the Note lacks any reference to the Cooperation and Licensing Agreement or of any other contract or transaction between BvW and Hoowaki and similarly, the

Cooperation and Licensing Agreement lacks any reference to a note or any other obligation to repay a loan. (Id.). The Trial Court found that "there are no facts to suggest that the Note is governed by the Agreement." (Id. p.4).

3. THE TRIAL COURT DID NOT ERR IN DENYING ARBITRATION PURSUANT TO FAA.

Hoowaki argues in its Initial Brief that the trial court failed to fully consider and apply the FAA provisions to this dispute. The FAA applies in federal or state court to any arbitration agreement regarding a transaction of interstate commerce. See Munoz v. Green Tree Financial Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). However, Hoowaki's argument that the FAA provisions and federal case law should apply is misplaced. Even if the FAA applies, the first step in the FAA's two-step inquiry "is to determine whether the parties agreed to arbitrate that dispute." South Carolina jurisprudence is clear that "South Carolina law applies to the initial determination of whether an arbitration agreement exists." MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008). In making the initial determination about whether an arbitration clause exists, the Trial Court properly applied South Carolina law, and this Court in its review should similarly apply South Carolina law to determine the arbitration clause in the Cooperation and Licensing Agreement does not apply to a dispute under the Note.

CONCLUSION

This Court should affirm the judgment of the circuit court for the reasons stated and for any ground appearing on the Record as provided by Rule 220(c) SCACR.

Respectfully submitted,
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