RECEIVED
Mar 10 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2021-000766

Debra Lynn B. Peele, as Personal Representative of the Estate of Iola Aileen Bagwell,.....Respondent,

v.

Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living, Reatha Connelly, Regency Hospice of Georgia, LLC d/b/a Regency Southerncare, Defendants,

Of whom Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living and Reatha Connelly are.....Appellants.

FINAL BRIEF OF RESPONDENT

W. ANDREW ARNOLD, SC BAR # 0065311
Law Office of W. Andrew Arnold, P.C
307 Pettigru St.
Greenville, SC 29601
(864) 242-4800
aarnold@aalawfirm.com
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. STATEMENT OF THE ISSUE ON APPEAL

WHETHER THE DESIGNATION OF NATIONAL ARBITRATION FORUM AS THE ARBITRAL FORUM IS AN INTEGRAL TERM OF THE ARBITRATION AGREEMENT.

II. STATEMENT OF THE CASE

Respondent agrees with Appellant's statement of the case. In addition, it should be noted that Appellant conducted discovery in this case and only filed its motion to compel arbitration upon the filing of Respondent's Motion to Compel (responses to Plaintiff's discovery). Most importantly, the Circuit Court's June 21, 2021 Order (R. pp. 2-7) made only few findings of fact and ruled only that the National Arbitration Forum was integral to the arbitration agreement. Appellants did not file a Rule 59(e) motion, which resulted in several issues initially raised by Appellant not being ruled upon. Although Appellant's Brief submits four separate issues on appeal, there is only one issue which was ruled upon by the Circuit Court. Although Appellant's Brief acknowledges this, Appellant briefed issues not properly before this Court. Respondent will not follow suit.[1]

III. STATEMENT OF FACTS

Respondent agrees with Appellant's statement of the facts, with two exceptions. There is no evidence in the record that Cynthia Bagwell held a valid Financial and Health Care Power of Attorney (POAs) nor the power to execute the Arbitration Agreement. The Circuit Court noted that there were questions regarding the mental capacity of Iola Aileen Bagwell at the time she executed the POAs but the Circuit Court did not decide the issue. Secondly, the plain language of the Arbitration Agreement (bearing what purport to be Iola

[1] Respondent did not contest that the underlying transaction between the parties involved interstate commerce.

Aileen Bagwell and Cynthia Bagwell's signatures) provides that the claims in this case "will be *resolved by binding arbitration by the National Arbitration Forum* under the Code of Procedure then in effect." (Lease Agreement, p. 10. Emphasis added). (R. p. 39) The NAF is unavailable to conduct an arbitration of this matter. (*See* Exhibit 2, Plaintiff's Memorandum in Opposition, Order dated June 21, 2021) (R. pp. 56-61) (R. pp. 2-7). Plaintiff does not have possession of the NAF Code of Procedure: Defendants have not produced it.

IV. LEGAL ARGUMENTS AND AUTHORITIES

THE DESIGNATION OF NATIONAL ARBITRATION FORUM AS THE ARBITRAL FORUM IS A INTEGRAL TERM OF THE ARBITRATION AGREEMENT.

In this case, National Arbitration Forum ("NAF") is designated in clear and unequivocal language as the forum under the Arbitration Agreement. (Lease Agreement, p. 10.) (R. p. 39). The entire promise to arbitrate is contained in one sentence which specifically provides that claims "will be *resolved by binding arbitration by the National Arbitration Forum* under the Code of Procedure then in effect." (Emphasis added). It is not disputed that NAF is unavailable to conduct the arbitration of claims in this case. (Order dated June 21, 2021) (R. pp. 56-61). The language of the Arbitration Agreement makes clear the designation of the NAF was integral to the agreement to arbitrate.

1. Integrality

This language in this case resembles that which was the subject of *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009). In *Grant*, Leslie Grant was admitted to Magnolia Manor nursing home and upon admission, and her legal respresenative signed an admission agreement that contained an arbitration provision. The

arbitration agreement required that arbitration proceedings be "administered by" the American Health Care Lawyers Association ("AHLA"), which was unavailable to conduct the arbitration. *Grant,* 383 S.C. at 128, 678 S.E.2d at 436-37. The Supreme Court noted that the test was "whether a named arbitrator is an integral part of the agreement or an ancillary logistical concern…." *Id* at 131, 678 S.E.2d at 439. The Supreme Court held that "the specific designation of the AHLA as arbitrator is an integral term of this arbitration agreement." *Id.*

In *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014), upon admission to a nursing home, Darlene Dean signed an arbitration agreement. However, the language of the Arbitration Agreement was quite different than that in *Grant* (and in our case). The Agreement states that:

> any and all controversies, claims, disputes, disagreements or demands of any kind . . . arising out of or relating to the [patient's residency agreement] with the Facility . . . or any service or care provided to the [patient] by the Facility shall be settled exclusively by binding arbitration. This means that the parties are waiving their right to a trial before a jury or a judge.
>
> Further, the Agreement provides that:
>
> Any arbitration proceeding that takes place under this [] Agreement *shall follow the rules of the American Arbitration Association ('AAA')* and any resulting decision shall be enforceable by a court of competent jurisdiction. The arbitration proceeding shall be conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator selected *in accordance with the rules of the AAA*. The parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

Dean, 408 S.C. at 376-77, 759 S.E.2d at 730(emphasis in original).

The Supreme Court found the above language distinguishable from that at issue in *Grant* and stated as follows:

> Thus, in examining similar clauses, a majority of jurisdictions distinguish agreements requiring a proceeding "administered by" the named forum from those requiring a proceeding conducted "in accordance with" the named forum's rules. In the case of proceedings "administered by" a named forum, most courts view the forum selected as an integral term of the agreement because it is an express statement of the parties' intent to arbitrate exclusively before that forum; therefore, if the forum is unavailable, a material term of the agreement has failed, rendering the entire arbitration agreement invalid.

Id. at 382–83, 759 S.E.2d at 733 c*iting Grant,* 383 S.C. at 131–32, 678 S.E.2d at 439; (other citations omitted). The Supreme Court adopted the majority rule and held:

> "[W]e adopt the majority rule distinguishing between 'in accordance with' and 'administered by.' More specifically, we find that the named arbitral forum is not a material term to agreements in which the parties agree to arbitrate 'in accordance with' the named forum's rules, absent other evidence to the contrary; however, as in *Grant,* when parties elect for a proceeding "administered by" a named forum, that forum should be viewed as integral to the arbitration agreement, absent other evidence to the contrary."

Id. at 384, 759 S.E.2d at 734. The Court in *Dean* concluded: "Rather, by invoking only the AAA's rules, and not the AAA itself, the Agreement suggests that the parties anticipated an entity *other than the AAA* might conduct the arbitration." *Id. at* 385, 759 S.E.2d at 735.

Further, in *Berry v. Spang*, 433 S.C. 1, 6, 855 S.E.2d 309, 312 (Ct. App. 2021), this Court of Appeals decided a case involving an investment advisor who had signed Form U4s that contained the following agreement to arbitrate:

> I agree to arbitrate any dispute, claim, or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations indicated in Item 10 as may be amended from time to time . . . .

Item 10 included specific self-regulatory organizations (SROs). This Court of Appeals found that this language and designation of SROs as arbitral forums. The agreement relied on *Grant* and *Dean* in holding that "arbitration forum was a material and integral term of the agreement, and because the indicated organizations no longer existed or provided

arbitration services, there was no enforceable agreement to arbitrate." The language at issue in *Berry* is much less clear and unequivocal than in our case, and further supports the Circuit Court's decision that NAF as the arbitral forum was material and integral to the agreement to arbitrate.

So, the language in this case is clearly distinguishable from *Dean* and similar to the language used in *Grant* and *Berry*. The parties invoked the NAF not merely NAF Code of Procedure, although referencing the code is significant. Also, unlike *Dean*, the arbitration agreement in our case contains more than a single reference to NAF, but provides separately that a claimant must initiate the arbitration through NAF: "Information may be obtained, and claims may be filed at any office of the National Arbitration Forum, at www.arbitration-forum.com or at P.O. Box 50191, Minneapolis, MN 55405." Thus, the Abitration Agreement in this case not only provides that NAF is the specific arbitral forum but provides that the NAF Code of Procedure should govern the proceedings and that arbitration must be initiated by filing with NAF. The listing of the web address for NAF as the place for Plaintiff to obtain information about arbitration and filing claims is additional evidence that the NAF was integral to this Arbitration Agreement.

2. Severability

The presence of a severability provision provided an additional factor in *Dean* supporting its finding that AAA as the arbitral forum was not an integral term. Appellants argue that a severability clause trumps the language in the Arbitration Agreement designating NAF as the arbitral form. However, this is not the holding of *Dean.* In reaching its decision, the Supreme Court in *Dean* cited two cases that also contained severance provisions, but those courts ultimately decided that the specified arbitral forum was integral

to the arbitration agreement. *See Crossman v. Life Care Ctrs. of Am., Inc.,* 738 S.E.2d 737, 740 (N.C. Ct. App. 2013); *Rivera v. Am. Gen. Fin. Servs., Inc* 150 N.M. 398, 259 P.3d 803 (Sup. Ct. NM 2011). Like those cases, the arbitration agreement in the instant case contains multiple references to the specific arbitral forum, the rules of that forum, and referencing the forum's address and/or website for initiating claims and obtaining additional information. The Court in *Crossman* rejected the invitation to "sever" the provision containing reference to the arbitral forum. "We disagree and note that '[s]evering the unenforceable provisions of the arbitration clause at issue in the instant case would require the Court to rewrite the entire clause, and we decline to do so here.'" *Crossman,* 225 N.C. App. at 6, 738 S.E.2d at 741.

However, *Dean*'s reliance on *Rivera* is particularly significant and helpful because it involved a provision designating the NAF as the arbitral forum and adopting the NAF Code of Procedure together with a severability clause. Like other courts, the New Mexico Supreme Court took notice that the NAF Code states that it "shall be administered only by the [NAF] or by any entity or individual providing administrative services by agreement with the [NAF]." *Id.* at 409, 259 P.3d at 814. The arbitration agreement multiple references to the NAF and specific adoption of the NAF Code. The court concluded that the NAF was an integral part of the contract. *Id.* It also rejected the argument that the severability provision solved the problem because of NAF and the NAF Code was integral. *Id.* "'[W]hen the severed portion is integral to the entire contract, a severability clause, standing alone, cannot save the contract.'" *Id.* at 410, 259 P.3d 815. (internal citation omitted).

There are a couple of other opinions involving the NAF as the designated arbitral forum decided in other jurisdictions that are instructive. In *Miller v. GGNSC Atlanta, LLC*, 323 Ga. App. 114, 746 S.E.2d 680 (2013), the Georgia Court of Appeals concluded that NAF being the single designated forum made it integral to the arbitration agreement. In addition to the plain language of the arbitration agreement, the court took notice that NAF Code Rules 48 (D) and (E) further supports a finding of integrality:

> That part of Rule 48 (D) which provides that the NAF may decline to arbitrate the parties' claims if their agreement has "substantially modified a material portion of the Code" shows that unless the NAF Code *in its entirety* applies to the arbitration the parties' agreement to arbitrate may be unenforceable.

Id. at 121-22*,* 746 S.E.2d at 686-87. Moreover, the arbitration agreement contained a severability clause, but the Court stated that severance of an essential term is not permitted. *Id.* at 123-24, 746 S.E.2d at 688. Accordingly, it determined NAF was integral to the arbitration agreement and not severable. *Id.*

Similarly, in *Flagg v. First Premier Bank*, 644 F. App'x 893 (11th Cir. 2016) the United States Court of Appeals for the Eleventh Circuit considered a provision that provided thal all disputes would be resolved "by and under the Code of Procedure of the National Arbitration Forum." The court found that the text of the arbitration agreement did not appear to contemplate any other forum. *Id.* at 894. The Eleventh Circuit also took notice of the NAF Code of Procedure provided that "[i]f the parties are denied the opportunity to arbitrate a dispute, controversy or Claim before the Forum, the Parties may seek legal and other remedies in accord with applicable law." *Id.* at 896.

> Here, the NAF pervaded the arbitration provision. It was designated as the exclusive forum and its Code of Procedure was selected to govern all claims. <u>The provision directed consumers to file their claims with and obtain required forms from any NAF office, online at the NAF website, or by sending a request to the NAF's mailing address</u>.

Id. (emphasis added).

However, the Arbitration Agreement does not contain multiple provisions containing an agreement to arbitrate. So, even if the court was inclined to sever the provision including the NAF, it would eliminate the entire promise to arbitrate:

> By signing this agreement, the resident agrees with the facility that any dispute between you and us, including any services rendered prior to the date this agreement was signed and any dispute arising out of the diagnosis, treatment or care of the resident, including the scope of of this arbitration clause and the arbitrability of any claim or dispute, against whomever made (including, to the full extent permitted by applicable law, third parties who are not signatories to this agreement) will be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect.

(Lease Agreement, page 10) (R. p. 39). If the provision naming NAF as the arbitral forum is severed, there is no agreement to arbitrate.

> A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. The entirety or severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject, although the latter aids in determining the intention.

Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002); *see also E. Bus. Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) ("The severability of the contract must be determined from its language and subject matter; and where the severable character of the agreement is not determinable from the contract itself, the court, in order to uphold the contract, cannot create a new agreement for the parties…."). Appellants do not want this court to sever this provision, but to rewrite the agreement.[2]

[2] The provision also references a "Code of Procedure," which clearly means the NAF Code of Procedure in the context of agreement as a whole. If we rewrite the provision by striking

V. CONCLUSION

For the reasons stated above and for any other reason found in the Record on Appeal, the designation of the NAF is integral to the arbitration agreement, and accordingly, this Court should affirm the order of the Circuit Court.

Respectfully submitted,

s/W. Andrew Arnold
W. ANDREW ARNOLD
SC Bar # 0065311
Law Office of W. Andrew Arnold, P.C.
307 Pettigru St.
Greenville, SC 29601
(864) 242-4800
aarnold@aalawfirm.com
Attorney for Respondent

Dated March 10, 2022

reference to the NAF, the reference to the Code becomes unintelligible from the remaining language.