RECEIVED
Mar 28 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No.: 2021-001168

BVW HOLDING AG…….Respondent,

v.

HOOWAKI, LLC,……..…….Appellant.

FINAL BRIEF OF APPELLANT

Respectfully submitted,

s/Michael D. Wright

Vincent A. Sheheen
Michael D. Wright
SAVAGE, ROYALL & SHEHEEN, L.L.P.
P.O. Drawer 10
Camden, South Carolina 29021
803-432-4391
vsheheen@thesavagefirm.com
mwright@thesavagefirm.com

TABLE OF CONTENTS

Table of Authorities……i

Statement of Issues on Appeal…….....1

Statement of the Case…….....2

Statement of the Facts…… . . . …….3

Standard of Review . . . . . ….....4

Argument

I. The Trial Court applied the Incorrect Standard of Review When Determining the Enforceability of the Arbitration Provision…….……..4

II. The Trial Court erred in Declining to Dismiss this Action or Compel Arbitration…….6

A. The Federal Arbitration Act mandates that the trial court should have directed the parties to proceed to arbitration…….9

Conclusion…….....12

TABLE OF AUTHORITIES

Page Number

Cases

Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 644 S.E.2d 705 (2007)…….5

Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007)……...4

Cherry v. Wertheim Schroder and Co., 868 F. Supp. 830 (D.S.C. 1994)……..10

Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014)……..4,6

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985)……10

Drews Distrib. v. Sillicon Gaming, Inc., 245 F.3d 347, 349 (4th Cir. 2001)…….10

Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, (2000)……..4,6

Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 739 S.E.2d 209 (2013)……6

MBNA America Bank, N.A v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (2008)…….5,6

Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614 (1985)……9

Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)……..9

Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001)……11

Simpson v. World Finance Corp. of South Carolina, 367 S.C. 184, 623 S.E.2d 877 (2005) ….4

StoltNielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010)……..10

Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118–19 (2001)…….6, 11

Statutes

9. U.S.C.A. § 1-14…….*passim*

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err by applying the wrong standard of review in declining to enforce the parties' arbitration provision?

II. Did the trial court err in refusing to dismiss this action or, in the alternative, to compel arbitration?

STATEMENT OF THE CASE

On March 20, 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 an alleged debt Hoowaki owes to BVW ("Complaint"). (R. p. 12). On April 29, 2021, Hoowaki timely filed its Motion to Dismiss and Compel Arbitration ("Arbitration Motion") (R. p. 19). Hoowaki's Arbitration Motion asserts, in pertinent part, that BVW's Complaint should be dismissed "pursuant to Rule 12 of the South Carolina Rules of Civil Procedure, as amended; the Federal Uniform Arbitration Act, 9 U.S.C. §§ 1, *et. seq.*; the dispute resolution provision of the Cooperation and Licensing Agreement between the parties; as well as applicable Federal and South Carolina jurisprudence." (R. p. 19).

On July 29, 2021, BVW filed its Memorandum of Law in Opposition to Defendant's Motion to Dismiss ("Opposition to Arbitration Motion"). (R. p. 20). The following day, July 30, 2021, Hoowaki filed its Memorandum in Support of Defendant's Motion to Dismiss and Compel Arbitration. (R. p. 26). On August 2, 2021, the Honorable Alex Kinlaw, Jr. entertained oral argument on Hoowaki's Arbitration Motion and requested counsel for the parties to submit proposed orders. On the same day, Judge Kinlaw issued a Form-4 Order stating he was taking the matter under advisement and requesting proposed orders within 30 days from the hearing. (R. p. 1).

Following the parties' submission of proposed orders, Judge Kinlaw entered an Order denying Defendant's Motion to Dismiss and Compel Arbitration ("Order"). (R. p. 4). On September 10, 2021, Hoowaki timely filed its Motion to Alter or Amend and for Reconsideration of Judge Kinlaw's Order. ("Motion for Reconsideration") (R. p. 10). On September 20, 2021, the circuit court entered an Order denying Hoowaki's Motion for Reconsideration. (R. p. 10).

On October 14, 2021, Hoowaki timely filed its Notice of Appeal from the "Orders of the Honorable Alex Kinlaw, Jr." and included a copy of the orders referenced in the Notice of Appeal. (R. p. 87).

STATEMENT OF THE FACTS

Hoowaki is an industry leader in high and low friction micro-surfaces for grips, devices, gear, and packaging and holds multiple U.S. patents. On or about July 10, 2015, BVW and Hoowaki entered into a Cooperation and License Agreement ("Agreement") between the entities. The Agreement provided for, among other things, an agreement to cross-license certain intellectual properties from one entity to the other for the use in the parties' respective businesses, or "fields of use" as well as facilitated cooperation in the development of further intellectual property that the parties could utilize in their respective fields of use. On or about June 9, 2017, the parties entered into an Addendum to the Cooperation and License Agreement ("Addendum") which modified certain terms of the Agreement between the parties. These agreements are still in full force and effect and the parties are currently operating under the terms of these agreements.

BVW brought suit against Hoowaki regarding a promissory note that was executed between the parties in order to facilitate the parties' business arrangement consistent with the terms of the Agreement. The only reason Hoowaki executed the promissory note at issue was to further the contractual agreements between the parties at issue since the inception of the Agreement in 2015. (R. p. 72). In short, the promissory note is only one part of a larger series of dealings and agreements between the parties. Hoowaki could have easily obtained a traditional loan from a third-party financial institution, but asserts that this related document and transaction contemplated therein is consistent with the parties' overall business dealings. (R. pp. 78-79). Having operated under the terms of the Agreement for several years and in order to better facilitate the parties'

business arrangement consistent with the terms of the Agreement, the parties executed the promissory note at issue. (R. p. 79). The 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. (R. p. 72).

STANDARD OF REVIEW

The law governing the standard of review in the denial of motions to compel arbitration in South Carolina is well-settled. "The determination of whether a claim is subject to arbitration is subject to de novo review." Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007); see also Simpson v. World Finance Corp. of South Carolina, 367 S.C. 184, 623 S.E.2d 877 (2005) ("The question whether a claim is subject to arbitration is a matter of judicial determination, unless the parties have provided otherwise. Appeal from the denial of a motion to compel arbitration is subject to de novo review.")

ARGUMENT

I. The Trial Court applied the Incorrect Standard of Review When Determining the Enforceability of the Arbitration Provision.

As a threshold matter, our courts have held that "[t]he party **resisting arbitration bears the burden** of proving that the claims at issue are unsuitable for arbitration." Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (quoting Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)) (emphasis added). The trial court in the instant matter erred in applying the wrong standard of review with respect to the enforcement of the arbitration provision. The trial court stated in its order that "[t]he party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement." (R. p. 5). Respectfully, Hoowaki asserts this is an error of law.

The trial court cited Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007) as standing for the proposition that the party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. This is an incorrect statement of the law. It is not simply that Hoowaki disagrees with the underlying court's characterization; instead, Hoowaki submits that language addressing the purported legal proposition is not included in Chief Justice Toal's majority opinion cited by Judge Kinlaw in the Order. In short, the opinion in the Aiken case does not state what the trial court's order says that it does and its reliance upon it is an error of law.

Likewise, the trial court's reliance upon MBNA America Bank, N.A v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (2008) is similarly misguided. In Christianson, MBNA obtained an arbitration award against Christianson in the National Arbitration Forum. Id. at 212, 659 S.E.2d at 210. MBNA subsequently filed an application for enforcement of the arbitration award in the circuit court, but importantly failed to attach a copy of the arbitration agreement. Id. Christianson thereafter filed a motion to vacate the arbitration award already granted to MBNA. Id. This Court ultimately concluded that MBNA failed to provide evidence Christianson agreed to arbitration, that the National Arbitration Forum did not have jurisdiction to hear the matter, and therefore vacated the arbitration award. Id. at 215-216, 659 S.E.2d at 212. The instant matter has a completely distinguishable fact pattern and posture as presented to the trial court. Here, there was no arbitration award or a motion to vacate the arbitration award. Additionally, the lower court was not confirming an arbitration award subject to the Federal Arbitration Act, which requires evidence of an arbitration agreement. See 9 U.S.C.A. § 13 (1999). Moreover, unlike MBNA, Hoowaki actually presented the entire arbitration agreement and language to the lower court and there is evidence of an arbitration agreement between the parties for the court to consider. Most

importantly, however, is that this Court in MBNA never stated that the party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement.

As noted, our state's jurisprudence is the exact opposite of the standard of review cited by Judge Kinlaw in the court's Order. "[T]he party **resisting arbitration bears the burden** of proving that the claims at issue are unsuitable for arbitration." Dean, 408 S.C. at 379, 759 S.E.2d at 731 (quoting Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)) (emphasis added). Moreover, "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118–19 (2001). Respectfully, the standard of review utilized by the trial court in its order improperly shifted the burden of proof to Hoowaki with respect to the threshold decision as to whether the matter was subject to arbitration. Hoowaki properly presented a valid, binding arbitration agreement and therefore it was incumbent upon BVW to prove that the claim was unsuitable for arbitration, which Hoowaki contends they did not. Accordingly, the trial court's use of the improper standard of review is a reversible error of law and this matter should be remanded to the trial court with instructions to dismiss this action and/or compel the parties to arbitrate all issues raised in this case.

II. The Trial Court erred in Declining to Dismiss this Action or Compel Arbitration.

Under the parties' master Agreement, the parties agreed to submit disputes between the parties to arbitration. The Agreement contained the following plain and unambiguous alternative dispute resolution language:

Article 11, Miscellaneous

Section 11.2 Dispute Resolution. The Parties accept the process set forth below as the exclusive means to resolve disputes arising under this Agreement.

(a) Dispute Notice. Either Party ("Claimant") may promptly notify the other Party ("Respondent") in writing ("Dispute Notice") of a dispute arising under this agreement that has not been resolved through ordinary commercial means. The Dispute Notice will include (i) a summary of the dispute; (ii) the Claimant's position; and (iii) any material and relevant documentary information or references relating to the dispute that are in Claimant's possession or control. Within five (5) business days after receiving the Dispute Notice, Respondent will respond in writing by either (I) agreeing to Claimant's position or (II) scheduling a dispute resolution meeting to occur within ten (10) business days following receipt of the Dispute Notice.

(b) Initial Meeting. If Respondent schedules a dispute resolution meeting, Respondent will submit to Claimant (i) Respondent's written position and (ii) any material and relevant documentary information or references relating to the dispute that are in Respondent's possession or control. The dispute resolution meeting may be by telephone or other agreed means of contemporaneous communication. Each Party will appoint one or more individuals authorized to act with regard to the disputed issue. All dispute resolution meetings must be concluded within twenty (20) business days of the Dispute Notice ("dispute resolution meeting period"). If the dispute has not been resolved by the Parties within five (5) business days of the conclusion of the dispute resolution meeting period, each Party will prepare, and deliver to the other Party, a written summary (not to exceed three (3) 8.S"xll" pages; single spaced; typed; one-inch margins; 12-point Times New Roman font) identifying (I) all resolved issues and how they were resolved and (II) any unresolved issues and including each Party's proposed resolution ("Written Summary").

(c) Mediation. If the Parties are unable to resolve all disputed issues themselves by meeting, either Party may initiate mediation by notice to the other generally following the Commercial Mediation Procedures of the American Arbitration Association ("AAA") (see www.adr.org) within thirty (30) days following delivery of the Dispute Notice. The mediator will be a qualified neutral, but need not be a member of the AAA panel of neutrals. Within seven (7) business days of initiating the mediation process, the Parties or their legal counsel shall attempt in good faith to select a single mediator; if they cannot, then a neutral shall be selected by each Party (and compensated by same) who shall together select a third neutral to mediate the matter. The Parties will present to the mediator the Written Summary and any material and relevant documentary information previously shared by the Parties, and a confidential memorandum if requested by the mediator. The confidential memorandum will be maintained in confidence by the mediator unless and only to the extent disclosure to the other Party or third parties is authorized in writing by the Party submitting such memorandum. The mediation will be completed within thirty (30) days of the mediator's appointment, and will be held

in New York, USA. If the mediation resolves all disputed issues, the Parties will bear their own mediation costs and equally share the cost of the mediator.

(d) Arbitration. If the mediation fails to resolve all disputed issues, either Party may initiate arbitration within ten (10) days after the mediation concludes. Arbitration will be governed by the US Federal Uniform Arbitration Act (Title 9, US Code, Section 1-14, as amended), and will follow the AAA Arbitration Rules then effective, as amended from time to time. The arbitrator will be a qualified neutral, but need not be a member of the AAA panel of neutrals. Within seven (7) business days of initiating arbitration, the Parties or their legal counsel shall attempt in good faith to select a single arbitrator; if they cannot, then a neutral shall be selected by each Party (and compensated by same) who shall together select a third neutral, to be the sole arbitrator of the matter. The Parties will present to the arbitrator their Written Summary and any material and relevant documentary information previously provided to the mediator, and a confidential memorandum if requested by the arbitrator. The confidential memorandum will be maintained in confidence by the arbitrator unless and only to the extent disclosure to the other Party or third parties is authorized in writing by the Party submitting such memorandum. Arbitration will be held in the State of New York, and will be completed with a final determination rendered within forty-five (45) days of the arbitrator's appointment. Unless otherwise determined by the arbitrator (or the judge in the case of applying clause (f), below, or Sections 11.3 -11.5, below), the non-prevailing Party will be obligated to reimburse the prevailing Party's reasonable attorneys' fees and other expenses related to the mediation, arbitration, or any judicial action; the Parties' good faith compliance with the intent of this Section 11.2 shall be a material factor in such determination by the arbitrator (judge).

(e) Application and Finality of Arbitration. 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. Judgment upon an arbitrator's determination may be entered by any court having competent jurisdiction over the affected Party. Notwithstanding the foregoing, either Party may seek a preliminary injunction or other equitable judicial relief if such action is commercially reasonable to prevent irreparable damage.

(f) Continuing Obligation to Perform. The Parties will continue in good faith to perform their respective obligations hereunder throughout any dispute resolution process. Throughout the entire dispute resolution process the Parties will have a continuing obligation to produce all relevant documentary information or references relating to the dispute that are in the Parties' respective possession or control.

(R. p. 26). Moreover, the Agreement maintains that "[t]his Agreement *and all related documents, and all matters arising out of or relating to this Agreement*, are governed by, and construed in

accordance with, the laws of the State of New York, United States of America . . .” (R. p. 26). The circuit court erred in concluding the alleged debt asserted in BVW’s complaint was not part of the substantive scope of the arbitration provisions of the Agreement.

A. The Federal Arbitration Act mandates that the trial court should have directed the parties to proceed to arbitration.

Hoowaki contends the trial court erred in failing to fully consider and accordingly apply provisions of the U.S. Federal Uniform Arbitration Act (Title 9, US Code, Section 1-14, as amended), (“FAA”), which would have mandated the trial court to direct the parties to proceed to arbitration.

The United States Supreme Court has established a two-step inquiry in considering whether to enforce an arbitration agreement. “The first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.” Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 626 (1985). “The court is to make this determination by applying the ‘federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.’” Id. (quoting Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). Courts are to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration with a healthy regard for the federal policy favoring arbitration. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). The Federal Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. Id. As such, courts “are to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration with a healthy regard for the federal policy favoring arbitration.” Cherry v. Wertheim Schroder and Co., 868 F. Supp. 830, 834 (D.S.C. 1994).

In determining whether the parties agreed to arbitrate the underlying dispute alleged in the Complaint, Hoowaki contends the trial court erred by not fully examining the language of the Agreement as well as the relationship between the promissory note allegedly in default and the Agreement. The Agreement contains a broad arbitration provision which states that 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." (emphasis added) (R. p. 26). The language in the Agreement—which includes the same parties as to the promissory note—puts BVW on notice that such claims would be subject to arbitration. Moreover, under the FAA, courts have license to construe the scope of arbitration agreements liberally. The FAA "is a congressional declaration of a *liberal federal policy favoring arbitration agreements*." See Drews Distrib. v. Sillicon Gaming, Inc., 245 F.3d 347, 349 (4th Cir. 2001) (emphasis added). The "central" purpose of the FAA is to "ensure that 'private agreements to arbitrate are enforced according to their terms.'" StoltNielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010) (citation omitted). In addition to the language of the Agreement itself which states the FAA is applicable to resolve disputes between the parties, it is important to note that the FAA "applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

In the instant matter, BVW is a Switzerland based company entering into multiple agreements with Hoowaki, a South Carolina based company, regarding the development of intellectual property rights that the parties might use in their respective fields of use. This case involves numerous transactions involving interstate commerce and the FAA should be applied to resolve the parties' dispute. See Munoz, 343 S.C. at 538, 542 S.E.2d at 363 ("[T]he FAA applies

in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce."). Moreover, the broadly-worded arbitration clause included in the Agreement applies to the dispute over the alleged debt of the promissory note executed between the parties due to Hoowaki's representations that the promissory note was to further the overall business dealings between the parties. As detailed to Judge Kinlaw, BVW is not in the business of loaning money and the promissory note was not a stand-alone agreement, but was instead executed between the parties because of the Agreement. (R. p. 79). The parties have operated under the Agreement for several years and Hoowaki contends the promissory note at issue is related to the original Agreement between the parties as it facilitated the day-to-day operations of Hoowaki to meet obligations under the Agreement. In short, the agreements between the parties are intertwined and the claims asserted have a significant relationship to the performance of the parties under the Agreement. See Zabinski, 346 S.C. at 598, 553 S.E.2d at 119 ("[C]ourts generally hold that broadly-worded arbitration agreements apply to disputes in which a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained.").

Therefore, under the Agreement, and by extension the promissory note, the Federal Arbitration Act, and relevant case law, the trial court should have directed the parties to proceed to arbitration. As a result, this Court should reverse the trial court's denial of Defendant's Motion and remand to the trial court with instructions to dismiss this action and/or compel the parties to arbitrate all issues raised in this case.

CONCLUSION

For the reasons stated more fully herein, this Court should reverse and vacate the trial court's denial of Hoowaki's Motion to Dismiss and Compel Arbitration. Further, this Court should

remand this action with instructions to dismiss this action and/or compel the parties to honor their contractual promises to each other through arbitration.

Respectfully submitted,

s/Michael D. Wright

Vincent A. Sheheen
Michael D. Wright
SAVAGE, ROYALL & SHEHEEN, L.L.P.
P.O. Drawer 10
Camden, South Carolina 29021
803-432-4391
vsheheen@thesavagefirm.com
mwright@thesavagefirm.com

March 28, 2022

RECEIVED
Mar 28 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Case No.: 2021-CP-23-01191

BVW HOLDING AG…….Respondent,

v.

HOOWAKI, LLC,……..…….Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned herby certifies that Appellant's Final Brief complies with Rule 211(b), SCACR and the Supreme Court's Order regarding personal identifiers and sensitive information.

Respectfully submitted,

s/Michael D. Wright

Vincent A. Sheheen
Michael D. Wright
SAVAGE, ROYALL & SHEHEEN, L.L.P.
P.O. Drawer 10
Camden, South Carolina 29021
803-432-4391
vsheheen@thesavagefirm.com
mwright@thesavagefirm.com

March 28, 2022