THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Appellate Case No. 2021-000977
Case No. 2020-CP-15-00604

David Mack Johnson, Sr. ..... Respondent,

v.

Palmetto Solar, LLC, Palmetto South Carolina Solar I, LLC, Brightest Solar, Inc., Sunlight Financial, LLC, Cross River Bank, Great America Services Corporation and Robert Dodge ..... Defendants,

of which Palmetto Solar, LLC, Palmetto South Carolina Solar I, LLC, Brightest Solar, Inc., Sunlight Financial, LLC, Cross River Bank, and Robert Dodge are the ..... Appellants.

APPELLANTS' FINAL REPLY BRIEF

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ARGUMENT

Plaintiff David Mack Johnson, Jr. ("Purchaser") concedes he contracted to purchase a solar system. He does not like the way it operates and believes Appellants did not live up to their side of the bargain, committing fraud in the process. The merits of those claims are not before the Court—only the question of whether the arbitration agreement Purchaser signed encompasses his claims. They do, so this Court should reverse.[1]

I. The proper standard of review is *de novo*.

Purchaser urges this Court to apply a deferential standard of review. (Resp't Br. at 4.) He is incorrect—*de novo* is the proper standard. The South Carolina Court of Appeals has reviewed an order compelling pre-arbitration discovery *de novo* and in doing so reversed the trial court's decision. *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002). The federal cases and those from other states that Purchaser cites to suggest this Court review under an abuse of discretion standard are distinguishable—they either affirmed trial courts' denials of pretrial discovery or did not reach the issue. *See Diggs v. Citigroup, Inc.*, 551 Fed. App'x 762, 766 (5th Cir. 2014) (affirming district court's order denying pre-arbitration discovery due to Congress's clear intent to move parties into arbitration as quickly and easily as possible) (unpublished); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999) (affirming district court's order denying pre-arbitration discovery because plaintiff did not allege fraud in the inducement of the arbitration agreement); and *White v. Equity, Inc.*, 178 Ohio App. 3d 604, 607,

[1] On April 6, 2022, Purchaser filed his initial brief and a motion to dismiss arguing that Appellants' Rule 59(e) motion was untimely. This is incorrect. Appellants filed the Motions to Reconsider the day after a state and federal holiday; moreover, the filing was early given the applicable mailing days. (Mot. Reconsider at 1 n.1; R. at 67.) On April 7, 2022, Purchaser submitted a letter to this Court withdrawing the motion and acknowledging it was filed in error. Therefore, this brief does not further address Purchaser's claim about the timeliness of Appellants' Rule 59(e) motion.

899 N.E.2d 205, 208 (Ohio Ct. App. 2008) (specifically declining to address whether the plaintiff was entitled to pre-arbitration discovery). Thus, the Court should review the trial court's decision *de novo*.

II. The trial court misapprehended binding precedent requiring arbitration even when a plaintiff brings a claim for fraud as the outrageous torts exception does not apply to Purchaser's claim.

Appellants consistently argued Purchaser's claims fall within the scope of the arbitration agreement. (Mem. Supp. Mot. Compel at 3; R. at 62; Mot. Compel Hr'g. Tr., Jan. 6, 2021, 4:6–11; R. at 26; Mot. Reconsider at 3; R. at 69). Appellants noted "[t]o decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." (Mot. Reconsider at 3; R. at 69 (quoting *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). Then, Appellants more specifically asserted that allegations of fraud fall within the scope of the arbitration agreement unless the fraud is directed at the making of the arbitration provision itself. (*Id.*). Purchaser now misconstrues precedent to assert that the outrageous torts exception takes the claim of fraud outside the arbitration agreement. (Resp't Brief at 10).

Our Supreme Court Justices have questioned the continued validity of the outrageous tort exception. The majority of the Court in *Parsons v. John Wieland Homes & Neighborhoods* held that the outrageous tort exception was inapplicable to a homeowner's claims that its builder failed to disclose defects and sold property that was contaminated with known underground pipes. 418 S.C. 1, 12, 791 S.E.2d 128, 133–34 (2016). Two justices would have found that the judicially created exception conflicted with the United States Supreme Court's opinion in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011), because the exception is not a general contract principle

and applies only to arbitration clauses. *Parsons*, 418 S.C. at 11–12 (Pleicones, C.J., joined by Kittredge, J.) (plurality opinion). This follows how other courts have interpreted similar judicially created exceptions attacking the validity of arbitration agreements. *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 56–57 (2015). However, a majority of the justices concluded that the exception remained viable six years ago. *Id.* at 14–15 (Hearn, J. and Beatty, J.); *id.* at 16–23 (Total A.J.).

Even if the outrageous tort exception is still recognized, Purchaser's attempt to invoke it to invalidate the arbitration agreement would expand the doctrine beyond the limits set to date. Our Supreme Court has repeatedly held that the outrageous tort exception is limited to outrageous conduct, "which although factually related to the performance of the contract, [is] legally distinct from the contractual relationship between the parties." *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 151–52, 644 S.E.2d 705, 709 (2007) (internal citations and quotations omitted). "Only where the claim presented was clearly not within the contemplation of the parties will a court decline to enforce an otherwise proper arbitration agreement." *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 494–95, 689 S.E.2d 602, 605 (2010). Here, the primary factual basis of Purchaser's claims center on alleged misrepresentations about the solar panel system, misrepresentations about the availability of tax credits, defects in workmanship, and installation problems. (Am. Compl. ¶ 6; R. at 17). The basis for these claims is in no way legally distinct from the contractual relationship between the parties.

The cases cited by Purchaser where courts applied the outrageous tort exception are distinguishable. For example, in *Partain*, the Court found that the dealer after completing a sale, would substitute an entirely different vehicle in place of the truck the plaintiff had agreed to purchase was not reasonably foreseeable. 386 S.C. at 494, 689 S.E.2d at 605. The Court

emphasized "[w]here parties have contractually agreed to arbitrate a claim, a party may not escape its commitment simply by presenting his claim as a tort." *Id.* And *Aiken* involved the theft of a plaintiff's personal information by the defendant's employees as part of a conspiracy to embezzle proceeds from sham loans. *Aiken*, 373 S.C. at 147, 644 S.E.2d at 707. The Court concluded that "in signing the agreement to arbitrate, [the plaintiff] could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct." *Id.* at 151, 644 S.E.2d at 709. Similarly, in *Chassereau v. Global Sun Pools, Inc.*, the Court declined to compel arbitration of a consumer's allegations that an employee of a company she bought an above-ground pool from "repeatedly phoned her at her workplace; disclosed private information to [her] friends, relatives, and co-workers; and also made false and defamatory statements about [her] to these same people." 373 S.C. 168, 170, 644 S.E.2d 718, 719 (2007). The Court concluded that "a reasonable person would not have foreseen and would not have expected . . . [the defendant's] employees to commit acts historically associated with the common law tort of outrage in seeking to collect an overdue debt." *Id.* at 172, 644 S.E.2d at 720.

Here, the underlying tort alleged by Purchaser is significantly related to the parties' agreement and falls within the scope of the arbitration agreement. All of Purchaser's claims arise out of the installation of a solar panel system on his house; the allegations do not involve actions wholly outside the contractual relationship between the parties. *See Aiken*, 373 S.C. at 152, 644 S.E.2d at 710. An expansion of the outrageous tort doctrine to the facts of this case would stray from the South Carolina Supreme Court's guidance that it "does not seek to exclude all intentional torts from the scope of arbitration." *Aiken*, 373 S.C. at 152, 644 S.E.2d at 709. Moreover, such a decision would flout United States Supreme Court precedent requiring arbitration agreements to be placed on an equal footing with other contracts. *See, e.g., AT&T Mobility, LLC v. Concepcion*,

563 U.S. 333, 339 2011). Therefore, the Court should refuse to expand this doctrine and instead find the trial court committed legal error in not compelling Purchaser to arbitrate his claims.

III. The Arbitration Agreement was not unconscionable.

At the January 6, 2021, hearing, Purchaser's opposition to the motion to compel arbitration hinged on his fraud claim and the general position that "[i]f somebody commits a fraud on the front side of a transfer [sic] and then tries to hide behind the arbitration agreement, that should be unconscionable." (Mot. Compel Hr'g. Tr., Jan. 6, 2021, 5:6–11; R. at 27). That is the extent of the unconscionability claim in the record. Rather than rule on this unconscionability challenge, the trial court denied Appellants' motion "as being premature"—with no further guidance to the parties.

Although the trial court never ruled on whether the arbitration agreement was unconscionable—nor could it given the lack of any evidentiary or other support for the claim—Purchaser now raises the issue as an additional sustaining ground.[2] When a respondent raises on appeal additional reasons an appellate court should affirm the lower court's ruling, the appellate court has the discretion to review the respondent's additional reasons if they are supported by evidence in the record. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). Here, the record is insufficient to conclude the arbitration agreement was unconscionable, so the Court should reject this argument.

A party asserting a contract is unconscionable must establish both the "absence of meaningful choice" and "one-sided contract provisions . . . so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Lackey v. Green Tree Fin.*

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[2] In contradiction with this assertion, Purchaser also acknowledges he "has alleged a wholly different category of conduct that doesn't challenge the formation of the contract." (Resp't Brief at 16).

Cop., 330 S.C. 388, 400, 498 S.E.2d 898, 904 (Ct. App. 1998) (quoting *Fanning v. Fritz's Pontiac–Cadillac–Buick Inc.*, 322 S.C. 399, 402, 472 S.E.2d 242, 245 (1996)). A court should focus its analysis "on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668–69 (2007). The arbitration agreement here does just that. (*See* Mot. to Compel, Ex. 1; R. at 45). Moreover, in the same breath as declaring the Arbitration agreement unconscionable, Purchaser's counsel stated, "Before he entered it, he did a lot of questioning of it." (Mot. Compel Hr'g. Tr., Jan. 6, 2021, 5:22–23; R. at 27). Indeed, seven months passed between Purchaser agreeing to purchase the system and entering the Agreement. (Am. Compl. ¶ 6; R. at 17; Mot. to Compel, Ex. 1; R. at 48). Thus, Purchaser did not lack meaningful choice in accepting the Agreement, nor was Purchaser forced to sign the contract on a take it or leave it basis. Instead, Purchaser had the time and opportunity to evaluate the terms of the Arbitration agreement. Therefore, Purchaser's argument that the unresolved issue of unconscionability is an additional sustaining ground to affirm the denial of the motion to compel arbitration lacks support.

IV. The trial court erred in declining to "proceed summarily to the determination of the issue" on which it based its denial of Appellants' motion to compel arbitration "as being premature."

The trial court's ruling in a Form 4 Order that Appellant's motion to compel arbitration was "premature," without additional reasoning or guidance, was legal error. In the motion to compel arbitration and memorandum in support, Appellants cited the Federal Arbitration Act and the South Carolina Uniform Arbitration Act to argue the trial court should either grant the motion or stay the action pending the arbitration of arbitrable claims. (Mot. Compel Arbitration at 3; R. at 44). Thus, Appellants directed the trial court to the statutory requirement that it "proceed summarily to the determination of the issue so raised." (*Id.*; Mot. Reconsider at 3; R. at 69).

When a party denies the existence of an arbitration agreement, Appellants do not dispute a court's ability to order limited pretrial discovery on the issue. (Initial Brief at n.3; Mot. to Reconsider at 5; R. at 71). Yet the Purchaser did not deny the existence of the Agreement, but conceded that he entered into the Agreement and later acknowledged that the allegations of fraud do not challenge the formation of the Agreement. (Mot. Compel Hr'g. Tr., Jan. 6, 2021, 4:19–20; R. at 26; Resp't Brief at 16). Given that Purchaser did not dispute he entered into the valid and binding arbitration agreement, the trial court had a solid record to determine the Arbitration agreement was valid and the claims fell within its scope. The Court simply abdicated this responsibility and punted on the question without giving any guidance to the parties.

Even so, if there were any factual questions about the validity of Arbitration agreement, the trial court ordering limited discovery would have been the proper procedure for resolving those questions—not dismissing the motion to compel as "premature." *See Deputy v. Lehman Bros.*, 345 F.3d 494, 511 (7th Cir. 2003) (permitting limited discovery on the narrow issue of the validity of signatures on the arbitration agreement at issue); *Parilla v. IAP Worldwide Servs., V.I., Inc.*, 368 F.3d 269, 284, 285 (3d Cir. 2004) (permitting limited discovery to the narrow issue of plaintiff's ability to pay anticipated costs of arbitration); *PBC v. Landow*, 180 A.D.3d 593, 594, 119 N.Y.S.3d 116, 117 (affirming a pre-arbitration discovery order made following the parties raising the need for further discovery a hearing and again over a telephonic conference relating to a motion for contempt and order to show cause). That said, the trial court included no explanation about the existence of the arbitration agreement or whether the fraud allegations fell within the scope of the contract. Nor did the trial court order limited pretrial discovery going to either of the narrow issues despite both arguments being presented to it. Thus, even if there were narrow issues of fact required to determine the validity of the arbitration agreement, the trial court's failure to

rule on the issue of the arbitration clause's enforceability in its one-sentence Form 4 order under these circumstances without any additional reasoning or guidance was legal error.

V. Cross River Bank consistently argued it was never served with process.

In its initial motion, Cross River Bank ("CRB") "also moved to dismiss on separate grounds. It join[ed] the motion for the limited purpose of seeking dismissal under Rule 12(b), SCRCP, but d[id] not make a general appearance in the action because it has not been served with process." (Mot. Compel at 1 n.1; R. at 42.) At the hearing on the motion, CRB specifically stated it had not been served with process and argued it was "not properly before the Court . . . ." (Mot. Compel Hr'g. Tr., Jan. 6, 2021, 3:9–15; R. at 25.) As it explained in its motion to reconsider, it "also moved to dismiss on separate grounds. It joins the motion for the limited purpose of seeking dismissal under Rule 12(b), SCRCP, but does not make a general appearance in the action because it has not been served with process." (Mot. Reconsider at 1 n.1; R. at 67.) Purchaser's claims that CRB somehow did not raise the absence of process or that the Court lacked personal jurisdiction over CRB ignores the record.

CONCLUSION

For these reasons, Appellants ask this Court to reverse the ruling of the trial court and remand the matter for entry of an order compelling Purchaser to submit his claims to arbitration. CRB further asks the Court to reverse the trial court's failure to dismiss claims against it given Purchaser's failure to serve CRB with process.

[Signature on following page.]

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