IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-13

Filed: 3 November 2020

Mecklenburg County, No. 18 CVS 18068

SHARI SPECTOR, Plaintiff

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC, Defendant

Appeal by Defendant from Order entered 11 July 2019 by Judge Steven Warren in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 August 2020.

North Carolina Justice Center, by Emily P. Turner, Carlene McNulty, and Jason A. Pikler, and J. Jerome Hartzell, for plaintiff-appellee.

Ellis & Winters LLP, by Jonathan A. Berkelhammer, Joseph D. Hammond, Michelle A. Liguori, and Carson Lane, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Portfolio Recovery Associates, LLC, (PRA) appeals from an Order denying PRA's Motion to Compel Arbitration (Order) entered on 11 July 2019. The Record reflects the following relevant facts:

PRA is a licensed collection agency that purchases and seeks to collect on delinquent consumer credit card debt. In 2012, PRA purchased a charged-off account belonging to Shari Spector (Plaintiff) pursuant to a Bill of Sale between GE Money Bank and PRA. The Bill of Sale provided:

> Seller hereby transfers, sells, conveys, grants, and delivers to Buyer, its successors and assigns, without recourse except as set forth in the Agreement, to the extent of its ownership, the Receivables as set forth in the Notification Files (as defined in the Agreement), delivered by Seller to Buyer on December 21, 2012, and as further described in the Agreement.

On 1 December 2014, PRA instituted a civil action against Plaintiff in Mecklenburg County District Court seeking to collect on Plaintiff's debt, and on 1 April 2015, PRA obtained a default judgment against Plaintiff in the amount of $2,777.28. On or about 14 March 2016, Plaintiff filed a Motion to Set Aside Default Judgment and Entry of Default, and on 8 June 2016, the Mecklenburg County District Court set aside and vacated the entry of default and default judgment against Plaintiff.

This litigation began on 18 September 2018, when Plaintiff filed a Complaint alleging PRA violated certain sections of North Carolina's Consumer Economic Protection Act of 2009 when it obtained its default judgment against Plaintiff—specifically N.C. Gen. Stat. §§ 58-70-115, -150, and -155. *See An Act to Enact the Consumer Economic Protection Act of 2009*, 2009 Sess. Law 573 § 1 (N.C. 2009). PRA filed its "Notice of Election to Arbitrate and Answer" on 6 December 2018. On 19

December 2018, the trial court entered a Case Management Order setting the trial date for 5 August 2019. In the meantime, the parties began the discovery process. On or about 21 May 2019, PRA filed its Motion to Compel Arbitration (Motion). Then, on 6 June 2019, PRA filed a Motion for Summary Judgment. The trial court heard oral arguments on PRA's Motion on 26 June 2019, and on 11 July 2019, entered its written Order denying PRA's Motion to Compel Arbitration. The trial court's Order, in relevant part, provided:

> 22. The issue of whether the documents PRA relies upon should be admitted into evidence is governed by the North Carolina Rules of Evidence. The documents attached to the Anderson Affidavit are inadmissible under the hearsay rule and best evidences rules, [N.C. Gen. Stat. §] 8C-1, Rules 802 and 1002.
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> 23. The documents agreement relied upon by PRA to show the terms of the purported arbitration agreement lack sufficient trustworthiness to satisfy the business records exception to hearsay. [N.C. Gen. Stat. §] 8C-1, Rule 803(6). While the affiant claims the document attached to her affidavit as Exhibit A is a "true and accurate copy" of the credit card agreement that was mailed to Plaintiff, the document attached as Exhibit A to the affidavit is a "CareCredit" credit card agreement, while the statements attached as Exhibit B to the affidavit are for an "hhgregg" branded credit card account. Further the affiant fails to assert that she has personal knowledge of how the business records were created or maintained.
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> 24. The GE Money Bank Credit Card Agreement recites that it was entered into in Utah and that it is subject to Utah law. The arbitration agreement contained therein further recites that it is subject to Utah law to the extent state law applies. If it is assumed that the GE Money Bank Credit Card Agreement was properly received in evidence, then both

matters of assignment and the generally applicable contractual defense of waiver are governed by state law, here the law of Utah. *See* 9 U.S.C. § 2; *King v. Bryant*, 225 N.C. App. 340, 348, 737 S.E.2d 802, 808 (2013); *Cain v. Midland Funding, LLC*, 452 Md. 141, 153-54, 156 A.3d 807, 814 (2017).

25. While the language of the arbitration agreement includes assigns, PRA has the burden of proving that it was assigned the rights contained in that clause. *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992) ("Accordingly, the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes.").

26. The evidence before the Court regarding assignment, that is, the assertion at paragraph 11 of the Anderson Affidavit and the bill of sale between GE Money Bank and PRA, does not meet the standard for demonstrating that PRA was assigned the right to enforce the arbitration clause in the GE Money Bank Credit Card Agreement: "Generally the elements of an effective assignment include a sufficient description of the subject matter to render it capable of identification, and . . . the intent to make an immediate and complete transfer of all right, title, and interest in and to the subject matter . . ." *Gables at Sterling Vill. Homeowners Ass'n, Inc. v. Castelwood-Sterling Vill. I, LLC*, 2018 UT 04, ¶ 38, 417 P.3d 95, 107 (Utah 2018) (internal quotation omitted).

27. The Anderson Affidavit, at paragraph 11, states that Synchrony, formerly GE Money Bank, "sold" Plaintiff's "Account" to PRA. The Bill of Sale states an intent to transfer to PRA "the Receivables as set forth in the Notification Files (as defined in the [purchase] Agreement)." This evidence does not support a conclusion that GE Money Bank "manifest[ed] an intention to transfer the right" to compel arbitration to PRA. *Id.*

. . . .

29. Given its conclusions in the foregoing paragraphs, and in consideration of applicable state and federal law, the Court

concludes that PRA has not met its burden of showing it was assigned the right to arbitrate the current dispute.

30. Under Utah law, PRA waived the right to demand arbitration by filing and obtaining a default judgment in *PRA v. Spector* as well as by filing a motion for summary judgment and seeking and obtaining discovery from Plaintiff in this matter. *Nelson v. Liberty Acquisitions Servicing LLC*, 2016 UT App 92, ¶ 20, 374 P.3d 27, 32 (Utah Ct. App. 2016). Under Utah law, no showing of prejudice is required to support waiver, *Mounteer Enters., Inc. v. Homeowners Ass'n for the Colony at White Pine Canyon*, 2018 UT 23, ¶ 34, 422 P.3d 809, 815 (Utah 2018); however, if prejudice is required, Ms. Spector suffered prejudice from PRA's actions in obtaining a default judgment in *PRA v. Spector* as well as from PRA's actions in serving discovery requests on Plaintiff and filing a motion for summary judgment in the present case. Ms. Spector and her counsel have been forced to incur time and expenses to set aside the default judgment in *PRA v. Spector* and to respond to PRA's discovery requests and motion for summary judgment.

31. PRA's Motion should be denied because PRA failed to meet its burden to demonstrate the existence of an arbitration agreement, and the evidence it presented as to the existence of such an agreement should be excluded as inadmissible hearsay and as pursuant to the best evidence rule.

32. In the alternative, and assuming the GE Money Bank Credit Card Agreement should be received in evidence, PRA's Motion should be denied because PRA failed to meet its burden to demonstrate that the right to demand arbitration was assigned to it and that it was therefore a party to the arbitration agreement.

33. In the alternative, and assuming the GE Money Bank Credit Card Agreement should be received in evidence and that PRA did carry its burden of showing that the right to demand arbitration was assigned to it, PRA's motion should be denied because PRA waived the right to demand arbitration when it

> sought and obtained a default judgment against Plaintiff, filed an answer and motion for summary judgment in this matter, and sought and obtained discovery responses from Plaintiff in this matter.

PRA filed a timely written Notice of Appeal on 29 July 2019.

Issue

The dispositive issue is whether the trial court properly concluded PRA was not assigned the right to arbitration.

Analysis

I. Appellate Jurisdiction and Standard of Review

"[A]n appeal from the trial court's denial of a motion to compel arbitration is an interlocutory order." *U.S. Trust Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 289, 681 S.E.2d 512, 513 (2009) (citation omitted). However, it is "well established that an order denying a motion to compel arbitration is immediately appealable." *Cornelius v. Lipscomb*, 224 N.C. App. 14, 16, 734 S.E.2d 870, 871 (2012).

> (a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
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> . . . .
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> (2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

N.C. Gen. Stat. § 1-569.7(a)(2) (2019).

This Court has elaborated "the trial court must perform a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *U.S. Trust Co., N.A.*, 199 N.C. App. at 290, 681 S.E.2d at 514 (citations and quotation marks omitted). "[T]he trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 633-34, 610 S.E.2d 293, 296 (2005) (citations and quotation marks omitted). We review the trial court's conclusions of law de novo. *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 354-55, 826 S.E.2d 567, 571 (2019) (citing *Creed v. Smith*, 222 N.C. App. 330, 333, 732 S.E.2d 162, 164 (2012)).

II. Denial of PRA's Motion to Compel Arbitration

As a threshold matter, we acknowledge PRA's argument the trial court erred when it excluded the Anderson Affidavit and attached documents as hearsay and in violation of the best evidence rule. PRA contends in the "summary proceeding" proscribed under N.C. Gen. Stat. § 1-569.7(a)(2), the North Carolina Rules of Evidence do not apply and therefore that the trial court should not have excluded evidence presented on such grounds. However, we do not reach this issue. This is so, because even assuming the trial court erred by applying the North Carolina Rules of

Evidence to the underlying proceeding and excluding the Anderson Affidavit and attached exhibits,[1] the trial court properly concluded PRA has not met its burden of proving the existence of a valid arbitration agreement between PRA and Plaintiff—even taking those documents into consideration. *See Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992) ("[T]he party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes."); *McCoy v. Blue Cross and Blue Shield of Utah*, 2001 UT 31 at ¶ 11, 20 P.3d 901, 904 (2001).

PRA next asserts the trial court erred in denying PRA's Motion to Compel Arbitration on the basis PRA was not assigned the right to arbitrate Plaintiff's claims. This Court addressed PRA's identical arguments in *Pounds v. Portfolio Recovery Assocs., LCC*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (COA 19-925) (filed 3 November 2020). In *Pounds*, we determined, examining both Utah law and the UCC, the trial court properly concluded PRA had not demonstrated the existence of a valid arbitration agreement as between the plaintiffs and PRA because the assignment of the plaintiffs' Accounts and Receivables, effectuated through the bills of sale, did not

[1] Although we do not reach PRA's argument the trial court erred in excluding proffered evidence as hearsay and in violation of the best evidence rule, we note PRA's argument also does not resolve the evidentiary discrepancies shown in the Record. For instance, the credit card agreement attached to the Anderson Affidavit, averred to be a "true and correct copy" of the credit card agreement mailed to Plaintiff, indicates it is for a CareCredit Card. All other filings by PRA and admissions by Plaintiff in this case reflect Plaintiff's credit card was an "hhgregg" brand credit card. Certainly, this would create a question of the credibility of the evidence that the trial court would then be permitted to weigh, regardless of the exact evidentiary standard to be applied in the summary proceedings proscribed by N.C. Gen. Stat. § 1-569.7(a)(2).

implicitly or necessarily include assignment of the right to arbitration. *Id.* Here, Plaintiff's Bill of Sale contains identical language to the GE Bank Bills of Sale in *Pounds*. Thus, because PRA asserts the same arguments in the case *sub judice* as it did in *Pounds*, for the reasons articulated in *Pounds* we conclude the trial court in this case correctly determined PRA has not shown it was assigned the right to arbitrate Plaintiff's claims and therefore there is not a valid arbitration agreement between Plaintiff and PRA.

Consequently, we conclude based on this Court's reasoning in *Pounds*, without any showing of additional intent by the original creditor to assign to PRA, at the very least, "all of the rights and obligations" under Plaintiff's original agreement, the trial court properly determined the right to arbitrate was not assigned in the sale and assignment of Plaintiff's Receivables as set forth in the Bill of Sale. Thus, the trial court did not err in concluding PRA had not met its burden of showing a valid arbitration agreement between Plaintiff and PRA and, therefore, the trial court did not err when it denied PRA's Motion. Because we uphold the trial court's ruling on this basis, we do not reach the question of whether the trial court properly determined PRA subsequently waived its right to compel arbitration.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Order denying PRA's Motion to Compel Arbitration is affirmed.

AFFIRMED.

Judges MURPHY and YOUNG concur.

Report per Rule 30(e).