09 CP 16 0351

STATE OF SOUTH CAROLINA)
)
COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICAL CIRCUIT

Chase Manhattan Bank USA, N.A. as Successor in Interest to Bank One Delaware N.A.,
Plaintiff,
vs.
Pamela P. Bell,
Defendant.

CASE NO.: 2008-CP-16-0329
Judgment roll # 58237

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SCOTT S. SUGGS
CLERK OF COURT/R.M.D.
DARLINGTON COUNTY, S.C.

Chase Manhattan Bank USA, N.A.,
Plaintiff,
vs.
Pamela P. Bell,
Defendant.

CASE NO.: 2008-CP-16-0330
Judgment roll # 58238

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CLERK OF COURT
DARLINGTON COUNTY, S.C.

Chase Bank USA, N.A.,
Plaintiff,
vs.
Pamela P. Bell,
Defendant.

CASE NO.: 2008-CP-16-0331
Judgment roll # 58239

ORDER GRANTING MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULES 60(b)(4) AND VACATING CONFIRMATION OF ARBITRATION AWARDS

Identical motions for Relief from Judgment Pursuant to Rules 60(b)(3) and 60(b)(4) and to Vacate Arbitration Award were filed by Defendant on May 1, 2008 in each of the three above-captioned matters. Such motions were before the Court on January 22, 2009. For purposes of these motions, the parties, lawyers, legal and factual issues are identical.

At the hearing, Defendant submitted to the Court an Affidavit in all of these matters in which she asserted that she had never seen, nor had any knowledge of, an unsigned, undated, photocopied document en-captioned "Cardmember Agreement" (the alleged Agreement) that had, for the first time, been presented to the Court as an attachment to a brief filed by Plaintiff's

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attorney at some time between January 12, 2009 and the hearing. Nowhere in the alleged Agreement itself, the brief to which it was attached, or the affidavit submitted to the Court on February 6, 2009, does Plaintiff, or its attorney, explicitly state that the alleged Agreement itself was, at any time, mailed to Defendant, but rather that "notice" of the alleged Agreement was mailed to all "Plaintiff's customers", and that after "notice" of the alleged Agreement had been mailed, Defendant "continued to use the account", insinuating that, therefore, Defendant "agreed" to the terms of the Alleged agreement that she had received "notice" of in the mail because she "continued to use the account." Affidavit of Plaintiff, Paragraphs 6 and 8. The "notice" of the alleged Agreement is not produced.[1]

These three motions had initially been before the Honorable James E. Lockemy on October 8, 2008, at which time he issued a Form Order in each of these cases which stated "Pursuant to agreement of Plaintiff and Defendant attorneys case is hereby vacanted (sic) and returned to non-jury roster [;] hearing can not be set before 60 days." While Judge Lockemy's Orders of October 8, 2008 are unclear, the attorney for Plaintiff represented that the "agreement" referenced in each Order was an agreement between counsel that Plaintiff's judgment in each of these cases would be vacated if within sixty (60) days Plaintiff could not adequately show to the Court the alleged arbitration agreement granting the authority for each of the alleged arbitration awards to be entered as judgments against Defendant.

It appears from the Court's files in each of these cases that on April 14, 2008 Plaintiff, by and through its attorney, mailed Defendant an Application for Order Confirming Arbitration Award pursuant to the Federal Arbitration Act (the Applications), a proposed Order of the Court (the Orders) and Notice of Judgment. None of these documents would have had the Court's civil

[1] As the alleged "notice" of the Application to Confirm Arbitration Award is not produced, and the alleged "notice" of arbitration claim is not produced.

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action number affixed to it at the time they were served upon the Defendant, because these cases were not even filed with the Court on April 14, 2008.

Rather, it appears from the Court's file that on April 17, 2008, just three (3) days after the Applications had been mailed to Defendant, and before they had been filed with the Court, Plaintiff's attorney had the Honorable James E. Lockemy sign the proposed Orders granting the Applications and rendering Judgment against Defendant: (1) for $20,324.39 in 2008-CP-16-0329 (Judgment roll 58237); (2) for $20,418.44 in 2008-CP-16-0330 (Judgment roll 58238); and (3) for $10,880.18 in 2008-CP-16-0332 (Judgment roll 58239).

It further appears from the Court's file that the Applications and Orders were all filed at the Darlington County Clerk of Court on April 21, 2008, without any arbitration agreement being attached to any of them, and that the Judgments were entered by the Clerk against Defendant in the amounts set forth above (an aggregate judgment of $51,623.01). The Defendant had not been given an opportunity to appear and answer or otherwise contest the sufficiency of the Applications at any time before the $51,623.01 in judgments were entered against her.

Based upon Defendant's brief, within a short time after entry, Plaintiff, by and through its attorneys, forwarded the judgments to Defendant asking her to make "satisfactory arrangements for payment."

On May 1, 2008, ten (10) days after the Applications and Orders rendering Judgment against Defendant were filed with the Court, Defendant filed these motions seeking relief from such alleged Judgments pursuant to Rule 60(b)(3) and 60(b)(4) of the South Carolina Rules of Civil Procedure, and to vacate the underlying arbitration awards.

It is undisputed that pursuant to the Federal Arbitration Act (the FAA) at 9 U.S.C. §13 the "party moving for an order confirming ... an award **shall**, at the time such order is filed with

the Clerk for the entry of judgment thereon, **also file** the following papers with the Clerk: (a) **The agreement**." It is also undisputed that this requirement also appears under the South Carolina Uniform Arbitration Act (the SCUAA) at S.C. Code §15-48-160, in pertinent part: "(a) On entry of judgment or decree, the clerk of court shall prepare the judgment roll consisting, to the extent filed, of the following: (1) **The agreement**,"

It is also undisputed that Plaintiff failed to attach any alleged arbitration agreement to the Applications or Orders, either prior to or in connection with the filing and entry of the same.

In 2008, the South Carolina Court of Appeals found that the FAA required an arbitration agreement to be attached to an Application for Order Confirming Arbitration Award and Order as a pre-requisite to the entry of an arbitration award as a judgment. MBNA American Bank, N.A. v. Christianson, 659 S.E.2d 209 (S.C.Ct.App. 2008). In Christianson, the Court of Appeals held that MBNA, a credit card creditor such as the Plaintiff in this case, is required to file a valid arbitration agreement[2] with its application for confirmation of an arbitration award, and rejected MBNA's argument that 9 U.S.C. §13 of the FAA "merely required the agreement to be filed before the Clerk performs the ministerial act of entering the judgment." Christianson at 212-213.

In Christianson, the South Carolina Court of Appeals repeatedly favorably cited the case of MBNA America Bank, N.A. v. Credit, 132 P. 3d 898 (Kan. 2006), and, in particular, quoted it for the proposition that a failure to attach a copy of the arbitration agreement to an Application for Order Confirming Arbitration Award, as here, "alone would have justified the ... Court in its

[2] In Christianson, as here, MBNA filed with the Greenville County Clerk of Court, subsequent to the Application for Confirmation of the Arbitration Award, "an unsigned, undated photocopy of one page of a pamphlet it alleges is the arbitration agreement", which both the trial judge and the Court of Appeals found to be inadequate evidence of an arbitration agreement between the parties under the Federal Arbitration Act.

decision to deny [the creditor's] motion to confirm the [arbitration] award." Christianson at 212 (citing and quoting the Kansas Supreme Court from Credit, 132 P. 3d at 901)[3].

Thus, as Mark Christianson requested that the Greenville County Court of Common Pleas vacate MBNA's arbitration award against him for its failure to comply with 9 U.S.C. §13 of the FAA, Defendant has asked this Court to vacate confirmation of Plaintiff's arbitration awards against her. Based upon the Court of Appeal's reasoning in Christianson, and leaving aside the issue of the sufficiency of the submission of the document Plaintiff now alleges contains the arbitration agreement, just the undisputed fact that there was no arbitration agreement attached to the Applications and Orders is enough for this Court to vacate any alleged arbitration awards and consequent judgments.

Defendant also prays this Court provide her with relief from the judgments pursuant to Rule 60(b)(4), SCRCP, because Plaintiff never filed Applications for Orders Confirming Arbitration Awards before obtaining signed Orders of Judgment against Defendant from a Circuit Court Judge; Orders which were then filed as Judgments against Defendant simultaneously with the filing of the Applications (on April 21, 2008), all without even providing Defendant the Applications – or, therefore, an opportunity to challenge them as being in blatant and willful derogation of the clear mandate of federal law as set forth in the FAA at 9 U.S.C. §13 requiring that the alleged arbitration agreement be attached thereto – at any time before serving Defendant with them via mail on April 14, 2008. Defendant, therefore asks this Court to find

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[3] "As mentioned above, MBNA failed to attach a copy of the arbitration agreement to its motion to confirm the award. This violated the Federal Arbitration Act for which MBNA intermittently expresses respect. See 9 U.S.C. § 13 (2000). This alone would have justified the district court in its decision to deny MBNA's motion to confirm the award." Christianson at 212. See also, MBNA America Bank, N.A. v. Straub, 2006 WL 1452772, 2006 N.Y. Slip Opinion 26209 (May 25, 2006).

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that the judgments are void because they were entered against her in violation of federal law, and, in particular, the FAA at 9 U.S.C. §13, and, consequently, were also confirmed and entered without subject matter jurisdiction, are fatally defective and must be vacated.

Plaintiff raises multiple issues.

First, as indicated above, subsequent to the filing of the Applications and Orders, and subsequent to the entry of judgments against Defendant, Plaintiff provided the Court with the alleged Agreement for the first time as an attachment to a brief – just as MBNA attempted to do in Christianson. Christianson at 211-212. As previously stated, as the Court of Appeals ruled in Christianson, and regardless of the sufficiency of the actual document, the submission of the alleged Agreement by Plaintiff in this case is too little too late, and the failure to attach it to the Applications and Orders prior to the entries of judgments is, in and of itself, sufficient for this Court to vacate and void the Judgments. Christianson at 212-213. Plaintiff states in its brief that such a ruling would moot the prior order in this matter, but the submission of the alleged Agreement does not even comport with the October 8, 2008 agreement of counsel and order that required any alleged arbitration agreement to be submitted by Plaintiff to the Court within sixty (60) days. As well, the prior order was simply that if Plaintiff could not adequately show to the Court the alleged arbitration agreement, the consequent judgments would be vacated, not that if Plaintiff did adequately show to the Court the alleged arbitration agreement, they would not be vacated. Further, this Court makes an explicit ruling that Plaintiff's showing was not adequate to prove the existence of an arbitration agreement; to wit, even if the Court takes the Affidavit of Plaintiff as true, and the Affidavit of Defendant as false (which it does not), Plaintiff's Affidavit still does not establish that an agreement was made between the parties.

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Second, Plaintiff alleges that Defendant was "late" in challenging the arbitration awards, Applications and Orders. Given the fact that such Applications were mailed to Defendant just three (3) days before the Orders granting them were signed by the Judge (and all before they were even filed with the Court), and just seven (7) days before the Orders were filed with the Court granting Plaintiff judgments, this argument, also, is completely without merit. In particular, although Plaintiff asserts that on March 31, 2008 it gave Defendant "notice" that it was going to file the Applications, the fact remains that it did not serve the actual Applications on Defendant until they were mailed to her on April 14, 2008. Therefore, Defendant could not reasonably have known that – nor made an appearance to raise the issue that – the Applications were defective under the FAA at any time before Plaintiff had Judge Lockemy sign the Orders just three days later on April 17, 2008 granting it judgments for in excess of $50,000 against Defendant.

As well, in Christianson the Court of Appeals found that the same or similar argument by MBNA was meritless to the extent that without submission of sufficient evidence of an arbitration agreement there was no subject matter jurisdiction to begin with; and further found that, despite any timeliness issue, there, as here, the Application and Order had been filed without the alleged arbitration agreement attached thereto and was therefore in contravention of the FAA and SCUAA, requiring the award to be vacated anyway. Id.

Third, Plaintiff asserts in its memorandum that unauthenticated FedEx receipts prove that "notice" of the alleged arbitration claim was served upon Defendant in September 2007, although the alleged "notice" is not included with the brief (as the "notice" of Application to Confirm Arbitration Award that Plaintiff asserts was served upon Defendant on or about March 31, 2008 is not included either). Based solely upon these representations, it would appear that

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the arbitration claims themselves may never even have been served upon Defendant before the awards were issued against her, and it is uncontroverted that the Application to Confirm that award was not served upon Defendant before being mailed to her on April 14, 2008, just three days before Orders was signed rendering judgments against Defendant for in excess of $50,000.00. While the Court appreciates the history given by Plaintiff, it does not change the fact that the Applications for Confirmation of Arbitration Award were improperly granted, and that judgments were entered against Defendant in violation of the law.

For all of the above reasons, because it is in the interest of justice, fairness, and equity, and because it shows due respect for the Acts of the Congress of the United States, as well as statutes of the State of South Carolina, and judicial precedent, this Court vacates confirmation of Plaintiff's arbitration awards, and provides Defendant relief from the judgments that were based upon the confirmation of such alleged awards, finding that such judgments were entered in contravention of the FAA and SCUAA and are void.

The Clerk is directed to void the judgments at Judgment roll numbers 58237, 58238 and 58239, and to dismiss these actions ~~with prejudice~~ without prejudice. (pwb)

AND IT IS SO ORDERED.

Honorable Paul Burch
Fourth Judicial Circuit

February 23 2009

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SCOTT B. SUGGS
CLERK OF COURT, D.D.
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