Rel: October 23, 2020

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190285

Gerriann Fagan

v.

Warren Averett Companies, LLC

Appeal from Jefferson Circuit Court
(CV-19-901956)

WISE, Justice.

Gerriann Fagan, the plaintiff below, appeals from the Jefferson Circuit Court's order granting the motion to compel arbitration filed by Warren Averett Companies, LLC, one of the defendants below. We reverse and remand.

Facts and Procedural History

Fagan alleged that, from February 2001 to March 2015, she was the owner of The Prism Group, LLC, a human-resources consulting firm. Fagan also alleged that, in February 2015, Warren Averett approached her and asked her to join Warren Averett and to build a human-resources consulting practice for it and that, in February 2015, she agreed to join Warren Averett. Fagan and Warren Averett entered into a "Transaction Agreement" effective April 1, 2015, which provided that Fagan would wind down the operations of The Prism Group; that Fagan would become a member of Warren Averett; that Warren Averett would purchase The Prism Group's equipment and furniture; that Warren Averett would assume responsibility for The Prism Group's leases; and that Warren Averett would assume The Prism Group's membership in Career Partners International, LLC. The Transaction Agreement further provided that Fagan would enter into a "Standard Personal Service Agreement" ("the PSA") with Warren Averett; that Fagan's title would be president of Warren Averett Workplace; and that Fagan would be paid in accordance with the compensation schedule outlined in the PSA.

Fagan alleged that the compensation schedule included in the PSA was drafted by April Harry, who was then chief financial officer of Warren Averett and who was the chief operating officer of Warren Averett at the time Fagan filed the complaint. The PSA included the following dispute-resolution section, which contains an arbitration provision:

> "19. DISPUTE RESOLUTION. All controversies, claims, issues and other disputes arising out of or relating to this Agreement or the breach thereof (collectively, the 'Disputes') shall be subject to the applicable provisions of this Section 19.
>
> "....
>
> "(b) Arbitration. Except as provided in Section 19(a)[1] hereof, all Disputes shall be settled by arbitration in Birmingham, Alabama in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Any disagreement as to whether a particular Dispute is subject to arbitration under this Section 19 shall be decided by arbitration in accordance with the provisions of this Section 19. Judgment upon any award rendered by the arbitrator in any such arbitration may be entered in any court having jurisdiction thereof. The arbitrator(s) shall have the power to grant all legal and equitable relief

[1]Section 19(a) provided for certain equitable relief under the following circumstances: in the event Fagan breached the nonsolicitation covenant and confidentiality provisions of the PSA; "in the event any client terminates or modifies his, her or its relationship with [Warren Averett] and directly or indirectly engages [Fagan] in breach of this Agreement"; and in the event that one or more of Warren Averett's employees left for direct or indirect employment with Fagan.

> and remedies and award compensatory damages as provided for by law but shall not award any damages other than, or in excess of, compensatory damages. In the event that the amount in question of such arbitration is over $200,000, [Warren Averett], in its sole discretion, may require a panel of three independent arbitrators.
>
> "....
>
> "(d) Costs and Fees. The parties shall bear their respective costs in connection with the dispute resolution procedures described in this Section 19 except that the parties share equally the fees and expenses of any arbitrator(s) and the costs of any facility used in connection with the dispute resolution procedures."

Fagan alleged that she subsequently resigned from Warren Averett when she was unable to resolve a claim that Warren Averett had failed to properly compensate her in accordance with the PSA. On or about February 28, 2019, Fagan filed a demand for arbitration with the American Arbitration Association ("AAA"). She filed her demand on an AAA form titled "Employment Arbitration Rules Demand for Arbitration." She asserted that she was claiming "$451,910.49 + additional interest as it accrues and any other damages for tort claims." She described the nature of her claim as follows:

> "Warren Averett Companies, LLC breached its employment contract with Gerriann Fagan by failing to compensate her and provide her commission in accordance with the contract. Ms. Fagan also brings

> claims of bad faith, fraud, unjust enrichment, minority shareholder oppression, and breach of fiduciary duty against Warren Averett. In addition, Ms. Fagan brings a claim under Alabama Code [1975], Section 8-24-1 for unpaid commission."

The form used by Fagan also included the following:

> "Filing Fee requirement or $300 (max amount per AAA)
>
> "Filing by Company: ☐ $2,200 single arbitrator ☐ $2,800 three arbitrator panel"

Counsel for Fagan sent counsel for Warren Averett a letter dated February 28, 2019, attaching the demand for arbitration and the arbitration provision in the PSA Fagan had filed with the AAA.

The employment-filing team of the AAA sent a letter dated March 4, 2019, to the parties. That letter stated:

> "The outcome of our preliminary administrative review, <u>which is subject to review by the arbitrator</u>, is that this dispute will be administered in accordance with the American Arbitration Association ('AAA') Commercial Arbitration Rules and Employment/Workplace Fee Schedule, which can be found on our website. www.adr.org.
>
> "In cases before a single arbitrator, a non-refundable filing fee, of $300.00, is due from the employee when a claim is filed, unless the arbitration agreement provides that the employee pay less. A non-refundable fee of $1,900.00 is due from the employer unless the arbitration agreement provides that the employer pay more.

> "We have received the employee's portion of the filing fee in the amount of $300.00. Accordingly, we request that the employer pay its share of the filing fee in the amount of $1,900.00 on or before March 18, 2019. Upon receipt of the balance of the filing fee, the AAA will proceed with administration.
>
> "....
>
> "The AAA's administrative fees are based on filing and service charges. Arbitrator compensation is not included in this schedule. The AAA may require arbitrator compensation deposits in advance of any hearings. Unless the employee chooses to pay a portion of the arbitrator's compensation, the employer shall pay all of the arbitrator's fees and expenses."

(Emphasis added.)

On March 28, 2019, counsel for Warren Averett sent an e-mail to the employment-filing team of the AAA, in which he stated:

> "My firm is outside counsel for Warren Averett. We are confused about this invoice. The arbitration agreement specifies the parties will split the costs of arbitration equally, but this invoice does not appear to acknowledge this fact. Please advise."

The employment-filing team responded:

> "The outcome of our preliminary administrative review, which is subject to review by the arbitrator, is that this dispute will be administered in accordance with the American Arbitration Association ('AAA') Commercial Arbitration Rules and Employment/Workplace Fee Schedule. (Please see attached)."

(Emphasis added.)

On April 8, 2019, counsel for Fagan sent an e-mail to counsel for Warren Everett, stating:

> "The American Arbitration Association made its determination at this stage that the attached employment fee schedule will apply. Is Warren Averett refusing to pay the arbitration fee?
>
> "It is our position that their determination is appropriate, in keeping with their rules and regulations, and consistent with applicable law."

Counsel for Warren Averett responded, stating, in pertinent part:

> "Warren Averett is asking that the parties' contract be enforced as written. The contract provides the parties will equally share the mediation costs. It also says it will be conducted pursuant to the AAA Commercial Rules, which nowhere include the application of an employment dispute fee schedule. The agreement does not state the arbitration has to be conducted by the AAA (only that the AAA Commercial Rules be applied). We would be agreeable to a different forum than AAA that will enforce the terms of the parties' arbitration agreement.
>
> "If there is law you believe applies which supports a departure from the parties' agreement, I will certainly review it."

On April 9, 2019, counsel for Warren Averett sent an e-mail to the employment-filing team of the AAA, stating:

> "Hi, with whom do we dispute the AAA's decision as to the fee split? We do not want to pay more than

> our 1/2 of fees as contractually agreed without having that dispute decided first."

The employment-filing team responded:

> "Any dispute regarding filing fee allocation should be raised to the arbitrator for a determination once the full filing requirements, including fee, are satisfied."

On April 18, 2019, the employment-filing team notified the parties that Warren Averett had failed to submit the requested filing fee and that it was administratively closing the file in the matter.

On April 30, 2019, Fagan sued Warren Averett and Harry in the Jefferson Circuit Court. In her complaint, Fagan alleged claims of breach of contract, misrepresentation, unjust enrichment/restitution, minority shareholder oppression, breach of fiduciary duty, and fraudulent suppression.

On June 5, 2019, Harry and Warren Averett each filed a motion to dismiss the claims. In its motion to dismiss, Warren Averett moved to dismiss all of Fagan's claims against it except the breach-of-contract claim. Warren Averett included a footnote stating that it was contemporaneously filing "a motion to compel the remaining claim asserted

against Warren Averett (Count I -- Breach of Contract) to arbitration as agreed by the parties."

On that same date, Warren Averett filed its "Motion to Compel Arbitration and to Dismiss or Stay this Action." In its motion, Warren Averett stated, in pertinent part:

> "Defendant Warren Averett Companies, LLC ('Warren Averett') hereby moves this Court to dismiss without prejudice (or, alternatively, stay) Plaintiff's Complaint and order that Plaintiff's claims (to the extent not dismissed by this Court under Ala. R. Civ. P. 12(b)(6)) be compelled to arbitration."

Warren Averett asserted that Fagan's complaint alleged a breach of the PSA, which included an arbitration provision, and that, before filing this action, Fagan had filed a demand for arbitration with the AAA. It further alleged:

> "However, rather than filing a demand under the Commercial Rules that the parties agreed would govern any such arbitration, Plaintiff filed a demand under the 'Employment Arbitration Rules.' ... The AAA contacted Warren Averett, advising that it had determined its 'Employment Workplace Fee Schedule' would apply to the arbitration, which in essence meant Warren Averett had to bear all costs of arbitration except for a $300 filing fee paid by the Plaintiff. Ex. 3 (AAA Ltr.). Warren Averett inquired as to why the terms of the parties' agreement concerning cost-sharing were not being followed, and the AAA advised this issue would not be addressed until Warren Averett paid a filing fee which was far in excess of its contractually agreed 1/2 of the fee. Ex. 4 (Email chain).

> "Plaintiff's counsel stated it was Plaintiff's position that the AAA's determination to disregard the parties' agreement was supported by 'applicable law.' ... Warren Averett's counsel responded that Warren Averett expected the parties' agreement to be enforced as written, and that the PSA provides the parties will share costs equally:
>
> > "'It also says [the arbitration] will be conducted pursuant to the AAA Commercial Rules, which nowhere include the application of an employment dispute fee schedule. The agreement does not state the arbitration has to be conducted by the AAA (only that the AAA Commercial Rules be applied). We would be agreeable to a different forum than AAA that will enforce the terms of the parties' arbitration agreement.
> >
> > "'If there is law you believe applies which supports a departure from the parties' agreement, I will certainly review it.'
>
> "... Plaintiff did not respond to this communication, and instead filed this action two weeks later."

On July 31, 2019, Fagan filed an amended complaint. On that same date, she also filed a response to Warren Averett's motion to compel arbitration. In her response, she asserted that Warren Averett had failed to participate in the arbitration and had failed to pay its required filing fee. She stated:

> "Despite repeated requests by the AAA, Warren Averett failed to participate in the arbitration and

> pay its required filing fee. Now that Fagan has filed this action in circuit court, Warren Averett seeks to compel arbitration. Warren Averett, however, has materially breached the employment contract as to the forum for filing this action and is in default under 9 U.S.C. § 3 in proceeding with the arbitration. Thus, Warren Averett is precluded from enforcing the arbitration provision. By failing to participate in the arbitration initiated by Fagan, Warren Averett has also waived its right to arbitrate the matter. In addition, the arbitration provision in the employment contract is unconscionable. For these reasons and more, Warren Averett's Motion to Compel is due to be denied."

After Fagan filed her amended complaint, Harry again filed a motion to dismiss the claims against her. Warren Averett also filed a motion to dismiss all of Fagan's claims in the amended complaint, except the breach-of-contract claim.

The trial court subsequently entered an order in which it granted Harry's and Warren Averett's motions to dismiss as to the minority-shareholder-oppression claim but denied the motions to dismiss as to the remaining claims. The trial court also granted Warren Averett's motion to compel arbitration and assigned the case to the administrative docket.

Fagan filed a motion to alter, amend, or vacate the portion of the trial court's order granting Warren Averett's

motion to compel arbitration, which the trial court denied. This appeal followed.

Standard of Review

> "'"This Court's review of an order granting or denying a motion to compel arbitration is de novo. ..."
>
> "'United Wisconsin Life Ins. Co. v. Tankersley, 880 So. 2d 385, 389 (Ala. 2003). Furthermore:
>
> > "'"'A motion to compel arbitration is analogous to a motion for summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that that contract evidences a transaction affecting interstate commerce. Id. "After a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question."'

> > > "'"Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000) (quoting Jim Burke Auto., Inc. v. Beavers, 674 So. 2d 1260, 1265 n. 1 (Ala. 1995) (emphasis omitted))."
>
> > "'Vann v. First Cmty. Credit Corp., 834 So. 2d 751, 753 (Ala. 2002).'
>
> "Cartwright v. Maitland, 30 So.3d 405, 408–09 (Ala. 2009)."

SCI Alabama Funeral Servs., LLC v. Hinton, 260 So. 3d 34, 36–37 (Ala. 2018).

Discussion

In this case, Fagan does not argue that Warren Averett did not prove the existence of a contract calling for arbitration or that Warren Averett did not prove that that contract evidences a transaction involving interstate commerce. Rather, Fagan argues that the trial court erred when it failed to find that Warren Averett was in default of the arbitration provision in the PSA.[2] Specifically, she asserts that Warren Averett materially breached the PSA when

[2]In her brief to this Court, Fagan raises additional defenses challenging the validity of the arbitration provision. However, based on our disposition of this claim, we pretermit those remaining arguments.

it failed to pay the filing fee and to participate in the arbitration proceedings she had initiated with the AAA.

Section 9 U.S.C. § 3 provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

(Emphasis added.)

In Pre-Paid Legal Services, Inc. v. Cahill, 786 F.3d 1287 (3d Cir. 2015), Pre-Paid Legal Services, Inc., d/b/a Legal Shield ("Pre-Paid"), sued Todd Cahill. Pre-Paid alleged tort claims and contract violations against Cahill, a former employee of Pre-Paid. Cahill removed the case from state to federal court. Cahill then moved the district court to stay the proceedings under the Federal Arbitration Act ("the FAA") so the parties could pursue arbitration, and the district court granted that motion. Pre-Paid initiated arbitration proceedings with the AAA and paid its share of the arbitration fees. The AAA repeatedly warned Cahill's attorney that the

arbitration proceedings would be suspended if Cahill did not pay his share of the arbitration fees. Pre-Paid declined to pay Cahill's share of the arbitration fees. After Cahill failed to pay his share of the arbitration fees, the arbitrators directed termination of the arbitration proceedings. Pre-Paid then moved the district court to remove the stay and resume the litigation. The magistrate judge "recommended lifting the stay because the arbitrators 'elected to terminate' the proceedings and '[i]t is clear under these circumstances that the arbitrators considered Cahill's failure to pay to be a default in arbitration.'" 786 F.3d at 1288. The district court granted Pre-Paid's motion and lifted the stay. Cahill appealed the order lifting the stay to the United States Court of Appeals for the Tenth Circuit. Cahill argued that the district court's order violated 9 U.S.C. § 3 and asked the Tenth Circuit to reinstate the stay.

In Pre-Paid, the Tenth Circuit stated:

> "Failure to pay arbitration fees constitutes a 'default' under § 3. Because Mr. Cahill failed to pay his arbitration fees, he was in 'default.' See Garcia[v. Mason Certified Contract Prods., LLC (No. 08-23103-CIV, Aug. 18, 2010) (S.D. Fla. 2010) (not selected for publication in F. Supp.)] ('[T]his default was ... an intentional and/or reckless act because the AAA provided repeated notices to the

> Defendant that timely payment of the fee had not been received.... There is no other description the Court can find for this self-created situation other than "default."'); Rapaport v. Soffer, No. 2:10-cv-00935-KJD-RJJ, ... (D. Nev. May 12, 2011) (unpublished) (finding the defendant was in default under § 3 because the AAA 'closed' or 'terminated' the case because of his failure to pay fees); Sanderson Farms, Inc. v. Gatlin, 848 So. 2d 828, 837-38 (Miss. 2003) (finding the defendant refused to pay its one-half of the costs pursuant to an arbitration agreement and that this constituted 'default' under § 3). Because Mr. Cahill was in default, the district court was not obligated under § 3 to maintain the stay so that arbitration could proceed.[3]
>
> "_____
>
> "[3]The FAA does not define '[d]efault in proceeding with [the] arbitration.' 9 U.S.C. § 3. As noted above, some courts have viewed a party's failure to pay its share of the arbitration fees as a breach of the arbitration agreement, which precludes any subsequent attempt by that party to enforce that agreement. Other courts have treated the failure to pay arbitration fees as a waiver of the right to arbitrate. See, e.g., Brown[v. Dillards, Inc.], 430 F.3d [1004,] 1012-13 [(9th Cir. 2005)]. Under either approach, the result is the same: Mr. Cahill's failure to pay his share of costs precludes him from seeking arbitration."

786 F.3d at 1294-95.

It is undisputed that Warren Averett did not pay the administrative filing fee that the AAA had requested from it. In its brief to this Court, Warren Averett argues that Fagan

was actually the party in default under the arbitration provision. Specifically, it asserts:

> "Here, the terms of the parties' agreement to arbitrate required the parties to follow the AAA Commercial Rules. In order to initiate an arbitration under those Rules, the claimant is required to submit the 'COMMERCIAL ARBITRATION RULES DEMAND FOR ARBITRATION' along with a filing fee set forth in the Commercial Arbitration Rules and Mediation Procedures Fee Schedules. Fagan did not do this. Rather, in disregard of the parties' agreement, Fagan submitted an 'EMPLOYMENT ARBITRATION RULES DEMAND FOR ARBITRATION,' along with the filing fee called for on that form, which comes from the Employment/Workplace Fee Schedule. That then led to a series of communications with the AAA's 'Employment Filing Team' over the proper split of the filing fees and other costs of arbitration."

(Citations omitted; emphasis in original.) However, Rule R-4(a) of the AAA's Commercial Arbitration Rules provides, in pertinent part:

> "Arbitration under an arbitration provision shall be initiated by the initiating party ('claimant') filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration."

The Commercial Arbitration Rules include the information to be included with any arbitration filing. Further, Rule R-4(f) provides that a claimant may file or submit a dispute to the AAA either through "AAA WebFile" or "by filing the complete

Demand or Submission with any AAA office, regardless of the intended locale of hearing." However, Rule R-4 does not specify which form is to be used when filing a demand for arbitration.

Rule R-4(b) also provides for the payment of "the administrative filing fee." The Commercial Arbitration Rules provide, in pertinent part:

> "Beginning October 1, 2017, AAA will apply the Employment Fee Schedule to any dispute between an individual employee or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims and including work-related claims under independent contractor agreements."

Fagan filed her demand for arbitration in 2019. Thus, the Commercial Arbitration Rules that were in place at the time Fagan filed her request for arbitration specifically provided that the Employment/Workplace Fee Schedule would apply to claims such as Fagan's.

For these reasons, Warren Averett's argument that Fagan initially defaulted under the arbitration agreement is without merit.

In arguing that it was not in default, Warren Averett argues that it "merely insisted on the parties' agreement being enforced as written, such that the parties would equally share in the costs of arbitration." It further argues that its "good faith attempt to follow the terms of the parties' agreement cannot be considered a 'default' under the FAA." (Warren Averett's brief at p. 31.) The dispute-resolution section of the PSA addresses costs and expenses as follows:

> "The parties shall bear their respective costs in connection with the dispute resolution procedures described in Section 19 except that the parties share equally the fees and expenses of any arbitrator(s) and the costs of any facility used in connection with such dispute resolution procedures."

(Emphasis added.) The PSA does not specifically state that the parties will equally share all the costs of arbitration. Rather, it provides only that the parties will equally share "the fees or expenses of any arbitrator(s)" as well as the costs for the use of any facility. Rule R-53 of the Commercial Arbitration Rules provides for the payment of administrative fees, including the filing fee. Rule R-54 deals with the payment of expenses, including "required travel and other expenses of the arbitrator." Finally, Rule R-55 provides for compensation for arbitrators. Accordingly, the

AAA's Commercial Arbitration Rules differentiate between administrative fees charged by the AAA, the expenses of arbitrators, and the compensation for arbitrators. When reading the PSA in conjunction with the AAA's Commercial Arbitration Rules, it appears that, other than fees and expenses of the arbitrators and the costs of facility usage, each party was to pay her or its own costs associated with the arbitration, including the filing fees. Thus, the PSA did not unambiguously provide that Fagan and Warren Averett would equally split the filing fees in this case.

The employment-filing team notified Warren Averett that it had initially determined that the Employment/Workplace Fee Schedule applied but that that determination was subject to review by the arbitrator. Additionally, the employment-filling team informed counsel for Warren Averett that

> "[a]ny dispute regarding filing fee allocation should be raised to the arbitrator for a determination once the full filing requirements, including fee, are satisfied."

However, rather than going forward with arbitration and letting the arbitrator resolve any disputes regarding the fee schedule and the cost-sharing provisions in the PSA, Warren Averett refused to pay the AAA filing fee and sought to change

to another arbitral forum. As was the case in Pre-Paid, Warren Averett's failure to pay the filing fee constituted a default under the arbitration provision. Accordingly, the trial court erred when it granted Warren Averett's motion to compel arbitration.

Conclusion

Based on the foregoing, the trial court erroneously granted Warren Averett's motion to compel arbitration. Accordingly, we reverse the order compelling arbitration and remand the case to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Sellers, and Mitchell, JJ., concur.

Stewart, J., recuses herself.