Rel: September 6, 2019

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2019

1180311

Jason Blanks et al.

v.

TDS Telecommunications LLC, Peoples Telephone Company, Inc., and Butler Telephone Company, Inc.

Appeal from Cherokee Circuit Court
(CV-18-900097)

SELLERS, Justice.

Jason Blanks, Peggy Manley, Kimberly Lee, Nancy Watkins, Randall Smith, Trenton Norton, Earl Kelly, Jennifer Scott, and Alyshia Kilgore (hereinafter referred to collectively as "the customers") appeal from the denial of a motion to compel

arbitration and a declaratory judgment entered in an action brought by TDS Telecommunications LLC, and its two affiliates, Peoples Telephone Company, Inc., and Butler Telephone Company, Inc. (hereinafter referred to collectively as "the Internet providers"). In the declaratory-judgment action, the trial court ruled that the Internet providers are not required to arbitrate disputes with the customers. We reverse and remand.

Background

The customers subscribe to Internet service furnished by the Internet providers; their relationship is governed by a written "Terms of Service."

The customers allege that the Internet service they have received is slower than the Internet providers promised them. At the time the customers learned that their Internet service was allegedly deficient, the Terms of Service contained an arbitration clause providing that "any controversy or claim arising out of or relating to [the Terms of Service] shall be resolved by binding arbitration at the request of either party." The arbitration clause also incorporated the commercial arbitration rules of the American Arbitration Association ("the AAA"). The customers' attorney notified the

Internet providers that he intended to initiate AAA arbitration proceedings with respect to the dispute regarding Internet speed.

Soon after the Internet providers learned of the customers' plan to arbitrate, the Internet providers updated the Terms of Service. As part of the update, the arbitration clause was modified. Among other things, the clause now states that all disputes arising out of or relating to the Terms of Service must be submitted to "JAMS" for arbitration.[1] Also included in the updated Terms of Service, however, is a provision expressly stating that the arbitration clause "does not apply to customers who receive services in Alabama or Georgia, and [the Internet providers] expressly [do] not consent to arbitration of any dispute, claim or controversy--regardless of when the dispute, claim, or controversy arose--for customers who receive services in Alabama or Georgia."[2]

The prior Terms of Service stated that the Internet providers could modify the terms at any time and in any

[1]JAMS, formally known as Judicial Arbitration and Mediation Services, is an alternative arbitration service to the AAA.

[2]The customers' counsel also represents customers of the Internet providers whose service is received in Georgia.

manner, that such a modification becomes effective upon notice of the modification to the Internet providers' customers, and that the continued use of the Internet service constitutes acceptance of the modification. The customers do not dispute that, on the day the Terms of Service was updated, the Internet providers gave them notice of the update. They also do not dispute that they continued to use their Internet service after they received that notice.

Notwithstanding the updated Terms of Service and its provision excluding the customers from arbitration, the customers indicated that they would continue to press for arbitration. Indeed, after the Terms of Service was updated, the customers filed arbitration demands with the AAA.

The customers have taken the position that, if the Terms of Service is construed as allowing the Internet providers to modify the applicability of the arbitration clause to disputes that arose before the modification, the agreement would be rendered illusory and unenforceable. Thus, the customers argue that the Terms of Service should be read as allowing modification of the arbitration clause only as to disputes that arise after the modification.

The Internet providers refused to participate in the arbitration proceedings. They also filed an action requesting the trial court to enter a judgment declaring that the updated Terms of Service is valid and applicable to the customers' claims regarding Internet speed and that the customers therefore cannot force the Internet providers to arbitrate those claims. In response to the Internet providers' complaint, the customers filed a motion to compel arbitration. In that motion, the customers argued that an arbitrator, not the trial court, should decide whether the arbitration exclusion in the updated Terms of Service is valid and applicable to their dispute and, therefore, whether the Internet providers should be required to arbitrate that dispute. The customers relied on precedent indicating that the incorporation of AAA rules into an arbitration agreement demonstrates intent to delegate gateway issues of "arbitrability" to an arbitrator.

The trial court entered a judgment denying the motion to compel arbitration and "further adjudg[ing] that the modified Terms of Service [is] valid and enforceable as of [the date it was updated and notice was provided]." This appeal followed.

The parties agree that this Court's standard of review is de novo. See Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313, 315 (Ala. 2003) (de novo standard of review applies to the denial of a motion to compel arbitration). See also Raley v. Main, 987 So. 2d 569, 575 (Ala. 2007) (de novo standard of review applied to a declaratory judgment that was based on documentary evidence and undisputed facts).

Discussion

"The party seeking to compel arbitration has the initial burden of presenting evidence of the existence of a contract calling for arbitration ...." Auto Owners Ins., Inc. v. Blackmon Ins. Agency, Inc., 99 So. 3d 1193, 1195 (Ala. 2012). The customers point to the prior version of the Terms of Service, which contained an arbitration clause applicable to disputes with all the Internet providers' customers and which, the customers say, delegated issues of arbitrability to an arbitrator. The Internet providers, on the other hand, argue that the prior version of the Terms of Service has been superseded by the updated version, excluding from arbitration any dispute with customers in Alabama, and is no longer in effect.

As they argued to the trial court, the customers argue on appeal that an arbitrator, not a court, should decide whether the Internet providers could validly modify the Terms of Service to exclude the customers' claims from arbitration. "The question of who is to decide whether a dispute is arbitrable is one that must necessarily precede the question of whether a dispute is arbitrable." VRG Linhas Aereas S.A. v. MatlinPatterson Glob. Opportunities Partners II L.P., 717 F.3d 322, 324 (2d Cir. 2013). Although questions of arbitrability are typically answered by courts, those questions should be sent to an arbitrator if there is clear and unmistakable evidence that the relevant parties intended an arbitrator to decide the issue of arbitrability. AT&T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986); Eickhoff Corp. v. Warrior Met Coal, LLC, 265 So. 3d 216, 221 (Ala. 2018).

The customers assert that, "when an arbitration agreement incorporates the AAA rules, as the one at issue here does, a dispute about the applicability of that agreement should be decided by an arbitrator." The customers point to CitiFinancial Corp. v. Peoples, 973 So. 2d 332, 339 (Ala.

2007), which held that the incorporation into an arbitration agreement of the AAA's commercial arbitration rules demonstrates an intent that questions of arbitrability are to be delegated to an arbitrator. The Court's ruling in Peoples was based an AAA rule that provided arbitrators with the power to determine if an arbitration agreement exists, to define the scope of the arbitration agreement, and to opine on the validity of the arbitration agreement. Based on Peoples and later opinions reiterating its holding, the customers argue that the trial court in the present case should have sent the matter to an arbitrator to determine whether the arbitration exclusion in the updated Terms of Service applied retroactively to their dispute.[3]

Most of the cases discussing who settles issues of arbitrability involve questions of scope, i.e., whether a particular arbitration clause is broad enough to cover a particular dispute. The present case, however, involves the

[3]Although the Terms of Service refers to the AAA's commercial arbitration rules, the parties continuously refer in their filings with this Court to the AAA's consumer arbitration rules. The Internet providers have not disputed that, for purposes of this case, the reference in the prior Terms of Service to the AAA's commercial arbitration rules is sufficient, generally speaking, to demonstrate an intent that issues of arbitrability are to be delegated to an arbitrator.

question of who should decide if the parties to an agreement containing an arbitration clause are no longer bound by that clause because an amended agreement has allegedly superseded the prior agreement and excludes the parties from arbitration.

The Alabama precedent most similar to the case at bar appears to be Managed Health Care Administration, Inc. v. Blue Cross & Blue Shield of Alabama, 249 So. 3d 486 (Ala. 2017). In 2006, Blue Cross and Blue Shield of Alabama entered into a contract with Managed Health Care Administration, Inc. ("MHCA"), whereby MHCA agreed to arrange for mental-health services for Blue Cross's insureds. 249 So. 3d at 487. The 2006 contract contained an arbitration clause that incorporated the AAA rules. Id. at 487-88.

In 2013, Blue Cross decided to replace MHCA with a different mental-health benefits manager, New Directions Behavioral Health, LLC. Accordingly, Blue Cross entered into a contract with New Directions. With Blue Cross's encouragement, New Directions also entered into a contract with MHCA, which delegated to MHCA some of New Directions' duties under its contract with Blue Cross. Like Blue Cross's

2006 contract with MHCA, the 2013 contracts contained arbitration provisions that incorporated the AAA rules.

There was affidavit testimony submitted to the trial court in Managed Health Care Administration indicating that, after the execution of the 2013 contracts, "'Blue Cross and MHCA terminated the [2006 contract] by mutual agreement.'" 249 So. 3d at 489. "Thereafter, a disagreement arose concerning the amount of compensation MHCA was to receive for its services." Id. MHCA sued Blue Cross, and Blue Cross filed a counterclaim. Eventually, MHCA moved to compel arbitration of all claims, pointing to the arbitration clauses in the 2006 contract between MHCA and Blue Cross, which allegedly had been terminated by mutual agreement, and the 2013 contract between MHCA and New Directions, which Blue Cross had not executed but by which MHCA asserted Blue Cross was bound. Ultimately, this Court held that, because the 2006 contract incorporated the AAA rules, it was up to an arbitrator to determine "whether the arbitration provision in the 2006 contract has been terminated." 249 So. 3d at 492. The Court adopted MHCA's position that "the parties [had] agreed in the 2006 contract

that such issues [of arbitrability] would be decided by an arbitrator." Id. at 491.[4]

Managed Health Care Administration and the present case involve the issue whether parties to an agreement containing an arbitration clause remain bound by that agreement and its arbitration clause when the document containing the arbitration clause is purportedly terminated or superseded by mutual agreement. For purposes of who is to decide arbitrability, this Court does not see a meaningful difference in the alleged termination of the agreement and the parties' business relationship in Managed Health Care Administration and the alleged superseding of the agreement governing the parties' relationship in the present case. See also Ex parte Shamrock Food Serv., Inc., 514 So. 2d 921, 922 (Ala. 1987) ("[U]nder the broad provisions of the arbitration clause, the

[4]The Court notes that, in Managed Health Care Administration, one of Blue Cross's counterclaims was based on an alleged breach of the 2006 contract. On appeal, Blue Cross purported to abandon that counterclaim. Although this Court questioned the effectiveness of that abandonment, it does not appear that the Court relied on the fact that Blue Cross based its counterclaim on the 2006 contract in concluding that Blue Cross was required to arbitrate the issue whether the 2006 contract and its arbitration provision had been terminated.

issue of whether the contract has been terminated must be submitted to arbitration.").[5]

"An agreement to arbitrate a gateway issue [of arbitrability] is simply an additional, antecedent agreement the party seeking arbitration asks the ... court to enforce ...." Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 70 (2010). There is no real dispute that the parties in the present case were bound by the prior version of the Terms of Service when they were unquestionably in effect. There is also no dispute that the incorporation of the AAA rules in that contract evidenced an agreement to delegate issues of arbitrability to an arbitrator. Whether the updated Terms of Service validly "terminated" the arbitration clause as to the

[5]The Internet providers rely on Greenway Health, LLC v. Southeast Alabama Rural Health Associates, [Ms. 1171046, May 17, 2019] ___ So. 3d ___ (Ala. 2019), in which this Court affirmed a trial court's judgment holding that a particular substantive dispute should not be sent to arbitration, based in part on the fact that the contract containing the arbitration clause had been expressly superseded by a new contract that did not contain an arbitration clause. Nothing in the opinion, however, indicates that this Court was asked to consider whether gateway arbitrability questions should have been delegated to an arbitrator in the first instance. The same is true with respect to Ex parte Conference America, Inc., 713 So. 2d 953 (Ala. 1998), which was cited in Greenway Health.

customers' claims is such an issue of arbitrability that was delegated to an arbitrator.[6]

With respect to a secondary issue in this case, we note that the customers contend that the actual merits of the arguments regarding the validity of the arbitration exclusion in the updated Terms of Service as applied to the customers' claims "are largely irrelevant," because, they say, that issue should be delegated to an arbitrator. However, in their motion to compel arbitration, the customers asserted that the trial court was required to "'determin[e] ... whether it [is] arguable' that an arbitration agreement exists that covers this dispute." (Quoting Auto Owners Ins., Inc. v. Blackmon Ins. Agency, Inc., 99 So. 3d at 1198.) In May 2018, this Court reiterated that, even when arbitrability is delegated to an arbitrator, a court should still determine if a dispute is "arguably within the scope of [a] contract [containing an arbitration provision]." Eickhoff Corp. v. Warrior Met Coal, LLC, 265 So. 3d at 224.

[6]It is also worth pointing out that the arbitration provision in the prior Terms of Service states that it "survives the termination of this service agreement."

After the trial court entered its judgment in this case, however, the United States Supreme Court decided Henry Schein, Inc. v. Archer & White Sales, Inc., ___ U.S. ___, 139 S. Ct. 524 (2019). In Schein, the Supreme Court held that, when parties delegate to an arbitrator issues of arbitrability, courts have no role in determining whether the scope of an arbitration clause is broad enough to cover a particular dispute. Thus, the Supreme Court rejected reasoning espoused by some courts that if an argument that an arbitration agreement applies to a particular dispute is "wholly groundless," then a court should deny arbitration even if the agreement delegates issues of arbitrability to the arbitrator. This Court has acknowledged the Schein Court's holding. See Carroll v. Castellanos, [Ms. 1170197, March 22, 2019] ___ So. 3d ___, ___ (Ala. 2019). We need not expressly decide whether Schein applies in the present case because we cannot conclude that the customers' argument regarding the validity of the update to the Terms of Service is "wholly groundless" or not "arguable."[7]

[7]Ultimately, however, it is up to an arbitrator to resolve the issue.

The arbitration clause in the prior version of the Terms of Service included an agreement between the Internet providers and the customers that an arbitrator is to decide issues of arbitrability, which includes the issue whether the updated Terms of Service effectively excluded the customers' disputes from arbitration. Accordingly, we reverse the trial court's denial of the customers' motion to compel arbitration and its judgment declaring the updated Terms of Service "valid and enforceable," and we remand the cause for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Bolin, Wise, Mendheim, and Stewart, JJ., concur.

Parker, C.J., and Shaw and Bryan, JJ., concur in the result.

Mitchell, J., recuses himself.