IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2008-IA-00323-SCT

REGIONS BANK, AS SUCCESSOR TO AMSOUTH BANK
Appellants

--vs.--

JIMMY WALKER AND BIG SHOT INDOOR SHOOTING RANGE, LLC

Appellees

REPLY BRIEF OF APPELLANT

Appeal From the Circuit Court for Jones County, Mississippi

Second Judicial District

Cause No. 2004-112-CV6

Oral Argument Requested

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IN THE SUPREME COURT OF MISSISSIPPI

REGIONS BANK AS SUCCESSOR TO AMSOUTH BANK — APPELLANT

V.

DOCKET NO.2008-IA-00323-SCT
LOWER COURT CASE #2004-112-CV6

JIMMY WALKER and BIG SHOT INDOOR SHOOTING RANGE, LLC — APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28(a)(1) of the Mississippi Rules of Appellant Procedure, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Regions Bank, as successor to AmSouth Bank
   Appellant

2. Jimmy Walker and Big Shot Indoor Shooting Range, LLC
   Appellee

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is warranted because the issue of laches or waiver raised in the Brief of Appellee is a matter of first impression. No other decision has construed both parties' obligations under Rule 15 of the Mississippi Rules of Appellate Procedure.

REPLY TO APPELLEES' ARGUMENTS

I. The Trial Court committed error when it refused to enforce the arbitration agreement contained in the loan documents executed by Walker and Big Shot.

A. Regions is not Barred by Laches or Waiver from Pursuing Arbitration.

Walker contends that the delay of almost three (3) years between the date of the hearing and arguments on Regions' Motion to Compel, and the entry of the Court's Order denying the Motion to Compel,[1] caused Regions to be estopped or otherwise have its right to pursue arbitration and this appeal barred by laches. The equitable doctrine of laches undoubtedly has no application in this case. Laches applies when a party has delayed in *bringing* an action to enforce a remedy. In order to establish a case of laches, the party asserting laches as a defense must prove that there was a delay in the *asserting* of a right or claim, that the delay was inexcusable, and, that the party asserting laches as a defense suffered some undue prejudice. ***E.G., Bailey v. Estate of Kemp,* 955 So. 2d 777 (Miss. 2007).** Regions did not delay in asserting its claim that this matter should be submitted to arbitration, the delay was not the result of the actions of Regions, but rather the result of inaction by the trial judge, and, Walker has wholly failed to show any prejudice.

In support of his argument, Walker cites no case law, but refers only to Rule 2.04 of the Uniform Rules of Circuit and County Court Practice. Rule 2.04 imposes a duty upon counsel who files a motion or other pleading to pursue a hearing on the motion or pleading in the trial court. Regions complied with Rule 2.04 when they promptly sought a hearing on the Motion to

[1] Motion to Compel shall be used to refer to the Motion to Stay Proceedings and for an order Compelling Arbitration, the overruling of which forms the ground for this appeal.

Compel after the Motion was filed. The Motion to Compel was filed by Regions on August 2, 2004. Walker filed a response to the Motion to Compel on September 17, 2004. Less than two (2) months later, on December 16, 2004 Regions noticed the Motion to Compel for hearing on February 28, 2005, at which time it was heard. Walker did not contend at that time that Regions was in violation of Rule 2.04, and indeed such a claim would have been frivolous.

Rule 2.04 does not apply once a motion is heard and the trial court takes it under advisement. If any rule were to apply, it would be Rule 15 of the Mississippi Rules of Appellate Procedure. However, MRAP 15 does not apply to every motion taken under advisement and did not apply to the Motion to Compel. Rule 15(a) applies to cases where the "motion or request for relief...would be dispositive of any substantive issues..." A ruling on a motion to compel arbitration is not dispositive of the substantive issues between the parties. It determines the forum where the issues will be decided. The arbitrator or arbitrators make the decision on the substantive issues after hearing evidence. Nevertheless, they do not enter a final judgment. Once the arbitrators reach a decision, the parties must return to a court of law or equity to establish the award as a final judgment.

In ***Tupelo Auto Sales, Ltd. V. Scott*, 844 So. 2d 1167 (Miss. 2003)** this court established a bright line test for appeals involving the denial of a motion to compel arbitration. The Court, after analyzing several of its decisions on appellate jurisdiction from orders denying a motion to compel arbitration, held that an order denying a motion to compel arbitration is interlocutory and *not* a final judgment, but relying on the Federal Arbitration Act[2] found that an appeal can be taken from such an order. By doing so it did not make a motion to compel arbitration a

[2] 9 U.S.C.§9(a)(1)(c).

dispositive order on substantive issues, but rather created an exception for the direct appeal of a procedural issue. Upon entry of the order denying arbitration, Regions timely appealed the decision in compliance with the ***Scott*** decision.

It must also be noted that the duties under Rule 15(a) are placed on all parties. Therefore, *if* Rule 15(a) applies then Walker had an equal obligation to seek entry of the order. To grant him the relief requested would allow him to profit from his own inaction.

B. The Claims do not arise from acts/inaction and misrepresentation outside of the loan transaction and the loan documents.

It must first be made clear that Regions has filed an Answer and Defenses in which it denies that any of the representations alleged by Walker were made, and contends that there were no promises to inspect or audit the books and records of Big Shot, LLC. Walker presented no affidavit or testimony to establish any facts supporting his position that the claims arose out of anything occurring prior to the date of execution of the Loan Documents.

As noted in Regions primary brief[3] the breadth of actions covered by an arbitration clause is governed by the clear and unambiguous language of the arbitration clause. The representations allegedly made by Regions,[4] if made, would be considered as a part of the negotiations of the terms and conditions of the loan and the guaranty. Paragraph 8 of the Complaint, which is specifically denied by Regions, alleges in part as follows:

> "Accordingly, Easterling and Russell solicited Walker to personally guaranty a loan to the prospective new business. As an incentive for Walker to agree to guaranty the loan, Easterling represented that if Walker would co-sign a loan for the new business, Amsouth would hire a local certified public accountant, John

[3] Brief of Appellant, p. 10.

[4] The alleged failure to act in the manner represented forms the basis for Walker's allegations of "omissions" on the part of Regions and so they inseparably wound into the allegations of misrepresentation.

> Havard ("Havard"), to monitor the business's books on a monthly basis and would notify Walker if Havard reported any irregular, abnormal, or adverse transactions or activity." (Complaint, ¶8, R. at 5)

Those allegations, by their very words, establish that the representations claimed to have been made by Regions would have been a part of the negotiations leading up to the making of the loan and the execution of the loan documents.

In each of the Loan Documents, there are clauses by which the parties agree that all the documents are a final expression of their agreements and that all oral representations made by the parties are incorporated into the Loan Documents and that there is no other unwritten agreement between the parties. The Guaranty Agreement provides:

> "This agreement and the other Loan Documents contain the entire understanding and agreement between the Guarantor and the Bank with respect to the obligations of the Guarantor hereunder and supersede any prior agreements, understandings, promises, and statements with respect to such obligations." (R. at 42)

The wording of the Note states that:

> "The Loan Documents contain the entire understanding and agreement between the Borrower and Holder with respect to the Loan and supersede any and all prior agreements, understandings, promises, and statements with respect to the Loan. This note may not be modified, amended, or supplemented in any manner except by a written agreement executed by both the Borrower and the Holder." (R. at 36)

The language of the Security Agreement is even more comprehensive. It states:

> "**SECTION 8.8 No Oral Agreements.** This Agreement is the final expression of the agreement between the parties hereto, and this Agreement may not be contradicted by evidence of any prior oral agreement between such parties. All previous oral agreements between the parties hereto have been incorporated into this Agreement and the other Loan Documents, and there is no unwritten oral agreement between the parties hereto in existence." (R. at 49)

Therefore, any allegations that there were prior oral representations which were to be "conditions precedent" to Walker's obligation as he argues, would be covered by the aforesaid

integration clauses. Any claim that Regions undertook duties other than those stated in the Loan Documents, would be a claim or controversy arising under the Loan Documents and not a separate outside claim. See ***Beneficial Nat. Bank v. Payton*, 214 F. Supp. 2d 679, 688-89 and fn. 11 (S.D. Miss. 2001) citing *First Family Financial Services, Inc.* 736 So. 2d 553, 557-58 (Ala. 1999).**

C. Regions did not waive its right to arbitration.

A finding that a party waived the right to arbitration is not favored by the law, and one who seeks to prove that his opponent waived his right to arbitration bears a heavy burden. ***Doleac v. Real Estate Professionals, LLC,* 911 So. 2d 496, 505 (Miss. 2005).** In order for there to be a waiver of it's right to arbitration, Regions would have had to have been guilty of a delay in *seeking* arbitration *and* have been actively engaged or participating in the litigation process. ***Century 21 v. Smith,* 965 So. 2d 1031, 1036 (Miss. 2007).** In ***Terminix International, Inc. v. Rice*, 904 So. 2d 1051, 1053, 1057 (Miss. 2004),** this Court held that proceeding through discovery and on to trial after the trial court denied a motion to compel arbitration, without first appealing the order denying arbitration, did not constitute a waiver of the right to compel arbitration. Regions' actions in this case are insufficient to establish that they waived the right to arbitrate.

As has already been noted[5], Regions did not delay seeking to have this case referred to arbitration. The Trial Court delayed rendering its decision. And Regions certainly did not actively engage n the litigation process to the level necessary to waive its right to arbitration. Walker's position is the classic attempt to "have his cake and eat it too." He seeks to have the

[5] **Part I A, *supra.***

Court hold that Regions failure to participate further in the litigation process and hope to force the Trial Court to rule on the Motion to Compel should be used against Regions to establish the delay necessary to prove a waiver, but if Regions had done so, Walker would then have claimed that Regions waived its right to arbitration by participating in the litigation process.[6] It is clear that the burden to establish a waiver of the right to arbitration has not been carried by Walker.

D. Walker was not fraudulently induced to sign the Loan Documents.

Walker's last ground for avoiding the effects of the arbitration clause in the loan documents is to claim that he was fraudulently induced to sign the Loan Documents. While there are allegations of misrepresentations and omissions in the third count of the Complaint, neither those allegations nor any other allegations of the Complaint plead fraud as a separate cause of action or claim. The Complaint certainly does not plead it with the degree of specificity required by Rule 9(b) of the Mississippi Rules of Civil Procedure.

The documents exhibited to the Motion to Compel, and which the parties agreed were the Loan Documents, contained specific statements that there were no oral representation and that all of the negotiations between the parties had been memorialized in the documents. Walker produced no evidence to dispute the documents or to establish that there were in fact oral representations upon which he relied to his detriment that induced him to sign the Loan Documents, including the Guaranty. While he filed a response to the Motion to Compel, it was not supported by an affidavit or any form of other evidence. Walker's proof is based upon the naked allegations of his Complaint which were denied by Regions. However, this Court also held in ***Terminix International, Inc. v. Rice,* 904 So. 2d at 1053, 1057** that allegations of

[6] It is this conundrum that Regions referred to in footnote 1 of its brief. **Brief of the Appellant, p.3, fn 1.**

fraudulent inducement in the complaint, without other supporting evidence, are insufficient to defeat a motion to compel arbitration. It is Regions' position that the ***Terminix*** decision is controlling of the issue and support the position that the Trial Court erred in overruling the Motion to Compel.[7]

CONCLUSION

Walker is an experienced and knowledgeable businessman. His signature appears on at least three separate documents containing the arbitration clause. The agreement to arbitrate is clear, unambiguous and broad enough to cover the dispute before this court. Regions promptly sought to enforce its rights under the agreement and should not be penalized for the Trial Court's inaction, especially when the Trial Judge committed a clear error in refusing to compel arbitration.

The Court should reverse the Order of the Trial denying arbitration and remand the case to the Circuit Court for the Second Judicial District of Jones County with directions to enter an order compelling the parties to seek arbitration.

Respectfully submitted, this the 5th day of January, 2009.

Paul J. Delcambre, Jr., ([redacted])
Counsel for Appellants

[7] Interestingly, the Trial Judge that denied the motion to compel in the ***Terminix*** case is the same Trial Judge who refused Regions' Motion to Compel.

CERTIFICATE OF SERVICE

I, Paul J. Delcambre, do hereby certify that I have this day mailed, via United Sates Mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellants to all counsel of record as follows:

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Hon. Billy Joe Landrum
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This the 5th day of January, 2009.

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