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Samaca, LLC, Order on Defendants' Motion to Dismiss Complaint and Compel Arbitration

Alice D. Bonner

Fulton County Superior Court Judge

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Bonner, Alice D., "Samaca, LLC, Order on Defendants' Motion to Dismiss Complaint and Compel Arbitration" (2017). *Georgia Business Court Opinions*. 415.

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**IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA**

SAMACA, LLC,)	
)	
Plaintiff,)	
)	
v.)	Civil Action File No. 2016CV276036
)	
CELLAIRIS FRANCHISE, INC.,)	
GLOBAL CELLULAR, INC., and CELL)	
PHONE MANIA, LLC,)	
)	
Defendants.)	

**ORDER ON DEFENDANTS’ MOTION TO DISMISS COMPLAINT
AND COMPEL ARBITRATION**

This matter is before the Court on the Motion to Dismiss Complaint and to Compel Arbitration by Defendants Cellairis Franchise, Inc. (“Cellairis”) and Global Cellular, Inc. (“Global”) (collectively as “Movants”). After consideration of the motions and briefs submitted the Court finds as follows:

I. FACTUAL BACKGROUND

Defendant Cell Phone Mania, LLC (“CPM”) operated four franchise units under franchise agreements with Cellairis. CPM operated the franchise units under Cellairis’ trademark at the Dolphin Mall in Miami, Florida. Global, an affiliate of Cellairis, licensed the spaces where the franchise units were located from Dolphin Mall. Cell Phone Mania then sub-licensed the spaces from Global.

Around June 2014, CPM, Movants and Plaintiff Samaca, LLC (“Samaca”) began negotiations regarding Samaca’s potential acquisition of the franchise units that CPM operated. On June 30, 2014, the parties reached an agreement whereby Samaca could purchase Cell Phone

Mania's interest in the franchise units. By the terms of their agreement, Cellairis required Samaca to execute four franchise agreements ("Franchise Agreements") which vested ownership interest in the franchise units to Samaca. Each of the Franchise Agreements contained a comprehensive agreement to arbitrate by which the parties agreed to arbitrate:

All controversies, claims, or disputes between Company and FRANCHISEE arising out of or relating to: a. This agreement or any other agreement between Company and FRANCHISEE; b. the relationship between FRANCHISEE and the Company; c. The scope and validity of this Agreement or any other agreement between Company and FRANCHISEE, specifically including whether any specific claim is subject to arbitration at all (arbitrability questions); and/or d. The offer or sale of the franchise opportunity ... Any claims by or against any affiliate of the Company may be joined, in the Company's sole discretion, in the arbitration.

In order to acquire the sub-licenses for the spaces at Dolphin Mall where the franchise units were located, Global required Samaca to execute four sub-license agreements (the "Sub-License Agreements") on June 30, 2014. The Sub-License Agreements contained a similar arbitration agreement whereby Samaca and Global agreed to arbitrate:

All controversies, claims, or disputes between Company and Sub-licensee arising out of or relating to: a. This agreement or any other agreement between Company and Sub-licensee; b. the relationship between Sub-licensee and Company; c. The scope and validity of this Agreement or any other agreement between Company and Sub-licensee, specifically including whether any specific claim is subject to arbitration at all (arbitrability questions); and/or d. The offer or sale of the franchise opportunity ... Any claims by or against any affiliate of the Company may be joined, in the Company's sole discretion, in the arbitration.

Notably, each arbitration agreement contained a Delegation Provision by which the parties agreed to arbitrate "whether any specific claim is subject to arbitration at all (arbitrability questions)."

Plaintiff contends that, on the same day, Cellairis presented an Assignment and Assumption Agreement ("AA Agreement") which assigned CPM's interest in the franchise units

to Samaca. Plaintiff claims the AA Agreement was predicated to have an effective date of September 1, 2014; the AA Agreement was signed by Cellairis, CPM and Samaca. The AA Agreement contained a general venue selection provision where the parties agreed that:

... the Georgia State Courts for Fulton County, Georgia... shall be the sole and exclusive venue and sole and exclusive proper forum in which to adjudicate any case or controversy arising either, directly or indirectly, under or in connection with this Agreement and the parties further agree that, in the event of litigation arising out of or in connection with this Agreement in these courts, they will not contest or challenge the jurisdiction or venue of these courts.

By the terms of the AA Agreement, Samaca was also required to sign new franchise and sub-license agreements that were to be “substantially the same form” as the prior Franchise and Sub-License Agreements. While the parties never executed new franchise or sub-license agreements, the new agreements were attached to the AA Agreement and contained the same mandatory arbitration agreement as the original Franchise and Sub-License Agreements.

Samaca began to operate the franchise units on October 1, 2014. Samaca claims that during this time Movants were in negotiations to extend the lease on the franchise units, but told the landlord at Dolphin Mall they would no longer be able to afford rent. Around December 2014 Samaca learned that Dolphin Mall had refused to renew the leases for the franchise locations and, as a result, Samaca brought suit seeking to rescind the agreements, among other claims. Defendants have now filed a motion to dismiss and compel arbitration based on the arbitration agreements contained in the original Franchise and Sub-License Agreements. Samaca claims the arbitration agreements are invalid and superseded by the subsequent AA Agreement which names this Court as the “sole and exclusive venue and sole and exclusive proper forum to adjudicate any case or controversy.”

II. ANALYSIS

The issue is whether the arbitration agreements contained in the Franchise and Sub-License Agreements were superseded by the AA Agreement. Under the terms of the arbitration agreements, “all matters relating to arbitration will be governed by the Federal Arbitration Act” (“FAA”). The FAA creates a presumption in favor of arbitrability that courts are to apply “only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand.” *Dasher v. RBC Bank*, 745 F.3d 1111, 1122-23 (11th Cir. 2014) (quoting *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 301 (2010)). While doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement containing an arbitration clause has been superseded. See *Applied Energetics, Inc. v. NewOak Capital Mkts., LLC*, 645 F.3d 522, 526 (2nd Cir. 2011). The Eleventh Circuit recently reasoned that the threshold determination of whether a subsequent agreement entirely superseded a prior agreement is made under state law without applying the FAA’s presumption in favor of arbitrability. *Dasher*, 745 F.3d at 1122-23. Here, Plaintiff has challenged the validity of the arbitration agreements by arguing that the arbitration agreements are invalid and were superseded by the AA Agreement. Therefore, the Court applies Georgia contract law to look for objective evidence that the parties intended for the AA Agreement to supersede the Franchise and Sub-License Agreements.

Under Georgia’s merger rule, “[a]n existing contract is superseded and discharged whenever the parties subsequently enter upon a valid and inconsistent agreement completely covering the subject-matter embraced by the original contract.” *Atlanta Integrity Mortgage, Inc. v. Ben Hill United Methodist Church, Inc.*, 286 Ga. App. 795, 797 (2007). In order for the

merger rule to apply, however, the terms of the contracts must completely cover the same subject matter and be inconsistent. *Id.* In the cases where Georgia courts found that the terms of a subsequent agreement to be inconsistent with a previous agreement, the courts have looked to the express intent of the parties and whether both agreements could be performed. *See Triple Net Properties, LLC, v. Burruss Development & Construction, Inc.*, 293 Ga. App. 323 (2008) (holding that a subsequent agreement superseded a previous agreement because the terms were inconsistent and both contracts could not possibly be performed); *Mapei Corp., v. Prosser*, 328 Ga. App. 81 (2014) (holding that the clear language of the superseding-agreement made clear that it replaced the earlier-entered agreements entirely).

Here, the AA Agreement explicitly incorporates by reference the Franchise and Sub-License Agreements which include the arbitration agreements. The AA Agreement also required that the parties execute subsequent Franchise and Sub-License Agreements in “substantially the same form” as the prior Franchise and Sub-License Agreements. Even though the parties never signed the subsequent Franchise and Sub-License Agreements, the new agreements were attached to the AA Agreement and contained the same mandatory arbitration agreement as the original Franchise and Sub-License Agreements. Absent a clear expression that the parties intended the AA Agreement to supersede the previous agreements, it cannot be said that the AA Agreement is inconsistent with the previous agreements as it required the execution of new arbitration agreements and incorporated the previous agreements by reference. Thus, the Court finds the merger rule does not apply and the arbitration agreements were not superseded. The question of arbitrability of the claims raised against Movants should be submitted to an arbitrator.

The Court hereby **GRANTS** Defendants' Motion to Dismiss Complaint and to Compel Arbitration.¹

SO ORDERED this 7th day of February, 2017.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

¹ In addressing the Motion to Dismiss the Court has not considered the two affidavits submitted with Movants' Reply Brief, which would convert the Motion to Dismiss to a motion for summary judgment.

Copies to:

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