IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

JONES, FUNDERBURG, SESSUMS, PETERSON & LEE, PLLC — **PLAINTIFF**

V. — **CIVIL ACTION NO. L07-135**

RICHARD SCRUGGS, Individually; DON BARRETT, Individually; SCRUGGS LAW FIRM, P.A.; BARRETT LAW OFFICE, P.A.; NUTT & McALISTER, PLLC; and LOVELACE LAW FIRM, P.A.

DEFENDANTS

PLAINTIFF'S MOTION TO STAY ARBITRATION AND RESPONSE TO MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION

INTRODUCTION

Defendants have expressly waived their right to arbitration. Defendants denied Plaintiff Jones, Funderburg, Sessums, Peterson & Lee (hereinafter collectively "Jones") its right to arbitration after Jones repeatedly requested to arbitrate its dispute and after Defendants forced Jones to seek redress for grievances in this Court. Defendants now seek to compel Jones into arbitration. The law is clear. Jones has suffered prejudice as a result of the Defendants' denial of its rights to arbitrate. The Defendants are in default of the arbitration provision of the Joint Venture Agreement after denying Jones its right to arbitration. This default constitutes a waiver, and a motion to compel arbitration need not be granted when a party has waived its right to arbitration. Therefore, Defendants cannot now invoke a right to arbitration.

FACTS

In December 2006, Defendant Scruggs ("Scruggs"), working outside the Joint Venture Agreement ("Agreement") and with no authority from his co-adventurers, contacted Jones. (See Affidavit of John G. Jones, Esquire, attached as Exhibit A). Defendant Scruggs said that instead of

splitting with Jones any fees that would be earned by the Joint Venture, that Jones instead would be paid $1 million by Defendant Nutt for work that Jones completed for the Scruggs Katrina Group. (Ex. A). Scruggs dictated that once Jones was paid $1 million, that Jones would receive no further recompense for its work and membership in the Joint Venture. (Ex. A) Jones rejected this offer from Scruggs and immediately invoked its right to arbitration and demanded an accounting from the group. (Ex. A).

These rights to arbitrate to arbitrate any dispute were provided in the Agreement. (See Joint Venture Agreement, Exhibit 1 to Defendants' Motion to Stay Proceedings and Compel Arbitration). From December 2006 until March 2007, Jones sought time after time to arbitrate its dispute with the Joint Venture. (Ex. A). Specifically, John Jones or his partner Steve Funderburg, demanded arbitration in written correspondence to Defendants dated Dec. 11, 2006, Dec. 14, 2006, and Feb. 22, 2007. (Ex. A). Demands and/or requests to submit the attorney-fee dispute to binding arbitration were made by email authored by Funderburg or John Jones dated Dec. 13, 2006, Dec. 15, 2006, Jan. 24, 2007 (three separate emails), Jan. 25, 2007, Jan. 30, 2007, and March 2, 2007. (Ex. A). Jones did not receive a response from Defendants to the demands or requests for arbitration contained in these letters and emails. (Ex. A). As detailed in correspondence between and among members of the Joint Venture and detailed more fully in the Complaint, members of the Joint Venture recognized that Jones had the right to arbitrate.

Defendant Don Barrett testified by affidavit that "[a]t various times prior to the March 2 fee distribution vote, Mr. Jones stated that he wanted the fee allocation to be arbitrated, but I personally did not believe the fee issue was 'ripe' for arbitration ...." (Affidavit of Don Barrett, Exhibit 3 to Defendants' Motion to Stay Proceedings and Compel Arbitration, pg. 3) (emphasis added).

In January/February 2007, the Joint Venture received $26,500,000 in fees from a settlement with State Farm in which Jones had logged a substantial amount of work. (Ex. A). Then, in March 2006, the Defendants as members of the Joint Venture voted to punish Jones, that is, to reduce Scruggs original offer of $1,000,000 in fees to an alleged three percent (3%) of the net fees earned or $617,924.43. (Ex. A). Defendants also voted to remove Jones from the Joint Venture at this time.(Ex. A).

Jones rejected the tender from the Joint Venture and immediately filed this action. (Ex. A). Now that the Defendants are facing litigation, punitive damages, and negative publicity, they are attempting to compel arbitration.

ARGUMENT

The issue squarely before this Court is whether Defendants waived their right to arbitration by expressly and repeatedly denying Plaintiff the same right. This Court has the right to decide whether a state law contract defense is applicable to deny the Motion to Compel. Waiver is a state law defense to enforcement of an arbitration agreement. The Defendants, when requested, refused time and again to go to arbitration and acted inconsistently with their rights to proceed to arbitration. Since Defendants refused to go to arbitration when requested, Defendants are in "default" and therefore cannot be granted a stay of these proceedings or motion to compel arbitration.

I. THIS COURT HAS JURISDICTION TO DECIDE IF THE DEFENDANTS ARE IN DEFAULT OR WAIVED THEIR RIGHT TO ARBITRATION.

The Mississippi Supreme Court in Sanderson Farms, Inc. v. Gatlin, cited Section 3 of the Federal Arbitration Act that addresses "default":

> 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**.

848 So. 2d 828, 856 (Miss. 2003) (quoting 9 U.S.C. § 3) (emphasis added).

"Waiver" and "default" are synonyms for purposes of § 3 of the FAA. Id. at 860, n. 19.

The existence of a waiver is a factual determination to be made by the trial court, and the appeals court's scope of review is limited and governed by the manifest error/substantial evidence standard. Scott Addison Constr., Inc. v. Lauderdale County Sch. Sys., 789 So. 2d 771, 776 (Miss. 2001).

A two-prong inquiry is used when determining whether a motion to compel should be granted. Sanderson Farms, Inc., 848 So. 2d at 834. The first prong has two components: (1) Whether there is a valid arbitration agreement; and (2) Whether the parties' dispute is within the scope of the arbitration agreement. Id. The second prong concerns whether legal constraints external to the parties' agreement foreclosed arbitration of those claims. Id. This second prong includes the consideration of applicable contract defenses available under state contract law which may invalidate the arbitration agreement. Id.

As for the second prong of the test, the existence of legal constraints external to the parties' agreement, foreclosing arbitration of the claim, even if the claim was found to be within the arbitration provision in question, the FAA mandates that arbitration agreements shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation

of any contract. Greater Canton Ford Mercury, Inc. v. Ables, 948 So. 2d 417, 423 (Miss. 2007) (internal quotes omitted). In considering this prong, courts should apply ordinary state-law contract principles. Id.

This Court has the right to determine if a state law contract principle applies to defeat a motion to compel arbitration. The facts and the applicable law could not be more clear. In December 2006, Jones received notice from Scruggs who was working outside of the Agreement and without authority from his co-adventurers that Jones would receive a one-time payment of $1 million for its work for the Joint Venture. In response, Jones invoked the right to arbitration. The Defendants refused. Thus, their refusal constituted a waiver.

II. WHILE A STRONG PRESUMPTION WEIGHS AGAINST THE PLAINTIFF, THE EVIDENCE CLEARLY SHOWS THAT THE DEFENDANTS TIME AND AGAIN REFUSED TO GO TO ARBITRATION WHEN REQUESTED.

There is a strong presumption against a finding that a party waived its contractual right to arbitrate, and any doubts thereabout must be resolved in favor of arbitration. Sanderson Farms, Inc., 848 So. 2d at 859. Numerous precedents agree that the proviso in § 3 - that a stay shall be granted providing the applicant for the stay is not in default in proceeding with such arbitration - refers to **a party who, when requested, has refused to go to arbitration** or who has refused to proceed with the hearing before the arbitrators once it has commenced, or who by long delay has waived any right to arbitrate. Id. at 861 (internal quotations omitted) (emphasis added).

It has been recognized that in order to determine whether legal constraints exist which would preclude arbitration, courts generally should apply ordinary state-law principles that govern the formation of contracts. Id. at 835. It is simple contract law that a party may waive the protections of any provision of a contract. Id. at 837. A party to a contract may by words or conduct waive a right

to which he would otherwise have been entitled. Id. Waiver may be express or it may be implied when the party actively participates in litigation or **acts inconsistently with its rights to proceed with arbitration**. Id. (emphasis added). Waiver may be inferred from the actions and conduct of the parties. Id.

Defendant Don Barrett admits in his affidavit that Jones invoked its rights to arbitration multiple times. Regardless of whether Defendant Barrett or any other member of the Joint Venture thought the dispute was "ripe," the Agreement stated plainly that any dispute arising under or relating to the terms of the Agreement shall be resolved by mandatory binding arbitration, not just those disputes that members of the Joint Venture deemed to be "ripe." Thus, the Defendants have acted inconsistently with their rights to proceed to arbitration saying "no" time and again then changing their mind once Jones filed this suit.

Defendants attempt to put the responsibility for initiating arbitration on the Plaintiff. Defendants cite no authority for the prospect that Plaintiff would be forced to unilaterally seek arbitration when the Defendants expressly and repeatedly denied Plaintiff this right. Indeed, the law states clearly that " ... a stay shall be granted providing the applicant for the stay is not in default in proceeding with such arbitration - refers to a party **who, when requested, has refused to go to arbitration** ...." 848 So. 2d at 861. Jones clearly requested the Defendants arbitrate the dispute. Defendants refused to go to arbitration. That, according to the law, is a clear waiver of the right to arbitrate.

III. THE PLAINTIFF WAS PREJUDICED BY THE DEFENDANTS' DELAY.

For purposes of a waiver of an arbitration agreement, prejudice refers to the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the

party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue. Alexander v. Easy Fin. of New Albany, Inc., 2007 U.S. Dist. LEXIS 5602 (N.D. Miss. 2007). Defendants should not now be allowed to change the course of these proceedings. Jones has suffered prejudice after invocation of its right to arbitrate in December 2006. The original $1 million offer by Scruggs was punitively reduced to $617,924.43 in March 2007 by the members of the Joint Venture, and Jones was subsequently removed from the Joint Venture after the other members voted it out. At the same meeting, Defendants again denied Jones the right to arbitrate. Jones was left with no recourse for its grievances except to retain counsel and file this cause of action.

CONCLUSION

For the foregoing reasons, Plaintiff Jones requests this Court grant its Motion to Stay Arbitration and deny Defendants' Motion to Stay Proceedings and Compel Arbitration.

RESPECTFULLY SUBMITTED, this the 16th day of April, 2007.

JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, PLLC

By and through its attorneys,
TOLLISON LAW FIRM, P.A.
100 Courthouse Square
Post Office Box 1216
Oxford, Mississippi 38655
662-234-7070 Telephone
662-234-7095 Facsimile

Grady F. Tollison Jr.
GRADY F. TOLLISON, JR.
MSB #8240

CERTIFICATE OF SERVICE

I, Grady F. Tollison, Jr., hereby certify that I have this date caused to be hand delivered, a true and correct copy of the foregoing document on this the 11th day of April, 2007 to:

Mr. Wilton V. Byars, III
DANIEL COKER HORTON & BELL, P.A.
265 North Lamar Boulevard, Suite R
Oxford, Mississippi 38655

Grady F. Tollison, Jr.
GRADY F. TOLLISON, JR.
MSB #8240

IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

JONES, FUNDERBURG, SESSUMS, PETERSON & LEE, PLLC — PLAINTIFFS

V. — CIVIL ACTION NO. L07-135

RICHARD SCRUGGS, Individually; DON BARRETT, Individually; SCRUGGS LAW FIRM, P.A.; BARRETT LAW OFFICE, P.A.; NUTT & McALISTER, PLLC; and LOVELACE LAW FIRM, P.A. — DEFENDANTS

AFFIDAVIT OF JOHN G. JONES, ESQUIRE

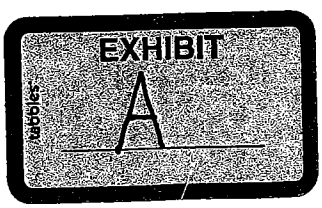
Personally appeared before me, John G. Jones, Esquire, and, upon his oath, deposes and says:

1. I am senior partner in Jones, Funderburg, Sessums, Peterson & Lee, PLLC. I devoted approximately 95% of my professional time as a member of an entity known as Scruggs Katrina Group ("SKG") from October, 2005, through the date Defendants attempted to terminate my firm's interest in past and future attorney fees generated by SKG.

2. The SKG Joint Venture agreement provided: "any dispute arising under or related to the terms of this agreement shall be resolved by mandatory binding arbitration, conducted in accordance with the guidelines of the American Arbitration Association. The site of the arbitration shall be Oxford, MS."

3. From December 6, 2006, the date on which Defendant Scruggs offered me $1,000,000.00 for my firm's services, yet nothing from the $25,000,000.00 in fees SKG received as part of a settlement of some 640 of our cases, I requested that the issue of fee splitting or profit sharing be submitted to arbitration.

4. Specifically, I or my partner, Steve Funderburg, Esquire, demanded arbitration in



written correspondence to Defendants dated December 11 and December 14, 2006, and February 22, 2007. Demands and/or requests to submit the attorney-fee dispute to binding arbitration were made by e-mail authored by Funderburg or me dated as follows: December 13, 2006, December 15, 2006, January 24, 2007 (three separate e-mails), January 25, 2007, January 30, 2007, and March 2, 2007. No response to the demand or request for arbitration contained in these letters and e-mails was *ever* received from Defendants or anyone associated with them.

5. At the meeting on March 2, 2007, Funderburg and/or I made the following statements concerning arbitration: that we had been asking for arbitration since December 6, without receiving any response as no one would engage us in these requests; that we had brought to the meeting authority supporting the position that we intended to take in arbitration; that we had been asking for arbitration since December specifically because it was impossible for the parties, all of whom were tainted by self-interest, to make an objective and fair determination of the fee splits; and that we were under the impression that the meeting was for the purpose of discussing our differences in good faith or submit them to arbitration. In response to each of these statements, Defendant Barrett simply said: "we're not going to arbitrate." At that point, we were offered 6% of the fees from the State Farm settlement then totaling approximately $26,500,000.00 as unilaterally determined by the Defendants without input from us, told by Barrett that if we did not agree to that allocation we would be permanently removed from SKG, thereby terminating all rights we had to claim fees for our past work or future profits, that the State Farm money was going to be disbursed that very day, and that they wanted a decision from Funderburg and me immediately.

6. At no time prior to the filing of the instant Complaint did any Defendant or member thereof respond to our demands and requests for arbitration. The only response we ever

received to our demand for arbitration was Defendant Barrett's statements at the March 2 "meeting" that "we're not going to arbitrate this." The first time I knew that the Defendants wanted to arbitrate was after the filing of our Complaint.

7. As a result of our attempting to arbitrate our dispute and the refusal to accept the 6% of the fees, the Defendants voted instead to tender a check of 3% or $617,924.43 to us. We rejected that tender.

Further, affiant sayeth naught.

WITNESS MY SIGNATURE, this the 16 day of April, 2007.

John Griffin Jones, Esquire

SWORN TO AND SUBSCRIBED before me this the 16th day of April, 2007.

Notary Public

My Commission Expires:

BRIDGETT CELLUM, RANKIN COUNTY, MS
NOTARY PUBLIC
My Commission Expires
October 12, 2008