STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2018-0182

HOYLE, TANNER & ASSOCIATES, INC.
and
MCLEAN COMMUNICATIONS, LLC
and
AT COMM CORPORATION

v.

150 REALTY, LLC
and
HARBOUR LINKS ESTATES, LLC

ITNH, INC.

v.

150 REALTY, LLC
and
HARBOUR LINKS ESTATES, LLC

BRIEF OF APPELLANTS 150 REALTY, LLC And HARBOUR LINKS ESTATES, LLC

October 15, 2018

150 REALTY, LLC and
HARBOUR LINKS ESTATES, LLC

By their attorneys,

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ORAL ARGUMENT BY:
Christopher H.M. Carter, Esq.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

QUESTIONS PRESENTED

1. Whether the trial courts (Brown, J.; Schulman, J.) erred in deciding the issue of whether the parties' dispute was subject to the arbitration clause in Plaintiffs' commercial leases, where the clause requires application of rules of the American Arbitration Association (AAA), and those rules expressly grant the arbitrator the authority to rule on the arbitrability of any claim. Add. at 6-7; App. at 273-74.[1]

2. Whether the trial courts erred in holding that the parties' dispute, which concerns the landlord's authority under the Plaintiffs' leases to regulate tenant parking, was not within the scope of the arbitration clause in the leases, where the clause allows the landlord to submit "any dispute" between the parties "pertaining to the lease" to binding arbitration. Add. at 6-7; App. at 274-78.

STATEMENT OF THE FACTS AND CASE

The underlying trial court proceedings arose from lease disputes between Defendants 150 Realty, LLC and Harbour Links Estates, LLC (collectively "150 Realty"), and four of 150 Realty's commercial tenants – Plaintiffs Hoyle, Tanner & Associates, Inc. ("HTA"), McLean Communications LLC ("McLean"), At Comm Corporation ("At Comm"), and ITNH, Inc. ("ITNH") [collectively "Plaintiffs"]. App. at 31-33, 98-99, 139-40, 431-32; App. at 5-10, 17-23, 179-85, 476-81.

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[1] Citations in this Brief are as follows:
- "Add.": the Addendum to this Brief, which consist of the trial courts' two written Orders being appealed;
- "App.": Appellant's Appendix; and
- "Tr.": transcript of the October 6, 2017 motions hearing before the Hillsborough County Superior Court.

I. Plaintiffs' Leases

Each Plaintiff leases office space in a large commercial building located in the Manchester Millyard at 150 Dow Street ("150 Dow Street"). App. at 3, 15, 177, 473. Plaintiffs' original landlord, One Dow Court, Inc. ("ODC"), also owned two smaller buildings located nearby at 100 Dow Street and 89 Dow Street. App. at 27-28, 190. In February 2017, 150 Realty purchased the three buildings (collectively the "Millyard Campus") from ODC. App. at 27-28, 190. ODC's leases with the four Plaintiffs (collectively the "Leases"), as well as leases with approximately 29 other tenants at the Millyard Campus, were assigned to 150 Realty. App. at 27-28, 190.

The underlying disputes arose as a result of disagreement over the scope of tenant parking rights conferred under the Leases, and the application of the Lease provisions granting the landlord the authority to implement parking rules and regulations. App. at 31-33, 98-99, 139-40, 431-32; App. at 5-10, 17-23, 179-85, 476-81.

Each Lease contains an identical provision stating, "LESSEE'S parking rights are subject to LESSOR'S reasonable rules and regulations." App. at 3, 15, 177, 474. Each Lease also grants the lessee a designated number of specifically assigned spaces in parking areas at 150 Dow Street, and the right to park with other Millyard Campus tenants in unassigned spaces in common parking areas at 89 Dow Street. App. at 3-4, 16, 181, 474.

Additionally, each Lease contains a substantially identical dispute resolution clause that grants the landlord the right to demand binding arbitration to resolve disputes arising under the Lease. The clause states in relevant part as follows:

> (a) In the event of default on the part of LESSEE under the terms of this Lease, LESSOR shall be entitled to choose the forum LESSOR deems appropriate for purposes of enforcing its rights under this agreement and collecting any sums due LESSOR hereunder. Specifically, LESSOR shall be able to, at

LESSOR's option, pursue collection and enforcement in the appropriate District or Superior Court, or LESSOR shall be entitled to pursue binding arbitration at LESSOR's sole determination.

(b) If LESSOR decides to submit any dispute between the parties pertaining to this Lease to binding arbitration, LESSOR shall still be entitled to prejudgment attachment remedies in District or Superior Court for purposes of securing any future judgment obtained through the arbitration process. Such arbitration proceedings shall take place in Manchester, New Hampshire. LESSOR shall, in the first instance, have the right to select an arbitrator from the American Arbitration Association, with said arbitration to be governed under the rules of the American Arbitration Association. Arbitration proceedings, including the selection of the arbitrator, shall be conducted pursuant to the rules, regulations and procedures in effect as promulgated by the American Arbitration Association.

App. at 287, 318 (emphasis added). Notably, Rule R-7 of the AAA Commercial Arbitration Rules expressly grants the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the . . . arbitrability of any claim or counterclaim." App. at 560.

II. 150 Realty's Implementation of Updated Parking Rules

The Millyard Campus has a total parking capacity of 625 spaces (225 spaces at 150 Dow Street, 300 spaces at 89 Dow Street, and 100 spaces at 100 Dow Street). App. at 428-29. In February 2017, when 150 Realty purchased the property, actual tenant demand for parking exceeded 1,250 parking spaces, which is double the capacity. App. at 429. Parking shortages prevented the lease of vacant space to new tenants, and approximately 33 percent of the Millyard Campus was unoccupied. App. at 429. This situation existed, in part, because ODC indiscriminately issued and re-issued parking tags allowing tenants' employees and customers to use common spaces at the Millyard Campus. App. at 429. In addition, certain tenants (including Plaintiffs) claimed rights to use a disproportionate number of common spaces at 89 Dow Street, resulting in demand which far exceeded the 300 parking space capacity. App. at 429. To further complicate matters, while some tenants claimed the right to use all (or a substantial number) of

the common spaces at 89 Dow Street, ODC had entered into leases that afforded certain tenants the right to claim a substantial number of those 300 spaces as assigned spaces. App. at 429.

After soliciting input from tenants about solutions to address these parking issues, 150 Realty updated parking rules that ODC previously implemented for the Millyard Campus. App. at 29. The updated rules, which were scheduled to take effect on October 1, 2017, were intended to address the "free-for-all" approach to parking that prevailed at the Millyard Campus, in order to better serve all tenants' rights to limited parking resources. App. at 4, 30. The rules called for capital improvements, including the construction of parking gates operated by electronic "key fobs," the hiring of personnel to manage the parking areas, and the installation of additional parking area lighting. App. at 30-31. The updated rules also introduced a fee schedule for assigned parking spaces. App. at 30. In addition, tenants could obtain additional assigned spaces (i.e., assigned spaces in addition to those specified in the tenants' leases) for a monthly fee of $135 per space. App. at 30.

III. The Underlying Arbitrations and Civil Actions

Most of the Millyard Campus tenants cooperated with 150 Realty in the development and implementation of the updated parking rules. Plaintiffs did not. App. at 31, 97, 138, 431. They disputed 150 Realty's authority under the Leases to implement many of the rules, and alleged that 150 Realty had breached the Leases. App. at 5-10, 17-23, 179-185, 476-481.

As a result, 150 Realty filed separate demands for arbitration with the AAA against each Plaintiff.[2] App. at 26, 93, 134, 426. Broadly, the arbitration demands sought to enforce 150 Realty's rights under the Leases by confirming that the updated rules constituted a valid exercise

[2] 150 Realty filed its demands for arbitration against HTA and At Comm on September 29, 2017, against McLean on October 3, 2017, and against ITNH on December 1, 2017. App. at 26, 93, 134, 426.

of 150 Realty's authority under the Leases to implement rules and regulations for parking. To that end, 150 Realty sought declaratory judgment and asserted anticipatory breach of contract claims based on Plaintiffs' refusal to comply with the updated rules, as required by the terms of the Leases. App. at 31-33, 78-99, 139-140, 431-432.

For their part, Plaintiffs initiated four separate actions in the Superior Court contesting 150 Realty's authority to implement the updated parking rules.[3] HTA, McLean, and ITNH filed suit in Hillsborough County Superior Court, while At Comm filed suit in Rockingham County Superior Court. App. at 1, 13, 175, 472. Ultimately, all four actions were consolidated before the Hillsborough County Superior Court. Add. at 4; App. at 526, 536, 541. All of Plaintiffs' claims involve the same underlying issue: whether Plaintiffs' are obligated under the Leases to comply with the updated rules. Each action included claims for breach of contract alleging 150 Realty breached the Leases by imposing parking control measures in the updated rules, and each action sought declaratory judgment to that effect. App. at 5-10, 17-23, 179-185, 476-481. Additionally, At Comm and McLean also alleged that 150 Realty's updated rules, to the extent they proposed assigning spaces in common parking areas for other tenants' exclusive use, violated the implied covenant of good faith and fair dealing. App. at 98-99, 139-140.

In October 2018, 150 Realty filed Motions to Dismiss or Stay the civil actions, arguing that the disputes fell within the scope of the Leases' arbitration clause. App. at 189, 286, 333.

[3] HTA, McLean, and ITNH filed their complaints in Hillsborough County Superior Court on September 11, September 21, and December 20, 2017, respectively. At Comm filed suit in Rockingham County Superior Court on October 5, 2017. App. at 1, 13, 175, 472.

150 Realty further argued that the arbitrability of the disputes should be resolved by an arbitrator appointed by the AAA, as expressly provided for in the AAA rules. App. at 273-274.[4]

On December 11, 2017, the Hillsborough County Superior Court denied 150 Realty's motions to dismiss or stay the HTA and McLean actions. Add. at 5-8. The trial court first held that the cases were not arbitrable.[5] Add. at 6-7. In so holding, the trial court accepted Plaintiffs' argument that 150 Realty was not entitled to compel arbitration because Plaintiffs had not yet defaulted under the leases. Add. at 6; App. at 269. The trial court concluded a default had not been established because "150 Realty [had] failed to establish that the imposition of a parking fee separate from the lessees' rent . . . is a reasonable rule or regulation." Add. at 6-7.[6]

The trial court then ruled that it, not the arbitrator, had the authority to determine arbitrability. Add. at 7. The trial court's analysis cited the proposition that the interpretation of arbitration agreements is normally a question of law for courts, but it did not include any analysis as to whether the Leases' arbitration clause evidenced the parties' clear and unmistakable intent to delegate the question of arbitrability to the arbitrator. Add. at 7. On January 2, 2018 (prior to the consolidation of the At Comm matter), the Rockingham County Superior Court, adopting the reasoning of the Hillsborough County Superior Court, likewise denied 150 Realty's motion to dismiss or stay the At Comm action pending arbitration. Add. at 10-11.

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[4] Although HTA had not yet had the opportunity to submit an objection to 150 Realty's motion to dismiss, the applicability of the Leases' arbitration clause was discussed at the October 6, 2017 motions hearing before the Hillsborough County Superior Court. Tr. 4:4-20, 17:21-18:18.

[5] The order later applied to the ITNH case as result of the consolidation of the ITNH matter with the HTA and McLean matters. App. at 536.

[6] The December 11 Order interpreted these disputes as focused narrowly on whether 150 Realty may charge "a fee for parking." Add. at 6-7. However, fees are but one aspect of this dispute, which concerns, more broadly, 150 Realty's ability under the leases to control parking; the scope of Respondent's rights to use unassigned spaces at the 89 Dow Street Lots; Claimants' ability to demand a minimum number of unassigned spaces; and Claimants' ability to assign spaces at the 89 Dow Street Lots to other tenants. App. at 31-33, 98-99, 139-140, 431-432.

150 Realty sought leave to bring an interlocutory appeal on the issue of arbitrability, which was denied by the trial court on January 23, 2018. App. at 529. As a result of the trial courts' denial of 150 Realty's motions to dismiss or stay Plaintiffs' trial court actions, the arbitrations against Plaintiffs have been stayed. App. at 544.

On November 28, 2017, HTA and McLean moved for partial summary judgment on their claims seeking a declaratory judgment that 150 Realty's rules assessing fees for spaces specifically assigned under their Leases were unenforceable because they breach the terms of the Leases. App. at 544. The trial court granted the motions. App. at 544. The trial court did not resolve the separate issue of whether 150 Realty may allow tenants to obtain additional assigned spaces for a fee. App. at 544.

After resolution of the summary judgment motions, the parties entered a joint stipulation in which Plaintiffs agreed to voluntarily nonsuit, without prejudice, their remaining claims in order to allow 150 Realty to bring the present appeal. App. at 542, 547.

BRIEF ANSWER

1. The trial courts erred in ruling on the threshold question of the arbitrability of the parties' commercial lease dispute, rather than allow this question to be resolved by an arbitrator as dictated by the AAA rules incorporated in Plaintiffs' Leases.

2. The trial courts erred in holding that the parties' dispute was not within the scope of the arbitration clause in Plaintiffs' Leases, where the clause allows the Landlord to submit "any dispute" between the parties "pertaining to the lease" to binding arbitration.

ARGUMENT

The trial courts erred in deciding the issue of arbitrability was for a court, not the arbitrator, to determine. The arbitration clause in each Lease states that arbitration shall be

conducted pursuant to the AAA arbitration rules, which in turn grant the arbitrator authority to determine whether a dispute is arbitrable. Consequently, the trial courts should not have proceeded beyond this threshold matter to rule on the ultimate question of arbitrability. The trial courts further erred in concluding that the parties' disputes are not subject to arbitration, when the disputes unquestionably concern the scope of the Landlord's rulemaking authority under the Leases.

I. Standard of Review

The trial courts' rulings regarding the scope of the Leases' arbitrability clauses turned on legal questions of contract interpretation. Consequently, those rulings are subject to *de novo* review by the Supreme Court. See Lebanon Hangar Assocs., Ltd. v. City of Lebanon, 163 N.H. 670, 673 (2012); John A. Cookson Co. v. N.H. Ball Bearings, Inc., 147 N.H. 352, 355 (2001).

II. Arbitrability Should Have Been Decided By An Arbitrator

Arbitrability is a "gateway" issue. Private Jet Servs. Grp., Inc. v. Marquette Univ., No. 14-cv-436-PB, 2015 WL 2228041, at *2 (D.N.H. May 12, 2015). As a general matter, an arbitrator's jurisdiction depends upon the agreement of the parties, and therefore the principles of contract interpretation govern the question of jurisdiction. Aetna Life & Cas. Co. v. Martin, 134 N.H. 90, 93 (1991). Although this issue often is decided by a court, "parties to an arbitration agreement may, if they so choose, agree to delegate gateway arbitrability questions to an arbitrator rather than to a court." Private Jet Servs., 2015 WL 2228041, at *2. "[A]ny doubts held by a reviewing court concerning what the parties intended to arbitrate should be resolved in favor of arbitration." Lebanon Hangar Assocs., 163 N.H. at 677–78.

Where a contract requires arbitration to be conducted under AAA rules, courts have held that there is clear and unmistakable evidence that the parties intended that an arbitrator, not a

court, determine arbitrability. See Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013) ("Virtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); 92 Am. Jur. 3d Proof of Facts §§ 6, 20 (2006) ("A clear and unmistakable intent for the arbitrator to decide issues of arbitrability is demonstrated when parties incorporate by reference AAA Commercial Arbitration Rules."). This is because Rule R-7 of the AAA's Commercial Arbitration Rules grants the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." App. at 560 (emphasis added).

Other jurisdictions have held overwhelmingly that arbitration clauses incorporating AAA rules by reference delegate jurisdictional questions to the arbitrator. Sakyi v. Estee Lauder Companies, Inc., 308 F. Supp. 3d 366, 378 (D.D.C. 2018) ("[E]very circuit court to address this question has reached the same conclusion."); see also, e.g., Awuah v. Coverall, Inc., 554 F.3d 7, 11-12 (1st Cir. 2009) (holding that courts should uphold the parties' clear and unmistakable intent to have an arbitrator determine arbitrability, and a contract's incorporation of AAA rules "is about as 'clear and unmistakable' as language can get"); Contec Corp. v. Remote Solution, Co., 398 F.3d 205, 208 (2d Cir. 2005) (incorporation of the AAA rules "serves as clear and unmistakable evidence of the parties' intent to delegate [issues of arbitrability] to an arbitrator"); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012) (same); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009) (same); Gaililea, LLC v. AGCS Marine Ins. Co., 879 F.3d 1052 (9th Cir. 2018) (same); Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332-33 (11th Cir. 2005) (same); Sakyi, 308 F. Supp. 3d at

378-79 (same); Hopkinton Drug, Inc. v. CaremarkPCS, LLC, 77 F. Supp. 3d 237, 249 (D. Mass. 2015) (same); Wal-Mart Stores, Inc. v. Helferich Patent Licensing, LLC, 51 F. Supp. 3d 713, 719-720 (N.D. Ill. 2014) (same); Mounts v. Midland Funding LLC, 257 F. Supp. 3d 930, 941-42 (E.D. Tenn. 2017) (same); McLaughlin v. McCann, 942 A.2d 616, 626 (Del. Ch. 2008) (same). This conclusion remains true even where the arbitration agreement does not use specific language indicating that the parties agreed to submit questions of arbitrability to an arbitrator, not a court. See, e.g., Glasswall, LLC v. Monadnock Constr., Inc., 187 So. 3d 248, 251-52 (Fla. Dist. Ct. App. 2016) (holding that incorporation of AAA rules by reference in arbitration clause was sufficient evidence of the parties' clear and unmistakable intent to delegate questions of arbitrability to an arbitrator, even without specific contract language); Brake Masters Sys., Inc. v. Gabbay, 78 P.3d 1081, 1087-88 (Ariz. Ct. App. 2003) (stating that where AAA rules are incorporated by reference, "[the] clear and convincing evidence standard does not require that the arbitration agreement specifically state that the arbitrator has the primary authority to decide the arbitrability of the issues").

Here, the trial courts erroneously overlooked that the Leases' arbitration clause incorporated the AAA rules, which plainly delegates the issue of arbitrability to an arbitrator. Consequently, the parties clearly and unmistakably intended that an arbitrator, not the court, determine any question of arbitrability. Thus, under the law cited *supra,* Plaintiffs' challenge to the arbitrability of this dispute should have been decided by an arbitrator appointed by the AAA, not by the trial courts.

III. The Arbitration Clause Applies to These Disputes

Under New Hampshire law, parties that have voluntarily entered into an arbitration agreement are required to arbitrate any disputes covered by the agreement. See RSA 542:1; John

A. Cookson Co. v. N.H. Ball Bearings, Inc., 147 N.H. 352, 355 (2001) (recognizing presumption of arbitrability if contract contains arbitration clause). The purpose and policy of arbitration is to obtain a speedy and inexpensive resolution of disputes, foregoing the ordinary process of law, and avoiding the courts. See Demers Nursing Home, Inc. v. R.C. Foss & Son, Inc., 122 N.H. 757, 761 (1982).

RSA 542:1 provides that a written contract "to settle by arbitration a controversy thereafter arising out of such a contract . . . [is] valid, irrevocable, and enforceable." As a result, where, as here, a lawsuit is filed "upon any issue referable to arbitration" pursuant to an arbitration agreement, the trial court "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." RSA 542:2.

Where a contract contains an arbitration clause, "there is a presumption of arbitrability." State v. Philip Morris USA, Inc., 155 N.H. 598, 604 (2007). Any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration. Lebanon Hangar Assocs., 163 N.H. at 677-78. A party's request to arbitrate should not be denied unless "it is determined with positive assurance that the contract is not susceptible of an interpretation that covers the dispute." Philip Morris, 155 N.H. at 604.

Here, the arbitration clause at issue is unequivocal, stating that the lessor "shall be entitled to pursue binding arbitration" for the purpose of "enforcing its rights under" the Lease, and resolving "any dispute between the parties pertaining to" the Lease. App. at 287, 318. All of the disputes here (in litigation or arbitration) directly and specifically "pertain" to the leases, such as:

- Plaintiffs' rights under the Leases to use common spaces in parking areas that are not part of the demised premises;
- Whether, under the Leases, Plaintiffs could prevent the Landlord from implementing parking restrictions necessary to protect parking rights recognized in leases that ODC entered into with other tenants;
- Whether, under the Leases, Plaintiffs may prevent the assignment of in common spaces to other tenants, when other tenants' leases expressly allow for such an assignment;
- Whether, under the Leases, the Lessor has the authority to permit tenants to obtain, for monthly fees, additional assigned parking spaces.

More broadly, this dispute is expressed as dueling breach of contract claims. 150 Realty alleged the rules are a valid exercise of the landlord's rights under the Leases, and that Plaintiffs breached the Leases by refusing to comply with the rules. Plaintiffs, in turn, allege that the updated parking rules breached their Leases. Consequently, this dispute unquestionably "pertains" to the Leases.

The trial courts adopted Plaintiffs' argument that the disputes were not arbitrable because they concerned parking rules adopted under the Leases, not breaches of the Leases. Add. at 6-7; App. at 269. However, it is 150 Realty's position that the reasonable parking rules *are* an enforceable part of the Leases. In holding otherwise, the trial courts directly and impermissibly considered the merits of 150 Realty's underlying claims. See Appeal of Town of Bedford, 142 N.H. 637, 639 (1998) (court "should not rule on the merits of the parties' underlying claims when deciding whether they agreed to arbitrate"); 92 Am. Jur. 3d Proof of Facts § 36 (2006).

The recent case of Private Jet Services Group, Inc. v. Marquette University, No. 14-cv-436-PB, 2015 WL 2228041, at *2 (D.N.H. May 12, 2015), is illustrative. Private Jet concerned two related agreements – a contract for private jet services, and an escrow agreement that required the defendant to escrow payments due under the services contract. Id. at *1. The escrow agreement had an arbitration clause for claims "arising out of or relating to" that agreement; the services contract did not have an arbitration clause. Id. After the defendant terminated the services contract, plaintiff filed suit alleging breach of contract. Id. At that point, the defendant moved to stay the case and compel arbitration, and the District Court granted the motion. Id. The plaintiff argued the dispute was not arbitrable because it arose under the services contract, not the escrow agreement. Id. at *2. The District Court held, however, that the two agreements had enough "commonality" to support the defendant's position that the plaintiff's claim for breach of the services contract related to the escrow agreement, and was arbitrable. Id. The Court further reasoned, "[i]nquiring into the arbitrability of [the plaintiff's] claim with any more scrutiny would verge on deciding a request to enforce an arbitration agreement based on the merits of the underlying dispute," which is contrary to the Federal Arbitration Act and United States Supreme Court precedent. Id. at *3.

The same reasoning applies here. 150 Realty contends that the updated parking rules are promulgated pursuant to, and become an enforceable part of, the Leases. Plaintiffs' countervailing argument – that the parking rules are outside of the terms of the Lease – impermissibly goes to the merits of this dispute. See also Warren Bros. Co. v. Cardi Corp., 471 F.2d 1304, 1309 (1st Cir. 1973) ("In deciding whether a particular controversy is within the scope of an arbitration clause, however, it is not the function of the court to determine the tenability of the claims presented."). The unsoundness of the trial courts holdings' is

underscored by the fact that it allows Plaintiffs to advance contradictory arguments: that 150 Realty breached the Leases by adopting the updated parking rules; and that this dispute does not pertain to any dispute arising under the Lease.

The trial courts should have considered whether the issues presented "on their face" were within the Lease's arbitration clause. See id. at 1305 ("[I]f the issues presented are on their face referable to arbitration under the parties' agreement, the inquiry of the court is at an end."). On their face, Plaintiffs' claims allege 150 Realty's updated parking rules violated their Leases. Similarly, 150 Realty's arbitration demands allege the updated parking rules are valid under the Leases. As such, the issues presented fall squarely within the scope of the arbitration clause.

In addition to erroneously deciding the merits of the underlying dispute, the trial courts further erred by failing to ascribe the plain meaning to the language of the Leases' arbitration clause. The Hillsborough County Superior Court concluded that subparagraphs (a) and (b) of the arbitration clause should be read together, and be interpreted to apply only to "situations in which the lessee has already defaulted under the terms of the lease." Add. at 6. The plain language of these arbitration provisions, however, supports a different conclusion, namely, that two distinct sets of circumstances trigger the lessor's right to invoke arbitration.

The first provision of the arbitration clause (subparagraph (a)), states that if the lessee defaults under the lease, the lessor shall be entitled to "choose the forum" to enforce its rights, to include binding arbitration before the AAA. App. at 287, 318. The following provision of the arbitration clause (subparagraph (b)) states more broadly that if the lessor "decides to submit any dispute between the parties pertaining to this Lease to binding arbitration," the lessor shall "have the right to select an arbitrator before the American Arbitration Association." App. at 287, 318 (emphasis added).

Under New Hampshire law, the question is not whether it is *possible* to read subparagraphs (a) and (b) together as applying only to prior lessee defaults. Instead, given the "presumption of arbitrability," the question is whether it can be said with "positive assurance that the contract is not susceptible of an interpretation that covers the dispute." Philip Morris, 155 N.H. at 604.

Here, the contract is reasonably read, and certainly susceptible of an interpretation that: (1) If the lessee defaults, subparagraph (a) provides that the landlord can select the forum for enforcing its rights, including binding arbitration before the AAA; and (2) subparagraph (b), which contains no reference to default, applies more broadly to "any dispute between the parties pertaining to this Lease," and states that in such cases the landlord shall "have the right to select an arbitrator before the [AAA]."

Considering this interpretation, as it must, the trial courts should have found that the disputes at issue plainly triggered the arbitration clause. As the parties' dispute falls directly within the scope of the Leases' arbitrability clause, Plaintiffs' trial court claims should have been dismissed or stayed pending the outcome of the arbitration actions brought by 150 Realty.

CONCLUSION

For the forgoing reasons, 150 Realty respectfully requests that this Court reverse the trial courts' orders denying 150 Realty's motions to dismiss or stay in favor of arbitration.

ORAL ARGUMENT REQUESTED

150 Realty requests oral argument. Attorney Christopher Carter will argue on Plaintiff's behalf.

Respectfully submitted,

150 REALTY, LLC, and
HARBOUR LINKS ESTATES, LLC

By their attorneys,

Dated: October 16, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing was sent to all counsel of record.

Jamie S. Myers, Esq.

#58153423

ADDENDUM TO BRIEF FOR APPELLANTS 150 REALTY, LLC
And HARBOUR LINKS ESTATES, LLC

TABLE OF CONTENTS

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
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December 13, 2017

FILE COPY

Case Name: **Hoyle Tanner & Associates, Inc. v 150 Realty, LLC, et al**
Case Number: **216-2017-CV-00665** *216-2017-CV-00703*

You are hereby notified that on December 11, 2017, the following order was entered:

RE: MOTION TO CONSOLIDATE, MOTION TO DISMISS and PRELIMINARY INJUNCTION:

See copy of order attached - Brown, J.

Notice of trial assignment enclosed herewith.

W. Michael Scanlon
Clerk of Court

(539)

C: James F. Ogorchock, ESQ; Megan C. Carrier, ESQ; Jamie Sue Myers, ESQ; Christopher H.M. Carter, ESQ

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

McLean Communications, LLC

v.

150 Realty, LLC, and Harbour Links Estates, LLC

Docket No. 216-2017-CV-00703

*****

Hoyle, Tanner & Associates, Inc.

v.

150 Realty, LLC, and Harbour Links Estates, LLC

Docket No. 216-2017-CV-00665

ORDER

Plaintiff, McLean Communications, LLC ("McLean"), brought the instant action against defendants, 150 Realty, LLC ("150 Realty") and Harbour Links Estates, LLC ("Harbour"), seeking preliminary and permanent injunctive relief, a declaratory judgment, and damages. The Court held a hearing on October 25, 2017. Upon consideration of the pleadings, arguments, and applicable law, the Court finds and rules as follows.

Factual Background

For the purposes of this motion, the Court finds the following relevant facts. McLean has leased space at 150 Dow Street in Manchester, New Hampshire ("the property") since September 1, 2001, pursuant to a lease entered into on July 19, 2001,

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which runs through August 31, 2019. (Ver. Compl. ¶¶ 6–7, 17.) From September 1, 2001, through early 2017, One Dow Court, Inc. ("ODC") was McLean's landlord. (Id. at ¶ 8.) The lease contained the following provision regarding parking:

> a) Permanent parking for employees of LESSEE shall be limited to six (6) assigned parking spaces, located immediately adjacent to the 150 Dow Street building, and up to twenty four additional spaces located in the parking lot east of the buildings at 79-89 Dow Street and 801-815 Canal Street in Manchester.
>
> b) LESSEE's parking rights are subject to LESSOR's reasonable rules and regulations.
>
> c) LESSEE's employees shall have the right to use, in common with other tenants of LESSOR, the parking lot owned by LESSOR and located just east of LESSOR's building at 79-89 Dow Street, provided they do not occupy spaces that are presently or become in the future, marked with a specific tenant's name. In addition, when requested to do so by LESSEE, LESSOR shall obtain parking permits from the City of Manchester, if available, and provide them to LESSEE at cost.

(McLean's Obj. Consolidate, Ex. B, ¶ 27.) Pursuant to the lease, McLean was assigned two additional spaces on August 8, 2005, and, at some point thereafter, ODC assigned McLean two more additional spaces, which were marked with signage to signal they were reserved for McLean's use. (Ver. Compl. ¶¶ 10–11.) Since entering the lease in 2001, McLean has never been charged a fee in addition to its base rent for parking. (Id. at ¶ 15.)

At some point in early 2017, 150 Realty and Harbour (collectively, "defendants"), purchased the property. (Id. ¶ 16.) On August 18, 2017, defendants notified McLean that they were introducing new building rules and regulations ("the new rules"), which provided, among other things, that beginning on October 1, 2017:

> a) Tenant employees, including employees of McLean, parking cars on the Campus must display at all times a valid front parking tag

hanging from the vehicle's rear view mirror, as well as a valid rear window parking sticker;

b) Any vehicle that is parked in any parking spot on the Campus that does not display a valid front parking tag and rear window parking sticker . . . will be towed, at the owner's expense, regardless of whether the vehicle is parked in a specifically assigned spot for a specific tenant;

c) For tenants whose leases designate a specific number of parking spaces that will be available for use but does not specify that those spaces shall be 'free' of charge, a $55.00 monthly fee for each designated space will be charged;

d) For tenants whose leases entitle them to use additional parking spaces but do not specify the exact quantity of additional parking spaces that may be utilized, a $135.00 monthly fee will be charged for each additional parking space required; and

e) All payments shall be required to be made prior to the first day of the month for parking tags and stickers to be valid for any given month.

(Id. at ¶ 19.)

Legal Analysis

I. **Motion to Consolidate**

McLean first seeks to consolidate the present action with Hoyle, Tanner & Associates, Inc. v. 150 Realty, LLC et al., No. 216-2017-CV-00665. Hoyle Tanner is also a tenant at the property and McLean argues the two cases "arise out of the same events and involve common issues of law and fact." (McLean Mot. Cons. ¶ 2); see N.H. Sup. Ct. Civ. R. 12(b).

Similar to McLean, Hoyle Tanner has leased space at the property since before 150 Realty purchased it in 2017. (Hoyle Tanner Compl. ¶¶ 6–8.) Hoyle Tanner's parking rights are governed by section 27 of its lease, which states:

a) Permanent parking for employees of LESSEE shall be limited to six (6) assigned parking spaces, located immediately adjacent to the 150 Dow Street building.

b) LESSEE shall be entitled to additional parking, as required, in the lot located between Gold's Gym and Sanel Auto Parts on Dow Street.

c) LESSEE's parking rights are subject to LESSOR'S reasonable rules and regulations.

(Id. ¶ 9.) Hoyle Tanner has acquired additional spaces in subsequent amendments to the lease. (Id. at ¶ 15.) Since it leased space at the property in 1998, Hoyle Tanner has not paid an additional fee for parking outside of its base rent. (Id. ¶ 16.) Like McLean, Hoyle Tanner also received the August 18. 2017 letter, which notified tenants of "the new rules" relating to parking fees. (Id. ¶ 21.)

150 Realty contends the two cases do not involve common issues of law or fact and thus should not be consolidated. The Court is unpersuaded. 150 Realty's argument relies on the existence of minor differences in McLean and Hoyle Tanner's leases, such as the number of parking spaces assigned to each party or the amount they pay in rent. However, these differences are immaterial to the ultimate question as to whether 150 Realty can charge McLean and Hoyle Tanner a fee for parking under "the new rules." Therefore, because the cases arise out of the same transaction or events—namely, the imposition of the new rules—and involve common issues of law and fact, McLean's motion to consolidate is GRANTED.

II. ***Motion to Dismiss or Stay***

150 Realty moves to dismiss or stay the cases against McLean and Hoyle Tanner (collectively, "plaintiffs"), arguing each respective lease "contains a dispute resolution clause that grants [150 Realty] the right to demand binding arbitration to resolve

disputes arising under the Lease." (Def. Mot. Dismiss, ¶ 2.) Plaintiffs counter, arguing 150 Realty is not entitled to compel arbitration under the terms of the lease, as this right is limited to circumstances in which plaintiffs breach the terms of the lease. The Court agrees. The leases contain identical dispute resolution clauses, which read, in pertinent part:

> a) In the event of default on the part of LESSEE under the terms of this Lease, LESSOR shall be entitled to choose the forum LESSOR deems appropriate for purposes of enforcing its rights under this agreement and collecting any sums due LESSOR at LESSOR's option, pursue collection and enforcement in the appropriate District or Superior Court, or LESSOR shall be entitled to pursue binding arbitration at LESSOR's sole determination.
>
> b) If LESSOR decides to submit any dispute between the parties pertaining to this Lease to binding arbitration, . . . LESSOR shall, in the first instance, have the right to select an arbitrator from the American Arbitration Association, with said arbitration to be governed under the rules of the American Arbitration Association. Arbitration proceedings, including the selection of an arbitrator, shall be conducted pursuant to the rules, regulations and procedures in effect as promulgated by the American Arbitration Association.

(Id. Ex. A, ¶ 42(a)–(b).)

"The proper interpretation of a lease is ultimately a question of law for [the Court] to determine." S. Willow Properties, LLC v. Burlington Coat Factory of New Hampshire, LLC, 159 N.H. 494, 501 (2009). "As with any contract, [the Court] interpret[s] a lease by giving its terms their reasonable meaning." Id.

The Court finds a plain reading of the dispute resolution provisions demonstrates 150 Realty's right to compel arbitration is limited to situations where the lessee defaults under the terms of the lease. Although 150 Realty contends subparagraph (b) gives it the right to submit "any dispute between the parties pertaining to the lease to binding

arbitration," the Court is unpersuaded. The Court finds this paragraph, when read in conjunction with subparagraph (a), limits 150 Realty's right to situations in which the lessee has already defaulted under the terms of the lease.

150 Realty also argues that the new rules were promulgated pursuant to section 27 of plaintiffs' leases, which grants the landlord the authority to implement "reasonable rules and regulations." The Court is again unpersuaded. The Court finds 150 Realty has failed to establish that the imposition of a parking fee separate from the lessees' rent, where the lessees' rent previously included parking, is a reasonable rule or regulation and not a substantive amendment to the lease.

150 Realty finally argues that the determination of arbitrability should be decided by the arbitrator. The Court disagrees. "The jurisdiction of arbitrators over the parties and the subject matter depends entirely upon the voluntary agreement of the parties." Aetna Life & Cas. Co. v. Martin, 134 N.H. 90, 93 (1991). "It follows that a contractual provision creating a right to arbitration remains subject to the traditional principles of contract law, and its interpretation and construction is therefore a question of law for the court." Id. "Consequently, the court, and not the arbitrator, has jurisdiction to determine whether the dispute is arbitrable." Id.; see First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) ("This Court, however, has added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Court should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.").

As stated above, the Court finds plaintiffs agreed to arbitrate only those disputes arising from their respective breaches of the terms of the lease. Because 150 Realty

has failed to establish the imposition of a parking fee is a term under the plaintiffs' leases, it cannot compel arbitration under section 27.[1]

III. **Preliminary Injunction**

On October 6, 2017, this Court preliminary enjoined enforcement of the new parking regulations in the Hoyle Tanner suit. (Hoyle Tanner, Case Index # 8.) In light of the Court's ruling on McLean's motion to consolidate its case with the Hoyle Tanner case, McLean's request for preliminary injunctive relief is GRANTED.

SO ORDERED.

12/11/17
Date

Kenneth C. Brown
Presiding Justice

[1] Although 150 Realty submitted an arbitration order, see 150 Realty, LLC, et al v. Dow Fitness, Inc. d/b/a FitLab, the Court is unpersuaded. As stated above, the determination of arbitrability is a question for the Court to decide. Further, it appears the dispute resolution provision in the FitLab lease is much broader than the arbitration clause in the instant case.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **At Comm Corporation v 150 Realty, LLC, et al**
Case Number: **218-2017-CV-01166**

Enclosed please find a copy of the court's order of January 02, 2018 relative to:

Motion to Dismiss/Stay

January 04, 2018

Maureen F. O'Neil
Clerk of Court

(504)

C: James F. Ogorchock, ESQ; Megan C. Carrier, ESQ; Christopher H.M. Carter, ESQ; Jamie Sue Myers, ESQ

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss.

AT COMM CORPORATION

v.

150 REALTY, LLC
and
HARBOUR LINKS ESTATES, LLC.

218-2017-CV-1166

ORDER

The matter before the court is defendants' motion to dismiss or stay the case pending mandatory arbitration (Docket Document 7). The motion is DENIED.

"Everyone knows the Federal Arbitration Act [9 U.S.C. §2] favors arbitration. But before the Act's heavy hand in favor of arbitration swings into play, the parties themselves must agree to have their disputes arbitrated. . . . [E]ven under the FAA it remains a "fundamental principle" that "arbitration is a matter of contract," not something to be foisted on the parties at all costs." Howard v. Ferrellgas Partners, L.P., 748 F.3d 975, 977 (10th Cir. 2014) (Gorsuch, J) (quoting AT & T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011). The same is true under the New Hampshire arbitration statute, RSA 542:1.

The black letter text of the parties' contract makes it clear—beyond any doubt—that the plaintiff lessee contracted for the right to bring this case in Superior Court:

> In the event that LESSEE initiates an action against LESSOR, whether by suit or by arbitration, LESSEE shall be required to bring such action in the appropriate forum in New Hampshire.

Lease Agreement, ¶41(d) (attached as Exhibit A to defendant's motion) (emphasis added). The contract expressly empowered the plaintiff to choose between a judicial and an arbitral forum.

The same freedom of choice was extended to the defendant lessors with respect to claims against the lessee arising from the lessee's default. See id. at ¶41(a):

> In the event of default on the part of the LESSEE under the terms of this Lease, LESSOR shall be entitled to choose the forum LESSOR deems appropriate for the purposes of enforcing this agreement[.] . . . LESSOR shall be able to, at LESSOR'S option, pursue collection and enforcement in the appropriate District or Superior Court, or LESSORT shall be entitled to pursue binding arbitration at LESSOR'S sole determination.

This provision of the contract only comes into play when (a) the lessors allege that the lessee is in default of its lease obligations and (b) the lessors seek a remedy for the default. In this case, there has been no default and the lessors are not seeking a remedy for default.

This court adopts and incorporates Judge Brown's reasoning in McLean Communications, LLC. v. 150 Realty, LLC et al., 216-2017-CV-703 (12/11/17). In that narrative order Judge Brown denied a nearly identical motion in a case with the same defendant lessors and identical (or virtually identical) lease language relating to dispute resolution.

MOTION DENIED.

January 2, 2018

Andrew R. Schulman,
Presiding Justice