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

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

December 5, 2018

150 REALTY, LLC and
HARBOUR LINKS ESTATES, LLC

By their attorneys

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I. Arbitrability Should Have Been Decided By the Arbitrator

Plaintiffs acknowledge "the principle that the incorporation of the AAA rules constitutes clear and unmistakable evidence of the parties' agreement that the arbitrator will decide the issue of arbitrability." Plaintiffs' Appeal Brief ("Pls.' Br.") 18. Courts overwhelmingly apply this principle, as recognized in cases cited by Plaintiffs. Id. at 21-23. Yet, relying solely on one quote from James & Jackson LLC v. Willie Gary, LLC, 906 A.2d 76, 80-81 (Del. 2006), Plaintiffs argue the principle does not apply here, and instead "applies only where the arbitration clause at issue generally refers all controversies to arbitration." Pls.' Br. 20-21. Plaintiffs' argument is misplaced.

First, the Arbitration Clause in the Leases does "generally refer all controversies" pertaining to the Leases to arbitration. Subsection (b) of the Clause is explicit that when the lessor "decides to submit any dispute between the parties pertaining to the Lease to binding arbitration," then "said arbitration [will] be governed under the rules of the [AAA]." App. at 318 (emphasis added). "Any dispute" means what it says – any dispute or controversy between the lessor and lessee. The parties' underlying claims pertain to the Leases. Moreover, the instant dispute over the interpretation of the Arbitration Clause likewise is a dispute "pertaining to the Lease[s]." Subsection (b) delegates all these issues, including disputes over who should decide arbitrability, to the arbitrator.

Second, Plaintiffs neglect to point out that other jurisdictions have rejected James & Jackson in its entirety. In James & Jackson, the Delaware court deviated from the majority rule that incorporation of AAA rules in an arbitration clause reflects a clear and unmistakable intent to delegate arbitrability issues to the arbitrator. See 150 Realty's Appeal Brief, 8-10 (citing cases applying majority rule); see also, e.g., Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069,

1076-77 (9th Cir. 2013). No other jurisdictions have applied the proposition suggested in James & Jackson (and advanced by Plaintiffs) that even when an arbitration clause expressly incorporates AAA rules, arbitrability still is not decided by the arbitrator unless the clause contains language providing "for arbitration of all disputes," and does not "carve out" disputes to be decided outside of arbitration. James & Jackson, 906 A.2d at 80.

For example, in Oracle, the Ninth Circuit observed that the suggestion in James & Jackson "that the federal majority rule only applies when an arbitration agreement lacks a carve-out provision does not follow from the cases [James & Jackson] cited . . . and we know of no other authority supporting this proposition." Oracle, 724 F.3d at 1076-77. In rejecting the application of James & Jackson, the Ninth Circuit held that the subject arbitration clause, which incorporated the AAA rules and called for arbitration of any claims arising out of the parties' "Source License," clearly and unmistakably delegated arbitrability issues to the arbitrator, even though the clause contained a "carve-out" allowing either party to select the forum for actions relating to the parties' "Intellectual Property Rights" or "TCK license." Id. at 1075-77; see also Hopkinton Drug, Inc. v. CaremarkPCS, LLC, 77 F. Supp. 3d 237, 249 (D. Mass. 2015) (rejecting application of James & Jackson because "[o]ther courts have persuasively questioned [its] reasoning"); Trafigura Pte. Ltd. v. CNA Metals Ltd., 526 S.W.3d 612, 619 (Tex. Ct. App. 2017) (refusing to apply James & Jackson and holding that exception to permit interim judicial relief does not indicate that parties did not intend to delegate arbitrability questions).

Even cases applying Delaware law have rejected the broad application of James & Jackson's "general reference" requirement, like that proposed by Plaintiffs. A subsequent Delaware Chancery Court decision, McLaughlin v. McCann, 942 A.2d 616, 624-25 (Del. Ch. 2008), explains that James & Jackson did not intend to establish a rule requiring that arbitration

clauses "refer all disputes to arbitration without exception." The McLaughlin court reasoned that such a requirement would mean that incorporation of AAA rules would have no independent weight when determining whether the parties intended to arbitrate arbitrability, and would defeat the efficiency rationale of the majority view. Id. Instead, the McLaughlin court held that James & Jackson merely concluded that the majority rule will not apply if "the carve-outs and exceptions to committing disputes to arbitration . . . [are] so obviously broad and substantial as to overcome a heavy presumption" that the parties intended to delegate arbitrability issues to the arbitrator. Id. at 625; see also Promptu Sys. Corp. v. Comcast Corp., No. 2:16-cv-06516, 2017 WL 4475966, at *5 (E.D. Penn. May 18, 2017) (accepting the McLaughlin approach and holding that arbitration clause excepting intellectual property claims did not overcome the presumption that reference to AAA rules required arbitrator to resolve arbitrability disputes).

Similarly, in another case, the Delaware Chancery Court held that a provision in an arbitration clause, which allow parties to seek ancillary relief from a court to protect their interests during the pendency of arbitration, was narrowly tailored and therefore did "not provide the same boundless and independent access to judicial relief" as in James & Jackson. Baypo Ltd. P'ship v. Technology JV, LP, 940 A.2d 20, 26-27 (Del. Ch. 2007); see also ASUS Computer Int'l v. InterDigital, Inc., No. 15-cv-0176-BLF, 2015 WL 5186462, at *5 (N.D. Cal. Sept. 4, 2015) (finding incorporation of AAA rules expressed intent to delegate arbitrability issues to the arbitrator, even though the arbitration clause included permissive language allowing parties to select judicial action if the arbitration clause was not triggered).

Here, the "carve-outs" specified by Plaintiffs – a provision recognizing the lessor's right to pursue prejudgment attachment remedies in court, and a forum selection clause (discussed below) governing the initiation of actions by the lessee – are not so substantial as to defeat the

obvious intent reflected in the Leases to delegate issues of arbitrability to the arbitrator. This is evidenced by the plain language in subsection (b) applying AAA rules to "any dispute pertaining to the Lease." Plaintiffs cite no authority to suggest that any provision of the Arbitration Clause should preclude a finding of intent to delegate arbitrability to the arbitrator. Indeed, as discussed above, cases Plaintiffs cite as being consistent with their interpretation of James & Jackson (see Pls.' Br. 21-23) actually reject such an overbroad application. See McLaughlin, 942 A.2d at 624-25; Oracle, 724 F.3d at 1076-77; Hopkinton, 77 F. Supp. at 249. Accordingly, arbitrability of the parties' dispute should have been decided by the arbitrator.

II. The Arbitration Clause Mandates Arbitration of the Parties' Dispute

Had the trial courts allowed the arbitrator to decide the threshold issue of arbitrability (as called for by the AAA rules), the trial courts would not have reached the separate question of whether the parties' dispute is within the scope of the Arbitration Clause. In any case, the trial courts erred in concluding that the Arbitration Clause does not apply.

A. The Parties' Dispute Arises Under the Leases

Subsection (b) of the Arbitration Clause is unequivocal: if the lessor "decides to submit any dispute between the parties pertaining to [the Leases] to binding arbitration," the lessor "shall have the right to select an arbitrator from the [AAA]." App. at 318 (emphasis added). The underlying dispute unquestionably "pertains" to the Leases, which is why each Plaintiff asserted claims against 150 Realty for breach of the Leases. Plaintiffs have not identified any justification for not affording the terms "any dispute" and "pertaining" their plain, ordinary meaning.

In arguing that subsection (b) does not apply, Plaintiffs contend the parties' claims relate solely to 150 Realty's ability to introduce fees under its updated parking rules. Pls.' Br. 31.

Plaintiffs then argue the rules "were not part of the terms of the Leases," such that a dispute over the rules does not pertain to the Leases. Pls.' Br. 29-31. Plaintiffs' argument misses the mark for several reasons. First, this dispute does arise under the Leases. It concerns the scope of Plaintiffs' parking rights under the Leases, and whether the lessor has the authority under the Leases to assign common spaces to tenants and implement other parking control measures.

Second, each Plaintiff asserts claims alleging that 150 Realty's actions breached the Leases. Given this, Plaintiffs cannot plausibly argue that their claims do not "pertain" to the Leases. Third, even viewing certain of the parties' claims as directed to the validity of the updated parking rules, that issue can only be resolved by reference to the Leases, and by determining whether the rules are consistent with the parties' respective rights and obligations under the Leases. The "commonality" between the Leases and the parking rules is clear, such that any claims concerning the validity of the parking rules pertain directly to the Leases. See Private Jet Servs. Grp., Inc. v. Marquette University, No. 14-cv-436-PB, 2015 WL 2228041, at *2 (D.N.H. May 12, 2015).

Plaintiffs' attempt to distinguish Private Jet Services is not persuasive. Plaintiffs argue that in this case, unlike in Private Jet: (a) the Leases exist independently of the updated parking rules; (b) the updated parking rules do not reference the Leases; (c) the updated rules were created after the Leases; and (d) the Leases have an integration clause. Pls.' Br. 30-31. These distinctions, to the extent they exist at all, are not meaningful. The outcome in Private Jet turned on the court's conclusion that, because there was enough "commonality" between a services contract and separate escrow agreement, the arbitration clause in the escrow agreement governed a dispute under the services contract. Id. This reasoning applies with greater force here. The Leases and parking rules were created separately, but the Leases expressly anticipate the

subsequent creation of the parking rules. Moreover, the content of the parking rules is dictated by the parking rights in the Leases. Simply put, the Leases call for the parking rules, and the parking rules would not exist without the Leases. Given this, the fact that the Leases contain a standard integration clause and were created prior to the parking rules, is irrelevant.

B. Subsections (a) and (b) Provide Two Distinct Triggers of Arbitration Rights

Plaintiffs argue that 150 Realty's interpretation of subsection (b) would render subsection (a) meaningless, and that the two clauses must be read together to apply only where the lessee is alleged to have breached the Lease. Pls.' Br. 28. This is incorrect.

First, by its terms, subsection (b) allows the lessor to submit to arbitration "any dispute" pertaining to the Leases. App. at 318. A dispute pertaining to the Lease can exist without a breach by the lessee. Subsection (b) easily encompasses disputes over the interpretation of the Leases, including disputes over the scope of the lessees' and lessor's respective rights and obligations under the Leases. Allowing the lessor, under subsection (a), to select the forum for bringing enforcement and collection actions once a default by the lessee has occurred is not in any respect inconsistent with allowing the lessor, under subsection (b), to submit other disputes pertaining to the Lease to arbitration. Furthermore, subsection (b), unlike subsection (a), applies to the separate situation (discussed below) where the lessee first initiates an action in court pursuant to subsection (d). In such cases, the lessor has the unqualified right, under subsection (b), to have the action resolved through arbitration.

Furthermore, subsection (a) was triggered in this case. 150 Realty's arbitration demands asserted breach of contract claims requiring resolution of the same issues as Plaintiffs' claims against 150 Realty. 150 Realty sought declaratory relief concerning the lessor's rights under the

Leases to control parking, and also asserted claims of breach of contract and anticipatory breach of contract based on Plaintiffs' refusal to comply with 150 Realty's parking rules.

Finally, as set forth in 150 Realty's Opening Brief, given the "presumption of arbitrability," the question is not whether it is possible to read subsections (a) and (b) together as applying only to prior lessee defaults. Instead, the question is whether it can be said with "positive assurance that the contract is not susceptible of an interpretation that covers the dispute." State v. Philip Morris USA, Inc., 155 N.H. 598, 604 (2007). No such "positive assurance" exists here.

C. Subsection (d) Does Not Operate Independently of Subsection (b)

Plaintiffs also rely on subsection (d) of the Arbitration Clause to argue that 150 Realty may not elect arbitration if the lessee first initiates an action in court. Subsection (d), however, neither expressly nor impliedly overrides the lessor's right under subsection (b) to choose arbitration.

Subsection (d) is simply a forum selection clause. It requires the lessee, if it "initiates an action" against the lessor by suit or arbitration, to bring the action in "the appropriate forum in New Hampshire." App. at 318. Reading subsections (b) and (d) together, a lessee may initiate an action in New Hampshire, but by doing so, the lessee does not circumvent the lessor's express right under subsection (b) to submit the same dispute to binding arbitration.

Even when an arbitration clause uses permissive language to allow a party to select a forum, such language does not override the other party's right to compel arbitration if and when that party chooses to exercise that right. See Chiarella v. Vetta Sports, Inc., No. 94 Civ. 5933, 1994 WL 557114, at *3 (S.D.N.Y. Oct. 7, 1994). Any interpretation to the contrary would render the arbitration provision meaningless. Id.; see also In re Winstar Commc'ns, Inc.,

335 B.R. 556, 563-64 (Bankr. D. Del. 2005) ("The word 'may,' . . . cannot reasonably imply that either party had the option to avoid arbitration once that clause had been triggered."); Block 175 Corp. v. Fairmont Hotel Mgmt. Co., 648 F. Supp. 450, 452 (D. Colo. 1986) ("Plaintiff contends the presence of the word 'may' . . . renders arbitration permissive and not mandatory. A common sense reading of the clause belies this contention. When either party elects to arbitrate and serves the proper notice, as was done here, then arbitration must ensue.").

Similarly, whether Plaintiffs file an action in court before lessor exercises its arbitration rights is irrelevant.[1] The arbitration provision cannot reasonably be read to permit simultaneous litigation and arbitration of the same dispute. See, e.g., Kingstown Corp. v. Black Cat Cranberry Corp., 839 N.E.2d 333, 337-38 (Mass. App. Ct. 2005) (rejecting interpretation of arbitration clause that would allow for simultaneous litigation on the same contract, interpretation would "obviously lead to the undesirable result of inconsistent determinations leading to a further dispute"); Mentor Capital, Inc. v. Bhang Chocolate Co., No. 3:14-CV-3630, 2014 WL 6485666, at *4 (N.D. Cal. Nov. 19, 2014) (party's right to compel arbitration was not foreclosed by opponent's prior filing of a lawsuit; recognizing that compelling arbitration after a lawsuit is filed is a common occurrence).

CONCLUSION

For the these reasons, and those stated in full in 150 Realty's opening brief, 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.

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[1] Notably, however, 150 Realty filed its demands for arbitration against At Comm and ITNH on September 29 and December 1, 2017, respectively. App. at 93, 426. 150 Realty's selection of arbitration was therefore prior to At Comm and ITNH filing their complaints on October 5 and December 20, 2017, respectively. App. at 175, 472.

Respectfully submitted,

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HARBOUR LINKS ESTATES, LLC

By their attorneys,

Dated: December 5, 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.

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