

Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

MOHAMMED SUID,) S. Ct. Civ. No. 2020-0017
Appellant/Plaintiff,) Re: Super. Ct. Civ. No. 349/2018 (STT)
)
v.)
)
LAW OFFICE OF KARIN A. BENTZ,)
P.C. and KARIN A. BENTZ,)
Appellees/Defendants.)
)
)
)
)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Denise M. Francois

Considered and Filed: February 19, 2021

Cite as: 2021 VI 1U

BEFORE: RHYS S. HODGE, Chief Justice; MARIA M. CABRET, Associate Justice; and
IVE ARLINGTON SWAN, Associate Justice.

APPEARANCES:

Lee J. Rohn, Esq.
Rhea Lawrence, Esq.
Lee J. Rohn & Associates, LLC
St. Croix, U.S.V.I.
Attorneys for Appellant,

Charlotte K. Perrell, Esq.
Dudley Newman Feuerzeig LLP
St. Thomas, U.S.V.I.
Attorneys for Appellees.

ORDER OF THE COURT

PER CURIAM.

¶ 1 **THIS MATTER** comes before the Court pursuant to a motion for stay pending appeal,

filed by Appellant Mohammed Suid, requesting that this Court stay the arbitration hearing scheduled for February 22-24, 2021, pursuant to the January 29, 2020 order of the Superior Court. Also before the Court is the opposition filed by Appellees Law Office of Karin A. Bentz, P.C., and Karin A. Bentz, Esq., to that motion.

¶ 2 “To determine whether a litigant is entitled to a stay pending appeal, this Court considers: (1) whether the litigant has made a strong showing that he is likely to succeed on the merits; (2) whether the litigant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.” *In re Najawicz*, S. Ct. Crim. Nos. 2008-0098, 099, 2009 WL 321342, at *3 (V.I. Jan. 8, 2009) (unpublished). Nevertheless, “[t]he first of these factors is ordinarily the most important.” *Rojas v. Two/Morrow Ideas Enterprises, Inc.*, S. Ct. Civ. No. 2008-0071, 2009 WL 321347, at *2 (V.I. Jan. 22, 2009) (unpublished) (citing *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)).

¶ 3 We conclude that Suid has met his burden.¹ With respect to the first factor—likelihood of success on the merits—the record reflects that in its January 29, 2020 order, the Superior Court denied as moot Suid’s motion under Rule 60(b) of the Virgin Islands Rules of Civil Procedure,

¹ Appellees argue that this Court should not consider the motion because Suid has purportedly failed to comply with Rule 8 of the Virgin Islands Rules of Appellate Procedure, which specifies that requests for a stay pending appeal “must ordinarily be made in the first instance to the Superior Court,” and should be made directly to the Supreme Court only if the movant is able to “show that application to the Superior Court for the relief sought is not practicable, or that the Superior Court has denied an application, or has failed to afford the relief which the applicant requested.” V.I. R. APP. P. 8(b). The record, however, reflects that Suid filed a stay motion with the Superior Court on July 24, 2020, which has not been ruled on despite being pending for nearly seven months. Because the Superior Court has not issued a ruling on the motion, we conclude that Suid has made a sufficient showing that the Superior Court is not likely to afford him with the relief he has requested before the February 22-24, 2021 arbitration hearing.

which had been filed on January 31, 2019. The Rule 60(b) motion requested that the Superior Court set aside its prior order dismissing the complaint and referring it to arbitration on grounds that when arbitration was subsequently initiated in accordance with that order, the American Arbitration Association (“AAA”), in a January 23, 2019 letter, declined to administer the arbitration and closed the matter due to Appellees’ failure to pay the filing fee, and in a prior December 12, 2018 letter had advised the parties that “should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.”

¶ 4 The Superior Court did not consider Suid’s waiver argument on the merits, but instead denied the Rule 60(b) motion as moot because Appellees initiated a new arbitration proceeding on September 19, 2019, nearly nine months after the initial arbitration proceeding had been dismissed and the Rule 60(b) motion had been filed. Numerous courts, however, have held that a party who demands arbitration under an arbitration agreement, but then refuses to pay the arbitration filing fee resulting in dismissal or closure of the arbitration procedure, has committed a material breach of the arbitration agreement and waived its right to compel arbitration.² See, e.g., *Freeman v. SmartPay Leasing, LLC*, 771 Fed. Appx. 926 (11th Cir. 2019); *Pre-Paid Legal Services, Inc. v. Cahill*, 786 F.3d 1287 (10th Cir. 2015); *Brown v. Dillard’s, Inc.*, 430 F.3d 1004 (9th Cir. 2005);

² In their opposition, Appellees justify their failure to pay the filing fee and otherwise participate in the arbitration proceeding on Suid’s alleged failure to participate in mediation prior to arbitration, as is also provided for in the parties’ agreement. However, the record reflects that after Suid filed his complaint in the Superior Court, Appellees filed a motion to compel arbitration without requesting mediation, and the Superior Court, in granting that motion, ordered that the matter to proceed to arbitration, also without ordering that mediation occur first. Therefore, it appears that Appellees waived the mediation requirement by requesting that the Superior Court only enter an order compelling arbitration. Moreover, the record reflects that Appellees advised the AAA in a December 11, 2018 letter of their position that arbitration should not occur until after mediation, yet the AAA still issued correspondence on December 12, 2018, and January 4, 2019, directing Appellees to pay the filing fee and advising that resolution of other issues would be deferred until the filing requirements were met.

Sanderson Farms, Inc. v. Gatlin, 848 So.2d 828 (Miss. 2003). Moreover, the courts that have considered the question have also held that a party who has breached the arbitration agreement by failing to pay the arbitration filing fee cannot undo or cure that breach by initiating a second arbitration proceeding and paying the fee in that matter. *See, e.g., Bruzda v. Sonic Automotive*, 2017 WL 5178967, *5 (D. Colo. Jan. 23, 2017) (unpublished) (“Defendant’s willingness to pay fees in [the second] case is insufficient to overcome the prior default.”); *Norgren, Inc. v. Ningbo Prance Long, Inc.*, 2015 WL 5562183, at *10 (D. Colo. Sept. 22, 2015) (unpublished) (“NPL argues that *Pre-Paid Legal Services* is not controlling because NPL has paid its required fees in the Second Arbitration and is not in default in that particular proceeding. This argument, however, is squarely at odds with the Tenth Circuit’s unambiguous statement that ‘a party’s failure to pay its share of arbitration fees breaches the arbitration agreement and precludes any subsequent attempt by that party to enforce that agreement.’”) (quoting *Pre-Paid Legal Servs., Inc.*, 786 F.3d at 1294); *Fire Ass’n of Philadelphia v. Appel*, 80 N.E. 952, 955 (Ohio 1907) (“When one arbitration fails from default of one of the parties, the other is not bound to enter into a new arbitration agreement.”). Although these authorities are not binding on this Court, they are persuasive, and it is therefore likely that Suid will prevail on appeal.

¶ 5 Although the likelihood of success on the merits is the most important factor and supports a stay, the remaining three factors cognizable on a stay application also support granting the motion in the present case. Absent a stay, Suid will be compelled to devote his time to participate in an arbitration proceeding that likely should not occur, a harm which could not be cured by this Court at a later date by reversing the January 29, 2019 order. A stay would also not harm Appellees, and in fact may benefit them, in that they, too, will not be required to participate in an arbitration proceeding that would ultimately prove completely meaningless were this Court to reverse the

January 29, 2019 order. A stay would also serve the public interest, in that were this Court to deny the stay but ultimately reverse the January 29, 2019 order at a later date, the failure of this Court to fashion an appropriate remedy to “undo” an arbitration proceeding that should never have happened may cause the public to lose some confidence in the administration of justice in the Territory.

¶ 6 For the foregoing reasons, Suid has met his burden of demonstrating that he is entitled to a stay pending appeal in this case. Accordingly, it is hereby

ORDERED that the motion for a stay pending appeal is **GRANTED**, and that all action in AAA Case No. 01-19-0003-0079, including the February 22-24, 2021 hearing, is stayed pending resolution of this appeal. It is further

ORDERED that copies be directed to the appropriate parties.

SO ORDERED this 19th day of February, 2021.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Jessica Grant
Deputy Clerk II

Dated: February 19, 2021

Copies to:

Justices of the Supreme Court
The Honorable Denise M. Francois, Superior Court Judge
Lee J. Rohn, Esq.
Rhea R. Lawrence, Esq.
Charlotte Perrell, Esq.
Veronica J. Handy, Esq., Clerk of the Supreme Court
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