

IN THE CIRCUIT COURT OF ~~LAFAYETTE COUNTY~~ LAFAYETTE COUNTY, MISSISSIPPI

**FILED**

JONES, FUNDERBURG, SESSUMS,  
PETERSON & LEE, PLLC

JUN 27 2007

PLAINTIFF

V.

BY Mary Alice Busby ~~CIRCUIT CLERK~~ **OUR** D.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 SUPPLEMENTAL MEMORANDUM BRIEF IN RESPONSE  
TO MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION**

Plaintiff Jones, Funderburg, Sessums, Peterson, & Lee, PLLC (hereinafter "Plaintiff"), by and through counsel, submits this Supplemental Memorandum Brief in opposition to Defendants' Motion to Stay Proceedings and Compel Arbitration.

**INTRODUCTION**

Since the submission to this Court of the original briefs by the Plaintiff, additional issues have arisen. These issues add weight to the Plaintiff's position and are supported by newer, additional facts and authority. The Defendants have already waived arbitration by their actions. There are even more reasons that arbitration is not appropriate.

The Mississippi Supreme Court addressed the scope of arbitration agreements in its June 14, 2007, opinion Smith v. Captain D's, LLC, 2007 Miss. LEXIS 343 (Miss. 2007). The dispositive issue in Smith was whether the parties' dispute was within the scope of the arbitration agreement. Plaintiff asserts in its First Amended Complaint causes of action that fall outside the scope of the arbitration agreement, and, therefore, support Plaintiff's contention that arbitration is not appropriate.

Since the time that Plaintiff brought suit against Defendant Scruggs, individually, and against

his law firm, actions taken by Defendant Scruggs on behalf of the joint venture have become the focus of a criminal contempt investigation ordered by a federal judge in Alabama. A copy of the Order and its Memorandum Opinion are attached as Exhibits A and B. Members of Plaintiff firm may be witnesses to ethical violations that not only will have an impact in the Alabama criminal investigation, but may become evidence in support of the claims brought here by Plaintiff. Actions taken by Scruggs have caused State Farm Ins. Co. to seek removal of Scruggs and all partner law firms in the joint venture from further representation in some Katrina litigation against State Farm. A copy of the Motion is attached as Exhibit C. This may further impact Plaintiff and its right to recover damages - that is, depriving Plaintiff its share of future joint venture profits derived from representation of Katrina plaintiffs against State Farm.

Plaintiff incorporates its arguments from its previous briefs, in particular the assertion that Defendants impliedly and expressly waived their right to arbitration. These additional arguments bolster Plaintiff's assertion that this case should be in a Mississippi court.

### ARGUMENT

In Smith v. Captain D's, LLC, the plaintiff Smith and her guardian signed an employment agreement with her employer Captain D's. 2007 Miss. LEXIS 343 at \*1-3 (Miss. 2007) ("Smith"). After being assaulted and raped by another employee named Howell during work hours, Smith brought causes of action for negligence in hiring, supervising, and retention of Howell. Id. at \*4. The Captain D's employee agreement included an arbitration provision. Id. at \*10-11. The Smith case squarely addresses the issue of whether the parties agreed to arbitrate the dispute. Id. at \*6.

Plaintiff in the case sub judice now brings forth this same issue and states definitively that many of its causes of action fall outside of the scope of the arbitration provision in the Joint Venture

Agreement (“Agreement”).

When confronted with arbitration issues, the court must first determine whether the parties have agreed to arbitration of the dispute and if it is determined that they have, then a determination must be made as to whether legal constraints external to the parties' agreement foreclosed arbitration of those claims. Smith at \*8 (internal quotations omitted). This first prong has two sub-factors: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement. Id. The court analyzes whether a reasonable person would have agreed to arbitrate the disputes. Id. at \*9. Here there are issues as to whether or not the Agreement is unconscionable because of its removal provision.

While there is a strong and liberal federal policy favoring arbitration agreements, such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract. Id. at \*7. The court analyzed the provision in the agreement and characterized it as either being “broad” or “narrow.” Id. at \*11. Language in the contract provision in Smith was quoted as being “any and all previously unasserted claims, disputes, or controversies arising out of or relating” to the employment agreement. Id. at 10. Because broad arbitration language is capable of expansive reach, courts have held that it is only necessary that the dispute “touch” matters covered by the contract to be arbitrable. Id. at 12.

Ultimately, the Mississippi Supreme Court recognized the breadth of the language in the arbitration provision, but found that the causes of action as alleged in Smith’s complaint fell outside the scope of the arbitration agreement - that is, that Smith’s claim of sexual assault resulting in causes of action for negligent hiring, supervision, and retention of the alleged rapist did not pertain to nor had a connection with Smith’s employment. Id. at \*12-13.

The Smith case follows the court's decision this year in Rogers-Dabbs Chevrolet-Hummer v. Blakeney, 950 So. 2d 170 (Miss. 2007) ("Rogers-Dabbs"). In Rogers-Dabbs, the plaintiff had executed a purchase agreement that included an arbitration provision in which the parties agreed to arbitration of "all claims, demands, disputes or controversies of every kind or nature between them arising from, concerning or relating to" the transaction, including negotiations, financing arrangements, extended warranties, performance of the vehicle, "or any other aspect of the vehicle and its sale, lease, or financing." Smith at \*8-9. The court in Rogers-Dabbs found that while the purchaser no doubt had agreed to arbitrate claims originating from or relating to the sale of vehicle, **no reasonable person would agree** to submit to arbitration any claims concerning a vehicle to which he would never receive title, a scheme of using his name to forge vehicle titles and bills of sale to sell stolen vehicles, and the commission of civil fraud against him by misappropriating his title to the vehicle he purchased and forging his name on fake titles and bills of sale on various stolen vehicles. Id. at \*9-10. (emphasis added). No reasonable person would agree to submit to arbitration the fraudulent, capricious, and unconscionable acts of the Defendants in this situation.

When conducting its two-pronged analysis of arbitrability, the court must not consider the merits of the underlying action. Primerica Life Ins. Co. v. Brown, 304 F.3d 469, 471 (5th Cir. 2002). But the analyses in both Smith and Rogers-Dabbs were based on the causes of action filed and the factual claims that supported them. The Mississippi Supreme Court clearly used an objective, reasonable person standard.

In the case sub judice, Plaintiff and Defendants signed a joint venture agreement ("Agreement") that brought the Scruggs Katrina Group into existence. The Agreement included an arbitration provision that states, in its entirety:

Disputes - Any dispute arising under or relating 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.

Joint Venture Agreement, p. 3. Plaintiff here has stated claims that do not “touch” matters within the contract, that is, the instant case includes causes of action outside of and unrelated to the Agreement which brought the Scruggs Katrina Group into existence.

Each firm was a partner in the partnership. The group was brought into existence upon the signature of a representative attorney for each firm. The partnership was not comprised of any individual attorney, but the firms to which the attorneys belonged. Plaintiff goes beyond suing each individual firm as a partner of the SKG and includes individual causes of action against Richard “Dickie” Scruggs and Don Barrett.

With the exception of a thirty-five percent (35%) share of the profits to be taken by Defendant Nutt & McAlister for funding the joint venture, the Agreement was silent as to the share of profits to be shared among the other partner law firms. Under the undisputed facts and Mississippi law, all partners were thus entitled to equal shares of all profits from the venture.

In December 2006, individual Defendants Scruggs and Barrett conspired among themselves and others to set Plaintiff’s fee allocation at a ridiculously low portion of the net earnings of the Joint Venture from the State Farm settlement. See First Amended Complaint (“FAC”), p. 5, para. 20. After substantial performance by Plaintiff from October 2005 through all pertinent times during which substantial legal work was logged, Defendant Scruggs called Jones on December 6, 2006 and dictated Scruggs’s “decision” on a division of attorney fees. FAC, p. 5, para. 21. Scruggs told Plaintiff that it would receive one payment of \$1,000,000 to be paid by Defendant Nutt **outside the**

venture and that Plaintiff would then be paid nothing else. FAC, p. 5, para. 22. (emphasis added). Defendant Scruggs told Jones that Scruggs and his firm would pay nothing for Plaintiff's share and that Defendants **Scruggs, Barrett and Nutt had agreed** to split approximately \$26,500,000 in fees from the State Farm settlement by each defendant taking 32% but paying nothing to Plaintiff nor Defendant Lovelace. FAC, p. 6, para. 23. (emphasis added).

Over the following three months, Defendant law firms and **the individually-named Defendants attempted to leverage, bully and cajole Plaintiff** into taking less than what Plaintiff was rightfully due in legal fees under the common law and Mississippi statutory law governing division of income in a joint venture when no percentages are set. FAC, pg. 6, para. 25. (emphasis added). Further, Defendants began a course of conduct intended to "freeze out" Plaintiff from further involvement in the Joint Venture. FAC, p. 6, para. 27. Plaintiff raised matters in an SKG meeting relevant to the criminal contempt proceedings, which, proof will show, directly led to the intentional "freeze out" and marginalization of Plaintiff's right of equal control in the management of SKG affairs.

At the March 2, 2007 meeting of the joint venture, Defendants Scruggs, Barrett, Nutt, and Lovelace (via telephone) informed Plaintiff representatives Jones and Funderburg that the meeting was intended to force Plaintiff to take a sum determined by the other venturers or the Plaintiff would face immediate termination of all further involvement. FAC, pp. 8-9, para. 43. Defendant Barrett in bad faith demanded that Plaintiff accept a six percent (6%) share of the fees earned by the Joint Venture in a take-it-or-leave-it fashion and in a further act of bad faith stated that failure to accept the "offer" would result in immediate termination and the withholding of funds to which even the Defendants admitted Plaintiff was entitled. FAC, p. 9, para. 44. From that day to the present,

Defendants have paid nothing to Plaintiff for their seventeen (17) months of concentrated work on behalf of the joint venture.

Plaintiff has sued Defendant Scruggs as an individual and not as a partner of the SKG (the Scruggs Firm is the partner, not Scruggs himself). One of Plaintiff's causes of action is based on the fact that Scruggs has done this in the past to other members of other joint ventures entitling Plaintiff to punitive damages from Scruggs as an individual. See FAC, p. 11, paras. 61-63. Don Barrett has engaged in the same type of conduct on multiple occasions where he would engage and be a part of a joint venture to pursue wrongful conduct by tortfeasors on behalf of various clients and when funds became available for distribution would attempt to renegotiate or shortchange his joint venturers. FAC, p. 11, para. 64. As will be shown in discovery, the Defendant Nutt has also engaged in the same type of conduct. The distinction in this case is that this Plaintiff refused and rejected such a post-settlement, post-fee-generation attempt by Scruggs and Barrett to avoid paying a fair share of the venture profits while some of the previous victims were not in a position to decline and seek redress. As a direct consequence of such refusal, the Plaintiff was summarily ejected from the venture and deprived of any and all recovery for their work on behalf of the joint venture. It is the intention of Plaintiff to expose and forever stop this modus operandi of the individual defendants.

Causes of action stated in the FAC that go beyond and do not "touch" the contract include claims for conspiracy, usurpation, conversion, fraud, and constructive trust, among others. The fraud claim is, in part, a cause of action against Scruggs and Barrett, individually. FAC, p. 17, para. 144. A claim for constructive trust is extra-contractual in this case and a creature of statute. That is, Miss. Code Ann. § 79-13-404 (b)(1) states that a partner's duty of loyalty to the partnership and the other partners includes to account to the partnership and **hold as trustee for it any property, profit, or**

**benefit derived by the partner in the conduct** and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity. And, while the duty of good faith and fair dealing attends all contracts interpreted under Mississippi law, see Baker, Donelson, Bearman & Caldwell, P.C. v. Muirhead, 920 So. 2d 440, 451 (Miss. 2006), these duties also arise under the Uniform Partnership Act. See Miss. Code Ann. § 79-13-404 (d). But it is the statutory duty of loyalty that was breached when the Plaintiff was denied its fair share of profits derived the work of the group. See Miss. Code Ann. §§ 79-13-404 (b) and 79-13-401 (b) (stating that each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits).

As well, Plaintiff demands punitive damages from Richard Scruggs and Don Barrett as individuals. The law firms of Scruggs and of Barrett act as the partners of the joint venture partnership. But these causes of action are against the defendants as individuals. The punitive damages requested would be for such an amount as would deter such conduct in the future and would serve as an example to others that such conduct would not be tolerated. FAC, p. 20, para. 137. The facts will show that such conduct has been a practice by these individual defendants in the past and punitive damages should be awarded in such an amount that would deter these two tortfeasors and others from engaging in such conduct in the future. Id.

In its Complaint, Plaintiff also claims that **Defendant Scruggs** engaged in various activities such as the wrongful expenditures of funds belonging to the joint venture including the unauthorized hiring of personnel for SKG without approval of all members of SKG and continued to do so without authority. FAC, p. 8, para. 38. (emphasis added). Many details of these acts came to light June 15, 2007, when Defendant Scruggs was referred by District Judge William M. Acker, Jr., to the United

States Attorney for the Northern District of Alabama for prosecution for criminal contempt. See Order, p. 1, attached as Exhibit A, and Memorandum Opinion, attached as Exhibit B.

Judge Acker, in a case styled E.A. Renfroe & Co., Inc., v. Moran et al in the northern district of Alabama, requested that the United States Attorney for the Northern District of Alabama prosecute the criminal contempt of non-parties Richard F. Scruggs and the Scruggs Law Firm. Ex. A, p. 1. If the government declines this request, Judge Acker stated that he will appoint another attorney to prosecute Scrugg's criminal contempt. Id. Judge Acker, citing testimony presented at a contempt hearing, states definitively that in **July 2006**, Cori Rigsby Moran and her sister Kerri Rigsby ("Rigsbys" or "the sisters") became paid consultants for the Scruggs Katrina Group. Ex. B, p. 3. Judge Acker states that Scruggs (not the SKG) became the sisters' attorney in February 2006. Id. at 2.

Scruggs did not inform Plaintiff as a member of the SKG until Oct. 6, 2006 that he wanted the sisters to work for the SKG. Before the meeting on Oct. 6, 2006, an agenda was prepared and circulated by Sid Backstrom that included agenda item number #3 - "The Girls." That meeting was attended by Steve Funderburg, John Jones and Stewart Lee on behalf of Plaintiff. At the meeting, whether the SKG could ethically pay the sisters was raised as an issue and Scruggs said that he had told the sisters that the SKG would "take care of them." No amount was discussed. Plaintiff was not told that the sisters had already been paid by Scruggs and were on his firm's payroll as of the date of the meeting at which the issue of paying them was first brought before the group. Plaintiff was also not told when the group was expected to start paying the sisters, how they would be paid, and what service they would purportedly perform to each such pay. Scruggs simply stated that the sisters had taken great risk and he felt a personal obligation to them and that Scruggs expected the group

to share the expense because he had already told Moran and Rigsby that he would “take care of them.” The ethics over paying material witnesses was again raised and the group decided an opinion letter would be sought from Mississippi attorney Cham Trotter. No opinion letter was ever received, or, as far as Plaintiff knows, requested. Then, in January 2007, when Plaintiff received a partial accounting from the SKG, an expense of \$150,000 per sister was listed as an expenditure. Plaintiff immediately raised an objection, again questioning whether the group ethically could employ the sisters. No response to this objection and inquiry was ever received from Defendants, and Defendants’ efforts to “freeze out” Plaintiff were redoubled.

Judge Acker stated succinctly in his Order: “Scruggs is an experienced attorney and an officer of the court. His brazen disregard of the court’s preliminary injunction is precisely the type of conduct that criminal contempt sanctions were designed to address.” Id. pp. 19 - 20. Actions by Don Barrett in the Renfroe litigation were questionable as well. Judge Acker found that Defendant Don Barrett on Jan . 27, 2007, as a member of the Scruggs Katrina Group, called counsel for Renfroe - the former employer of the sisters and the plaintiff in Renfroe v. Moran and offered to turn over additional documents as part of a settlement offer. Exhibit B, pp. 9, 24. But Judge Acker did not find Barrett in criminal contempt. Id.

As a result of Scruggs’s actions, on June 19, 2007, State Farm in a case styled McIntosh v. State Farm, moved to disqualify not only Scruggs and the Scruggs Law Firm from representation in that suit, but the entire Scruggs Katrina Group. See Motion to Disqualify, attached as Ex. C. If the SKG is not allowed to represent the McIntoshes against State Farm, this will interfere with the profit potential to which Plaintiff was entitled. State Farm charges that Scruggs has violated multiple state and national ethical standards. Ex. C, p. 1. He testified that (1) he has had regular ex parte contacts

