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SUPREME COURT OF ARKANSAS

No. CV-21-448

FUNDING METRICS, LLC, A
DELAWARE LIMITED LIABILITY
COMPANY, D/B/A QUICK FIX
CAPITAL AND LENDINI; JOHN
DOES 1-10; AND JOHN DOES 11-20
APPELLANTS

V.

LETHA'S PIES, LLC, AN ARKANSAS
LIMITED LIABILITY COMPANY;
RHONDA GLENN, AN INDIVIDUAL;
AND TIMOHTY GLENN, AN
INDIVIDUAL, ON BEHALF OF
THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED
APPELLEES

Opinion Delivered: April 7, 2022

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. 72CV-19-1917]

HONORABLE JOHN THREET,
JUDGE

REVERSED AND REMANDED.

KAREN R. BAKER, Associate Justice

Appellant, Funding Metrics, LLC, appeals the Washington County Circuit Court's June 23, 2021 order granting class certification in a lawsuit brought by appellees Letha's Pies, LLC, an Arkansas limited liability company; and Rhonda Glenn and Timothy Glenn on behalf of themselves and all others similarly situated (hereinafter "Letha's Pies") for alleged violations of the Arkansas Securities Act.

Letha's Pies sells frozen pies to restaurants. In 2017, Letha's Pies entered into a written agreement (the "Merchant Agreement") to sell Funding Metrics \$21,900 of Letha's Pies'

future receivables in exchange for an immediate payment of \$15,000 by Funding Metrics. Pursuant to the Merchant Agreement, Funding Metrics was allowed to withdraw from Letha's Pies' depository accounts a daily amount corresponding to 11.38 percent of Letha's Pies' daily receipts. Letha's Pies also agreed to pay a one-time 8 percent origination fee. The Glens signed the agreement on behalf of Letha's Pies. The terms of the Merchant Agreement included a choice-of-law provision stating that any litigation relating to the agreement would be brought in the state or federal courts of New York. Additionally, the Merchant Agreement contained a class-action-waiver provision. Letha's Pies paid the contracted amount.

In July 2019, Letha's Pies filed a class-action complaint against Funding Metrics, claiming that it promoted and sold securities in violation of Arkansas law. Funding Metrics moved to dismiss in part based on the forum-selection provision and class-action waiver, and also asserted the Merchant Agreement was not a security. Letha's Pies amended its complaint and Funding Metrics again moved to dismiss. On February 5, 2020, the circuit court held a hearing and concluded that it was required to accept Letha's Pies' allegation that the agreement was a security. The circuit court found that the forum-selection clause was valid and required dismissal of one of Letha's Pies' claims, but that it did not apply to claims that allegedly arose before the parties entered into the Merchant Agreement. The circuit court denied Funding Metrics' request to enforce the class-action waiver based on its finding that the agreement lacked mutuality of obligation.

On February 27, 2020, Letha's Pies filed a second amended class-action complaint, the operative complaint in this appeal. Letha's Pies alleged three causes of action: (1) failure

to register the Merchant Agreement with the Arkansas Securities Department, (2) promotion of securities by an unregistered broker or dealer, and (3) fraud in connection with the sale of a security. On March 18, Funding Metrics filed a motion to dismiss the second amended complaint and motion to strike class claims arguing that it was time-barred and reiterated its arguments regarding the forum-selection clause and class waiver. Funding Metrics also contended that the expanded class was untenable.

On June 29, the circuit court denied Funding Metrics' motion to dismiss the second complaint and motion to strike. On July 14, Funding Metrics filed its answer and affirmative defenses and a counterclaim for its costs based on an indemnification clause in the agreement. After discovery, Letha's Pies moved for class certification.

On June 23, 2021, the circuit court granted Letha's Pies' motion. The court found that the waiver provision was not enforceable and certified two classes:

Predominant Class:

All Arkansas individuals and/or entities that entered into a Merchant Agreement with Funding Metrics through its subsidiaries, Quick Fix Capital and Lendini, at any time within three years prior to filing of the [Letha's Pies'] Complaint through the date of final disposition of this action.

Ancillary Class:

All Arkansas individuals and/or entities that have received communications promoting a Quick Fix Capital or Lendini Merchant Agreement at any time within three years prior to filing of the [Letha's Pies'] Complaint through the date of final disposition of this action.

From the order granting class certification, Funding Metrics appeals and argues that the circuit court abused its discretion (1) by refusing to enforce the class-action waiver in the Merchant Agreement as a bar to class certification; (2) by holding that Letha's Pies met

their burden of proving that common questions predominate and a class action is superior under Rule 23; and (3) by certifying the ancillary class, which was overbroad as defined to include class members who lack standing and suffered no harm. We reverse and remand.

II. *Law and Analysis*

A. Standard of Review

An interlocutory appeal may be taken from an order certifying a case as a class action in accordance with Arkansas Rule of Civil Procedure 23. Ark. R. Civ. P. 23. Circuit courts are given broad discretion in matters regarding class certification; we will not reverse a circuit court's decision to grant or deny class certification absent an abuse of discretion. *ChartOne, Inc. v. Raglon*, 373 Ark. 275, 283 S.W.3d 576 (2008). When reviewing a circuit court's class-certification order, this court reviews the evidence contained in the record to determine whether it supports the circuit court's decision. *Teris, LLC v. Gollither*, 371 Ark. 369, 266 S.W.3d 730 (2007). Our focus is "whether the requirements of Rule 23 are met," and "it is totally immaterial whether the petition will succeed on the merits or even if it states a cause of action." *Philip Morris Cos. v. Miner*, 2015 Ark. 73, at 3, 462 S.W.3d 313, 316 (quoting *Am. Abstract & Title Co. v. Rice*, 358 Ark. 1, 9, 186 S.W.3d 705, 710 (2004)); *Ark. Dep't of Veterans Affs. v. Mallett*, 2015 Ark. 428, at 2–3, 474 S.W.3d 861, 863. Stated another way, "we will not delve into the merits of the underlying claims when deciding whether the Rule 23 requirements have been met." *Id.* (quoting *Nat'l Cash Inc. v. Loveless*, 361 Ark. 112, 116, 205 S.W.3d 127, 130 (2005)).

B. Points on Appeal

For its first point on appeal, Funding Metrics contends that the circuit court abused its discretion by refusing to enforce the class-action waiver. At issue is the following paragraph from the Merchant Agreement:

THE PARTIES HERETO WAIVE ANY RIGHT TO ASSERT ANY CLAIMS AGAINST THE OTHER PARTY AS A REPRESENTATIVE ACTION, EXCEPT WHERE SUCH WAIVER IS PROHIBITED BY LAW AS AGAINST PUBLIC POLICY. TO THE EXTENT EITHER PARTY IS PERMITTED BY LAW OR COURT OF LAW TO PROCEED WITH A CLASS ACTION OR REPRESENTATIVE ACTION AGAINST THE OTHER, THE PARTIES HEREBY AGREE THAT: (I) THE PREVAILING PARTY SHALL NOT BE ENTITLED TO RECOVER ATTORNEY FEES AND/OR COSTS ASSOCIATED WITH PURSUING [sic] THE CLASS OR REPRESENTATIVE ACTION (NOTWITHSTANDING ANY OTHER PROVISION IN THIS AGREEMENT); AND (II) THE PARTY WHO INITIATES OR PARTICIPATES AS A MEMBER OF THE CLASS WILL NOT SUBMIT A CLAIM OR OTHERWISE PARTICIPATE IN ANY RECOVERY SECURED THROUGH THE CLASS OR REPRESENTATIVE ACTION.

The circuit court found that the waiver was void, explaining in its order that

[t]he Merchant Agreement at issue herein does not contain a mandatory arbitration provision. As such, the Federal Arbitration Act (9 U.S.C.A. § 2) does not apply. For this reason and the reasons set forth in the Plaintiffs' briefing, the class action waiver clause contained in the Merchant Agreement neither applies to this action nor is enforceable under governing Arkansas law.

Funding Metrics contends that the circuit court erred and asserts that there is no legal basis for the circuit court's refusal to hold Letha's Pies to the class-action waiver. Further, Funding Metrics asserts that the waiver is valid under Arkansas contract and security law and New York law. Specifically, Funding Metrics contends that the circuit court's reasoning conflicts with this court's holding in *Jorja Trading, Inc. v. Willis*, 2020 Ark. 133, 598 S.W.3d 1. Funding Metrics argues that under this court's precedent, the class-action-waiver provision is enforceable. In *Jorja Trading*, we upheld a class-action-waiver provision contained in an arbitration agreement. We held that class-action waivers were valid under

Arkansas law. With respect to the arbitration agreement as a whole, we held that the agreement was subject to Arkansas contract law, which we described as follows:

In Arkansas, the essential elements of a contract are: (1) competent parties; (2) subject matter; (3) consideration; (4) mutual agreement; and (5) mutual obligations. *City of Dardanelle v. City of Russellville*, 372 Ark. 486, 491, 277 S.W.3d 562, 565–566 (2008). Here, the circuit court found that the arbitration agreement was invalid because it lacked mutuality of obligations. Mutuality of obligations means “an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; thus, neither party is bound unless both are bound.” *Jordan v. Diamond Equip. & Supply Co.*, 362 Ark. 142, 153, 207 S.W.3d 525, 533 (2005). It requires that the terms of the agreement “impose real liability upon both parties.” *Independence Cty. v. City of Clarksville*, 2012 Ark. 17, at 7, 386 S.W.3d 395, 399.

Jorja Trading, 2020 Ark. 133, at 4, 598 S.W.3d at 5.

We held that “[u]nder our state-contract precedent, mutuality of obligation does not require a precisely even exchange of identical rights and obligations between the contracting parties.” *Id.* at 6, 598 S.W.3d at 6. We have also said that “[i]t is enough that the duty unconditionally undertaken by each party be regarded by the law as a sufficient consideration for the other’s promise.” *Lindner v. Mid-Continent Petroleum Corp.*, 221 Ark. 221, 244, 252 S.W.2d 631, 632 (1952). We explained that the mutuality of obligation must be based on the entire agreement, not just the arbitration clause, and “under Arkansas contract law, the failure of the appellees to receive precisely the same benefit from the arbitration agreement as appellants does not negate the entire contract’s mutuality of obligation.” *Jorja*, 2020 Ark. 133, at 8, 598 S.W.3d at 7. Further, we held that the otherwise enforceable class-action waiver was not invalidated merely because it appeared as part of an arbitration agreement.

Here, Letha’s Pies contends that the absence of an arbitration agreement and the inapplicability of the Federal Arbitration Act determines the viability of the class-action

waiver. However, in *Jorja Trading*, we specifically addressed Arkansas contract law and held that the class waiver there did not turn on application of the Federal Arbitration Act. We therefore conclude that the class-action waiver is enforceable pursuant to Arkansas contract law. Further, we are not persuaded by the argument that the waiver is inapplicable. Letha's Pies contends that the class-action waiver does not apply here because Funding Metrics is not seeking to enforce the Merchant Agreement but rather to enforce the Arkansas Securities Act. Letha's Pies contends that Funding Metrics' liability exists independently of the execution of the Merchant Agreement and neither the class-action waiver nor any of the other contract terms apply. We disagree. The parties' relationship is governed by the Merchant Agreement, and the language of the class-action waiver is broad—waiving any right to assert any claims against the other party as a representative action, except where such waiver is prohibited by law as against public policy. Also, the operative complaint here seeks rescission of the agreement, and return of fees and profits obtained under the Merchant Agreement.

Finally, we reject the argument that the waiver is invalid pursuant to Arkansas securities law. Letha's Pies relies on language in the Arkansas Securities Act that states that parties cannot waive compliance with the Act: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this chapter or any rule or order under this chapter is void." Ark. Code Ann. § 23-42-109 (Repl. 2012). The parties here, however, contracted to waive their right to pursue a class action, and there is no provision in the Arkansas Securities Act regarding class actions. Although Leitha's Pies waived its right to bring a class-action, it did not "waive compliance

with any provision . . . rule . . . or order” set forth in the Arkansas Securities Act. Accordingly, we find merit in Funding Metrics’ argument and reverse the class-certification order because the waiver is enforceable. Therefore, we do not reach the remaining points on appeal. We reverse the circuit court’s order granting class certification and remand the matter for an order consistent with this opinion.

Reversed and remanded.

Eldridge Brooks, PLLC, by: *Conner Eldridge* and *Emily A. Neal*, for appellant.

RMP, LLP, by: *Timothy C. Hutchinson*, *Larry McCredy*, *Bo Renner*, and *Lisa M. Geary*; and *Bishop Law Firm*, by: *Matt Bishop*, for appellees.