FSM SUPREME COURT TRIAL DIVISION

PACIFIC INTERNATIONAL, INC., Plaintiff, vs. THE NATIONAL GOVERNMENT OF THE FEDERATED STATES OF MICRONESIA, by and through its agency, the FSM Program Management Unit ("PMU"), Defendant.	)	CIVIL ACTION NO. 2014-046

ORDER DENYING MOTION FOR RECONSIDERATION

Beauleen Carl-Worswick
Associate Justice

Decided: August 20, 2021

APPEARANCES:

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HEADNOTES

Judgments – Alter or Amend Judgment

The court may alter or amend a judgment under Rule 59(e) on any of four grounds: 1) to correct a manifest error of law or fact upon which the judgment is based; 2) the court is presented with newly discovered or previously unavailable evidence; 3) to prevent a manifest injustice; or 4) there is an intervening change in controlling law. Pacific Int'l, Inc. v. FSM, 23 FSM R. 389, 390 (Pon. 2021).

Civil Procedure – Motions – For Reconsideration

A motion for reconsideration may not be used to marshal arguments for the first time that could have been raised before. The motion should state, with particularity, the points of law or fact the moving party contends the court overlooked or misapprehended vis a vis an attempt to reargue a question that has previously been considered and ruled upon. Pacific Int'l, Inc. v. FSM, 23 FSM R. 389, 390-91 (Pon. 2021).

Civil Procedure – Motions – For Reconsideration

A motion for reconsideration must be narrowly construed and strictly applied, in order to discourage

litigants from making repetitive arguments on the same issue that the court has already thoroughly considered. Pacific Int'l, Inc. v. FSM, 23 FSM R. 389, 391 (Pon. 2021).

Arbitration

Even if the contract as a whole is invalid, unenforceable, voidable, or void, that does not prevent a court from enforcing a specific agreement to arbitrate. Pacific Int'l, Inc. v. FSM, 23 FSM R. 389, 392 (Pon. 2021).

Arbitration

A party, that has made utmost effort to avoid arbitration, has maintained its objection to arbitrability, but when a party did not exhaust its remedies but only opposed a motion to stay litigation to enforce an arbitration agreement before the court ordered arbitration, that is not sufficient to show that the party maintained its objection to arbitrability. Pacific Int'l, Inc. v. FSM, 23 FSM R. 389, 392-93 (Pon. 2021).

Arbitration

Afer the arbitrator is chosen, a party may waive any objection to arbitrability by not objecting to the arbitrator's jurisdiction and vigorously participating in arbitration because if the party intended to preserve the right to appeal the order requiring arbitration, at a minimum, the party should have raised an objection before the arbitrator. Pacific Int'l, Inc. v. FSM, 23 FSM R. 389, 394 (Pon. 2021).

Arbitration

It would be a great waste of judicial resources to permit defendants, after fully participating in the arbitration proceeding, to essentially have a second run of the case before a trial court. That would be contrary to a primary objective of arbitration to achieve final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner. Pacific Int'l, Inc. v. FSM, 23 FSM R. 389, 394 (Pon. 2021).

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COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

I. BACKGROUND

On July 2, 2021, the court entered its Final Order Re: PII's Motion for Entry of Judgment on AAA/ICDR Arbitrators' Final Award ("Final Order on Motion to Enter Judgment on Arbitration Award"). Judgment was entered on July 6, 2021. On July 12, 2021, the FSM filed a Motion for Reconsideration. PII filed its Opposition on July 16, 2021.

II. MOTION TO RECONSIDER

A motion to reconsider is not expressly identified within the FSM Rules of Civil Procedure, instead such filings are treated as a motion to alter or amend judgment under Rule 59(e). "The Court may alter or amend a [Judgment] under Rule 59(e) on any of the following four grounds: (1) to correct a manifest error of law or fact upon which the judgment is based; (2) the Court is presented with newly discovered or previously unavailable evidence; (3) to prevent a manifest injustice; or (4) there is an intervening change in controlling law." FSM Dev. Bank v. Setik, 20 FSM R. 315, 317 (Pon. 2016) (quoting Ehsa v. FSM Dev. Bank, 19 FSM R. 421, 422 (Pon. 2014) (quoting Chuuk v. Secretary of Finance, 9 FSM R. 99, 100 (Pon. 1999))).

A motion for reconsideration may not be used to marshal arguments for the first time that could have been raised before. Setik, 20 FSM R. at 319. A motion to reconsider should state, with particularity, the points of law or fact the moving party contends the court overlooked or misapprehended vis a vis an attempt

to reargue a question that has previously been considered and ruled upon. A motion for reconsideration must also be narrowly construed and strictly applied, in order to discourage litigants from making repetitive arguments on the same issue that the court has already thoroughly considered. *Id.*

Jurisdiction to Sever and Enforce Arbitration Clause

The FSM asserts that the court committed manifest error of law in relying on Lefoldt for Natchez Regional Medical Center Liquidation Trust v. Horne, L.L.P., 853 F.3d 804, 814-15 (5th Cir. 2017) to support its finding that the court had jurisdiction to sever and enforce the arbitration clause in the parties' June 3, 2015 mediated settlement agreement. PII argues that Lefoldt is a "secondary citation" and not determinative. The court finds that Lefoldt should be confined to its facts but remains legally relevant.

The FSM submits that the court wrongly interpreted the holding in the Lefoldt matter, based on the underlying facts. In Lefoldt, a Chapter 9 bankruptcy trustee, having stepped into the shoes of defendant medical center, sued to invalidate three (3) engagement letters (dated 2009, 2010 and 2012) by which the medical center employed the plaintiff to [perform annual audit services. The medical center, as a public entity, was controlled by a board of trustees and under Mississippi's "minutes rule," all decisions of the board adopting public contracts were required to be approved by a quorum of the board by a decision, on the record.

The minutes rule is generally intended to protect the integrity of public proceedings; however, it is also a trap for the unwary, as it precludes enforcement of what otherwise may be valid contracts, for failure to comply with its inflexible requirements.[1]

The Lefoldt court discussed the pitfalls of this rule at length:

> [W]hether the minutes requirement precludes enforcement of an agreement or instead forecloses formation of an agreement, given the facts in the present case, is a close question. Horne contends, with some purchase, that "the rule accepts that a contract exists between the parties, but simply refuses to enforce the contract on public policy grounds."

Id. at 812.

> [I]n some instances, the minutes rule is not a matter of contract formation but instead a rule preventing consideration of evidence of the terms of the contract other than what is set forth in the minutes. When applied in this manner, the minutes rule seems to be one regarding validity, or more precisely, enforceability of contract terms not described in the minutes. The existence of a contract is not at issue in such a case; a meeting of the minds between the board and another party has occurred; but only the terms of the "contract" that are "contained in the minutes" are enforceable.

Id. at 812-13. "[W]e cannot say that, categorically, the Mississippi minutes requirement pertains to contract formation rather than the validity or enforceability of a contract or certain of its provisions." *Id.* at 813.

The FSM asserts that the holding of the Lefoldt case pertains to contract formation, not contract validity issues, and supports its contention that the arbitration clause herein cannot be severed from the mediated settlement agreement due to faulty contract formation. However, the distinction the Lefoldt court draws between the validity and formation of contracts in its treatment of the 2009, as opposed to the 2010 and 2012 letters of engagement, must be understood in the context of the Mississippi minutes rule, and how

[1] "[T]he minutes rule is partially in the nature of a statute of frauds or a prohibition of reliance on parol evidence to establish the terms of a contract with a public entity." Lefoldt, 863 F.3d at 811.

it acts to preclude enforcement pf contracts not stated in the record. The court dos not find that the Lefoldt court clearly differentiates between enforcement of contracts as a matter of public policy and under general contract principles.

Accordingly, this court finds that the Lefoldt court's conclusions regarding contract formation should be restricted to the facts of that case on account of the overlay of the minutes rule, which is a statutory scheme unique to Mississippi and is controlling in that matter. The statute is not relevant in the FSM.

The court further finds that the point of law cited in this court's Final Order on Motion to Enter Judgment on Arbitration Award remains valid and applicable to the instant matter: "[E]ven if . . . 'the contract as a whole,' is invalid, unenforceable, voidable, or void, that 'does not prevent a court from enforcing a specific agreement to arbitrate' because, '[a]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.'" Lefoldt 853 F.3d at 814-15.

In addition, by raising the issue of the centrality of contract formation to the severance and enforcement of the arbitration clause, the FSM reprises the arguments it should have made via a Motion to Reconsider following the issuance of this court's June 13, 2018 Order re Stay of Litigation and Enforcement of Arbitration Agreement, Pacific Int'l, Inc. v. FSM, 21 FSM R. 662, 664 (Pon. 2018).

The court has previously considered and ruled on the issue of whether the validity of the contract controls the severance and enforcement of the arbitration clause and the court will not redetermine that issue here. Setik, 20 FSM R. at 319.

Waiver of Right to Object to Arbitrability

Failure to Raise an Objection

The FSM asserts that the court committed manifest error of law in relying on Ruffin Woody & Assocs., Inc. v. Person County, 374 S.E.2d 165 (N.C. 1988) to support its finding that the FSM waived any objection to arbitrability after the issuance of the arbitration award. PII contends that the court did not directly rely on Ruffin Woody and the case does not support the FSM's argument. PII's Opp'n to the FSM's Mot. for Recons. at 9, 17-18. The concurs with PII.

The Ruffin Woody court set forth procedures essential to preserving the plaintiff's right to object to arbitrability:

> [W]e must address defendant's contention that plaintiff waived its right to challenge the arbitrability of defendant's claims by participating in the arbitration. One who participates in an arbitration hearing without objection may not raise an objection after the award is entered. *McNeal v. Black*, 61 N.C. App. 305, 300 S.E.2d 575 (1983). In this case, however, plaintiff's objection was filed before the hearing was commenced. Moreover, plaintiff followed the correct procedure by applying for a court order to stay the arbitration proceeding. G.S. 1-567.3. Once the trial court refused to *enjoin* the arbitration, plaintiff had no choice but to participate in the proceeding.

Ruffin Woody, 374 S.E.2d at 167 (emphasis added).

The plaintiff in Ruffin Woody made utmost effort to avoid arbitration; it is understandable why it felt compelled to participate in arbitration when its requests were denied.

Here, the FSM did not exhaust its remedies as did the Ruffin Woody plaintiff. The FSM did not apply

for a stay of enforcement of the arbitration order or seek a restraining order and preliminary injunction.[2] The court does not find that the FSM's filing of its Opposition to Plaintiff's Motion for Stay of Litigation to Enforce Arbitration Agreement on February 5, 2018, prior to issuance of this court's June 13, 2018 Order re Stay of Litigation and Enforcement of Arbitration Agreement, to be sufficient to show that the FSM maintained its objection to arbitrability.

Accordingly, the court finds that the FSM was not under the same compulsion to arbitrate as the plaintiff in Ruffin Woody and that matter is not applicable here.

Vigorous Participation in Arbitration

The FSM further asserts that Wein v. Morris, 909 A.2d 1186 (N.J. Super. App. Div. 2006) is at odds with this court's finding that the FSM waived its right to object to arbitrability by vigorously participating in the arbitration. However, as PII points out, the FSM fails to recognize that the 2006 appellate decision in Wein was appealed to the New Jersey Supreme Court, which arrived at substantially different conclusions regarding the waiver issue.

The New Jersey Supreme Court held that

> [T]he court should consider the totality of circumstances to evaluate whether a party has waived the right to object to arbitration after the matter has been ordered to arbitration and arbitration is held. Some of the factors to be considered in determining the waiver issue are whether the party sought to enjoin arbitration or sought interlocutory review, whether the party challenged the jurisdiction of the arbitrator in the arbitration proceeding, and whether the party included a claim or cross-claim in the arbitration proceeding that was fully adjudicated.

Wein v. Morris, 944 A.2d 642, 653 (N.J. 2008) (citing Highgate Dev. Corp. v. Kirsh, 540 A.2d 861, 863 (N.J. Super. App. Div. 1988).

There is an important factual distinction between our case and Wein, but also numerous similarities to the instant matter. First, the trial court ordered the case to arbitration *sua sponte*, after the parties mutually waived arbitration (the Supreme Court determined the trial court erred in doing so). *Id.* at 649. Nonetheless, the Supreme Court determined that under the circumstances presented defendants waived their right to contest the arbitrator's jurisdiction.

Some of the circumstances that the Supreme court found compelling included the following: the case was filed in 1998 and the parties engaged in extensive discovery that lasted until 2003. The trial court closely monitored discovery and issued six case management orders. Several summary judgment motions were filed. "Defendants did not raise any objection with the arbitrator regarding the arbitrator's authority to resolve the dispute." The arbitration was held over sixteen days and the parties presented multiple witnesses and significant documentary evidence. *Id.* at 646. These facts are consistent with those in the instant matter.

The Wein court engaged in an extensive review of cases regarding a party's waiver of its right to a court determination of its matter, by its conduct or by its agreement to proceed in arbitration. The court recited the facts in Highgate, which parallel those in our case and resulted in a finding of waiver:

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[2] PII asserts that the FSM should have pursued additional appellate relief "by direct appeal under FSMRAP Rule 4(a)(1)(B) [this court's grant of an injunction (Staying the Litigation)], or by a Petition to Appeal by Permission under FSMRAP 5." PII's Opp'n to the FSM's Mot. for Recons. at 4. However, these novel arguments are beyond the scope of the Motion to reconsider and will not be considered. Setik, 20 FSM R. at 319.

> In Highgate, our Appellate Division addressed whether the parties waived the right to proceed in court by participating in the arbitration proceeding. There, the plaintiffs filed a demand for arbitration with the AAA. Highgate, *supra*, 224 N.J. Super. at 330, 540 A.2d 861. The defendants objected on the grounds that the agreement did not require arbitration. Ibid. Nevertheless, the defendants filed a response with the arbitrator, objecting to the arbitration but also asserting twelve substantive defenses. Id. at 331, 540 A.2d 861. The matter proceeded to arbitration without further objection and "occupied five full days, during which both parties presented extensive proofs." Ibid. The arbitrator issued an award in favor of the plaintiffs, but when the plaintiffs sought confirmation of the award, the defendants argued that the award was invalid because the arbitrator lacked jurisdiction. Id. at 331-32, 540 A.2d 861.

Wein, 944 A.2d at 651-52.[3]

The Wein court cited the fact that the defendants failed to object to arbitration before the arbitrator as a determining factor:

> [O]nce the parties agreed on an arbitrator, defendants did not file an objection to the arbitrator's jurisdiction. Rather, defendants expressed disagreement with the trial court, agreed to an arbitrator, filed their counterclaim, and fully participated in the arbitration proceeding. If defendants intended to preserve the right to appeal the order requiring arbitration, at a minimum, they should have raised an objection before the arbitrator.

Wein, 944 A.2d at 653 (citing N.J. Mfrs. Ins. Co. v. Franklin, 160 N.J. Super. 292, 300, 389 A.2d 980 (App. Div. 1978)).

This court finds that the FSM waived arbitrability, on similar facts as did the parties objecting to arbitrability in the Wein and Highgate matters.[4]

IV. CONCLUSION

The court has reviewed the FSM's Motion for Reconsideration and PII's Opposition and finds that the FSM has failed to establish that the court committed manifest error of law. Both parties have readdressed the essential facts and arguments already considered and determined by the court and the court finds no basis to change its Final Order on Motion to Enter Judgment on Arbitration Award.

The court concurs with the ultimate conclusion of the Wein court:

> Finally, it would be a great waste of judicial resources to permit defendants, after fully participating in the arbitration proceeding, to essentially have a second run of the case before a trial court. That would be contrary to a primary objective of arbitration to achieve "final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner." Barcon Assocs. v. Tri-County Asphalt Corp., 86 N.J. 179, 187, 430 A.2d 214 (1981) (citation omitted).

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[3] Highgate contains another similar fact to the instant matter: "an e-mail sent from defendants' attorney to plaintiffs' attorney after the court-ordered arbitration that stated, "[d]epending on the selection [of the arbitrator], which is essential, my client would agree to arb[itration]." Wein, 944 A.2d at 647.

[4] The court finds that the numerous cases cited by PII in its Opposition are duplicative of the holdings in the Wein and Highgate matters and will not discuss them. PII's Opp'n to the FSM's Mot. for Recons. at 7, 13. Additionally, the court will not address the novel arguments raised by PII regarding the applicability of Res Judicata and Estoppel to this matter. *Id.* at 13, 19. Application of these doctrines is beyond the scope of the Motion to Reconsider. Setik, 20 FSM R. at 319.

> Accordingly, we conclude that under the totality of the circumstances presented, defendants waived their right to appeal the order compelling arbitration.

Wein, 944 A.2d at 653-54.

THEREFORE IT IS HEREBY ORDERED that the Motion to Reconsider is DENIED in its entirety and the Judgment entered July 6, 2021 shall remain in full force and effect.

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