IN THE SUPREME COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS

WILLIE COTTON	)	SC-2005-1
	)	
v.	)	**ORDER**
	)	
BENEFICIAL CORPORATION, ET AL.	)	

Per Curiam (Chief Justice Rae Nell Vaughn and Associate Justices Frank Pommersheim and Carey Vicenti)

I. Introduction

This is a case brought by Ms. Willie Cotton, Plaintiff and an enrolled member and elder of the Mississippi Band of Choctaw Indians, against the Defendants, Beneficial Corporation and Beneficial Bank, USA. The gravamen of the plaintiff's complaint alleges that a door- to- door salesman and employee of the Defendants improperly and illegally sold her a home satellite system at her residence in the Bogue Chitto Community on the Choctaw Indian Reservation. Plaintiff asserts several causes of action related to various alleged misrepresentations surrounding purchase of the satellite television system and the financing transaction associated with her purchase. Plaintiff seeks compensatory and punitive damages.

The Defendants filed a motion to compel arbitration alleging that arbitration was compulsory as part of the purchase agreement. Plaintiff opposed the motion. On February 15, 2005, the Trial Judge denied the motion and issued a stay "pending the consideration of this issue by the Choctaw Supreme Court."

The Defendants/Appellants subsequently filed a Notice of Appeal requesting this Court to grant an interlocutory appeal on the issue of compulsory arbitration. This Court ordered simultaneous briefs on the question of the propriety and necessity of an interlocutory appeal. After due consideration of the appropriate law and the arguments of the parties, the request for

an interlocutory appeal is denied.

II. Discussion

In their brief to the Court, Defendants/Appellants failed to cite, much less discuss, the relevant Mississippi Band of Choctaw law on interlocutory appeals. The relevant code provision is C.T.C. § 7-1-10, which permits interlocutory appeals when the trial court has "[c]omitted an obvious error which would render further lower court proceedings useless or substantially limit the freedom of a party to act and a substantial question of law is presented which would determine the outcome of the appeal."[1] Obviously, the failure to cite or discuss the relevant Tribal law is fatal to the proponent of any motion seeking to advance an (interlocutory) appeal.

III. Conclusion

For the above-stated reasons, the motion for an interlocutory appeal is denied and the case is remanded for an immediate trial on the merits, including, if necessary, a more complete development of the arbitration issue. This is, of course, in accord with the core of the trial court's responsibility to develop a full and complete record on all the relevant matters before it.

IT IS SO ORDERED.

For the Court

Rae Nell Vaughn

Chief Justice Rae Nell Vaughn

Dated: April 6, 2005

[1] See also this Court's opinion in *Williams v. Parke Davis* (Civ. Act. #1142-01, 2004). Statements by Appellants' counsel in their brief that there is no Choctaw Tribal law dealing with interlocutory appeals is absolutely incorrect.

IN THE SUPREME COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS

WILLIE COTTON, Plaintiff/Appellee, v. BENEFICIAL CORPORATION; BENEFICIAL NATIONAL BANK, N.A.; HOUSEHOLD INTERNATIONAL INC.; And Fictitious Defendants "A", "B", and "C", whether singular or plural, those other persons, corporations, firms, or other entities whose wrongful conduct caused or contributed to cause the injuries and damages to the Plaintiff, all of whose true and correct names are unknown to Plaintiff at this time, but will be substituted by amendment when ascertained. Defendants/Appellants.	)	SC 2005-1
	)	**MEMORANDUM OPINION AND ORDER**

Per Curiam (Chief Justice Rae Nell Vaughn and Associate Justices Frank Pommersheim and Carey Vicenti)

I. Introduction

In the Spring of 1995, Ms. Willie Cotton, Plaintiff/Appellee and a member of the Mississippi Band of Choctaw Indians, purchased a satellite television system from an agent of Beneficial Corp., one of the Defendants-Appellants. The sale was solicited and consummated at her residence located on trust land within the boundaries of the Mississippi Band of Choctaw Indian Reservation. The purchase was financed with a "revolving credit card account" that was created between the Plaintiff and Defendant as part of the purchase.

Subsequent to this purchase, Beneficial Corp. sent a notice to Plaintiff (and others) informing cardholders that all claims relating to the purchase would henceforth be subject to binding arbitration unless the cardholder sent written notice to Beneficial Corp. within 30 days rejecting the arbitration provision. Ms. Cotton did not send any written notice objecting to these new terms.

On February 1, 2000, Plaintiff filed an action against the Defendants-Appellants in Tribal court

asserting various claims relevant to the disclosures, representations and financial terms involved with the "revolving credit account" purchase of the satellite television system. In response, the Defendants-Appellants filed a motion to compel arbitration. The trial court received evidence on the motion, denied the motion to compel arbitration, but nevertheless granted a stay and motion for an interlocutory appeal to this Court.

A motion for an interlocutory appeal was subsequently filed with this Court. This motion was denied because the Defendants-Appellants failed to address the relevant Choctaw Tribal law on interlocutory appeal, namely Choctaw Tribal Code ('CTC') §7-1-10. Defendants/Appellants have now filed a motion for reconsideration before this Court. This motion is premised essentially on the excusable neglect of the Defendants-Appellants and the alleged necessity for an interlocutory appeal as a matter of law. Briefs were filed and oral argument was heard on October 17, 2005.

II. Issues

The issues raised by this appeal (and motion) are whether this matter is a proper one for interlocutory appeal and if so, whether the parties should be compelled to arbitrate in accordance with the (amended) cardholder agreement.

Each claim will be discussed in turn.

III. Discussion

A. Interlocutory Appeal

The Tribal statute on interlocutory appeals, CTC §7-1-6, expressly states that an interlocutory appeal is only permitted when the trial court has "committed an obvious error which would render further lower court proceedings useless or substantially limit the freedom of a party to act and a substantial question of law is presented." Defendants/Appellants contend that the "obvious error" was the trial court's failure to grant the motion to compel arbitration. Yet it appears in any number of ways that the trial court's ruling does *not* constitute "obvious error."

This is a case of first impression within this jurisdiction and thus the trial court's ruling could only have constituted "obvious error" if it flatly contradicted some express provision of Tribal law or some directly applicable provision of federal law. There is currently no express Tribally enacted law on arbitration[1] and thus the trial court's ruling does not violate any portion of the Tribal Code. There is no "obvious error" as a matter of Tribal law.

Defendants/Appellants do not argue to the contrary, but rather claim that there is "obvious error" in the trial court's ruling as a matter of federal law. The gist of this argument is essentially twofold, namely that the Federal Arbitration Act, 9 U.S.C. §§1-16, applies to this transaction and that the relevant federal caselaw requires arbitration even when a party is challenging the validity of the contract as a whole rather than the arbitration provision standing alone.

Both of these claims fail to add up to "obvious error." The Federal Arbitration Act does not by its terms expressly apply to transactions that take place in Indian country and insomuch as it is premised on the Interstate Commerce Clause (Defendants-Appellants brief at 20) rather than the Indian Commerce Clause, Art. I, Sec. 8(3), it does not apply in Indian country. In addition, the caselaw cited by the parties appears divided (though, perhaps, not equally) whether arbitration is required when one party is attacking the validity of the contract as a whole. More significant is the fact that neither party cites a single *federal* or tribal court decision case construing the applicability of the Federal Arbitration Act in Indian country. This complete absence of Indian country caselaw can hardly constitute "obvious error."[2]

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[1] This may well be an area where the Tribal Council would want to consider potential Tribal legislation, especially in light of the ever increasing commercial activity that takes place on the Reservation.

[2] The Defendants-Appellants also arrive at the applicability of the Federal Arbitration Act through a faulty and circuitous route. Defendants-Appellants argue that pursuant to Choctaw Tribal Code §1-1-4 the trial court "should have first looked to tribal law, customs and usages, if any, before looking to applicable federal law and then the law of the State of Mississippi." Defendants/Appellants brief at 13. This is a *correct statement* of Mississippi Band of Choctaw law, but then Defendants/Appellants claim that "as there are no Tribal Code Provisions or Tribal customs or usages regarding this question, the court is bound by the Tribal Code to look to federal law and federal courts in Mississippi have found the arbitration argument at issue in this case to be enforceable." *Id.* This is an *incorrect interpretation* of Mississippi Band of Choctaw law. The trial court made no such finding and in fact received uncontroverted evidence to the contrary. Plaintiff-Appellee's brief at 3-4 referring to the affidavits and depositions of Dr. Kenneth York and Ms. Thallis York on Choctaw

B. Arbitration Issues

The trial court also apparently found (though it doesn't appear in the trial court's order or slip opinion but is apparently incorporated by reference) (Slip Opinion at 2) that the contract between Ms. Cotton and Beneficial Corp. was void because Beneficial Corp. did not possess the requested "permit" to engage in commercial activity on the Reservation as required by §14-1-3 of the Choctaw Tribal Code. Trial Transcript at 6. (January 14, 2005).

Insomuch as this is part of the trial court's decision, it is reversed. It is the finding of this Court the Title XIV of the Choctaw Tribal Code, which is expressly captioned as the Choctaw Tax Code is directed primarily to revenue raising and other regulatory matters. This portion of the Tribal Code is not a vehicle to determine the validity of *individual* commercial transactions. In fact, the only remedy in this part of the Choctaw Tribal Code is for the Tribe (*not* an individual) to bring an enforcement action seeking a fine and/or an order to bring the offending entity into compliance with the Tribal licensing and permit process. See Title XIV, § 14-1-3.

This Court cannot render any final determination in this matter until two issues are resolved by the trial court. These two issues include making a determination about the nature and applicability (if any) of Tribal tradition and custom to both the commercial transaction as well as the potential remedy of arbitration. In addition, it is necessary for the trial court to consider and decide whether the Federal Arbitration Act applies in Indian country.

IV. Conclusion

For all the above-stated reasons, the Court finds that this matter is not one which is ripe for an interlocutory appeal at this time. The trial court's decision is therefore reversed and remanded with

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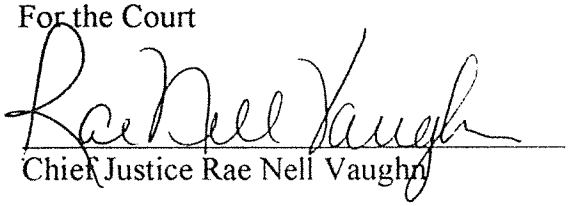
tradition and custom relevant to trust and the making and enforcing of commercial agreements. It remains for the trial court to make an *express* finding on the existence (or non-existence) of such tradition and custom and its applicability (or non-applicability) to the case at bar.

instruction to consider the two issues described above.[3] Once these issues are resolved the trial court should, in accordance with its findings, either set the case for trial or order compulsory arbitration.

IT IS SO ORDERED.

For the Court



Chief Justice Rae Nell Vaughn

Dated: May 3, 2006

[3] The trial court's responsibilities, as a general matter, are to make a full and complete finding as to *all* questions of law and fact before it and *not* to defer *in advance* to what this Court might ultimately find and decide.

IN THE SUPREME COURT OF THE MISSISSIPPI
BAND OF CHOCTAW INDIANS

WILLIE COTTON	APPELLEE
VS.	NO. SC-2005-1
BENEFICIAL CORPORATION, ETAL	APPELLEE

DATE OF JUDGMENT	10/17/2006
TRIAL JUDGE:	HON. CHRIS COLLINS
COURT OF ORIGIN:	CIVIL TRIBAL COURT
ATTORNEY FOR APPELLANT:	HON. J. CHASE BRYAN
ATTORNEY FOR APPELLEE:	HON. BRIAN DOVER, HON. TERRY JORDAN
NATE OF THE CASE:	CONTRACT/INTERLOCATORY APPEAL
TRIAL COURT DISPOSITION:	DENIED ARBITRATION

BEFORE CHIEF JUSTICE PRO-TEM THOMPSON, ASSOCIATE JUSTICES PIPESTEM AND JONES, CHIEF JUSTICE NICKEY NOT PARTICIPATING

ORAL ARGUMENT

FOR THE COURT: JUSTICE JONES

PROCEDURAL HISTORY

Ms. Willie Cotton, an elder with the Mississippi Band of Choctaw Indians and a resident of the Reservation, in the Spring of 1995 signed an agreement to purchase a satellite television system from an agent of Beneficial Corporation. The agent appeared in a "door to door" fashion at the residence of Plaintiff on Reservation land to solicit and consummate the purchase of the satellite deal. The satellite service would allow Ms. Cotton the benefit of multiple television channels. Ms. Cotton spoke little or no English and at the time of the initial discussions of the documents to be signed, she was assisted by her twelve (12) year old female relative who served

as a de facto translator. The purchaser of the satellite system implemented financing through a cardholder account. The agreement is "wordy" and would require a complete analysis to fully appreciate. Ms. Cotton signed the documents as personally presented by the agent to her in her home. Ms. Cotton testified she had never received a copy of the signed agreement.

Subsequently, Beneficial Corporation, by United States mail sent to its customer cardholders, including plaintiff, a notice that all claims relating to the purchase of a satellite system would be subject to binding arbitration under the Federal Arbitration Act, unless the cardholder sent written notice to Beneficial Corporation within 30 days rejecting the arbitration provision. Ms. Cotton in the hearing denied receiving the notice; thus, she admitted she did not send any written notice objecting to the arbitration terms. Beneficial Corporation asserts that this procedure to change the agreement is provided in the language in the agreement on page 2 entitled "Change of Terms".

On February 1, 2000, the Plaintiff filed its lawsuit against the named defendant in Tribal Court asserting claims related to contractual misrepresentations. The defendant's responded with their request for the compelling of mandated binding arbitration. The trial court denied arbitration and granted defendant's interlocutory appeal.

This interlocutory appeal was filed by Beneficial Corporation. This matter was originally heard on oral argument by the Justices presiding prior to November 2008. Since the present Justices were not involved, additional oral argument was conducted on May 14, 2009.

This interlocutory appeal presents itself on the Order Denying Motion to Compel Arbitration and Granting Plaintiff's Motion to Apply Tribal Tradition filed October 17, 2006.

This ruling was prompted by the Memorandum Opinion and Order of this court, by the prior Justices of May 3, 2006. This court in the October 17, 2006 ruling ruled, inter alia, that "Ilitibapesa" did not occur in this transaction. The Choctaw custom and traditions mandates that contracting parties have a "meeting of the minds"; thus, face to face meetings are preferred.

Choctaw Code §1-1-4 states:

> *In all civil actions the Choctaw Court shall apply applicable laws of the United States and authorized regulations of the Secretary of the Interior, and ordinances, customs, and usages of the Tribe. Where doubt arises as to the customs and usages of the Tribe, the court may request the advice of persons generally recognized in the community as being familiar with such customs and usages. Any matter not covered by applicable federal law and regulations or by ordinances, customs, and usages of the Tribe, shall be decided by the court according to the laws of the State of Mississippi.*

Appellant primarily relies upon *Beneficial National Bank USA vs. Payton 214 F. Suppl 2d 679 (S.D. Miss. 2001)* as its authority for the reversal of the trial court's ruling order and for the application of the FAA.

PRINCIPALS OF LAW

While it is noted that the Mississippi Band of Choctaw Indians desires its tribe members to be a economic part of the country's commerce, this obviously must be balanced with the tribe's "self-determination" right through its historic traditions and customs.

This case pits the application of commercial contractual disputes that are applicable to the FAA with the facts of this particular case which involve door to door solicitation on the Choctaw Reservation of a non-English speaking Indian Elder with a twelve (12) year old who assisted her grandmother to interpret intricate commercial language.

The initial inquiry for this court is whether the lower court's ruling was erroneous. The lower court considered the arguments related to the interests of an open society to business

dealings from outside the tribe and the importance to preserve Choctaw common law.

In this case, when the salesperson came onto Reservation land for a commercial dealing with Ms. Cotton in her home, under Choctaw common law she would have formulated a reasonable expectation of continued "face to face" dealings. Of course, this expectation is tempered by a determination of whether a contract was ever created initially.

Without addressing all of the appellant's citations to support arbitration, it appears the focus is on *Beneficial National Bank, USA vs. Payton, 214 F. Supp. 679 (S.D. Miss. 2001)*. This Court believes *Payton* is not controlling to the facts of this case as to whether the lower court's ruling was incorrect. This court is not ruling on whether the FAA may or may not apply in another fact scenario. Considering *Union Planters Bank National Association vs. Rogers 912 So. 2d 116 (Miss. 2005)*, the ruling in *Banc One Acceptance Corp. vs. Hill, 2004 WL 831240 (5th Circuit Miss. 2004)*, and *First Options of Chicago, Inc., vs. Kaplan, 514 US 938 1995*, along with the Choctaw Tribal Code added to by the testimony of tribal custom witnesses, this Court affirms the conclusions and ruling of the lower court and its order is affirmed. This matter is to be finalized on the trial issues to be determined in Tribal Civil Court.

Concurred in by Chief Justice Pro Tem Thompson.

Roseanna Thompson, Pro Tem

Robert Jones, Associate Justice

Concurrance by Justice Brenda Toineeta Pipestem.

I concur with the Court's majority to affirm the trial court's denial of the motion to compel arbitration, relying upon the Choctaw common law principle of ilitibapesa.

According to the expert testimony of Dr. Kennith York, a Choctaw elder and historian of the MBCI, ilitibapesa is defined as "we agree together" and it "requires a clear understanding by the parties to any agreement." Traditionally, according to Dr. York this meant agreements were made during face-to-face meetings and any changes to the agreement required another face-to-face meeting to ensure that both parties clearly understood and agreed to any changes. If changes to the original agreement were not clearly consented to by both parties, the original terms of the agreement remained.

Unlike the majority, my interpretation of the principle of ilitibapesa is not inconsistent with the use of written contracts to formalize agreements and it does not require on-going "face to face" dealings to amend agreements. Ilitibapesa requires that the parties to a written contract be explicit in the rights and expectations of the parties to change the terms or rights of parties going forward *in addition to* recognition and adherence by the parties that any change not expressly provided for in the contract requires express consent, not merely silence from the effected party. Therefore, a Choctaw citizen could enter into a binding contract amendment not accounted for in the original agreement if a proposed amendment is delivered to the Choctaw citizen by mail or other delivery and the Choctaw citizen agrees to the changes by virtue of his signature. The signature of the Choctaw citizen would demonstrate explicit agreement.

Under Choctaw common law, Ms. Cotton had no reason to believe that the agreement she made in her home with the representative of the satellite company would be handled any differently than any other agreement she would make whereby her express agreement would be required to make any changes not previously agreed upon.

The Appellant maintains that the language "[w]e may change the terms of this Agreement with respect to both existing balances and future purchases" in the Cardholder Agreement and Disclosure Statement covers the arbitration amendment mailed to Ms. Cotton. However, ilitibapesa requires that each party clearly understands and expressly agrees to any changes made to an original agreement. There is nothing in the "Change of Terms" language that expressly mentions the right to amend the Agreement to require arbitration without express consent. Further, the Cardholder Agreement and Disclosure Statement clearly identifies the items that have an impact on existing balances: minimum monthly payment amounts, finance charges, number of days in a billing period, Daily Periodic Rate, Annual Percentage Rate, Prime Rate, Purchase Advances, and Other Charges in addition to finance charges (i.e., late charge, returned check charge, and collection charge). Again, there is no mention of methods to resolve account disputes via arbitration.

Ms. Cotton's signature on the original Agreement did not negate her expectation or waive her rights under ilitibapesa that any other changes to the Agreement would require her

explicit agreement. The offer to arbitrate along with the instructions requiring Ms. Cotton to reject the offer within 30 days was mailed under separate notice to Ms. Cotton. However, Ms. Cotton did nothing to expressly agree to the offer of arbitration. In fact, Ms. Cotton maintains that she never saw the offer to arbitrate.

Brenda T. Pipestem, Associate Justice