IN THE SUPREME COURT OF FLORIDA

CASE NO: 65,872

HELEN MELAMED,

Petitioner,

vs.

MERRILL LYNCH PIERCE FENNER & SMITH, INC., and BRIAN SHEEN,

Respondents.

_____/

PETITIONER'S BRIEF IN SUPPORT OF DISCRETIONARY REVIEW
OF THE DECISION OF THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

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AUTHORITIES CITED

I

PREFACE

The Appellant/Petitioner herein was the Respondent in the District Court of Appeal, Fourth Judicial District and the Plaintiff in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. The Appellees/ Respondents herein MERRILL LYNCH PIERCE FENNER & SMITH, INC., and BRIAN SHEEN, were the Petitioners in the District Court and the Defendants in the Circuit Court.

The Appellant/Petitioner invokes this Court's appeal jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(A)(ii) on the basis that the District Court, for the first time in the cause, held Florida Statute §517.241(2) F.S.A. invalid.

The Appellant/Petitioner also seeks to invoke the certiorari jurisdiction of the Florida Supreme Court on the basis that the decision of the District Court of Appeal is in direct and irreconcilable conflict with decisions of other District Courts and of this Honorable Court on the same points of law. The conflicting decisions are set forth in this brief. Point I of this brief will briefly allude to this court's appeal jurisdiction. However, a subsequent brief on the merits will follow in accordance with Florida Rule of Appellate Procedure 9.110(f).

In this brief the parties will be referred to as they stood in the trial court, i.e. Petitioner will be referred to as Plaintiff and Respondents will be referred to as Defendants.

This brief, in accordance with Rule 9.120(d) F.A.R., will be confined solely to the question of this Court's jurisdiction based upon conflict.

References to Petitioner's Appendix will be referred to with the symbol (A-).

II

STATEMENT OF THE CASE AND FACTS

This action was instituted on February 4, 1981 by filing of a Complaint. (A1-16). On April 17, 1981 an Amended Complaint was filed. (A17-32). An Answer on behalf of both Defendants was filed May 12, 1981 (A33-40). After the Amended Complaint was filed, a Motion to Compel Arbitration was filed May 14, 1981. (A47-53). This Motion acknowledged and stipulated that no arbitration should take place on the count seeking recovery based upon violations of Federal and Florida Securities Laws. (A-47). The Motion was predicated upon an alleged voluntary written agreement to arbitrate. However, the documents attached did not include any such agreement. (A49-53). On May 22, 1981 a hearing was held on the Defendants' Motion to Compel Arbitration and the Defendants offered no testimony to support their allegations of a voluntary agreement to arbitrate. This defect was specifically pointed out at the hearing. (A62-99), see specifically (A79). The trial court's Order denying the Amended Motion to Compel Arbitration was entered June 7, 1981 (A 100) and was reversed on the basis that the trial court should have considered the Federal Arbitration Act since said Act "supersedes inconsistent provisions of Florida law and the Florida Arbitration Code, Sections 682.01 to 682.22 Florida Statutes (1979)." Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed, 405 So2d 790, 791 (1981, Fla.App. D4) - Melamed I. On remand the Amended Motion to Compel Arbitration was properly renoticed for hearing. (A102-115). The Defendants appeared through their attorney and announced that they were unprepared to proceed. (A 104). The trial court again denied the Motion to Compel Arbitration. (A-116). Again the trial court's Order was quashed on "procedural requirements" without reaching the legal issues passed on by the trial court. Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed, 425 So2d 127 (1983, Fla.App. D4) - Melamed II. (A117-119).

Meanwhile, on September 14, 1982, Plaintiff filed her "Amendment to Amended Complaint asserting Securities Law and Regulation Violations pursuant to the Securities Act of 1933". (A127-129). Motions to Dismiss said pleading (A130-132) were denied, except that the Plaintiff was required to separate into a separate count one section of her 1933 Securities Act Claim. (A133-134). This the Plaintiff did. (A135-136).

Count XI was ultimately dismissed (A-240), but Count X has withstood 2 motions for summary judgment (A241-242) and petitions for certiorari to the Fourth District Court of Appeal. (A312-313). It should be noted that Plaintiff's initial complaint contained a Securities Law count. (A5-6). The count was dismissed when the trial court determined that it appeared to be based (at least in part) on the 1934 Act as to which exclusive jurisdiction vests in the Federal Courts. (A137-138). This amendment simply limited the Federal Securities claim to the 1933 Securities Act. Another hearing was held on August 18, 1983. Plaintiff immediately brought to the trial court's attention that the Melamed II opinion requested findings of fact and conclusions of law and that if the court found that Plaintiff had signed the agreement, an Order articulating the trial court's concludions on the legal issues was requested by the District Court. (A145-146). Petitioner's lead counsel then apologized for unpreparedness once again, explaining that he had been out of his office for three weeks. (A-148). This was followed with the assertion that he thought that the only issue to argue was the authenticity of the contract and that if that was proved, his client would be immediately entitled to an order of arbitration despite the previously argued legal impediments to such order. (A205-206). When the trial court refused to accept such excuses for unpreparedness once again, (A-206), both Defendants through attorney Bennett Falk, lead counsel, admitted that because of the pending 1933 Securities Act claims, Counts X and XI, the trial court could not order arbitration:

> The Court: "Right now I have a live thing.
> Mr. Falk: I think the Court is correct at this point. . . ."(A-218)
>
> * * *
>
> The Court: "It appears as if that would be an Impediment to referring it to arbitration.
> Mr. Falk: Agreed." (A-219)

Following the trial court's third order denying arbitration (A226-239), the District Court again reversed the trial court. (A243-250)- Melamed III.

III

POINT ON APPEAL

THIS COURT HAS APPELLATE JURISDICTION OF THIS CAUSE

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POINT I

AS THE DISTRICT COURT ITSELF NOTES AT PAGE 5 OF ITS OPINION, THE DECISION UNDER REVIEW IS IN DIRECT CONFLICT WITH THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN YOUNG V. OPENHEIMER AND COMPANY IN ORDERING ARBITRATION ON THE FLORIDA SECURITIES LAW COUNT OF THE COMPLAINT.

POINT II

THE DECISION OF THE DISTRICT COURT TO REFER THE FRAUD AND PUNITIVE DAMAGE CLAIMS TO ARBITRATION CONFLICTS WITH THIS COURT'S DECISION IN KLOSTERS REDERI A/S v. ARISON SHIPPING CO. AS WELL THE DECISIONS OF THE THIRD DISTRICT COURT OF APPEAL IN SHEARSON HAMMILL & CO. v. VOUIS, AND YOUNG v. OPPENHEIMER CO., INC.

POINT III

THE DECISION OF THE DISTRICT COURT HOLDING THAT THE PENDING FEDERAL SECURITIES ACT CLAIM WAS SEVERABLE AND NOT A BAR TO ARBITRATION OF THE REMAINING CLAIMS CONFLICTS WITH THIS COURT'S DECISION IN BOULD V. TOUCHETTE, AND NUMEROUS OTHER DECISIONS FROM OTHER DISTRICT COURTS TO THE EFFECT THAT ONE MAY NOT COMPLAIN ON APPEAL ABOUT A RULING WHICH HE HIMSELF INVITED.

POINT IV

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IV

ARGUMENT RE APPEAL JURISDICTION

THIS COURT HAS APPELLATE JURISDICTION OF THIS CAUSE

At pages 5 and 6 of its opinion (A247-248) the District Court, Fourth Judicial District, states:

> "As an initial matter, we observe that arbitration agreements are binding and enforceable as to claims arising under the Florida Securities Law. See Raymond James & Associates, Inc. v. Maves, 384 So2d 718 (Fla. 2d DCA 1980). But see Young v. Openheimer & Company, 434 So2d 369 (Fla. 3d DCA 1983). We so conclude despite an express provision preserving the right to bear an action in court contained in the Florida Securities Act, section 517.241(2), Florida Statutes (1983), because we find that provision to be in conflict with §2 of the Federal Arbitration Act and therefore invalid under the Supremacy Clause of the Federal Constitution. See Southland Corporation v. Keating, supra."

As the District Court has held Florida Statute §517.241(2) invalid and unconstitutional under the Supremacy Clause of the United States Constitution, this Court has direct appellate jurisdiction. State of Florida v. Kinner, 398 So2d 1360 (Fla. 1981); Chapman and Liberty Mutual Insurance Co. v. Dillon, etc., 415 So2d 12 (Fla. 1982); Rupp, Stasco and School Board of Duval County v. Bryant, 417 So2d 658 (Fla. 1982).

V

ARGUMENT RE DISCRETIONARY REVIEW JURISDICTION

POINT I

AS THE DISTRICT COURT ITSELF NOTES AT PAGE 5 OF ITS OPINION, THE DECISION UNDER REVIEW IS IN DIRECT CONFLICT WITH THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN YOUNG V. OPENHEIMER AND COMPANY IN ORDERING ARBITRATION ON THE FLORIDA SECURITIES LAW COUNT OF THE COMPLAINT.

The conflict between the Third District and the Fourth District is set forth in the opinion. It is admittedly irreconcilable and effects every citizen of the State of Florida who seeks to pursue his rights under Chapter 517 against a stock-brokerage house. Furthermore, the abyss between the Districts continues to widen as decisions are being rendered following each District's view of the law. See Laquer v. Smith Barney Harris Uphand & Co., Inc., 446 So2d 119 (1984 Fla.App. D3). The Fourth District's reliance on Southland Corporation v. Keating, U.S. , L.Ed.2d ,104 S.Ct. 852 (1984) is totally misplaced. Southland held merely that the Federal Arbitration Act was substative in nature. This was not an issue. Melamed I had already enunciated the same rule. Southland further held that the California Franchise Act should not be read so as to deprive a party of the right to arbitration in light of the intent of the Federal Arbitration Act. Southland did not involve claims under Federal and Florida Securities Acts. Southland in no way retreated from the Supreme Court's holding in Wilco v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953) to the effect that claims under the Federal Securities Acts must be submitted to the courts and cannot be arbitrated despite an arbitration agreement or Section 2 of the Federal Arbitration Act. In Young v. Openheimer & Company, supra, the Third District Court of Appeal held that Chapter 517 "provides the same remedies as federal law" and "the Florida Securities Act is drafted meticulously so as to avoid conflict with Federal law governing securities transactions with respect to both remedy and the exercise of jurisdiction" and therefore "the Federal Government's power under the commerce clause to regulate commerce does not exclude all state power of regulation. Merrill Lynch Pierce Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973)" Id. pages 371 and 373. Melamed III, on the other hand, goes out of its

way to hold Florida Statute §517.241(2) unconstitutional and to create conflict between the two acts and deprive Florida citizens of their right to proceed on Chapter 517 claims in a court of law.

POINT II

THE DECISION OF THE DISTRICT COURT TO REFER THE FRAUD AND PUNITIVE DAMAGE CLAIMS TO ARBITRATION CONFLICTS WITH THIS COURT'S DECISION IN KLOSTERS REDERI A/S v. ARISON SHIPPING CO. AS WELL THE DECISIONS OF THE THIRD DISTRICT COURT OF APPEAL IN SHEARSON HAMMIL & CO. v. VOUIS, AND YOUNG v. OPPENHEIMER CO., INC.

At pages 3 and 4 of the District Court's opinion, the District Court holds that the fraud and punitive damage claims are subject to arbitration under the Federal Arbitration Act. The District Court cites three Florida decisions in support of its conclusion. Post Tension Engineering Corp. v. Fairways Plaza Associates, 412 So2d 871 (1982 Fla.App. D3) and Sabates v. International Medical Centers, Inc. 450 So2d 514 (1984 Fla.App. D3) did not involve an agreement to arbitrate under the Federal Arbitration Act. Merrill Lynch Pierce Fenner & Smith, Inc. v. Westwind Transportation, Inc., 442 So2d 414 (1983 Fla.App. D3) involved claims for negligence, misrepresentation and omission, and breach of contract. Id. page 415. No claim for fraud or punitive damages was even involved therein.

On the other hand, the District Court's decision conflicts with a number of established Florida judicial precedents, and without citation impliedly seeks to overrule this Court's controlling decision in Klosters Rederi A/S v. Arison Shipping Co., 280 So2d 678 (Fla. 1973) cert. den. 414 U.S. 1131. Klosters held that notwithstanding the existance of an agreement to arbitrate, the Third District Court of Appeal erred in compelling arbitration in a complicated case founded upon allegations of fraud and breach of fiduciary duties. Klosters has been followed and cited with approval by the Third District Court of Appeal in Shearson Hammill & Co. v. Vouis, 247 So2d 733 (1971 Fla.App. D3) cert. den. 253 So2d 444 as well as Young v. Oppenheimer Co., Inc., supra, page 371. The decision under review creates conflict with these decisions as well. Indeed, the Melamed III decision appears inconsistent with the Fourth District's own decision in Merrill Lynch Pierce Fenner & Smith, Inc. v. Falowski, Inc., 425 So2d

129 (1982 Fla.App. D4).

POINT III

THE DECISION OF THE DISTRICT COURT HOLDING THAT THE PENDING FEDERAL SECURITIES ACT CLAIM WAS SEVERABLE AND NOT A BAR TO ARBITRATION OF THE REMAINING CLAIMS CONFLICTS WITH THIS COURT'S DECISION IN BOULD V. TOUCHETTE, AND NUMEROUS OTHER DECISIONS FROM OTHER DISTRICT COURTS TO THE EFFECT THAT ONE MAY NOT COMPLAINT ON APPEAL ABOUT A RULING WHICH HE HIMSELF INVITED.

At the trial court level Defendants conceded that pursuant to Wilko v. Swan, supra, the pending 1933 Securities Act count of the complaint was "an impediment to referring it to arbitration." (A-219). Lead counsel for defendants advised the trial court that as long as the 1933 Securities Act was "a live thing" no arbitration order could be entered. (A-218). Even at the District Court level, the petition filed by the defendants did not assert that the trial court was in error in refusing to order arbitration at the stage of the proceeding when the motion was heard. Instead the defendants argued merely that the trial court should have determined the viability of the 1933 Securities Act Count by summary judgment prior to ruling on the motion for arbitration, and that the trial court's ruling on arbitration was "premature". (A277, 308-309). This argument became moot when the trial court subsequently denied motions for summary judgment by both defendants (A241-242), and the District Court denied petitions for certiorari. (A312-313). The District Court's decision to sever the 1933 Securities Act count when no such relief was every requested directly conflicts with this Court's holding in Bould v. Touchette, 349 So2d 1181 (Fla. 1977) as well as its long progeny of decisions in the District Courts. The rule announced by this court in Bould was that a party could not be heard to complain on appeal regarding the adoption of a position stipulated by him as correct at the trial court level. Id. page 1186. See also Savoca v. Sherry Frontenac Hotel, 346 So2d 1207 (1977, Fla.App. D3); Public Health Trust of Dade County v. O'Neal, 348 So2d 377 (1977, Fla.App. D3); Sonson v. Nelson, 357 So2d 747 (1978, Fla.App. D3); Ten Associates, et al., v. McCutchen, 398 So2d 860 (1981 Fla.App. D3); Davis, Inc. and INA v. City of Miami, 400 So2d 536 (1981, Fla.App. D3); Leisure Group, Inc. v. Williams, 351 So2d 374 (1977, Fla.App. D2); Diaz v. Rodriguez, 384 So2d 906 (1980, Fla.App. D3); Winstead & Faircloth v. Adams,

363 So2d 807 (1978, Fla.App. Dl).

POINT IV

THE DISTRICT COURT'S DECISION HOLDING THAT THERE HAD BEEN NO WAIVER OF THE RIGHT TO ARBITRATION IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN KLOSTERS REDERI A/S v. ARISON SHIPPING CO., THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN BICKERSTAFF v. FRAZIER, AND THE THIRD DISTRICT COURT OF APPEAL'S DECISIONS IN LYONS v. KRATHEN, LAPIDUS v. ARLEN BEACH CONDOMINIUM ASSOCIATION, AND MARTHAME SANDERS & CO. v. 400 WEST MADISON CORP.

In its third order denying arbitration, the trial court found as a matter of fact that the Defendants had waived their right to arbitration. The trial court cited extensive examples of waiver. (A230-239). The District Court's conclusion that the 3 year delay occasioned by Defendants' delaying tactics caused no prejudice to Plaintiff, ignores the facts and conflicts with previously established case law. Indeed in the case sub judice the Defendants have agreed that the trial court could proceed with the replevin count and even entered into a stipulation which necessarily conceded the trial court's jurisdiction. (A-314). The instant decision conclicts with Klosters Rederi A/S v. Arison Shipping Co., supra, page 681; Bickerstaff v. Frazier, 232 So2d 190, 191 (1970, Fla.App. Dl); Lyons v. Krathen, 368 So2d 906 (1979, Fla.App. D3); Lapidus v. Arlen Beach Condominium Association, 394 So2d 1102 (1981, Fla.App. D3); amd Marthame Sanders & Co. v. 400 West Madison Corp., 401 So2d 1145 (1981, Fla.App. D4); see also Hansen v. Dean Witter Reynolds, Inc., 408 So2d 658 (1982, Fla.App. D3) cert. den. 417 So2d 328. The District Court's citation to Graham Contracting, Inc. v. Flagler County, 444 So2d 971 (1983, Fla.App. D5) does not resolve this conflict even between the Fifth District and the Fourth. Graham involved merely a four month delay between the filing of the case and the motion for arbitration. Furthermore, Graham did not involve an affirmative pleading change. Unlike Graham, Melamed involves specific written stipulations filed with the court submitted to the court's jurisdiction.

VI

CONCLUSION

For the reasons discussed above it is respectfully submitted that discretionary review jurisdiction, as well as direct appeal jurisdiction exists.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief in Support of Discretionary Review of the Decision of the District Court of Appeal Fourth District of Florida, has been furnished to Bennett Falk, Esq., One Biscayne Tower, Suite 2020, Two South Biscayne Blvd., Miami, Florida 33131 and to Michael Easley, Esq., 800 Forum III, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401, by mail, this 20th day of September, A.D. 1984.

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