OA 8-30-91

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IN THE SUPREME COURT OF FLORIDA

JOHN S. ROE,

Petitioner,

vs.

CASE NO. 71,682

AMICA MUTUAL INSURANCE CO.,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

THOMAS M. ERVIN, JR.
and
E. C. DEENO KITCHEN
of the law firm of
Ervin, Varn, Jacobs,
Odom & Kitchen
Post Office Drawer 1170
Tallahassee, FL 32302
(904)224-9135

AND

W. JAMES KELLY
and
C. KENNETH STUART, JR.
of W. James Kelly, P.A.
Post Office Box 2177
Lakeland, FL 33806-2177
(813)688-2405

ATTORNEYS FOR PETITIONER
JOHN S. ROE

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioner must reply to Amica's assertion that the contractual provision "does not authorize the insurer to unilaterally reject anything" (p. 3). The contractual authorization for "either party" to reject clearly purports to vest in the insurer the right to unilaterally reject any arbitration award exceeding $10,000. See Ziegler v. Knuck, 419 So.2d 818 (Fla. 3d DCA 1982). Such a unilateral rejection is what occurred, and was erroneously approved in this case.

ARGUMENT

REPLY POINT I

THE CONTRACT PROVISION AUTHORIZING THE INSURER TO UNILATERALLY REJECT AT WILL ANY ARBITRATION AWARD EXCEEDING $10,000 IS CONTRARY TO THE FLORIDA ARBITRATION CODE AND PUBLIC POLICY AND IS, THEREFORE, INVALID AND INOPERATIVE.

Respondent Amica contends that its arbitration "escape" clause is fully valid in authorizing Amica to participate in, and even compel, arbitration of the issue of amount of damages, and thereafter reject any arbitration award of more than $10,000.

Amica contends, alternatively, that since petitioner Roe agreed to invoke the provisions and participate in arbitration, Roe is estopped to challenge the validity and enforceability of the arbitration "escape" clause. In this latter argument Amica has placed the estoppel "shoe" on the wrong "foot." This is clearly established by documents included in the appendices to the briefs of the parties (A 1-12; SA 1-4).

The record reflects that by letter of January 21, 1986, Roe did request arbitration of his dispute with Amica, and named his arbitrator (SA 1). By letter of February 3, 1986, Amica agreed, and named its arbitrator (SA 2). By these letters, the parties clearly agreed to submit the issue of determination of damages to arbitration (SA 1; SA 2). Petitioner Roe did not reference his request to any contractual clause, or express any agreement to limitation of the arbitration with respect to damages (SA 1). More importantly, respondent Amica, despite the prospect of damages far exceeding $10,000, did not refuse arbitration or invoke any contractual or "escape clause" limitation on the damages issue to be submitted to arbitration (SA 2). Thus, the record reflects that arbitration of damages was submitted to the arbitration process without any expression of reservation or limitation by either party (SA 1; SA 2).

In keeping with the foregoing, the factual issue of damages (without reservation or limitation) was submitted to and determined by arbitration, resulting in an arbitration award of $225,735 in favor of petitioner Roe (A 1). Thus, the issue voluntarily agreed to be submitted to arbitration was properly determined by the duly appointed arbitrators. It was only at this late point, by post-arbitration award letter of July 25, 1986, that respondent Amica first purported to invoke any limitation on the arbitration process, reject the award, and demand trial on the amount of damages (A 2).

The importance of this sequence of events has been consistently overlooked by respondent Amica and the courts below. Under these circumstances, if estoppel has application in these proceedings (as respondent Amica contends), then it is Amica which is estopped by its submission without reservation to arbitration which resulted in a proper arbitration award of the issue submitted. Such a holding, and estoppel of Amica, is entirely consistent with Chapter 682, Florida Statutes, and applicable Florida case authorities.

Berger v. Fireman's Fund Insurance Company, 515 So.2d 997 (Fla. 3d DCA 1987), illustrates the minimum procedure which was arguably available to Amica in order to avoid the binding effect of an arbitration award. In that case the insured made a claim for damages and arbitration "notwithstanding the amount" of damages. The insurer refused the request. The insured, prior to the conduct of arbitration, sought declaratory judgment seeking to hold the "escape" clause invalid in arbitration, and the insurer sought to compel arbitration with application of the escape clause as written.

The district court in Berger v. Fireman's Fund Insurance Co., supra, at page 998, specifically held that the "escape" clause contravened the Florida Arbitration Code and public policy as expressed in judicial opinions and was, therefore, "null and void." Like holding should be entered herein. In Berger, however, because the matter had not been previously

submitted to arbitration resulting in an arbitration award, the district court held that arbitration would not be compelled and the matter should be resolved in the courts.

In this case one critical issue determined in Berger, supra, is present (the invalidity of the escape clause) and one issue is not (whether arbitration should be compelled). In this case arbitration has already occurred and an arbitration award issued, without prior protest or attempted reservation or rejection by respondent Amica. The issue in this case is not whether the parties should be compelled to arbitrate, but whether having done so, Amica may, under Florida law, reject the arbitration award at will.

This distinction is one clearly recognized under Florida law, and even under authorities mistakenly relied upon by respondent Amica, such as Knight v. A. S. Equities, Inc., 280 So.2d 456 (Fla. 4th DCA 1973). At page 18 of its answer brief Amica cites Knight, supra, for the general proposition that arbitration agreements are non-enforceable when they do not comport with the Florida Arbitration Code.

Reading of Knight v. A. S. Equities, Inc., supra, demonstrates the court's recognition of a clear distinction between upholding prior arbitration proceedings which have resulted in an award, and compelling future arbitration. At page 459 the court specifically noted:

> It is recognized that agreements to arbitrate disputes are generally looked upon with approval by the courts and every reasonable presumption will be indulged to uphold arbitration proceedings

> which have resulted in an award. However, the jurisdiction of the courts cannot be invoked to specifically enforce or compel arbitration unless an agreement to arbitrate complies with the Florida Arbitration Code. . . . (Emphasis by court.)

While the foregoing has been discussed in terms of estoppel, it is equally applicable in terms of public policy and contractual validity. Simply stated, irrespective of whether arbitration would be compelled, once it has been conducted and arbitration award issued, a clause purporting to authorize rejection of the award at will contravenes the Florida Arbitration Code and public policy and is null and void.

This is fully in keeping with Florida's recognition that the "very essence" of arbitration is agreement to be bound by the factual determination of the arbitrators and thus end the factual controversy. Berger v. Fireman's Fund Ins. Company, supra; Travelers Ins. Co. v. Luckett, 279 So.2d 885 (Fla. 3d DCA 1973).

Respondent has cited a number of cases for the proposition that arbitration should include only those controversies or disputes which the parties have agreed to submit to arbitration. Pacemaker Corporation v. Euster, 357 So.2d 208 (Fla. 3d DCA 1978) (arbitrators of an agreed one-year warranty claim could not reach other, previously settled, damages claims); Paine, Webber, Jackson & Curtis v. Lucas, 411 So.2d 1369 (Fla. 5th DCA 1982) (arbitration would not be compelled as to cash fund account dispute where agreement to arbitrate

only applied to client commodity account dispute); Frank J. Rooney, Inc. v. Charles W. Ackerman of Fla., Inc., 219 So.2d 110 (Fla. 3d DCA 1969) (subcontractor's claim for "extras" was beyond scope of agreement to arbitrate claims under original subcontract).

Such authorities are readily distinguishable in that, in each, the challenged issue or controversy was wholly outside any agreement to arbitrate. There was no agreement to arbitrate the subject issues and, therefore, arbitration of the issues would neither be compelled nor enforced. In the case sub judice, however, the contract between the parties clearly provided for arbitration of the subject damages issue. Further, after the controversy arose, the parties agreed by correspondence to submit that very issue to arbitration (without any expressed reservation; SA 1; SA 2) and arbitration of that very issue was conducted and completed (A 1).

A holding that Amica waived any entitlement to assert the "escape" clause by proceeding through arbitration without objection is fully in keeping with Florida law. This is so even if the "escape" clause terms are viewed as an initial limitation (albeit invalid) on the scope of agreement to arbitrate or scope of the arbitrator's jurisdiction to issue a binding award. In City of West Palm Beach v. Palm Beach County P.B.A., 387 So.2d 533 (Fla. 4th DCA 1980), the district court observed that while parties could not confer jurisdiction

on a court by waiver, failure to object or consent, jurisdiction in arbitration proceedings was a different matter.

As to jurisdiction in arbitration proceedings, the court held at page 534:

> On the other hand, jurisdiction in arbitration proceedings is conferred by the agreement of the parties and is circumscribed by the terms of that agreement. Accordingly, jurisdiction may and does arise by waiver, failure to object and consent.

Thus, even if the escape clause was viewed as an initial "jurisdictional" limitation on arbitration, the limitation was effectively removed or waived by Amica when it proceeded with arbitration without objection.

Respondent has not cited a single Florida authority that states, or even suggests, that where an issue is clearly agreed to be submitted to arbitration and is submitted to arbitration, an ensuring arbitration award may be rejected at will or avoided upon any grounds other than those approved and enumerated in §§682.12-14, Fla. Stat. See Dairyland Insurance Company v. Hudnall, 279 So.2d 905 (Fla. 3d DCA 1973) (where none of grounds set forth in §682.13, Fla. Stat., are pled or found it is error to vacate arbitration award between insured and insurer).

As noted above, respondent has cited Knight v. A. S. Equities, Inc., 280 So.2d 456, 459 (Fla. 4th DCA 1973), for the proposition that arbitration agreements, and awards, are not binding if they do not comply with the Florida Arbitration Code. The instant agreement, however, fully complies

with the code, except for the provision purporting to authorize rejection at will after an arbitration award.

Knight v. A. S. Equities, Inc., supra, and like cases deal primarily with contracts which attempt to engraft the law of other jurisdictions, and are distinguishable on that ground. No such adoption of foreign law is present herein. More importantly, respondent has omitted a critical qualification of the non-enforceability rule, even where foreign law is present. In Butcher & Singer, Inc. v. Frisch, 433 So.2d 1360 (Fla. 4th DCA 1983), the court stated the general rule more fully at page 1361, as follows:

> Butcher & Singer basically assert that a contract requiring arbitration pursuant to the laws of a foreign jurisdiction is not enforceable in Florida if either party objects prior to an arbitration award. This is a correct general premise. See Section 682.02, Florida Statutes (1981), Damora v. Stresscon International, Inc., 324 So.2d 80 (Fla. 1975); Romar Transports Ltd. v. Iron and Steel Company of Trinidad and Tobago, Ltd., 386 So.2d 572, 574 (Fla. 4th DCA 1980); Knight v. H. S. Equities, Inc., 280 So.2d 456 (Fla. 4th DCA 1973). (Emphasis supplied.)

Thus, under Butcher & Singer, Inc. v. Frisch, supra, and cases cited therein, a party must object prior to an arbitration award. Even if, arguendo, the instant contractual terms differed with Chapter 682 adequately to initially allow Amica to object and avoid enforceability, that right was lost or waived when Amica allowed the matter to proceed without protest through arbitration and to arbitration award. Once an arbitration award was entered, the terms of Chapter 682, Florida Statutes, clearly were applicable as to means

of and grounds for vacating or avoiding the award. Whether the "escape" clause is viewed as having been waived by lack of pre-arbitration award protest by Amica, or as being contrary to public policy and, therefore, null and void, it is clear that said clause is insufficient and ineffective as a means of avoidance of an arbitration award, once entered.

Amica has argued at pages 17-18 of its answer brief that if the "escape" clause is invalid, then the arbitration clause is void ab initio in its entirety and the arbitration award could not be confirmed. This is incorrect. In Damora v. Stresscon International, Inc., 324 So.2d 80 (Fla. 1975), and again in Romar Transports v. Iron and Steel Co., 386 So.2d 572 (Fla. 4th DCA 1980), it was specifically recognized that conflict with the arbitration code did not render a contract void ab initio, but merely voidable. In the latter case it was also specifically held that the right to assert unenforceability of such a clause was waiveable by failure to timely assert the right.

Amica's reliance on Title & Trust Co. of Florida v. Parker, 468 So.2d 520 (Fla. 1st DCA 1985), is particularly misplaced. Amica cites the case for the proposition that invalidity of the "escape" clause would render the entire arbitration agreement void ab initio. In that case, however, the court concluded in its opinion as follows:

> Where a contract contains both legal and illegal terms and enforcement of the illegal terms can be refused without nullifying the contract's essential purpose, courts will give effect to those valid

> portions and ignore the illegal terms, New Products Corp. v. City of N. Miami, 241 So.2d 451 (Fla. 3d DCA 1970), cert. den., 244 So.2d 434 (Fla. 1971); Points v. Barnes, 301 So.2d 102, 104 (Fla. 4th DCA 1974), cert. den., 312 So.ed 751 (Fla. 1975).

Thus, the holding in Title & Trust Co. of Florida v. Parker, supra, authorizes excision of the invalid "escape" clause while retaining the contract's essential purpose of dispute resolution by arbitration. This is obviously the proper course where arbitration has already been conducted and an arbitration award has issued.

For the foregoing reasons, petitioner respectfully submits that the district court erred and must be reversed. A contractual "escape" clause which permits a party to reject an arbitration award at will, and irrespective of the absence of statutory grounds, is contrary to Chapter 682, Florida Statutes, and the public policy of Florida. The escape clause should, therefore, be held null and void, and stricken.

Further, even if arguendo the presence of the clause and its conflict with Chapter 682, Florida Statutes, would allow either party to object and avoid compelled arbitration, the application of such a clause after arbitration has been conducted without protest and an arbitration award entered clearly contravenes Chapter 682, Florida Statutes, and public policy. Thus, the attempted application should be held null and void as a basis for avoidance of confirmation of the arbitration award.

Any other holding would allow respondent to litigate the factual issue of amount of damages first in arbitration proceedings and, if displeased with the arbitration award, have another go at litigation of the identical factual issue of amount of damages. Such a second, re-litigation of the identical factual issue is clearly contrary to the public policy of this state. See Travelers Insurance Company v. Luckett, 279 So.2d 885 (Fla. 3d DCA 1973).

This Court should reverse the erroneous decision below. Since the record establishes that no statutory ground for denial of confirmation of the arbitration award was pled or found (A 3-4), this Court should direct that upon remand the arbitration award in favor of petitioner John S. Roe be confirmed.

REPLY POINT II

THE CONTRACT PROVISION AUTHORIZING THE INSURER TO UNILATERALLY REJECT ANY ARBITRATION AWARD EXCEEDING $10,000 SHOULD BE CONSTRUED TO AUTHORIZE REJECTION ONLY UPON OR BY TIMELY FILING OF COURT APPLICATION SETTING FORTH THEREIN GROUNDS SPECIFIED IN §§682.13 AND 682.14, FLA. STAT.

The thrust of this point is that, under applicable Florida law and proper contractual interpretation, Amica could avoid confirmation of the arbitration award only by (1) submitting an "application" in court which (2) sets forth grounds authorized under §§682.12-14, Fla. Stat. (A 11-12). Respondent Amica filed no application, and offered no grounds authorized by §§682.12-14, Fla. Stat.

As to this point, Amica has offered little that requires response. In essence, Amica merely argues, without citation of authority, that its contract is outside of and unfettered by Chapter 682, Florida Statutes, respecting arbitration. In this contention Amica overlooks that its contract does not state that the Florida ARbitration Code shall not apply. See §682.02, Fla. Stat. (A 11). Amica also overlooks that all applicable Florida law, including the Florida Arbitration Code, is incorporated in Amica's contract as if set forth fully therein. Department of Insurance v. Teachers Ins. Co., 404 So.2d 735, 741 (Fla. 1981).

Despite Amica's protestations to the contrary, the contract before this Court is clearly silent on its face as to the means of rejecting an arbitration award which exceeds $10,000. When the provisions of §§682.12-14, Fla. Stat., are incorporated as required by law, however, it is clear that the required means of rejection is the filing of a judicial application. This, Amica clearly failed to do. It was error, therefore, to deny confirmation of the arbitration award.

It is equally clear that the contract before this Court is silent as to authorized grounds for rejection of an arbitration award exceeding $10,000. This could be construed as authorizing unilateral rejection of an arbitration award at will, but such a construction is contrary to the Florida Arbitration Code and public policy. Berger v. Fireman's

Fund Ins. Company, 515 So.2d 997 (Fla. 3d DCA 1987). Such an interpretation, leading to invalidity, should be avoided where possible. Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So.2d 938 (Fla. 1979).

Proper construction requires the incorporation of grounds for vacating or modifying an arbitration award as set forth and restricted in §§682.12-14, Fla. Stat. Department of Insurance v. Teachers Ins. Co., supra. Absent assertion and finding of one or more of the authorized grounds, the arbitration award must be confirmed. Dairyland Insurance Company v. Hudnall, 279 So.2d 905 (Fla. 3d DCA 1973). No such grounds were present herein and it was error, therefore, to deny confirmation of the arbitration award.

The district court erred in failing to properly construe the contract as incorporating Florida law. When the contract is properly so construed, it is clear that Amica neither filed the required application nor demonstrated any authorized ground for denial of confirmation of the arbitration award. This Court should reverse this error, and direct that upon remand the arbitration award be confirmed.

CONCLUSION

This Court should reverse and direct confirmation of the arbitration award. The "escape" clause which purports to allow Amica to submit the issue of damages to arbitration and then reject at will any arbitration award exceeding $10,000 is contrary to Florida law and public policy.

Furthermore, where Amica participated in arbitration proceedings without protest and an arbitration award was duly entered, waiver and estoppel preclude subsequent assertion of any right to reject the award at will.

Reversal is also required because of erroneous interpretation of the contract. All contracts incorporate existing Florida law, and are to be read as though such law is set forth fully therein. Proper interpretation of the contract requires that any rejection of an arbitration award be by timely judicial application. Proper interpretation requires that such rejection may only be based upon grounds authorized in §§682.12-14, Fla. Stat. Neither requirement was met by Amica, and the trial court and district court erred in denying confirmation.

Amica has had its opportunity to once fully litigate the amount of damages in the chosen forum of arbitration. Now that an arbitration award has issued, Amica should not be allowed to re-litigate this identical issue in court. This Court should bring this controversy to the end contemplated by Florida law and public policy by directing confirmation of the arbitration award.

Respectfully submitted,

Thomas M. Ervin, Jr.

THOMAS M. ERVIN, JR.

and

E. C. DEENO KITCHEN
of the law firm of
Ervin, Varn, Jacobs,
Odom & Kitchen
Post Office Drawer 1170
Tallahassee, FL 32302
(904)224-9135

AND

W. JAMES KELLY

and

C. KENNETH STUART, JR.
of W. James Kelly, P.A.
Post Office Box 2177
Lakeland, FL 33806-2177
(813)688-2405

ATTORNEYS FOR PETITIONER
JOHN S. ROE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioner's Reply Brief on the Merits has been furnished by U.S. mail to MANUEL J. ALVAREZ, ESQ., Mitchell, Alley, Rywant & Vessel, P.A., Post Office Box 2003, Tampa, FL 33601, and GEORGE A. VAKA, ESQ., Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Post Office Box 1438, Tampa, FL 33601, this 9TH day of June, 1988.

Thomas M. Ervin, Jr.
ATTORNEY