OA 2-10-89

IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

NO. 72,994

SCHNURMACHER HOLDING, INC.,

Petitioner,

v.

WILLIAM L. NORIEGA,

Respondent.

PETITIONER'S BRIEF ON MERITS

Discretionary Proceeding to Review a Decision
of the Third District Court of Appeal

Arthur J. England, Jr., Esq.
Charles M. Auslander, Esq.
Joanne M. Rose, Esq.
Fine Jacobson Schwartz Nash
Block & England
One CenTrust Financial Center
100 S.E. Second Street
Miami, Florida 33131
(305) 577-4000
Attorneys for Petitioner

Table of Contents

Table of Authorities

Other Authorities

Florida Statutes

Statement of the Case and Facts

Respondent William L. Noriega is landlord of real property located in Dade County, Florida leased to petitioner Schnurmacher Holding, Inc. The parties entered into a commercial lease agreement which was silent as to which party had responsibility for payment of the sales tax imposed by section 212.031, Florida Statutes (1987). (R.11-28).

When the issue of sales tax responsibility arose, the parties elected to arbitrate the sales tax dispute. (R.10). Following a hearing and presentation of legal arguments, the arbitrator concluded that the landlord, Noriega, must pay the sales tax in the absence of a contractual provision to the contrary. (R.6). Acting under section 682.13, Florida Statutes (1987), Noriega then filed an action in the circuit court to vacate, modify or correct the arbitration award. (R. 1-28). The circuit court affirmed the award of the arbitrator. (R. 35-40). Noriega appealed. (R. 34).

The district court reversed the trial court's order confirming the arbitrator's determination. (R. 41-45). The only explanation for doing so, without citation of authority, was that "the arbitrator misapplied [the law], thereby constituting grounds for our reversal as a matter of law." Noriega v. Schnurmacher Holding, Inc., 13 F.L.W. 1303, 1304 (Fla. 3d DCA May 31, 1988).

The tenant sought review of the district court's decision in this Court on two bases: (1) an express and direct

conflict of decisions as to the obligation of a tenant to pay for sales tax in the absence of a lease provision assigning that responsibility, and (2) the authority of courts to overturn an arbitrator's award in the absence of any factor identified in section 682.13(1), Florida Statutes (1987). The Court granted review in an order entered on November 2.

Statement of the Issues

1. Whether courts can vacate an arbitrator's award in the absence of any factor identified in section 682.13(1), Florida Statutes (1987).

2. Whether the landlord or the tenant under a commercial lease has the burden of paying Florida sales tax in the absence of a lease provision assigning that responsibility.

Summary of the Argument

1. Section 682.13(1), Florida Statutes (1987), prescribes the limited conditions under which an arbitration award may be overturned by the courts. The district court in this case affirmatively held that no factor identified in the statute was present in this case. Noriega, 13 F.L.W. at 1304. The district court's holding, that the arbitrator misapplied the sales tax statute as a matter of law and that the arbitration award could therefore be overturned, is erroneous. It is at odds with section 682.13 itself, and with an unbroken line of case law to the contrary. See, e.g. Cassara v. Wofford, 55 So.2d 102 (Fla. 1951); Affiliated Marketing, Inc. v. Dyco Chemicals & Coatings, Inc., 340 So.2d 1240 (Fla. 2d DCA), cert. denied, 353 So.2d 675 (Fla. 1976). On this basis alone, and without reaching the merits of the sales tax issue, the district court's decision should be reversed and the arbitrator's award reinstated.

2. The sales tax imposed by Florida law on the rental of real property rests, as a matter of law, on a landlord. Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959); Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950); Oven v. Dawirs, 419 So.2d 1186 (Fla. 1st DCA 1982). The district court erred in placing the sales tax burden on the tenant, Schnurmacher, in the absence of a contract provision assigning it that burden.

Argument

1. Arbitration awards may only be overturned under the limited circumstances set forth in section 682.13(1), Florida Statutes (1987), none of which were present here.

The district court's opinion acknowledges that the statutorily-enumerated grounds for vacating an arbitration award are absent in this instance. Noriega, 13 F.L.W. at 1304. The district court specifically rejected the landlord's claim that the arbitrator "exceeded his powers" in contravention of section 682.13(1)(c) -- the only ground urged by the landlord for vacating the award.[1] Nonetheless, the arbitrator's award was reversed with the succinct, but unsupported, statement that the arbitrator and the trial court had misapplied the sales tax law. Noriega, 13 F.L.W. at 1304. Section 632.13(1)(e) and prior decisions of this Court, however, contravene the district court's pronouncement.

Section 682.13(1)(e) expressly states that Florida courts may not vacate or refuse to confirm an arbitration award

---

1/ The landlord's argument that the arbitrator exceeded his powers by re-writing the contract between the parties was properly rejected. The parties agreed to submit, and did submit to arbitration their controversy as to which party is obligated to pay sales tax where the lease is silent on that issue. (R. 10). The arbitrator concluded that "absent a specific assumption or requirement by the lessee set forth in the lease agreement, it is the obligation of the lessor to pay the sales tax ...." (R. 6). The arbitrator directly answered the question posed. In doing so, he neither re-wrote the contract nor exceeded his powers.

because the relief granted by the arbitrator either "could not or would not be granted by a court of law or equity ...." An award may be vacated pursuant to section 682.13(1) only where (a) the award is procured by corruption, fraud or other undue means; (b) there is partiality by an arbitrator or other misconduct prejudicing the rights of any party; (c) the arbitrator exceeded his powers; (d) the arbitrator refuses to hear evidence material to the controversy or postpone the hearing on sufficient cause being shown; or (e) there is no agreement or provision for arbitration.

The landlord and tenant voluntarily resorted to arbitration to resolve their sales tax dispute. By doing so, they voluntarily relinquished their right to have the dispute resolved in a court of law. See Johnson v. Wells, 72 Fla. 290, 73 So. 188 (1916); Affiliated Marketing, Inc. v. Dyco Chemicals & Coatings, Inc., 340 So.2d 1240 (Fla. 2d DCA), cert. denied, 353 So.2d 675 (Fla. 1976). The arbitrator acted in accordance with his instruction to answer the question posed. The district court's disagreement with the arbitrator as to the legal effect of the applicable sales tax provisions is statutorily prohibited.

Precedent plainly provides that "the award of arbitrators in statutory arbitration proceedings cannot be set aside for mere errors of judgment either as to the law or as to the facts ...." Cassara v. Wofford, 55 So.2d 102, 105 (Fla. 1951). Other cases to the same effect are Florida Yacht Club v.

Renfroe, 67 Fla. 154, 64 So. 742 (1914); Johnson v. Wells, 72 Fla. 290, 73 So. 188 (1916); Packard v. Ripple, 13 F.L.W. 2151 (Fla. 3d DCA Sept. 13, 1988), citing McDonald v. Hardee County School Board, 448 So.2d 593 (Fla. 2d DCA), rev. denied 456 So.2d 1181 (Fla. 1984); Affiliated Marketing, Inc. v. Dyco Chemicals & Coatings, Inc., 340 So.2d 1240 (Fla. 2d DCA), cert. denied, 353 So.2d 675 (Fla. 1976); Bohlmann v. Allstate Insurance Co., 171 So.2d 23 (Fla. 2d DCA 1965); Dade County v. Dobbs Houses, Inc., 283 So.2d 886 (Fla. 3d DCA 1973); Newport Motel, Inc. v. Cobin Restaurant, Inc., 281 So.2d 234 (Fla. 3d DCA 1973); Dairyland Insurance Co. v. Hudnall, 279 So.2d 905 (Fla. 3d DCA 1973); Carol City Utilities, Inc. v. Gaines Constr. Co., 201 So.2d 242 (Fla. 3d DCA 1967), cert. denied, 210 So.2d 221 (Fla. 1968).

In Cassara the Court held that even where an arbitrator makes a mistake of law,

> [i]f ... the arbitrators are not guilty of the acts of misconduct set forth in the statute, the award operates as a final and conclusive judgment, and -- however disappointing it may be -- the parties must abide by it.

Cassara, 55 So.2d at 105. The reasons underlying the need for finality in arbitral awards were expressed over 70 years ago in Johnson v. Wells, 72 Fla. 290, 73 So. 188, 190-91 (1917):

> The reason for the high degree of conclusiveness which attaches to an award made by arbitrators is that the parties have by agreement substituted a tribunal of their own choosing for the one provided and established by law, to the end that the expense usually incurred by litigation may be avoided and the

> cause speedily and finally determined. To permit the satisfied party to set aside the award and invoke the judgment of the court upon the merits of the cause would be to destroy the purpose of the arbitration and render it merely a step in the settlement of the controversy, instead of a final determination of it. Indeed, the finality and enforceable nature of the arbitral award is a characteristic feature of arbitration which distinguishes it from other forms of alternative dispute resolution. To allow judicial review of the merits of arbitral awards for any reasons other than those stated in the statute would undermine the purpose of settling disputes through arbitration.

In his Arbitral Finality, Arbitration and the Law, AAA General Counsel's Annual Report, 32-38, at 32 (1987-88), Michael F. Hoellering[1] states "an important advantage of arbitration over other forms of alternative dispute resolution is the final and binding nature of the arbitration process. Modern arbitrational legislation provides only limited grounds for vacating or modifying awards, and it is well settled that an award will not be set aside for errors of fact or law." The district court's unprecedented and unreasoned invalidation of an arbitrator's award for a non-statutory reason thwarts all legislative and judicial precedent in this area.

There is absolutely no support for the district court's assertion of jurisdiction to vacate this arbitration award. The district court's jurisdictional overreach is marked by its

---

1/ Michael F. Hoellering is general counsel of the American Arbitration Association.

failure to cite authority for the action it took. Having acknowledged that none of the statutorily enumerated grounds for vacation exist in this case, the district court was obliged to follow precedent and policy by leaving the arbitrator's award intact. The court's decision must be reversed.

2. The obligation to pay sales tax on the rental of real property rests on the landlord, rather than the tenant, in the absence of a lease provision allocating that burden.

In Oven v. Dawirs, 419 So.2d 1186 (Fla. 1st DCA 1982), the precise question answered by the arbitrator in this case was answered in precisely the same manner: that the burden of payment falls on the landlord when a commercial lease is silent as to the party responsible for the payment of sales tax. The district court in this case incorrectly held to the contrary.

Under section 212.031(3), the lessor bears ultimate responsibility and liability to the state for the payment of sales tax. Section 212.031(1)(a) expressly declares the legislative intent that every person in the business of leasing real property is exercising a taxable privilege. Oven, 419 So.2d. at 1187, citing to Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959). The Fourth District subsequently approved of this analysis in Spacelink of Florida, Inc. v. Golden Lakes Village Ass'n, 505 So.2d 32 (Fla. 4th DCA 1987).

In Green, the Court held that the transient rental tax levied by section 212.03 is an excise tax on the landlord for the privilege of doing business in the state. The statute analyzed

in Green is in all pertinent respects identical to section 212.031, Florida Statutes (1987). Section 212.03(1) states:

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, or letting any living quarters or sleeping or housekeeping accomodations.... For the exercise of such privilege, a tax is hereby levied ... on the total rental charged for such living quarters or sleeping or housekeeping accomodations by the person charging or collecting the rental.

Precisely the same allocation of tax burden on the same taxable privilege is expressed in sections 212.031(1)(a) and (c), Florida Statutes (1987). The state's imposition of sales tax on real property leases and on transient rentals is identical.

The Oven and Spacelink decisions recognize that in Green this Court, for all intents and purposes, already passed on and rejected the notion that the sales tax law imposes responsibility for the tax on tenants, rather than landlords. Nonetheless, the landlord argued below (in its reply to the tenant's motion for rehearing) that section 212.03 was not identical to section 212.031 because the section on transient rental tax does not contain the statement in section 212.031(2)(a) that "The tenant or person actually occupying, using, or entitled to the use of any property from which the rental or license fee is subject to taxation under this section shall pay the tax to his immediate landlord ...." The landlord's reliance on this one sentence in section 212.031(2)(a) is completely misplaced. This recitation in the real property

rental provision does not alter the burden of liability as between landlord and tenant. Section 212.03(2) (analyzed in Green) is similar to section 212.031(2)(a), and provides that the tax "shall be in addition to the total amount of the rental, shall be charged by the lessor ... to the lessee ... and shall be due and payable at the time of the receipt of such rental payment by the lessor ...." (emphasis added). Section 212.03(2), for which the Court in Green held that the tax levied is an excise tax on the landlord since the landlord is the party exercising the privilege of doing business in this state, is in legal effect identical to section 212.031(2)(a). For both the sales tax on real property leases and on transient rentals, the statutory scheme makes the landlord liable, but it directs the landlord to collect the tax from the tenant. If the landlord for any reason did not collect the tax from the tenant, he would still be liable to the state for exercising the taxable privilege of renting his property.

It is also worth noting that in Green the Court implicitly rejected the conclusion (reached by the district court in this case) that section 212.031(3) merely designates the landlord as the agent for collecting and remitting the taxes to the Department of Revenue. Noriega, 13 F.L.W. at 3-4. In Green, the Court repudiated and receded from Spencer v. Metro, 52 So.2d 679 (Fla. 1951) and from Davis v. Ponte Vedra Club, 78 So.2d 858 (Fla. 1955), both of which had held that the seller was merely an

agent of the state charged with the duty of collecting and remitting the tax.

The landlord argues, and the tenant recognizes, that the laws of the state are a part of every contract under Board of Pub. Instruction of Dade County v. Town of Bay Harbor Islands, 81 So.2d 637, 643 (Fla. 1955). To say that the law is part of every contract, however, merely poses the question: It does not provide an answer as to what the law is. This Court has answered the question in its Green and Gaulden decisions, by interpreting the sales tax law to mean that ultimate liabilty for the tax rests on the landlord. Bringing that Florida "law" into the parties' contract, as Noriega requests, is precisely what the arbitrator and circuit court did in holding that the landlord must pay the tax in this case in the absence of a lease provision to the contrary.

Conclusion

The burden of sales tax on the rental of real property has been held by this Court to fall primarily on a landlord, not on a tenant. The Court need not reach that question, however, because that issue was improperly considered by the Third District Court of Appeal. The district court had no authority to address the substantive issue of sales tax burden in the absence of a statutory factor which would warrant court review of an arbitrator's decision. This Court should confirm the sanctity of

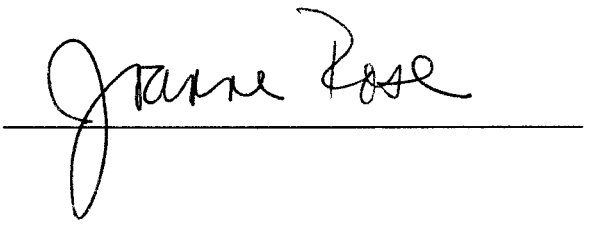
arbitration awards, as reflected in the long line of cases saying that courts may not overturn an arbitrator's award merely for disagreement as to the application of a principle of law. Schnurmacher requests that the Court reverse the decision of the district court and reinstate the action of the circuit court in confirming the arbitrator's award.

Respectfully submitted,

Arthur J. England, Jr., Esq.
Charles M. Auslander, Esq.
Joanne M. Rose, Esq.
Fine Jacobson Schwartz Nash
Block & England
One CenTrust Financial Center
100 S.E. Second Street
Miami, Florida 33131
(305) 577-4000
Attorneys for Petitioner

Certificate of Service

I certify that a correct copy of this brief was mailed on November 28, 1988 to Irwin B. Levenson, Esq., Buchbinder & Elegant, P.A., Counsel for Respondent, 46 S.W. First Street, 4th Floor, Miami, Florida 33130.



:LT:077LT1654C