OA 2-10-89 047

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

NO. 72,994

SCHNURMACHER HOLDING, INC.,

Petitioner,

v.

WILLIAM L. NORIEGA,

Respondent.

PETITIONER'S REPLY BRIEF ON MERITS

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

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Statement of the Case and Facts

In his answer brief, Noriega accuses petitioner of creating misimpressions in the statement of the case and facts presented in the initial brief. Noriega never identifies these misimpressions. Instead, he unduly elongates his factual statement by providing a narrative chronology of events irrelevant to this court's review.

Even more surprisingly, Noriega's statement of facts is repeatedly punctuated with pure argument. Commencing in paragraph 3 of his factual statement (answer brief at page 2), Noriega argues the effect of section 212.031(2)(a), Florida Statutes, on the lease submitted to arbitration.[1] Obviously unsatisfied with this invasion of argument into his statement of facts, Noriega continues the trend on page 3 of his brief by setting forth a provision of the arbitrator's decision and bluntly stating that "the arbitrator re-wrote the agreement between the parties."[2] In these passages Noriega has characterized facts and argued legal conclusions. Noriega has

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1/ The quotation from Noriega's brief is as follows: "The [statute] is a part of the contract entered into by and between the parties to this cause as though it were set forth therein verbatim."

2/ The exact quote from Noriega's brief is: "[n]otwithstanding that the statutory law of Florida was a part of the contract between the parties and plainly imposed the obligation of paying the sales tax on the tenant, the arbitrator re-wrote the agreement between the parties...." (Answer brief at 3).

truly developed a novel way to cure unidentified misimpressions purportedly crafted by petitioner in its statement of the facts.

Rather than dwelling any further on these improprieties, which the court is required to ignore in any event, one more point must be noted prior to replying to Noriega's argument. Noriega has seen fit to rewrite and reverse the order of the issues presented to this court. The purpose of an answer brief is to respond to the issues presented by the petitioner. Noriega's restatement and reverse presentation of the issues does nothing to further this purpose. If argumentative presentation of the issues is Noriega's goal, the appropriate place is the text of his arguments which challenge petitioner's presentation. Petitioner will reply to the issues as presented in the initial brief.

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.

Noriega's argument for overturning the arbitration procedure jointly agreed to by the parties is that the arbitrator's decision rewrites the contract between the parties. Of course, Noriega cannot point to one word from the arbitrator's opinion which reflects that consequence. The opinion addresses only the question of sales tax allocation where a contract fails to deal with the legal issue in controversy.

What Noriega is really arguing, unmasked from its verbal disguise, is that the arbitrator reached the wrong decision under Noriega's view of what the law should be regarding who bears the burden of sales tax on rental payments. This faulty interpretation of the law, he implies, caused a rewrite of the contractual agreement for purposes of section 682.13(1). If accepted, this contention would have a grave impact on the settled law of arbitration in this state. If Noriega is correct that the arbitrator's decision regarding the law amounts to a revision of the contract, then all legal decisions of arbitrators in commercial cases of any sort are subject to the claim that the arbitrator has rewritten the contract. No arbitration involving a legal question will be immune from court review, and the

limitation of the statute will become instead an invitation for judicial second-guessing.

It certainly bears noting once again that section 682.13(1)(e) expressly states that Florida courts may not vacate or refuse to confirm an arbitration award because the relief granted by the arbitrator either "could not or would not be granted by a court of law or equity...." (See petitioner's initial brief at 4-5). There is no analytical distinction between Noriega's "rewrite of the contract" theory as applied to this case and the admonition of this court that "the award of arbitrators in statutory arbitration proceedings cannot be set aside for mere errors of judgment ... as to the law...." Cassara v. Wofford, 55 So.2d 102, 105 (Fla. 1951).

If Noriega's argument is to prevail that "the law is a part of every contract" for this purpose, whenever an arbitrator construes the law and in the course of doing so makes no reference to a particular contractual provision (and indeed in this case the arbitrator could not since admittedly there was no contract provision), then the statute governing arbitration reviewability is made meaningless. At any time at which a reviewing court adjudges a statute to be in conflict with an explicit, or even implicit, contractual provision then the arbitrator's decision may be vacated if the reviewing court takes

a differing view of how the law applies to the particular circumstance.

This is exactly the error made by the Third District when it determined that misapplication of the law by the arbitrator constituted grounds for reversal of the arbitrator's decision as a matter of law. Noriega v. Schnurmacher Holding, Inc., 528 So.2d 28, 31 (Fla. 3d DCA 1988). That decision is erroneous because it fails to follow uniform and binding precedent of this court. Cassara, supra; Johnson v. Wells, 72 Fla. 290, 73 So. 188 (1916).

Interestingly, none of the cases cited by Noriega support his novel "rewrite of the contract" theory as applied to this circumstance. In United Steelworkers,[3] the United States Supreme Court actually reversed a court of appeal's opinion which had refused to enforce the decision of the arbitrator. The high court specifically enforced the arbitrator's determination against the argument that the law had not properly been applied to the contract in question. The pertinent language from the court's holding, unlike the passage quoted with that claim in Noriega's brief, reads as follows:

> Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the

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3/ United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 591, 80 S.Ct. 1358 (1960).

> collecting bargaining agreement it can be determined that the agreement did not so provide, and that therefore the arbitrator's decision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final ... [t]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

United Steelworkers, 363 U.S. at 598-599; 80 S.Ct. at 1361-62. Neither the result nor the reasoning of United Steelworkers assists Noriega's argument.

Noriega then cites two Florida decisions which even the Third District rejected as precedent for Noriega's assertion that the arbitrator exceeded his powers.[4] The Cornelison case is analytically distinct from this circumstance and in no way supports Noriega's contentions. In Cornelison, the function of

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[4] School Board of Seminole County v. Cornelison, 406 So.2d 484 (Fla. 5th DCA 1981), rev. denied, 421 So.2d 67 (Fla. 1982); SAC Construction Company v. Milam Dairy Associates, 481 So.2d 28 (Fla. 3d DCA 1986).

the arbitrator was to determine under the collective bargaining agreement whether the school board had followed certain evaluation procedures for non-contractual renewal of a non-tenured teacher. The arbitrator apparently found that the evaluation procedures had not been followed and then he renewed the teacher's contract for an additional year. This was not a remedy provided by the collective bargaining agreement. The arbitrator plainly went beyond the relief he could grant and in so doing exceeded his powers by failing to limit himself to the submission of the parties. The Third District, in its decision below, quite rightly did not utilize this case to vacate the arbitration decision, since there was no contention here that the arbitrator ruled on a matter not submitted by the parties.

The SAC decision is a one paragraph per curiam opinion, revealing no facts, simply approving the Cornelison opinion. It has no precedential value to this court's resolution of this issue. Neither of these decisions support Noriega's theory that the arbitrator rewrote the contract in this instance.

Noriega next turns to what he admits to be two novel reasons for upsetting the arbitrator's decision. The first ground is that a court should be willing to intrude on the arbitrator's exclusive jurisdiction if his award is violative of public policy. The out-of-state case cited for this proposition dealt with an arbitrator's assessment of punitive damages not

provided for in the agreement submitted to arbitration. Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976). In a 4 to 3 decision, the majority decided that the award of punitive damages should be vacated because such an award by an arbitrator violates public policy principles.

Interestingly, it appears that this case could have been decided on the same basis as Cornelison, that the arbitrator exceeded the remedies provided in the contract submitted to arbitration. In any event, the New York court appears to be in the minority in its adoption of the public policy ground for vacation of an arbitration decision and the Florida courts have approved no such exception.[5]

The second novel ground urged for reversal is that the arbitrator meant to decide the case according to law but decided it wrongly, and thus the arbitration decision cannot stand. This argument is mere bootstrapping to the initial argument made by Noriega that the failure to apply the law as he interprets it caused the arbitrator to rewrite the contract between the parties. Approval of this argument would lead to nothing less

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5/ The annotation of the Garrity case discusses a number of cases related to the peculiar issue of a punitive damages award made by an arbitrator and reflects that a number of federal decisions have upheld the arbitrator's right to assess punitive damages. Annotation, Arbitrator's Power to Award Punitive Damages, 83 A.L.R. 3d 1037 (1978).

than an open season of full reviewability of arbitration decisions by the courts subject to none of the statutory limitations on that review. See Section 682.13, Fla. Stat. (1987).

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.

Noriega's substantive argument regarding who should bear the sales tax ignores precedent. Noriega erroneously states that the landlord is merely the state's agent for the collection and payment of the tax. (Answer brief at 12). In Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959), this court expressly rejected this mere agency theory regarding the landlord's obligation for the sales tax. In Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950), which involved the landlord's failure to collect and pay the tax, the court made expressly clear that the landlord is the one who is required to pay the tax to the state and that it is he on whom the tax is levied for the privilege of engaging in the business of leasing property. Id. This early judicial overlay on the statutory scheme of taxation imposed in sections 212.03 and 212.031(3) has been accepted as authoritative for almost the entire life of Florida's sales tax law. The First and Fourth Districts rest on solid ground in determining that when a commercial lease is silent as to the party responsible for

payment of the sales tax, the burden of payment falls on the landlord and not the tenant. Oven v. Dawirs, 419 So.2d 1186 (Fla. 1st DCA 1982); Spacelink of Florida, Inc. v. Golden Lakes Village Ass'n, 505 So.2d 32 (Fla. 4th DCA 1987).[6]

It should be stressed that none of the cases cited by Noriega hold that the tenant must actually pay the tax, or that an agreement which is silent on the point requires the tenant to pay the tax. For instance, in Zero Food Storage Division v. Department of Revenue, 330 So.2d 765 (Fla. 1st DCA 1976), the court found only that a sublessor must pay the tax when it failed to collect it from several sublessees. Other cases cited by Noriega do not sustain his hypothesis that in a commercial lease the parties could not expressly provide for the landlord to pay the sales tax since the cases he cites for this proposition are not sales tax cases. Local No. 234 v. Helney & Beckwith, Inc., 66 So.2d 818 (Fla. 1963) (court will not enforce a closed shop agreement); Robert G. Lassiter & Co. v. Taylor, 99 Fla. 819, 128 So. 14 (1930) (municipality cannot pay public funds for contract agreed to in derogation of its municipal charter).

6/ The Second District and even the Third District have, in passing, approved the Oven result. See Natural Kitchen, Inc. v. American Transworld Corporation, 449 So.2d 855, 859 (Fla. 2d DCA 1984); Valencia Center, Inc. v. Publix Super Markets, Inc., 464 So.2d 1267, 1269 (Fla. 3d DCA), rev. denied, 475 So.2d 696 (Fla. 1985).

Interestingly, Noriega violates his own hypothesis on this score by stating that in the case of ad valorem taxation that parties to a contract could agree to shift the burden of taxation from the property owner to the tenant. (Answer brief at 18). There is no analytical distinction identified for this purpose between ad valorem taxes and sales taxes, and none comes to mind. Consequently, if the burden of ad valorem taxation can be allocated by contract, which most certainly it can, Noriega has condemned his own argument. In any event, it is quite plain that the Oven decision correctly decided that the absence of a contractual sales tax provision leaves the burden with the landlord to pay that tax.

Conclusion

For the reasons expressed in petitioner's initial and reply briefs, the judgment of the district court should be reversed with directions to enforce the arbitrator's decision.

Respectfully submitted,

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Certificate of Service

I certify that a correct copy of this brief was mailed on January 13, 1989 to Irwin B. Levenson, Esq., Buchbinder & Elegant, P.A., Counsel for Respondent, 46 S.W. First Street, 4th Floor, Miami, Florida 33130.

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