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IN THE SUPREME COURT OF FLORIDA

FLORIDA EDUCATION ASSOCIATION/UNITED,
f/k/a FLORIDA EDUCATION ASSOCIATION, INC.,

Petitioner,

vs.

WILLIAM R. SACHS,

Respondent.
_____/

CASE NO. 83,206

FILED
SID J. WHITE
FEB 25 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

ON REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

Robert M. Ervin Jr.
Florida Bar No. 0350397
of the law firm of
Ervin, Varn, Jacobs,
Odom & Ervin
Post Office Drawer 1170
Tallahassee, FL 32302
(904) 224-9135

Attorneys for Petitioner

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STATEMENT OF THE CASE AND FACTS

This is a petition by the Florida Education Association/United ("FEA"), pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv) and 9.120, for review of a decision of the First District Court of Appeal of Florida ("the district court"). As framed by the district court, the relevant facts are as follows:

In 1989, the respondent, William R. Sachs ("Sachs"), sued FEA in circuit court, alleging FEA's failure to pay him under a 1977 contract for architectural services. [App. at 1-2.] The contract, which was attached to Sachs's complaint, provided for arbitration. [App. at 2.] FEA answered the complaint and asserted a counterclaim. [App. at 2.] Thereafter, Sachs filed an amended complaint which, following an unsuccessful motion to dismiss, FEA answered, reasserting its counterclaim. [App. at 2.]

FEA and Sachs proceeded with discovery, concluding with depositions on March 7, 1991. [App. at 2.] In March 1992, FEA moved to dismiss for failure to prosecute. The motion was granted. [App. at 2.] Following the dismissal, Sachs moved to stay the trial court proceedings, "expressing for the first time a desire to seek arbitration under . . . the contract." [App. at 2.] Based upon the previous dismissal of Sachs's complaint, the trial court denied the motion as moot. [App. at 2-3.]

Citing section 682.03(4), Florida Statutes (1991), FEA then moved the trial court to stay arbitration as to its counterclaim. [App. at 3.] FEA sought a permanent stay of arbitration based upon a finding either that (1) the arbitration agreement was void or (2) Sachs had waived his right to arbitration by submitting his claim

to the courts. [App. at 3.] The trial court denied the motion, stating that the arbitration panel could decide the questions of voidness and waiver before proceeding to the merits of the case. [App. at 3-4.] FEA appealed the trial court's order to the district court. [App. at 4.]

Citing several cases from other district courts of appeal, the district court concluded that "the greater weight of the authority"[1] mandates that courts yield to arbitration where the making of the arbitration agreement is admitted, and the issue relates only to whether the agreement has been abandoned or is no longer in effect because of subsequent events. [App. at 4-5.] In so concluding, however, the district court recognized the existence of conflicting authority.[2] [App. at 4.] The district court concluded that whether the arbitration agreement herein is void because a valid agreement never existed should be decided by the trial court. [App. at 5.] The district court remanded with directions to the trial court to determine only that issue prior to ruling on the motion for stay. [App. at 5.]

In doing so, the district court concluded,

> In light of this ruling, we need not address appellant's argument on the merits of the waiver issue.

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[1] Modern Health Care Servs. v. Puglisi, 597 So. 2d 930 (Fla. 3d DCA 1992); Feather Sound Country Club, Inc. v. Barber, 567 So. 2d 10 (Fla. 2d DCA 1990); Metropolitan Dade County v. Resources Recovery (Dade County) Constr. Corp., 462 So. 2d 570 (Fla. 3d DCA 1985); Gersh v. Concept House, Inc., 291 So. 2d 258 (Fla. 3d DCA 1974).

[2] Thomas W. Ward & Assocs. v. Spinks, 574 So. 2d 169 (Fla. 4th DCA 1990), review denied mem., 583 So. 2d 1037 (Fla. 1991); Calloway Homes, Inc. v. Smiley, 422 So. 2d 49 (Fla. 4th DCA 1982).

> We note that, should the trial court determine that, at one time, a valid contract and arbitration clause existed, the effect of any post-contracting event on that clause is an issue for the arbitrators.

[App. at 5.]

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal has held that the duty imposed on the trial court by section 682.03(4), Florida Statutes (1991), includes a determination of whether a substantial issue has arisen as to the termination of a prior contractual provision for arbitration; and if such an issue is found to exist, then to resolve it summarily. Moreover, this Court and each of the other district courts of appeal have recognized the well-established principle that the trial court may determine whether a party to a lawsuit, by actively participating in the lawsuit, has waived the right to arbitration. Therefore, in precluding the trial court herein from determining the waiver issue, the decision of the district court expressly and directly conflicts with decisions of this Court and each of the other district courts of appeal on the same question of law.

ARGUMENT

THE DECISION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND EACH OF THE OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW; THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO CONSIDER THE MERITS OF FEA'S ARGUMENT

The Fourth District Court of Appeal in Calloway Homes, Inc. v. Smiley, 422 So. 2d 49 (Fla. 4th DCA 1982), held that the duty imposed on the trial court by section 682.03(4), Florida Statutes (1991), includes a determination of whether a substantial issue has arisen as to the termination of a prior contractual provision for arbitration; and if such an issue is found to exist, then to resolve it summarily. Smiley, 422 So. 2d at 50; accord Thomas W. Ward & Assocs. v. Spinks, 574 So. 2d 169, 169-70 (Fla. 4th DCA 1990), review denied mem., 583 So. 2d 1037 (Fla. 1991). Therefore, in precluding the trial court herein from determining the waiver issue, the decision of the district court expressly and directly conflicts with decisions of the Fourth District Court of Appeal.

Moreover, it is well-established that the trial court may determine whether a party to a lawsuit, by actively participating in the lawsuit, has waived the right to arbitration. This principle has been recognized by this Court, see Klosters Rederi A/S v. Arison Shipping Co., 280 So. 2d 678, 679, 681 (Fla. 1973); by the Second District Court of Appeal, see Donald & Co. Sec. v. Mid-Florida Community Servs., Inc., 620 So. 2d 192, 193, 194 (Fla.

2d DCA 1993)[3]; by the Third District Court of Appeal, see Hardin Int'l, Inc. v. Firepak, Inc., 567 So. 2d 1019, 1020-21 (Fla. 3d DCA 1990)[4]; by the Fourth District Court of Appeal, see Finn v. Prudential-Bach Sec., Inc., 523 So. 2d 617, 618 (Fla. 4th DCA), review denied mem., 531 So. 2d 1354 (Fla.), cert. denied mem., 488 U.S. 917 (1988)[5]; and by the Fifth District Court of Appeal, see School Bd. of Orange County v. Southeast Roofing & Sheet Metal, Inc., 489 So. 2d 886, 886, 887 (Fla. 5th DCA), review dismissed mem., 496 So. 2d 143 (Fla. 1986).[6] Therefore, in precluding the

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[3] Accord Bared & Co. v. Specialty Maintenance & Constr., Inc., 610 So. 2d 1, 1, 2-3 (Fla. 2d DCA 1992); State Farm Fire & Casualty Co. v. Kaplan, 596 So. 2d 101, 101-02 (Fla. 2d DCA 1992); Executive Life Ins. Co. v. John Hammer & Assocs., 569 So. 2d 855, 856 (Fla. 2d DCA 1990); Wieneke v. Raymond, James & Assocs., 495 So. 2d 869, 870, 871 (Fla. 2d DCA 1986); Prudential-Bache Sec., Inc. v. Pauler, 488 So. 2d 894, 894-95 (Fla. 2d DCA 1986); Riverfront Properties, Ltd. v. Max Factor III, 460 So. 2d 948, 949, 952 (Fla. 2d DCA 1984); Manalili v. Commercial Mowing & Grading, 442 So. 2d 411, 412, 413 (Fla. 2d DCA 1983); Balboa Ins. Co. v. W.G. Mills, Inc., 403 So. 2d 1149, 1150 (Fla. 2d DCA 1981); Seville Condominium #1, Inc. v. Clearwater Dev. Corp., 340 So. 2d 1243, 1244, 1245 (Fla. 2d DCA 1976), cert. denied mem., 348 So. 2d 945 (Fla. 1977).

[4] Accord Rosen v. Shearson Lehman Bros., Inc., 534 So. 2d 1185, 1186-87 (Fla. 2d DCA 1988), review denied mem., 544 So. 2d 200 (1989); Coral 97 Assocs. v. Chino Elec., Inc., 501 So. 2d 69, 70-71 (Fla. 3d DCA 1987); Lapidus v. Arlen Beach Condominium Assoc., 394 So. 2d 1102, 1102-03 (Fla. 3d DCA 1981); Ojus Indus., Inc. v. Mann, 221 So. 2d 780, 780, 782-83 (Fla. 3d DCA 1969); Mike Bradford & Co. v. Gulf States Steel Co., 184 So. 2d 911, 912-13, 915 (Fla. 3d DCA 1966).

[5] Accord Marthame Sanders & Co. v. 400 W. Madison Corp., 401 So. 2d 1145, 1145 (Fla. 4th DCA 1981); William Passalacqua Builders, Inc. v. Mayfair House Ass'n, 395 So. 2d 1171, 1172-73 (Fla. 4th DCA 1981); King v. Thompson & McKinnon, Auchincloss Kohlmeyer, Inc., 352 So. 2d 1235, 1235 (Fla. 4th DCA 1977); Gettles v. Commercial Bank, 276 So. 2d 837, 838, 840 (Fla. 4th DCA 1973).

[6] Accord Paine, Webber, Jackson & Curtis, Inc. v. Fredray, Inc., 521 So. 2d 271, 272 (Fla. 5th DCA 1988); R.W. Roberts Constr. Co. v. Masters & Co., 403 So. 2d 1114, 1115 (Fla. 5th DCA 1981).

trial court herein from determining the waiver issue, the decision of the district court expressly and directly conflicts with decisions of this Court and each of the other district courts of appeal on the same question of law.

It is evident from the foregoing authorities that this Court and each of the other district courts of appeal have determined that where, as here, the trial court's jurisdiction has already been submitted to by the parties to a lawsuit, the trial court, and not a subsequent arbitrator, is in the best position to determine whether a party has waived his right to arbitration by first submitting his claim or defense to the trial court. The waiver issue is dispositive of this case. To preclude the trial court, which has been directed to decide only the voidness issue, from now deciding the waiver issue as well, is not only in express and direct conflict with decisions of this Court and each of the other district courts of appeal, it is a waste of judicial resources, for the issue will undoubtedly return.

CONCLUSION

For the foregoing reasons, this Court has discretionary jurisdiction to review the decision of the district court and should exercise that jurisdiction to consider the merits of FEA's argument.

Respectfully submitted,

Robert M. Ervin Jr.
Florida Bar No. 0350397
of the law firm of
Ervin, Varn, Jacobs,
Odom & Ervin
Post Office Drawer 1170
Tallahassee, FL 32302
(904) 224-9135

Attorneys for Petitioner

APPENDIX

Florida Education Association/United v. Sachs,
No. 92-3136 (Fla. 1st DCA Dec. 7, 1993)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

FLORIDA EDUCATION ASSOCIATION/ UNITED, f/k/a FLORIDA EDUCATION ASSOCIATION, INC.,

Appellants,

vs.

WILLIAM R. SACHS,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED.

CASE NO. 92-3136

Opinion filed December 7, 1993.

An Appeal from the Circuit Court for Leon County.
P. Kevin Davey, Judge.

Robert M. Ervin, Jr., of Ervin, Varn, Jacobs, Odom & Ervin, Tallahassee, for appellants.

William R. Sachs, pro se.

DAVIS, J.

Florida Educational Association/United (FEA) has appealed from a nonfinal order of the trial court denying its motion to stay arbitration. We reverse, and remand for further proceedings.

In 1989, appellee Sachs filed a pro se complaint in circuit

court, alleging FEA's failure to pay him under a 1977 contract for architectural services on FEA's property. He also alleged that he had filed a lien against that property. Sachs attached to the complaint a copy of the contract, Article 11 of which provided that "all claims, disputes and other matters arising out of, or relating to this agreement or the breach thereof shall be decided by arbitration . . . unless the parties mutually agree otherwise."

FEA answered the complaint, denying its allegations and asserting numerous affirmative defenses. FEA also filed a counterclaim alleging the fraudulent filing of a lien, to wit: Sachs knew or should have known that the contract on which the lien was based was invalid, and of no force and effect. Sachs thereafter filed an amended complaint and, after an unsuccessful motion to dismiss, FEA answered the amended complaint and re-asserted its counterclaim. The parties proceeded with discovery, concluding with depositions on March 7, 1991.

The only action in the case in the twelve months thereafter was the substitution and withdrawal of Sachs' counsel in July and October 1991, respectively. Citing the foregoing inactivity, FEA moved to dismiss for failure to prosecute in March 1992. The trial court granted this motion. Only then did Sachs move to stay the court proceedings, expressing for the first time a desire to seek arbitration under Article 11 of the contract. Based on the previous dismissal of Sachs' complaint, the trial court denied the

motion as moot. FEA thereafter moved to stay arbitration as to its counterclaim, citing section 682.03(4), Florida Statutes (1991).[1]

FEA alleged in its motion either that the 1977 contract, and thus the arbitration clause contained therein, was void, or that Sachs had waived arbitration by pursuing a civil suit. Sachs did not appear at the hearing on the motion to stay at which FEA's counsel informed the trial court that it had already participated in the arbitration process as to the counterclaim to a limited extent and under protest. FEA sought a permanent stay of arbitration based on a finding either that: 1) the arbitration agreement was void, or 2) Sachs had waived his right to arbitration by submitting his claim to the courts.

The trial court thereupon expressed itself reluctant to interfere with the arbitration proceeding and stated that the arbitration panel itself could decide the questions of voidness and waiver before proceeding to the merits of the case. In response to FEA's argument that, if the court did not act, it would have to incur the expense of preparing for the merits of the arbitration proceeding, the court expressed the view that the arbitrators would

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[1]On application, the court may stay an arbitration proceeding commenced or about to be commenced if it shall find that no agreement or provision for arbitration subject to this law exists between the party making the application and the party causing the arbitration to be had. The court shall summarily hear and determine the issue of the making of the agreement or provision and, according to its determination, shall grant or deny the application.

undoubtedly settle the voidness/waiver issues before setting a merits hearing. The court orally announced its intent to deny the motion for stay without prejudice to reconsideration if the arbitrators refused to consider FEA's defenses, but the written order entered thereafter simply denied the motion.

Section 682.03(4), Florida Statutes, mandates that courts yield to arbitration where the making of the agreement and arbitration clause are admitted, and the issue relates only to whether that contract was abandoned or no longer in effect due to subsequent events. Gersh v. Concept House, Inc., 291 So. 2d 258, 259 (Fla. 3d DCA 1974). Accord Feather Sound Country Club, Inc. v. Barber, 567 So. 2d 10 (Fla. 2d DCA 1990). See also Metropolitan Dade County v. Resources Recovery Construction Corp., 462 So. 2d 570 (Fla. 3d DCA 1985) (if the party is asserting that an existing arbitration clause is not in effect due to events following the contract, the issue of whether a question is arbitrable is for the arbitrators); Modern Health Care Services, Inc. v. Puglisi, 597 So. 2d 930 (Fla. 3d DCA 1992) (the institution of arbitration proceedings divests the court of jurisdiction over all but the making of the arbitration agreement). But see Calloway Homes, Inc. v. Smiley, 422 So. 2d 49 (Fla. 4th DCA 1982) and Thomas W. Ward & Assocs., Inc. v. Spinks, 574 So. 2d 169 (Fla. 4th DCA 1990) (trial court can properly address the issue of post-contract termination of an existing arbitration clause).

Under the greater weight of the authority, we find that the question here is whether FEA's position below was that: 1) a contract between itself and Sachs containing an arbitration clause never existed (a question for the court); or 2) an existing arbitration clause was no longer in effect because of abandonment or other post-contracting events (a determination for the arbitrators). After an exhaustive review of FEA's filings below, we find that the gravamen of those filings is that a valid contract and arbitration clause never existed. We therefore reverse the order of the trial court insofar as it defers to the arbitrators on the existence of the contract. We remand with directions to determine that issue prior to ruling on the motion for stay. See Acumen Construction, Inc. v. Neher, 616 So. 2d 98, 99 (Fla. 2d DCA 1993).

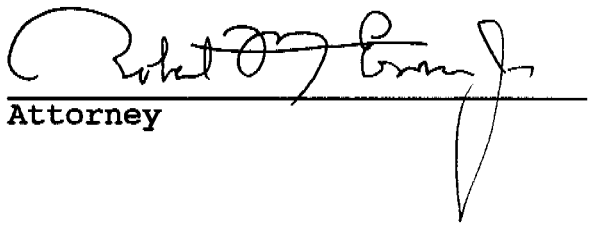
In light of this ruling, we need not address appellant's argument on the merits of the waiver issue. We note that, should the trial court determine that, at one time, a valid contract and arbitration clause existed, the effect of any post-contracting event on that clause is an issue for the arbitrators.

Reversed and remanded with directions.

ZEHMER, CHIEF JUDGE, and SHIVERS, SENIOR JUDGE, CONCUR.

Certificate of Service

I certify that a copy of the foregoing has been furnished to William R. Sachs, 5018 64th Street, Woodside, NY 11377, by mail this 24th day of February 1994.



Attorney