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
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REVIEW OF THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This is a review of Florida Education Association/United v. Sachs, 627 So. 2d 1240 (Fla. 1st DCA 1993), based on conflict with Klosters Rederi A/S v. Arison Shipping Co., 280 So. 2d 678 (Fla. 1973), cert. denied mem., 414 U.S. 1131, 94 S. Ct. 869, 38 L. Ed. 2d 755 (1974), and numerous decisions of the several district courts of appeal.[1] Florida Education Association/United ("FEA") appealed to the First District Court of Appeal ("the district court") from a non-final order of the trial court which had denied FEA's motion for a stay of arbitration proceedings initiated by William R. Sachs ("Sachs"). Sachs, 627 So. 2d at 1240. The trial court had denied FEA's motion to stay arbitration despite the fact that Sachs, over two and one-half years earlier, had submitted to the trial court the claim for which he subsequently initiated arbitration. [App. at 1-3, 5, 140-41, 158-60, 170-71, 174-75.][2]

The district court reversed the trial court's denial of FEA's motion, and remanded with directions to the trial court to determine whether the arbitration agreement was void because a valid arbitration agreement had never existed. Id. at 1241. In doing so, the district court precluded the trial court from determining whether Sachs, "by submitting his claim to the courts," id., waived any right to arbitration that he may have had, noting that the waiver issue was solely for the arbitrators. Id. at 1241-42. It is from the district court's holding on the waiver issue that FEA seeks relief.

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[1] See cases cited infra pp. 10-12.

[2] All references to "App." are to the Appendix to Initial Brief of Appellant, as filed in FEA's appeal to the district court.

I. Trial Court Proceedings

On October 3, 1989, Sachs, a resident of New York, [App. at 5, 6, 15], appearing pro se, sued FEA and other parties who are no longer participants in the litigation, [App. at 1, 5]. In a three-count complaint, filed in the Circuit Court for Leon County, Florida, Sachs alleged that the defendants and he had entered into a standard American Institute of Architects ("AIA") form agreement whereby Sachs was to provide architectural services to the defendants. [App. at 5.] Sachs sought $1,267,200 in damages, an amount which was alleged to include services rendered, interest thereon and anticipated profit. [App. at 5.]

Attached to the complaint was a copy of a statement for that amount, dated August 5, 1988. [App. at 6.] Also attached to the complaint was the standard AIA form agreement alleged by Sachs, which was dated August 15, 1977. [App. at 7-14.] Included in the AIA agreement was a provision that all claims, disputes and other matters relating to the agreement were to be decided by arbitration. [App. at 13.] Also attached to the complaint was a copy of a claim of lien, in the amount of $1,267,200, signed by Sachs. [App. at 15.] The copy of the claim of lien indicated that the original had been recorded in the Public Records of Leon County on October 17, 1988. [App. at 15.] Along with the complaint, Sachs served FEA with several requests for admission. [App. at 16-17.]

FEA answered the complaint and asserted several affirmative defenses. [App. at 18-21.] FEA did not, however, raise the arbitration provision of the AIA agreement as a defense. FEA also initiated a counterclaim against Sachs for recording a fraudulent

lien. [App. at 21-22.] Sachs, now represented by the law firm of Fuller, Johnson & Farrell, replied to and denied each of the affirmative defenses raised by FEA. [App. at 24.] Sachs also answered FEA's counterclaim, but raised no affirmative defenses to the counterclaim. [App. at 26-27.] On February 19, 1990, Sachs moved the trial court for leave to file an amended complaint. [App. at 28-29.] On February 26, 1990, the motion was granted. [App. at 30-31.]

On June 20, 1990, FEA moved the trial court for summary judgment on its counterclaim. [App. at 32-34.] On July 25, 1990, Sachs, now represented by another law firm, Broad & Cassel, served a verified two-count amended complaint. [App. at 35-40.] In one count, Sachs sought damages for the alleged breach of the AIA agreement. [App. at 38.] In the other count, Sachs sought damages for quantum meruit. [App. at 38-39.] Sachs did not seek, however, to enforce his claim of lien, which was neither alleged in nor attached to the amended complaint. [App. at 35-40.]

In August 1990, FEA's motion for summary judgment was denied. [App. at 41.] FEA then moved the trial court for a more definite statement or to dismiss the amended complaint for failure to state a cause of action. [App. at 42-48.] In September 1990, FEA's motions were denied. [App. at 49.] Also in September 1990, Sachs and FEA served on one another several interrogatories and requests for production. [App. at 50-59.]

In October 1990, FEA answered the amended complaint and asserted several affirmative defenses, but did not raise the arbitration provision of the AIA agreement as a defense. [App. at

60-63, 65.] FEA also reasserted its counterclaim against Sachs for recording a fraudulent lien. [App. at 63-64.] Sachs replied to and denied each of the affirmative defenses raised by FEA. [App. at 66-67.] Sachs also answered FEA's counterclaim, but raised no affirmative defenses to the counterclaim. [App. at 67-68.]

In December 1990 and January 1991, Sachs and FEA served upon one another their responses to the interrogatories and requests for production previously served. [App. at 69-76.] On March 7, 1991, Sachs deposed FEA's designated representative. [App. at 77.] The transcript of the deposition encompassed 167 pages. [App. at 80.] Thirty-six exhibits were identified during the course of the deposition. [App. at 79.] Also on March 7, 1991, FEA deposed Sachs. [App. at 81.] The transcript of the deposition encompassed 139 pages. [App. at 84.] Eleven exhibits were identified during the course of the deposition. [App. at 83.]

On July 3, 1991, yet another law firm, Stowell, Anton & Kraemer, moved the trial court to be substituted as counsel for Sachs. [App. at 85-86.] On October 21, 1991, Stowell, Anton & Kraemer moved the trial court for leave to withdraw as counsel for Sachs upon the ground that that law firm had been discharged by Sachs. [App. at 87-88.] On March 10, 1992, FEA moved the trial court to dismiss Sachs's action for failure to prosecute upon the ground that no activity to advance Sachs's action had occurred for a period of over one year. [App. at 89-91.]

On March 18, 1992, Sachs, again appearing pro se, served a thirty-eight page motion, [App. at 92-129], among other things, to raise the amount of damages claimed to $2,447,646, [App. at 92],

and "proceed to trial forthwith," [App. at 92-93]. Thereafter, FEA's motion to dismiss, which was originally noticed for hearing on May 4, 1992, [App. at 130-31], was, at Sachs's request, renoticed for hearing on June 3, 1992, [App. at 132-34]. Nevertheless, Sachs moved the trial court to reschedule the hearing again, this time for July 8, 1992, [App. at 135], so that Sachs could, among other things, present "evidence as to the merits as to why his cause should be allowed to proceed to trial forthwith . . . ," [App. at 136]. On June 4, 1992, FEA's motion to dismiss Sachs's action was granted. [App. at 138-39.]

Thereafter, on June 15, 1992, Sachs, for the first time, moved the trial court to stay the Florida court proceedings, [App. at 140-42], allegedly because an attorney for FEA had agreed to arbitration in Florida, [App. at 140]. Sachs asserted that his trial court action "was to preserve the Plaintiff's right of Lien." [App. at 140.] Sachs further asserted that a New York court had previously stayed arbitration initiated by Sachs in New York, pending completion of his action upon his lien in Florida. [App. at 140-41.] By the time Sachs moved to stay the Florida trial court proceedings, over two and one-half years had passed since Sachs had filed his complaint, nearly two years had passed since Sachs had amended his complaint and abandoned his action to enforce his lien, and almost seventy pleadings and other papers had been docketed with the trial court. [App. at 1-3.]

In responding to Sachs's motion to stay the trial court proceedings, [App. at 143-57], FEA pointed out that Sachs had sought arbitration in New York <u>after</u> suing FEA in Florida, [App. at

143]. Attached to FEA's response was a copy of an April 1990 order of the New York court in which the New York court denied FEA's application for a permanent stay of arbitration, but stayed the New York arbitration "pending completion of the lien foreclosure action in the Florida courts." [App. at 148-49.] FEA further pointed out that FEA's attorney never agreed to arbitration. Rather, upon Sachs's statement that he intended to have the stayed New York arbitration moved to Florida, FEA's attorney simply agreed to consider any written proposal concerning the arbitration. [App. at 144-45, 150, 155.] FEA argued that the arbitration agreement was void, [App. at 143-44], and that Sachs, by submitting his claim to the trial court, waived any right to arbitration that he may have had, [App. at 145]. The trial court ruled that the dismissal of Sachs's Florida action rendered Sachs's motion to stay the Florida action moot. [App. at 162.]

On July 10, 1992, FEA, relying in part upon section 682.03(4), Florida Statutes (1991), moved the trial court to stay arbitration in Florida upon the grounds that a valid arbitration agreement had never existed and that Sachs, by submitting his claim to the trial court and actively participating in the lawsuit, waived any right to arbitration that he may have had. [App. at 158-61.] At the hearing on the motion, [App. at 163-86], the trial court, doubting its jurisdiction, declined to decide either issue, preferring to defer to the arbitrators for a ruling upon the issues raised in FEA's motion to stay arbitration, [App. at 175-83]. The trial court, therefore, denied the motion. [App. at 187.]

II. District Court Proceedings

FEA appealed the trial court's order to the district court. Sachs, 627 So. 2d at 1240. Still relying in part upon section 682.03(4), FEA argued that the trial court erred in deferring to the arbitrators rather than ruling upon the two issues raised in FEA's motion to stay arbitration, and sought a remand for a ruling upon both issues. [Initial Br. of Appellant at 7, 13.] FEA also argued, in the alternative, that the trial court erred as a matter of law in denying FEA's motion because the facts were sufficient to establish that Sachs, by submitting his claim to the trial court and actively participating in the lawsuit, waived any right to arbitration that he may have had. [Initial Br. of Appellant at 8-13.] The district court, however, found the question before it to be "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)."[3] Id. at 1241 (emphasis added).

Citing several cases from other district courts of appeal, the district court concluded that "the greater weight of the authority" 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

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[3] In addition to stating the question in the disjunctive rather than the conjunctive, the district court also found that FEA's motion was to stay arbitration only as to FEA's counterclaim. Sachs, 627 So. 2d at 1241.

because of subsequent events.[4] Id. at 1241. In so concluding, however, the district court recognized the existence of conflicting authority.[5] Id. The district court held that whether the arbitration agreement herein was void because a valid agreement had never existed should have been determined by the trial court. Id. The district court remanded with directions to the trial court to determine only that issue prior to ruling on FEA's motion to stay arbitration. Id.

In doing so, the district court also held,

> 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.

Id. at 1241-42. It is from this latter holding that FEA seeks relief.

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[4] 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 Constr. Corp., 462 So. 2d 570 (Fla. 3d DCA 1985); Gersh v. Concept House, Inc., 291 So. 2d 258 (Fla. 3d DCA 1974).

[5] 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).

SUMMARY OF ARGUMENT

This Court and each of the 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. Moreover, the Fourth District Court of Appeal has recognized a broader power, holding that section 682.03 of the Florida Arbitration Code imposes upon the trial court the duty to determine 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. The cases relied upon by the district court do not support the decision under review.

Where, as here, the trial court's jurisdiction has already been submitted to by the parties to a lawsuit, the trial court, and not an arbitrator, is in the best position to determine whether a party has waived his right to arbitration by first submitting his claim to the trial court or actively participating in the lawsuit. The facts here are sufficient for the trial court to determine that Sachs has done both. It was error for the district court to preclude the trial court, in ruling upon FEA's motion to stay arbitration, from determining whether Sachs, by submitting his claim to the trial court and actively participating in the lawsuit, waived any right to arbitration that he may have had. To preclude the trial court, which has been directed to decide only the voidness issue, from deciding the waiver issue as well, is not only in conflict with decisions of this Court and each of the district courts of appeal, it is a waste of judicial resources.

ARGUMENT

IT WAS ERROR FOR THE DISTRICT COURT TO PRECLUDE THE TRIAL COURT, IN RULING UPON FEA'S MOTION TO STAY ARBITRATION, FROM DETERMINING WHETHER SACHS, BY SUBMITTING HIS CLAIM TO THE TRIAL COURT AND ACTIVELY PARTICIPATING IN THE LAWSUIT, WAIVED ANY RIGHT TO ARBITRATION THAT HE MAY HAVE HAD

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), cert. denied mem., 414 U.S. 1131, 94 S. Ct. 869, 38 L. Ed. 2d 755 (1974); by the district court, see Piercy v. School Bd. of Wash. County, 576 So. 2d 806, 807-08 (Fla. 1st DCA 1991);[6] 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);[7] by the Third District Court of Appeal, see Hardin Int'l, Inc. v. Firepak, Inc.,

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[6] Accord Doan v. Amelia Retreat Condominium Ass'n, 604 So. 2d 1292, 1293 (Fla. 1st DCA 1992); Maryland Casualty Co. v. Department of Gen. Servs., 489 So. 2d 54, 57 (Fla. 1st DCA), review dismissed mem., 494 So. 2d 1151 (Fla. 1986).

[7] 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).

567 So. 2d 1019, 1020-21 (Fla. 3d DCA 1990);[8] 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);[9] 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).[10]

Indeed, the district court in Piercy described the power somewhat more broadly, summarizing the trial court's role as follows:

> The trial court's role when considering applications to compel arbitration under Section 682.03, Florida Statutes (1987), is limited to determining (1) whether a valid written agreement exists containing an arbitration clause, (2) whether an arbitrable issue exists, and (3) whether the right to arbitrate was waived. . . . The trial court should not, however, delve into the merits of the grievance, because "[a]n order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides." § 682.03(5), Fla. Stat. (1987).

Piercy, 576 So. 2d at 807-08 (citations omitted) (emphasis added).

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[8] Accord Rosen v. Shearson Lehman Bros., Inc., 534 So. 2d 1185, 1186-87 (Fla. 3d DCA 1988), review denied mem., 544 So. 2d 200 (Fla. 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).

[9] 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).

[10] 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).

Moreover, the Fourth District Court of Appeal has recognized a still broader power. Specifically relying upon section 682.03 of the Florida Arbitration Code,[11] the Fourth District Court of Appeal has held that section 682.03 imposes upon the trial court the duty to determine whether any 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. Calloway Homes, Inc. v. Smiley, 422 So. 2d 49 (Fla. 4th DCA 1982); 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).

Thus, Florida courts, in recognizing this principle, have stated the scope of the trial court's determination in at least three different breadths. These are, in increasing expanse, (1) whether a party to a lawsuit, by actively participating in the lawsuit, has waived the right to arbitration; (2) whether the right to arbitration has been waived; and (3) whether any substantial issue has arisen as to the termination of a prior contractual provision for arbitration. However, under even the most narrowly stated scope of the trial court's power, it was error for the

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[11] Section 682.03 provides in its relevant part:

> 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.

§ 682.03(4), Fla. Stat. (1991).

district court to preclude the trial court, in ruling upon FEA's motion to stay arbitration, from determining whether Sachs, by submitting his claim to the trial court and actively participating in the lawsuit, waived any right to arbitration that he may have had.

As recognized by this Court in Klosters Rederi A/S, the trial court may, at the very least, determine whether a party to a lawsuit, by actively participating in the lawsuit, has waived the right to arbitration. Klosters Rederi A/S, 280 So. 2d at 681. After Klosters Rederi A/S sued Arison Shipping Company in the trial court, Arison Shipping Company petitioned the trial court to compel arbitration. Id. at 680. The petition was denied. Id. Arison Shipping Company appealed the order of denial to the Third District Court of Appeal. Id. While the appeal was pending, Arison Shipping Company filed a counterclaim in the trial court. Id.

The counterclaim became a part of the record on appeal. Id. Nevertheless, the Third District Court of Appeal reversed the order of the trial court and ordered compulsory arbitration. Id. In quashing the decision of the Third District Court of Appeal, this Court held, in part, that Arison Shipping Company's conduct subsequent to requesting arbitration was inconsistent with its request and constituted a waiver of any contractual right to arbitration. Id. In explaining its holding, this Court stated, "A party's contract right may be waived by actively participating in a lawsuit or taking action inconsistent with that right." Id.

In Piercy, the district court explained the trial court's role in determining whether the right to arbitration has been waived by active participation in the lawsuit as follows:

> A trial court may find waiver to have occurred if, for instance, the party seeking arbitration is actively participating in a lawsuit or taking action inconsistent with the right to arbitration. . . . Filing an answer without asserting the right to arbitration acts as waiver, as does initiating legal action without seeking arbitration or counterclaiming without raising the issue of arbitration. . . . Consequently, if a party has manifested an acceptance of the judicial forum, a court could reasonably conclude that the party waived any right he or she may have had to arbitration.

Piercy, 576 So. 2d at 808 (citations omitted) (emphasis added); see Maryland Casualty Co., 489 So. 2d at 57 (even if arbitration provision were applicable, right to arbitration was waived by filing an answer, discovery requests and various motions, because "[t]he right to arbitration can be waived by one taking actions inconsistent with arbitration, such as actively participating in the judicial proceeding").

Gersh v. Concept House, Inc., 291 So. 2d 258 (Fla. 3d DCA 1974), the case primarily relied upon by the district court in the decision under review, is inapposite to the issue. The Third District Court of Appeal, in Gersh, did not address the propriety of the trial court's determining whether a party, by actively participating in the lawsuit, had waived the right to arbitration. In Gersh, the plaintiff sought a declaratory judgment from the trial court that the defendant, who had previously commenced an arbitration proceeding, had no right to arbitration. Gersh, 291 So. 2d at 258. The issue was whether the trial court "may stay an arbitration proceeding provided for by contract, upon a preliminary

finding that the contract has been breached by the party demanding arbitration." Id. (emphasis added).

The Third District Court of Appeal held that the trial court "may not enjoin or stay an arbitration proceeding upon the ground that the contract providing for arbitration is not in force and effect because of factual matters which may have occurred since the making of the contract." Id. at 259 (emphasis added). In explaining its holding, the Third District Court of Appeal stated, "[A] contrary determination would frustrate the purposes of arbitration by furnishing a means of delay resulting in destruction of the remedy" provided by arbitration agreements and approved by section 682.03. Gersh, 291 So. 2d at 259 (emphasis added).

While the trial court's yielding to arbitration might serve the stated rationale behind the holding in Gersh under the facts of that case, that rationale is not served where, as here, the party seeking to stay arbitration is not relying upon facts external to and preceding the lawsuit. Here, the party pursuing arbitration has previously acquiesced in the trial court's jurisdiction by either invoking the jurisdiction of the trial court in the first instance or actively participating in the lawsuit. The party seeking to stay arbitration, on the other hand, is relying upon the fact that the very party belatedly pursuing arbitration is the party that chose the trial court as the forum to decide his claim in the first instance or has acquiesced in that forum. If there is any destruction of the remedy provided by arbitration, that destruction has been caused or participated in by the party who is

belatedly pursuing arbitration. Gersh is inapposite to the facts of the decision under review.

Nor do the other cases relied upon by the district court support the decision under review, either because of their facts, see Modern Health Care Servs. v. Puglisi, 597 So. 2d 930, 931 (Fla. 3d DCA 1992) (trial court was without jurisdiction because defendant had invoked arbitration prior to plaintiff's filing suit in trial court; nor did plaintiff waive arbitration, because plaintiff invoked trial court's jurisdiction solely for extraordinary relief outside scope of arbitration provision); the absence of the waiver issue, see Metropolitan Dade County v. Resources Recovery Constr. Corp., 462 So. 2d 570, 571 (Fla. 3d DCA 1985) (no issue of waiver of arbitration by actively participating in lawsuit); or both, see Feather Sound Country Club v. Barber, 567 So. 2d 10, 11 (Fla. 2d DCA 1990) (arbitration provision raised as a defense in motion to dismiss complaint; no issue of waiver of arbitration by actively participating in lawsuit).

Hardin International, Inc. v. Firepak, Inc., 567 So. 2d 1019 (Fla. 3d DCA 1990), on the other hand, is virtually indistinguishable from the present case. In Hardin International, Inc., Firepak sued Hardin to enforce a mechanic's lien. Id. at 1020. Hardin answered Firepak's complaint and counterclaimed for breach of contract. Id. Firepak moved to dismiss the counterclaim upon grounds not related to the right to arbitration. Id. Almost three years later, Firepak moved to compel arbitration of Hardin's counterclaim. Id. Hardin then moved to compel arbitration of Firepak's lien enforcement action. Id.

The Third District Court of Appeal found that Firepak waived its right to arbitration of the lien dispute when it filed the lien enforcement action; and that Hardin waived its right to arbitration of the lien dispute when it answered Firepak's complaint without seeking to compel arbitration. Id. at 1021. The Third District Court of Appeal further found that Hardin waived its right to arbitration of the alleged breach of contract when it filed its counterclaim; and that Firepak waived its right to arbitration of the alleged breach of contract when it moved for dismissal of the counterclaim upon grounds other than the right to arbitration. Id.

The Third District Court of Appeal concluded that, by acquiescing to the judicial forum for nearly three years after the actions were filed, both sides manifested an acceptance of the judicial forum and waived any right to arbitration. Id. Similarly, in School Board of Orange County v. Southeast Roofing & Sheet Metal, Inc., 489 So. 2d 886 (Fla. 5th DCA), review dismissed mem., 496 So. 2d 143 (Fla. 1986), the Fifth District Court of Appeal concluded that "it would be unduly prejudicial to force a party to engage in the litigation process for a period of fourteen months and then allow the party who initiated the action to request that the case be resolved by arbitration proceedings . . . ." Id. at 887.

Stone v. E.F. Hutton & Co., 898 F.2d 1542 (11th Cir. 1990), also is similar to the present case. In Stone, Hutton deposed Stone in November 1987, four months after Hutton's right to arbitration arose, and again in January 1988, and responded to a request for production by Stone in January 1989. Id. at 1542.

Also in January 1989, Stone served Hutton interrogatories and requests for production. Id. Additionally, both parties had scheduled depositions for July 1989. Id. Hutton first moved to compel arbitration in June 1989. Id. at 1543. Recognizing that federal law favors arbitration, id., the federal court nevertheless concluded that a one year and eight month delay in seeking to enforce the arbitration agreement rendered Hutton's motion to compel arbitration untimely, id. at 1544.

In the present case, Sachs continually took actions inconsistent with arbitration: Sachs elected to sue FEA in the Florida trial court in October 1989, seeking $1,267,200 in damages, encompassing services rendered, interest and anticipated profit. The three-count complaint apparently included an attempt to enforce Sachs's claim of lien. Sachs also served on FEA several requests for admission. After suing FEA in Florida and opening discovery, Sachs initiated arbitration proceedings in New York, but nevertheless continued to pursue his litigation in Florida.

In April 1990, a New York court stayed the New York arbitration proceedings pending completion of Sachs's apparent attempt, among other things, to enforce his claim of lien in Florida. In the meantime, FEA had answered Sachs's Florida complaint and initiated a counterclaim against Sachs in Florida, which Sachs answered without raising any affirmative defenses. Sachs also had sought and received from the Florida trial court leave to file an amended complaint.

In July 1990, Sachs served a verified two-count amended complaint in the Florida action, seeking damages for breach of

contract and quantum meruit. To the extent that Sachs had previously been seeking to enforce his claim of lien in the Florida trial court, that effort was abandoned. In the meantime, FEA had moved the Florida trial court for summary judgment upon its counterclaim. In August 1990, the motion was denied. FEA then moved the Florida trial court for a more definite statement of or to dismiss Sachs's amended complaint. Both motions were denied in September 1990, and Sachs and FEA served several interrogatories and requests for production upon one another in the Florida action.

In October 1990, FEA answered Sachs's amended complaint in the Florida action and again asserted its counterclaim against Sachs in the Florida action, which Sachs answered without raising any affirmative defenses. In December 1990 and January 1991, Sachs and FEA served upon one another their responses to the previous discovery requests in the Florida action. On March 7, 1991, Sachs deposed FEA's designated representative and FEA deposed Sachs. Following a one-year period in which Sachs undertook no further activity to advance his Florida action, FEA, on March 10, 1992, moved the Florida trial court to dismiss Sachs's Florida action for failure to prosecute.

Almost immediately, Sachs served a thirty-eight page motion in the Florida action, among other things, to increase his damage claim to $2,447,646 and "proceed to trial forthwith." At Sachs's request, the hearing upon the motion to dismiss Sachs's Florida action was moved from May 4, 1992, to June 3, 1992, and Sachs then sought by motion again to delay the hearing until July 8, 1992, so that he could, among other things, present "evidence as to the

merits as to why his cause should be allowed to proceed to trial forthwith . . . ." FEA's motion to dismiss Sachs's Florida action was granted on June 4, 1992.

Thereafter, on June 15, 1992, over two and one-half years after Sachs had initiated the Florida action; nearly two years after he had amended his complaint and abandoned any attempt to enforce his lien; after the docketing of nearly seventy pleadings and other papers in the Florida action; after Sachs had moved to proceed to trial of his Florida action; and after his Florida action had been dismissed; in short, after his judicial remedy had been exhausted, Sachs, for the first time, sought to stay the Florida action in order to pursue arbitration of his dispute with FEA.

It is evident from the foregoing authorities that this Court and each of the 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 an arbitrator, is in the best position to determine whether a party has waived his right to arbitration by first submitting his claim to the trial court or by actively participating in the lawsuit. The facts here are sufficient for the trial court to determine that Sachs has done both. The waiver issue is dispositive of this case. To preclude the trial court, which has been directed to decide only the voidness issue, from deciding the waiver issue as well, is not only in conflict with decisions of this Court and each of the district courts of appeal, it is a waste of judicial resources.

For if the trial court should determine that the arbitration agreement is not void, the waiver issue will undoubtedly return.

CONCLUSION

For the foregoing reasons, the decision under review should be quashed insofar as it precludes the trial court, in ruling on FEA's motion to stay arbitration, from determining whether Sachs, by submitting his claim to the trial court and actively participating in the lawsuit, waived any right to arbitration that he may have had; and the trial court should be directed, on remand, to determine not only the voidness issue, but the waiver issue as well.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing has been furnished to

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Attorney