IN THE SUPREME COURT

OF THE STATE OF FLORIDA

CASE NUMBER: SC-00-931

L.T. CASE NUMBER: 99-01394 (08)

CORPORATE SECURITIES GROUP, INC.,

Petitioner,

vs.

SHIRLEY LIND,

Respondent.

_____/

On Appeal from the Fourth District Court of Appeal

of the State of Florida

Case Number:4D99-1394

ANSWER BRIEF OF RESPONDENT

SHIRLEY LIND

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INTRODUCTION

Respondent, SHIRLEY LIND, will use the same method of identification as used by Petitioner, CORPORATE SECURITIES GROUP, INC.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent, SHIRLEY LIND, accepts the Statement of the Case and of the Facts as stated by Petitioner, CORPORATE SECURITIES GROUP, INC., with the following and brief exceptions.

Petitioner states, on page 2, that the NASD rule, 10304, requires that an action be brought within six (6) years. The rule states within six years of the occurrence or event. Petitioner then goes on to state that the trial court ruled that she may proceed with her claims in court. The order, however,

only determines arbitrability.

SUMMARY OF THE ARGUMENT

This case concerns the initial eligibility for arbitration under NASD Rule 10304. Issues concerning eligibility for arbitration are to be decided by courts absent a clear and unmistakable intent to arbitrate that issue. Because the agreement between the parties does not clearly and unambiguously express any such agreement, the trial court correctly denied Petitioner's Motion to Compel Arbitration and the Fourth District Court of Appeal correctly affirmed that decision.

Petitioner's suggestion that the trial court incorrectly is allowing this claim to proceed in court, despite the expiration of the applicable statute of limitations, has not been raised or ruled on below. It is inappropriate for an appellate court to direct the trial court how to rule on an issue not presented to it and ruled upon by it.

The asserted conflict between the decision below and the decision in Pembroke Industrial Park Partnership v. Jazayri Construction, Inc., 682 So. 2d 226 (Fla. 3rd DCA 1996) does not exist. Pembroke determined only that statute of limitations issues are for arbitration. Our case, on the other hand, dealt solely and exclusively with eligibility issues. The rule as to eligibility issues is that, absent a clear intent to the

contrary, courts and not arbitrators decide eligibility.

ARGUMENT

ISSUE ONE

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT THE ISSUE OF ARBITRABILITY WAS FOR THE COURT TO DECIDE, BASED UPON THERE BEING NO CLEAR AND UNMISTAKABLE AGREEMENT TO ARBITRATE THAT ISSUE

The initial problem with Petitioner's position in this case is that Petitioner fails to recognize the distinction between limitation issues and eligibility issues. As the court stated in Prudential Securities, Inc. v. Krucinski, 947 Fed. Supp. 462 (M.D. Fla. 1996), at page 466:

> "Section 15 (now 10304) of the NASD Code is a jurisdictional prerequisite to arbitration; i.e., the provision, by its terms, limits the authority of NASD arbitrators to the adjudication of claims brought no more than six years after the event or occurrence giving rise to the claim. Cohen, 62 Fed. 3rd at 384. Because it is a limitation on the power of NASD arbitrators to decide claims, Section 15 should not be treated as a statute of limitations and is not capable of being told. Id. at 385, N. 4; Sorrells, 597 Fed. 2nd at 512. Defendants filed their statement of claim on February 6, 1996. Accordingly, if

> the occurrence or events giving rise to Defendants' claims took place before February 6, 1990, the claim is, by operation of Section 15, not arbitrable."

The issue very simply is whether, under the circumstances of this case, the trial court or arbitrators should decide this preliminary eligibility question. There was no question placed before the trial court with regard to the statute of limitations and no decision on this issue was made. The determination of statute of limitations questions in this case will ultimately be a jury question and has not been addressed in any form as of yet. Williams v. Bear Stearns & Company, 725 So. 2d 397 (Fla. 5th DCA 1998)

The determination as to whether the court or arbitrators decide this eligibility issue depends upon the contract or agreement between the parties. Only where there is a clear and unmistakable agreement to arbitrate the determination as to arbitrability is that issue properly before an arbitration panel. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) Examination of the agreement between these parties discloses no clear and unmistakable intent to arbitrate that issue.

The agreement between the parties which is, of course, a form agreement signed to open the account, provides in pertinent part:

> "Any and all controversies arising out of or relating to this agreement or the conduct of the parties hereto which can be lawfully submitted to arbitration, should be submitted

> to arbitration … however, it is specifically agreed between the parties that the arbitrators shall not have the authority or jurisdiction to award punitive damages."

The question is whether this language represents a clear and unmistakable agreement to arbitrate arbitrability. It certainly does not.

First, the agreement defines controversies to be those which can be lawfully submitted to arbitration. While limiting the scope of included controversies, the agreement is silent as to who makes this determination. Silence cannot amount to a clear and unmistakable expression of intent to submit arbitrability to arbitration.

Second, the agreement provides such disputes, if otherwise arbitrable, should be submitted to arbitration, but does not say "shall" or "must". This language, selected by Petitioner, falls short of a clear and unmistakable intent to arbitrate eligibility.

The court, in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 Fed. 3rd 381 (11th Cir. 1995), similarly discussed the clear and unmistakable rule, as well as the distinction between eligibility requirements arising under NASD Rule 10304 and statute of limitations issues. In our case, unlike Cohen, there are no allegations of continuing fraud through false reporting and the like. Respondent has specifically alleged the occurrence or events occurred in 1990 and that she did not learn of the

occurrence or events until 1998. Taking the allegations as true, as the court must, at the moment Respondent reasonably discovered the wrong, the eligibility provisions for arbitration had already expired. Since there is no tolling provision for arbitration eligibility, the claim is simply not arbitrable. The statute of limitations, unlike eligibility, does not begin to accrue until the wrong was discovered or reasonably should have been discovered; a question of fact. Williams v. Bear Stearns & Company, 725 So. 2d 397 (Fla. 5th DCA 1998)

The court, in Scott v. Prudential Securities, Inc., 141 Fed. 3rd 1007 (11th Cir. 1998), recognized Florida law is in accord regarding the specificity required to demonstrate clear and unmistakable intent to arbitrate arbitrability. The court cited Romano v. Goodlette Office Part, Ltd., 700 So. 2d 62 (Fla. 2nd DCA 1997), which specifically held that "contract silence or ambiguity" is not such an expression of intent. Similarly, had Petitioner wished to include arbitrability as an issue to be arbitrated, Petitioner most certainly could have clearly and unmistakably so stated in its agreement.

ISSUE TWO

THE FOURT DISTRICT COURT OF APPEAL WAS CORRECT IN AFFIRMING THE ONLY ISSUE BEFORE THE COURT WHICH DEALT WITH WHETHER THE COURT OR ARBITRATORS SHOULD DECIDE THE ISSUE OF ARBITRABILITY

The only issue before the trial court and the only decision reviewed by the Fourth District Court of Appeal concerns Petitioner's Motion to Compel Arbitration. There was no determination made by the trial court on any statute of limitations issue. The only pleading filed by Petitioner, at the trial court level, was the Motion to Compel Arbitration, which certainly did not raise any statute of limitations argument. Even if it had, the resolution of any such issue would require fact-finding. Williams, supra.

Petitioner has cited no authority for the legal proposition that any appellate court can or should direct a trial court as to how to rule on an issue which has never been raised or presented to the trial court. Certainly, upon remand, Petitioner can raise the issue of the statute of limitations if Petitioner desires. Ultimately, however, that issue will be one for the jury.

Petitioner also suggests that arbitration is the sole and exclusive remedy for Respondent and if there can be no arbitration, the court proceedings must be dismissed. The trial court has certainly not been presented with an opportunity to rule on this issue. Moreover, the agreement in this case simply does not support such exclusivity of remedy.

ISSUE THREE

THERE IS NO CONFLICT, DIRECT OR OTHERWISE, BETWEEN THE DECISION BELOW AND THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN PEMBROKE INDUSTRIAL PARK PARTNERSHIP v. JAZAYRI CONSTRUCTION, INC.

The decision below does not conflict with Pembroke Industrial Park Partnership v. Jazayri Construction, Inc., 682 So. 2d 226 (Fla. 3rd DCA 1996). As stated by the courts in Cohen, supra; Krucinski, supra and in Smith Barney, Inc. v. Potter, 725 So. 2d 1223 (Fla. 4th DCA 1999), the issue in our case is not a limitation issue but, rather, an eligibility issue. Pembroke simply stands for the proposition that where a claim is otherwise arbitrable, the issue as to whether the claim was brought timely, pursuant to the applicable statute of limitations, is to be determined in arbitration. There is no conflict between the holding in Pembroke and the holding in our case.

CONCLUSION

In conclusion, this case involves eligibility for arbitration and not a statute of limitations decision. Because

there has been no clear and unmistakable expression of intent to arbitrate the issue of arbitrability, that issue was to be resolved by the trial court. Issues concerning any potential but, as of yet, unraised statute of limitations argument, must be first presented to the trial court before any appellate court. As there is no conflict between the decision below and the Pembroke decision, the petition should be dismissed.

ATTESTATION

In order to comply with the font requirements of Rule 9.210(a)(2) FRAP, the undersigned hereby certifies that the size and style of the type used in the preparation of this brief was 12 point Courier New, as recommended by the Court.

_____
Thomas D. Lardin, Esquire

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Respondent has been furnished, via United States mail, to: Leonard H. Bloom, Esquire, located at 200 South Biscayne Blvd., Suite 4750, Miami, FL 33131 and Howard A.

Tescher, Esquire, located at 100 NE Third Avenue, Suite 610, Fort Lauderdale, FL 33301, on this _____ day of December, 2000.

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