IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC 05-1417
Lower Tribunal No. 05-651

O'KEEFE ARCHITECTS, INC.,

Petitioner,

v.

CED CONSTRUCTION PARTNERS, LTD.

Respondent.

ON CERTIFICATION OF CONFLICT BY THE FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT, CED CONSTRUCTION PARTNERS, LTD.

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STATEMENT OF THE CASE

This case is on appeal based on a certification from the Fifth District Court of Appeal of a conflict between two cases:

- *CED Construction, Inc. v. Kaiser-Taulbee Assoc., Inc., 816 So. 2d 813 (Fla. 5th DCA 2002).*
- *Reuter Recycling of Florida, Inc. v. City of Dania Beach*, 859 So. 2d 1271 (Fla. 4th DCA 2003).

The Respondent, CED Construction Partners, Ltd. (hereinafter "CED") filed an arbitration claim against O'Keefe Architects, Inc. on two contracts arising out of two construction projects. O'Keefe responded by filing a complaint for declaratory relief with the circuit court. No other pleadings or motions were filed by O'Keefe. In response, CED filed a motion to stay the circuit court action and to compel arbitration. The trial court ruling granting CED's motion to compel arbitration and to stay the circuit court action gives rise to this appeal.

The core issue before this court is whether the trial court, in deciding the legal question of whether the merits of the underlying dispute are arbitrable, should also have resolved what is in effect a fact-intensive affirmative defense, the statute of limitations, i.e., whether CED knew, or should have known of latent design defects more than four years before filing the arbitration claim.

STATEMENT OF THE FACTS

On August 30, 1997, O'Keefe Architects, Inc. ("O'Keefe") contracted with the owner, Vero Club Partners Limited, to design a 184-unit housing project ("Vero Project"). A copy of this contract is attached as Exhibit A to Petitioner's Appendix 7.

On January 7, 1999, O'Keefe entered a nearly identical contract with another owner, Clearwater Phase I Partners Ltd., to design a 240-unit housing project ("Renaissance Project"). A copy of this agreement is attached as Exhibit "B" to Petitioner's Appendix 7.

Both of the owner-O'Keefe contracts contain the following arbitration clause:

> "Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise."

(See Exhibits A and B, para. 7.1, to Petitioner's Appendix 7).

The Vero Project was substantially complete in June, 2000. The Renaissance Project was substantially complete in February, 2001. CED Construction Partners Ltd. was the general contractor on both projects.

After discovering latent construction and design defects on their properties, the owners demanded CED fix the problems. CED did so, at its own expense. O'Keefe did not contribute to the remediation.

On June 25, 2002, the owner, Vero Club Partners Limited, executed an assignment of claim, assigning to CED its rights to claim damages for defects resulting in water intrusion. That same day, the owner, Clearwater Phase I Partners Ltd., also executed an assignment of claim, assigning to CED its claim for damages for defects resulting in water intrusion. Both assignments of claim are attached as Exhibit "B" to Petitioner's Appendix 8. The assignments encompass claims the owners would have against O'Keefe.

The same day the assignments were made, CED filed a single demand for arbitration[1] against O'Keefe and several subcontractors[2] for damages arising from the negligent design and construction of both the Vero and Renaissance projects (See Petitioner's Appendix 1). The claimant was designated as "CED Construction Partners, Ltd. and as assignee of the Owner."

[1] The claim was filed with the American Arbitration Association ("AAA").
[2] All subcontractors have since been dismissed from the case, leaving O'Keefe as the sole respondent.

On April 25, 2003, CED agreed the arbitration of the two projects should be split into two separate arbitration cases (See Petitioner's Appendix 2).[3] Accordingly, on February 2, 2004, the AAA issued an order separating the subcontractor claims from the claims against O'Keefe (See Petitioner's Appendix 4).

On February 12, 2004, the AAA conducted a hearing and made the following rulings: i) the four year statute of limitations applies to damages for design work under the contracts; ii) the causes of action for damages are assignable; and iii) O'Keefe is entitled to two separate arbitration hearings (See Petitioner's Appendix 5). Subsequently, on March 23, 2004, pursuant to the AAA order, CED served an amended demand for arbitration for the Vero Project while maintaining its original demand for arbitration against O'Keefe on the Renaissance Project (See Petitioner's Appendix 6).

O'Keefe then filed a complaint in the Circuit Court in and for Orange County requesting relief declaring that the owners, not CED, must bring the arbitration claims based on the assertion that the contracts were not assignable. (See Petitioner's Appendix 7). On May 24, 2004, CED and the owners responded

[3] On January 14, 2004, CED confirmed its agreement that the claims against the subcontractors should be heard in a separate arbitration proceeding (See Petitioner's Appendix 3).

in the circuit court with a motion to stay and to compel arbitration (See Petitioner's Appendix 8).

On August 30, 2004, the trial court below held a hearing on CED's Motion to Stay and Compel Arbitration (See Petitioner's Appendix 9). The court ordered the parties to arbitration, but ordered two separate arbitration proceedings, one for each project. Notably, O'Keefe did not raise at the August hearing the issue of whether CED's arbitration claims are time-barred (See generally, Petitioner's Appendix 9, August 30, 2004, hearing transcript). The parties were unable to agree on the content of a proposed order, resulting from that hearing, despite each parties' possession of a transcript of said hearing.

On January 6, 2005, five months later, an additional hearing was held to resolve the wording of the order (See Petitioner's Appendix 11). No new motions were filed or set for the second hearing. The court again ruled the owners' assignments of claims arising under the agreements to CED were proper and again ruled that two separate arbitration proceedings must be conducted (See Petitioner's Appendix 12). O'Keefe now appeals the resulting written order (See Respondent's Appendix 1).

On March 23, 2005, in the arbitration proceeding, CED sought leave to amend its demand for arbitration for both of the projects to more particularly reflect the claimant as "CED Construction Partners Ltd., individually and as

assignee and subrogee of the claims of the owners, Clearwater Phase I, Ltd. and Vero Club Partners, Ltd." (See Respondent's Appendix 2). This amendment was sought in response to O'Keefe's pleadings gamesmanship regarding which entity is entitled to bring the arbitration claim.[4] The amendment would repeat that CED is the assignee of the owners but specifically names the ownership entities.

STANDARD OF REVIEW

This court has jurisdiction pursuant to *Florida Rule of Appellate Procedure* 9.030(a)(3)(A)(vi). The standard of review is de novo.

SUMMARY OF ARGUMENT

O'Keefe argues the trial court and Fifth District Court of Appeal erred by holding the arbitrators, not the courts, should decide whether CED's arbitration claims are time-barred. The Fifth DCA had held, in a prior opinion, that the issue of whether a demand for arbitration is timely is a question of fact to be decided by the arbitrators, not the trial court. *CED Construction, Inc. v. Kaiser-Taulbee Associates, Inc.*, 816 So. 2d 813 (Fla. 5th DCA 2002). The Fifth DCA has certified

[4] In an attempt to assuage O'Keefe's insistence that the owner's must bring the arbitration in their own names (even though CED was named as "assignee"), CED reassigned the causes of action back to the respective owners (See Petitioner's Appendix 3). The owners and CED are related business entities. This did not please O'Keefe any more than the prior designation of the claimants as "assignees" so CED reaffirmed the original assignment and continued to maintain its claims as "assignee."

conflict with *Reuter Recycling of Florida Inc. v. The City of Dania Beach*, 859 So.2d 1271 (Fla. 4th DCA 2003).

Without exception, each of the cases cited by O'Keefe at the Fifth DCA deals with the issue of whether the merits of the arbitration claims fall within the scope of the arbitration clauses or whether a person, e.g., a trust beneficiary or subcontractor, could be forced to arbitrate. Each of those cases involved contract interpretations, to be made as a matter of law by the courts. In compliance with those decisions, the trial court below ruled that the merits of the disputes, i.e, CED's breach of contract claims, were arbitrable. The Fifth DCA properly affirmed.

O'Keefe asserts the trial court should also have adjudicated what is effectively an unpled affirmative defense, i.e., the factual question of whether the arbitration claims were made in a timely manner, more specifically, when CED or the owners "knew or should have known" of the latent defects. This is a factual dispute properly addressed by the arbitrators, not a matter of law for the court.

O'Keefe also asserts, incorrectly, that an anti-assignment clause in its contracts prevents the assignment of claims arising from these contracts. Indeed, both of the O'Keefe contracts contain non-assignment provisions. Florida law, however, is well settled on this issue. A contract term prohibiting assignment prohibits only the assignment of the rights and privileges under the contract but

does ***not*** prohibit the assignment of a claim arising under the contract. In this case, the owners never assigned their respective agreements to CED. They simply assigned their claims for damages resulting from the latent defects and resulting water intrusion.

O'Keefe further complains it agreed to arbitrate only with the owners and not CED. Settled Florida laws says otherwise. Rights arising under a contract, to include the rights to compel arbitration, are assignable. Arbitration clauses have been found binding on assignees of a contract and properly so.

Lastly, O'Keefe argues, in the face of well-settled, well-reasoned Florida law to the contrary, that a two-year, rather than a four-year, statute of limitation should apply to CED's claims.

ARGUMENT

I. THE AAA IS THE APPROPRIATE BODY TO DECIDE WHETHER CED's ARBITRATION CLAIMS ARE TIME-BARRED

There has been no dispute that the arbitration clause did not require the arbitrators in lieu of a court to decide whether the merits of the dispute were arbitrable. That is what the trial court did; it ruled the merits of the dispute were arbitrable and ruled the statute of limitation defense was arbitrable. The Fifth DCA affirmed the trial court's ruling that the question of when a demand for arbitration has been timely filed is a question of fact to be decided by the arbitrators rather than the trial court. The Fifth DCA specifically relied upon the

decisions in *CED Constr., Inc. v. Kaiser-Taulbee Assoc., Inc.*, 816 So.2d 813 (Fla. 5th DCA 2002); *Pembroke Indus. Park P'ship v. Jazayri Constr., Inc.*, 682 So.2d 226 (Fla. 3d DCA 1996); and *Alderman v .City of Jacksonville Fire & Rescue Div.*, 902 So.2d 885 (Fla. 1st DCA 2005). The Fifth DCA certified conflict with *Reuter Recycling of Florida Inc. v. The City of Dania Beach*, 859 So.2d 1271 (Fla. 4th DCA 2003).

O'Keefe relies on *First Options of Chicago, Inc. v .Kaplan*, 514 U.S. 938 (1995), ostensibly to support its argument that courts are to determine not only the question of the arbitrability of the merits, an issue never disputed in this case, but also defenses to CED's claim. O'Keefe misapprehends the holding from *First Option*. The *First Options* decision was a narrow one, addressing ***only*** the question of who decides whether the parties agreed to arbitrate the merits. *First Options* at 942. *First Options* held that absent an agreement to the contrary, the courts decide who should rule on the arbitrability of the merits. In the case at bar, the arbitration clause did not address whether the arbitrators should decide arbitrability. This is not, nor was it ever, in dispute between O'Keefe and CED.

With all due respect, the Fourth DCA's decision in *Reuter* was based upon a misinterpretation of the U.S. Supreme Court's decision in *First Options.* The *First Options* court identified a two-question inquiry for resolving disputes over the arbitrability of claims:

1) *who decides* whether the underlying merits dispute is arbitrable – the court or the arbitrators; and

2) is the particular merits dispute subject to the arbitration clause?

As to the first question, the only question answered by *First Options*, the court held that absent clear and unmistakable evidence that the parties agreed to arbitrate the very question of who rules on arbitrability, the courts, not the arbitrators, decide whether the merits issue is arbitrable. *First Options*, at 994. In the absence of any dispute between O'Keefe and CED on this first question, by default, the trial court, without objection, properly moved right to the second question. The merits of the dispute, whether O'Keefe breached its contracts, fall squarely within the contracts' arbitration clause and the trial court below properly so ruled.

The *First Options* court did not address the second question at all. To read into that case a rule that, when addressing whether the merits issue is arbitrable, the court must also rule on fact intensive defenses, would be to grossly exaggerate what the court had to say on the second question. That was a question which the court emphasized was not even within the narrow scope of its review.

The *Reuter* court misconstrued *First Options* by failing to appreciate that although the court may be, and frequently is, the body to decide *who should rule* on the arbitrability of a claim, the body deciding *who should rule* is not necessarily the body *who will rule*. The *Reuter* court should have: 1) concluded that, since the

agreement was ambiguous, it was for the court to say who should rule on the arbitrability of the merits issues at hand, then 2) ruled, as a matter of law, on whether the substance of the dispute fell within the scope of the arbitration clause. For the *Reuter* court to suggest the *First Options* decision supports a ruling that defenses, more specifically, the statute of limitations defense, is an issue to be resolved by the courts, is to stretch that ruling far beyond the narrowness of the question the U.S. Supreme Court emphasized it was addressing.

Consider the effect of adopting O'Keefe's assertion. Every affirmative defense which could be raised in an arbitration, would become a factual issue for a court to resolve. Would jury trials, or evidentiary hearings, then be called for as a predicate to arbitrating any claim? This would mangle arbitration proceedings to such an extent[5] that by pleading a multitude of affirmative defenses, e.g., fraud in the indictment, waiver, estoppel, statutes of limitation, or failure to comply with conditions precedent, a crafty respondent could effectively turn arbitration from a form of private alternative dispute resolution into a hybrid quasi-judicial proceeding.

In contrast to the *Reuter* decision, the *Kaiser-Taulbee* decision did address, albeit briefly, which body should decide whether the demand for arbitration was

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[5] See, *Cardegna v. Buckeye Check Cashing*, 894 So. 2d 880 (Fla. 2005); and *Simpson v. Cohen*, 812 So. 2d 588 (Fla. 4th DCA 2002). A broad arbitration clause encompasses claims for fraud in the inducement of the contract.

timely filed. *Kaiser-Taulbee*, at 814. In *Kaiser-Taulbee*, the first inquiry of *First Options*, i.e., who should decide which body should rule on arbitrability, was not disputed. The court then ruled on which body should rule on the timeliness issue – and held it was a question for the arbitrators.

Likewise, in both the *Pembroke* and *Alderman* cases, the issue of who should decide what body should rule on arbitrability was not in dispute. Strictly speaking, *First Options* was not implicated. The court ruled on who should determine arbitrability – and in both cases held the arbitrators should determine whether the claims were timely filed.

O'Keefe's attempt to distinguish *Pembroke* and *Alderman* fails. O'Keefe incorrectly asserts the *Pembroke* case did not involve a statute of limitations issue (See O'Keefe's Initial Brief, page 12). The *Pembroke* opinion clearly states, "Jazayri then filed suit to enjoin the arbitration proceedings alleging they were time-barred by the four-year statute of limitations." *Pembroke*, at 227. The *Pembroke* court made no strained distinction, as O'Keefe attempts to do, between a question of "timeliness" and the statute of limitations.

Likewise, the *Alderman* court makes no distinction between timeliness and the statute of limitations. The *Alderman* court's decision was unequivocal – questions of timeliness are to be decided by an arbitrator, not a court. *Alderman*, at 887. O'Keefe would have this court read into the *Alderman* opinion the

proposition that the lack of an explicit distinction between timeliness and the statute of limitations must mean that court did not consider the statute of limitations a question of timeliness. O'Keefe proffers no legal or rational basis for limiting the definition of timeliness to laches while excluding from it the statute of limitations (See Petitioner's Brief, p. 12). In *Alderman*, the court merely states the trial court erred by combining the timeliness and waiver issues. *Alderman*, at 887.

Of note, subsequent to its decision in *First Options*, the U.S. Supreme Court in *Howsam v. Dean, Woodard, Reynolds, Inc.*, 537 U.S. 79 (2002), restated its holding in *First Options,* that absent clear intent to the contrary, the court decides which body should rule on the arbitrability of an issue. *Howsam**Error! Bookmark not defined.***, at 83. Importantly, however, the *Howsam* court then provides guidance, to the body selected to rule, on whether the issue in dispute is arbitrable. The *Howsam* court stated that the courts generally decide issues of substantive arbitrability, such as whether an arbitration clause applies to a particular type of controversy or whether a party is bound by a given arbitration clause. *Howsam*, at 84, *citing AT&T Technologies v. Communication Workers*, 475 U.S. 643, 651 – 652 (1986).

On the other hand, *Howsam* dictates that issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel and other conditions precedent, are met, are for the arbitrators to decide. *Howsam*, at 85.

The *Howsam* court held, based on the facts before it, that whether the time limit for bringing arbitration claims was met presented an issue for the arbitrator, not the court. *Howsam*, at 85.

Florida decisions are in keeping with the *Howsam* guidance. For example, in *Seifert v. US Home Corporation*, 750 So.2d 633 (Fla. 1999), cited by O'Keefe, this court, not the arbitrators, decided whether a wrongful death action was within the scope of an arbitration clause. In *Curtis v. Olson*, 837 So.2d 1155 (Fla. 1st DCA 2003), also cited by O'Keefe, the court decided whether the right to restrict the transfer of shares was subject to the arbitration agreement. All the other cases cited by O'Keefe, ostensibly supporting its argument, analyze legal questions - whether the claims were substantively within the scope of the arbitration clause or whether a party could be forced to arbitrate as a matter of law - not whether the claims were timely filed as a matter of fact or procedure.[6] This is an important

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[6] *Premier Med. Mgmt., Ltd. v. Falas*, 830 So. 2d 959 (Fla. 1st DCA 2002) (whether claims, not related to the legality of the agreement, were within the scope of the arbitration clause); *Wood-Hopkins Contracting Co. v. Barco Contracting Co.*, 301 So. 2d 479 (Fla. 1st DCA 1974)(whether a subcontractor could properly be forced to arbitrate under a contract); *Romano v. Goodlette Off. Park, Ltd.*, 700 So. 2d 62 (Fla. 2nd DCA 1997) (whether affirmative claims for fraud in the inducement, breach of fiduciary duty and interference with a business relationship were subject to the arbitration clause); *CitiGroup v. Amodio*, 894 So. 2d 296 (Fla. 4th DCA 2005) (determining whether claims at issue involved construction, performance or breach of an account agreement); *Royal Prof. Bldr's., Inc. v. Roggin*, 853 So. 2d 520 (Fla. 4th DCA 2003) (whether breach of contract claims fell within an arbitration clause in a limited warranty); *KW Brown and Co. v. McCutchin*, 819 So. 2d 977 (Fla. 4th DCA 2002) (analyzing whether claims for negligence, breach of

distinction, as it is the court's role to decide matters of law bearing upon jurisdiction and the arbitrator's role to resolve factual disputes pertaining to defenses raised. O'Keefe's allegation that some of the arbitration claims are time-barred raises a question of fact on a defense which is for the arbitrators to decide.

O'Keefe also relies on this court's holding in *Fulton County Admin. v. Sullivan*, 753 So. 2d 549 (Fla. 1999), which merely stands for the proposition that statutes of limitation are to be treated as substantive law for purposes of choice of law determinations. Such law does not turn O'Keefe's time-barred defense into a question of law necessitating a ruling by the court in lieu of the arbitrators.

Whether CED has timely made its arbitration demand, based on when CED discovered or should have discovered the latent defects, is a question of fact to be decided by arbitration.

II. CED CONSTRUCTION PARTNERS, LTD. IS A PROPER PARTY TO THE ARBITRATION

Rights arising under a contract are assignable. *New Holland, Inc. v. Trunk*, 579 So. 2d 215, 217 (Fla. 5th DCA 1991). A well recognized principle of law is that an assignment transfers to the assignee the interests of the assignor. *Superior Ins. Co. v. Libert*, 776 So. 2d 360 (Fla. 5th DCA 2001).

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fiduciary duty and fraud were subject to arbitration); *Fla. Power Corp. v. City of Casselberry*, 793 So. 2d 1174 (Fla. 5th DCA 2001) (analyzing whether the valuation of utilities assets must be arbitrated based upon a contract and repealed statute).

Here the owners duly executed assignments titled, "Assignment of Claim" in which they unconditionally assigned to CED Construction Partners, Ltd. the right to bring all claims related to the water intrusion and resulting damage on the project (See Exhibit "B" to Petitioner's Appendix 8). CED, therefore, has full legal standing to pursue the claims in arbitration based on the arbitration clause in the owner-O'Keefe agreement.

O'Keefe argues the court should not have compelled arbitration between O'Keefe and CED because the arbitration agreement prohibits an assignment. (*See*, O'Keefe's Initial Brief, page 13). O'Keefe ignores the important distinction in Florida law between assigning a claim and assigning substantive contract rights and duties. When a contract has an arbitration clause, an assignee will also be subject to arbitration. *Cone Constructors, Inc. v. Grumman Community Bank*, 754 So. 2d 779 (Fla. 1st DCA 2000). In *Cone,* the court soundly rejected the assignee's argument that, because it was merely the assignee of a security interest, it was not subject to the arbitration provision in the underlying contract. In rejecting the assignee's attempt to avoid arbitration, the court held the assignee was subject to the arbitration provision in the contract. *Cone, at 780.* Had CED, as assignee, sued O'Keefe in circuit court, CED would no doubt be faced with the argument, and a valid argument at that, that CED's claim must be pursued in arbitration.

Consider the full implications of O'Keefe's argument that a proscription on assigning a contract must also be read to proscribe the assignment of claims arising under that contract. First, an owner could not assign its claims for defective design and construction but would have to pursue them itself. However, since the owner demanded the contractor repair the defects and the contractor did, the owner would have no damages to pursue. The contractor would then be the party suffering damages, the real party in interest, but would have no recourse against the responsible party, the architect. Due to the fortuity of the contractor acting promptly to remedy the defects, the architect would answer to no one for its breach.

Thus, an owner might rightfully demand the defects be remedied, but since the defects included design errors, the contractor would have to refuse to remedy the defects lest it incur monetary damages which it could not recover. The defects would remain in place, while the owner, who is without fault, sued the contractor and designer. Water would continue to intrude while the owner was forced to sue both the architect and contractor. Or, under the doctrine of mitigation, the owner would have to pay for prompt repairs and then shoulder the burden of proving damages in court. At the very least, this would present the contractor with the Hobson's choice of: 1) doing the right thing, correcting the defects thereby mitigating the damages, or 2) refusing to correct the defects because as an

assignee, it could not recover the damages from the responsible party. Public policy militates against courts refusing to effectuate assignments of claims. At the very least, when the contract does not explicitly prevent the assignment of claims, as in the case at bar, the court should not refuse to enforce the assignment of claims.

III. NOTHING IN THE O'KEEFE-OWNER CONTRACTS PROHIBITS THE ASSIGNMENT OF CLAIMS

As a general matter, a contract prohibiting assignment of "the contract" bars only the delegation of performance of a duty or condition. A clause prohibiting assignment of rights does not forbid assignment of the right to claim damages for breach of the whole contract. Restatement (Second) of Contracts, § 322 (1981). As one treatise puts it:

> When a contract contains express words forbidding one party to assign the contract… *it does not make his right to compensation non-assignable, either before or after he has performed the condition.*

4 Corbin, *the Law of Contracts*, § 872, at 484 (1951)(emphasis added). Florida courts have followed these well-settled principles.

A contract which prohibits assignment of the rights and privileges under the contract does not prohibit the assignment of a claim for damages for breach of the contract. *Cordiss Corp. v. Sonics Int'l, Inc.*, 427 So. 2d 782 (Fla. 3rd DCA 1983). *See also, Highlands Ins. Co. v. Kravecas*, 719 So. 2d 320, 321 (Fla. 3rd DCA 1998)

(insurance policy clause prohibiting assignment of the policy does not prevent the assignment of a claim arising thereunder); *Gisela Invest., N.V. v. Liberty Mutual Ins. Co.*, 452 So. 2d 1056 (Fla. 3rd DCA 1984) (same); and *Paley v. Cocoa Masonry, Inc.*, 433 So. 2d 70 (Fla. 2nd DCA 1983) (provision prohibiting contract assignment does not prevent assignment of claims arising thereunder).

In this case, Paragraph 9.5 of the O'Keefe-Owner contract states: "Neither Owner nor Architect shall assign this Agreement without the written consent of the other." This provision addresses assignability of the agreement only, and does not address assignability of claims or either party's right to compensation under the agreement. O'Keefe's consent was never required as the owners never assigned or attempted to assign the contract as a whole to CED Construction Partners, Ltd. Rather, the owners assigned their claims arising under the agreements.

The assignment document is notably self-described as an "Assignment of Claim." The assignment states:

> The Owner is advised by Concord Management, Ltd. that the Lexington Club at Renaissance Square Project has experienced latent design and construction defects resulting in leaks, water intrusion and/or mold ('Defects') and the Owner desires to cure such Defects....
> * * *
> Clearwater [the Owner] hereby unconditionally grants, transfers, assigns and conveys, absolutely and without contingency or condition, to CED the right and interest of Clearwater to bring suit and claims against all potentially responsible parties… .

(See Exhibit "B" to Petitioner's Appendix 8). The same clause is in the Vero assignment. Here, the owners assigned claims, not the agreements themselves. Accordingly, O'Keefe has no basis for claiming the owners' assignment of claims to CED invalid.

The cases cited by O'Keefe in its initial brief do not dictate otherwise. In *Morgan Stanley DW Inc. v Halliday*, 873 So. 2d 400 (Fla. 4th DCA 2004), trust beneficiaries sued the trustee and brokerage firm handling the trust for mismanagement. The agreement between the trustee and brokerage firm contained an arbitration clause. The court held the defendants could not force the plaintiff, a non-party to the contract, to arbitrate. *Morgan Stanley,* at 405. No assignment of rights was involved. In *Technical Aid Corp. v. Tomaso*, 814 So. 2d 1259 (Fla. 5th DCA 2002), the plaintiff tried to compel arbitration with two separate defendants, one of which was party to the contract containing the arbitration clause, the other of which was not. The court simply ruled the plaintiff could not compel the defendant, not a party to the contract, to participate in arbitration. *Tomaso,* at 1261. No assignment of rights was involved.

Similarly, in *Raffa Assoc., Inc. v. Boca R. Resort & Club*, 616 So. 2d 1096 (Fla. 4th DCA 1993), cited by O'Keefe, there was no assignment of claims. In *Raffa*, the contract between the general contractor and the owner specifically provided the architect could not be brought into any arbitration, absent written

consent. *Raffa* attempted to bring the architect into the arbitration, but due to the specific contract provision, the court determined the architect was not subject to arbitration. Nothing in the *Raffa* decision is pertinent or controlling in the instant case.

O'Keefe alleges the court failed to adequately consider whether, as a matter of law, CED, as assignee, could pursue arbitration, citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). To the contrary, the parties argued the issue of whether CED, as assignee, could pursue arbitration at the August 30, 2004 hearing. *Petitioner's Appendix 9, August 30, 2004 Hearing Transcript, pages 13-17.* After hearing argument of counsel, the court stated,

> "The court is reading the agreements. Those agreements require that any claims arising out of dispute in this agreement will be decided by arbitration. It doesn't say who gets to file for the arbitration, whether it's CED, Vero Club, Clearwater. What the court has before it basically is a contract that indicates AAA is going to take jurisdiction of these two disputes first . . . . I'm directing the parties to arbitration".

Petitioner's Appendix 9, August 30, 2004 Hearing Transcript, pages 16-17. The court expressly considered whether or not CED, as assignee, could pursue arbitration against O'Keefe and concluded that it could.

O'Keefe's reliance on the *Int'l Bullion and Metal Brokers, Inc. v. West Pointe Land, LLC*, 846 So. 2d 1276 (Fla. 4th DCA 2003) case is also misplaced. In *Int'l Bullion*, the defendant had entered into two separate contracts, one, without

an arbitration clause, for the purchase of property and one, with an arbitration clause, for the construction of buildings on the property. A party to the land purchase contract attempted to compel arbitration, claiming the two contracts were intertwined. The court rejected the argument, noting the contract to which they were a party did not contain an arbitration clause. *Int'l Bullion*, at 1277. The case did not involve an assignment of claims.

O'Keefe has no basis in its agreements with the owners or under the law to prohibit the owners' assignment of claims to CED.

IV. THE TRIAL COURT PROPERLY DIRECTED TWO SEPARATE ARBITRATION PROCEEDINGS - ONE FOR EACH PROJECT

O'Keefe argues the trial court erred by permitting consolidation of claims from two different projects in a single arbitration. Indeed, a court cannot order consolidation of claims arising from separate arbitration agreements into one arbitration proceeding without the parties' consent. *Seretta Construction, Inc. v. Great American Insurance Co.*, 869 So. 2d 676 (Fla. 5th DCA 2004).

In this case, the court has not ordered or permitted the consolidation of claims arising from the Vero project with those arising from the Renaissance project. Directly, to the contrary, at the January 6, 2005 hearing before the trial court, Judge Thorpe stated, "No. I am saying there should be two arbitrations, Vero Club Partners Limited and Clearwater Phase I Partners Limited."

Petitioner's Appendix 11, January 6, 2005 Hearing Transcript, page 18. Judge Thorpe went on to say,

> "let's clean up the order to reflect what we want here. Basically there are two separate arbitrations going on based on Vero Club Partners Limited Contract, [and] based on Clearwater Phase I Partners Limited."

Petitioner's Appendix 11, January 6, 2005 Hearing Transcript, page 21. Judge Thorpe then said, "I am not governing the AAA proceedings. I am just separating out the two contracts for two separate arbitration proceedings, which is what was requested." *Petitioner's Appendix 11, January 6, 2005 Hearing Transcript, page 22.*

CED originally filed a consolidated demand for arbitration for the two projects. O'Keefe objected to the consolidation. O'Keefe prevailed on its objection. The claims were bifurcated (except for discovery). In fact, CED does not oppose the court's order bifurcating the claims arising from the two different projects. The court clearly ruled in O'Keefe's favor on this issue, stating:

> "once you've got your separate panels and your - that stand freely from each other and you have got the agreement there that you have got to consolidate discovery - you have your separate claims. And they will be heard separately. And that's what you want."

Petitioner's Appendix 11, January 6, 2005 Hearing Transcript, page 9.

But the court's ruling does not go far enough for O'Keefe. O'Keefe is demanding the court have a say in the make-up of arbitration panels appointed by

the AAA. O'Keefe asserts the arbitration panels must be made up of different people. The court properly balked at this demand stating, "I'm not going to direct AAA what they need to do in terms of who is going to sit on their panels. . . ." *Id.*

O'Keefe has no legal support for its claim that using the same arbitrators to conduct both hearings violates the contractual prohibitions against consolidation and assignment. The case O'Keefe cites, *Lefkowitz v. Wagner*, 395 F. 3d 773 (7th Cir. 2005), stands simply for the proposition that when a party consents to an arbitration in one proceeding, it does not, *ipso facto*, mean it has consented to the same arbitrator in a second proceeding. CED does not dispute this principle. Nor does CED dispute the simple holding in *The Govt. of Great Britain v. Boeing*, 998 F. 2d 68 (2d Cir. 1993), also cited by O'Keefe, that a district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate. *Great Britain*, at 74.

In *Lefkowitz*, the arbitrator did, in fact, consolidate three separate arbitrations into one proceeding, without the defendants' consent, resulting in one monetary award. Such is not the case here. In the case at bar, the court has ordered two separate arbitration hearings. Additionally, consent to a particular arbitrator is not an issue in this case as it is the AAA that selected and should have selected the

arbitrators[7]. O'Keefe's demand exceeds the requirements set forth in *Seretta Construction*.

O'Keefe's argument that the court should interfere with the AAA's assignment of arbitrators would certainly have adverse practical implications for the AAA. To what extent could the courts order that no single party in separate arbitrations could have the same arbitrator or arbitrators hear their disputes? It should be left to the AAA to decide which arbitrators hear which arbitrations. Courts of law certainly don't, and couldn't effectively, apply such a standard to their own operation. A party doesn't pick the judge and doesn't get to object to a judge because the judge concurrently presides over another of its cases. Would the AAA have to add so many arbitrators to its approved list of arbitrators so as to ensure no party has the same arbitrator in a separate case?

Despite the court giving O'Keefe what it asked for, O'Keefe continues to elevate form over substance by claiming the AAA's failure to designate a new case number constitutes an actual consolidation of proceedings. O'Keefe's argument is contrary to the current status of the two separate arbitration proceedings and the court's January 6, 2005 ruling, directing that two separate proceedings be held for the two projects.

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[7] In *Lefkowitz*, the parties had agreed to an arbitrator in the initial arbitration. This same arbitrator consolidated and heard two other, unrelated, proceedings between the same parties, hardly analogous to the facts at hand.

V. THE FOUR-YEAR STATUTE OF LIMITATIONS FOUND IN §95.11(3)(c) APPLIES TO THIS CASE

Florida courts have consistently applied the more liberal four-year limitation found in § 95.11 (3)(c), *Florida Statutes*, to claims against architects rather than the two-year limitation found in § 95.11 (4)(a), *Florida Statutes*. In *School Board of Seminole County v. GAF Corporation*, 413 So. 2d 1208 (Fla. 5th DCA 1982), the school board brought a negligence action against the architect who designed a number of schools. The lower court ruled that § 95.11 (3)(c) applies in the construction context, rather than the two-year statute, as the language of the four-year statute is more specifically applicable to construction cases when compared with the two-year statute, which references professional malpractice suits in general. *School Board of Seminole County*, at 1210.

This Court agreed that the four-year statute should be applied in lieu of the two-year statute in the construction context. *Kelley v. School Board of Seminole County*, 435 So. 2d 804 (Fla. 1983). The four-year statute in the construction context has been consistently applied by Florida's courts. *See Havatampa Corp. v. McElvy, et al*, 417 So. 2d 703 (Fla. 2nd DCA 1982); and *Snyder v. Wernecke*, 813 So. 2d 213 (Fla. 4th DCA 2002).

CONCLUSION

The decision reached by the District Court of Appeals for the Fifth Judicial District of Florida, affirming the trial court order compelling arbitration in two

separate proceedings between CED and O'Keefe, was proper and should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and regular U.S. Mail on this ___ day of October, 2005 to: O'Keefe Architects, Inc., c/o Lee Haas, Esq., Haas & Castillo, P.A., Arbor Shoreline Office Park, 19321-C U.S. 19 North, Suite 104, Clearwater, FL 33764.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Reply Brief has been typed using the Times New Roman 14-point font in compliance with the requirements of Fla. R. App. P. 9.210(a)(2).

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