IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: SC05-1417
LOWER TRIBUNAL NO.: 5D05-651

O'KEEFE ARCHITECTS, INC.

Petitioner,

v.

CED CONSTRUCTION
PARTNERS, LTD., ET AL.

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER

On Certification of Conflict by the
Fifth District Court of Appeal

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TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, does not apply to the resolution of this case since the transactions between Petitioner and each of the Respondent property owners do not involve interstate commerce. The arbitration clauses in the contracts between Petitioner and each of the Respondent property owners made no mention of the FAA, but expressly provided that arbitration was to be governed by the law of Petitioner's principal place of business. Therefore, the Florida Arbitration Code applies.

I. THE FLORIDA ARBITRATION CODE APPLIES TO THIS CASE RATHER THAN THE FEDERAL ARBITRATION ACT

Petitioner submits this supplemental brief pursuant to the Supreme Court Order dated March 17, 2006 directing the parties to address the issue whether the Federal Arbitration Act or the Florida Arbitration Code applies to this case. Petitioner respectfully submits that the Florida Arbitration Code applies to this case and that the Federal Arbitration Act is inapplicable because interstate commerce is not involved. However, the Court's ultimate resolution of this case does not depend upon whether the FAA or the Florida Arbitration Code is applied, but rather, upon determination of other issues which are unaffected by the decision in Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006), which held that the validity of a contract under the FAA is decided by an arbitrator, not a court.

Section 1 of the FAA defines commerce as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation". In determining the applicability of the FAA to a particular dispute, courts have examined whether the transaction involves interstate commerce and consistently held that transactions that do not involve interstate commerce are not subject to the FAA. Bernhardt v. Polygraphic Company of America, Inc., 350 U.S. 198 (1956); Merritt-Chapman & Scott Corporation v. Pennsylvania Turnpike Commission, 387 F.2d 768 (3d Cir. 1967); H.L. Libby Corporation v. Skelly and Loy, Inc., 910 F.Supp. 195 (M.D. Pa. 1995).

Like their federal counterparts, Florida courts have been called on to decide whether the FAA applies by examining the underlying transactions to determine whether they involve interstate commerce. In Butcher & Singer, Inc. v. Frisch, 433 So.2d 1360 (Fla. 4th DCA 1983), a dispute between a New York Stock Exchange brokerage firm and its former employee, and Eastern Funding, LLC v. Roman, 882 So.2d 1059 (Fla. 4th DCA 2004), a dispute between a New York-based Delaware corporation and Florida residents, the courts found that the transactions involved interstate commerce and therefore the FAA applied. In Mora v. Abraham Chevrolet-Tampa, Inc., 913 So.2d 32 (Fla. 2d DCA 2005), however,

the court determined that the FAA did not apply because the employment agreement containing the arbitration clause was between a Florida corporation and a Florida resident concerning work in Florida and, therefore, did not involve interstate commerce, notwithstanding the fact that the agreement called for binding arbitration under the Federal Arbitration Act.

The case of Higley South, Inc. v. Park Shore Development Company, Inc., 494 So.2d 227 (Fla. 2d DCA 1986) is factually similar to the instant case. In Higley, two Florida corporations formed a joint venture and acted as general contractor to construct a multi-million dollar building in Florida for the owner, also a Florida corporation. The construction contract was a standard form AIA document, although a different document from the one at issue in this case. Because all parties were Florida corporations and the project involved construction in Florida, the court found the FAA did not apply, stating "there is nothing before us permitting the finding that interstate commerce is either affected or involved. We further reject the notion that we should find such commerce contact from the nature and magnitude of the construction undertaken." Id. at 230.

The FAA was ruled inapplicable in Higley and the same result is warranted herein. As the record on appeal reveals, Petitioner is a Florida corporation that contracted, in two separate agreements, with two separate Florida limited partnerships (Respondents Vero Club Partners, Ltd. and Clearwater Phase I

Partners, Ltd.) to design buildings to be constructed in Florida, that were constructed by a general contractor (Respondent CED Construction Partners, Ltd.), also a Florida limited partnership. (Petitioner's Appendix 7). The owners attempted to assign their claims to Respondent CED, an entity whose ownership and management was substantially similar to the ownership and management of the property owners (Petitioner's Appendix 7, paragraph 33), which then consolidated the claims into a single arbitration case. There is nothing in the record to suggest that interstate commerce is either affected or involved. To the extent Respondents argue that the sheer size of the construction projects implicate interstate commerce, the Higley court rejected a similar argument. See 494 So.2d 227, 230 at n. 1.

The agreements between Petitioner and Respondent owners do not provide a basis for the application of the FAA. The agreements are merely standard AIA documents (B141, 1987 edition). Each of these agreements provides, in §9.1, that "[u]nless otherwise provided, this Agreement shall be governed by the law of the principal place of business of the Architect." (Petitioner's Appendix 7, Exhibits A and B). There are no other provisions regarding the applicable law nor are there any references to the FAA. Because the contracts involved Florida businesses regarding construction in Florida and did not involve interstate commerce, the agreements to arbitrate can only be governed by the Florida Arbitration Code.

Although Petitioner maintains that the Florida Arbitration Code is applicable and the FAA is not, a determination by this Court to the contrary should not adversely affect Petitioner's position before this Court. The critical issue in this case is not the severability of arbitration provisions (the issue causing reversal in Buckeye Check Cashing), but rather the resolution of a two-fold question: 1) Did the original parties to the owner/architect agreements agree to arbitrate these particular disputes in this particular fashion; and 2) does a court or an arbitrator decide arbitrability (i.e. who decides what the parties agreed to arbitrate).

As to the first question, addressed by this Court in Seifert v. U.S. Home Corporation, 750 So.2d 633 (Fla. 1999), the United States Supreme Court held in EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) that it would first determine whether the parties agreed to arbitrate a dispute to determine the scope of the arbitration agreement. It would not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because of the general policy favoring arbitration. Id. at 294. The Waffle House decision also made clear that the public policy favoring enforcement of arbitration provisions is based upon enforcement of contract, not a preference for arbitration, similar to the Florida Supreme Court's ruling in Raymond James Financial Services, Inc. v. Saldukas, 896 So.2d 707 (Fla. 2005).

In Buckeye Check Cashing, supra, the issue before the United States Supreme Court was whether an arbitrator or a court was to determine if a contract was void for illegality. The Court ruled that this determination was to be ruled on by an arbitrator. Nothing in Buckeye Check Cashing, however, suggests that the three-part analysis in Seifert is not still good law.

Resolution of the second question appears to be the same under both the FAA and the Florida Arbitration Code. Section 3 of the FAA provides in part:

> [T]he court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added). Section 4 of the FAA provides in part: "If the making of the arbitration or the failure, neglect, or refusal to perform the same be an issue, the court shall proceed summarily to the trial thereof." (Emphasis added). Thus, even if this Court were to conclude that the FAA controlled, section 3 of the FAA requires the trial court to conduct a trial or evidentiary hearing to determine whether the parties agreed to arbitrate the claims at issue. The FAA does not authorize a court to delegate its authority to an arbitrator to decide arbitrability. Neither do the Florida Arbitration Code or Florida case law. See Seifert, supra. Yet, in the present case, the trial judge refused to conduct an evidentiary hearing

on the arbitrability issue, despite the requirement to do so under the FAA or the Florida Arbitration Code.

Two recent decisions from the Second District Court of Appeal reaffirm the propriety of a court determining arbitrability, following First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), which held that the arbitrability of a dispute is, in the absence of a clear indication otherwise, to be decided by a court. In Morton v. Polivchak, 2D05-215 (Fla. 2d DCA February 15, 2006), the court stated:

> Decisions regarding arbitrability are to be made by the trial court, unless the parties have entered an agreement stating otherwise. Contractual silence or ambiguity regarding who determines the questions of arbitrability is insufficient to give that authority to the arbitrators. If the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently. First Options of Chicago, Inc. v. Kaplan. Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. (Citations omitted).

Because the purchase and sale agreement did not expressly authorize the arbitration panel to determine arbitrability, the Morton court found that the arbitration panel exceeded its authority by ruling that it had no power to award punitive damages and held that the trial court committed reversible error in failing to decide the arbitrability of the punitive damages claim.

In Mercedes Homes, Inc. v. Rosario, 2D05-3153 (Fla. 2d DCA February 24, 2006), decided shortly thereafter, the Second District again addressed the issue of

arbitrability and again reversed a trial court, which had denied a motion to compel arbitration. The reason given for the different result was that the arbitration provision at issue contained a clause providing that the scope of arbitrable issues was to be decided by the arbitrator. Again, citing First Options, the Second District held that this language clearly indicated that the arbitrator was to decide the issue of arbitrability. As such, it was error for the trial court to decide which claims were arbitrable.

In the present case, Petitioner maintains that it does not have an agreement to arbitrate with Respondent CED Construction Partners, Ltd. and that its owner-architect agreements with Respondents Vero Club Partners, Ltd. and Clearwater Phase I Partners, Ltd. prohibited them from assigning those agreements. Furthermore, the agreements to arbitrate specifically prohibited consolidation of arbitration proceedings and Petitioner did not agree to consolidation. Thus, Petitioner has called into question whether there is an agreement to arbitrate and it is entitled to a determination of arbitrability by a court, after an evidentiary hearing, as to whether Petitioner is obligated to arbitrate two separate claims in a single arbitration case with Respondent CED Construction Partners, Ltd. despite clear language prohibiting assignment and consolidation in the two written agreements with Vero Club Partners Ltd. and Clearwater Phase One Partners Ltd.

CONCLUSION

Petitioner requests this Court apply the Florida Arbitration Code to this matter. The Federal Arbitration Act does not apply because the transactions did not involve interstate commerce. However, irrespective of this determination, and following its own or federal precedent, this Court should direct the trial court to enjoin arbitration with CED because of the non-consolidation, non-assignment provisions in the owner-architect agreements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and United States Mail this 24th day of March 2006, to Kevin P. Kelly, Esquire, Gray Robinson, P. O. Box 3068, Orlando, Florida 32802-3068.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Supplemental Brief has a typeset of Times New Roman 14.

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