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MURKY WATERS: SUPREME COURT OF ALABAMA COMPELS ARBITRATION ALTHOUGH THERE MAY NOT HAVE BEEN A CONTRACT

By
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I. INTRODUCTION

The Schultzes hired the Olshan Foundation Repair Company of Mobile ("Olshan") to perform foundation work on their house three different times.[1] When the work was not performed to the Shultzes liking, they sued and Olshan sought to compel arbitration.[2] The Supreme Court of Alabama held that the Schultzes did not present enough evidence to show that the 2008 work was not performed pursuant to the 2007 contract; it therefore granted the motion to compel arbitration.[3]

II. BACKGROUND

Florence and Arnold Schultz own a home in Washington County, Alabama, and hired Olshan to perform work on their house.[4] Olshan performed work on the foundation of the Schultz's home on three separate occasions: August 2006, March 2007, and January 2008.[5] In July 2008, the Schultzes sued Olshan, alleging breach of contract, breach of warranty, negligence and wantonness.[6] The Schultzes alleged that Olshan performed the repair work negligently, resulting in damage to their house; that the value of their home decreased as a result; and that the Schultzes suffered emotional distress caused by the negligent home repair.[7]

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[1] Olshan Found. Repair Co. of Mobile, L.P. v. Schultz, 2010 WL 4034866, *1 (Ala. 2010) [hereinafter *Olshan*].

[2] *Id.*

[3] *Id.* at *8.

[4] *Id.* at *1.

[5] *Id.*

[6] *Olshan*, 2010 WL 4034866 at *1.

[7] *Id.*

Olshan responded to the complaint by filing a motion to compel arbitration.[8] After completing some discovery to determine whether the controversy should proceed through arbitration, the trial court made certain factual determinations that the Supreme Court of Alabama accepted.[9]

The parties agreed that the work performed in August 2006 was completed pursuant to a contract signed by Mr. Schultz; however, neither party was able to produce the contract.[10] Olshan produced a contract that it claimed normally was used when performing residential foundation repair work, the type of work done in this matter.[11] This document contained a clause stipulating that "any dispute, controversy, or lawsuit between any of the parties to this agreement about any matter arising out of this agreement" would be submitted to binding arbitration using the American Arbitration Association ("AAA").[12] The Schultzes claimed that the condition of their home worsened after the work performed by Olshan in 2006.[13]

In March 2007, the Schultzes rehired Olshan to perform similar repair work to the foundation of their home; this time, Olshan produced a copy of the contract dated March 2, 2007 to install nine "CableLock Plus Pilings," which came with a lifetime warranty.[14] The contract provided further that "the owner may order extra work to be done, not contemplated by this Agreement, in which event a separate Agreement for such work shall be entered into between [Mr. Schultz] and [Olshan]. No oral representation made by anyone can change or modify this agreement."[15] In addition, this contract contained an arbitration submission provision identical to that of the first contract.[16] Instead of inserting nine pilings,

[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Olshan*, 2010 WL 4034866 at *1.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at *2.
[16] *Olshan*, 2010 WL 4034866 at *2.

however, Olshan actually installed twelve; Olshan's general manager stated that it was typical for his company to agree to install a certain number of pilings, but install more if the job so required.[17] Again, Mr. Schultz stated that the work performed in 2007 worsened the condition of his home; this time, he did not pay Olshan.[18]

In January 2008, Olshan performed more work on the foundation of the Schultzes' home.[19] This work was done without a contract, but Olshan produced a letter stating that the company's intention in performing this work was to "satisfy our agreement so your warranty will be instigated and we can get paid."[20] For a third time, Mr. Schultz said that the condition of his home worsened after Olshan's repairs.[21] He sued Olshan on July 28, 2008, and after Olshan's motion to compel arbitration, the Schultzes amended their complaint to add claims by Mrs. Shultz only for negligence and wantonness.[22] The trial court rendered its opinion on January 22, 2010. It denied the claims of Mrs. Schultz as being without merit, granted the motion to compel arbitration as to the work performed pursuant to the March 2, 2007 contract, but denied the motion to compel arbitration as to any work performed in 2006 and 2008.[23]

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Olshan*, 2010 WL 4034866 at *3.
[22] *Id.*
[23] *Id.*

III. ANALYSIS[24]

The Supreme Court of Alabama reviewed the denial of the motion to compel arbitration *de novo*.[25] In this case, Olshan had the burden of proving a contract existed that contained a reference to arbitration and that was involved in interstate commerce.[26] If Olshan could make this showing, then the burden shifted to the Schultzes to prove that the arbitration agreement was either invalid or did not apply to the controversy.[27]

Olshan argued that the district court erred in denying its motion to compel arbitration on the 2008 work because it was done as follow-up work to the 2007 contract, which contained an arbitration agreement.[28] Olshan cited *Elizabeth Homes, L.L.C. v. Cato* to support his argument.[29] The *Cato* court stated that all doubts about the arbitration provision should be decided in favor of arbitration, "[when] *the problem at hand is in the construction of the contract language itself*."[30] Therefore, the motion to compel arbitration should not be denied unless one can positively say that the arbitration provision did not cover the particular dispute that spawned the litigation.[31] Elizabeth Homes argued that the work performed in their case was done as a result of a warranty provision in the original

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[24] The Analysis section does not discuss any of the work performed in 2006 as Mr. Schultz admitted that the contract he signed in 2006 contained a reference to arbitration. *Id.* at *4. In addition, the Court found that Mrs. Schultz's claims were subject to the 2006 and 2007 contracts and were arbitrable. *Id.* at *12.

[25] *Olshan*, 2010 WL 4034866 at *3; *see* Parkway Dodge v. Yarbrough, 779 So.2d 1205 (Ala. 2000).

[26] *Olshan*, 2010 WL 4034866 at *3; *see* TranSouth Fin. Corp. v. Bell, 739 So.2d 1110, 1114 (Ala. 1999).

[27] *Olshan*, 2010 WL 4034866 at *3; *see* Elizabeth Homes, L.L.C. v. Gantt, 882 So.2d 313, 315 (Ala. 2003) (quoting Fleetwood Enters., Inc. v. Bruno, 784 So.2d 277, 280 (Ala. 2000)).

[28] *Olshan*, 2010 WL 4034866 at *5.

[29] *Id.* at *5; *see* Elizabeth Homes, L.L.C. v. Cato, 968 So.2d 1 (Ala. 2007) [hereinafter "Cato"].

[30] *Olshan*, 2010 WL 4034866 at *5; *see Cato*, 968 So.2d at 7 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983)) (emphasis added).

[31] *Olshan*, 2010 WL 4034866 at *5; *see* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960); and *Cato*, 968 So.2d at 7.

agreement, and as such the work was part of the original agreement.[32] The Supreme Court of Alabama agreed with Elizabeth Homes, and held that the homeowners failed to meet the burden of showing the arbitration provision did not apply to the work performed.[33]

Analogizing the case at bar to *Cato*, Olshan pointed to the 2007 agreement that provided a lifetime warranty for Olshan's work, and argued that the 2008 work was done as "follow-up."[34] The Court found that the work done was either performed as a warranty on the 2007 contract or to complete the 2007 contract; therefore, Olshan met its burden and it would be up to the Schultzes to show that the arbitration provision did not apply.[35]

Mr. Schultz argued that the language in the 2007 contract was not broad enough to encompass the work performed in 2008.[36] The contract provided that if the owner wanted extra work to be done, the parties should enter into a separate agreement.[37] Mr. Shultz used the reasoning in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jordan* decision to support his proposition.[38] In that case, the arbitration clause applied to "all controversies which may arise between us…whether entered into prior [to], on, or subsequent to the date hereof," and the court found it broad enough to apply to "*any* and *all* controversies…regardless of the kind of controversy or the date on which the controversy occurred."[39] While the Court agreed that the *Merrill Lynch* agreement was broader than the agreement in this case, the Court did not believe that the 2007 agreement was too narrow as to not apply to the work done in 2008.[40] The Court believed that Mr. Schultz did not

[32] *Olshan*, 2010 WL 4034866 at *6; *see Cato*, 968 So.2d at 10.
[33] *Olshan*, 2010 WL 4034866 at *6; *see Cato*, 968 So.2d at 10-11.
[34] *Olshan*, 2010 WL 4034866 at *6.
[35] *Id.* at *7.
[36] *Id.*
[37] *Id.*
[38] *Id.*; *see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jordan, 719 So.2d 201 (Ala. 1998) [hereinafter "Merrill Lynch"].
[39] *Olshan*, 2010 WL 4034866 at *7 (quoting *Merrill Lynch*, 719 So.2d at 202-04).
[40] *Id.* at *8.

present any evidence that the 2008 work was not done in furtherance of the 2007 contract.[41] Therefore, the Court cannot say definitely that the work done was not in furtherance of the 2007 contract and the lower court erred in denying the motion to compel arbitration.[42]

IV. SIGNIFICANCE

This is a case that should be the poster-child for bad arbitration agreements. *Olshan* took nearly two-and-a-half years to work its way through the courts before being compelled to arbitration. A lot of time and money were wasted on determining whether there was an agreement to arbitrate over the 2008 work; only now can the case proceed through arbitration and a final decision can be rendered. One has to wonder if this was even worth it to the Schultzes. They could have spent more on legal fees than they could possibly recover in damages to their home. For Olshan and businesses that work pursuant to contracts, this case is an example of how not to write an arbitration agreement. The courts usually uphold broad arbitration agreements, yet it certainly cannot be said definitively whether Olshan's contract applied to future work. Since arbitration is supposed to be a speedy, efficient, and cheaper route to the resolution of disputes, those who draft arbitration clauses should take note of the time invested in this case as a reminder to make the clauses as broad as possible.

[41] *Id.*
[42] *Id.*