No. 94675-2

SUPREME COURT
OF THE STATE OF WASHINGTON
(Court of Appeals, Division III Cause No. 346927)

SVN CORNERSTONE, LLC, a Washington Limited Liability Company,

Petitioner,

v.

N. 807 INCORPORATED, a Washington corporation, d/b/a BERKSHIRE HATHAWAY HOMESERVICES FIRST LOOK REAL ESTATE; KENNETH M. LEWIS AND MICHELLE S. LEWIS, and the marital community composed thereto; HENRY SEIPP AND JANE DOE SEIPP, and the marital community composed thereof,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS

Respondents N. 807 Incorporated d/b/a Berkshire Hathaway HomeServices First Look Real Estate ("Berkshire") a real estate brokerage firm, Kenneth Lewis and Michelle S. Lewis, Berkshire's Managing Broker and his wife, and Henry and Jane Doe Seipp, a Berkshire real estate broker and his alleged marital community, (collectively "Respondents") ask this Court to *deny* Cornerstone's Petition for Review.

II. STATEMENT OF THE ISSUE

Whether the Court of Appeals properly reversed and remanded this case to the trial court for an order compelling arbitration of Cornerstone's claims that fall within the broad scope of the CBA arbitration provision requiring arbitration of all disputes between its members involving commission or fees lost as a result of another member?

III. STATEMENT OF THE CASE

A. Factual Background.

In 2015, Berkshire procured the sale of 2707 E. 37th Avenue, Spokane, Washington 99223 ("the Property"). (CP 392-393). Berkshire and the seller, EZ Properties, LLC, executed an Exclusive Listing Agreement, entitling Berkshire to a two percent commission

for the sale of the Property. (CP 393). Just after the buyer and seller of the Property signed the Purchase and Sale Agreement, Respondent Cornerstone interjected itself into the closing of the sale of the Property. (CP 71; 393-394). Cornerstone proclaimed that it was entitled to the commission for the sale of the Property, despite its lack of any written agreement with the seller of the Property. Id.

Prior to the sale of the Property, the seller contacted numerous commercial brokerage firms in the Spokane area and requested that these firms solicit informal offers for the sale of the Property. (CP 392-393). One of those firms was Cornerstone. Id. While working as a commercial broker for Cornerstone, Appellant Henry Seipp and Cornerstone's Managing Director, Matthew Byrd, worked to help the seller find a buyer. (CP 392-393; 328-329).

Cornerstone terminated its relationship with Mr. Seipp on or about April 15, 2015. Id. On April 20, 2015, Mr. Seipp joined Berkshire as a commercial real estate broker. Id. After Mr. Seipp made the transition to Berkshire, for the first time, the seller executed an Exclusive Listing Agreement with Berkshire. (CP 402-404).

On April 22, 2015, the seller accepted an offer on the Property of $2,150,000. (CP 92-118). Months later, in October 2015, due to financing issues, the seller and the buyer executed a Rescission of Purchase and Sale Agreement, rescinding the April 2015 Purchase and Sale Agreement for the sale of the Property, and executed a new Purchase and Sale Agreement on or about October 20, 2015, reflecting the new sales price, $2,100,000, along with the new financing terms. (CP 120-139). Neither the original Purchase and Sale Agreement executed in April 2015, nor the entirely new Purchase and Sale Agreement executed in October 2015, mention Cornerstone, or any of its brokers. (CP 92-118; 120-137).

All of the parties to the present dispute are voluntary members of the Commercial Brokers Association ("CBA"). (CP 25-28). CBA is a voluntary, member-owned trade association that provides commercial real estate multiple listing services to its members. (Br. of Pet. at A4). The CBA requires, and its members agree, to submit all claims between them involving commission to mandatory and binding CBA arbitration. (CP 32). The CBA bylaws state:

> ***It is the duty of the members of CBA (and each so agrees) to submit all controversies involving commissions between or among them to binding arbitration*** *by CBA pursuant to*

> *its then current arbitration rules and policies,* ***rather than to bring a suit to law****. The foregoing* ***includes controversies which arose prior to one of the parties becoming a member****. The term "commissions" as used above means commissions or fees arising from the real estate brokerage services as the same is now or in the future defined in RCW 18.85; together with interest and out-of-pocket costs or expenses related thereto and included commissions or fees actually paid,* ***as well as commissions or fees lost as a result of the acts of another member****.*

Id. (emphasis added).

Cornerstone filed a lawsuit in Spokane County Superior Court against Berkshire, its owner Kenneth Lewis, his wife, Michelle Lewis, and its former commercial broker, Henry Seipp on April 29, 2016. (CP 3-13). Cornerstone claims it is entitled to commission for the sale of the Property. Id. Specifically, Cornerstone claims damages in the amount of $63,000, a three percent commission on the sale of the Property for $2,100,000, as reflected by the new Purchase and Sale Agreement executed by the buyer and seller in October of 2015. Id.

B. Procedural Posture.

On April 29, 2016, Cornerstone filed a lawsuit against the Respondents in Spokane County Superior Court asserting that it was entitled to a commission for the sale of the Property in the amount of $63,000, three percent of the sale price of the Property.

(CP 3-13). In response, Respondents filed a Motion to Dismiss and Motion to Compel Arbitration because all parties are members of the CBA, which requires (and its members agree) its members to submit any dispute involving commission to mandatory and binding CBA arbitration. (CP 42-66).

Cornerstone filed a Motion for Partial Summary Judgment asking the trial court to rule that Mr. Seipp breached his Independent Contractor Agreement with Cornerstone, and that the trial court find as a matter of law that Cornerstone is entitled to $63,000, a three percent commission on the sale price of the Property, as evidenced by the Purchase and Sale Agreement executed in October 2015. (CP 358-373; VRP 1-24). The trial court denied both Respondents' Motion to Dismiss and Motion to Compel Arbitration and Cornerstone's Motion for Partial Summary Judgment. (CP 464-466; 495-497). Respondents timely filed an appeal as a matter of right pursuant to RAP 2.2(a)(3) with the Court of Appeals.

The Court of Appeals properly reversed the denial of Respondents' motion to compel arbitration and remanded this case back to the trial court for proceedings consistent with its direction to compel arbitration of all of Cornerstone's claims for relief that

seek to determine or recover commissions or fees lost as a result of the alleged acts of the Respondents. The plain language of CBA's bylaws require arbitration of all of Cornerstone's claims that seek, as damages, commissions or fees lost as a result of the acts of the alleged Respondents, whether those acts occurred prior to or after the Respondents became CBA members. The Court of Appeals chose not to publish its decision, as its decision is not in conflict with a published decision of the Court of Appeals.

IV. ARGUMENT

A. Cornerstone Fails to Establish Grounds for Acceptance of Review.

Cornerstone fails to establish grounds upon which the Supreme Court of Washington should review the Court of Appeals decision. RAP 13.4(b). "*A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a public decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.*" Id. Cornerstone argues that the Court of Appeals'

decision is in direct conflict with Todd v. Venwest Yachts, Inc., 127 Wn. App. 393 (Div. I, 2005), rev. denied, 156 Wn.2d 1025 (2006). However, the Court of Appeals' decision at issue is an unpublished case, which has "*no precedential value*" and is "*not binding upon any court.*" RAP 14.1(a). Thus, it is not capable of being in direct conflict with a published decision such as Todd. Id. Had the Court of Appeals intended for its decision to have "*precedential value*" it would have been "*published as [an] opinion[] of the court.*" RCW 2.06.040. Furthermore, the Court of Appeal's decision at issue is not in direct conflict with Todd, as it is factually and legally distinguishable, as set forth below. The decision of the Court of Appeals is directly in line with a recent Court of Appeals' decision, that distinguishes Todd, Marcus & Millichap Real Estate Inv. Servs. Of Seattle, Inc. v. Yates, Wood & MacDonald, Inc., 192 Wn. App. 465, rev. denied, 185 Wn.2d 1041 (2016). Thus, Cornerstone's Petition for Review should be denied because it fails to establish grounds for acceptance of review.

B. De Novo Review.

This court engages in de novo review of a trial court's decision granting or denying a motion to compel arbitration. Satomi Owners Ass'n v. Satomi, LLC, 167 Wn. App. 781, 797 (2009).

"The court shall decide whether . . . a controversy is subject to an agreement to arbitrate." RCW 7.04A.060(2). This is a *"threshold legal question"* that the court determines by *"examining the arbitration agreement without inquiry in to the merits of the dispute."* Marcus & Millichap, 192 Wn. App. 474 (emphasis added).

When a motion is made pursuant to RCW 7.04A to compel arbitration, the court's only inquiries are whether the arbitration provision is valid and whether the present dispute falls within the scope of that arbitration provision. RCW 7.04A.060, .070; see e.g., Marcus & Millichap, 192 Wn. App. at 472-473. Likewise, the court has a duty to make these decisions, summarily. Id. When in doubt, Washington's strong policy in favor of arbitration compels the court to resolve disputes in favor of arbitration. Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula, 130 Wn.2d 401, 414 (1996). If the dispute can fairly be said to invoke a claim covered by the provision, the courts inquiry must end. Heights at Issaquah Ridge v. Burton Landscape Grp., Inc., 148 Wn. App. 400, 403 (2009).

C. The Court of Appeals' Decision is Not in Direct Conflict with the Published Division I Court of Appeals' Decision Todd v. Venwest Yachts, Inc.

Cornerstone continues to ignore the broad scope of Washington's Uniform Arbitration Act, chapter 7.04A RCW, and

instead relies upon its argument that Todd is applicable to the present dispute. However, as correctly discussed by the Court of Appeals, Todd is entirely distinguishable from the case at hand and is not in direct conflict with the Court of Appeals' decision. (Br. of Pet. at A9). In Todd, Division I held that an arbitration provision found in the bylaws of a voluntary organization does not become part of an ***employment relationship*** in the absence of an intent that the employment relationship be bound thereby. 127 Wn. App. at 399. There, an employee sued his former employer for commissions he alleged he was owed. Id. at 395. The employer moved to dismiss, arguing that the employee was required to arbitrate his dispute according to the bylaws of the Northwest Yacht Broker's Association ("NYBA"), a voluntary organization that both the employer and employee were members of. Id. The NYBA bylaws stated, "*[w]hen a dispute arises between members, between members and a nonmember, or between members and the public*" the dispute shall be arbitrated. Id. at 396. However, the Todd court specifically determined that the parties did not intend to be bound by the NYBA in their ***employment relationship***. Id. And, as discussed by the Court of Appeals, here, the scope of the arbitration provision in Todd was

inexplicably broad rendering intent undeterminable. (Br. of Pet. at A9). The scope of the arbitration provision at issue in Todd rendered any dispute involving a NYBA member to be submitted to arbitration, whether the dispute was with another NYBA member, or not. Id. at 396.

Cornerstone contends that the Court of Appeals erred when it looked at the language of the arbitration clause in the NYBA bylaws to determine its intended scope. (Br. of Pet. at 9). Yet, when determining whether claims are subject to an arbitration agreement, courts must answer two questions: (1) whether the arbitration agreement is valid; and (2) if valid, whether the scope of the agreement encompasses the claims asserted. Wiese v. Cach, LLC, 189 Wn. App. 466, 4674 (2015)(citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627-28, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)); see also RCW 7.04A.060(2). ("*The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.*"). The Court of Appeals properly distinguished the arbitration clause at issue in Todd from the arbitration clause at issue here, as the intended scope of the arbitration clause at issue in Todd could not be determined,

whereas the intended scope of the arbitration agreement in the CBA bylaws is clear.

As declared by Division I in 2016, "*[f]orty-six years ago, this court set forth the principle that voluntary membership in a professional organization gives rise to a corresponding obligation to comply with that organization's bylaws.*" Marcus & Millichap, 192 Wn. App. at 469. Mr. Seipp's decision to join the CBA, thereby agreeing to be bound by its bylaws, after he left Cornerstone did not alter his independent contractor agreement. (Br. of Pet. at A12). And, as correctly reasoned by the Court of Appeals, even if membership in CBA altered or amended the terms of the independent contractor agreement, a contract may be modified or abrogated by the parties in any manner they choose, notwithstanding provisions in the contract prohibiting modification or abrogation. Id. (citing Columbia Park Golf Course, Inc. v. City of Kennewick, 160 Wn. App. 66, 82 (2011)).

In this case, Cornerstone, Mr. Seipp, and Berkshire all agreed to be bound by CBA's bylaws. (CP 25-28). Thus, as determined by the Court of Appeals, the broad scope of the CBA arbitration provision applies to all of Cornerstone's claims

involving commissions or fees allegedly lost as a result of the acts of Respondents. (Br. of Pet. at A2).

D. The Court of Appeals' Decision is in Line with the 2016 Marcus & Millichap Decision from Division I.

Washington's Uniform Arbitration Agreement ("UAA"), enacted in 2006, governs the validity of arbitration agreements entered into on or after January 1, 2006. RCW 7.04A.030(1)(a). The UAA provides that *"[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties is valid, enforceable, and irrevocable except upon a ground that exists at law of in equity for the revocation of a contract."* RCW 7.04A.060(1).

An express agreement to arbitrate is not required. Marcus & Millichap, 192 Wn. App. at 474. For example, in Keith Adams, a dispute related to commission arose between a real estate broker and his brokerage over the sale of an apartment complex. Keith Adams & Assoc., Inc. v. Edwards, 3 Wn. App. 623, 624 (1970). The broker disagreed with his brokerage's allocation of the commission paid on the sale. Id. Both the broker and the brokerage were voluntary members of the Tri-City Board of Realtors. Id. Thus, the broker filed a complaint with the board pursuant to the Board's bylaws. Id. At the conclusion of the arbitration, the brokerage

petitioned the superior court to vacate the arbitrator's award. Id. at 624-25. In response, the broker moved the court to dismiss the brokerage's petition and confirm the award. Id. at 625. The superior court granted the motion to dismiss and confirmed the arbitrator's award. Id. Thereafter, the brokerage appealed to this court, Division III. Id. The Keith Adams court held that voluntary membership in the board constituted a binding agreement to arbitrate disputes pursuant to the board's bylaws. Id.

In Marcus & Millichap, Yates, Wood & MacDonald, Inc., ("Yates") a real estate brokerage firm, asserted that it was entitled to a portion of the commission earned by Marcus & Millichap, a real estate brokerage firm, that had an exclusive listing agreement to sell an apartment complex. Id. at 469-70. Both of the real estate brokerage firms were members of the Commercial Brokers Association. Id. at 470. Yates initiated arbitration proceedings against Marcus & Millichap seeking one-half of the commission earned by Marcus & Millichap on the sale of the property. Id. at 471. Before CBA arbitration commenced, Marcus & Millichap filed a complaint for declaratory relief claiming that no arbitration agreement existed between the parties. Id. The parties then filed cross-motions for relief. Id. Marcus & Millichap moved to stay

arbitration, and Yates filed a motion to compel arbitration. Id. The superior court found a valid arbitration agreement, granted Yates' motion to compel arbitration, and dismissed the lawsuit. Id. Applying the holding of Keith Adams, the Marcus & Millichap court held that the "***CBA bylaw provision constitutes a valid and enforceable arbitration agreement between the parties***. . ." Id. at 480 (emphasis added). Division I affirmed the trial court's ruling. Id. at 482. And, the Supreme Court of Washington denied review of that decision. Marcus & Millichap, 192 Wn. App. 465, review denied, 185 Wn.2d 1041 (2016).

Here the same CBA bylaw provision mandating arbitration of disputes involving commission is at issue:

> *It is the duty of the members of CBA (and each so agrees) to submit all controversies involving commissions between or among them to binding arbitration by CBA pursuant to its then current arbitration rules and policies, rather than to bring a suit to law. The foregoing includes controversies which arose prior to one of the parties becoming a member.*

(CP 30-32). All of the parties to the present dispute are voluntary CBA members who agreed to be bound by CBA's bylaws. (CP 25-28). Thus, as held by Marcus & Millichap, the CBA arbitration agreement is valid and enforceable between the parties. Marcus & Millichap, 192 Wn. App. at 480.

Nearly all of Cornerstone's alleged claims against the Respondents fall squarely within the language of the CBA bylaw arbitration provision because Cornerstone's entire lawsuit revolves around one central allegation: "*Cornerstone lost the opportunity to obtain a* ***commission*** *of 3% of the gross sale price of $2,100,000 for the Property, which would have been the principal amount of $63,000.*" (CP 8)(emphasis added). Thus, the Court of Appeals properly reversed the trial court's denial of the motion to compel and remanded to the trial court for entry of an order in line with the Court of Appeals' decision that all of Cornerstone's claims that seek to recover commissions or fees lost as result of the acts of the alleged Respondents are subject to CBA arbitration and Cornerstone's claims that fall outside of the CBA arbitration provision's broad scope, alleged claims of trade secret may be litigated in the trial court.

E. Agency Principles Do Not Require Mr. Lewis and Berkshire to Litigate Their Dispute with Cornerstone.

Berkshire and Mr. Lewis are not bound to litigate the present dispute. Cornerstone relies upon a number of inapplicable cases, arguing that Berkshire and Mr. Lewis are bound by the resolution procedure outlined in Mr. Seipp's

contract with Cornerstone because of the legal theory of agency. (Petitioner's Brief, p. 15).

For example, in Powell v. Sphere Drake Ins. P.L.C., a seaman sued the owners of the vessel he was working on when he suffered an injury. 97 Wn. App. 890, 892 (1999). After obtaining a judgment and finding that the owner had no assets to satisfy the judgment, he sued the owners' insurer. Id. at 893. The insurance contract between the owner and the insurer contained a mandatory arbitration clause. Id. The issue before the court was whether the seaman, who was not a party to the insurance contract, was required to arbitrate his claims against the insurer. Id. at 894. The Powell court held that the seaman was not required to arbitrate his claims because his claims were statutory claims not based on the insurance policy itself. Id. at 895-96.

Here, Berkshire and Mr. Lewis seek to ensure that the valid and binding CBA arbitration clause which provides for arbitration of all claims involving commission whether they arose prior to or after becoming a CBA member is enforced. (CP 42-55). Furthermore, Cornerstone asserts claims against both Berkshire and Mr. Lewis that do not arise out of its contract with Mr. Seipp. (CP 474-77). Cornerstone argues that Berkshire and Mr. Lewis,

who are not parties to Mr. Seipp's independent contractor agreement, "*are bound to litigate this case since there is not an arbitration provision in the Independent Contractor Agreement.*" (Petitioner's Brief, p. 15). This argument is entirely nonsensical. In its First Amended Complaint, Cornerstone asserts independent claims entirely unrelated to the independent contractor agreement against Berkshire and Mr. Lewis: unjust enrichment, tortious interference with business relations, violation of Uniform Trade Secrets Act, conversion, and civil conspiracy. (CP 474-77). The cases cited by Cornerstone are entirely inapplicable to the case at hand and do not stand for the proposition that Cornerstone has the right to compel litigation based upon agency principals. Thus, as set forth herein, neither the independent contractor agreement nor agency principles require Berkshire and Mr. Lewis to litigate all of Cornerstone's claims against them. As CBA members, Berkshire and Mr. Lewis have a right to compel arbitration of all of Cornerstone's claims against them involving commissions or fees lost as a result of the alleged acts of the Respondents.

F. Equitable Estoppel Does Not Prohibit Arbitration.

Berkshire and Mr. Lewis are not equitably estopped from enforcing the arbitration provision of the CBA bylaws. Cornerstone relies upon Townsend v. Quadrant Corp., 173 Wn.2d 451 (2012), to support its argument that Berkshire and Mr. Lewis should be equitably estopped from compelling arbitration because the contract between Mr. Seipp and Cornerstone provides for litigation as the dispute resolution process. (Br. of Pet. at 17-20). In order to establish equitable estoppel, Cornerstone must show by clear, cogent, and convincing evidence that: (1) Berkshire and Mr. Lewis said or did something on which it relied; (2) that it relied on Berkshire or Mr. Lewis's statement or conduct; and (3) that it would be injured if Berkshire or Mr. Lewis were allowed to contradict that statement or conduct now. Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 831 (1994); WPI § 302.05. Cornerstone altogether fails to address what conduct or words of Berkshire and/or Mr. Lewis that it relied upon to its detriment. (Respondent's Brief, pp. 37-39).

In Townsend, the Supreme Court of Washington found that equitable estoppel applied to impose a Purchase and Sale

Agreement's arbitration clause upon the children of manufactured home purchasers who asserted identical causes of action as their parents against the seller arising out of the Purchase and Sale Agreement. 173 Wn.2d at 461. Id. There is entirely no evidence to support Cornerstone's contention that Berkshire and Mr. Lewis exploited or in any way benefited from the contract between Cornerstone and Mr. Seipp. Thus, neither the independent contractor agreement nor equitable estoppel create a duty to litigate.

G. RAP 18.1 – Motion for Attorney Fees and Costs.

Respondents are entitled to their reasonable attorney fees and costs on appeal pursuant to RCW 4.84.330 and RAP 18.1. The CBA bylaws and Cornerstone's independent contractor agreement with Mr. Seipp provide for attorney fees and costs to the prevailing party. (CP 39 & 78-79). Consequently, as the Respondents prevailed at the Court of Appeals, the Respondents hereby move for attorney fees and costs for having to file the present Answer to Petition for Review in the event Cornerstone's current Petition for Review is denied.

V. CONCLUSION

Pursuant to the foregoing, Cornerstone's Petition for Review should be denied.

DATED this 21st day of July 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July 2017, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

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