

FILED
COURT OF APPEALS
DIVISION II

2018 FEB 23 AM 10:22

NO. 50970-9-II

STATE OF WASHINGTON

BY AP
DEPUTY

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

PUCCHINI-ONE, LLC,

Appellant,

v.

ECP COLLEGE WAY, LLC,

Respondent.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENT OF ERROR AND ISSUES PRESENTED

The trial court erred in granting Respondent's Motion to Compel Arbitration. The primary issue presented is whether a party to a contract that includes a permissive arbitration clause waives the right to arbitrate by failing to seek arbitration until after discovery is complete and a trial court has ruled on that party's dispositive motions. If waiver results under these circumstances, the secondary issue is whether an order compelling arbitration is harmful.

II. STATEMENT OF THE CASE

Appellant (Puccini) filed its Complaint in the underlying action on February 23, 2015. CP 8 Puccini filed an Amended Complaint two days later. CP 76. The Amended Complaint alleged that Puccini and Respondent (ECP) were parties to a lease agreement. CP 77. Puccini operated a restaurant in the leased premises. CP 79. Puccini wanted to sell the restaurant, but could not do so without transferring the lease to the prospective buyer. CP 79-80. Because ECP thwarted Puccini's attempts to transfer the lease, Puccini alleged that ECP breached contract and tort obligations. CP 81.

On March 17, 2015, ECP appeared, and filed a Motion to Dismiss. CP 367. The Motion to Dismiss asserted that the lease agreement was between ECP and SOB, LLC (the "SOB Lease"). CP 371-72. ECP asserted that Puccini was not a party to the SOB Lease, because the alleged modification of that agreement substituting Puccini for SOB as the lessee was not documented in writing as required by the terms of the SOB Lease. According to ECP:

Puccini and Mr. Saleemi allege only that the "Plaintiffs' lease" was amended as the result of the e-mail correspondence with Mr. Huber and Mr. Petramalo. However, there never was a lease between Plaintiffs and ECP or its predecessors. Neither Puccini nor Mr. Saleemi are tenants under the SOB Lease (*See* Ex. B to Bomsztyk Declaration). Only SOB can bring an action for damages based on an alleged amendment and/or breach of the SOB Lease. Moreover, the SOB Lease expressly provides that it "may not be amended, altered or modified in any way except in writing signed by the parties hereto." (*See* Exhibit B at ¶ 31.4 to Bomsztyk Decl.). No such written consent is attached to the Complaint. CP 371-372.

In response to that motion, Puccini moved for, and obtained leave to, amend its complaint. CP 488. Puccini filed the Second Amended Complaint (SAC) on March 17, 2015 (CP 375), at which point that became the operative pleading from which all discovery and motion practice followed. The material allegations of the SAC relating to the

lease agreement between ECP and Puccini did not differ from the allegations that were the subject of ECP's Motion to Dismiss.

Of importance, the SAC alleges that SOB, LLC, through its owner, Faraz Saleemi, entered a commercial lease with ECP's predecessor, College Way Commercial Plaza, L.L.C. ("College"), in 2007. CP 376, ¶ IV. The terms of the SOB Lease were "subsequently renegotiated with the then agent of College, Donald Huber." CP 376, ¶ V. In April, 2013, the negotiations between Mr. Saleemi and Mr. Huber resulted in an agreement by College to lease the premises to Puccini. CP 376, ¶¶ VI-VII. After the April agreement between SOB and College was concluded, Puccini began making the rent payments at an agreed upon reduced rate. CP 377, ¶ VIII. The SAC specifically alleged:

VI.

On November 6, 2012, Plaintiffs negotiated a lower rent and related charges for the rest of the lease period, and to substitute Puccini as the new leasee. * * *. CP 376.

Attached to the SAC were exhibits that supported the allegations. Exhibit 1 to the SAC is a November 6, 2012, e-mail from Mr. Huber to Mr. Saleemi relating that "I will lower the rent. Don't give up. It will pay off eventually." CP 385. Exhibit 2 to the SAC is a November 14, 2012, e-mail from Mr. Hubert to a co-owner of the project that relates "Landlord

and tenant *wish to make a change to the current lease. * * * * **. CP 387 (Emphasis added). Exhibit 12 to the SAC is an October 10, 2014, e-mail from Mr. Saleemi to defendant's property manager that relates "I sent you earlier the renegotiated terms of the lease so you could draft an updated lease for the store *reflecting the renegotiated terms * * **." CP 439 (Emphasis added).

On April 17, 2015, ECP moved to dismiss the claims asserted by Puccini because the allegations and evidence failed to show that there was a lease between ECP and Puccini. CP 680-689. The trial court denied that motion. CP 704.

Subsequently, ECP propounded interrogatories and requests for production. Interrogatories 14 and 15 requested information supporting the allegation that Puccini replaced SOB under the SOB Lease as follows:

INTERROGATORY NO. 14: Identify any and all facts that you contend support your allegation that, on or about November 6, 2012, Puccini and College Way negotiated a lower rent *and to substitute Puccini as the new lessee under the SOB Lease.*

* * * * *

INTERROGATORY NO. 15: Identify any and all facts that you contend support your allegation that, on or about April 6, 2013, College Way gave final approval to with respect to "reducing the final charges, writing off all previously owed rent and debt of Puccini *and substituting*

Puccini as the lessee" under the SOB Lease. CP 1639
(Emphasis added).

On January 29, 2016, ECP moved for summary judgment.

CP 1083. The summary judgment motion, like the motion to dismiss, asserted that ECP was never a party to a lease with Puccini. CP 1090. Alternatively, ECP asserted that, even if there was a lease, it was extinguished by a foreclosure sale and that ECP's obligations were excused by a material breach of contract by Puccini. CP 1092-1095.

Depositions of Mr. Huber, Mr. Cann and Mr. Petramalo occurred during the week of March 1, 2016. In his testimony, Mr. Petramalo explained that the property manager, Targa, could negotiate addendums to existing leases. CP 1105-1106; 1123. He explained that changes could be made informally, including through e-mail. CP 1121-1122. He also explained that Targa recognized Puccini as the tenant in the space leased by SOB, LLC, and that Targa accepted rent payments from Puccini. CP 1109-1112.

On March 24, 2016, in response to ECP's requests for production, Puccini produced document PUC 00023. CP 1172. That document is an e-mail from Mr. Petramalo to Mr. Huber relating "I believe after discussions with Nate and you that Puccinis has a new lease with new

lowered rent to be \$2,200 *and all other terms as is*. We have been getting checks for that amount every month.” *Id.* (Emphasis added). Puccini also produced document PUC 00027, which includes an e-mail from Mr. Huber to Mr. Saleemi relating “I don’t think you need a new lease. *We have just modified the current lease*. Only change is the monthly charges of \$2200 with everything else the same.” CP 1174 (Emphasis added).

Puccini responded to the summary judgment motion on April 29, 2016. CP 1177. The response asserted that the “evidence would permit a reasonable trier of fact to find that the [SOB] Lease was modified to substitute Puccini-One for SOB. That substitution occurred before 2012, and was confirmed by e-mails from Mr. Huber and Mr. Petramalo in 2013.” CP 1185.

On May 9, 2016, ECP filed a reply supporting its Motion for Summary Judgment. The reply asserted that the SOB Lease was not modified as a matter of law. CP 1431-1432. Even if modified, ECP argued that the modified lease was terminated by a subsequent foreclosure of the landlord’s interest in the leased property, and that ECP’s obligations under the modified lease were excused by Puccini’s failure to pay rent. CP 1434. ECP also asserted, for the first time, that any new lease between ECP and Puccini, or a modified SOB lease, would be subject to a consent

to assignment clause. According to ECP:

Even if the New Lease had been drafted and executed, it would have included the same provision as the SOB Lease requiring the landlord's consent to any such assignment. CP 1431.

ECP appeared and argued the summary judgment motion on May 13th, 2016. In an order that same date, the trial court denied the Motion for Summary Judgment. CP 1437-1434.

Five weeks later, ECP moved to compel arbitration. CP 1439. According to ECP, any contract between it and Puccini would be subject to the boilerplate arbitration clause that appears in the SOB Lease. Puccini opposed the motion asserting that ECP waived the right to enforce the arbitration agreement. CP 1647. ECP argued that it could not have waived its right to enforce the arbitration clause because it was not aware that Puccini was claiming that the SOB Lease was modified until Puccini filed its summary judgment response. CP 1692-1695; RP July 29, 2016, p. 10. The trial court agreed, and granted the Motion to Compel Arbitration. CP 1697-1698.

Puccini and ECP subsequently arbitrated their dispute, which resulted in an award for ECP. CP 1800-1804. On September 15 2017, The trial court entered an order confirming the arbitration award, and a

judgment in favor of ECP was entered on the award. CP 1813-1815. This appeal was taken from that Order/Judgment. CP 1816.

III. ARGUMENT

ECP moved to compel arbitration based on the arbitration clause in the SOB Lease which states that “[a]ny dispute between the parties hereto * * * may be determined by arbitration.” CP 1503. ECP made this motion two years into the lawsuit, after discovery was complete, and the trial court had denied its Motion to Dismiss and its Motion for Summary Judgment. By so delaying its Motion to Compel Arbitration, ECP waived its right to arbitration.

A. Standard of Review

RCW 7.04A.280(1)(C) allows an appeal to be taken from an order confirming an arbitration award. On appeal, the appellant can assign error to the order compelling arbitration. A trial court’s decision on a motion to compel arbitration is reviewed de novo. *Otis Housing Ass’n, Inc., v. Ha*, 165 Wn.2d 582, 586, 201 P.3d 309 (2009).

A. ECP Waived Any Right to Arbitrate

A contractual right to arbitration is waived is if it is not timely invoked. *Otis*, 165 Wash.2d at 587. In order to avoid a finding of waiver, a party seeking to enforce its right to arbitration must take some action to

enforce that right within a reasonable time. *Id.*, at p. 588. And “a party waives a right to arbitrate if it elects to litigate instead of arbitrate.” *Id.*

Before ECP moved to compel arbitration, it asserted a counterclaim for affirmative relief, exchanged discovery documents, propounded interrogatories, participated in depositions, and presented two dispositive motions. ECP’s participation in the litigation prior to filing its motion to compel amply demonstrates that ECP chose to litigate rather than arbitrate. That choice is consistent with ECP’s often repeated assertion in the trial court that it did not have a contractual relationship with Puccini. ECP’s reliance on that defense clearly formed its decision to litigate rather than arbitrate. Indeed, it was not until after the trial court rejected ECP’s motion for summary judgment based on the “no contract” defense that ECP moved to compel arbitration. The motion was too late.

In *Saili v. Parkland Auto Center, Inc.*, 181 Wash.App. 221, 329 P.3d 915 (2014), the court surveyed the cases dealing with waiver of arbitration and identified the factors that demonstrate waiver. Those include (1) failing to assert a right of arbitration in an answer, (2) participating in motion practice, (3) participating in discovery, and (4) failing to raise the arbitration issue until late in the proceedings. Because all of those factors are present here, ECP waived arbitration.

ECP argued below that it did not waive arbitration because it had no notice that there was an arbitration clause in the alleged contract until Puccini filed its response to defendant's motion for summary judgment. Specifically, ECP contends that it was unaware, until that pleading, that Puccini was asserting that the SOB Lease was modified to substitute Puccini for SOB as the lessee, or, thus, that the terms of the alleged contract between ECP and Puccini were the same as the terms of the SOB Lease. The trial court record refutes that contention.

ECP's very first substantive pleading filed in the trial court recognized that Puccini's claim was based on an alleged modification of the SOB Lease. In its first Motion to Dismiss, ECP asserted that Puccini was not a party to a lease with ECP because the SOB Lease required any modification of that agreement to be documented in writing. According to ECP:

Puccini and Mr. Saleemi allege only that the "Plaintiffs' lease" was amended as the result of the e-mail correspondence with Mr. Huber and Mr. Petramalo. However, there never was a lease between Plaintiffs and ECP or its predecessors. Neither Puccini nor Mr. Saleemi are tenants under the SOB Lease (*See* Ex. B to Bomszyk Declaration). Only SOB can bring an action for damages based on an alleged amendment and/or breach of the SOB Lease. Moreover, the SOB Lease expressly provides that it "may not be amended, altered or modified in any way except in writing signed by the parties hereto." (*See*

Exhibit B at ¶ 31.4 to Bomsztyk Decl.). No such written consent is attached to the Complaint. CP 371-372.

In sum, ECP argued that the terms of the SOB Lease governed whether Puccini could pursue a claim against ECP. The SOB Lease required modifications to be in writing. ECP moved to dismiss asserting that Puccini had not alleged that the SOB Lease had been modified in writing to substitute Puccini for SOB as the lessee. Because ECP understood, when it filed its first motion, that Puccini's claim was based on an alleged modification of the SOB Lease, ECP's argument that it was not aware of that theory until after it filed its Motion for Summary Judgment lacks factual support.

That argument is also refuted by ECP's discovery requests.

Before it moved for summary judgment, ECP propounded these interrogatories:

INTERROGATORY NO. 14: Identify any and all facts that you contend support your allegation that, on or about November 6, 2012, Puccini and College Way negotiated a lower rent *and to substitute Puccini as the new lessee under the SOB Lease.*

* * * * *

INTERROGATORY NO. 15: Identify any and all facts that you contend support your allegation that, on or about April 6, 2013, College Way gave final approval to with respect to "reducing the final charges, writing off all

previously owed rent and debt of Puccini *and substituting Puccini as the lessee" under the SOB Lease.* CP 1639
(*Emphasis added.*)

Both of these interrogatories acknowledge that Puccini's claim was predicated on an alleged modification of the SOB Lease. ECP would not have propounded these interrogatories if it did not understand that to be a basis of Puccini's claim. It follows that ECP knew that Puccini's claim was based on an alleged modification of the SOB Lease well before ECP moved for summary judgment.

Finally, ECP's summary judgment response recognized that any lease between it and Puccini, either new or modified, would be subject to the same terms as the SOB Lease. According to ECP:

Even if the New Lease had been drafted and executed, it would have included the same provision as the SOB Lease requiring the landlord's consent to any such assignment.
CP 1431.

If a new, or modified, lease would have included the arbitration clause, ECP could have moved to compel arbitration long before it received an adverse ruling on its summary judgment motion.

ECP cannot dispute that it would have waived arbitration if it knew the claims were subject to arbitration when it asked the trial court for substantive relief. As demonstrated above, ECP was aware, when it filed

its first substantive pleading, that Puccini's claims were subject to the terms of the SOB Lease. Because ECP continued to participate in trial court proceedings, and twice asked the trial court for substantive relief, before it moved to compel arbitration, it waived any right to arbitrate.

The same conclusion follows even if ECP first received notice of an alleged modification of the SOB Lease after it moved for summary judgment, but before that motion was adjudicated. Any other conclusion would promote forum shopping.

ECP had actual notice that there was an arbitration clause in the Puccini lease as soon as Puccini filed its summary judgment response, and ECP had constructive notice of that even sooner. The second amended complaint alleged that the terms of the SOB lease were "subsequently renegotiated with the then agent of College, Donald Huber." CP 375 at ¶ V. Attached to the second amended complaint was a November 14, 2012, e-mail from Mr. Huber to a co-owner of the project that relates "Landlord and tenant which to make a change to the current lease. * * * *". CP 439. Exhibit 12 to the second amended complaint is a October 10, 2014, e-mail from Mr. Saleemi to defendant's property manager that relates "I sent you earlier the renegotiated terms of the lease so you could draft an updated lease for the store reflecting the renegotiated terms * * *." CP

437. These allegations and exhibits would have placed a reasonable attorney on notice of a potential claim that the SOB lease was modified, or that the Puccini lease had the same boilerplate terms as the SOB lease, including an arbitration clause.

The e-mails produced in discovery enhanced that notice. One e-mail that Mr. Petramalo sent to Mr. Huber related “I believe after discussions with Nate and you that Puccinis has a new lease with new lowered rent to be \$2,200 and all other terms as is. We have been getting checks for that amount every month.” CP 1172. The phrase “all other terms as is” clearly telegraphs that the Puccini lease, like the SOB Lease, had an arbitration clause. Mr. Huber also informed Mr. Saleemi “I don’t think you need a new lease. We have just modified the current lease. Only change is the monthly charges of \$2200 with everything else the same.” CP 1174. The phrase “everything else the same” also telegraphs that the Puccini-One lease would have the same arbitration provision as the SOB lease. Despite having this discovery before Puccini filed its summary judgment response, ECP professed to have had no notice that the Puccini lease had an arbitration clause. ECP’s professed failure to appreciate the legal significance of the evidence does not excuse its failure to promptly invoke arbitration.

If ECP's first notice of arbitrability was provided by the Puccini summary judgment response, ECP could have stricken the hearing on its motion for summary judgment and filed its motion to compel arbitration. Over two weeks elapsed between the time Puccini filed its summary judgment response and the summary judgment hearing. In the interim, ECP filed a summary judgment reply, which continued to deny the existence of a contract with Puccini, and which did not reference arbitration. ECP did not seek arbitration before the summary judgment hearing because it expected the trial court to grant its summary judgment motion. Certainly, if the trial court had granted that motion, ECP would not have asked the trial court to compel arbitration. It is only because it was disappointed by the trial court's summary judgment ruling that ECP wanted a second bite of the apple in arbitration. That was not a timely assertion of a contractual right; that was forum shopping. ECP's failure to seek arbitration until after it obtained a disappointing order on its summary judgment motion, is, standing alone, sufficient evidence that ECP waived arbitration.

C. The Order to Compel Prejudiced Puccini

In *Saleemi v. Doctor's Associates, Inc.*, 176 W.2d 368, 382, 292 P.3d 108 (2013), the Court recognized, for the first time, that an erroneous order compelling arbitration is prejudicial if “it affects a fundamental right or there is a substantial likelihood it affected the outcome of the arbitration.”

In *Saleemi*, the appellant, Doctor's Associates, Inc. (DAI), moved the trial court to compel arbitration of a dispute with the respondent, Waqas Saleemi. The trial court granted the motion to compel, but ordered the arbitration to occur in Washington, subject to Washington law, and removed any remedy limitations in the contract between Saleemi and DAI. The arbitration proceeded as ordered, Saleemi prevailed, and DAI appealed the ensuing judgment on the confirmed award. On appeal, DAI argued that the order compelling arbitration was erroneous because the arbitration should have occurred in Connecticut, the arbitrator should have applied Connecticut law, and the remedies should have been limited. In short, DAI did not argue that it was not required to arbitrate at all. Rather, DAI argued that it was entitled to arbitrate on different terms. The Washington Supreme Court affirmed the order compelling arbitration

because DAI could not prove that the Washington venue, Washington choice of law, or removal of remedy limitations tainted the arbitration result based on the face of the award.

Where, as in *Saleemi*, a party demands arbitration, but only on terms different than those ordered, prejudice can be measured by whether arbitration on different terms could have produced a different result. If that possibility exists, prejudice exists. But that test is unworkable where, as here, the question is whether the claims should have been arbitrated at all. In this context, a results focused test for prejudice would require a court to examine the arbitration record and determine if the outcome could, or would, have differed if the case had not been arbitrated. No part of the decision in *Saleemi* suggests that review for prejudice can, or should, involve an examination of the arbitration record. To the contrary, the *Saleemi* court acknowledged that any such inquiry would contravene the rule limiting review to the face of the award. *Saleemi*, 176 Wash.2d at 385.

An appellant's burden of showing prejudice also should not be insurmountable. Otherwise, harmful error may go uncorrected. Because this court cannot reconsider the arbitration record to determine if Puccini

might have obtained a different outcome in the trial court, a test for prejudice that is outcome focused cannot apply in this context.

Instead, when an appellant establishes that arbitration should never have occurred, prejudice is inherent because of the loss of a fundamental right to have the dispute resolved in a public tribunal, with the concomitant right to have any legal rulings examined in the Washington Court of Appeals. The record in this case shows that the arbitrator resolved Puccini's claim summarily, as a matter of law. CP 1793. Had a trial court summarily dismissed Puccini's claims as a matter of law, Puccini would have had the fundamental right to appeal that determination and assert that the trial court misapprehended the law, failed to recognize a question of material fact, or both. Because the trial court erroneously compelled arbitration, it deprived Puccini of the fundamental right of review for errors of law and questions of fact. That is prejudice.

Even if Puccini was required to show the possibility of a different outcome had the case remained in the trial court, that possibility appears in the record. As noted above, the arbitrator summarily dismissed Puccini's claim, having concluded that Puccini failed to comply with the consent to assignment clause (Section 23) of the lease. CP 1793. In its summary

judgment reply filed in the trial court, ECP argued that Puccini's claim was barred as a matter of law because it did not comply with Section 23 of the lease. CP 1431-1432; RP May 13, 2016, p. 5. Judge Mary Sue Wilson declined to expressly rule on that defense because it was raised for the first time in a summary judgment reply brief. RP May 13, 2016, p. 7.

Nevertheless, Judge Wilson commented:

for the same reasons I've ruled on the other matters, that in my mind at this point there are genuine issues of material fact in terms of the exchanges between the parties throughout several years, with Mr. Huber's role at times representing the old owner and for periods of time after the change indicating or at least leaving the apparent impression to Mr. Saleemi that he was representing the new owner; his communications always being consistent with helping Mr. Saleemi get a new lease so he could go forward with the ownership transfer to Ms. Oakley, to me, leaves a genuine issue of material fact as to whether or not there was substantial compliance with 23.2; and the owner not exercising any of the options to refuse left Mr. Saleemi with the impression that they would work to ultimately approve the transfer. RP May 13, 2016, pp. 7-8.

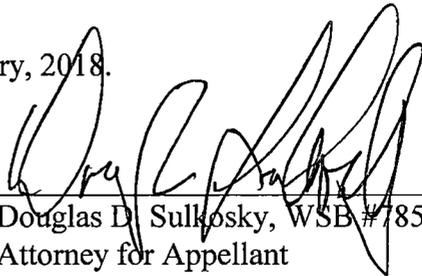
In sum, the trial court recognized that a question of fact precluded summary dismissal of Puccini's claim based on Section 23 of the lease. Conversely, the arbitrator granted ECP's motion for summary dismissal based on Section 23 of the lease. Because the trial court was predisposed to the contrary, the record establishes the possibility of a different outcome

had this case remained in the trial court. Indeed, given the timing of ECP's motion to compel arbitration, that followed shortly after the summary judgment ruling, ECP was sought arbitration to avoid the unfavorable ruling telegraphed by the trial court. Because the order to compel removed this case from the jurisdiction of a trial court that was disinclined to grant summary judgment, and transferred jurisdiction to an arbitrator who summarily dismissed Puccini's claims, Puccini has established a possibility of prejudice.

IV. CONCLUSION

Because ECP waived its right to arbitrate, the trial court erroneously compelled arbitration. Because the order to compel deprived Puccini of its rights to have the dispute resolved in a public tribunal, with the concomitant right to have any legal rulings examined in the Washington Court of Appeals, the error was prejudicial. It follows that this Court should reverse the order to compel, and remand this case for further proceedings in the trial court.

DATED this 22 day of February, 2018.

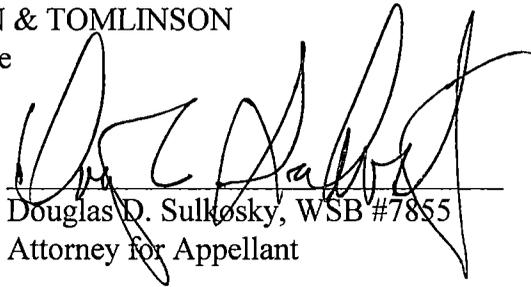


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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2018, I served the foregoing APPELLANT'S OPENING BRIEF upon the attorneys for all parties by depositing in the United States Post Office, Tacoma, Washington, a full, true and correct copy thereof, with postage thereon prepaid, addressed to them at the addresses set forth below their names:

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