

80626-8

COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION III

No. 250768 - III

OTIS HOUSING ASSOCIATION, INC.,
A Washington corporation

PLAINTIFF / APPELLANT

v.

JOHN HA AND MIN HA,
husband and wife,

DEFENDANTS / RESPONDENTS

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The Trial Court erred in denying Appellant's Application For An Order Directing The Respondents To Proceed With Arbitration. (CP 76)
2. The Trial Court erred in denying Appellant's Application For An Order Appointing An Arbitrator.
3. The Trial Court erred in granting Respondents' Motion For Order To Cancel Lis Pendens. (CP 75)
4. The Trial Court erred in entering Findings 1 through 6 (CP 74-75) and any findings included in the trial court's oral decision. (RP 15-16)
5. The Trial Court erred in denying Appellant's Motion For Reconsideration. (CP 107)
6. The Trial Court erred in awarding attorney fees and costs to the Respondent. (CP 117)

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the Appellant entitled to have the dispute between the parties concerning the Appellant's option to purchase the Otis Hotel submitted to arbitration in accordance with the terms of the Real Estate Option to Purchase? (Assignments of Error 1-5)

2. Should the Trial Court have appointed an arbitrator to serve on the arbitration panel as the arbitrator that should have been designated by the Respondents and ordered the parties to proceed with arbitration? (Assignments of Error 1, 2, 4 and 5)

3. Should the Notice of Lis Pendens be reinstated? (Assignments of Error 1-5)

4. Should attorney fees and costs in the trial court have been awarded to the Appellant rather than to the Respondents? (Assignments of Error 1-6)

C. STATEMENT OF THE CASE

In 1997 the Appellant, Otis Housing Association, Inc. (hereinafter "Otis") and the Respondents, John and Min Ha (hereinafter "Ha") entered into an option agreement entitled "Real Estate Option to Purchase." (CP 20-27) The option gave Otis the right to purchase the Otis Hotel in Spokane, Washington for a price of one million three hundred thousand dollars (\$1,300,000.00). (CP 23) At the same time the parties entered into a Building Lease whereby Otis leased the Otis Hotel from Ha. (CP 30)

Of primary significance to this appeal is paragraph 15 of the Option, which provides as follows:

15. Arbitration. In the event that a dispute should arise under this agreement, **as a condition precedent to suit, the dispute shall be submitted to arbitration** in the following manner: The party seeking arbitration shall submit to the other party a statement of the issue(s) to be arbitrated and shall designate such party's nominated arbitrator. The responding party shall respond with any additional or counter statement of the issue(s), to be arbitrated and shall designate the responding party's arbitrator, all within fourteen (14) days after receipt of the initial notice. The two arbitrators thus nominated shall proceed promptly to select a third arbitrator. The arbitrators shall, as promptly as the circumstances allow and within a time established by a majority vote of the arbitrators, conduct a hearing on the issues submitted to them and shall render their decision in writing. Any decision as to procedure or substance made by a majority of the arbitration panel shall be binding. A decision by a majority of the arbitrators on any issue submitted shall be the decision of the arbitration panel on that issue. The arbitrators have authority to award costs and attorney fees to either party in accordance with the merits and good faith of the positions asserted by the parties. In lieu of appointing three arbitrators in the manner set forth above, the parties may, by agreement, designate a single arbitrator. Except as provided herein the arbitration proceedings shall be conducted in accordance with the rules of the American Arbitration Association and the statutes of the State of Washington pertaining to binding arbitration." (Emphasis added)(CP 26)

Over the years from 1997 to 2005 there were numerous amendments to the Lease and to the Option. Of particular significance is the THIRD ADDENDUM TO REAL ESTATE

OPTION TO PURCHASE¹ (CP 29) which recited that, as of December 2002, in addition to the rent that Otis was required to pay under the lease, the Appellant had, as of the date of the Third Addendum, paid \$45,000 at the rate of \$2,500.00 per month, which was to apply on the purchase price under the option. (CP 30-31)

An AGREEMENT REGARDING EXERCISE OF OPTION TO PURCHASE, executed in February 2001, recites, in paragraph 5, that Otis had given notice of its exercise of the Option. (CP 50) In addition, Ha, through counsel, specifically acknowledged that the option had been exercised. (CP 49)

The sale of the hotel was supposed to close no later than December 31, 2004. (CP 32, 16) The amount due to Ha on closing was to be reduced by the amounts that Otis had paid on certain encumbrances referred to in that agreement, and by the payments of \$2,500 per month referred to above. (CP 52)

By the end of 2004 Otis had made payments of \$679,868.70 which were to apply on the purchase price. These payments included payments on the underlying items of indebtedness

¹ (The Third Addendum incorrectly recited that the original option was entered into in 1999)

against the Otis Hotel and payments in addition to rent at the rate of \$2,500 per month. (CP 46) In addition, Otis had made improvements and repairs to the Otis Hotel at a cost of over \$243,000. (CP 47)

Otis acknowledges that it failed to pay rent or make any other payments during the year 2005. (CP 46) Ha brought suit for unlawful detainer for non-payment of rent. A writ of restitution was issued (CP 53, 73) after which Otis delivered possession of the hotel to Ha. (CP 53)

On October 22, 2005, Otis sent a Demand for Arbitration to Ha by certified mail (CP 3) in the manner called for in the arbitration clause of the Option. (CP 25-26) That demand was followed by a Notice of Intention to Arbitrate (CP 8, 56) sent to Ha by registered mail (CP 9) in accordance with R.C.W. 7.04.060, for the reason that the law appeared to be unclear as to whether the notice requirements of R.C.W. 7.04.060 or the notice provision of the option controlled. The statutory demand for arbitration given by Otis was received by Ha on December 3, 2005. (CP 9) Ha did not respond in any way to either the Demand for Arbitration pursuant to the arbitration clause in the Option or to the statutory Notice of Intention to Arbitrate. (CP 85)

On November 22, 2005, pursuant to R.C.W. 7.04.040, Otis filed an Application For An Order Directing Ha To Proceed With Arbitration (CP 1) based on the Demand for Arbitration referred to above, and on the same day recorded a Notice of Lis Pendens. (CP 75) On December 29, 2005 Otis filed an Application for an Order Appointing an Arbitrator. (CP 5)

On March 10, 2006 the trial court, on the motion of Ha, entered an Order Canceling The Notice Of Lis Pendens and Denying The Application For Arbitration and The Application For The Appointment Of An Arbitrator. (CP 74) Otis filed a Motion For Reconsideration on March 17, 2006, which was considered without oral argument and denied on March 31, 2006. (CP 107)

Otis filed a timely Notice of Appeal to this Court on April 6, 2006, having served counsel for Ha on April 5, 2006. (CP 109-116)

On May 19, 2006 Judgment was entered awarding attorney fees and costs to Ha and setting the amount of a supersedeas bond. (CP117-120).

D. Summary of Argument

The law of the State of Washington greatly favors arbitration. When an agreement calls for disputes arising under the agreement to be resolved by arbitration a trial court is precluded

from interpreting the agreement or ruling on the merits of the dispute. If one party fails to appoint an arbitrator or participate in arbitration the Court must appoint an arbitrator for that party and order the parties to proceed with arbitration.

The law of the State of Washington abhors a forfeiture, which would be the result if the trial court's action denying arbitration of the dispute were allowed to stand.

E. Argument

1. THE PARTIES AGREED TO ARBITRATE ANY DISPUTE UNDER THE AGREEMENT

Otis and Ha entered into an agreement whereby Ha granted Otis an option to purchase the Otis Hotel for \$1,300,000.00. (CP 23) That agreement included an arbitration clause which provides, in part, that "In the event that a dispute should arise under this agreement, as a condition precedent to suit, the dispute shall be submitted to arbitration in the following manner.... Any decision as to procedure or substance by a majority of the arbitration panel shall be binding." (CP 26) The entire arbitration clause is important, but those two provisions are restated simply to note that the agreement provides for binding arbitration of all disputes arising under the agreement, and expressly confers on the arbitrators the

authority to render binding decisions as to both substance and procedure.

The option agreement provided that the last date to exercise the option to purchase the Otis Hotel was December 1, 2004 and that the last day to close on the purchase was December 31, 2004. (CP 32)

Otis exercised the option prior to December 31, 2004. (CP 50) Prior to December 31, 2004, and pursuant to the Agreement with respect to Exercise of Option to Purchase, (CP 50) Otis made payments to Ha totaling \$679,868.70 (CP 46) which were to apply on the purchase price. (CP 52)

The agreement was silent as to which party had the obligation to arrange for, and perform, the activities incident to closing, such as selecting an escrow agent, engaging counsel to draft the closing documents, and the like. And, while the option to purchase had been exercised and Otis had paid over half of the purchase price to Ha, neither party took any action to schedule a closing and the sale was not closed.

In Washington, arbitration agreements are valid, supported by public policy, and enforceable. Harvey v. University of Washington, 118 Wn. App. 315, 318, 76 P.3d 276 (2003). "As a

rule, a contractual dispute is arbitrable unless the court can say with positive assurance that no interpretation of the arbitration clause could cover the particular dispute.” Stein v. Geonerco, Inc., 105 Wn. App. 41, 46, 17 P.3d 1266 (2001), quoting from Kamaya Co. v American Property Consultants, Ltd., 91 Wn. App. 703, 959 P. 2d 1140 (1998). In other words, 'the agreement is construed in favor of arbitration unless the reviewing court is satisfied the agreement cannot be interpreted to cover a particular dispute.' Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 456, 45 P.3d 594 (2002) quoting from King County v. The Boeing Co., 18 Wn. App. 595, 570 P. 2d 713 (1977). In the case now before the court, Ha has never questioned the proposition that the dispute between the parties came under the arbitration clause in the option.

2. A DISPUTE EXISTS UNDER THE AGREEMENT

The dispute is simply this: Otis contends that it is entitled to close on its purchase of the hotel pursuant to the exercised option. Ha contends that it is not and that Otis should forfeit the \$679,868.70 that it has paid to apply on the purchase price. The arbitration panel could resolve this dispute on a number of theories including waiver, estoppel, unjust enrichment or an equitable grace period as was allowed in John R. Hanson, Inc. vs. Pacific

International Corporation, 76 Wn. 2d 220, 455 P. 2d 946 (1969).

The possible end results include allowing Otis to close on its purchase of the hotel, requiring Ha to refund the money that Otis paid to Ha to apply on the purchase price, or any other legal or equitable relief that the arbitration panel determined was appropriate.

3. OTIS PROPERLY DEMANDED ARBITRATION

On December 2, 2005 Otis, in the manner prescribed by R.C.W. 7.04.060, gave notice of intent to arbitrate. (CP 8) Ha failed to commence an action to stay the arbitration, or to respond in any way to the notice, within the twenty days allowed by both the statute and the notice and are thus, in the words of the statute, "barred from putting in issue the existence or validity of the agreement or the failure to comply therewith." R.C.W. 7.04.060. Otis also demanded arbitration in the manner provided in the arbitration agreement. (CP 3)

4. THE DISPUTE MUST BE ARBITRATED

When the parties have agreed to submit their disputes to an arbitration panel, their agreement should be enforced whether or not a court considers the dispute to have merit. See, Greyhound

Corp. vs. Div 1384, etc., 44 Wn. 2d 808, 820-821, 271 P.2d 689 (1954).

Again, in Electrical Workers vs. PUD No. 1, 40 Wn. App. 61, 696 P.2d 1264 (1985), the Supreme Court explained the standard, "(W)e begin with the presumption that all questions upon which the parties disagree are within the arbitration provisions unless negated expressly or by clear implication.... [E]ven frivolous claims are arbitrable, and a court has no business weighing the merits of a grievance or determining whether there is particular language in the labor agreement to support the claim. Such decisions are for the arbitrator...." Id. 63-64. That proposition was expressed in most forceful terms, including a quotation from the Supreme Court of the United States, in ML.Park Place v. Hedreen, 71 Wn. App. 727, 739, 862 P.2d 602 (1993),

Absent an express provision excluding a particular type of dispute, "only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail." Local Union 77, IBEW v. PUD 1, 40 Wn. App. 61, 65, 696 P.2d 1264 (1985). The court must be able to say "with positive assurance" that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. 40 Wn. App. at 65, (quoting United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 at 582-83, 4 L. Ed 2d 1409, 80 S.Ct. 1347 (1960)).

The Supreme Court of the United States, in a case decided in February, 2006, reaffirmed the paramount role of the arbitrator in a contract case involving an arbitration clause, Buckeye Check Cashing, Inc. v. John Cardegna, et al., 546 U.S. ____ 126 S. Ct. 1204 (2006). The claim that a contract containing an arbitration clause is void for illegality must be determined by the arbitrator, not by the court. While there has been no claim raised that the Option Agreement is illegal, this decision by the highest court in the land once more reaffirms the proposition that when a contract says that disputes shall be resolved by arbitration, the courts must defer to the arbitration panel.

In ruling on a motion to enforce an agreement to arbitrate, "a court should not reach the underlying merits of the controversy when determining arbitrability." Stein, 105 Wn. App. at 45-46. "The court has no concern with the merits of the controversy when construing the agreement. The sole inquiry is whether the parties bound themselves to arbitrate the particular dispute." Meat Cutters Local No. 494 v. Rosauer's Super Markets, Inc., 29 Wn. App. 150, 154, 627 P.2d 1330, review denied, 96 Wn.2d 1002 (1981). "If the dispute can fairly be said to involve an interpretation of the agreement, the inquiry is at an end and the proper interpretation is

for the arbitrator.” Munsey vs. Walla Walla College, 80 Wn. App. 92 (Div. 3, 1995), citing Meat Cutters, 29 Wn. App. at 154, 627 P.2d 1330 (1981).

The trial court here went beyond its authority and addressed the merits of the dispute. It decided that the failure of the parties to close on the real estate sale by the date stated in the agreement amounted to a default which voided the option resulting in a forfeiture of all monies that had been paid under the agreement.

As in Munsey vs. Walla Walla College, 80 Wn. App. 92, 906 P.2d 988 (1995), the superior court had no authority to interpret the agreement or to pass upon the question of default. The arbitrator has the responsibility to decide whether the agreement has been breached and, if so, what remedies, if any, were available to the parties. “The agreement here provided a method for resolving both the substantive disputes ...and also any procedural disputes which arise out of that document. Those methods must be pursued before either party can resort to courts for relief.” Id. at 95 citing Toombs v. Northwest Airlines, Inc., 83 Wn 2d 157, 162, 516 P. 2d 1028 (1973).

As the foregoing authorities make clear, the law of Washington holds arbitration agreements in the highest regard,

greatly favors their use in the resolution of disputes, and precludes the courts from considering, even cursorily, the merits of any dispute which the parties have agreed shall be decided by arbitration.

If a party moves to compel arbitration of a particular dispute and the court determines that the parties have agreed to arbitrate that dispute, the court must order the parties to proceed with arbitration. Kamaya Co., Ltd. v. American Property Consultants, Ltd., 91 Wn. App. 703, 708, 959 P.2d 1140 (1998). The superior court erred in ruling on the merits of the dispute, in not appointing an arbitrator and in not ordering Ha to proceed with arbitration is required by the contract.

5. OTIS, NOT HA, SHOULD HAVE BEEN AWARDED JUDGMENT FOR ATTORNEY FEES AND COSTS

Because, under the law, Ha should not have prevailed in the trial court, Ha should not have been awarded judgment for attorney fees and costs. On the contrary, because the applications of Otis for an order directing the parties to proceed with arbitration and to appoint an arbitrator should have been granted, Otis should have been awarded attorney fees and costs.

6. OTIS IS ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL

Pursuant to RAP 18.1(b) Otis asserts that it is entitled to an award of attorney fees and expenses pursuant to paragraph 18 of the Real Estate Option To Purchase, which provides:

In any proceeding in court with respect the enforcement or interpretation of this agreement, the prevailing party shall be entitled to costs and attorney fees in such amount as may be awarded by the court in its discretion taking into account the merits and good faith of the positions asserted by the parties.
(CP 27)

As provided in the contract and pursuant to RCW 4.84.330, as the prevailing party in enforcing the agreement to arbitrate, Otis is entitled to an award of attorney's fees. RAP 18.1.

F. Conclusion

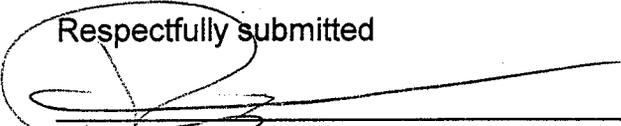
Because the parties agreed that any dispute arising under the option must be resolved by arbitration, no basis exists in law or equity for refusing arbitration, and the Appellant's application for an order directing the Respondents to proceed with arbitration and its application for an order appointing an arbitrator should have been granted.

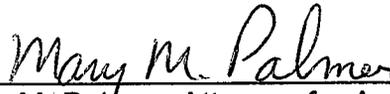
The orders of the trial court denying Appellant's Application for an Order Directing the Respondents to Proceed with Arbitration,

denying Appellant's Application for an Order Appointing an Arbitrator, granting Respondents' Motion for an Order to Cancel Lis Pendens, Denying Appellant's motion for reconsideration and granting Respondent attorney fees and costs should be reversed, and this case should be remanded to the trial court with directions to appoint an arbitrator, order the parties to proceed with arbitration, reinstate the Notice of Lis Pendens, and determine the amount of attorney fees which should be awarded to Otis in the Superior court. This court should also award Otis attorney fees on this appeal.

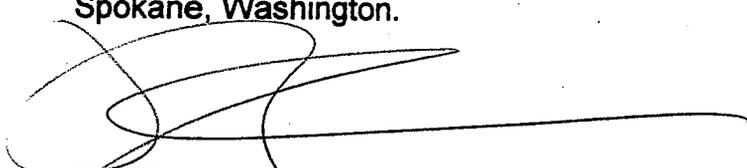
Dated this 13th day of June, 2006.

Respectfully submitted


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I, Paul J. Allison, do hereby certify that on the 13 day of June, 2006, I personally served a copy of the above and foregoing Brief of Appellant on Eric R. Shumaker, Attorney for the Respondents, by delivering a copy of said brief to him at his office at 102 E. Baldwin, Spokane, Washington.



Paul J. Allison, Attorney for Appellant