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No. 69445-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LEIBSOHN PROPERTY ADVISORS INCORPORATED, a Washington corporation, dba LINC PROPERTIES,

Appellant/Cross Respondent,

v.

COLLIERS INTERNATIONAL REALTY ADVISORS (USA), INC., a California corporation and ARVIN VANDER VEEN and JANE DOE VANDER VEEN, and their marital community,

Respondents/Cross Appellants.

LEIBSOHN PROPERTY ADVISORS INCORPORATED, a Washington corporation, dba LINC PROPERTIES,

Appellant,

v.

CITY OF SEATAC, a municipal corporation,

Respondents.

REPLY BRIEF OF RESPONDENTS/CROSS APPELLANTS COLLIERS AND VANDER VEEN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Civil Rules

I. There Were No Misrepresentations or Inconsistent Statements

The underlying premise for Leibsohn's arguments about judicial and equitable estoppel, vacation of the arbitration award, and sanctions is that there were: (i) incorrect statements by the Commercial Brokers Association ("CBA") upon which Leibsohn could justifiably rely; (ii) inconsistent statements by attorney Osborn; and (iii) inconsistent positions taken by Colliers.[1] There was not substantial evidence supporting any of these assertions.

A. The CBA's Statements Could Not Be Relied Upon by Leibsohn and Did Not Bind Colliers in Any Event

Leibsohn made a complaint to the CBA in October 2009 about a supposed violation of the CBA rules by Colliers.[2] At that time, the sale had not closed, no commission had been earned, and the matter was not eligible for arbitration. (Under the CBA's Bylaws, a commission dispute is not ripe for arbitration until the sale has closed.)[3] Although Leibsohn did not request arbitration, and for reasons unclear, the CBA staff told him

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[1] As used herein, "Colliers" refers to defendant Colliers and its co-defendant/broker Arvin Vander Veen.

[2] CP 341-42.

[3] CP 75 ¶ 6.

the matter could not be arbitrated because he had stricken the CBA-related language from his listing agreement.[4]

Leibsohn says that based on this, he justifiably believed, after the sale closed, that a lawsuit was his only recourse.[5] Leibsohn could not justifiably rely on the CBA's statement for at least two reasons. First, the CBA rules provide that members are charged with knowing the rules and bylaws.[6] While members may inquire of CBA staff about such matters, the ultimate responsibility for knowing and following the rules remains with the member.[7]

Second, just two days later, and as detailed below, the CBA's counsel explained the arbitration provisions to Leibsohn, including when a matter becomes ripe for arbitration.

B. Attorney Osborn Did Not Make Any Inconsistent Statements

In response to Leibsohn's communications with the CBA, CBA attorney Osborn explained the CBA's procedure for complaints about rules violations.[8] Additionally, because Leibsohn had asked questions

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[4] CP 61.
[5] Leibsohn Reply Br. at 23-24.
[6] CP 367 n.1.
[7] Id.
[8] CP 66.

about the arbitration process, Osborn explained that the arbitration process is "available only for commission disputes between members, and then only after a closing has occurred."[9] This was an accurate statement of the CBA's Bylaws.[10]

Leibsohn claims that Osborn later contradicted himself when, in moving to compel arbitration, Osborn argued that the claim was subject to arbitration.[11] By this time, however, the matter fell within the arbitration provision of the Bylaws. The sale had closed and the matter was ripe for arbitration under the CBA Bylaws. There was no contradiction.

II. Even If the CBA or Osborn Made Misstatements in Response to Leibsohn's Complaint to the CBA, Colliers Is Not Bound by Them

Leibsohn says Colliers is responsible for the CBA's statements in response to Leibsohn's original complaint because Vander Veen was the CBA's treasurer and a member of the Board of Directors.[12] According to Leibsohn, "any distinction between [Colliers] and the CBA was illusory, and the statements of one were equivalent to statements of the other."[13] Leibsohn cites no authority for this proposition. We are aware of no basis

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[9] Id.
[10] CP 75 ¶ 6.
[11] Leibsohn Reply Br. at 24.
[12] Id. at 35.
[13] Id. at 35-36.

by which the CBA, based on Vander Veen's positions in it, can be deemed a speaking agent of Colliers or otherwise bind Colliers.

Likewise, Leibsohn says that Colliers is responsible for Osborn's statements on behalf of the CBA in response to the original complaint because Osborn was supposedly representing Colliers at the time.[14] Leibsohn is factually incorrect. Osborn's statements were made on October 23, 2009.[15] At that time, Colliers was represented by a different lawyer at a different firm, Kerry Bucklin.[16] Moreover, Leibsohn's record cites for his claim that Osborn was representing Colliers at the time of the statements do not support his assertion.[17]

III. Colliers Did Not Take Inconsistent Positions

Leibsohn notes that in moving to compel arbitration, Colliers said that if the CBA concluded that the claim was not arbitrable, Colliers would not object to the matter proceeding in Court.[18]

Leibsohn says Colliers reneged on this statement by opposing Leibsohn's motion to lift the stay after the CBA decided "that the case was

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[14] Id. at 23.
[15] CP 66-67.
[16] CP 160-63. Leibsohn's counsel knew that Colliers had obtained separate counsel by this point. See, e.g., CP 635 at 129:12-18.
[17] See record cites set forth in Leibsohn's Reply Br. at 23 n.52.
[18] Leibsohn Reply Br. at 24-25 (citing CP 68).

not arbitrable."[19] **But the CBA did not hold that the case was not arbitrable. To the contrary, the CBA (i) expressly ruled that the claim was subject to arbitration under the CBA bylaws,[20] and (ii) denied Leibsohn's request to declare the matter was not arbitrable.[21]**

IV. Equitable Estoppel Does Not Apply

A. There Were No Inconsistent Statements or Positions

Equitable estoppel requires "an admission, statement, or act inconsistent with a claim afterward asserted." Peterson v. Groves, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). As discussed in §§ I-III, there were no inconsistent acts, statements or admissions.

B. There Was No Injury As a Result of the Alleged Misstatements

Equitable estoppel requires injury to the party who relied on the alleged inconsistent statements. Peterson v. Groves, 111 Wn. App. 306. The alleged misstatements by Colliers (as distinct from those by Osborn and the CBA in response to the original complaint) were made long after the CBA's limitation period had expired. The "injury" – missing the

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[19] Id. at 25-26.
[20] CP 197 ¶ 5; CP 209.
[21] CP 200.

statute of limitations – had already occurred and Colliers' statements did not cause it.

Leibsohn does not dispute that (i) the CBA Bylaws required arbitration, (ii) the Court was required to send the matter to arbitration, and (iii) there was a three month post-closing statute of limitations under the CBA's arbitration rules.

Colliers' statements in moving to compel arbitration, months after the statute of limitations had passed, could not change these facts. Nor could the Court have denied the motion even if it had known that once in arbitration, the claim would be dismissed as time barred. Yakima Cnty. v. Yakima Cnty. Law Enforcement Officers Guild, 157 Wn. App. 304, 320, 237 P.3d 316 (2010) (whether claim is time barred is determined by arbitrator, not court). Accordingly, Leibsohn suffered no injury as a result of any alleged misstatements by Colliers.

C. Equitable Estoppel Does Not Relieve Leibsohn of His Failure to Timely Seek Vacation of the Arbitration Award

Leibsohn says he was misled into not seeking to vacate the arbitration award because Colliers "aggressively litigated" the matter once the stay was lifted. Thus, Colliers should be estopped from benefitting from Leibsohn's failure to timely seek to vacate the award. This argument fails for at least three reasons.

First, Leibsohn was on notice about the arbitration issue well before the deadline to seek to vacate. In its Answer to Leibsohn's post-arbitration Amended Complaint, Colliers pled res judicata as an affirmative defense based on the arbitration decision.[22] This pleading was served on May 29, 2012,[23] well before the June 21, 2012, deadline to move to vacate the arbitration award.

Second, Leibsohn is factually incorrect. The arbitration decision was issued on March 22, 2012.[24] Leibsohn had ninety days from then – until June 21, 2012 – to move to vacate the award.[25] During that time, almost nothing happened. The first deposition did not occur, for example, until June 13, 2012.[26]

Third, equitable estoppel requires "reasonable reliance." Peterson v. Grove, 111 Wn. App. at 310. Regardless of whether Colliers was defending itself after the case was reinstated, Leibsohn knew that the arbitration award had not been vacated. He also knew (or at least was charged with knowledge) of the statutory deadline for seeking to vacate the award. Leibsohn's reliance, if any, was not reasonable.

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[22] CP 378.
[23] CP 378-79.
[24] CP 344-46.
[25] RCW 7.04A.230(2).
[26] CP 1150.

D. The Cases Leibsohn Cites Are Distinguishable

Leibsohn notes that Courts have applied equitable estoppel to prevent a party from relying upon the statute of limitations. These cases are distinguishable. In Brevick v. City of Seattle, 139 Wn. App. 373, 160 P.3d 648 (2007), plaintiff brought a personal injury action against the City of Seattle. In its answer, the City admitted that plaintiff Brevick had complied with the city and state claim-filing requirements for an action against a city. After the statute of limitations ran, the City contended that Brevick had not properly complied with the claim-filing requirements. Here, the statute of limitations had run even before Leibsohn filed his lawsuit and before the alleged misstatements and actions by Colliers.

Dyson v. King County, 61 Wn. App. 243, 809 P.2d 769 (1991), is distinguishable for the same reason. In Dyson, the plaintiff did not comply with the claim-filing requirements. Defendant King County did not cite the failure as an affirmative defense or plead it as required by CR 9(b). Id. at 245. Instead the county vigorously litigated the matter, and waited until after the limitations period had passed to raise plaintiff's failure to provide a claim notice. Here, by contrast, the arbitration

decision was pled as an affirmative defense within the period during which Leibsohn could seek to vacate the award.[27]

V. Leibsohn's Attempts to Avoid His Failure to Timely Seek to Vacate the Arbitration Award Fail

This case involves some odd procedural questions, all arising out of Leibsohn's efforts to avoid his failure to timely seek vacation of the arbitration award. As with his failure to timely pursue arbitration in the first place, he blames Colliers. None of his arguments excuse compliance with the strict limitation period in RCW 7.04A.230.

There was no basis to vacate the arbitration award in the first instance. Even if there had been, the Court abused its discretion by amending the order lifting the stay to include a provision vacating the award because the limitation period had expired.

A. There Was No Basis to Vacate the Arbitration Award

RCW 7.04A.230(1)(a) allows an arbitration award to be vacated where it was procured by "corruption, fraud, or other undue means." "Undue means" is construed as "behavior that is immoral if not illegal." A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403-04 (1992). The phrase is "equivalent in gravity to corruption or fraud." Am.

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[27] CP 378.

Postal Workers Union, AFL-CIO v. U. S. Postal Serv., 52 F.3d 359, 362 (D.C. Cir. 1995).

To set aside an arbitration award based on fraud, plaintiff must show (i) clear and convincing evidence of fraud, (ii) materiality, and (iii) due diligence would not have prompted the discovery of the fraud during or prior to the arbitration. Int'l Bd. of Teamsters, Local 519 v. United Parcel Serv., Inc., 335 F.3d 497, 503 (6th Cir. 2003).

Here, even if one assumes that (i) Colliers represented that there would be a hearing on the merits in the arbitration (it did not), or that it was required to disclose that it intended to raise the statute of limitations as a defense (it was not), and (ii) Colliers' conduct was "immoral if not illegal," Leibsohn cannot establish materiality. Under RCW 7.04A.70 and the CBA's Bylaws, the Court had to compel arbitration regardless of whether the case would be dismissed based on the statute of limitations. Yakima Cnty., 157 Wn. App. at 320 (whether claim is time barred is determined by arbitrator, not court).

B. The Court Had No Authority to Retroactively Amend the Order to Vacate the Arbitration Award

ML Park Place Corp v. Hedreen, 71 Wn. App. 727, 743, 862 P.2d 602 (1993), holds that the sole vehicle for challenging an arbitration award

(as distinct from a judgment confirming an arbitration award) is a timely motion to vacate the award under RCW 7.04A.230.

No case allows a Court, after the limitation period of RCW 7.04A.230 has expired, to retroactively amend an order to include a provision vacating the award. There are at least two reasons why this Court should not now so hold. First, it would eviscerate the time limit in RCW 7A.04A.230(2), and the desired finality of arbitration would instead be subject to the trial court's discretion to undo the award at any later time.

Second, the power to amend an award springs from CR 60(a). But under CR 81, the statutes governing arbitration – a special proceeding – trump the civil rules where the rule would be inconsistent with the arbitration statute. ML Park Place, 71 Wn. App. at 742. Accordingly, CR 60(a) cannot be used to avoid RCW 7.04A.230.

C. Leibsohn's Reliance on CR 60(b) Fails

Leibsohn argues that under CR 60(b), the Court could have vacated the original order compelling arbitration. Had that happened, everything that followed would have been a nullity – "a domino effect, invalidating subsequent orders."[28]

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[28] Leibsohn Reply Br. at 42.

Leibsohn's argument fails for at least three reasons. First, Leibsohn sought unsuccessfully such relief in the trial court.[29] The trial court "decline[d Leibsohn's] request to vacate its Order Compelling Arbitration"[30] and Leibsohn did not appeal the denial of that motion.[31]

Second, ML Park Place, 71 Wn. App. at 743, holds that CR 60(b), cannot be used to expand the 90-day limitation provision of the statute.

Third, Leibsohn's argument relies on Saleemi v. Doctor's Associates, Inc., 166 Wn. App. 81, 269 P.3d 350 (2012), affirmed, 176 Wn.2d 368 (2013). Saleemi holds that a party can challenge an order compelling arbitration (as distinct from the arbitration award itself) outside the confines of RCW 7.04A.230. But if the party does not bring an interlocutory challenge to the order compelling arbitration, and instead waits until the end of the proceeding, he must show prejudice. 166 Wn. App. at 94-95.

Leibsohn cannot show prejudice. The Court disregarded the arbitration award and addressed the merits of Leibsohn's claims as though the arbitration had never occurred.

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[29] CP 1650.
[30] CP 1659.
[31] CP 1665-66.

VI. Colliers Was Entitled to Its Attorneys' Fees

Leibsohn's claims were based on the listing agreement. The claims failed and the lawsuit was dismissed. The determinative issue was the Court's enforcement of the provisions of the listing agreement, and therefore this is a case that provides for the contract-based award of attorneys' fees to Colliers as the prevailing party.

Leibsohn says Colliers has no authority to enforce the listing agreement and therefore it provides no basis for a fee award.[32] However, contractual attorneys' fee provisions must be applied mutually. See RCW 4.84.330 (providing for award of attorneys' fees "whether he or she is the party specified in the contract or lease or not"). Here, Leibsohn earlier insisted that he had won, and was entitled to a contractual-based award of fees against Colliers.[33] Colliers, is equally entitled to its fees under the equitable principle of mutuality of remedy. See Almanza v. Bowen, 155 Wn. App. 16, 230 P.3d 177 (2010) (under the doctrine of mutuality of remedy, if a party would have been entitled to an attorney fee award by showing that the agreement is enforceable, then the prevailing party who proves that the agreement does not apply is also entitled to an award of

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[32] Leibsohn Reply Br. at 45.

[33] CP 362 ("[Leibsohn] is also entitled to its attorneys' fees and costs under the [listing agreement].").

fees); Kaintz v. PLG, Inc., 147 Wn. App. 782, 788-89, 197 P.3d 710 (2008) (same).

Both Colliers and Leibsohn (before he lost) relied on Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn. App. 229, 215 P.3d 990 (2009), to support an attorney fee award. Leibsohn's effort to disavow Deep Water is unavailing. Leibsohn focuses on the wrong parties (the developer and its sole shareholder), where the analogous party to Colliers is the Homeowners Association.[34] The Homeowners Association (like Colliers) was not a party to the agreement yet it was found liable for tortiously interfering with the agreement and, therefore, jointly and severally liable for attorneys' fees.

In Deep Water, the tortious interference claim supported an attorneys' fee award because the "enforcement of the agreements and the claims that followed their breach is the essence of the ... tortious interference with contract claim." 152 Wn. App. at 279. The same holds true here even though the tortious interference claim was defeated.

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[34] See Leibsohn Reply Br. at 47.

DATED this 24th day of May, 2013.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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