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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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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

PETITION FOR REVIEW BY THE SUPREME COURT

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Attorney for Petitioner (Appellant)

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Identity of Petitioner

The Petitioner is Otis Housing Association, Inc., a Washington corporation, the plaintiff and appellant below, hereinafter referred to as Otis.

Person Filing this Petition

This petition is being filed by Paul J. Allison, WSBA No. 2114, attorney for Otis.

Citation to the decision by the Court of Appeals

The decision by the Court of Appeals was reported in the Official Advance Sheets of the Washington Appellate Reports at 138 Wn. App. 1058 (2007), as being unpublished, despite the order of the Court of Appeals granting Otis's motion to publish.

Decision which the Petitioner wants reviewed

The decision of the Court of Appeals, which Otis wants this Court to review, was filed on May 31, 2007, affirming the decision of the Trial Court which ruled that Otis was not entitled to have its dispute with the Respondents John and Min Ha, hereinafter referred to as Ha, resolved by arbitration. Otis's Motion for Reconsideration was denied by the Court of Appeals by Order filed August 9, 2007.

Issue Presented for Review

Ha, having refused to sell the subject real property to Otis, and, despite the provision in the Real Estate Option to Purchase (CP 20, 26) that any dispute between Otis and Ha would be resolved by arbitration, and despite the fact that Otis had paid in excess of \$700,000 that was to apply on the purchase price of \$1,300,000, the trial court ruled that Otis was not entitled to have the dispute over its right to purchase the real property decided by arbitration. The Court of Appeals affirmed.

The issue presented for review by the Supreme Court, is whether or not Otis, having been the Optionee in the Real Estate Option to Purchase (CP 20) which provided (at CP 26) for the arbitration of any dispute with Ha, the Optionor, and having paid more than half of the one million three hundred thousand dollar purchase price, is entitled to have its claim that it is entitled to complete its purchase the real property, submitted to arbitration.

Statement of the Case

In 1997 Otis and Ha entered into an option agreement entitled "Real Estate Option to Purchase." (CP 20) 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 real Estate Option to Purchase, 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.” (CP 26)

Over the years from 1997 to 2005 there were numerous amendments to the Lease and to the Option. Two are of particular significance. In February, 2001 the parties entered into the “Agreement Regarding Exercise of Option to Purchase” (CP 50 at 52) which provided that at closing the proceeds due to Ha would be reduced by payments of \$2,500 per month, which were to be made by Otis in addition to the rent of \$5,000 per month, and by the amounts paid by Otis on certain encumbrances against the property. The payments which Otis made on those encumbrances totaled \$679,868.79. (CP 46) That Agreement also

recited that notification that the option had been exercised had been given. (CP 50) In addition, Ha, through counsel, specifically acknowledged that the option had been exercised. (CP 49)

In 2003 the parties entered into the THIRD ADDENDUM TO REAL ESTATE OPTION TO PURCHASE (CP 29) in which it is recited that, as of December 2002, in addition to the rent that Otis was required to pay to Ha under the lease, Otis had paid to Ha \$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)

The sale of the Otis Hotel was supposed to close no later than December 31, 2004. (CP 32, 16)

By the end of 2004 the payments that Otis had made to Ha, \$679,868 on underlying encumbrances and \$45,000 in addition to rent, came to over \$700,000, which was to apply on the purchase price. In addition, Otis had made improvements and repairs to the Otis Hotel at a cost of over \$243,000 (CP 47) and caused the Otis Hotel to be put on the local, state and national Historic Registers. (CP 47)

When Otis sought to close on the purchase and Ha refused, Otis, on October 22, 2005, sent HA a Demand for Arbitration by certified mail (CP 3) in the manner called for in the Option to Purchase. (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 RCW 7.04.060, for the reason that the law appeared to be unclear as to whether the notice requirements of RCW 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, within twenty days or at any time, to either the Demand for Arbitration pursuant to the arbitration clause in the Option to Purchase or to the statutory Notice of Intention to Arbitrate. (CP 85) Having thus failed to respond to the Notice of Intention to Arbitrate, Ha was "barred from putting in issue the existence or validity of the agreement or the failure to comply therewith." RCW 7.040.060.

On November 22, 2005, pursuant to RCW 7.04.040, Otis filed an Application For An Order Directing Defendants (Ha) To Proceed With Arbitration (CP 1) based on the Demand for Arbitration referred to above. 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 Denying both 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 (CP 78), which was denied without oral argument on March 31, 2006. (CP 107)

Otis filed a timely Notice of Appeal to the Court of Appeals on April 6, 2006, having served counsel for Ha on April 5, 2006. (CP 109-116) On May 19, 2006 Judgment was entered in the Trial Court awarding attorney fees and costs to Ha. (CP 117-120).

ARGUMENT

The Court of Appeals took it on itself (a) to interpret the agreement of the

parties with respect to the option to purchase, (b) to decide as a matter of fact that the option to purchase had not been timely exercised, despite the evidence to the contrary, and (c) to decide as a matter of law that the option had expired and that the agreement to arbitrate had expired with it, resulting in a forfeiture of over \$700,000 that Otis had paid that was to apply on the purchase price. This decision was contrary to the established law of the State of Washington. .

Conflicts with Decisions of the Supreme Court

The decision of the Court of Appeals is in conflict with an unbroken line of decisions by the Supreme Court of the State of Washington favoring arbitration. In *Tombs v. Northwest Airlines*, 83 Wn. 2d 157, 161, 516 P. 2d 1028 (1973), the Supreme Court held that “Agreements to arbitrate are valid and will be enforced by the courts. *Hanford Guards Local 21 v. General Elec. Co.*, 57 Wn. 2d 491, 358 P. 2d 307 (1961); *Keith Adams & Associates, Inc. v. Edwards*, 3 Wn App. 623, 477 P. 2d 36 (1970).” *Tombs* was followed by a long line of cases which have consistently held that arbitration is highly favored by the public policy of the State of Washington. See *Greyhound Corporation v. Division 1384*, 44 Wn 2d 808, 274 P. 2d 689 (1954); *Boyd v. Davis*, 127 Wn. 2d 256, 262, 897 P. 2d 1239 (1995); *Davidson v. Hensen*, 135 Wn. 2d 112, 118, 954 P. 2d 1327 (1998); *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn 2d 885, 16 P. 3rd 617 (2001); *Fire Fighters v. City of Everett*. 146 Wn 2d 29, 42 P 3rd 1265 (2002); *Zuver v. Airtouch Communications, Inc.*, 153 Wn. 2d 293, 153 P. 3rd 753 (2004).

In addition to being a favored public policy, it is well established by the decisions of our Supreme Court that it is the role of the arbitrator, not the courts, to address both the law and the facts. “Arbitrators, when acting under the broad

authority granted them by both the agreement of the parties and the statutes, become judges of both the law and the facts....” *Boyd v. Davis*, supra, at 263. “As we said in *Hanford Guards Local 21*, at page 498: It is the evaluation and conclusion of the arbitrator, and not those of the courts, that the parties have promised to abide by.” *Tombs v. Northwest Airlines*, supra at 160. See also *Firefighters v. City of Everett*, supra, at 145.

The decision of the Court of Appeals is also in conflict with a principle of the law so well established that it scarcely needs citation of authority. The law abhors a forfeiture. “The case is thus reduced to an action for the forfeiture of an option for the purchase of land.... This court has held the general doctrine that forfeitures are not favored in the law, and that courts should promptly seize upon any circumstance arising out of the contract or relations of the parties that would indicate an election or an agreement to waive the harsh and at times unjust remedy of forfeiture....” *Spedden v. Sykes*, 51 Wash. 267, 271, 98 Pac. 752 (1908). If there was ever such a contract or such a relation of the parties it is found in this case in which the Ha’s, as the Optionors, accepted over \$700,000 to apply on the purchase price and then refused to sell or to arbitrate their obligation to sell, despite their agreement to do so. In *Dill v. Zielke*, 26 Wn 2d 246, 252, 172 P. 2d 977 (1946) this court said that “forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit of no denial (citing authority).... (T)he courts of this state have frequently relieved a party from default of payment on an executory contract involving real estate by extending to such person ‘a period of grace’ within which to make such payments.” (citing authority). As this court said in *Hansen Inc. v. Pacific*

International, 76 Wn 2d 220, 228, 455 P. 2d 946 (1969) “...we do have in this case the factor which has always appeared most important to the court – a substantial financial loss to the buyer if the contract is forfeited, with no corresponding loss to the seller if a period of grace is allowed.” That factor is clearly present in the dispute between Otis and Ha.

Conflicts with Decisions of the Courts of Appeals

The cases in the Courts of Appeals addressing arbitration and forfeitures are legion. All are consistent. Arbitration is favored. Forfeitures are disfavored. It is the province of the arbitrator, not the courts, to decide the facts and to interpret the agreement of the parties. As the Court of Appeals said in *Munsey v. Walla Walla College*, 80 Wn. App. 92, 906 P. 2d 988 (1955) “The only question, therefore, for the superior court here should have been ‘whether the parties bound themselves to arbitrate the particular dispute.’ *Meat Cutters Local 494 v. Rosauer’s Super Markets, Inc.*, 29 Wn. App. 150, 154, 627 P. 2d 1330, review denied, 96 Wn 2d 1002 (1981)”

The Issues are of Substantial Public Interest

Arbitration clauses are widely used in both public and private contracts. They have come before the courts many times in many different contexts. Sometimes, as here, one of the parties seeks arbitration and the other party refuses to arbitrate. See, e.g. *Tjart v. Smith Barney, Inc.* 107, Wn. App. 885, 28 P. 3rd 823 (2001) and *Belfor USA Group, Inc. v. Thiel*, 160 Wn 2d 669 (2007). . Sometimes the arbitrator has rendered a decision and one of the parties wants it overturned by the courts. See, e.g. *Boyd v. Davis, supra*. Sometimes there is a dispute as to compliance with the agreement to arbitrate. See e.g. *Munsey v. Walla Walla*

College, supra. No matter how the issue arises, the line of separation between the matters that are to be decided by the arbitrator and that which is to be decided by the courts is critical. The only question for the court is whether or not the parties bound themselves to arbitrate. *Munsey v. Walla Walla College, supra.* The decision in this case by the Court of Appeals is contrary to every decision that has addressed that separation and if allowed to stand will cast a cloud of confusion, especially in Division Three, over arbitration and lead to further litigation which will be necessary in order to clear away the aberrant precedent which this case creates.

Lenders and sellers on one side and borrowers and buyers on the other are ever interested in forfeitures and grace periods. It can be expected that this case, in which the Court of Appeals allowed the forfeiture of over \$700,000, more than half of the purchase price of real property, will encourage lenders and sellers to pursue litigation seeking to enforce harsh and substantial forfeitures, while striking terror into the hearts of borrowers and buyers.

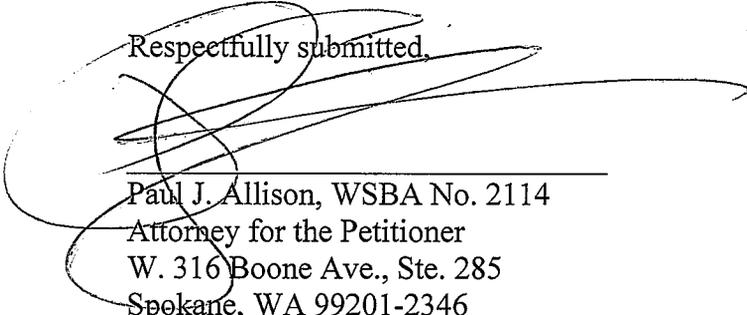
Conclusion / Requested Relief

The decision by the Court of Appeals is contrary to the established law of the State of Washington as declared by The Supreme Court and the Courts of Appeals. If allowed to stand it would create uncertainty and engender litigation in the broadly significant areas of arbitration and forfeitures.

The Petitioner asks The Supreme Court to accept review, to reverse the decision of the Court of Appeals and to remand the case with a mandate (a) to order the parties to proceed with arbitration, (b) to order Respondents Ha to refund the attorney fees that were paid to them by the Petitioner, and (c) to enter

judgment awarding to the Petitioner attorney fees and costs in the trial court, the
Court of Appeals and in The Supreme Court

Respectfully submitted,



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No. 25076-8-III
Otis Housing Assoc., Inc. v. Ha

OTIS HOUSING ASSOCIATION, INC., a)	No. 25076-8-III
Washington Corporation,)	
)	
Appellant,)	Division Three
)	
v.)	
)	PUBLISHED OPINION
JOHN HA and MIN HA, husband and)	
wife,)	
)	
Respondents.)	
)	

Brown, J.—John and Min Ha leased the Otis Hotel to Otis Housing Association, Inc. (OHA) with an option to purchase and a mandatory arbitration clause. When OHA did not make their lease payments, the Has successfully sued for unlawful detainer. OHA then sought to arbitrate and filed a lis pendens. Deciding the option had expired, the court denied OHA's application, canceled the lis pendens, and granted attorney fees. OHA appealed. Finding no error, we affirm.

FACTS

In 1997, OHA and the Has entered into an option to purchase with OHA agreeing to purchase a Spokane property known as the Otis Hotel and parking lot for \$1.3 million. The agreement included attorney fee provisions and an arbitration clause, partly stating:

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.

Clerk's Papers (CP) at 26. The clause set a specific procedure for selecting arbitrators.

The parties agreed OHA would lease the property for \$5,000 per month until it exercised its option to purchase. In February 2001 they agreed to extend the option to purchase with closing to occur no later than December 31, 2001. OHA then began making \$7,500 monthly payments, \$5,000 for the lease and \$2,500 toward the purchase price. The parties did not close by December 31, 2001.

In December 2002, the parties entered into a "Third Addendum To Real Estate Option To Purchase." CP at 29. The parties agreed, "OHA has not exercised the Real Estate Option to Purchase for the leased premises." CP at 32. They modified the option term so that the option could be exercised before December 1, 2004 with closing no later than December 31, 2004. Credit was to be given for the \$2,500 monthly installment payments; however, the parties agreed if OHA did not exercise its option to purchase, "such sums shall be deemed forfeited to HA." CP at 32. The sale did not close in 2004.

In 2005, OHA stopped paying the Has. The Has sued for unlawful detainer. Although the Has received OHA's answer, apparently OHA neglected to file it with the court. OHA claimed it had exercised its option. On October 14, after argument, the court issued a writ of restitution.

On October 22, 2005, OHA demanded arbitration. On November 22, 2005 OHA applied for a court order directing the Has to proceed with arbitration and filed a lis

pendens. On December 2, 2005 OHA sent a "Notice Of Intention To Arbitrate." CP at 8. Apparently hearing nothing from the Has, OHA applied for the appointment of an arbitrator.

The court found "[OHA] materially failed to timely exercise and/or close the Option to Purchase." CP at 74. The court further found OHA previously sought relief in the unlawful detainer action. The court awarded \$3,975.00 in attorney fees and \$429.35 in costs for the Has. After OHA's reconsideration motion was denied, it appealed.

ANALYSIS

The issue is whether the trial court erred in denying OHA's application for arbitration and canceling the lis pendens.

We review arbitrability questions de novo. *Kruger Clinic v. Regence Blueshield*, 157 Wn.2d 290, 298, 138 P.3d 936 (2006). "The party opposing arbitration bears the burden of showing that the agreement is not enforceable." *Zuver v. Airtouch Communs., Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004).

Initially, the Has argue dismissal is warranted because OHA did not sufficiently challenge the trial court's findings of fact. However, OHA challenged all of the trial court's findings in the assignment of error section of its brief and provided meaningful argument in the argument section of its brief. Thus, review is warranted.

According to the parties' option contract, OHA could exercise its option by

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Otis Housing Assoc., Inc. v. Ha

“delivery to the Optioners of written notice by the Optionee within the time period(s), including extensions, set forth in this agreement.” CP at 23. In 2001, OHA provided written notice that it desired to exercise its option. However, the parties did not proceed to closing. Closing a sale after the execution of a purchase and sale contract is “the fulfillment of the obligations created by the contract.” *Duprey v. Donahoe*, 52 Wn.2d 129, 135, 323 P.2d 903 (1958).

The parties entered into a third addendum to real estate option to purchase, agreeing, “OHA has not exercised the Real Estate Option to Purchase for the leased premises.” CP at 32. They agreed to modify the option term so that the option could be exercised anytime before December 1, 2004 with closing no later than December 31, 2004. If OHA did not exercise its option, it agreed the monthly installment payment would “be deemed forfeited to HA.” CP at 32.

The court found OHA failed to exercise its option by the December 1, 2004 deadline. Findings of fact must be supported by substantial evidence. *Nordstrom Credit, Inc. v. Dep’t of Revenue*, 120 Wn.2d 935, 942, 845 P.2d 1331 (1993). The record does not contain written notice showing OHA exercised its option after the third addendum to the option contract was executed. OHA did not tender the purchase price or initiate closing proceedings causing the option to lapse. The option to purchase, including the arbitration clause, no longer had any force or effect; thus, it was void.

RCW 4.28.320 permits the plaintiff in an action affecting the title to real property

to file a notice of the pendency of the action with the auditor of the county in which the property is situated. A lis pendens has the effect of providing constructive notice of the action to a subsequent purchaser or encumbrancer.

Since the trial court properly found the option to purchase was not exercised, no dispute existed regarding ownership of the Otis Hotel; title remained with the Has. See *In re Estate of Niehenke*, 117 Wn.2d 631, 645, 818 P.2d 1324 (1991) (title to land does not change until an option to purchase is exercised). Therefore, the court had a tenable basis to quash the lis pendens; there was no abuse of discretion.

In sum, the trial court did not err in denying OHA's application for arbitration and canceling the lis pendens. Accordingly, we do not discuss the alternative arguments for affirming suggested by the Has, and turn to attorney fees and costs.

The parties' option contract contained an attorney fees provision allowing fees and costs to the prevailing party "[i]n any proceeding in court with respect [to] the enforcement or interpretation of this agreement." CP at 27. RCW 4.84.330 provides for an award of attorney fees and costs to the "prevailing party" in any action on a contract. As the prevailing party, the Has were entitled to their attorney fees and costs. The court did not err.

OHA requests attorney fees on appeal under RAP 18.1 and paragraph 18 of the parties' option contract, which provides that in any proceeding regarding enforcement or interpretation of the contract, "[t]he prevailing party shall be entitled to costs and

No. 25076-8-III
Otis Housing Assoc., Inc. v. Ha

attorney fees." CP at 27. Since OHA has not prevailed, its request is denied.

Affirmed.

Brown, J.

WE CONCUR:

Sweeney, C.J.

Kulik, J.

THE COURT has considered appellant's motion for reconsideration and motion to publish this Court's opinion filed May 31, 2007, and is of the opinion the motion for reconsideration should be denied and the motion to publish should be granted. Therefore,

IT IS ORDERED, appellant's motion for reconsideration is hereby denied.

IT IS FURTHER ORDERED that the motion to publish this Court's opinion filed May 31, 2007 is hereby granted, and shall be modified on page 1 to designate it is a published opinion and on page 6 by deletion of the following language:

A majority of the panel has determined this opinion will not be printed

in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040

DATED: _____

BY A MAJORITY:

JOHN A. SCHULTHEIS
ACTING CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON