ORIGINAL

81083-4

No. 59821

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION 1

THE PIER AT LESCHI CONDOMINIUM OWNERS ASSOCIATION,

Respondent/Plaintiff,

v.

LESCHI CORP.,

Appellant/Defendant.

FILED
SUPREME COURT
STATE OF WASHINGTON
2008 JAN 30 P 4:02
BY RONALD R. CARPENTER
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
2008 JAN 11 A 10:25
BY RONALD R. CARPENTER
CLERK

AMICUS CURIAE BRIEF ON BEHALF OF BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

Julie M. Sund, WSBA No. 37685
Building Industry Association
of Washington
111 21St Avenue SW
Olympia, WA 98507
Telephone: (360) 352-7800
Facsimile: (360) 352-7801
e-mail: julies@biaw.com

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2007 DEC 12 P 3:59
BY RONALD R. CARPENTER
CLERK

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 DEC 14 AM 10:55

TABLE OF CONTENTS

I. INTRODUCTION 3

II. ISSUE OF CONCERN TO *AMICUS CURIAE* 3

III. IDENTITY AND INTEREST OF *AMICUS CURIAE* BUILDING INDUSTRY ASSOCIATION OF WASHINGTON 3

IV. STATEMENT OF THE CASE 4

V. ARGUMENT 4

A. The Superior Court's decision ignores (1) Congressional intent and (2) the United States Supreme Court's record on the FAA. 5

1. Congress intended a broad reach for the FAA. 5

2. The lower court incorrectly limited the FAA's reach. 7

B. The lower court's decision ignores the record of Washington courts and the record of the United States Supreme Court favoring arbitration of disputes as a matter of public policy. 8

VI. CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 6, 7, 9

Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003) 7, 8

Int'l Ass'n. of Fire Fighters, Local 46 v. City of Everett, 146 Wash.2d 29, 51, 42 P.3d 1265 (2002) 9

Marina Cove Condominium Owners Ass'n v. Isabela Estates, 109 Wash.App. 230 (2001) 7, 8

Mendez v. Palm Harbor Homes, Inc., 111 Wash.App. 446, 454, 45 P.3d 594 (2002) 9

Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983) 10

Perez v. Mid-Century Ins. Co., 85 Wash.App. 760, 765, 934 P.2d 731 9

Satomi Owners Association v. Satomi, LLC, 139 Wash.App. 175, 185 (2007) 8

Southland Corp. v. Keating, 465 U.S. 1, 15 (1984) 6

Zuver v. Airtouch Commc'ns, Inc., 153 Wash.2d 293 (2004) 9

Statutes

9 U.S.C.A. § 2 5

U.S. Const., Art. VI, cl. 2 7

Other Authorities

Jon O. Shimabukuro, *The Federal Arbitration Act: Background and Recent Developments,* CRS Report for Congress, updated August 15, 2003 5

Preston Douglas Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: a Look at the Past, Present and Future of Section 2*, 29 U. Rich. L. Rev. 1499 (1995)..... 5, 9

I. INTRODUCTION

This case presents a critical question involving construction contracts in Washington state: whether arbitration clauses in condominium sales contracts are enforceable. The parties here disagree on whether the arbitration agreement included as part of the Purchase and Sale Agreement should be enforced to resolve claims brought by the Homeowners' Association. Among the questions raised in this disagreement is whether the Federal Arbitration Act (FAA) pre-empts the anti-arbitration provision in the Washington Condominium Act.

II. ISSUE OF CONCERN TO *AMICUS CURIAE*

Does the Federal Arbitration Act pre-empt the Washington State Condominium Act's judicial enforcement provision in this case, where the conflict arises from alleged construction defects, construction materials came from other states, and the contract contained a mandatory arbitration provision?

III. IDENTITY AND INTEREST OF *AMICUS CURIAE* BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

The Building Industry Association of Washington (BIAW) is the largest trade association in the state with over 13,600 members, employing over 350,000 Washingtonians. Most of our members enter into construction contracts – containing arbitration clauses – with their customers and clients. Contractors must be able to rely on the plain language of their contracts in order to do business. Therefore, BIAW's members are directly impacted by any decision or policy change that affects the validity of terms included in those contracts.

BIAW, as an association representing numerous home builders who will be affected by this Court's decision, brings a unique perspective of those who are directly impacted by the Superior Court's decision. Therefore, BIAW believes an *amicus curiae* brief can be of substantial assistance to this Court.

IV. STATEMENT OF THE CASE

Amicus BIAW adopts and incorporates the statement of facts as set forth in Appellant's brief.

V. ARGUMENT

Amicus BIAW asks the Court to reverse the Superior Court's order denying Leschi Corp.'s motion to enforce arbitration, and remand with instructions to resolve all the HOA's claims by arbitration.

A. The Superior Court's decision ignores (1) Congressional intent and (2) the United States Supreme Court's record on the FAA.

1. Congress intended a broad reach for the FAA.

The lower court ignored Congressional intent and clear precedent when it incorrectly decided the FAA does not apply to this case.

The FAA states simply:

> A written provision in any maritime transaction or a contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2

The enactment of the FAA was a clear rejection of historic judicial hostility toward arbitration. *See* Jon O. Shimabukuro, *The Federal Arbitration Act: Background and Recent Developments,* CRS Report for Congress, updated August 15, 2003; Preston Douglas Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: a Look at the Past, Present and Future of Section 2*, 29 U. Rich. L.

Rev. 1499 (1995). The United States Supreme Court has repeatedly held that the purpose of the Federal Arbitration Act is to "overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265 (1995) (citing *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).)

In 1984, the United States Supreme Court addressed the specific issue of whether state courts were subject to the FAA, holding that the FAA created "federal substantive law requiring the parties to honor arbitration agreements that must be enforced by both state and federal courts under the Supremacy Clause of the United States Constitution." *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984).

Further emphasizing Congressional commitment to the fundamental purpose of the FAA, the Court in *Allied-Bruce* pointed out that Congress has enacted federal laws "extending, not retracting," the scope of arbitration, both before and after the decision in *Southland. Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265. With nearly a century passed since the enactment of the FAA, both Congress and the Supreme Court have made clear that the purpose of the FAA is to prevent courts from invalidating arbitration agreements, as the lower court did in this case.

2. The lower court incorrectly limited the FAA's reach.

The Supremacy Clause of the United States Constitution establishes that federal statutes are the "supreme law of the land":

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const., Art. VI, cl. 2.

In addition, the United States Supreme Court has said that the phrase "involving interstate commerce" implies the broadest possible reading of the scope of Congress' power under the commerce clause. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003); *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265 (1995).

The FAA applies to this case because the construction of the condominiums, the administration of the warranty, and the purchases of the condominiums all involved interstate commerce. In addition, the Supremacy Clause demands that the FAA supersedes the Washington Condominium Act's anti-arbitration provision in this case.

Arguments to the contrary have relied on a case where this court considered another condominium project and determined that the FAA was not implicated where the sales contract involved only Washington residents. *Marina Cove Condominium Owners Ass'n v. Isabela Estates*,

109 Wash.App. 230 (2001). There are two important responses to this position. First, this case arises from defective materials in construction that came from out-of-state, involves purchasers in other states, and a warranty administrator from out-of-state. In *Marina Cove*, ". . . [t]he only connection to other states involves one buyer, who moved to Washington from another state, and another buyer, who transferred funds from an out-of-state bank account for use as a down payment on one unit purchased." *Marina Cove*, 109 Wash. App. at 244. Second, this court has recently questioned its own holding in *Marina Cove* since the United States Supreme Court issued a decision in *Citizens Bank vs. Alafabco, Inc.*, applying the FAA to a debt restructuring agreement between an Alabama contractor and an Alabama bank. *Satomi Owners Association v. Satomi, LLC*, 139 Wash.App. 175, 185 (2007). The *Citizens Bank* court re-iterated the broad reach of the FAA. *Citizens Bank*, 539 U.S. 52 (2003). This court acknowledged that in light of *Citizens Bank*, "*Marina Cove*'s continuing validity is questionable." *Satomi*, 139 Wash.App. at 185.

B. The lower court's decision ignores the record of Washington courts and the record of the United States Supreme Court favoring arbitration of disputes as a matter of public policy.

Courts in Washington have repeatedly ruled in favor of a strong public policy favoring arbitration. *See Zuver v. Airtouch Commc'ns, Inc.*,

153 Wash.2d 293 (2004); *Int'l Ass'n. of Fire Fighters, Local 46 v. City of Everett*, 146 Wash.2d 29, 51, 42 P.3d 1265 (2002); *Mendez v. Palm Harbor Homes, Inc.,* 111 Wash.App. 446, 454, 45 P.3d 594 (2002); *Perez v. Mid-Century Ins. Co.*, 85 Wash.App. 760, 765, 934 P.2d 731.

There are economic and efficiency reasons for the widespread use of arbitration clauses in construction contracts. Both parties benefit from the predictability gained and risk minimized by including such a provision. These are the reasons for Congress' and the Supreme Court's reinforcement of the FAA's broad reach. The United States Supreme Court referred to the discussion in Congress about arbitration's advantages, more than 50 years after the passage of the FAA:

> "The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . ."
> *Allied-Bruce*, 513 U.S. at 280 (quoting H.R.Rep. No. 97-542 p.13 (1982)).

Other advantages to arbitration are cost efficiency, confidentiality, and the nature the informal process itself, which encourages the parties to reach a solution. *See* Preston Douglas Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: a Look at the Past, Present and Future of Section 2*, 29 U. Rich. L. Rev. 1499 (1995).

This case is no different; settling the matters at hand through arbitration will undoubtedly save time and resources.

The United States Supreme Court also has a long record favoring arbitration. The Court has made clear that disputes over arbitration agreements "must be addressed with a healthy regard for the federal policy favoring arbitration . . . any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983).

VI. CONCLUSION

Based on the foregoing, *amicus* BIAW requests this court reverse the lower court's order denying Leschi Corp.'s motion to enforce arbitration, and remand with instructions to resolve all the HOA's claims by arbitration.

The outcome of this case is of great significance to BIAW members. The building industry is a driving force of the economy of Washington state, and in order to do business contractors must have confidence in the plain language of the contracts agreed upon with their customers.

RESPECTFULLY SUBMITTED this 12th day of December, 2007.

By_____

Julie M. Sund, WSBA No. 37685
Attorney for Amicus Curiae
Building Industry Association of Washington
111 21St Avenue SW
Olympia, WA 98507
Telephone: (360) 352-7800
Facsimile: (360) 352-7801
Email: julies@biaw.com