

70664-1

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No. 70664-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

LANGDON HALL LAND, LLC,

Plaintiff/Appellant,

v.

LANGDON HALL, INC.; ALBERT RUMPH; JAMES MCCLAIN AND
JOHN FRANKENFELD,

Defendants/Respondents

BRIEF OF PETITIONER LANGDON HALL LAND, LLC

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I. INTRODUCTION

Langdon Hall Land, LLC (“Langdon Hall”) respectfully requests that this Court reverse the trial court’s erroneous decision to vacate a judgment held by Langdon Hall against Respondent James McClain (“McClain”).¹

McClain was part of a conspiracy to embezzle nearly a million dollars invested by Langdon Hall in a Florida assisted living facility. In 2008, Langdon Hall obtained an arbitration award in Florida against McClain and his associates.

Langdon Hall then initiated a proceeding in King County Superior Court to confirm the judgment. That was done pursuant to the confirmation provision of the parties’ arbitration agreement, which states:

Judgment upon the award rendered by the arbitrator(s) may be entered in any court having *in personem* and subject matter jurisdiction. Buyer and each Shareholder hereby submit to the *in personem* jurisdiction of the Federal and State courts in Hillsborough County, for the purpose of confirming any such award and entering judgment thereon.

¹ Respondents Langdon Hall, Inc., Albert Rumph and John Frankenfeld are also debtors under the judgment. However, they have not appeared and did not participate in the motion to vacate. Therefore, for clarity, this brief will generally refer to “McClain” rather than “Respondents.”

CP 364, at ¶ 10.5. McClain appeared, took no other action, and the Court entered a judgment confirming the award.

Five years later, in May of 2013, McClain came out of hiding to attack the judgment. McClain's principal attack was a hypertechnical argument that, under the Washington Uniform Arbitration Act, a judgment can only be confirmed in the jurisdiction where the arbitration was held. Judge Eadie of the King County Superior Court accepted this argument, and vacated the judgment. Though not before this Court, McClain contends that, due to the statute of limitations, it is impossible for Langdon Hall to reinstate its judgment in any jurisdiction.

For the reasons set forth below, the Court's decision was contrary to law—specifically, it was based on a misinterpretation of Washington's arbitration statute. In brief, while the Act states that an arbitration held in Washington must be confirmed in Washington, it does not state that arbitrations held in other states must be confirmed in those states. On the contrary, established Washington caselaw provides that out-of-state awards may be confirmed in Washington, and the Washington statute cannot reasonably be read to overturn that caselaw. In addition, the trial court failed to apply a relevant provision of the Federal Arbitration Act, which applies to the parties' arbitration agreement, preempts any state law

to the contrary, and supports the judgment here. Finally, the court neglected to apply a statute of limitations providing that McClain was required to challenge the judgment within one year of issue (rather than waiting for five years).

But the trial court's decision was not only legally erroneous; it was also manifestly unjust. McClain has no defenses to the merits of the arbitrator's decision against him. Rather, his tactic has been to evade Langdon Hall's attempts to collect on the judgment, and then, after statutes of limitation had arguably passed, assert this technical issue. If sustained, the trial court's ruling would (at least, pending efforts in other jurisdictions) reward McClain's lack of diligence and excuse the misdeeds that led to the arbitration award and judgment.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting McClain's motion to vacate the judgment, where such a motion was untimely under RCW 4.28.200 and CR 60(b).
2. The Court misconstrued the Washington Uniform Arbitration Act (Chapter 7.04A RCW),

3. The Court failed to apply the controlling Federal Arbitration Act (Title 9 U.S.C.) so as to preempt its interpretation of the Washington Uniform Arbitration Act.

III. STATEMENT OF THE CASE

A. The Underlying Claim and Arbitration Award

McClain owes the money claimed here—that was conclusively determined in an arbitration McClain lost in 2008. Langdon Hall Land, LLC’s arbitration award and judgment against McClain arose out of claims against an entity called Langdon Hall, Inc., for whom McClain was a guarantor. (Langdon Hall Land and Langdon Hall, Inc. were not related at the time).

In brief, Langdon Hall invested in an assisted living facility in Florida which was run by the unrelated Langdon Hall, Inc. CP 335-36, at ¶ 3. That investment was made through a Stock Purchase and Subscription Agreement dating from 2005 (“the Agreement”), as well as a promissory note to Langdon hall’s sister entity, Langdon Hall Assisted Living, LLC. *Id.* at ¶¶3-4; CP 343-73. In addition, McClain executed

personal guarantees of Langdon Hall, Inc.'s obligations on both the stock purchase and the note. *See* CP 377-79 (guarantee on note).

The managers of Langdon Hall, Inc., including McClain, embezzled Langdon Hall's investment. CP 336, at ¶ 5. Langdon Hall commenced arbitration against McClain, Langdon Hall, Inc., and the other managers in Florida in 2007. *Id.* The arbitration panel entered an award in Langdon Hall's favor in February of 2008. CP 381-82. By virtue of his personal guarantee, the award ran against McClain personally.

B. The Confirmation of the Award

Langdon Hall then filed a proceeding in King County Superior Court to confirm the arbitration. Langdon Hall attempted to serve McClain with process, but McClain had disappeared. Langdon Hall engaged a private investigator, Ken Crow, who attempted to find McClain based on visits and telephone calls to his previously-listed addresses in Nevada. *See* CP 384-88; CP 425-28. Mr. Crow also determined that McClain owned several properties in Washington, including real estate in Forks, Port Townsend and Ellensburg, but was unable to derive a service address from that knowledge. CP 426. (McClain held the Forks and Port Townsend entities through an LLC, of which McClain was the sole member).

Langdon Hall moved to serve McClain by mail. CP 11-15. In support of that motion, Langdon Hall's attorney and the private investigator submitted declarations detailing their unsuccessful efforts to locate McClain, their belief that McClain was intentionally evading service, and their findings regarding McClain's property holdings in Washington. CP 384-88; CP 425-28. Commissioner Holland of the King County Superior Court found that Langdon Hall had satisfied the statutory criteria, and granted that motion. CP 8-10.

McClain filed a notice of appearance in the King County proceeding shortly thereafter. CP 76-77. McClain did not challenge or seek reconsideration of Commissioner Holland's order, or take any other steps to challenge the King County action.

Langdon Hall then moved to confirm the arbitration award, a motion McClain also did not oppose. CP 78-82. In fact, McClain took no action at all other than filing the Notice of Appearance. Judge Erlick entered an order and judgment confirming the arbitration award on September 24, 2008. CP 101-02. McClain did not seek reconsideration of that order within 10 days, within a year, or at any other time until McClain collaterally attacked the order on May 13, 2013, almost five years after entry of the judgment by Judge Erlick.

C. The Kittitas County Litigation and Bankruptcies

Meanwhile, in a continuing effort to hide his assets from Langdon Hall, McClain also entered into a sham transaction with Derald Martin, an Ellensburg-area land developer. CP 338, at ¶ 14. McClain does not contest that he invested \$1.4 million dollars in a development LLC put together by Martin. McClain also claims that this transaction was later “unwound, ” resulting inexplicably in a payment to McClain’s brother in the amount of \$338,000, but with Martin keeping the balance, leading to the fraudulent conveyance action.

Langdon Hall challenged the McClain/Martin dealings as a fraudulent transfer designed to hide McClain’s assets, and filed a fraudulent transfer action in Kittitas County court. (Cause No. 09-2-00143-2). In late 2012, Langdon Hall moved for summary judgment. CP 338, at ¶ 14. Martin (as the recipient of the fraudulent transfer) moved to dismiss, among other things arguing similar jurisdictional arguments to those McClain is making here. McClain, who was named in that lawsuit but had never appeared, resurfaced in 2012 only to submit a declaration on Martin’s behalf. CP 453-58. But the Kittitas County court rejected the jurisdictional arguments and found a fraudulent transfer as a matter of law on summary judgment. CP 469-70.

To avoid entry of the Kittitas judgment, McClain, and shortly thereafter, Martin, who, by then, were clearly acting in concert, both declared bankruptcy—Martin’s bankruptcy coming the night before the Kittitas County court was to enter judgment in favor of Langdon Hall. CP 472-74 (Martin petition); CP 476-83 (Martin petition). McClain’s bankruptcy was a sham designed to hinder Langdon’s efforts to enter the Martin fraudulent transfer judgment. When that tactic did not work, McClain did not further pursue the bankruptcy and it was recently dismissed. CP 485-86.

D. The Motion to Vacate

On May 13, 2013, McClain (likely at the instigation of Martin) filed a motion in King County Superior Court to vacate the 2008 judgment confirming the arbitration award. CP 103-28. McClain made a number of arguments, but the one before this Court is the argument that the trial court lacked subject matter jurisdiction to confirm the award because it had been entered in Florida. At a hearing on June 19, 2013, Judge Eadie ruled that subject matter jurisdiction was lacking, and entered an order vacating the previous judgment. CP 499-501. Langdon Hall timely filed a Notice of Appeal. CP 502-507.

IV. ARGUMENT

A. Standard of Review

“A motion to vacate a final order for lack of jurisdiction as void is reviewed de novo.” *In re Marriage of Wilson*, 117 Wn. App. 40, 45, 68 P.3d 1121, 1124 (2003). All questions of statutory interpretation are also reviewed de novo. *Id.*³

B. McClain’s Motion Was Untimely

The trial court should have rejected McClain’s motion outright because it was untimely under both RCW 4.28.200 and CR 60(b).

First, RCW 4.28.200 imposes a one-year limitations period on post-judgment challenges to judgments where the defendant was served by publication (and by reference, service by mail):

If the summons is not served personally on the defendant in the cases provided in RCW 4.28.110 [service by publication] and 4.28.180 [service on out-of-state defendant], he or she or his or her representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action and, except in an action for divorce, the defendant or his or her representative may in like manner be allowed to defend after judgment, and *within one year after the rendition of such judgment*, on such terms as may be just...

³ As mentioned above, McClain made a number of alternative arguments in his motion to vacate, but the trial court did not rule on them, nor did it make any factual findings that would be required to sustain them. Therefore, they are not ripe for consideration for this Court.

RCW 4.28.200 (emphasis added). Under the statute a party served in this manner may not vacate a subject judgment more than a year after the judgment is entered. *Id.*; see *Bruhn v. Pasco Land Co.*, 67 Wash. 490, 492, 121 P. 981, 982 (1912) (predecessor statutes “limit the time within which an application can be made to vacate a judgment for the causes therein set forth to one year after the rendition of the judgment.”) (citations omitted); *Smith v. Stiles*, 68 Wash. 345, 350, 123 P. 448, 450 (1912) (petition to vacate judgment made more than one year after entry of judgment was void).

There is no credible argument that RCW 4.28.200 should not apply here. McClain concedes that Langdon Hall obtained an order for service by mail in this case. CP 108. Under Civil Rule 4, service by mail “has the same jurisdictional effect as service by publication.” CR 4(d)(4). Further, McClain’s own motion argued that the standards for service by publication (such as residency) underlay those for service by mail. If that is the case, then this statute does as well. The judgment confirming the arbitration award was entered on September 28, 2008. McClain waited nearly five years to move to vacate. His motion was plainly untimely under RCW 4.28.200.

McClain's motion was also untimely under CR 60(b). That rule provides that any motion to vacate a judgment must be made "within a reasonable time." McClain, having filed a notice of appearance in 2008, was on actual notice of the entry of the judgment at that time. There is nothing "reasonable" about McClain's decision to take no action during the confirmation proceedings, wait nearly five years, and then dispute the judgment. Rather, McClain's lack of diligence appears to be a calculated effort to use the statute of limitations to avoid liability. The Court should not indulge that abuse of the rules.

C. The Court's Ruling on Subject Matter Jurisdiction was Erroneous

The trial court vacated the judgment on the grounds that subject matter jurisdiction was improper. The court's decision, as Langdon Hall understands it, was based on the conclusion that the Washington Uniform Arbitration Act, Chapter 7.04A RCW, only gives Washington courts subject matter jurisdiction to confirm arbitration awards that were entered in Washington. That interpretation was incorrect, but even if Washington law so holds, it is preempted by the Federal Arbitration Act, which allows confirmation in the manner that Langdon Hall followed here.

1. The Washington Uniform Arbitration Act

The trial court apparently accepted McClain's argument that the Washington Uniform Arbitration Act forces the prevailing party to confirm the award in the same venue where the arbitration occurred. However, this argument is misplaced.

As a threshold matter, state law vests original jurisdiction in superior courts for "all cases in equity... all other cases in which the demand or the value of the property in controversy amounts to three hundred dollars... [and] in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court." RCW 2.08.010. Thus, a superior court should be presumed to have subject matter jurisdiction unless the defendant can show a specific provision of law withholding jurisdiction.

McClain claims that the Washington Act prohibits Washington courts from confirming any arbitration award when the arbitration was held in other states. But the jurisdictional provisions of the Washington UAA cited by McClain only apply to agreements to arbitrate *in Washington*. For example, RCW 7.04A.260 provides: "An agreement to arbitrate providing for arbitration *in this state* confers exclusive jurisdiction on the court to enter judgment on an award under this

chapter.” (emphasis added). The statute says nothing about agreements to hold the arbitration hearing in another state.

McClain simply assumes that the act would have to apply symmetrically to arbitrations held out of state, but there is nothing in the statute to indicate this is so. Rather, under the principle of *expressio unius est exclusio alterius*, the fact that the statute only mentions held in Washington indicates that the Legislature did not intend for it to apply to arbitrations held out of state. See *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993). (“Legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded.”). The Legislature could have written a statute saying “Courts of this state lack jurisdiction to confirm arbitration awards entered in other states,” but it has not done so. In the absence of that specific provision or one like it, there is no basis to refute the Superior Court’s general jurisdiction.

In addition, McClain’s argument is squarely refuted by *Equity Group, Inc. v. Hidden*, 88 Wn. App. 148, 943 P.2d 1167 (1997). In that case (decided before the current version of the arbitration statute), the prevailing party in an arbitration which took place in Oregon initiated a Washington proceeding to confirm the judgment. *Id.* at 152. The losing party argued that jurisdiction was lacking because a Washington court

cannot confirm an out-of-state arbitration award. *Id.* at 153. The court rejected that proposition, noting:

RCW 7.04.150 allows court confirmation of arbitration awards upon application to the court by any party to the arbitration. *Hidden's* contention is that this statute requires the award to have been made in Washington. No such constraint is evident, however, from the plain language of the statute...

Id. at 153-54. On that basis, the Court ruled that the exercise of jurisdiction was proper, and affirmed the trial court order confirming the judgment. *Id.* at 151-52.

Hidden is still good law today. While Chapter 7.04 RCW has been replaced by Chapter 7.04A, as discussed above, the new Act cannot be read to foreclose jurisdiction on arbitration awards outside of Washington. There is still “no such constraint” in “the plain language of the statute.” *Hidden*, 88 Wn. App. at 153-54. Moreover, “[i]n the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law.”). *Glass v. Stahl Specialty Co.*, 97 Wash. 2d 880, 888, 652 P.2d 948, 952 (1982). There is nothing in the legislative history or text of the Arbitration Act evincing a legislative intent to overrule *Hidden*. Therefore, even if the Court finds ambiguity in the new

act, it should construe the act to harmonize with the existing case law holding that out-of-state arbitrations may be confirmed in Washington.

Finally, to the extent the Court had any concern regarding comity with Florida law, Florida case law follows the same approach set out in *Hidden*. For example, the *Lewis & Peat* case concerned an arbitration provision nearly identical to the one at issue here, which stated:

Arbitration is the sole remedy hereunder and it shall be held in accordance with the law of New York State, and judgment of any award may be entered in the courts of that State, or in any other court of competent jurisdiction.

Lewis & Peat Coffee, Inc. v. Condor Grp., Inc., 588 So. 2d 316, 317 (Fla. Dist. Ct. App. 1991). In that case, the parties conducted arbitration in New York, and the winner attempted to confirm the award in Florida. *Id.* The court of appeals reversed the trial court's dismissal for lack of jurisdiction, finding that confirmation in Florida was proper, since the Florida trial court was "a court of competent jurisdiction to confirm the award." *Id.* Thus, the Court should continue to apply *Hidden* as consistent with both Florida and Washington law.

2. The Federal Arbitration Act

Even if the Washington UAA could be read as McClain suggests, the Federal Arbitration Act ("FAA"), Title 9 of the U.S. Code, provides

broader rights to prevailing parties to confirm their arbitration awards. McClain's interpretation of the UAA would bring the state statute into a "head-on collision" with the federal scheme, and would be preempted as a consequence. According to McClain, the Washington Act flatly precludes confirmation of an arbitration award resulting from arbitration in another state. In direct conflict is the provision of the FAA discussed below allowing parties to contract as to the location of where an arbitration award can be confirmed. Thus, even if the Court interprets the state statute as McClain urges, it would not preclude subject matter jurisdiction here, because McClain's reading of the Washington Act would bring it into direct conflict with the FAA, resulting in preemption of that portion of the state Act.

To begin with, the FAA "applies to any "transaction involving commerce" that contains an agreement to arbitrate. 9 U.S.C. § 2. "Commerce," in turn, is given the same very broad definition used with respect to Congress's powers under the Commerce Clause of the U.S. Constitution. 9 U.S.C. § 1; *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S. Ct. 2037, 2040, 156 L. Ed. 2d 46 (2003). In other words, if the U.S. Congress had the power to regulate a commercial activity, and an arbitration agreement was entered into with respect to that transaction, the

FAA applies. The arbitration provision here was part of a contract for an interstate securities transaction between residents of Washington and Florida. As nearly a century of federal securities law makes clear, such transactions are indisputably “commerce” subject to federal regulation. *See generally* 15 U.S.C. § 77a et seq. (Securities Act of 1933). There is no doubt that the arbitration at issue here falls within the FAA.

Under the Supremacy Clause of the United States Constitution, the FAA “clearly preempts any state law to the contrary.” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773, 781 (2004); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (“Because it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ California’s *Discover Bank* rule is preempted by the FAA.”) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). Therefore, if the FAA permits confirmation of the award in the manner at issue here, the confirmation was valid notwithstanding any contrary provision of state law.

And the FAA does so provide. Specifically, 9 U.S.C. § 9 states that:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must grant* such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C.A. § 9 (emphasis added). In other words, the FAA gives the force of federal law to the parties' choice of where an arbitration award may be confirmed.

Here, the arbitration agreement states:

Judgment upon the award rendered by the arbitrator(s) may be entered in any court having *in personem* and subject matter jurisdiction. Buyer and each Shareholder hereby submit to the *in personem* jurisdiction of the Federal and State courts in Hillsborough County, for the purpose of confirming any such award and entering judgment thereon.

CP 364, at ¶ 10.5. By its plain language, the agreement allows judgment to be entered against McClain in any court, including one in Washington, so long as it has proper jurisdiction. Langdon Hall indisputably filed the confirmation proceeding within the one year period specified by 9 U.S.C. § 9. Therefore, the court was required to confirm the award.

McClain/Martin have previously argued that the arbitration agreement's reference to Hillsborough County was exclusive – that *only*

Florida courts could be selected. However, courts uniformly hold that choice-of-venue provisions are *not* exclusive unless they specifically use restrictive language; no exclusivity is established if the parties simply specify one court for which the parties waive jurisdictional objections. As the Ninth Circuit explained with respect to a similar provision:

Here, the plain meaning of the language is that the Orange County courts shall have jurisdiction over this action. The language says nothing about the Orange County courts having exclusive jurisdiction. The effect of the language is merely that the parties consent to the jurisdiction of the Orange County courts. Although the word “shall” is a mandatory term, here it mandates nothing more than that the Orange County courts have jurisdiction. Thus, Supreme cannot object to litigation in the Orange County Superior Court on the ground that the court lacks personal jurisdiction. Such consent to jurisdiction, however, does not mean that the same subject matter cannot be litigated in any other court. In other words, the forum selection clause in this case is permissive rather than mandatory.

Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987).

In addition, McClain’s interpretation of the agreement would completely read the “any court” language out of the agreement. *See Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980) (“An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or

ineffective.”). If the parties had intended to create exclusive jurisdiction to confirm an arbitration award in Florida, they easily could have sent so in a single sentence. But their agreement instead contains a provision creating broad rights to confirm the arbitration award in any Court with jurisdiction.

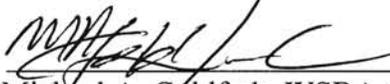
Under the *Hidden* case, Washington courts have subject matter jurisdiction to enforce an arbitration award entered in another state. Nothing in the changes made to the arbitration statute changed that published decision. And, even if McClain could argue that under the Uniform Act there was no subject matter jurisdiction, that argument would fail under the FAA. The parties’ agreement is given the force of federal law under the FAA, and required that the King County Court confirmed the award. To the extent any provision of state law precluded such an award, it was preempted by the FAA, and the trial court erred by applying its contrary interpretation of state law.

IV. CONCLUSION

For the reasons stated above, the trial court erred when it entered an order vacating the previous judgment. This court should reverse and reinstate the judgment.

RESPECTFULLY SUBMITTED this 7th day of October, 2013.

KELLEY, GOLDFARB, HUCK & ROTH,
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DECLARATION OF SERVICE

The undersigned certifies under the penalty of perjury, under the laws of the State of Washington, that on October 7, 2013, I caused the service of the foregoing pleadings on each and every attorney of records herein:

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10/7/2013 10:51 AM
FILED
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