IN THE SUPREME COURT
STATE OF FLORIDA

SEARS AUTHORIZED TERMITE AND PEST CONTROL, INC. f/k/a ALL AMERICA TERMITE AND PEST CONTROL, INC.,

Petitioner,

vs.

Supreme Court No: SC01-960

SHELLEY SULLIVAN,

Fourth DCA No. 4D00-2276

L.T. No.: CL 99-10954 AI

Respondent.

_____/

On Review of a Decision by the
Fourth District Court of Appeal

REPLY BRIEF
OF PETITIONER, SEARS TERMITE AND PEST CONTROL, INC., f/k/a ALL AMERICA TERMITE AND PEST CONTROL, INC.

ARNSTEIN & LEHR
John A. Turner
Florida Bar No.: 000922
Willa A. Fearrington
Florida Bar No.: 173252
Attorneys for Petitioner, Sears Termite and Pest Control, Inc.
Northbridge Centre - Suite 600
515 North Flagler Drive

West Palm Beach, FL 33401-4323
(561) 833-9800 [ofc]
(561) 655-5551 [fax]

TABLE OF CONTENTS

Table of Contents ii

Table of Authorities iii

Argument 1

I. SULLIVAN DOES NOT REFUTE THE COMPELLING RELATIONSHIP WHICH EXISTS BETWEEN HER CLAIMS AND THE CONTRACT 1

II. THE ARBITRATION PROVISION IS SUFFICIENTLY BROAD TO ENCOMPASS SULLIVAN'S CLAIMS 4

III. THE DETERMINATION THAT SULLIVAN'S CLAIM IS SUBJECT TO ARBITRATION NECESSARILY MEANS SHE WAIVED A TRIAL BY JURY 9

IV. CONFLICT EXISTS BETWEEN THE DISTRICTS REQUIRING RESOLUTION BY THIS COURT 13

Conclusion 15

Certificate of Service 16

Certificate of Compliance 17

TABLE OF AUTHORITIES

Florida Supreme Court

Seifert v. U.S. Home Corp.,
750 So. 2d 633 (Fla. 1999) 1, 5, 6, 13

District Courts of Appeal

Sullivan v. Sears Authorized Termite and Pest Control, Inc.,
26 Fla. L. Weekly, D855 (Fla. 4th DCA, March 28, 2001) 13

Terminix Int'l. Co., L.P. v. Michaels,
668 So. 2d 1013 (Fla. 4th DCA 1996) 4

Terminix Int'l. Co., L.P. v. Ponzio,
693 So. 2d 104 (Fla. 5th DCA 1997) 7

Visa Centre Venture v. Unlike Anything, Inc.,
603 So. 2d 576, 580 (Fla. 5th DCA 1992) 10

Secondary Authority

Dusold v. Porta-John Corp.,
167 Ariz. 358, 807 F. 2d 526 (Ct.App. 1990) 6

I. SULLIVAN DOES NOT REFUTE THE COMPELLING RELATIONSHIP WHICH EXISTS BETWEEN HER CLAIMS AND THE CONTRACT

Sullivan agrees that only one of the three issues that courts consider in ruling on a motion to compel arbitration is contested here: i.e., whether her claims fall within the scope of the arbitration provision in the Agreement. (Answer Brief, p. 6). Sullivan also necessarily agrees that the test of whether her claim must be submitted to arbitration is the existence of a sufficient nexus between her claim and the contract with Sears TPC. Seifert v. U.S. Home Corp.,750 So. 2d 633, 638 (Fla. 1999). That nexus is patently present here because the resolution of the dispute, at a minimum, raises an issue requiring reference to or construction of portions of the contract itself. Id. (citations omitted). Indeed, the duty which Sears TPC allegedly breached here arises only by virtue of the contract, not under common law.

Sullivan's Answer Brief cannot and does not refute the obvious connection between her claims and the subject matter of her contract with Sears TPC ("the Agreement"). All of Sullivan's asserted legal theories of recovery (negligence, breach of implied warranties, negligent

misrepresentation and fraud in the inducement) converge at a common allegation: that spiders allegedly continued to live in her home after Sears TPC provided pest control treatments. In the absence of this core allegation, there would be no breach of any of the duties alleged by Sullivan. Thus, Sullivan's legal theories are entirely dependent upon the premise that Sears TPC did not adequately perform contractually imposed pest control services. Clearly, this premise is readily demonstrated by the repeated references in the allegations of the Complaint to the effectiveness, quality or suitability of chemicals used by Sears TPC and the manner in which they were applied. (Answer Brief, pp. 2-4).

But no doubt deliberately, Sullivan fails to address the fact that the contract was the sole wellspring from which any duty to eradicate these spiders flowed. Sullivan points to no common law or other extra-contractual source of a duty on the part of Sears TPC to prevent spiders in her home. She could not, because there is none.

Nor does Sullivan answer the question: could Sears TPC have been liable for her injuries had they occurred the day before the contract was

formed? The answer again is clearly "no," but not only because the parties were merely strangers to each other at that time. Sears TPC was not responsible for the spiders in Sullivan's home prior to the Agreement for the simple reason that Sears TPC did not owe the public in general, including Sullivan, any duty in that regard. The Agreement created new obligations between the parties, and the alleged breach of the contractually assumed obligation to control spiders is the crux of Sullivan's claim. The significant relationship test set forth under Seifert is unquestionably satisfied here and arbitration of Sullivan's claims is required.

Sullivan contends, perhaps with tongue in cheek, that resolution of her claim will require only common sense or reference to a dictionary, not the Agreement, and asks if Sears TPC contends it was obligated only to "control" spiders, and not to "kill 'em dead." (Answer Brief, p. 9). This is exactly Sears TPC's contention. Sears TPC believes and submits that it was obligated under the Agreement to "control" spiders, meaning it was to reduce spiders in Sullivan's home to infrequent and tolerable occurrences - not to completely eradicate each and every spider, wherever it came from and

under all circumstances, for the full one-year term of the Agreement. The Agreement itself supports Sears TPC's interpretation, providing that "Sears will perform any further retreatment necessary where live infestations are noted, free of charge, for the term of this agreement." (App. - C). This provision for free retreatments in the event that pests reappear, such as spiders, directly contradicts Sullivan's interpretation of the Agreement.

But the crucial point here is that Sullivan and Sears TPC clearly have a dispute concerning the standard of performance required under the Agreement. Regardless of which party ultimately prevails, resolution of the dispute will absolutely require and will necessarily depend upon the interpretation and construction of the Agreement. This is clearly a circumstance where arbitration of a claim, even one in sounding in "tort," is required under Seifert.

II. THE ARBITRATION PROVISION IS SUFFICIENTLY BROAD TO ENCOMPASS SULLIVAN'S CLAIMS

Sullivan also contends that the arbitration provision at issue here is "vague" because it supposedly does not expressly include her legal theories

to recover for personal injuries. It is true that the provision does not expressly apply to common law tort theories, but that is not Sullivan's claims. Sullivan's argument stands Florida law regarding the application of an arbitration provision to contractually based claims on its head.

Neither Seifert nor Terminix Int'l. Co., L.P. v. Michaels, 668 So. 2d 1013 (Fla. 4th DCA 1996) holds that a "magic language" requirement must be met before a tort claim which arises out of or relates to a contract will be subject to arbitration. This Court has already implicitly rejected this contention in Seifert. There, the absence of express language including tort claims as being arbitrable was only given importance after this Court concluded that an insufficient nexus existed between contract and injury, such that the tort claim did not "arise out of or relate to" the contract. Seifert, 750 So. 2d at 642. This reasoning in Seifert supports Florida's policy of construing arbitration clauses broadly: i.e. an arbitration provision may make tort claims expressly arbitrable, but the absence of such language does not necessarily exclude arbitrability under the significant relationship test.

Instead, requiring parties who seeking the broadest arbitration provision

possible to set forth a laundry list of claims would make the provision subject to the maxim *expressio unius, exclusio alterius*, thereby possibly defeating the parties' original intent. The issue of arbitrability must also not become subject to semantic manipulation, whereby a party may avoid arbitration by carefully framing their theory of recovery to avoid the arbitration provision. Once it is determined pursuant to the significant relationship test, that a tort claim such as Sullivan's "arises out of or relates to" a contract requiring arbitration, it becomes irrelevant that the tort claim is not specifically described in the arbitration provision.

Sullivan misstates Sears TPC's contention regarding the scope of the arbitration provision in this case. Sears TPC does not contend that all conceivable disputes between the parties are subject to arbitration merely because a contractual relationship exists. For example, if a Sears TPC employee misapplied pesticides and thereby injured Sullivan or a third party (as in Michaels), or struck Sullivan or a third party with an object, thereby injuring them, such common law negligence claims would not be subject to arbitration. Seifert, 750 So. 2d at 640 (citing Dusold v. Porta-John Corp., 167

Ariz. 358, 807 F.2d 526 (Ct.App. 1990)).

On the other hand, where the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of such duties arises from the contract and is thus subject to arbitration. Seifert, 750 So. 2d at 639. In this case, any duty relating to spiders - whether to "control" or "eradicate" them - derives entirely from the contract between Sears TPC and Sullivan, thus making Sullivan's claims arbitrable.

Sullivan points to the Fourth District's belief that the arbitration provision in this case is narrower than the provision at issue in Terminix Int'l. Co., L.P. v. Ponzio, 693 So. 2d 104 (Fla. 5th DCA 1997). The provision here, which is identical to the provision in Michaels, calls for arbitration of "any controversy or claim between [the parties] arising out of or relating to the interpretation, performance or breach of any provision of this agreement." (App. - C)(emphasis supplied). The Fourth District in this case and the Fifth District in Ponzio believed that the additional "interpretation, performance or breach"

language narrowed the scope of arbitration. Ponzio, 668 So. 2d at 108.[1]

Even if this Court believes the scope of the arbitration provision here is narrower than the provision in Ponzio, the facts of Sullivan's claims still fall within the provision here, because Sullivan's claims clearly involve the "interpretation, performance [and] breach" of the Agreement. The allegations and issues raised by Sullivan's Complaint (e.g., whether Sears TPC was obligated to exterminate or control spiders; whether the chemicals were ineffective; whether the methods were ineffective; and whether Sears TPC misrepresented the effectiveness of its services) are all totally based upon the issues of interpretation, performance and breach. Accordingly, these additional terms could not be interpreted to exclude Sullivan's claims.

Moreover, Sears TPC respectfully suggests that the distinction based on those additional terms is an artificial one, without legal or practical meaning. First, the additional terms necessarily occupy the entire field of

[1] It is of no small significance, however, that the Fifth District in Ponzio and the Fourth District in this case both pointed to the most significant distinguishing factor - that Michaels involved a common law tort while Ponzio, and this case, involved only alleged breaches of the contractually-based duty to "control" or "exterminate" insects. Ponzio, 693 So. 2d at 107; Sullivan, D855.

disputes which may arise out of or relate to an agreement. Second, and perhaps more importantly, the additional terms merely track the significant relationship test adopted by this Court in Seifert, which dealt with an arbitration provision as "broad" as the provision in Ponzio. Seifert, 750 So. 2d at 635. In determining whether the Seiferts' wrongful death claim had a sufficiently significant relationship to their construction contract so as to require arbitration, this Court observed that the contract suggested that the parties "anticipated potential disputes arising out of the interpretation, performance or breach of the contract and accordingly provided that disputes as to those matters be arbitrated." Seifert, 750 So. 2d at 641(emphasis supplied).

This Court's analysis in Seifert thus looked to whether issues of interpretation, performance or breach were involved in the wrongful death claim. Although this Court concluded that those issues were not involved there and rejected arbitration, Seifert clearly says that the issues of interpretation, performance and/or breach are the touchstones of determining whether a significant relationship exists between a tort claim and an

agreement, such that the claim will be arbitrable as one that "arises out of or relates to" the agreement.

The issues of interpretation, performance and breach are exactly what Sullivan's lawsuit is all about. The express inclusion of those terms in this arbitration provision simply cannot be interpreted as contractually limiting the scope of arbitration because, even in their absence, those terms must be implied by the courts in any event when determining arbitrability.

III. THE DETERMINATION THAT SULLIVAN'S CLAIM IS SUBJECT TO ARBITRATION NECESSARILY MEANS SHE WAIVED A TRIAL BY JURY

Sullivan also argues that this arbitration provision does not indicate an intent by the parties to waive the right to a jury trial for personal injury claims. It is well settled that the right to trial by jury can be waived. Visa Centre Venture v. Unlike Anything, Inc., 603 So. 2d 576, 580 (Fla. 5th DCA 1992)(citations omitted). In this case, the arbitration provision, which is located on the front of the Agreement immediately above Sullivan's signature, with a bold-faced heading of "ARBITRATION," specifically provides that arbitrable claims "will be settled exclusively by arbitration."

(App. - C)(emphasis supplied).

Sullivan does not argue that the arbitration provision is defective in its entirety. Nor does she claim it was hidden from her or that she did not understand it. Rather, she contends the provision is not triggered by the nature of this particular claim. Therefore, she does not dispute that she waived her right to a jury for some claims - just not for this one.

But, the issue of Sullivan's waiver of a right to a jury, just as in all other cases involving the scope of an arbitration provision, stands or falls with the issue of arbitrability. No authority can be found to support the proposition that either the Florida or United States Constitutions require that arbitration provisions contain an express waiver of the right to a jury before those provisions may be validly enforced as to arbitrable claims. Adopting Sullivan's argument would effectively render constitutionally void the vast majority of arbitration provisions in use today.

Although Sullivan does not expressly argue that the right to a jury is "stronger" in personal injury tort actions, as opposed to commercial tort or contract actions, this theme appears to underlie her argument. Again,

however, there is no authority to support the contention. The right to a jury either exists or it does not and, if it exists, it can be waived. In this case, it was waived.

So too, in drafting the Florida Arbitration Act, the legislature could have prohibited contracts requiring arbitration of personal injury claims, as some other states have done, but it chose not to. (Initial Brief, p. 4). This Court should decline Sullivan's invitation to engraft, either expressly or by implication, such a non-existent prohibition on to Florida law.

Sullivan also argues, for the very first time, that the arbitration provision, which embodies Sullivan's waiver of a jury, should not be enforced because it is a "contract of adhesion." First, and foremost, any argument that the Agreement is one of adhesion has been waived, as it was not raised either in the trial court or in the briefs filed with the District Court below. Indeed, Sullivan has even waived this argument here, because she concedes that this Court need not address the first element of determining arbitrability: the existence of a valid, written agreement to arbitrate. (Answer Brief, p. 6).

Sullivan does not even suggest there is any evidence that the

Agreement is procedurally or substantively unfair, so as to support the belated "adhesion" argument. The arbitration provision, which is clearly identified on the face of the Agreement, is substantially similar in form to the majority of such provisions commonly used today. Also, there is no evidence that Sullivan has been disparately treated in comparison to other Sears TPC customers, or that she could not have rejected the Sears TPC contract in favor of any one of the myriad of competing pest control service providers who might have different contracts.

Finally, Sullivan appears to argue that just because the damages she seeks are for personal injuries, the contract should be considered one of adhesion. There is plainly no merit to this conclusion-driven analysis. Whether any contract is one of adhesion depends on the nature of the contract and the circumstances surrounding its formation. The type of claim does not dictate, or even influence the result. In short, even if the argument were timely made, this is clearly not a contract of adhesion.

IV. CONFLICT EXISTS BETWEEN THE DISTRICTS REQUIRING RESOLUTION BY THIS COURT

Sullivan argues that the Fourth District's decision in this case is

somehow "in accord" with the Fifth District's decision in Ponzio because of the asserted differences in the arbitration provisions.[2] The Fourth District obviously disagreed with Sullivan's interpretation of the cases when it certified conflict in this case without the benefit of either oral argument or a request for certification by either party. (App. - A).

Interestingly, however, Sullivan contends that this Court in Seifert "quashed the Fifth District's decision in Ponzio when it approved Michaels." (Answer Brief, p. 20).[3] This statement is patently incorrect, a conclusion readily evident by the citation in Seifert to Ponzio as authority for the three elements to be considered by courts in deciding the issue of arbitration. Seifert, 750 So. 2d at 636.

More importantly, Sullivan's interpretation of Seifert as disapproving Ponzio, albeit wrong, necessarily reflects the extent to which the Fourth District's decision in this case conflicts with Ponzio. Not only does the Fourth

---

[2]As discussed above, there is no significant difference, and if there is, Sullivan's claims still fall within "her" clause.

[3]Sullivan made the same argument before the trial court at the hearing on Sears TPC's motion: i.e., that this Court's approval of Michaels in Seifert constituted disapproval of Ponzio. The Fourth District below impliedly agreed. Sullivan, 26 Fla. L. Weekly, D855.

District in this case wonder aloud in its decision why conflict was not certified between Ponzio and Michaels (the latter case being the principal foundation for the decision below), the Fourth District here goes a step further and suggests that Ponzio may no longer be good law after Seifert.

Sears TPC respectfully submits that prior to the decision below, there was in fact no conflict between Ponzio and Michaels. Both cases were correctly decided on their facts, using roughly the same tests later explained by this Court in Seifert. The decisions in Ponzio and Michaels provided contrasting, but nevertheless equally correct decisions to guide trial courts in determining the arbitrability of tort claims. The Fourth District's decision below, however, clearly creates a conflict between the Districts by applying the holding of Seifert so as to virtually overrule Ponzio. Thus, the decision below obviously conflicts with Ponzio. In order to preserve the meaning of this Court's decision in Seifert, this conflict must be resolved by compelling Sullivan to arbitrate her claims.

CONCLUSION

The principal issue here is whether the claim is based upon an alleged

breach of duties created by the Agreement. Although she has tried to creatively frame her legal theories to avoid arbitration, Sullivan could never demonstrate that Sears TPC was responsible for pest control because of a common law duty. Even construing the arbitration provision narrowly, the substantial relationship between Sullivan's claims and the interpretation, performance or breach of the Agreement is overwhelmingly clear.

Sullivan's remaining arguments fall once the substantial relationship between the claim and contract is determined. The parties intended to arbitrate claims falling within the provision, and that intent to arbitrate constitutes an intent to waive a jury trial. The fact that the words "torts" or "personal injury actions" are not specifically identified in the provision is not determinative. Rather, the substantial relationship between the claims and the contract triggers the right to arbitrate.

Finally, this Court must restore the balance between Ponzio, where the tort claim was arbitrable, and Michaels, where the tort claim was not. The Fourth District's decision should be quashed and arbitration here required.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: William M. Julien, Esquire, Grossman & Goldman, P.A., 1098 N.W. Boca Raton Boulevard, Boca Raton, Florida, 33432 and Howard S. Grossman, Esquire, Grossman & Goldman, P.A., 1098 N.W. Boca Raton Boulevard, Boca Raton, Florida, 33432, via regular U.S. mail this _____ of July, 2001.

ARNSTEIN & LEHR
Attorneys for Petitioner, Sears Termite and Pest Control, Inc.
Northbridge Centre - Suite 600
515 North Flagler Drive
West Palm Beach, FL 33401-4323
(561) 833-9800 [ofc]
(561) 655-5551 [fax]

JOHN A. TURNER
Florida Bar No.: 000922
WILLA A. FEARRINGTON
Florida Bar No.: 173252

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies the contents of this brief meet the font requirements set forth under Fla. R. App. P. 9.210(a). The size and style of type used in this brief is 14 point Arial.

ARNSTEIN & LEHR
Attorneys for Petitioner, Sears Termite and Pest Control, Inc.
Northbridge Centre - Suite 600
515 North Flagler Drive
West Palm Beach, FL 33401-4323
(561) 833-9800 [ofc]
(561) 655-5551 [fax]

JOHN A. TURNER
Florida Bar No.: 000922
WILLA A. FEARRINGTON
Florida Bar No.: 173252

111612