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SUPREME COURT OF FLORIDA

CASE N^o SC14-1211

L.T. N^o 3D13-2735

OCHA ENGINEERING CORP.,

Petitioner,

v.

AMS STAFF LEASING, INC.,

Respondent.

**RESPONDENT'S AMENDED ANSWER TO
PETITIONER'S JURISDICTIONAL BRIEF**

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RULES

Art. V. §3(b)(3), Fla. Const. 2

PRELIMINARY STATEMENT

Ocha Engineering Corp. will be referred to as Ocha. AMS Staff Leasing, Inc. will be referred to as AMS.

In accordance with Rule 9.120(d), the Appendix to this Brief contains a copy of the decision rendered by the Third District. References to the Appendix are designated as [A. #].

Except as noted, all **emphasis** is ours.

STATEMENT OF THE CASE AND FACTS

AMS and Ocha entered into a contract providing that AMS would provide Ocha with workers for a project in exchange for payment. One of those workers was injured while working at Ocha's job site, and the worker sued both Ocha and AMS for workers' compensation. The claim proceeded to the Office of the Judges of Compensation Claims ("OJCC"), where Ocha asserted a claim against AMS for indemnification of any workers' compensation claims due to a provision in the parties' contract. AMS responded by arguing that the OJCC only had subject matter jurisdiction over workers' compensation claims, and, thus, the OJCC could not adjudicate the contract dispute. The OJCC agreed that it lacked subject matter jurisdiction, and it advised the parties they would have to litigate the indemnification claim in circuit court.

Shortly thereafter, Ocha filed a four-count complaint against AMS in Miami-Dade Circuit Court, claiming indemnification, breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty. AMS initially responded by filing a motion to dismiss Ocha's complaint on the merits, AMS Staff Leasing, Inc. ("AMS") appeals an order denying its motion to dismiss the complaint of Ocha Engineering Corp. ("Ocha") and to compel arbitration.

[A. 2-3] (internal footnote omitted).

SUMMARY OF THE ARGUMENT

THE PANEL’S DECISION DOES NOT CONFLICT WITH THIS COURT’S HOLDINGS IN *BASULTO* OR *SEIFERT*.

The issue in this case is whether a party to an arbitration agreement waives its right to compel arbitration by successfully raising lack of subject matter jurisdiction in one court and by filing, before the court with subject matter jurisdiction, a motion to dismiss on the merits. [A. 3-4]. The panel decision found no waiver. [A. 3-4].

The panel’s decision in this case does not expressly and directly conflict with this Court’s decisions in *Basulto v. Hialeah Automotive*, 39 Fla. L. Weekly S140 (Fla. March 20, 2014) or *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999) because neither of those cases are waiver cases.

REPLY ARGUMENT

THE PANEL’S DECISION DOES NOT CONFLICT WITH THIS COURT’S HOLDING IN *BASULTO V. HIALEAH AUTOMOTIVE*.

This court’s jurisdiction is limited to review of decisions of the district court that “expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.” Article 5, § 3 (b)(3) of the Florida Constitution. As we will show, the panel’s decision does not conflict with this Court’s decisions in *Basulto* or *Seifert*.

The Issue Before the Panel.

The district court panel was asked to decide whether a party to an arbitration agreement waived its right to compel arbitration by successfully raising lack of subject matter jurisdiction in one court and by filing, before the court with subject matter jurisdiction, a motion to dismiss on the merits. [A. 2-3]. The Panel held that a party to an arbitration agreement did not waive its right to enforce that agreement by filing a motion to dismiss on the merits. [A. 3]. The panel also held that a party to an arbitration agreement did not waive its right to enforce that agreement by successfully challenging a court's subject matter jurisdiction. [A. 3-4].

***Basulto* is a Validity of Contract Case.**

Basulto v. Hialeah Automotive, 39 Fla. L. Weekly S140 (Fla. March 20, 2014) is a validity of contract case. The issue before the *Basulto* Court was whether the appellate court's reversal of a trial court order finding that no arbitration agreement existed conflicted with *Seifert* where there was clear and convincing evidence supporting the trial court's finding that there was no meeting of the minds between the parties and, thus, no valid agreement to arbitrate. *Basulto*, Slip at 8. In quashing the district court's decision, this Court held that "pursuant to the first prong of the *Seifert* elemental analysis, the trial court's legal

conclusion that no valid arbitration agreement exists was a proper basis to deny the motion to compel arbitration.” *Id.*

***Seifert* is a Validity of Contract and Arbitrable Issue Case.**

Seifert v. U.S. Home Corp., 750 So. 2d 633 (Fla. 1999) is a validity of contract and arbitrable issue case. The issue before the *Seifert* Court was whether a death arose out of the contract and, thus, whether a wrongful death claimant could be compelled to arbitrate under the contract. The *Seifert* Court held that a wrongful death claim was not subject to arbitration. In reaching this decision, the court found that “there are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.” *Seifert*, 750 So. 2d at 636. (internal citation omitted). The court also found that “The issue here relates to the first two prongs, and, of course, boils down to an issue of whether the wrongful death action is subject to arbitration.” *Id.*

The Instant Action is a Waiver Case - - not a Validity of Contract or Arbitrable Issue Case.

The instant action is a waiver case - - not a validity of contract or arbitrable issue case. The district court panel was asked to decide whether a party to an arbitration agreement waived its right to compel arbitration by successfully raising lack of subject matter jurisdiction in one court and by filing, before the court with

subject matter jurisdiction, a motion to dismiss on the merits that was later amended to include an arbitration demand. [A. 2-3]. The panel found no waiver. [A. 3-4]. The panel's decision in this case does not conflict with *Basulto* or *Seifert* because neither of those cases are waiver cases.

Ocha Concedes that the First Two Prongs of the *Seifert* Test Were Met.

Ocha concedes that the first two prongs of the *Seifert* test, *i.e.*, “(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists,” were been met and that the sole issue for the panel to decide was whether AMS had waived its right to arbitration.

In the instant case, the third prong is the critical issue for this Court to review. OCHA does not dispute the existence of the provision in the contract; however, it vehemently disputes Appellant's right to assert it years after the dispute arose and after Appellant had taken actions to litigate the case in Florida's trial courts, particularly disputing the merits of this case.

Answer Brief at Page 7.

Further, Ocha did not ask for an evidentiary hearing, or challenge the validity of the arbitration agreement in the trial court. Ocha may not now complain that that the trial court failed to determine the validity of its arbitration agreement.

CONCLUSION

Since the panel's decision in this case does not conflict with *Basulto* or *Seifert*, review of this case should be denied.

CERTIFICATE OF SERVICE

WE CERTIFY that a true and correct copy of the foregoing was served by electronic service pursuant to Rule 2.516 of the Florida Rules of Civil Procedure to **Eduardo E. Dieppa, III, Esq.**, 2097 West 76 Street, Hialeah, Florida 33016, *Counsel for Ocha Engineering Corp.*, email: edieppa@dieppalaw.com; martha@dieppalaw.com; and **Claire Diaz Bhathena, Esq.**, 18504 Kitty Hawk Ct, Port St. Lucie, Florida, *Counsel for Ocha Engineering Corp.*, email: cbhathena@diazbhathena.com, on **July 23, 2014**.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the font utilized in this brief is New Times Roman and the size is 14 point.

By: 
CHARLES M-P GEORGE