ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEWIS HELFSTEIN;
MADALYN HELFSTEIN;
SUMMIT LASER PRODUCTS, INC; AND SUMMIT TECHNOLOGIES, LLC.
Appellant,
vs.
UI SUPPLIES;UNINET IMAGING, INC.; AND NESTOR SAPORITI,
Respondent.

No. 56383

REPLY TO RESPONDENTS PARTIAL OPPOSITION TO APPELLANTS MOTION FOR STAY PENDING APPEAL

I. Introduction

The Saporiti defendants ("Respondents") purchased a business from the Helfstein defendants ("Appellants"). In their agreement, they agreed that "Any controversy or claim arising out of or relating to this Agreement, or its breach, shall be settled by binding arbitration in accordance with the commercial rules of the American Arbitration Association, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. The venue of any arbitration shall be Nassau County, New York."

There was no exception to this clause. There was no exception for claims for contribution and indemnity. There was no exception for claims asserting the falsity of representations and warranties contained in the agreement. Instead, in the broadest possible terms, the agreement stated "Any controversy or claim arising out of or relating to this Agreement, or its breach, shall be settled by binding arbitration…"

The claim asserted by the Saporiti defendants against the Helfstein defendants is governed by the arbitration agreement. They could have no other claim, since they have no relationship other than the relationship created in the agreement containing the arbitration provision.

Under the standards enunciated in Mikohn Gaming Corp. v. McCrea, 89 P.3d 36, 120 Nev. 248 (Nev. 2004), this Court should grant a stay, in order to give effect to the arbitration agreement.

II. Legal Argument

A. THE MIKOHN DECISION AND NEVADA PUBLIC POLICY BOTH SUPPORT THE GRANTING OF A STAY WITHOUT BOND

The opposition brief doesn't even mention the Mikohn decision, but instead simply argues that the Court should apply the traditional tests for the granting of injunctive relief. Thus, the opposition has ignored the governing law on the question of whether to grant a stay when an appeal is taken from an order denying a motion to compel arbitration.

The Mikohn decision explained that a stay should generally be granted in such instance, and the burden of proof is on the party opposing the stay to show that the appeal lacks merit or that they will suffer irreparable harm. Specifically, the decision states:

> Consequently, the first stay factor-whether the object of the appeal will be defeated if the stay is denied-takes on added significance and generally warrants a stay of lower court proceedings pending resolution of the appeal. The other stay factors remain relevant, but **absent a strong showing that the appeal lacks merit or that irreparable harm will result if a stay is granted, a stay should issue to avoid defeating the object of an appeal from an order refusing to compel arbitration**. (Emphasis added). See, 120 Nev. at 250.

The Saporiti defendants have not shown that they would suffer irreparable harm, nor have they shown that the appeal lacks merit. Accordingly, the stay should be granted.

The Saporiti defendants have also argued for a requirement that any stay be conditioned upon the posting of a $2,000,000 supersedeas bond, under NRCP 62(d). This argument is without merit, for several reasons. First, NRCP 62(d) is inapplicable as it speaks of bond requirements to prevent execution following entry of judgment. Second, the Mikohn decision never even mentioned a bond requirement in the specific instance where a stay is granted pending appeal from an order denying a motion to compel arbitration. Third, and most important, there is nothing to prevent Saporiti from proceeding against the Helfstein defendants in accordance with his written agreement to arbitrate. The stay would not prevent them from pursuing their remedy, it would merely require them to pursue it, if at all, in accordance with the written agreement to arbitrate.

B. SAPORITI'S CLAIMS FOR CONTRIBUTION OR INDEMNITY ARISE OUT OF THE AGREEMENT CONTAINING THE ARBITRATION PROVISION

The Saporiti defendants continue to argue that the Helfstein defendants are indispensable parties, and because of that, the Court has to stay the entire case, or not enter a stay at all. The corollary of their argument is that the Court would either have to require arbitration of the entire case (thereby requiring a non party to the arbitration agreement (the Plaintiffs) to arbitrate), or not order arbitration at all (thereby depriving the party to the arbitration agreement of the benefit of their bargain).

There is no authority to support this novel proposition. An indemnity (or contribution) claim is not a compulsory claim and can easily be severed. More important, a party who is or may be liable for indemnity or contribution is not an indispensable party.

To hold that the Helfstein defendants are indispensable parties would require a finding that all of a defendant's potential indemnitors would have to be joined as parties to prevent dismissal of a Plaintiff's case. This result would be absurd. Indemnity claims are not compulsory claims, and they are frequently litigated as separate cases, following disposition of the underlying claim. See: Rodriguez v. Prima Donna Company, LLC, 125 Nev. Adv. Op. 45, 216 P.3d 793 (2009)

By way of contrast, there are several examples of cases where the Nevada Supreme Court has found certain parties to be indispensable, but none of them are analogous to the indemnity (or contribution) claim asserted here. For instance, an owner of legal title to real property is an indispensable party in a quiet title action, See Schwob v. Hemsath, 98 Nev. 293, 646 P.2d 1212 (1982); an assignee of an interest in a judgment is a proper plaintiff in an enforcement action, See Mandlebaum v. Gregovich, 24 Nev. 154, 50 P. 849 (1897); in an action to set aside a conveyance of property into trust, the trust beneficiaries must be joined, See Robinson v. Kind, 23 Nev. 330, 47 P. 977 (1897); when a plaintiff seeks to set aside a conveyance of property, the person who received the property in the conveyance must be joined as a party, See Johnson v. Johnson, 93 Nev. 655, 572 P.2d 925 (1977); where unsuccessful bidder filed suit to challenge public contract award, successful bidder was an indispensable party, See Blaine Equipment Co., Inc. v. State, 138 P.3d 820, 122 Nev. 860 (Nev. 2006).

None of the cited cases are analogous to the case at bar. Having settled with the Helfstein defendants, the Plaintiffs remain free to pursue their claims against the Saporiti defendants, and the Saporiti defendants remain free to pursue their counterclaim against the Plaintiffs. Mr. Helfstein's testimony may be considered at the trial of the case, just like any witness, but if

Saporiti wants to pursue a claim against the Helfstein defendants, they should have to do it in arbitration, because that is what they agreed to do.

There is a strong policy in favor of arbitrability of disputes and an agreement to arbitrate is to be given effect. There is no exception for instances where a party to an arbitration agreement seeks to recover pursuant to the agreement due to being sued by a third party. A stay is the proper remedy at this time.

Respectfully Submitted,

FOLEY & OAKES, PC

J. Michael Oakes, Esq.
850 East Bonneville Avenue
Las Vegas, Nevada 89101
Attorneys for Appellants

CERTIFICATE OF MAILING

Pursuant to NRAP 25, I hereby certify that on the 14 day of September, 2010, I mailed a copy of the foregoing **REPLY TO RESPONDENTS PARTIAL OPPOSITION TO APPELLANTS MOTION FOR STAY PENDING APPEAL** addressed as follows:

Gary E. Schnitzer, Esq,
Michael B. Lee, Esq.
Kravitz, Schnitzer, Sloane & Johnson Chtd.
8985 S. Eastern Avenue, Suite 200
Las Vegas, NV 89123
Facsimile No. 702-362-2203
Attorneys for Defendants UI Supplies, Uninet Imaging and Nestor Saporiti

Jeffrey R. Albregts, Esq.
Santoro, Driggs, Walch, Kearney,
Holley & Thompson
400 South Fourth Street
Third Floor
Las Vegas, NV 89101
Facsimile No. 702- 791-1912
Attorneys for Plaintiffs

Byron L. Ames, Esq.
Jonathan D. Blum, Esq.
Tharpe & Howell
3425 Cliff Shadows Parkway, Suite 150
Las Vegas, NV 89129
Facsimile No. 702-562-3305
Attorneys for Plaintiffs

Robert Freedman, Esq.
Tharpe& Howell LLP
15250 Ventura Blvd., 9th Floor
Sherman Oaks, CA 91403
Facsimile No. 818-205-9944
Attorneys for Plaintiffs

An Employee of Foley & Oakes, PC