IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 56383

LEWIS HELFSTEIN; MADALYN HELFSTEIN; SUMMIT LASER PRODUCTS, INC; AND SUMMIT TECHNOLOGIES, LLC.

Appellants,

vs.

UI SUPPLIES; UNINET IMAGING, INC.; AND NESTOR SAPORITI

Respondents.

Interlocutory Appeal from an Order Denying Appellant's Motion for Stay or Dismissal, and to Compel Arbitration
Eighth Judicial District Court, Clark County, Nevada
The Honorable Elizabeth Gonzalez, District Judge

Appellant's Opening Brief

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I.

STATEMENT OF JURISDICTION

This is an appeal from an Order entered by the Honorable Elizabeth Gonzalez of the Eighth Judicial District Court, Clark County, Nevada, denying a Motion for Stay or Dismissal and to Compel Arbitration. The Notice of Entry of Order was served by mail on June 16, 2010. See Appellant's Appendix (hereafter referred to as "AA") at v.1, 196-200. A timely Notice of Appeal was filed on July 7, 2010. See AA at v.1, 201-203.

This court has jurisdiction of this appeal pursuant to NRS 38.247 (1)(a), which authorizes an interlocutory appeal from an order denying a Motion to Compel Arbitration, and NRAP 3A(b)(6), which authorizes an interlocutory appeal from an order "refusing to change the place of trial..."

On October 19, 2010, this Court entered an Order Granting Motion for Stay, staying the lower court proceedings "as they pertain to the crossclaims/third party claims" that are the subject of this appeal.

II.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in refusing to enforce the arbitration agreement contained in an Agreement for the Purchase and Sale of Assets, (hereafter referred to as the "Sales Agreement"); and

2. Whether the District Court erred in refusing to enforce the forum selection clause contained in the Sales Agreement.

3. Whether the District Court erred in refusing to change the place of trial.

///

III.

STATEMENT OF THE CASE

Plaintiffs below filed their complaint on April 3, 2009. AA, v.1, 1-16. They named two sets of defendants, consisting of the Appellants herein (also known as the "Helfstein defendants") and the Respondents herein (also known as the "Saporiti defendants"). The Helfstein defendants were Lewis Helfstein, Madelyn Helfstein, Summit Laser Products, Inc., and Summit Technologies, LLC. The Saporiti defendants were Nestor Saporiti, UI Supplies, and Uninet Imaging, Inc.

The Plaintiffs were alleging various claims arising out of a Consulting Agreement between the Plaintiffs and Appellant Summit Technologies, LLC. (See paragraph 7 of the Complaint, AA, v.1, 1-16). Claims were also asserted against the Respondents, as purchasers of the assets of Summit Technologies, LLC, including claims for breach of contract (see paragraph 25), promissory estoppel (see paragraphs 37-39), unjust enrichment (see paragraphs 40 – 42), and various other related claims.

Prior to filing a responsive pleading, the Appellants settled with the Plaintiffs, and Plaintiffs below filed a Notice of Voluntary Dismissal on November 23, 2009. AA, v.1, 38-39.

The Respondents then filed an Amended Answer, Counterclaim, and Crossclaim on January 19, 2010. AA, v.1, 40-73. The Crossclaim (which was really a third party claim because Appellants had been dismissed from the case) alleged (i) that the parties entered into an Agreement for the Purchase and Sale of Assets and the Respondents relied upon its provisions (see paragraphs 3 - 6), (ii) that the Respondents have been sued by the Plaintiffs, attempting to enforce the Plaintiff's Consulting Agreement against them (see paragraph 7), (iii) that Appellants "breached the term of the Sales Agreement by exposing Cross-Claimants to alleged damages by Plaintiffs related to the Consulting Agreement" (see paragraph 10), (iv) that Appellants "breached their obligations of good faith and fair dealing" (see paragraph 15), (v) that Appellants "did not comply with their duties

under the Sales Agreement nor with their underlying representations" (see paragraph 20), and (vi) that Appellants had failed to live up to their obligations under the Sales Agreement in various other manners (see paragraphs 25, 26, 31), all of which were similarly "arising out of" or "related to" the Sales Agreement.

The Appellants filed a Motion for Stay or Dismissal, and to Compel Arbitration on April 20, 2010. AA, v.1, 74-111. They argued that the claims asserted against them by the Respondents all arose out of the Sales Agreement, and under the Sales Agreement, the parties had agreed to mandatory arbitration in Nassau County, New York of "any controversy or claim arising out of or relating to this Agreement, or its breach." The motion was supported by the Affidavit of Lewis Helfstein, which authenticated the Agreement. AA, v.1, 87-88, 112-117.

The motion seeking enforcement of the arbitration clause and the forum selection clause was denied by an order entered on June 15, 2010. AA, v.1, 196-200.

This appeal was taken from the June 15, 2010 order, as NRS 38.247(1)(a) authorizes an interlocutory appeal of an order denying a motion to compel arbitration, and NRAP 3A(b)(6) authorizes an interlocutory appeal from an order "refusing to change the place of trial..."

IV.

STATEMENT OF FACTS

The Respondents purchased a business from the Appellants. The purchase and sale was governed by the Sales Agreement, AA, v.1, 89-108.

On page 1 of the Sales Agreement, it states that "This agreement is made as of March 30, 2007, at Bohemia, New York..." AA, v.1, 89.

On page 5 of the Sales Agreement, the Seller assigned and the Buyer assumed the lease of the premises at 95 Orville Drive, Bohemia, New York. AA, v.1, 93.

On page 10 of the Sales Agreement, the Buyer represented that "Buyer is a Corporation, duly organized, validly existing, and in good standing under the laws of the State of New York". AA, v.1, 99.

On page 15 of the Sales Agreement, it states 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." AA, v.1, 104.

On pages 15 and 16 of the Sales Agreement, both Seller and Buyer gave New York addresses for the giving of any notices required under the Agreement. AA, v.1, 104-105.

On page 16 of the Sales Agreement, the definition of a "business day" excluded any "legal holiday in the State of New York." AA, v.1, 105.

On page 17 of the Sales Agreement, it states that "this Agreement is made in, and shall be construed under, the substantive laws of the State of New York, exclusive of choice of law principles. Nassau County, New York shall be the sole venue for any action or arbitration brought pursuant to this agreement." AA, v.1, 106.

The claims asserted against the Appellants by the Respondents are for reimbursement of any amounts that Respondents are required to pay to the Plaintiff as a result of having purchased the assets from the Appellants pursuant to the Sales Agreement. Such claims fall directly within the broadly worded arbitration provision of the Sales Agreement.

V.

SUMMARY OF THE ARGUMENT

Arbitration agreements are strongly favored under the law. This is true under both New York law and Nevada law. The intention of the parties to arbitrate their disputes should have been honored by the District Court.

Furthermore, the intention of the parties to litigate their disputes in Nassau County, New York should have been enforced. This was not a standard form "take it or leave it" contract that was used by one side of the transaction on a repetitive basis. It was a contract between two New York entities with equal bargaining power, who agreed to resolve their disputes, through arbitration in New York under New York law.

The District Court erred in failing to enforce these terms of the Sales Agreement, and in requiring the Appellants to defend these claims in an improper venue.

VI.

ARGUMENT

A. AGREEMENTS TO ARBITRATE ARE FAVORED UNDER THE LAW, AND THE ARBITRATION AGREEMENT SHOULD HAVE BEEN ENFORCED

The Agreement contains a choice of law provision stating that New York law will apply to any dispute. Regardless of whether New York law or Nevada law is applied, the result is the same, because both states have a strong public policy in favor of the enforcement of arbitration provisions.

Under New York law, the case of Harris vs. Shearson Hayden Stone, 82 A.D. 2d 87, 441 N.Y.S.2d 70 (N.Y.A.D. 1981), aff'd 56 N.Y.2d 627, 435 N.E.2d 1097, 450 N.Y.S.2d 482 1982), held that:

> "[T]his State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties." *(Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Amer.*, 37 NY2d 91, 95; see *Matter of Maye [Bluestein]*, 40 NY2d 113.) Moreover, "[p]arties to a contract may agree, if they will, that any and all controversies growing out of it in any way shall be submitted to arbitration. If they do, the courts of New York will give effect to their intention." *(Matter of Marchant v Mead-Morrison Mfg. Co.*, 252 NY 284, 298.)"It has long been this State's policy that, where parties enter into an agreement and, in one of its provisions, promise that any dispute arising out of or in connection with it shall be settled by arbitration, any controversy which arises between them and is within the compass of the provision must go to arbitration." See 82 A.D. 2d at 93.

The strong policy in favor of arbitration is similarly well known in Nevada. NRS 38.035 states:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract.

As described in Phillips v. Parker, 106 Nev. 415, 794 P.2d 716 (1990), the Nevada Supreme Court has emphasized the desirability of enforcement of an arbitration agreement between the parties. The Phillips decision contains the following pronouncements of Nevada law on the subject:

> "There is a strong public policy favoring contractual provisions requiring arbitration of a dispute resolution mechanism. Consequently, when there is an agreement to arbitrate we have said that there is a "presumption of arbitrability."
> ...
> "We have previously held that once an arbitrable issue has been found to exist, all doubts concerning the arbitrability of the subject matter should be resolved in favor of arbitration. Exber, Inc. v. Sletten Constr. Co., 92 Nev. 721, 729, 558 P.2d 517, 522 (1976). Courts are not to deprive the parties of the benefits of arbitration they have bargained for, and arbitration clauses are to be construed liberally in favor of arbitration." See 106 Nev. at 417.

The allegations of the Respondents against the Appellants are "arising out of" or "related to" the Sales Agreement that contained the arbitration provision. The District Court erred by not giving effect to those provisions.

B. FORUM SELECTION CLAUSES ARE ENFORCEABLE, AND THE CHOICE OF FORUM PROVISION SHOULD HAVE BEEN GIVEN EFFECT

The Sales Agreement contains a forum selection clause, designating Nassau County, New York as the forum for any litigation or arbitration.

"Where such forum selection provisions have been obtained through `freely negotiated' agreements and are not `unreasonable and unjust,' their enforcement does not offend Due Process." See: Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, n.14 (1985).

Since the Agreement was made in New York among New York entities, there is nothing "unreasonable and unjust" about enforcing the venue provision as written. It bears repeating that:

On page 1 of the Sales Agreement, it states that "This agreement is made as of March 30, 2007, at Bohemia, New York..." AA, v.1, 89.

On page 5 of the Sales Agreement, the Seller assigned and the Buyer assumed the lease of the premises at 95 Orville Drive, Bohemia, New York. AA, v.1, 93.

On page 10 of the Sales Agreement, the Buyer represented that "Buyer is a Corporation, duly organized, validly existing, and in good standing under the laws of the State of New York". AA v.1, 99.

On page 15 of the Sales Agreement, it states 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." AA, v.1, 104.

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On page 17 of the Sales Agreement, it states that "this Agreement is made in, and shall be construed under, the substantive laws of the state of New York, exclusive of choice of law principles. Nassau County, New York shall be the sole venue for any action or arbitration brought pursuant to this agreement." AA, v.1, 106.

Thus, the State of New York had significant ties to the transaction, and those ties were mentioned throughout the Sales Agreement. By way of contrast, the State of Nevada was not mentioned anywhere in the Sales Agreement. Under these circumstances, there was no evidence

and no valid rationale to refuse to give effect to the intention of the parties concerning their choice of forum. There was nothing "unreasonable or unjust" about the decision of the parties to choose New York as the forum for their disputes. Their agreement should have been enforced.

C. VENUE WAS IMPROPER IN CLARK COUNTY

Even without a valid forum selection clause, venue for the cross claim was improper.

NRS 13.010 states:

> "Where actions are to be commenced.
>
> 1. When a person has contracted to perform an obligation at a particular place, and resides in another county, the action must be commenced, and, subject to the power of the court to change the place of trial as provided in this chapter, must be tried in the county in which such obligation is to be performed or in which the person resides; and the county in which the obligation is incurred shall be deemed to be the county in which it is to be performed, unless there is a special contract to the contrary."

Neither of these provisions point to Clark County as a proper venue for the dispute between Appellants and Respondents. The Sales Agreement recited that the agreement was "made as of March 30, 2007, at Bohemia, New York..." Thus, since "the county in which the obligation is incurred shall be deemed to be the county in which it is to be performed," Bohemia, New York was the place of performance, not Clark County. Furthermore, neither of the parties "resided" in Clark County.

Given the improper venue and the clear forum selection clause, it is clear that Clark County is not a proper venue for this dispute, and even if it was a permissible venue, Nassau County, New York, is the more appropriate forum for the adjudication of these claims.

VII.

Conclusion

The District Court erred in failing to give effect to the intentions of the parties as evidenced by the Sales Agreement. The arbitration clause and the forum selection clause should have been

enforced, and the crossclaim of the Respondents against the Appellants should have been dismissed, without prejudice. The June 15, 2010 Order Denying Motion To Stay or Dismiss should be reversed, with directions to dismiss the action of the Respondents against the Appellants, without prejudice to the rights of either of them to litigate their disputes, through arbitration in Nassau County, New York.

DATED this 5th of November, 2010.

By _____

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ATTORNEY'S CERTIFICATE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further verify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P.28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th of November, 2010.

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a true and correct copy of the foregoing APPELLANT'S BRIEF, APPELLANT'S APPENDIX, VOLUME I, AND APPELLANT'S APPENDIX, VOLUME II was served to those persons designated below on the 8TH day of November, 2010:

____x____ By placing a copy in the United States mail to the following parties and/or their attorneys at their last known address(es), postage thereon fully paid, addressed as follows below.

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