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 Reply Brief

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I.
INTRODUCTION

The lower court erred in determining that Respondents' action against the Appellants arose out of the underlying Plaintiff's Consulting Agreement, and using that as a basis for refusing to give effect to the arbitration agreement and choice of forum clause in the written agreement between the Appellants and the Respondents. If the Respondents had filed their action against the Appellants as a separate action, there would have been no question at all as to the source of their claims. Those claims all arise directly out of the relationship created by the agreement that contained the arbitration and choice of forum provisions. The fact that Nevada's liberal pleading rules allowed the permissive joinder of the Appellants as third party defendants does not change the nature of the claims asserted against them.

Thus, the question presented here is whether the intentions of the parties and the strong public policy in favor of arbitration should be thwarted by the rules of civil procedure, which allow the permissive joinder of third party defendants. More specifically for this case, is there a "third party claim for indemnity" exception to the strong presumption in favor of arbitrability of disputes?

Appellants assert that the answer to this question is a resounding "No." The rules of civil procedure **permit** a defendant to bring in a third party defendant, but do not require them to do so. Thus, there is no strong public policy on that question, either one way or the other. The mere fact that the arbitrable claim is a claim for indemnity, which is being asserted as a third party claim, should not negate or overcome the intent of the parties as expressed in their written agreement or the strong public policy in favor of arbitration.

II.
STATEMENT OF FACTS

The Saporiti defendants ("Respondents") purchased a business from the Helfstein defendants ("Appellants"). They entered into an Agreement for the Purchase and Sale of Assets (the "PSA"), where 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." See AA, v.1, 104.

There was no exception to this clause for claims for indemnity. There was no exception for claims asserting the falsity of representations and warranties contained in the PSA. Instead, in the broadest possible terms, the PSA stated "Any controversy or claim arising out of or relating to this Agreement, or its breach, shall be settled by binding arbitration ... The venue of any arbitration shall be Nassau County, New York."

Respondents have been sued by the Plaintiffs below, for damages arising out of a Consulting Agreement, which they allegedly either assumed or are estopped to deny.

In turn, after the Appellants settled with the Plaintiffs and were dismissed from the case, Respondents brought them back in as third party defendants (although they were incorrectly designated as crossdefendants), alleging, inter alia, that (i) the parties entered into the PSA and the Respondents relied upon its provisions (see paragraphs 3 - 6), (ii) **Appellants "breached the term of the Sales Agreement (the PSA) by exposing Cross-Claimants to alleged damages by Plaintiffs related to the Consulting Agreement"** (see paragraph 10), (iii) that Appellants "breached their obligations of good faith and fair dealing" (see paragraph 15), (iv) **that Appellants "did not comply with their duties under the Sales Agreement (the PSA) nor with their underlying representations"** (see paragraph 20), and (v) that Appellants had failed to live up to their obligations under the Sales Agreement (the PSA) in various other manners (see paragraphs 25, 26, and 31), all of which were similarly "arising out of" or "related to" the Sales Agreement (the PSA). See AA, v.1, 40-73.

These claims clearly "arise out of" and "relate to" the PSA, and it was error for the lower court to rule otherwise.

III.
ARGUMENT

A It Was Error To Conclude That Respondents' Claims Arose Out Of The Consulting Agreement.

Although the Plaintiff has asserted claims against the Respondents which include claims arising out of a Consulting Agreement, it is clear that the Respondents' claims against the Appellants arise solely out of the PSA, which contained the arbitration and choice of venue clause. This is made clear by the allegations of the incorrectly labeled crossclaim (as described hereinabove), and by the assertions made in the Respondents' Answering Brief for this appeal.

On page 6 of Respondents' Answering Brief, Respondents set forth various provisions of the PSA and argue that the liability of the Appellants to the Respondents is clear. They argue that the PSA "provided Respondents with a series of warranties, which are directly applicable to their right to seek indemnification from Appellants from liability arising out of the Consulting Agreement." See page 6, lines 2-4 of the Answering Brief. They then describe various other provisions of the PSA that were allegedly breached. By Respondents' own description, it is the warranties and promises made in the PSA which give rise to Respondents' alleged claim against the Appellants, not the claims of the Plaintiff.

By focusing on the underlying claim, rather the claim asserted against the Appellants by Respondents, the lower court has ignored the intentions of the parties and the strong public policy favoring arbitration. Appellants assert that there is no sound reason to do so, merely because one party to the agreement chooses to join the other party in an existing lawsuit.

Appellants have not located a Nevada case or a New York case that specifically addresses this issue. However, other jurisdictions have ruled on this point, and the better view is that the intention of the parties to arbitrate should be honored, rather than looking at the underlying claim.

In Maryland, in the case of Contract Construction Inc. v. Power Technology Center Limited Partnership, 640 A.2d 251 (Md.Ct.Spec.App. 1994), the Court dealt with third party claims for indemnification and breach of contract, and held that such claims would be subject to the arbitration clause contained in the agreement between the parties, even though the underlying case involved a dispute that was not subject to arbitration. The Court stated:

> Since subparagraph 4.5.1 is "a broad, all encompassing arbitration clause," we must presume that "all issues are arbitrable unless expressly and specifically excluded." Crown Oil, supra, 320 Md. at 560. Powertech's third-party claims for indemnification and breach of contract clearly "arise out of" and are "related to" the "Contract, or the breach thereof." After labeling its claims "Breach of Contract" and "Contractual Indemnification," Powertech cites Section 16.7 of the Agreement as the basis of its claim for indemnification, and Section 10.2 of the Agreement as the basis of its claim for breach of contract. Even if Powertech's claim for indemnification were tort-based rather than contract-based, see, e.g., Council of Co-Owners Atlantis Condominium v. Whiting-Turner Contracting Co., 308 Md. 18, 41, 517 A.2d 336 (1986); Board of Trustees of Baltimore County Community Colleges v. RTKL Associates, 80 Md. App. 45, 55-56, 559 A.2d 805, cert. granted, 317 Md. 609 (1989), cert. dismissed, 319 Md. 274 (1990), it would be based upon CCI's failure to keep the worksite safe, and thus have arisen from Powertech's relationship with CCI, created by the Contract. See Petroleum Helicopters, Inc. v. Boeing-Vertol Co., 478 F. Supp. 84, 85-86 (E.D. La.) ("Provisions [to the effect that claims "arising out of or relating to" an agreement are to be arbitrated] do not require that the specific legal rights being asserted be created by the Agreements, but rather simply that those legal rights relate to the underlying relationships between the parties established by the Agreements."), aff'd, 606 F.2d 114 (5th Cir. 1979).

Contract Construction, 640 A.2d at 256.

The case at bar is analogous. It involves "a broad, all encompassing arbitration clause," and this Court should presume that "all issues are arbitrable unless expressly and specifically excluded." Also, the Respondents have specifically based their claims upon terms contained in the agreement containing the arbitration clause. Furthermore, the only legal rights between the parties "relate to the underlying relationships between the parties established by the Agreements."

The Illinois court reached the same conclusion in the case of Board of Managers of Courtyards at Woodlands Condominium Association v. IKO Chicago Inc., 697 N.E.2d 727, (Ill.

1998), where the Court stated:

> At issue in this case is the contract between Zale Construction Company and Johnston in which Johnston agreed to furnish architectural and design services for the buildings. The contract also included an arbitration clause. Based upon this clause, Johnston filed a written demand for arbitration with the American Arbitration Association. Johnston also filed a motion to compel arbitration and stay the third-party claims against it pursuant to section 2(a) of the Illinois Uniform Arbitration Act (710 ILCS 5/2(a) (West 1994)). Relying on J.F. Inc. v. Vicik, 99 Ill. App. 3d 815 (1981), the trial court denied Johnston's motion, finding that the issues and parties were so "intertwined" and "interconnected" that "they could not be resolved without all the parties being a part of this litigation." Johnston appealed to the appellate court, which affirmed the trial court's decision. See 288 Ill. App. 3d 801, 807. We granted Johnston's petition for leave to appeal (166 Ill. 2d R. 315) and now reverse the decision of the appellate court.

Woodlands, 697 N.E. 2d at 728.

Thus, the Court was faced with arguments similar to those that have been made here. The party opposing arbitration was arguing that the claims were so intertwined and interconnected that they could not be resolved without all the parties being a part of the litigation. These arguments were rejected, with the Court concluding:

> The plaintiff and Zale defendants, nevertheless, argue that allowing arbitration between two of the parties in a multiparty litigation would frustrate the goals of judicial economy. However, Illinois courts have repeatedly held that judicial economy is an insufficient basis for denying arbitration. See J&K Cement Construction, Inc., 119 Ill. App. 3d at 676; Kostakos, 142 Ill. App. 3d at 538; TDE Ltd. v. Israel, 185 Ill. App. 3d 1059, 1068 (1989).

Woodlands, 697 N.E. 2d at 732.

Boiled down to its essence, this holding means that the procedural ability to permissively join a third party defendant should not be used to negate the intention of the parties to arbitrate an otherwise arbitrable claim. Applying this analysis to the case at bar, it was error to conclude that the Respondents' claims arose out of the Plaintiff's Consulting Agreement, rather than the PSA.

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B. The Intent Of The Parties To Arbitrate Their Disputes Should Be Honored

There is a strong public policy in favor of arbitration which has been recognized in virtually all states, and specifically in both New York and Nevada. See 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); Phillips v. Parker, 106 Nev. 415, 794 P.2d 716 (1990). The ruling of the lower court runs entirely contrary to that strong public policy.

The language of the arbitration agreement in the PSA is broad and all encompassing, containing no exceptions. Appellants assert that this Court should follow its decision in Clark County Public Employees v. Pearson, 106 Nev. 587, 798 P.2d 136 (Nev. 1990), which stated:

> "Nevada courts resolve all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration." *Firefighters,* 104 Nev. at 618, 764 P.2d at 480 (citing *Exber, Inc. v. Sletten Constr. Co.,* 92 Nev. 721, 729, 558 P.2d 517, 522 (1976)). Disputes are presumptively arbitrable, and **courts should order arbitration of particular grievances "unless it may be said with *positive assurance* that the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute."** *Firefighters,* 104 Nev. at 620, 764 P.2d at 481 (quoting *AT & T Technologies,* 475 U.S. at 650, 106 S.Ct. at 1419) (emphasis added). Moreover, the U.S. Supreme Court has stated that, in cases involving broadly worded arbitration clauses, "**in the absence of any express provision excluding a *particular* grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.**" *AT & T Technologies,* 475 U.S. at 650, 106 S.Ct. at 1419 ..." (Emphasis added).

Clark County Public Employees, 106 Nev. at 591.

To overcome the presumption of arbitrability, the Respondents would have to show that it could be said, "with *positive assurance* that the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute." Alternatively, since there is no "express provision excluding a particular grievance from arbitration," "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." Neither of these tests has been met here. Therefore, it was error to refuse to give effect to the intentions of the parties, as shown by the

written PSA.

C. The Appellants Are Not Indispensable Parties to the Underlying Case

The Respondents continue to argue that the Helfstein defendants are indispensable parties. This argument was initially presented to this Court in connection with Appellants' Motion for Stay Pending Appeal. Despite Respondents' argument, this Court stayed the lower court proceedings "as they pertain to the crossclaims/third-party claims." See Order Granting Motion for Stay, entered herein on October 19, 2010. Appellants believe this ruling was a recognition by this Court that the underlying case can proceed without the Appellants, as they are not, by any means, indispensable.

Crossclaims and third party claims are permissive in nature. NRCP 13(g) states that "A pleading **may** state as a crossclaim any claim by one party against a co-party..." and NRCP 14(a) states that "At any time after commencement of the action a defending party, as a third-party plaintiff, **may** cause a summons and complaint to be served upon a person not a party to the action..."

There is no authority to support the idea that these permissive claims make Appellants indispensable parties. A crossclaim or third party claim is not a compulsory claim, and even if brought, is frequently severed.

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.

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 third party indemnity 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 these indispensable party cases are analogous to the case at bar. Having settled with the Appellants, the Plaintiffs remain free to pursue their claims against the Respondents, and the Respondents remain free to pursue their counterclaim against the Plaintiffs. The Appellants are not indispensible parties for the adjudication of that dispute.

D. The Choice Of Venue Clause Should Also Be Enforced

Appellants' Opening Brief argued that the lower court erred in failing to enforce the choice of venue clause contained in the PSA, and that Appellants were being required to litigate in an improper forum.

Respondents' Answering brief has not specifically addressed these points, other than arguing that the venue provision in the PSA should be ignored just like the arbitration provision, because the case arises out of the Consulting Agreement.

If this Court rejects Respondents' argument, as Appellants believe it should, then the decision should enforce not only the arbitration clause, but also the choice of venue clause. The intention of the parties to litigate their disputes in Nassau County, New York was made clear in the PSA. 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 lower court erred in failing to enforce the terms of the PSA, and in requiring the Appellants to defend these claims in an improper venue.

IV.
Conclusion

The claims of the Respondents against the Appellants all arise out of the PSA, which contained a broad form arbitration agreement and a choice of venue provision establishing Nassau County, New York as the proper venue for adjudication of their disputes. The Respondents' reliance upon the PSA as justification for its claims is shown most clearly by simply reading the Respondents' own pleading.

It was error for the lower court to determine that the Respondents' claims arise out of the Consulting Agreement which is the basis of the underlying Plaintiff's suit.

The arbitration clause and the forum selection clause should have been enforced, and the incorrectly labeled crossclaim of the Respondents against the Appellants should have been dismissed, without prejudice.

Appellants respectfully request that the June 15, 2010 Order Denying Motion to Stay or Dismiss 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 6th of January, 2011.

By _____

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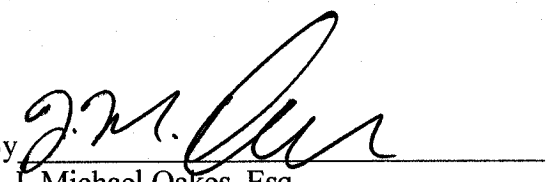
ATTORNEY'S CERTIFICATE

I hereby certify that I have read this appellate reply 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 reply 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 6th of January, 2010.

By 

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF was served to those persons designated below on the 6TH day of January, 2011:

____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:

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