RECENT DEVELOPMENTS

ARBITRATION

ARBITRATION AGREEMENT IN ATTORNEY'S RETAINER AGREEMENT MUST BE FULLY DISCLOSED

Smith v. JEM Group, Inc., 737 F.3d 636 (9th Cir. 2013).

FACTS: Appellant, JEM Group, Inc. ("JEM"), a debt-relief company, implemented and managed debt-relief programs marketed by its affiliates. Through its affiliates, JEM entered into an agreement with Appellee, Rosita H. Smith ("Smith"), to provide debt settlement services. Smith signed a twenty one-page contract sent by one of JEM's affiliates. The contract contained a four-page attorney retainer agreement ("ARA"), written in fine print. The last page of the ARA contained an arbitration agreement, but there was no explanation of the agreement, only an instruction to sign at every 'X' and return the contract with a voided check.

Smith filed a breach of fiduciary duty claim against JEM and its affiliates, who moved to compel arbitration. The district court denied the motions to compel arbitration, and JEM appealed.

HOLDING: Affirmed.

REASONING: Under Washington law, a provision of an attorney fee agreement is unenforceable if the attorney does not comply with the Washington Rules of Professional Conduct. The Rules required an attorney to provide a reasonable and fair disclosure of material elements in any fee agreement. The court looked to an opinion of the Washington State Bar Association ("WSBA") requiring an arbitration provision to be consistent with a lawyer's fiduciary obligation and statutory law and be fully disclosed to the client. The court also noted that according to an ABA Formal Opinion, arbitration agreements are permissible in ARAs only if the client has been given sufficient information to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement.

For these reasons the appellate court affirmed the ruling that the arbitration clause was a material element of an ARA and unenforceable under Washington law, unless fully disclosed to the client.

NO FEDERAL PRESUMPTION OF ARBITRABILITY UNTIL COURT FINDS VALID ARBITRATION AGREEMENT

Dasher v. RBC Bank (USA) 745 F.3d 1111 (11th Cir. 2014).

FACTS: Appellant, Dasher, sued Appellee, RBC Bank ("RBC"), for excessive overdraft fees. Dasher's original agreement with RBC ("RBC Agreement") contained an arbitration clause that the district court found unenforceable. RBC appealed. While on appeal, the parties agreed to vacate and remand the district court decision for reconsideration.

While on remand, PNC Financial Services acquired RBC and took possession of Dasher's account. Thereafter, PNC issued a new agreement ("PNC Agreement") to Dasher, and Dasher accepted the agreement. The PNC Agreement did not contain an arbitration clause and stated that it superseded all prior agreements.

In light of the PNC Agreement, the district court concluded that the RBC Agreement was superseded, and thus, no arbitration agreement existed. RBC appealed.

HOLDING: Affirmed.

REASONING: RBC argued that the lower court improperly ignored the presumption in favor of arbitration under the Federal Arbitration Act. The appellate court found that the presumption in favor of arbitration applied only where a contract contained a valid and enforceable arbitration agreement. and was ambiguous as to whether it applied to the dispute in question. The court found that the presumption of arbitration does not apply in determining whether an agreement to arbitrate has been made.

The presumption in favor of arbitration applied only where a contract contained a valid and enforceable arbitration agreement.

In order for the appellate court to decide whether a valid arbitration agreement exists, the analysis turned on whether the PNC Agreement superseded the RBC Agreement. The court found the PNC Agreement superseded the RBC Agreement. Next, the court looked to whether the PNC Agreement contained a valid arbitration agreement. The court found there was no valid arbitration agreement because the PNC Agreement was completely silent on the issue of arbitration. Therefore, the court held RBC could not force arbitration.

AN ERRONEOUS REFERENCE TO THE LEGAL BASIS FOR ITS AWARD DOES NOT JUSTIFY OVERTURNING AN ARBITRATION PANEL'S AWARD OF ATTORNEYS' FEES

Adviser Dealer Servs., Inc. v. Icon Advisers, Inc.,____ F. App'x ____(10th Cir. 2014).

FACTS: Appellee, Icon Advisers, Inc. ("ICON"), parted ways with one of its senior executives, Stephen C. Holmes, who signed a retirement agreement upon his departure. Appellants, Adviser Dealer Services, Meeder Asset Management, Inc., and Meeder Financial, Inc. ("Meeder"), subsequently hired Holmes, in direct violation of a non-compete clause in his retirement agreement. After informal settlement talks failed, all three parties agreed to arbitrate their dispute pursuant to Financial Industry Regulatory Authority ("FINRA") rules. Each signed a Uniform Submission Agreement permitting a FINRA arbitration panel to award attorneys' fees to the prevailing party. Subsequently, the FINRA panel found Meeder jointly and severally liable, and awarded ICON damages that included attorneys' fees "pursuant to the retirement agreement" at issue, a statement likely made in error.

Meeder then filed a motion in district court to vacate the award of attorneys' fees on the basis of it not being a party to the original retirement agreement. The district court ruled in Meeder's favor. ICON appealed, and Meeder subsequently cross-appealed.

HOLDING: Reversed.

REASONING: The court held that each party was bound by the terms of their FINRA Submission Agreements. The FINRA agreement granted the arbitration panel the express authority to determine all awards pursuant to a dispute, including attorneys' fees. The court noted that errors in an arbitration panel's factual findings, or its interpretation and application of the law, do not justify vacating an award. The court reasoned that even if the panel awarded attorneys' fees in error based on the terms of the retirement agreement, the court was not at liberty to overturn the panel's holding because all three parties had expressly delegated authority to award attorneys' fees to the panel in their FINRA agreements.

LANDLORD TENANT

PROPERTY CODE CANCELLATION AND RESCINDING OF CONTRACT REQUIRES BUYER TO RESTORE SELLER TO ORIGINAL POSITION

Morton v. Nguyen, 412 S.W.3d 506 (Tex. 2013).

FACTS: Petitioner, Morton, and Respondent, Nguyen, entered into a contract for deed. Pursuant to the Texas Property Code, Morton, as seller, continuously failed to provide Nguyen, as buyer, with required information in the annual statements. After thirty-four months, Nguyen sought to cancel and rescind the contract for deed. Additionally, Nguyen demanded restoration of all amounts paid under the contract and damages for breach of the Texas Property Code.

The trial court held for Nguyen, finding Morton did not comply with the Texas Property Code disclosure requirements and awarded Nguyen actual and liquidated damages. The appellate court reversed and remanded the trial court's judgment. Nguyen appealed.

HOLDING: Remanded.

REASONING: The Texas Supreme Court held that if the seller of a contract for deed fails to comply with disclosure requirements, Texas Property Code's Subchapter D requires the seller to cancel and *rescind* the contract for deed and give a *full refund* to the buyer.

The court, however, then addressed the definition of "rescission." Rescission is not a one-way street. Instead, it is a term that requires each party to restore property received from the other. To hold otherwise would create an unjust windfall to a rescinding buyer. The court defined "full refund" under Subchapter D. The court disagreed with the dissent's view that "full refund" was a unilateral refund. Instead, the court looked to the plain meaning of "refund," which is a transactional exchange where both parties give back what they previously received.

Applying this analysis, the court found that under a contract for deed transaction, the buyer cannot refund the title to the property because the buyer receives title only after all payments have been made. Instead the buyer must return what he received under the contract—the value of the occupation of the property. The Court remanded the case to the trial court for the determination of the value of Nguyen's occupation on the property.

LANDLORD WHO FAILS TO RETURN SECURITY DEPOSIT WITHIN STATUTORY TIME PERIOD MUST DEFEAT PRESUMPTION OF BAD FAITH

Johnson v. Waters at Elm Creek L.L.C., 416 S.W.3d 42 (Tex. App.—San Antonio 2013).

FACTS: Plaintiff, Shannon Johnson ("Johnson"), leased an apartment from and paid a security deposit to Defendant, Waters at Elm Creek ("Waters"). Waters was required to mail the security deposit refund and an itemized accounting of any deductions no later than 30 days after Johnson surrendered possession of the apartment.

Johnson surrendered possession of the apartment on October 5. Johnson received a check dated November 10 in the mail. The postmark on the envelope was dated November 11; however, the accounting was dated October 23. The trial court signed a take-nothing judgment in favor of Waters. Johnson appealed.

HOLDING: Reversed in part and affirmed in part.

REASONING: The court stated that under §92.109 of the Texas Property Code, a landlord is presumed to have acted in bad faith if she either fails to return a security deposit or fails to provide a written description and itemization of deductions on or before the 30th day after the date the tenant surrenders possession. Waters failed to do both of these things on or before the 30th day after the date Johnson surrendered possession.

The court noted that a landlord bears the burden to rebut the presumption of bad faith by presenting evidence that it acted in good faith. The court found good faith is established by showing honesty in fact in the conduct or transaction concerned. The court was provided testimony that showed the check was initially mailed to the address Johnson listed on her notice of intent to move out. The check was then returned to the corporate office of Waters. When Johnson called the property manager inquiring about the check, Johnson provided a new address and the check was re-sent. The court held that the property manager's testimony was sufficient evidence to rebut the presumption of bad faith.

The court found that under a contract for deed transaction, the buyer cannot refund the title to the property because the buyer receives title only after all payments have been made.