The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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MOTION TO COMPEL AND WAIVER
RICHMONT HOLDINGS, INC. et al. v. SUPERIOR RECHARGE SYSTEMS, LLC et al.
Texas Supreme Court
No. 12-0142 (Per Curiam)
2013 WL 276063
January 25, 2013

The Texas Supreme Court, in a *per curiam* opinion, recently reversed the Second Court of Appeals (Fort Worth)[2] and remanded to the Second Court for consideration of whether the movant to compel in the trial court waived its right to arbitrate the dispute in question by substantially invoking the judicial process.[3] Trial court[4] denied Richmont Holdings, Inc.'s motion to compel arbitration finding that movant had waived its right to arbitration.[5] Second Court, on a Texas General Arbitration Act interlocutory appeal, affirmed the trial court but not on the waiver finding but on a finding that the movant in the trial court failed to establish the existence of an arbitration agreement in the employment agreement signed by Jon Blake, an owner and manager of the asset seller, Superior Recharge Systems, LLC. The Texas Supreme Court found that movant did establish the existence of an arbitration agreement in the asset purchase and sale contract that was signed the same day as Blake's employment agreement. [6] Blake conceded at the Texas Supreme Court that the underlying dispute involved both the asset purchase and the arbitration agreements but continued to claim that Richmont had waived its right to arbitrate. The Texas Supreme Court relying on *Forrest Oil Corp. v. McAllen*, 268

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[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel.

[2] Richmont Holdings, Inc. v. Superior Recharge Sys., 02-10-00161-CV, 2011 WL 5247738 (Tex. App.--Fort Worth Nov. 3, 2011) review granted, judgment rev'd sub nom. Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C., 12-0142, 2013 WL 276063 (Tex. Jan. 25, 2013).

[3] *See Perry Homes v. Cull*, 258 S.W.3d 580, 592 (Tex.2008), *cert. denied* 555 U.S. 1103, 129 S. Ct. 952, 173 L. Ed. 2d 116 (2009) (Waiver of right to compel arbitration requires "substantial invocation of the judicial process" based on "totality-of-the-circumstances test.).

[4] Denton County, 211th District Court, (Shipman, Judge Presiding).

[5] Richmont answered lawsuit but delayed for 18 months its motion to compel arbitration.

[6] The employee in question filed a lawsuit claiming *inter alia* that Richmont had fraudulently induced him to enter into the asset purchase and sale agreement as well as his employment agreement.

S.W.3d 51, 56 (Tex.2008) decided that Blake's trial claims did involve both the asset purchase and employment agreements and found that the trial court had no discretion but to compel arbitration when, as in this case, there were no defenses to the arbitration agreement's enforcement.[7]

OBSERVATIONS

1. Apparently the asset purchase and sale agreement (with arbitration agreement) and the employment agreement (without arbitration agreement) were not sufficiently tied to one another although clearly part of one transaction.

2. The arbitration agreement itself provided: "Any controversy or claim arising out of or relating to **this Agreement, or the breach thereof**, shall be settled by binding arbitration."[8] (Emphasis added.)

3. This arbitration clause is a form used often in contracts but its scope appears to be limited to the asset purchase and sale agreement. Broader scope language could have been used to include the employment agreement or more general references to "this Agreement and all other agreements arising out of or related to this Agreement."

4. The Second Court of Appeals memorandum opinion quotes a discussion between trial judge and parties about Richmont's activities during the eighteen (18) months between its answer and its motion to compel arbitration. Richmont appears to argue to the trial court on its motion to compel that Richmont's failure to obey previous trial court discovery orders supports its lack of substantial invocation of the judicial process.[9]

5. Richmont did file with its motion to compel the asset purchase and sale agreement (with the arbitration agreement and a supporting affidavit), which along with Blake's concessions in the Texas Supreme Court, make it clear that the arbitration agreement had been established with no defenses to its enforcement.

6. No word yet on the Second Court's review of waiver argument.

[7] *Also citing In re FirstMerit Bank, N.A.*, 52 W.W.3d 749, 753-54 (Tex.2001); *In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546, 549 (Tex.2002) (per curiam); and *Cantella & Co., Inc. v. Goodwin*, 924 S.W.2d 943, 944 (Tex.1996).
[8] 2013 WL 276063, *1 fn1.
[9] 2011 WL 5247738, *5-7.