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As of: Jun 03, 2008

**SIMEON MANALILI, et al., Petitioners, v. COMMERCIAL MOWING AND GRADING, a Florida corporation, Respondent**

No. 83-2181

Court of Appeal of Florida, Second District

442 So. 2d 411; 1983 Fla. App. LEXIS 25148

December 16, 1983

**PRIOR HISTORY:** [\*\*1] Petition for Writ of Certiorari to the Circuit Court for Lee County; William J. Nelson, Judge.

the court quashed the order denying petitioners' motion to compel arbitration and directed the parties to proceed with arbitration according to the terms of the agreement.

**CASE SUMMARY:**

**OUTCOME:** The court granted certiorari to petitioner property owners because the trial court erred in denying their motion to compel arbitration in respondent moving and grading corporation's breach of contract action. The court found that there was a right to arbitration under the agreement between the parties.

**PROCEDURAL POSTURE:** Petitioner property owners sought a writ of certiorari after the Circuit Court for Lee County (Florida) denied their motion to compel arbitration in a breach of contract action filed by respondent moving and grading corporation.

**LexisNexis(R) Headnotes**

**OVERVIEW:** Petitioner property owners entered into a contract with respondent moving and grading corporation whereby respondent agreed to construct a driveway and to grade and fill petitioners' property. A dispute arose regarding payment and respondent filed a complaint against petitioners for foreclosure of a mechanic's lien, breach of contract, quantum meruit, goods sold and delivered, and foreclosure of an equitable lien. The trial court denied petitioners' motion to stay the proceedings and their demand for arbitration. Petitioners then sought a writ of certiorari. The court granted the petition for certiorari, finding that the trial court erred in denying petitioners' demand for arbitration. The court further found that there was a right to arbitration under the terms of the contract, and that the statutory prerequisites for the right to compel arbitration had been met. Accordingly,

*Civil Procedure > Alternative Dispute Resolution > Arbitrations > Arbitrability*

*Civil Procedure > Alternative Dispute Resolution > Mandatory ADR*

*Contracts Law > Contract Conditions & Provisions > Arbitration Clauses*

[HN1] Before a right to compel arbitration arises, a petitioner must establish that there was a written agreement containing an arbitration clause, the existence of an arbitrable issue, and that the right to arbitrate has not been waived.

*Civil Procedure > Alternative Dispute Resolution >*

***Arbitrations > General Overview******Civil Procedure > Alternative Dispute Resolution > Mandatory ADR******Contracts Law > Contract Conditions & Provisions > Conditions Precedent***

[HN2] Article 7.9 of the American Institute of Architect's General Conditions (AIA Code) provides that all claims and disputes between a contractor and an owner shall be subject to arbitration. The article does not contemplate the presentation of a dispute to a licensed architect as a condition precedent to the right to arbitrate, if in fact there is no architect for a project.

**COUNSEL:** Kevin F. Jursinski, Fort Myers, for Petitioners.

James L. Goetz, Fort Myers, for Respondent.

**JUDGES:** Campbell, Judge. Grimes, A.C.J., and Schoonover, J., concur.

**OPINION BY: CAMPBELL****OPINION**

[\*412] Petitioners, Simeon and Lydia Manalili, petitioned this court for a writ of certiorari following the trial court's denial of a motion to compel arbitration. We find the trial court was in error and grant the petition for certiorari.

Petitioners entered into a contract on January 28, 1983, with respondent, Commercial Mowing and Grading, a Florida corporation. For the sum of \$15,732, respondent agreed to construct a driveway, and grade and fill petitioners' property.

The contract included the American Institute of Architect's General Conditions (AIA Code). The AIA Code provides for arbitration between the parties.

A dispute arose regarding payment. Respondent claimed the work was satisfactorily performed; petitioners claimed the fill materials were not acceptable, and refused to pay. Respondent and petitioners submitted the dispute to the engineer/designer of the project who [\*\*2] found that respondent had not satisfactorily performed the contract. He did not enter a written decision. Subsequently, respondent filed a complaint in the circuit court against petitioners for foreclosure of a mechanic's lien, breach of contract, quantum meruit,

goods sold and delivered, and foreclosure of an equitable lien, all counts arising out of the work performed by respondent for petitioners under the contract presented here. Petitioners then filed a motion to stay the proceedings and a demand for arbitration which was denied. As a result of that denial, petitioners filed this petition for a writ of certiorari.

An order denying the right to compel arbitration forces the parties to litigate and defeats the purpose of the arbitration clause. Therefore, where a right to compel arbitration exists, such a denial "departs from the essential requirements of law." The jurisdiction of this court is thereby properly invoked, pursuant to *Florida Rule of Appellate Procedure 9.100. Vic Potamkin Chevrolet, Inc. v. Bloom*, 386 So.2d 286 (Fla. 3d DCA 1980); *Morton Z. Levine and Associates, Chartered v. Van DeRee*, 334 So.2d 287 (Fla. 2d DCA 1976).

The argument below centered [\*\*3] around the lack of a written determination of the dispute by the "architect." As previously stated, this dispute was in fact submitted to the engineer/designer since there was no architect for the project.

The trial court denied the motion to compel arbitration on the ground that there was no written decision by an architect as required by article 2.2.12 of the AIA Code. Section 2.2.12 states that:

No demand for arbitration of any such claim, dispute or other matter may be made until the earlier of (1) the date on which the Architect has rendered a written decision, or (2) the tenth day after the parties have presented their evidence to the Architect or have been given a reasonable opportunity to do so, if the Architect has not rendered his written decision by that date.

We find the trial court's reason for refusing to compel arbitration was improper. Article 2.2.12 establishes time limits for making a demand for arbitration. It does not provide that a written decision by an architect is a condition precedent to a [\*413] demand for arbitration. Respondent now argues to this court that there was no right to arbitration inasmuch as no architect was involved [\*\*4] in the project, and the dispute had instead been presented to the engineer/designer.

Generally, [HN1] before a right to compel arbitration arises, the petitioners must establish that there was a written agreement containing an arbitration clause, the existence of an arbitrable issue, and that the right to arbitrate has not been waived. § 682.03, *Fla. Stat.* (1981), and *William Passalacqua Builders, Inc. v. Mayfair House Association, Inc.*, 395 So.2d 1171 (*Fla. 4th DCA 1981*). Under respondent's new argument, the issue is whether arbitration is available under the terms of the agreement.

Respondent claims that arbitration is not available until the issue is submitted to a licensed architect, rather than an engineer/designer, pursuant to article 2.1.1. Article 2 is entitled "Architect." Article 2.1.1 defines an architect as follows:

The Architect is the person lawfully licensed to practice architecture, or an entity lawfully practicing architecture identified as such in the Owner-Contractor Agreement, and is referred to throughout the Contract Documents as if singular in number and masculine in gender. The term Architect means the Architect or his authorized representative.

[\*\*5]

Petitioners contend that article 7.9 provides a right to arbitrate the dispute. Article 7.9 is entitled "Arbitration." Article 7.9 provides that:

All claims, disputes and other matters in question between the Contractor and Owner, arising out of or relating to, the

Contract Documents, or the breach thereof, except as provided by subparagraph 2.2.11, with respect to Architect's decisions on matters relating to artistic effect and, except for claims which have been waived by the making or acceptance of final payment as provided in subparagraph 9.9.4 and 9.9.5 shall be decided by arbitration . . . unless the parties mutually agree otherwise.

Respondent's claim must fail. Article 2.1.1 deals exclusively with the architect and his duties. Article 7.9 sets forth the basis for arbitration and controls the entire code. [HN2] It provides that all claims and disputes shall be subject to arbitration. Article 7.9 does not demand the use of an architect. The code does not contemplate a presentation of the dispute to a licensed architect as a condition precedent to the right to arbitrate, if in fact there is no architect for the project.

As to respondent's other points, [\*\*6] we find no merit.

Thus, there is a right to arbitrate under the terms of the contract. The statutory prerequisites of the right to compel arbitration have also been met. The petition for writ of certiorari is granted. The order denying the motion to compel arbitration is quashed with directions to proceed with arbitration according to the terms of the agreement.

GRIMES, A.C.J., and SCHOONOVER, J., Concur.

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