THE PASCHOS LAW UPDATE NEWSLETTER
THOMAS PASCHOS & ASSOCIATES P.C. ATTORNEYS AT LAW

July 1, 2010

I. EMPLOYMENT LAW

Arbitrator Decides Enforceability of an Arbitration Agreement When a Party Challenges the Enforceability of the Agreement as a Whole

In *Rent-A-Center, West, Inc. v. Jackson,* --- S.Ct. ---, 2010 WL 2471058 (June 21, 2010), Jackson filed an employment-discrimination suit against petitioner Rent-A-Center, his former employer, in a Nevada Federal District Court. Rent-A-Center filed a motion, under the Federal Arbitration Act (FAA), to dismiss or stay the proceedings and to compel arbitration based on the arbitration agreement (Agreement) Jackson signed as a condition of his employment. The Agreement provided for arbitration of all "past, present or future" disputes arising out of Jackson's employment with Rent-A-Center, including "claims for discrimination" and "claims for violation of any federal ... law." It also provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."

Jackson opposed Rent-A-Center's motion on the ground that the arbitration agreement was unconscionable. Rent-A-Center responded that Jackson's unconscionability claim was not properly before the court because Jackson had expressly agreed that the arbitrator would have exclusive authority to resolve any dispute about the enforceability of the Agreement. It also disputed the merits of Jackson's unconscionability claims.

The District Court granted Rent-A-Center's motion, holding that the agreement "'clearly and unmistakenly provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable'" and that "'the question of arbitrability is for the arbitrator.'" The District Court also held that, even were it to decide the merits of the unconscionability challenge, the employee had not shown that the agreement was substantively unconscionable.

The Supreme Court reversed the Ninth Circuit's judgment and held that "under the FAA, where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, if a party challenges specifically the enforceability of that particular agreement, the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator."

II. PROFESSIONAL LITIGATION

Failure to Schedule a Ferreira Conference Will Not Toll the Time Frames Set Forth in the Affidavit of Merit Statute

In *Paragon Contractors, Inc. v. Peachtree Condominium Assoc.*, --- A.2d ---, 2010 WL 2553869 (N.J. June 28, 2010), Paragon Contractors filed an action seeking damages from Peachtree Condominium Association regarding certain unpaid fees allegedly due for construction work. The condominium association filed a third-party complaint against Key Engineers, Inc., alleging it performed incomplete and defective design work in connection with the project. More than 120 days after Key filed its answer to Peachtree's third-party complaint and before Peachtree filed an affidavit of merit or a case management conference had been scheduled, Key filed a motion to dismiss the third-party action on the basis that Peachtree had failed to provide a timely affidavit of merit. Before the motion hearing but outside the statutory period, Peachtree filed an affidavit of merit. In defense of the late filing Peachtree argued that the failure to schedule a conference pursuant to Ferreira v. Rancocas Orthopedic Associates, 178 N.J. 144, 836 A.2d 779 (2003) tolled the time frames in the Affidavit of Merit statute. The Superior Court granted the motion for dismissal.

The issue on appeal was whether the failure to hold a Ferreira conference tolls the filing period provided in the Affidavit of Merit statute and whether the dismissal of the third-party complaint in this matter was justified.

The *Ferreira* conference was created to remind parties of their statutory obligations and thus avoid the dismissal of meritorious claims through inadvertence. In *Ferreira*, the New Jersey Supreme Court developed a measure to encourage the timely filing of affidavits. The court instituted “an accelerated case management conference [to] be held within ninety days of the service of an answer in all malpractice actions.” The assumption underlying the conference was that it would “ensure that discovery related issues, such as compliance with the Affidavit of Merit statute, d[id] not become sideshows to the primary purpose of the civil justice system-to shepherd legitimate claims expeditiously to trial[.]” At the conference, the parties and the court are to identify any failure to comply with the Affidavit of Merit statute in time to correct it within the statutory time limit

At issue here is what effect the failure to hold a *Ferreira* conference has on the time limits prescribed in the Affidavit of Merit statute. The court provided:

The answer is none. It is true that we created and mandated the *Ferreira* conference to “remind the parties of the sanctions that will be imposed if they do not fulfill their obligations.’ Our clear purpose was to help attorneys and litigants to avoid the dismissal of meritorious claims. . . . However, it is equally true that parties are presumed to know the law and are obliged to follow it. . . the absence of a *Ferreira* conference cannot toll the legislatively prescribed time frames. However, the court did recognize that there apparently had been a lack of unanimity in the courts over this conclusion. The court held that that confusion counseled lenience in this case and afforded relief to Peachtree, but the court warned that “lawyers and litigants should understand that, going forward, reliance on the scheduling of a Ferreira conference to avoid the

strictures of the Affidavit of Merit statute is entirely unwarranted and will not serve to toll the statutory time frames."

Affidavit of Merit Statue Applies to Suit against Title Insurance Agent in Sale of Property

In *Waller v. Lomax*, 2010 WL 2696698 (N.J. Super. A.D. July 8, 2010), the matter involves the closing of a real estate contract at which no party was represented by an attorney. In the original complaint, plaintiffs, the sellers of the property, alleged that defendants Joseph Lomax, Lomax Realty, Five Star Remodeling and Rose Martin breached the contract of sale and engaged in consumer fraud and common law fraud because plaintiffs did not receive funds to which they were entitled at the closing. A default judgment was entered in favor of plaintiffs and against all defendants.

Although the default judgment resolved all issues as to all parties, plaintiff was permitted to file an amended complaint against Lloyds & Hanson, a title insurance agent, and New Jersey Title Insurance Company (NJ Title). Plaintiffs alleged, among other things, that Lloyds & Hanson and NJ were negligent in the performance of their obligation as settlement agents and title insurers by failing to provide the plaintiffs with their proceeds from the sale of their real property and for failing to adequately set forth the distribution of the proceeds on the settlement statement.

Lloyds & Hanson moved for dismissal arguing that, because it is a licensed professional, plaintiffs were required to timely serve an affidavit of merit pursuant. The plaintiffs claimed that the affidavit of merit statute did not apply because the title insurance agent was not a legal professional.

The court granted defendant's motion for dismissal noting that plaintiffs' argument that Lloyds & Hanson's role at this closing was the same or similar as that of an attorney actually supported Lloyds & Hanson's position. The court stated "If an attorney had participated in the closing and a suit had been brought against that attorney in the same circumstances, an affidavit of merit would have been required."

Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.