

“Arbitration of Disputes in Particular Areas: Construction Arbitration”

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by

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I. Selection of an Arbitrator:

Everyone wants to select that arbitrator who is in “your pocket.” Problem is, this is not possible if the arbitrator is honest and ethical. Thus, savvy litigants have started selecting arbitrators by reputation for good judgment, not for predisposed points of view.

II. Each arbitrator is different, but

No two arbitrators view construction arbitration exactly the same way. Therefore, it is important to ask what the arbitrator wants and does not want in a presentation. Arbitrators are about getting to the truth in the most economical manner possible, both to save money for the parties, and to allow the proceeding to move forward quickly; good arbitrators are busy and have other matters deserving their attention. They tend not to waste time and expect others to respond accordingly.

Having said that, good arbitrators tend to view the same evidence in generally the same way. Differences of opinion amongst a panel of three neutral arbitrators generally tend to be minor. While construction arbitrators may have different approaches in how they want the evidence presented, they usually interpret the evidence in a similar way.

III. Know the rules of the game

Construction arbitrators work hard to keep everyone on a level playing field. But the parties and their counsel should ask about the rules and the earlier, the better. For example, will hearsay be allowed and if so, how much? Will the arbitrator want pre hearing briefs, and if so, how long and on what specific issues? Will the arbitrator ask questions of the witnesses? Will the arbitrators submit written questions to counsel at the close of the evidence at the hearing?

IV. Discovery disputes

Discovery disputes may win points with a judge but seldom if ever do they curry favor with a construction arbitrator. Construction arbitrators are not interested in procedure. Their interest lies in getting the parties to the hearing as soon as reasonably possible. If procedure is your game, avoid arbitration. Neither the rules of arbitration nor an arbitrator's general disposition engender enthusiasm or even support for engaging in procedural battles. After all, arbitration is based on consent and agreement, and procedural disputes, by contrast, are rooted in discord and disagreement. Construction arbitrators more and more are about getting at the facts as quickly as possible. Procedure often takes a back seat in this process.

V. Marshalling the evidence

Prepare your evidence in a manner that allows the arbitrator to understand and follow easily and quickly. Often this means arranging exhibits in chronologic order. Hiding the evidence and employing surprise are not

useful tactics. This does not mean, however, that there should be extensive discovery to avoid surprise. It does mean that lawyers and their clients need to be flexible during the hearing and able to think on their feet. Many witnesses will be presenting testimony that is being heard for the first time by at least one of the parties.

VI. The hearing

Style still counts in life and in a dead heat it may matter in the outcome of an arbitration proceeding as well. But for all matters that are not a dead heat, substance wins over style. Construction arbitrators are experienced in the industry and in the ways of the world. Truth and merit impress them. Not flair and drama.

What works for a jury may not work for a construction arbitrator, particularly an arbitrator who is not an attorney. Know your arbitrator and tailor your proof accordingly.

This in no way means you need to be boring. Arbitrators do not like boring, any more than you do. It means you need to get to the meat of the matter very quickly. Remember, the construction arbitrator already knows the industry and the general background. Take advantage of his or her knowledge to show why your case fits within industry standards or is deserving of other consideration. Arbitrators like to hear from the witnesses.

VII. Should I ask for specific findings?

This is a frequent question. The answer is generally no—unless your dispute involves novel issues of fact or law, or a specific finding would be

helpful in future cases to provide guidance on how a party should conduct business going forward. In addition, while everyone wants a finding that the other side was untruthful, such a finding is less likely in arbitration.

Construction arbitrators tend to be cautious about issuing sharply worded awards. They understand that the parties are still part of a larger construction industry and the parties may do business together again in the future.

VIII. I lost, now what should I do?

Remember, arbitration is a process for early and final resolution. No one likes to lose. Attorneys should prepare their clients early that they may lose and in arbitration, there is no meaningful appeal or recourse. That is both the beauty and the beast of construction arbitration.

IX. The construction community is small, very small

Stake out a credible position. While arbitration allows a more discreet forum for dispute resolution than an open court of law, the construction industry tends to hear anyway what happened. While the arbitrators will not be talking, others probably will be. The construction industry is close. When necessary, fight, but when not necessary, there is no disgrace in compromise and settlement.

X. Recent cases/developments in construction arbitration of business and consumer disputes:

A. Untimely Request to Arbitrate

An untimely request to arbitrate can preclude a party from arbitration and allow a judgment in a court of law to stand, according to the Missouri

Court of Appeals, Eastern Division, in *Sitelines, LLC v. Pentstar Corp.*, No. ED 88579, decided February 6, 2007. The dispute involved a contractor who brought a breach of contract action against its subcontractor after the subcontractor allegedly abandoned the project without notice. This left substantial portions of the work uncompleted. The contractor filed a petition in circuit court and sought damages for breach of contract. The defendant subcontractor failed to respond to written document requests and failed to respond to plaintiff's request for admissions.

Accordingly, plaintiff contractor filed a motion for summary judgment. The defendant subcontractor never filed a response. The summary judgment motion was set for hearing and when both parties appeared in court on the date of the hearing, the hearing was reset for another date about a month later. On the afternoon before the hearing, defendant's attorney telefaxed a motion to dismiss or in the alternative, to compel arbitration pursuant to the arbitration clause in the agreement. Defendant's attorney also telefaxed at the same time a notice to hear the arbitration motion the next day at the same time as the hearing on plaintiff's motion for summary judgment.

At the hearing, the Court granted plaintiff's motion for summary judgment and awarded plaintiff \$280,074.76 in damages and \$7,920.00 in attorney's fees. By separate order, the Court denied defendant subcontractor's motion to dismiss or to compel arbitration. Defendant appealed that decision.

The appellate court decided that because the motion to dismiss or compel arbitration violated Missouri's Rule 44.01(d) which requires at least five

days' notice, the trial court properly denied the motion. In fact, the appeals' court went on to state that had the trial court granted the motion and enforced the request for arbitration, the trial court would have committed error.

Further, the Court concluded: "We are aware that the trial court's order has the effect of precluding defendant from ever asserting a right to arbitrate the dispute, because a judgment on the merits of this dispute was entered on the same day. However, this situation was created by defendant."

B. Tort Claims Not Covered by Arbitration Provision

Construction claims typically involve both allegations of breach of contract and tort claims. Inevitably, a dispute arises regarding the breadth of an arbitration provision. The most-recent case to address this issue is *Amega Mobile Home Sales, Inc. v. Southern Energy Homes, Inc.*, 186 S.W.3d 793 (Mo. App. WD 2006). The dispute was between purchasers of a mobile home and the manufacturer/installer of the mobile home. The home was covered by a one-year limited warranty stating that the home was free from any serious structural defects in material and workmanship, assuming reasonable maintenance and servicing of the home by its owner. The homeowners filed a lawsuit in circuit court alleging in Count I breach of contract, stating that the home was in a dangerous and defective condition and was not habitable due to the presence of excessive levels of formaldehyde gas within the home. Count II of the petition pled a product liability claim against the manufacturer, alleging that the home was in a defective and dangerous condition due to its manufacture and design.

The defendants alleged that there was a binding arbitration provision contained in the warranty which provided:

All disputes between us ... resulting from or arising out of the design, manufacture, warranty, or repair of the manufactured home, (including but not limited to: the terms of the warranty, the terms of this arbitration agreement, and all clauses herein contained, their breadth and scope, and any term of any agreement contemporaneously entered into by the parties concerning any goods or services manufactured or provided by Southern Energy Homes, Inc.; the condition of the manufactured home; the conformity of the manufactured home to federal building standards; the representations, promises, undertakings, warranties or covenants made by Southern Energy Homes, Inc., (if any); or otherwise dealing with the manufactured home); will be submitted to BINDING ARBITRATION, pursuant to the provisions of 9 U.S.C. section 1, et. seq. and according to the commercial Rules of the American Arbitration Association then existing in Addison, Alabama, where Southern Energy Homes, Inc. maintains its principal place of business. ... *THIS ARBITRATION SHALL BE IN LIEU OF ANY CIVIL ACTION IN ANY COURT, AND IN LIEU OF ANY TRIAL BY JURY.*

The defendants contended that given this provision, plaintiff's action was subject to arbitration. The sale contract between the buyer and seller, however, did not contain any provision relating to arbitration. The majority of the Court's opinion related to whether the tort claim of product liability was barred by the arbitration provision contained within the one-year warranty. The appellate court, affirming the trial court's decision, concluded that the cause of action was independent of and different from a warranty claim and thus was not limited to the arbitration provision contained therein. The Court further concluded:

At the very least, for a tort claim to be subject to arbitration under a broad arbitration clause, it must raise some issue the resolution of which requires reference to or construction of some portion of the parties' contract. Where, however, a tort claim is independent

of the contract terms and does not require reference to the underlying contract, arbitration is not compelled.

Id. at 798.

C. One-Sided Arbitration Provision is Unconscionable

The question of unconscionability was decided recently by the Missouri Supreme Court in *Vincent v. Schneider*, 194 S.W.3d 853 (2006). Plaintiffs were purchasers of single-family homes from defendant McBride & Son Homes, Inc. Written contracts were exchanged for each home that was purchased and they contained a preprinted provision that provided McBride the unilateral right to require any claim by the homeowner arising out of the contract or the home to be decided by binding arbitration. Specifically, the contract provision read as follows:

4. It is agreed between the parties that Seller's liability to Purchaser for damages of any breach of this contract (including, without limitation, defects in construction items warranted hereunder or breach of Seller's warranties) shall be *856 limited to the reasonable cost of repair or replacement of any defective items of labor or material. In the event of any claim by Purchaser against seller arising out of this Contract or the Residence, Seller, at its option, may either:

(a) By written notice to Purchaser, repurchase the Residence ...; or

(b) By written notice to Purchaser, submit the resolution and determination of such claim by Purchaser against Seller to binding arbitration pursuant to the provisions of the Missouri Uniform Arbitration Act, Mo.Rev.Stat. Ch. 435 (1986), as amended, and/or the Federal Arbitration Act, Title 9 U.S.C. §§ 1 et seq., as amended. The arbitrator shall be selected by the President of the Homebuilders Association of Greater St. Louis. The arbitration shall take place and such dates as directed by the arbitrator. The decision of the arbitrator shall be binding on both parties and enforceable in a court of competent jurisdiction. Purchaser shall be liable to Seller for all court, arbitration and attorney's fees and costs incurred by Seller in enforcing this provision.

Plaintiffs discovered problems with their homes and filed a lawsuit against McBride alleging violations of the Missouri Merchandising Practices Act, fraudulent misrepresentation, breach of the implied warranty of habitability, and breach of fiduciary duty. McBride sought to enforce the arbitration provision and asserted that the contract required payment of all of McBride's costs to enforce the agreement to arbitrate. The appellate court concluded that there was not sufficient information for it to determine based upon the record presented whether the arbitration provision in the contract was a contract of adhesion. The Court determined that a pre-printed contract by itself is not proof of a contract of adhesion. If this were the case, the majority of the contracts in this country which are based upon preprinted forms would automatically be invalid.

The appellate court determined, however, that the provision that allowed McBride to select the arbitrator was unconscionable. Section 435.360 R.S.Mo. provides that if the selected arbitrator cannot serve for any reason, then the court shall appoint an arbitrator. Accordingly, Missouri law provided a cure for this particular provision, even though it was unconscionable.

The Court further found to be unconscionable the requirement in the arbitration provision that seller's attorney fees and costs must be paid by the purchaser of the home. "The sentence dealing with fees and costs is strangely worded," according to the Court. *Id.* at 860. Accordingly, the Court concluded:

"It is unconscionable to have a provision in an arbitration clause that puts all fees for arbitration on the consumer. This is particularly true when the cost-shifting terms could work to grant one party immunity from legitimate claims on the contract. At the

time this contract was created, the arbitration provision that shifts all arbitration fees to Relators [the homeowners] was unconscionable and unenforceable.

Id. at 860-61.

D. Selection of an Arbitrator

Selection of an arbitrator was decided recently in *Jackson County v. McClain Enterprises, Inc.*, 190 S.W.3d 633 (Mo. App. WD 2006). Jackson County brought a lawsuit against an excavating company for trespass and conversion, alleging that the company entered upon county property that was a park and removed approximately 73,000 cubic yards of soil by digging a pit approximately 2 acres in size. The soil was used as fill dirt in a housing development owned by McClain, the defendant. Counsel for Jackson County then sent a letter to defendants offering to submit the dispute to arbitration and articulating in separate numbered paragraphs various items as to how the arbitration would proceed. Counsel premised the letter with an introductory statement that it was offering to enter into an agreement to submit the dispute to binding arbitration “before retired Circuit Judge John Moran.” Counsel for defendants accepted the offer, but then counsel for both parties learned that Judge Moran would not hear the arbitration case. Jackson County then asserted that because participation by Judge Moran as the arbitrator was an essential term of the contract and since he was not available to serve, the contract was unenforceable.

The excavating defendant filed a motion to compel arbitration which the trial court overruled. The appellate court determined that the terms of the

agreement to arbitrate were ambiguous enough that evidence should have been presented to the trial court to ascertain the parties' intentions and for the trial court to resolve the ambiguity. Accordingly, the appellate court remanded the case to the trial court for hearing on the motion to compel and further instructed the trial court to determine whether Judge Moran's service as an arbitrator was an essential term to the contract. If it was, the contract was unenforceable. By contrast, should the trial court determine that Judge Moran's service as an arbitrator was not an essential term, then the arbitration provision was enforceable and the matter would proceed to arbitration with the appointment of an arbitrator by the Court.

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