

IN THE SUPREME COURT OF TEXAS

Nos. 09-0432, 09-0433, 09-0474, 09-0703

IN RE OLSHAN FOUNDATION REPAIR COMPANY, LLC AND
OLSHAN FOUNDATION REPAIR COMPANY OF DALLAS, LTD., RELATORS

ON PETITIONS FOR WRITS OF MANDAMUS

JUSTICE HECHT, concurring, in which JUSTICE MEDINA joined.

I join fully in the Court's opinion and write only with this further observation.

The homeowners contend that the contracts at issue violated the Texas Home Solicitation Act¹ because they did not contain the requisite notice of their right to cancellation and are therefore void by express provision of the Act.² In response, Olshan tells us in its briefing only that it “will present its defenses . . . in the arbitral forum”. Asked at oral argument what defenses it has to the

¹ Act of May 18, 1973, 63rd Leg., R.S., ch. 246, § 1, 1973 Tex. Gen. Laws 574, codified as TEX. REV. CIV. STAT. ANN. art. 5069-13.01, amended by Act of April 4, 1975, 64th Leg., R.S., ch. 59, § 1, 1975 Tex. Gen. Laws 124, and by Act of May 27, 1995, 74th Leg., R.S., ch. 926, § 1, 1995 Tex. Gen. Laws 4649, recodified by Act of May 24, 1997, 75th Leg., R.S., ch. 1008, § 3, 1997 Tex. Gen. Laws 3091, 3583, as TEX. BUS. & COM. CODE §§ 39.001-.009, and by Act of May 15, 2007, 80th Leg., R.S., ch. 885, § 2.01, 2007 Tex. Gen. Laws 1905, 2026, as TEX. BUS. & COM. CODE §§ 601.001-.205.

² Section 601.201, TEX. BUS. & COM. CODE, provides that “[a] sale or contract entered into under a consumer transaction in violation of . . . Subchapter D is void.” Section 601.152, in subchapter D, states: “A merchant may not: (1) at the time the consumer signs the contract pertaining to a consumer transaction or purchases the goods, services, or real property, fail to inform the consumer orally of the right to cancel the transaction; or (2) misrepresent in any manner the consumer’s right to cancel.” The prior versions of the Act contained substantively identical provisions. Former TEX. BUS. & COM. CODE. § 39.008(a)(3)-(4) & (b); TEX. REV. CIV. STAT. ANN. art. 5069-13.03(a)(3)-(4) & (b).

homeowners' contention that their contracts, including the arbitration provisions, are void and unenforceable, counsel answered that "there might be an estoppel defense" because the homeowners did not challenge the validity of the contracts until work was completed. Counsel also argued that even if the contracts are void, the arbitration provision is severable and valid, and the homeowners must still submit their complaints to arbitration. Olshan has cited no authority for either of these arguments.

The homeowners acknowledge that, as the Court notes, the validity of the contracts is a matter for the arbitrator to decide.³ But the homeowners argue that the invalidity of the contracts is a foregone conclusion and that "the entire process . . . will be a needless waste of time, energy, and money".⁴ I agree with the Court that even if this is true, the contracts are not unconscionable. But being led on a wild goose chase,⁵ if that is all arbitration comes to, is not without remedy.

If, as the homeowners predict, the arbitrator concludes that the contracts are indeed void, Olshan and its counsel are subject to being sanctioned by the trial court for filing a groundless motion to compel arbitration.⁶ The trial court certainly has the authority to sanction frivolous resistance to arbitration, and sanctions are not a one-way ratchet. The court's authority to sanction

³ *Ante* at ___ (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)).

⁴ *E.g.*, Brief of Real Parties in Interest Kenneth and Vickie Kilpatrick at 21.

⁵ *See* WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 4:

"Romeo: Switch and spurs, switch and spurs; or I'll cry a match.

"Mercutio: Nay, if thy wits run the wild-goose chase, I have done; for thou hast more of the wild-goose in one of thy wits than, I am sure, I have in my whole five."

⁶ TEX. R. CIV. P. 14; TEX. CIV. PRAC. & REM. CODE §§ 9.001-.014, 10.001-.006.

a frivolous motion to compel is not displaced by the arbitrator's authority to determine the predicate issue—that the contracts are unenforceable. If the dispute returns to the trial court, the homeowners may seek full redress for Olshan's lark.

Nathan L. Hecht
Justice

Opinion delivered: December 3, 2010