

IN THE SUPREME COURT OF MISSISSIPPI

DAVID MICHAEL ANDREWS

APPELLANT

V.

No. 2007-CA-00497

**TINA FORD, ADMINISTRATRIX OF THE
ESTATE OF ROBERT LEE FORD, III, DECEASED**

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal.

David Michael Andrews -- Defendant/Appellant

Mrs. Tina Ford, Administratrix of the Estate of Robert L. Ford, Deceased –
Plaintiff/Appellee

Harris H. Barnes, III and James G. McGee, Jr. – Attorneys for Appellant Andrews

R. Andrew Taggart, Jr., Andy Taggart, Legal and Strategic Counsel, PLLC –
Attorney for Tina Ford, Administratrix of the Estate of Robert L. Ford, Deceased

Robert W. Long, Herring Long and Crews – Attorney for Tina Ford,
Administratrix of the Estate of Robert L. Ford, Deceased

Honorable Samac Richardson, Rankin County Circuit Judge – Trial Court Judge


R. ANDREW TAGGART, JR. MSB [REDACTED]

ATTORNEY OF RECORD FOR APPELLEE

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STATEMENT OF THE ISSUE

Was the trial court correct in relying on the plain language of the unambiguous contracts before it in overruling the defendant's motion to compel arbitration of the dispute between the parties?

STATEMENT OF THE CASE

Procedural History

This appeal is before the Court from the order of the Circuit Court of Rankin County overruling the motion of defendant Michael Andrews to compel the arbitration of this breach of contract action. The Court accepted Andrews' Petition for Interlocutory Appeal of that order as a Notice of Appeal.

This is the brief of plaintiff/appellee Tina Ford in response to Andrews' appeal brief.

Statement of Facts

Robert L. Ford ("Bob Ford"), deceased husband of plaintiff Tina Ford in this case, died on November 7, 2005. Until that date, Bob Ford and Michael Andrews, defendant in this case, were each 50% owners of Sleep World, LLP, a/k/a Sleep World, LLC ("Sleep World") and had been since September 12, 2000. Sleep World was in the retail mattress and bedding business.

Although the parties had intended to form a limited liability company for their business, their attorneys actually formed instead a limited liability partnership. Thus, references to the parties in some of the documents are to "Members", although Bob Ford and Andrews were actually partners in an LLP.

On September 12, 2000, Andrews and Bob Ford entered into a Buy-Sell Agreement, setting out their mutual rights and duties to one another with respect to the purchase of the ownership interest of each in the event of a variety of circumstances, including sales to other buyers, and disability or death of one of the partners. The Buy-Sell Agreement is clear and unambiguous on its face, and must be interpreted from the four corners of the document.

Upon Bob Ford's death, the provisions of the Buy-Sell Agreement required that Andrews purchase Ford's entire 50% interest in Sleep World at a valuation calculated according to a set formula. Andrews has refused to comply with his contractual duty to purchase Bob Ford's interest in Sleep World from Ford's Estate.

Sleep World was operated according to a written Operating Agreement between Bob Ford and Andrews. Article IX of the Operating Agreement expressly provides that upon the death of one of the Members of Sleep World, his ownership interest shall be purchased by the surviving Member in accordance with the Buy-Sell Agreement. Like the Buy-Sell Agreement, the Operating Agreement is clear and unambiguous on its face, and must be interpreted from the four corners of the document.

Andrews has not purchased Bob Ford's ownership interest from the Estate as required by the Buy-Sell Agreement. As a consequence, Tina Ford, Bob Ford's widow and the administratrix of his estate, has been forced to bring this action for breach of contract against Andrews.

Besides requiring the purchase of Bob Ford's ownership interest by Andrews, the Operating Agreement also provides that the proceeds a life insurance policy purchased on the life of Bob Ford must be used to purchase his interest from his Estate. Neither Sleep World nor Andrews has transferred life insurance proceeds to the Estate, although Andrews admits that he received \$100,000 in life insurance proceeds upon the death of Bob Ford.

Andrews has taken the position in this action that the Estate owns no interest in Sleep World, and that the ownership interest of Bob Ford terminated upon his death, which Andrews claims to be an "Event of Dissolution" under the Operating Agreement. Consequently, for example, Sleep World and Andrews have refused to produce discoverable material after the date of November 7, 2005, claiming that information is privileged and that the Estate has no interest in the business after that date.

The Operating Agreement is clear, however, that in the event of dissolution of the business, the company is immediately to file a Certificate of Dissolution with the Secretary of State, and to commence to wind up its affairs and distribute its assets. Sleep World and Andrews have not filed a Certificate of Dissolution and have not commenced the winding up of the affairs of Sleep World.

The Operating Agreement is also clear that Members shall continue to share net profits and net losses of the Company after dissolution. Sleep World and Andrews have never transferred any net profits to the Estate or to Tina Ford.

SUMMARY OF THE ARGUMENT

The facts of every case control the manner in which the law is to be applied. Here, two contracts were executed by two partners in a limited liability partnership, a Buy-Sell Agreement and an Operating Agreement.

The Buy-Sell required arbitration only if, during the lives of the partners, they were in disagreement over whether one of them was subject to a disability. There was no agreement between the parties to the Buy-Sell that their heirs would be required to arbitrate disagreements over the purchase price of a deceased partner's interest in the event of the death of one of the partners.

The Operating Agreement contained a separate arbitration provision, dictating only the manner in which disputes "among the Members" would be resolved. The Buy-Sell Agreement provided that disputes dealing with issues of disability between the Members would be arbitrated, but reflected no similar provision in the event of a dispute over the value of the business arising after the death of one of the partners.

This action, being a breach of contract action on the Buy-Sell Agreement brought by the estate of a deceased partner, is not subject to any arbitration provision, both because the Buy-Sell does not require arbitration in a dispute over valuation after death of a partner, and because the disagreement is not a dispute "among the Members" under the Operating Agreement.

ARGUMENT

Standard of Review

This Court has created a two pronged test for determining whether a matter should be sent to arbitration. *East Ford, Inc. v. Taylor*, 826 So. 2d 709 (Miss. 2002). The first prong of the standard actually has two considerations in Mississippi law:

- (1) whether there is a valid arbitration agreement, and
- (2) whether the parties' dispute is within the scope of the arbitration agreement.

Then, if the two considerations in the first prong of the analysis are satisfied, the second prong of the analysis is "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims."

East Ford, 826 So. 2d at 713.

Andrews' effort to send this matter to arbitration fails on each point.

1. First Prong, First Consideration: There is no valid arbitration agreement controlling the dispute before the Court.

The Buy-Sell that is the subject of this litigation is a two page contract between two men, Andrews and Bob Ford. That contract consists of five numbered sections: Section One describes the 50/50 ownership of the parties; Section Two describes "Transfer During Lifetime"; Sections Three, Four and Five describe the details of ownership transfer in the event of death of a partner.

The only arbitration language found anywhere in the short Buy-Sell contract is in "Section Two. Transfer During Lifetime," and deals with disputes between the parties over disability. The pertinent language reads:

If the members are in disagreement as to whether one is disabled they agree to submit this issue to binding arbitration through the American Arbitration Association or some other like organization.

*See Buy-Sell, R./R.E. at 15.*¹

Conversely, there is not a word about arbitration in Section Three, Four or Five, the contract provisions that describe the mechanics, valuation and terms of payment of a member's interest in the event of death.

See Buy-Sell, R./R.E. at 15-16.

¹ The Record in this appeal and the Record Excerpts bear identical page numbers, so references in this brief will be to "R./R.E.", indicating "Record/Record Excerpts".

It is easy to see from the face of this short, simple contract that Andrews and Bob Ford, during Bob Ford's life, set out their clear intention to require the arbitration of a dispute between the two of them over disability should such arise in the future. But it is just as clear that they did not intend to require their heirs to be subject to arbitration when a surviving partner refused to honor the valuation provisions of the contract.

Mississippi law long has held that where a contract states the clear intention of the parties in writing in one place, but is silent as to the same subject in another place, the law presumes that the parties intended by their silence to exclude the subject. *See*, among many other cites to same effect, *In re: Last Will and Testament of Sheppard*, 757 So. 2d 173, 176 (Miss. 2000), all citing the ancient provision of the law, "*expressio unius est exclusio alterius*" ("the expression of one is the exclusion of the other"). The parties were perfectly capable of requiring arbitration in the Buy-Sell Agreement where they thought it appropriate – on the issue of disability. Mr. Andrews should not now be allowed to write into the contract language that was not put there by the parties while Bob Ford was still alive and able to take care of his family.

The fact that Andrews and Bob Ford would have required arbitration for disability disputes but not for post-death disputes stands to perfect reason. Both men could well have been willing to arbitrate disagreements between themselves as businessmen, but not to have wished to preclude their family members from the benefit of trial by jury should the unfortunate day arise that it would be necessary. Just as plausible is that neither of the two partners ever considered that his surviving partner would act in any way other than honorably with respect to his deceased partner's widow, so it might never even have occurred to them that the valuation of a deceased partner's interest would result in a dispute.

Whichever of these two scenarios, if either, is accurate, or if none of these issues was even in the minds of the two men before Bob Ford died, the simple fact is that today we have the four corners of a clear, unambiguous contract that does not provide for arbitration of disputes arising out of a partner's death such as now presents itself.

The first consideration of the first prong of *East Ford* is not satisfied here, and no matter how liberally the public policy toward arbitration might be read, it cannot possibly create an arbitration clause where the parties did not intend one.

2. First Prong, Second Consideration: This dispute is not within the scope of arbitration language in the Operating Agreement or the Buy-Sell Agreement.

Andrews' favorite argument is that he was also party to a *different* contract with Bob Ford, the Operating Agreement, a contract that did contain an arbitration clause.

But here, Andrews must argue that this Court should ignore the Buy-Sell, the contract that is the subject of the breach of contract action now pending, and instead

substitute in its place a different contract and use the provisions of that different contract to determine how to rule in this litigation.

Even if Andrews succeeds in this clever sleight of hand, it should avail him nothing. Because even if this Court looks to the arbitration provision in another contract, the first prong *East Ford* analysis requires a second consideration on which Andrews fails.

The second consideration under *East Ford* is whether the parties' dispute is within the scope of the arbitration agreement. So, should this Court buy Andrews' argument that it should switch contracts and look at the Operating Agreement rather than the Buy-Sell by "construing the contracts together" as Andrews urges, it still doesn't get Andrews his desired relief of bouncing Mrs. Ford out of court.

The Arbitration provision of the Operating Agreement is clear and easy to understand. It says that any disagreement "among the Members" of Sleep World, LLC is to be arbitrated. See Operating Agreement, R.E. at 52. The "Members" (actually, the partners) of Sleep World were Bob Ford and Andrews. Tina Ford was neither a Member of Sleep World nor a signer on the Operating Agreement contract. The trial court correctly observed that upon the death of one member of a two member LLC (or, similarly, one of two partners of a two partner LLP), there no longer remain any "Members" to be subject to the terms of an Operating Agreement. See February 28, 2007 Ruling of the Circuit Court of Rankin County, R./R.E. at 282-84.

Moreover, Andrews has consistently taken the position in this action that neither Tina Ford nor the Estate owns *any* interest in Sleep World. Andrews says that the 50% ownership interest held by Bob Ford in Sleep World terminated upon his death. To that end, Andrews has, among other things, refused to produce discoverable material after the date of November 7, 2005 when Bob Ford died, claiming that material is "not relevant and confidential" and that the Estate has no interest in the business after the death of Bob Ford. See, e.g., Defendant's "General Objections" to Plaintiff's Interrogatories and Defendant's "General Objections" to Plaintiff's Request for Production of Documents, R./R.E. at 207.

But Andrews cannot have it both ways. He cannot take the position, as he has for the past two years since Bob Ford died, that the Estate owns no interest in the business, and then come before this Court and argue that this case is a dispute "among the Members" of the company under the Operating Agreement. And that is exactly the argument that Sleep World must make in order to persuade this Court that it should kick Mrs. Ford out of the courtroom and into arbitration.

Even then, Andrews runs into yet another insurmountable obstacle in trying to satisfy the first prong of the *East Ford* standard. Mrs. Ford takes no issue with the authority or the wisdom of the cases requiring that contracts executed simultaneously should be construed together. *Sullivan v. Protex Weatherproofing, Inc.* 913 So. 2d 256 (Miss. 2005); *Sullivan v. Mounger*, 882 So. 2d 129 (Miss. 2004). That proposition of law

is soundly reasoned and those cases are fine on their facts. But they do not allow what Andrews urges here – the complete disregard of the language of the contracts themselves.

The facts of every case are different from the facts of every other case. The only similarity between the case now before this Court and the cases the Court considered in *Sullivan v. Mounger* and *Sullivan v. Protex* is that all the cases dealt with multiple contracts.

But those cases do not control this case, because the contracts there and here are simply different. The language of the contracts themselves must be read, and it is absolutely plain to see that Bob Ford and Mike Andrews intended that some disagreements should be arbitrated – namely, those that arose between the two of them as members/partners under the Operating Agreement, or between the two of them on the issue of disability under the Buy-Sell Agreement. But it is equally plain to see that they did not require that disputes that might arise after the death of one of them be arbitrated.

If, as Andrews argues here, the Operating Agreement just simply consumes the Buy-Sell and requires that any disagreement for the rest of time in any way related to Sleep World must be arbitrated, why did Bob Ford and Mike Andrews go to the trouble of including arbitration language covering disability disputes in the Buy-Sell? They certainly did not think when they executed the two contracts that the Operating Agreement imposed the requirement of arbitration on every issue arising out of the Buy-Sell Agreement. If they had, they would not have mentioned specifically in the Buy-Sell that they wanted disability issues arising under the Buy-Sell to be arbitrated if a disagreement arose between them.

In fact, Bob Ford and Mike Andrews did mention arbitration in the Buy-Sell, but they provided for arbitration only of disagreements over disability. Andrews should not be heard to argue that this Court now should substitute his desires after the fact for the judgment of the signers of the two contracts at the time. It is specifically to prevent a surviving party to a contract from changing its terms after the other party's death that we have a carefully crafted set of rules for how we construe the clear language of contracts under our law.

Andrews thus fails also to satisfy the second consideration of *East Ford*, in that the dispute before this Court is not within the scope of the arbitration language of the Operating Agreement or the Buy-Sell Agreement.

3. Second Prong: Other factors counsel against requiring arbitration in this case.

Finally, Andrews is unable to satisfy the second prong established by this Court in *East Ford*, because there are, in fact, constraints external to the arbitration provision that should foreclose arbitration of the simple contract issue before this Court. Those constraints consist of the raw unfairness of the position Andrews has attempted to push upon this Court.

If, in fact, Andrews is entitled to have this Court compel arbitration in this matter under the Operating Agreement as a dispute “among the Members”, then the Estate owns a Member’s interest in Sleep World. But for two solid years, since November 7, 2005, Andrews has denied a Member’s interest to the Estate. He has expressly prevented the Estate or Mrs. Ford from participating in the governance, management, compensation or net income of the business. Far from treating the Estate or Mrs. Ford as representing the interests of the deceased Member – Mrs. Ford’s husband – and standing in the stead of that Member as provided by law, Andrews has, instead, refused so much as to produce discovery of any information about the business since Mr. Ford’s death, declined to share compensation or net profit with the Estate or Mrs. Ford, refused to turn over proceeds of life insurance on the life of Robert Ford and refused to purchase the interest of Robert Ford from the Estate as required by the Buy-Sell. *See* Miss. Code Ann. Sec. 79-29-308 (1972, as amended).

Not satisfied with that litany of abuse, Andrews has now gone beyond callous disregard for his partner’s widow to actual creation of a new business entity, “Sleep World Mattress Centers, LLC”, located in the same building as the old Sleep World and capitalized and doing business, no doubt, with the assets of Sleep World, half of which belong to the Estate. *See* Excerpts from Corporate Search Site of the Office of Secretary of State of the State of Mississippi, R./R.E. at 209. Not satisfied to stonewall his partner’s widow into accepting a low-ball buy-out deal, Andrews has now gone so far as to signal a willingness to divest Sleep World of its assets by transferring them to another company controlled exclusively by him.

Mississippi law flatly provides that the Estate “may exercise *all* of the member’s rights” of Bob Ford with respect to Sleep World for purposes of “settling his estate or administering his property....” *See* Miss. Code Ann. Sec. 79-29-705 (1972, as amended) (emphasis added). But in this case, Andrews has prevented the Estate from exercising *any* of the deceased member’s rights.

Now, having ignored the inconvenient portions of the Operating Agreement – the portions that would require that the widow of Andrews’ partner be treated with some dignity and equity – Andrews asks this Court to cherry pick a provision that he wishes to utilize for his perceived benefit and to avoid standing in front of a jury of his peers. But by his own conduct over the past two years, he has demonstrated that there exists no dispute “among the Members” of Sleep World, such as would be necessary to trigger the arbitration provisions of the Operating Agreement.

This Court should not today let Andrews take advantage of select provisions of an Operating Agreement that he has otherwise ignored for two years, and should find that the second prong of the *East Ford* analysis, like the first prong, has not been satisfied, on the raw grounds of fundamental fairness.

CONCLUSION

Occasionally, the law genuinely serves as the last hope for a disadvantaged person where common decency has failed. To that end, it was our founders' conviction that the best ultimate arbiter of the facts of a dispute is a jury of one's peers; so firm was that conviction that it is protected by constitutional mandate.

Quite reasonably, our law has in recent years allowed for parties to suspend or waive their own right to trial by jury through contractual agreement. Such agreements sometimes offer the benefits of efficiency and lower cost that business people may choose in favor of jury resolution of factual disputes if they wish.

At the same time, the case pending before the Court is a perfect example of why the personal right of trial by jury is so valued in our history. Tina Ford's husband is gone; his surviving partner is not doing what he agreed contractually to do in the event of Bob Ford's death. In response to Mrs. Ford's efforts to seek redress in the courts, Andrews' response was first to try to sweat her out with a low settlement offer, then force her to arbitration of her claim for justice by a convoluted legal argument that one contract should be substituted for another.

Lady Justice might, indeed, be blind. But she is not deaf. And, like this Court, she can no doubt tell when a siren's song is masquerading as a legal argument.

The decision of the trial court overruling Andrews' Motion to Compel Arbitration should be affirmed, and this matter set down for trial forthwith.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, R. Andrew Taggart, Jr., counsel of record for Appellee Tina Ford, certify that I have served a true and correct copy of this Motion upon all parties by e-mail and by placing copies in the mail, first class postage pre-paid, to the following counsel at the address below:

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This the 14th day of November, 2007.


R. ANDREW TAGGART, JR.