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APPPELLANT’S REPLY TO BRIEF OF APPELLEE

Appellant, Thomas Mazerski, by and through counsel, Stanley R. Jacobs, reply submits the following reply to the issues raised in the brief of the Appellees.

I. THERE IS NO AMBIGUITY IN THE PROVISION OF THE AGREEMENT PERTAINING TO ARBITRATION.

There is no an ambiguity in the language of the Agreement pertaining to arbitration. Paragraph 16 of the Agreement states:

“the parties retain the right to, and shall not be prohibited, limited or in any way restricted from, seeking or obtaining equitable relief from a court having jurisdiction over the parties.”

Appellant contends that the language is not ambiguous, but if the Court reaches a conclusion that it is ambiguous, then the Agreement should be considered a contract of adhesion and should be interpreted in favor of the Appellant, who was an employee working for a major corporation, who drafted the agreement.

In the case of Doyle v. Finance America, 173 Md. App. 370 (2007), this Court
stated:


Where the contract is unambiguous, its plain meaning will be given effect. There is no need for further consideration. Spengler v. Sears, Roebuck & Co., 163 Md. App. 220, 239, 878 A.2d 628 (2005).”

This leads to the question as to what is meant by the terms “equitable relief”.

II. THE TERM “EQUITABLE RELIEF” INCLUDES APPELLANT’S RIGHT TO FILE A CIVIL ACTION AS OPPOSED TO ENGAGING IN ARBITRATION

In the case of Cheek v. Healthcare, 378 Md. 139 (2003), the Court of appeals stated:

“The determination of whether there is an agreement to arbitrate, of course depends on contract principles since arbitration is a matter of contract. As such a party cannot be required to submit any dispute to arbitration that it has not agreed to submit. Curtis G. Testerman Co. v. Buck, 340 Md. 569, 579, 667 A.2d 649, 654(1995) (recognizing that “[a]rbitration is ‘consensual; a creation of contract’ ” and that the absence of an express arbitration agreement, no party can be compelled to submit to
Apart from the fact that Appellant requested a hearing which was denied, although required by the rules, Appellant filed an affidavit stating as follows:

“I am not an attorney and I interpreted the language of the Agreement to mean that I am not required to go to arbitration but can bring an action in Court to enforce my rights.” [E-42,71, Appellant’s Affidavits].

Appellee erroneously argues that Appellant has misinterpreted “equitable relief” to mean something different than was the parties intended.

The Maryland Law Encyclopedia, Courts & Judicial Proceedings, §2, entitled “Merger of law and equity” states that “The merger of law and equity was accomplished in Maryland on July 1, 1984, as part of a comprehensive revision of the Maryland Rules of Procedure. Accordingly, the Maryland Rules provide that there is one form of action known as “civil action”. The effect of this Rule is to eliminate distinctions between law and equity for purposes of pleadings, parties, court sittings and dockets....” “Accordingly, a party may state as many separate claims or defenses as the party has, regardless of consistency and whether based on legal or equitable grounds.”

Maryland Law Encyclopedia, Courts & Judicial Proceedings, §1, states that “Equity” has been said to be the name of the principle or set of principles under which substantial justice may be attained in particular cases where the prescribed or customary forms of ordinary law seem to be inadequate. “Equitable remedies” is a collective term of
art for a category of remedies, historically developed in courts of equity that are (1) in personam in character and (2) coercive in nature. Citing Alternatives Unlimited, Inc. V. New Baltimore City Bd. Of School Com’rs, 155 MDAPP 415, 843 A.2d 252 (2004).

Appellant’s interpretation of the language “that the parties retain the right to, and shall not be prohibited, limited or in any way restricted from, seeking or obtaining equitable relief from a court having jurisdiction over the parties” allowed him to bring a civil action is correct.

III. APPELLEES WAIVED THEIR RIGHT TO COMPEL ARBITRATION WHEN THEY REFUSED TO ARBITRATE.

The right to arbitrate is a matter of contract and it is possible to waive that right. Freedman v. Comcast Corporation, No. 435, September Term, 2008 (Md. App. 2010) this Court citing the case of Charles J. Frank, Inc. v. Associated Jewish Charities, Inc., 294 Md. 443, 448 (1992). The Court then extended the general contractual waiver rule to hold that an arbitration agreement is waived by acts inconsistent with intention to insist upon enforcing such provisions. Thus a waiver is a question of intent that ordinarily turns on the factual circumstances of each case. Frank at 449.

The facts in this case clearly indicate that Appellees unilaterally revoked and abandoned the Agreement with Appellant and cannot compel arbitration.

California has a Code Provision pertaining to waiver of arbitration.

Section 1281.2 of the California Code of Civil Procedure provides:
“On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.”

In the case of DeGrezia v. Superior Court of Los Angeles County, 2003 CA 2381 (CACA, 2003) citing the case of B. L. Metcalf Contractor, Inc. V. Earl Erne, Inc. 28 Cal Rptr 382, 212 Cal.App.2d 689 (Cal App. 4 Dist., 1963) the California Court of Appeals stated:

“It is true that if a contract which contains a provision for arbitration has been entirely rescinded or abandoned the provision for arbitration ceases to exist. Silva v. Mercier, 33 Cal.2d 704, 204 P.2d 609)’’

In the case of Emma Corp. v. Inglewood Unified School, 8 Cal.Rptr.3d 213, 114 Cal.App.4th 1018 (Cal. App., 2004) involving construction, the Court stated:

“Under the abandonment doctrine, once the parties cease to follow the contract's change order process, and the final project has become materially different from the project contracted for, the entire contract — including its notice, documentation, changes, and cost provisions — is deemed inapplicable or abandoned....”
The facts in this case, being the refusal to participate in the earlier arbitration, clearly indicate that Appellees abandoned and/or revoked that provision of the Agreement and have no right to compel arbitration.

**CONCLUSION**

There is no ambiguity in the language of the Agreement. Appellant clearly has the right to interpret the provisions of the Agreement to allow Appellant to bring a civil action as opposed to engaging in arbitration.

If the Court reaches a determination that an ambiguity exists, then this is a contract of adhesion, and Appellant’s interpretation that he could file a civil action should be accepted.

Appellees waived or revoked the provision of the Agreement when they refused to arbitrate in the earlier proceeding.

Appellant respectfully requests this Court to reverse the order of the lower court and to remand this case for a trial on the merits.

Respectfully submitted,

________________________
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**RULE 8-504(8) STATEMENT**

Pursuant to Maryland Rule 8-504(8), the font used in this brief is Times New Roman and the size used is thirteen (13) point.

_____________________
Stanley R Jacobs

**CERTIFICATE OF SERVICE**

I certify that two (2) copies of the brief were mailed, postage prepaid, first class mail this 5th day of May, 2010 to the Appellants’ Attorney:

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_____________________
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