

ORAL ARGUMENT – 3/27/02
01-0682
CVN GROUP V. DELGADO ET AL

BLOCH: There are two issues before the court today. The first is whether an arbitrator has the authority to determine the underlying facts relating to the validity and enforceability of a mechanics lien? We believe that the answer to that question is yes, despite the provision in the property code reserving foreclosure, an order of foreclosure for the courts.

But even if the answer to that first question is no, and that the arbitrator does not have the authority to determine the validity of a lien, or if there are other common law grounds for vacating this award, then the second issue arises. And that is whether a TC after vacating an arbitrator's award has the authority to then simply substitute its own judgment based on the arbitrator's record. The answer to that is clearly no. After vacating an arbitrator's award there is nothing left to modify. The only thing that can happen if there are appropriate grounds for vacating (and again we submit there are not) the only thing a TC can do is vacate the award, set it aside, and then either send it back to arbitration if the issue is proper for arbitration, or if it's not, tell the parties to go try the case anew in a TC.

HANKINSON: Do you have any authority for your statement in your brief that determining the validity of a mechanics lien, ordering its foreclosure are two separate steps?

BLOCH: Yes. The authority I have is twofold. One is from the cases that are out there, and there are only two, one of which is cited in my brief. And that is Dalton Contractors Inc. v. Brian Autumn Woods LTD, 60 S.W.3d 351. And in that case even more specifically than in the Hearthshire Braeswood case, that is cited in our brief, the court very clearly said based on a broad arbitration clause, the issues relating to the validity of a mechanics lien can be tried by the arbitrator reserving then the order of foreclosure for the court.

HANKINSON: But I don't think that Hearthshire talks about the elements related to the validity of a mechanics lien. It talks about the underlying contract issue. There is no mention in Hearthshire about dividing the foreclosure issue between the two pieces and sending the mechanics lien over. What it says is that the TC should have stayed the foreclosure proceedings pending the determination by the arbitrator on the underlying contract claim.

BLOCH: That is absolutely correct.

HANKINSON: So you're taking it one step further than what the case actually does aren't you?

BLOCH: And so did the case involve...

HANKINSON: I understand. The Dalton case took it a step further. But Hearthshire does not support that proposition.

BLOCH: I agree. And I frankly admit that. I do take it a step further because I think that determining the validity of the lien is part and parcel of the underlying contract dispute.

HANKINSON: Other than Dalton, do you know of any authority just looking at the nature of a foreclosure proceeding in which we would treat the determination of the validity of the lien separate and apart from any determination about the underlying debt under the contract as being two separate proceedings?

BLOCH: I think the authority for that is found in the property code itself. If you look at §53.160, that provision of the property code establishes a summary proceeding to allow a party objecting to the validity or enforceability of a lien, a procedure to come into court through verified pleading, and it sets out the parameters of what has to be done, in order to challenge the validity of the lien. So there is a separate provision in the property code establishing the procedure for determining the validity of the lien. There is nothing in that provision that reserves that procedure for the courts.

HANKINSON: But it's all in the same chapter dealing with all of the provisions relating to foreclosure of mechanics lien.

BLOCH: It is in the same chapter, which I think makes it even more clearer that the legislature in a separate provision says foreclosure, the order of foreclosure is reserved for the courts.

HANKINSON: This is a statutory procedure that is designed to effect the exception in the constitution to allow in this kind of a lien in the face of a homestead, the homestead exemption which is why we're dealing with a judicial foreclosure.

BLOCH: Yes. Although the statute is broader than just homestead.

HANKINSON: I understand that it's broader than that, but that's really its origin. So you cannot do this by nonjudicial foreclosure. You have to go to the court and get a judicial foreclosure by virtue of the way the legislature set out _____.

BLOCH: Correct. And that's why we didn't ask the arbitrator to order the foreclosure.

HANKINSON: If we separate the issue of the validity of the lien from the actual order of foreclosure aren't we then reducing the act of the TC particularly given the type parameters that are on a TC under the Texas arbitration act, aren't we then reducing the act to a purely ministerial act in which the judge is just to put his or her signature on the final order?

BLOCH: I believe so.

HANKINSON: Doesn't that then cut against what the legislature intended in setting up an entire statutory scheme saying that we're going to leave it in the hands of the court to actually litigate and do foreclosure proceedings on matters under the mechanics lien statute?

BLOCH: Again, I think you have to look at what the legislature tells us. The legislature told us that the actual order of foreclosure saying this lien can be foreclosed upon has to come from a TC.

HANKINSON: I understand that that's what it says. But it's very clear that the legislature has set up in connection with that a scheme that is prescribed in the statute of how a TC is to handle this and what is to happen and how a court is to do one of these judicial foreclosures. And if we buy your approach that we can teeth out and the only thing that the legislature was concerned about was a court signing the order as a ministerial act, then haven't we completely undercut this statutory scheme which apparently the legislature decided needs to be handled by a court as opposed to allowing it to go forward as a nonjudicial _____

BLOCH: I don't believe so. And I understand that there is a fine line there. But let me also point out that foreclosures outside of the mechanics and _____ lien realm can occur by contract under deeds of trust.

HANKINSON: But that to me is very significant that they chose not to allow that to happen here. I think that's an important distinction that they made it a point to say we want these to be at the courthouse.

BLOCH: If you have the other kind of a lien that's not involving a mechanics and _____ lien, say you have one arising under a deed of trust. The act of going down to the courthouse steps and foreclosing on that lien is one step. If a party wants to challenge the validity of that lien prior to going down to the courthouse steps, then you either go to court to litigate the matter, or if there is a provision in the contract between the parties requiring them to arbitrate all the _____, then I would suggest even in that situation you have to litigate that issue in arbitration.

HANKINSON: But that's like litigating any other matter. There is not a statutory scheme that requires you to go to the courthouse in the first _____ to get the foreclosure. You have said to us that we should take this foreclosure proceeding and treat it like two pieces. And I'm trying to see how that squares with the fact that we have a statutory scheme in place that the legislature apparently decided was important for some reason. And if we do what you ask, we will reduce the court's function to performing a purely ministerial act of putting its name on an order of foreclosure without in fact litigating the issue.

BLOCH: I understand your concern about that. It's an uncomfortable position. The legislature has also told us how important it is to enforce arbitration agreements, and they've given us procedures for doing that. We certainly have two different rationals and policy reasons behind what the legislature has done. And I suggest to you that the legislature simply did not have the

arbitration provisions in mind when it set up the statutory scheme to require a court order in order to foreclose a mechanics lien. They weren't thinking "oh I wonder if these other underlying lien issues can be resolved by arbitration." But instead they gave us the separate arbitration statute.

HANKINSON: Given the limitations there are in the arbitration act for a TC in a TC's reviewing of an arbitration order, what if we have an arbitrator who in fact is just plain wrong and we have an invalid mechanics lien. Everyone knows that's the case. And in fact just is flat wrong on that issue. In the face of that statutory scheme, the TC would have no choice despite the fact that it was designated by the legislature as the appropriate adjudicative body it must sign the order proposed under the statute.

BLOCH: We have a very, very strong body of law in this state that prohibits TC's from reaching a decision that is different from an arbitrator even if the arbitrator has made a mistake of law or of fact except if you've got common law grounds for setting it aside, or grounds for vacating it under the statute, which I don't believe are present here although the respondent is certainly alleging that they are. So there are some procedures to safeguard the process.

HANKINSON: But I have a hard time looking at the arbitration act figuring out what conceivable exception could be applied if in fact an arbitrator has determined that an invalid _____ was in fact _____.

BLOCH: First of all I want to give you some comfort level about the validity of this lien.

HANKINSON: I understand that you say it's a valid lien. Can I get you to direct your attention to what options would a TC have if it was faced with a decision by an arbitrator determining that a lien was valid when it was clearly invalid.

BLOCH: I think a party seeking to set aside the arbitration order in that instance would still nonetheless have to come within the grounds under the statute for setting it aside, or probably in a situation you've raised, which again I don't think is present here, but if it's so clearly wrong, if there is such a gross mistake as to evidence, bad faith or the failure to exercise an honest judgment, that's the common law standard, then the TC would have a basis for setting it aside.

HANKINSON: But I don't get to look at the common law standard if I'm under the Texas arbitration act. This kind of procedure would be under the arbitration act wouldn't it?

BLOCH: No. I believe the case law is clear in Texas. My understanding is that the cases have indicated that the statutory scheme and the common law go hand in hand. They don't necessarily trump one or the other. And so a party can bring a challenge both under the statute and under the common law, which is what happened here.

HANKINSON: I can't find any ground in the arbitration act that would allow me as a trial

judge to decide to not accept the arbitrator's decision _____ that I didn't agree with. What ground under the statute? I couldn't find one.

BLOCH: Well in this case, the ground that has been alleged is that the arbitrator exceeded his authority in making that determination. And that's an issue that this court has to decide: does the arbitrator have the authority to make that decision? If the arbitrator does not, then that would be a basis for vacating.

HANKINSON: Your position I thought was that exceeding the authority goes to what the parties have agreed in terms of the extent of the authority given by parties in their agreement.

BLOCH: That's the typical spoke of authority issue. And that's not the one here. Because there really is no dispute here, but that the validity of the lien comes within this broad arbitration clause. The only thing that would take that out of the arbitrator's authority is the property code provision that states that only a court may order foreclosure. That's the only thing that would bring the validity of the lien determination out of this broad arbitration clause.

HANKINSON: Conceivably we could have a situation with a statutory mechanics lien that was invalid, having been determined to be valid by an arbitrator, and it's a lien against a homestead, and in fact it would come back to a TC and the TC would have no choice but as a ministerial act to sign the order of foreclosure knowing that it wrong.

BLOCH: Again, we've got to give deference to the arbitrators and the arbitration process. I suggest that perhaps if the legislature wants to go that next step and give that additional protection to homesteaders and say we're not even going to allow the validity of a lien to be tried in arbitration, then the legislature is free to do that. But I suggest to you given the statutory scheme that we have, there is no basis for preventing that from happening.

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RESPONDENT

SAVRICK: The one issue that I think makes this an easy call is homestead.

OWEN: Let's say that you do have an arbitration agreement between a builder and homeowners to build their home on their homestead. And the lien in their case, unlike this case, turns on very fact specific disputes. Was the work done? Were there proper credits and offsets? So the only dispute about the _____ lien is the amount of land. It's a very fact specific debate. And the parties agree to arbitrate disputes about whether the work was done and that sort of thing. So you go through the arbitration, and the arbitrator decides what the facts were and says the lien is valid in this amount. Now are you saying that you can still go to a TC and relitigate that whole matter: was the work properly done? was it done in a good and workmanlike manner? were all the proper credits and offsets allowed? Do you get to relitigate all of that in the TC even though it was subject to arbitration simply because a homestead is involved and a lien is involved?

SAVRICK: I think the underlying issue of whether there is a valid debt and how much that debt is for, it is ripe for arbitration. And for purposes of being before this court, that decision stands. That is the court doesn't come in afterwards and say well the amount of money or the decision regarding whether there is a debt at all exist.

HECHT: Even though if you won that, there wouldn't be a foreclosure, and even if it were plainly wrong?

SAVRICK: That's correct. In this situation we have to protect is the determination by the arbitrator that there is a lien on this homestead.

OWEN: Well you go to the TC and say the arbitrator has determined that here's the debt, I have a valid lien, now I want foreclosure. And the homeowner says, oh no, I agree there may be a lien, but it's not for that amount and you can't foreclose on my home for that amount. Now where are you left? Does the TC relitigate the amount of the lien or would not?

SAVRICK: I think in certain circumstances the court should step in. But that's not the situation we have here.

OWEN: Under that scenario should the court step in? Could the court step in or not?

SAVRICK: I think that if the arbitrator's decision violated the constitution or violated a dominant public policy, the court should step in. And that's what happened in this case. That is, the court is not going back and we're not asking this court to go back and say the amount of the debt was wrong. We're saying that they failed to satisfy the constitutional and statutory requirements for a lien on a homestead.

HANKINSON: So you're going to draw the line between the debt, the arbitrator gets to decide the debt that the lien is attached to? So what does that leave for the TC to do? Then I get to walk in and I get to say, here's the debt, nobody gets to look at the amount of the debt. Then what's left to be litigated?

SAVRICK: If the decision regarding the debt also happens to violate some constitutional ground or something against public policy - for example the debt could be a gambling debt, and the court would say well wait a second. I'm not going to - there is where the line is.

HANKINSON: Let's assume we don't have a gambling debt or anything like that. We're just talking about, like J. Owen said, just arguing over how much was owed, how much work was done and how much was owed. That's all that was decided in the arbitration.

SAVRICK: Unless there is a statutory ground for overturning the decision about the debt, I don't think the court should step in and overturn that debt.

HANKINSON: Then what would the TC decide?

SAVRICK: The TC would decide whether the claimant has satisfied the constitutional and statutory requirements to have a lien on the homestead. So I do concede that whether the debt exist is subject to arbitration and shouldn't be overturned for statutory ground. But I'm not before this court with some new standard to apply. A court must step in if the arbitrator's decision violates the constitution or violates some dominant public policy.

OWEN: Is there still statutory retainage piece on homestead liens?

SAVRICK: Yes. There's a whole statutory scheme.

OWEN: Let's suppose that the only argument about the validity of the lien was did the contractor comply with the 10% retainage provision. And that's a very factual inquiry, and there's an agreement to arbitrate. So it goes to the heart of the validity of the lien. But it's a very factual inquiry about how much work was done? when did the contractor retain or not retain? So that's all arbitrated. The lien is declared valid because retainage was met. Does the TC get to relitigate that or does the parties have to relitigate that at the TC?

SAVRICK: If it's an issue of violating one of the requirements.

OWEN: Well that's one of the requirements. Did she meet the statutory retainage requirements?

SAVRICK: I respectfully disagree with the court. It's not a requirement in order to have a lien that the owner who was the one to retain. That's a separate scheme in getting a lien on a property. There's a statute that says that if you retain 10%, that lien may be limited. But there's another section in the property code that says here's what you have to have in order to have the lien. And you have to have some of the very requirements that both the TC and the CA went through. And they are both constitutional and they are both statutory.

And I do think that if we decide that arbitration on this issue of lien on a homestead can be sacred, then we are just left with a ministerial task of a court. And I would suggest to this court that no judge should think that after signing the oath that they sign about protecting the constitution should just be the rubberstamp for that activity.

HANKINSON: What I'm having a hard time with is you're writing the opinion. How are you going to say which piece of this goes to arbitration, and which piece stays with the TC?

SAVRICK: And that's an interesting way of doing it. Because there are really two ways of looking at that issue. One is solely procedural. We have a procedure set up for arbitration. We have a procedure set up for foreclosure. And the court can decide this much like the CA decided as purely a procedural issue. That is what are we going to let the arbitrators do and what does it mean

when the legislature said the foreclosure of the lien has to be done by a court. And you do have these two legislative statutes that come in play. And it's a very interesting issue. I think it's a more interesting issue when you don't have issues of homestead.

HANKINSON: What does it look like if you do it on a procedural model? What does the opinion look like so that the next time a trial judge has to decide which piece to send to arbitration, the trial judge knows what to do?

SAVRICK: I think it looks like this in a homestead case. You arbitrate the underlying dispute of what's owed, what are the facts. The arbitrator can make factual determinations that work was done at this time, or that this is the amount of money that was owed, or they didn't have the right to send them off the job. Then you go to the court. And the court is being asked solely to foreclose the lien. And the court has to check: were all the requirements met in order to determine whether that lien has been satisfied. In our particular case...

HECHT: But it couldn't go behind the decision. He just looks to see if those fact findings are enough?

SAVRICK: I think that's correct. I think if there were factual findings for example that a contract had been signed, and there was a dispute about that and the arbitrator found that there was a signed contract that had been filed prior to the time, that that's a much trickier issue of whether the court can go behind those factual findings. Again we don't have that in the present case. The arbitrator concluded there was a lien.

BAKER: We're not talking about a contractual case are we? We're talking about a statutory mechanics and materialmans lien filed by a sub. Is that right?

SAVRICK: Filed by the general.

BAKER: By somebody who is not the owner.

SAVRICK: That's correct.

BAKER: Was it based on the contractual mechanics and materialmans lien between the general and the owner?

SAVRICK: In the arbitration they moved for foreclosure of their lien. And that didn't come out of what lien they were and what they weren't moving for. They moved for a termination of that lien. The court ultimately decided that they didn't have any lien at all. Because the requirements for a mechanics lien contract in connection with a homestead still have to satisfy the various requirements that you need in order to have it.

I know there's been some arguments about the fact that no mechanics lien

contract was decided. But in fact if you don't have all the statutory requirements for the statutory or constitutionally you don't have a mechanics lien contract.

OWEN: Again, let's suppose you've got a very broad arbitration agreement. I signed an agreement saying anything that you can possibly relate to in the construction of this home, and your rights against me, etc, etc., is very broad. I sign the contract. The home is built. The contractor says now I want to be paid. And he says well I'm not going to pay you. And he says well I'm going to foreclose my lien. And he says well I have a common law husband and you didn't get him to sign the contract. So we go to arbitration over whether I have a common law husband or not, and whether he signed the contract. Now do we relitigate that in the TC if I lose?

SAVRICK: I think if it's a matter of protecting the constitution, the answer could be yes. The US SC and even this court have recognized that this is a balancing.

OWEN: We're just talking about forums aren't we in arbitration clauses? Isn't that what the US SC has said: we're just talking about the forum where disputes are evolved to resolve. What's so different about that dispute? Do I have a common law husband or not, that takes it out of the arbitration statute

SAVRICK: What takes it out is the homestead nature of the property, and the fact that the court has to step in and say, Am I going to decide that the legislature in this arbitration scheme overrides the constitution and that the legislature intended that by signing an arbitration agreement you potentially gave up your homestead rights. What's the duty of the court to step in? And the answer to that is the court has a duty. Now how far that duty goes, does it go to looking behind the factual finding of the arbitrator? I would suggest that in certain cases the court may have to do that.

HECHT: What? You say don't look behind the debt. Look behind common law marriage. I'm not sure I see a principle there, but if we had some more examples maybe it would help us.

SAVRICK: There is a case from this court in which two spouses have to sign the contract, and only one signed it. And one signed it but not in front of the notary. And this court said, strict compliance.

HECHT: But what if there's a factual dispute about whether one signed it or not?

SAVRICK: If there's a factual dispute and two different people could differ onto it...

HECHT: Well the Pope and 5 people say she did, and she says she didn't, and the arbitrator says she did.

SAVRICK: I think the court should give deference to the arbitration in that factual finding. I don't have a problem with that. But the underlying fact dispute can be left to the arbitrator. And

I don't think that for a judge that it is - they have to balance those interests.

HECHT: But you think that the arbitrator decides no she didn't sign it, but that shouldn't matter in this case, that's something the judge should look at again?

SAVRICK: I think that's right. And I'm not saying that it's an easy task for a judge to do. But the question is, are we going to empower trial judges when it involves an issue of public policy to even make that determination?

HECHT: You think this is this way because of the homestead issue that's involved? For example, an arbitrator can't order garnishment. But he can say well you owe \$10. And then you go to the court and you get the garnishment. And you wouldn't let the court look behind that and the court would just have a ministerial duty to enforce the judgment by execution, or attachment, or garnishment, or whatever that once the award was confirmed, but because this involves homestead you think it's different?

SAVRICK: I think it's different. And I'm not the first person that's been before either this court or the US SC. I'm not creating law here.

HANKINSON: Have you looked at other jurisdictions in terms of this kind of an issue and how it interplays with arbitration?

SAVRICK: Yes. I have. Again, the US SC in a series of cases has looked at this issue, and has said that a common law basis, both under federal law and under state law has a limit. And that limit is when the arbitrator's award violates public policy. It's interesting. Most of the SC cases were labor related cases. And I've got some cites for the court.

HANKINSON: Would you mind submitting a supplemental brief that would provide that to us. Does any of those cases or cases from the US SC or other jurisdictions deal with this kind of a situation where you're looking at something like a foreclosure proceeding or something similar to that where you're saying we ought to split and send part of it over and leave part of it here?

SAVRICK: I don't know if there is any that split, but there are many including a decision of this court that says a court does step in when a contract violates public policy. And I think the issue here that comes out is whether the decision that a homeowner might owe money or the factual determination of the arbitrator doesn't cross that line necessarily into public policy or the constitution. But if those findings do and if that award does, then the court has an obligation to step in.

HECHT: And so in your view to take petitioner's further point, you don't think there's anything for the trial judge to try. He's just looking at the facts that have already been found and deciding as a matter of law whether that justifies foreclosure or not.

SAVRICK: And that's what the court did in this case. The parties agreed to limit the evidence that we were going to submit as the arbitration record. In this case we had a full blown arbitration record that there wasn't oral testimony. And the court looked at that record and said, okay as a matter of law here is my checklist of what I have to have to have a constitutional lien. They didn't satisfy that checklist, therefore, it is my job to say that that lien is invalid.

HANKINSON: It seems a little bit inconsistent though for you to take the position that we don't want the TC to just do a ministerial function, but to then confine the TC to just the record on the arbitration. If in fact the TC is going to determine the validity of the lien, then why isn't Ms. Bloch correct that in fact the issue should have been open to the TC, not to relook at fact findings, but for them to be able to say, see here's our lien, and here are the various requirements and here's how it was met?

SAVRICK: And that becomes a matter of procedure.

HANKINSON: Do you agree with her that this should go back to the TC if we decide that the TC should have done more than just sign the order of foreclosure?

SAVRICK: Not in this case. And the reasons is, we had that hearing. We had that trial. The lawyers on both sides said, what we're going to agree to submit to the court is the arbitration record. If you do not have the arbitration record, or if there is some other evidence that a party has present and wants to submit, then I think that the court should take that evidence.

HANKINSON: I thought that's what happened in this case, that there was an effort to put additional evidence on. That during the court of the hearings someone went downstairs to the clerk's office, to the property records or whatever in order to bring up to show the court what the record was.

SAVRICK: Never made it to the courtroom.

ENOCH: This sounds a little bit like you're trying to say that if it's a constitutional issue, we treat this like an agency decision. It's not an arbitration. It's sort of like a substantial evidence review. If there is some evidence supporting the arbitrator's decision that this agreement was entered into before the materials were delivered, then the court must accept that finding. But if there is no evidence supporting the arbitrator's decision that this agreement was entered into before the materials, then the TC cannot confirm the _____. Is that really what you're arguing here?

SAVRICK: I'm not arguing it because it doesn't matter in our case. That is, in our case, there was no findings of fact by the arbitrator that the TC's decision went against. There was only really a conclusion of law. I think you have maybe a more interesting issue than we have when you have a trial judge who is going to change the finding of an arbitrator. And what the courts have said on this is that this is tough. This is a balancing issue. This is balancing two interests that we have.

ENOCH: But the record you say is the record from the arbitration hearing, and you're

asking the court to review it. It sounds to me like what you're saying is that's what's going on here is a substantial evidence review, and that's what we ought to be doing.

SAVRICK: For this case, it really is a no evidence review. We don't have to get whether substantial evidence is the test to apply because in this situation there was no evidence at all, in the arbitration record or at the proceeding in front of the court that they satisfied the elements. So you do not have to say, well there was some evidence in which the arbitrator could decide that. In this particular case, and our positions is, there was no evidence whatsoever. And that's what the CA decided as well. But there was specifically no evidence.

ENOCH: Under binding arbitration a court would play no role to look at the evidence at all. So I'm trying to figure out what it is you're really saying the court should do because of the constitutional dimension. You're not saying that they ignore the arbitration award. You're really saying that in the constitutional dimension here the court plays a role in evaluating the record before the arbitration to determine _____.

SAVRICK: And that's the question we have: does the court even have a role that goes beyond just the ministerial...

OWEN: You're basically saying well there's a heightened tightened standard of review above and beyond what the arbitration act says?

SAVRICK: Correct when it involves constitutional or public policy issues.

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REBUTTAL

BLOCH: I want to talk about the constitution in homesteads for a moment. Mr. Savrick has argued that this is violative of public policy because the lien awarded violates the constitution. And I want to point out to you that that is simply not the case. That was certainly not the basis of the CA's decision. There's nothing in the CA's ruling indicating that this lien in some manner violated the constitution.

The constitutional provision merely requires that in order for a mechanics lien to be valid, there are two requirements: there has to be a written contract; and it has to be signed by those spouses if the spouses are married. Those two requirements were clearly met in this case. And that is not disputed.

ENOCH: If one of them wasn't met, and the arbitrator said well I think the lien is valid anyway, could the TC do anything about that?

BLOCH: That's a tougher call that this court need not reach. And I think that would go to the...

HECHT: Just so we'll explore all these things what's your take on that?

BLOCH: I tend to agree that if you've got a constitutional argument and a strong public policy argument, then maybe that's where the court should step in. But that is not the case here. We don't have a constitutional violation. The only bases for the CA's determination that this lien was somehow defective had to do with the statutory scheme.

BAKER: Well isn't that the public policy argument?

BLOCH: I don't believe it is. And to the extent that it may be...

BAKER: Well don't we always say that the legislature is the one that does public policy?

BLOCH: Well again the legislature has told us that it's strong public policy in this state to have issues resolved by arbitration.

BAKER: But that's the next question. Do we actually have a conflict between two statutory schemes, and if so, how do we resolve it?

BLOCH: No. I suggest that we don't. There is no conflict. And admittedly, when you're dealing with a homestead an argument can be made that there should be strict compliance with the statutory requirements and that is an argument to be...

BAKER: Well that is the argument that's made because the statute says so. Don't you think that's public policy?

BLOCH: And to the extent that that is evidence of the legislature's public policy, I think that is an argument to be made to the arbitrator. When you're telling the arbitrator: you've got to comply with the statute strictly because these issues have been agreed by the parties to be submitted to arbitration. Then you get back to the first question: if the arbitrator had authority to address these issues, then there is no basis for revisiting those factual disputes, those factual findings that were resolved by the arbitrator.

BAKER: Well then would your argument be that in fact there is an uncoupling between the validity of the lien and the requirement for judicial determinations in order to foreclose under .160?

BLOCH: Yes. I believe there is. And again we've got the Hearthshire case. But more specifically the Dalton case which does specifically address the validity of the lien as being a separate step that can be submitted to the arbitration. Once the arbitration is concluded then if the party won the declaration of the valid lien then they go to the court to foreclose. Also the authority for that division is found in the property code itself where it has a separate provision for determining

the validity of the lien. And there is nothing in that provision that says it's solely within the province of the courts to make that determination.

BAKER: When you cited .160, that's the procedure to object to the lien's validity?

BLOCH: Correct.

BAKER: And that's part of this whole chapter?

BLOCH: Correct. And in that chapter the legislature has said which parts are reserved for the courts and it's silent on that provision. And again that is the only thing that could possibly take this dispute out of the arbitration which again is a broad arbitration clause.

I suggest to you that the homestead distinction is irrelevant here. In fact in §53.154, which is the provision that says only a court may foreclose a mechanics lien, there is no distinction there between a lien on a homestead or on commercial property. So Mr. Savrick's procedural model of how to tell the TC which part to send to arbitration and which not, doesn't have any basis in that statutory provision. He wants to somehow exempt from arbitration anytime you've got a homestead involved, he wants to exempt that from arbitration. And there simply is no common law or statutory basis for doing that.

I suggest to you that the entire concept that there are some issues that are so important that we ought to not ever allow an arbitrator to rule on them is foreign to the jurisprudence of this state. If the legislature wants to tell us which issues can be submitted to arbitration that's one thing, but the courts have never done so.