Satomi Owners Association v. Satomi, LLC

No. 80480-0

CHAMBERS, J. (dissenting) — The majority incorrectly frames the issue, answers the wrong question, and ignores the nature of the homeowners' claims. The issue before us is whether a claim for breach of implied warranty, established by Washington statute after consultation with the stakeholders, imposed on Washington state builders, to protect condominium purchasers in Washington State, is preempted by federal laws because some of the materials used in building condominiums came from across the border. The answer is no because the homeowners' claims are not predicated upon defective materials that were shipped in interstate commerce. Instead, the claims before us arise out of a warranty, imposed by state law, which states that the seller (for our purposes):

> impliedly warrants that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by such declarant or dealer will be:
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> (a) Free from defective materials;
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> (b) Constructed in accordance with sound engineering and construction standards;
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> (c) Constructed in a workmanlike manner; and
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> (d) Constructed in compliance with all laws then applicable to such improvements.

RCW 64.34.445(2). Again, the breach of warranty claims are not based upon interstate commerce but on the builders' obligation to select suitable materials and install them in a workmanlike manner, all of which occurs wholly within the state. I agree with and would affirm the Court of Appeals' well reasoned opinion in *Satomi Owners Association v. Satomi, LLC,* 139 Wn. App. 175, 159 P.3d 460 (2007), and conclude that the Federal Arbitration Act (FAA), 9 U.S.C. § 2, does not preempt Washington law relating to a breach of that implied warranty. Accordingly, I respectfully dissent.

Our analysis should begin with an examination of the history and purpose of the Washington Condominium Act (WCA), chapter 64.34 RCW. Some portions of Washington State are known for rain and moisture. The Washington State Legislature perceived a problem with the construction and sale of condominiums that would soon mold and deteriorate because of inadequate weatherproofing and construction that had already led to a great deal of litigation and a significant disincentive to build even high quality condominium projects. Condo. Act Study Comm., Report to the Judiciary Committees of the Washington State Senate and House of Representatives 1-2 [hereinafter CASC Report] (Jan. 2005).[1] The legislature responded by appointing a special committee of stakeholders (some of which are before us in this case) to study the problem and suggest solutions. *Id.* The committee, and later the legislature, tried to fix both the underlying problem of water penetration into condominiums through stricter building and inspection

[1] This report is available at www.oregon.gov/DCBS/CCTF/docs/012805_report.pdf.

standards and statutory warranties, and the problem of endless and expensive litigation through a dispute resolution mechanism designed for the specific type of disputes. *See id.,* WCA, chs. 64.34, 64.55 RCW; *see also* Mark F. O'Donnell & David E. Chawes, *Improving the Construction and Litigation Resolution Process: The 2005 Amendments to the Washington Condominium Act Are a Win-Win for Homeowners and Developers,* 29 Seattle U. L. Rev. 515, 515-16 (2006) (citing CASC Report 1). The WCA makes arbitration mandatory upon request of nearly any party to a condominium dispute. RCW 64.55.100(1). It also makes trial de novo available if any party is not satisfied by the arbitration, with the looming potential of an attorney fee shifter should the advocate of trial de novo not improve its position. RCW 64.55.100(5), (6). Binding arbitration without the possibility of judicial review is not lawful. RCW 64.34.030 ("Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement.").

The stakeholders on the Condominium Act Study Committee (CASC) spent countless hours hammering out solutions and compromises that, in the committee's words, left "no member . . . happy with all of [its] recommendations." CASC Report at 17. But CASC strongly recommended that the legislature adopt all of its recommendations, "and not to cherry-pick the easier" ones. *Id.* at 3. "All members made significant concessions in order to make gains elsewhere." *Id.* at 17. As far as I can tell, the Washington State Legislature honored that compromise.

The question is whether Washington's carefully crafted approach to a Washington-specific problem is preempted by section 2 of the FAA. The FAA

simply requires courts to enforce arbitration contracts like any other contract, and only if the specific contract is "involving commerce" under 9 U.S.C. § 2. "Involving commerce" is a term of federalism art; it means involving *interstate* commerce. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995). The individual activity need not involve interstate commerce "if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" *Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52, 56-57, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003) (alteration in original) (quoting *Mandeville Island Farms, Inc., v. Am. Crystal Sugar Co.,* 334 U.S. 219, 236, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)).

The majority concludes that the purchase and sale of condominiums sufficiently implicates interstate commerce that preemption applies and the arbitration portions of the WCA are unenforceable. Such a conclusion is inconsistent with the established principle that the sale of real estate, including the requirements for and interpretation of purchase agreements, is governed by state law. Washington State closely regulates real property law. *See* Title 8 RCW (eminent domain); ch. 18.86 RCW (real estate brokerage relationships); Title 61 RCW (mortgages, deeds of trust, and real estate contracts); Title 64 RCW (real property and conveyances). Conversely, the federal government does not, as "a general practice," regulate property sales. *Cf. Citizens Bank,* 539 U.S. at 56-57; *see also Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local

public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.") (citing *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 443, 80 S. Ct. 813 4 L. Ed. 2d 852 (1960)).

I believe the proper question is whether the Washington State Legislature can, in response to a perceived crisis in Washington concerning condominiums, regulate condominiums through comprehensive legislation that includes implied warranties and their enforcement, or whether the warranties sufficiently involve interstate commerce to justify federal intervention.[2] I conclude it can. I agree with the Court of Appeals opinion in *Satomi* below: there are four reasons why the FAA does not apply to the statutory warranties under RCW 64.34.445. First, this is "a 'garden variety' Washington real estate deal." *Satomi,* 139 Wn. App. at 188. "Second, real property law has historically been the law of each state." *Id.* While both considerations are not determinative of whether the arbitration clauses apply,

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[2] The contracts in these cases treat the warranties separately. For example, the Satomi warranty addendum reads:

> 7. Seller's Right to Arbitration. At the option of the Seller, Seller may require that any claim asserted by Purchaser or by the Association under this Warranty or any other claimed warranty relating to the Unit or Common Elements must be decided by arbitration, in King County, Washington, under the Construction Arbitration Rules of the American Arbitration Association (AAA) in effect on the date hereof, as modified by this Warranty.

Clerk's Papers (CP) (Satomi) at 196; *see also* CP (Blakeley) at 16, 19-20; CP (Leischi) at 489, 358, 392. These arbitration clauses specifically apply to the statutory warranty. Whether that application is preempted by the FAA is the proper question.

certainly the historical division of federal and state concerns is not irrelevant. As Judge Ellington continued:

> Third, the warranties in question arise entirely from state law. Unlike *Citizens Bank* and *Allied-Bruce*, where the very subject matter of the contracts involved interstate commerce, here the issues are confined to claims founded in warranties created by the Washington Legislature.
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> Fourth, these transactions have none of the earmarks of an economic activity that in the aggregate would represent a general practice subject to federal control. The Company offers no authority holding that local real estate transactions represent such a practice, or that warranties required by state law for state condominium projects represent such a practice, or that local regulation of real estate transactions can constitute an economic activity that in the aggregate would represent a general practice subject to federal control. The Company relies upon a single fact: that construction materials came from outside Washington State. In some cases, this is adequate for FAA preemption. Here, it is not.
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> . . . .
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> Here, the only connection to interstate commerce is that materials from elsewhere were used in construction, and some of those were allegedly unsound or unsuitable, thereby violating the warranty required by RCW 64.34.445 that the condominium be free from defective materials and constructed in accordance with applicable state law. This warranty amounts to a guarantee that the builder has examined the materials used and ensures they are of sound quality and suitable for the use to which they are put, on site, in Washington State. The origin of the materials is irrelevant to the warranty, and the giving of the warranty is not a transaction involving commerce because, in the aggregate or otherwise, it does not represent a general practice subject to federal control. Whether the condominium declarant violated the

warranty is not a dispute involving interstate commerce.

Id. at 188-90. I agree. We should give force to the compromise crafted by Washington stakeholders and hold that the statutory warranty claims are subject to the WCA. I would affirm the Court of Appeals' well reasoned opinion in *Satomi*, and thus respectfully dissent.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Charles W. Johnson

Justice Richard B. Sanders