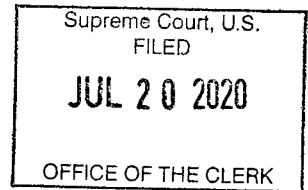


No. 20-75



IN THE
Supreme Court of the United States

THE S/V 'GLORI B'; JEFFREY G. HESTON,

Petitioners

v.

G. B. CAPITAL HOLDINGS, LLC.,

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals For
The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JEFFREY G. HESTON

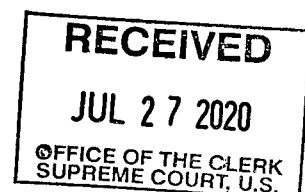
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ORIGINAL



Questions Presented For Review

In 2002, the San Diego Unified Port District ended the long-standing practice of “free anchorage” in San Diego bay. Using its police authority, the Port District mandated that all vessels must move to take up berthing at a Port facility, in this case of a private vessel, either a marina or mooring ground. Failure to do so would result in civil and criminal penalties. Such mandate forces a contract between the Port District through its concessionaires and the owner of the vessel. The contract at issue contains a provision providing for arbitration in the case of disputes.

- I. Does such a contract obtained in this manner sustain a determination of a “free and fair” formation on grounds equitable to both parties under the Federal Arbitration Act.
- II. Does this contract sustain an interpretation as a maritime contract necessary for the district court’s jurisdiction pursuant to 46 USC §31301, *et seq.*
- III. Does this contract sustain an interpretation as one of interstate commerce necessary for the jurisdiction of the Federal Arbitration Act.

Related Cases

- *Heston v. G.B. Capital Holding, LLC*, No. 16-cv-912, U.S. District Court for the Southern District of California. Judgment entered August 24, 2016.
- *Heston v. G.B. Capital Holdings, LLC*, No. 18-55125, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on August 21, 2018.

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Petition for Writ of Certiorari

The Sailing Vessel 'Glori B' and her interested party Jeffrey G. Heston respectfully petition this court for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this matter.

Opinions Below

The memorandum opinion (Appendix 1) of the Ninth Circuit Court of Appeals addressing the first and second questions presented is unpublished. The district court's order for sale of the vessel and the liquidation of her assets (Appendix 2) is unpublished. The memorandum opinion of the Ninth Circuit Court of Appeals addressing the first, second and third questions (Appendix 3) is unpublished. The district court's order for arbitration and dismissal is unpublished. The district court's opinions denying petitioner relief from its order (Appendices 4,5) are unpublished. The District Court's order compelling arbitration and dismissing action (Appendix 6) is unpublished.

Jurisdiction

The circuit court filed its judgment on April 21, 2020. This court derives a jurisdiction to review from 28 USC § 1254(1).

Statutory Provisions Involved

The district court, in its order of sale, cites as its jurisdiction 46 USC §31301, *et seq.*; specifically 46 USC §§31326(a),(b)(1): "When a vessel is sold by order of a district court in a civil action in rem

brought to enforce a preferred mortgage lien or a maritime lien' a 'preferred mortgage lien has priority over all claims against the vessel (except for...preferred maritime liens)", and §31301(5): "A preferred maritime lien is defined as a 'maritime lien on a vessel[,] (A) arising before a preferred mortgage was filed...;(B) for damage arising out of maritime tort; (C) for wages of a stevedore...; (D) for wages of the crew of the vessel; (E) for general average; or (F) for salvage, including contract salvage"

The district court, in its order to compel arbitration and dismissal, cites 9 USC §§ 2: "Section 2 of the FAA provides. ' A written provision in any... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," and 9 USC §4: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement."

Statement of the Case

The heart of the matter resides in a contract ostensibly entitled "Maritime Contract for Private Wharfage", a paper which provided, for a fee, a vessel

mooring in one of several mooring fields operated by G.B. Capital Holdings, LLC., as agent for the San Diego Unified Port District.

A controversy had arisen over a provision demanding the vessel be inspected – the agent holding to one term, the petitioner to another equal term. At some point during the owner's absence, the agent GB Capital removed the vessel from its mooring, at first failing to notify the petitioner of the removal of the vessel, then refusing to inform the petitioner of the vessel's whereabouts. Only after intervention by the US Coast Guard and the San Diego Unified Port District police did the agent reveal the location of the vessel – under lock and key at another of the agent's managed concessions. After repeated refusals to allow the petitioner access to the vessel, the lock to the impound was removed by the San Diego Unified Port District police and the petitioner was allowed access to his vessel. Upon inspection, the condition of the vessel was found to be a complete ruin: much of her sailing gear; sails, controls, navigation equipment and personal crew gear was found to be missing, making her impossible to sail. The cabin had been ransacked and much personal property had been removed. GB Capital's response to demands for the return of the missing property was to "take the boat and go".

In response, Heston filed a civil action in admiralty to compel GB Capital to return the property to the vessel and the vessel to its (paid for) mooring. The agent moved to compel arbitration in accordance with an arbitration provision of the contract.

The district court, finding that the contract evinced commerce and, citing the FAA, granted GB

Capital's motion compelling arbitration and the matter was dismissed. Petitioner Heston filed two Fed. R. Civ. Proc. 60(b) motions for relief, contending on various grounds insufficient jurisdiction: that the contract did not conform to the meaning of commerce as defined in 9 USC §1; that the use of the term "wharfage contract" as applied to this context was a misnomer in that the contract did not in any way actually represent the clearly understood meaning of "wharfage" nor did GB Capital actually provide wharfage; and that the formation of the contract was not in keeping with the principle of fair contract rules, thereby making it unconscionable. The district court denied the 60(b) motions and Heston appealed.

The circuit court considered only the second 60(b) motion for abuse of discretion and refused to consider the underlying question of jurisdiction.

Prior to the circuit court's decision, GB Capital initiated the current matter, again presenting the contract as one of a maritime character and the basis of a maritime lien. The district court concurred, the vessel was arrested and sold pursuant to 46 USC §31301 *et seq.* Again, Heston appealed on the same grounds of jurisdiction as before, and the circuit court found his arguments meritless.

Allowing the Writ

The basis for the lower court's original jurisdiction in this matter is a civil complaint in admiralty filed by Heston in the U.S. District Court for the Southern District of California on April 15, 2016. It is relevant here for the Order to Compel Arbitration and Dismissal of the Action found therein. (Appendix 6). This Order is cited and serves as justification for the Interlocutory Order for Vessel

Sale (Appendix 2). The Circuit Court “reviewed *de novo* the district court’s conclusions of law...”(Appendix 1).

It is the Circuit Court’s affirmation that Heston appeals.

The entire matter before this Court rests on the Order to Compel Arbitration and Dismissal, a conclusion of law.

Heston has argued various reasons why the Order should not have been issued. None – save one – has made it into the record now before this Court.

The lower court has decided that the Contract at issue is valid. The court has determined that abroad writing of the Contract encompasses all questions and relegates the resolution of those questions to arbitration with one exception: the Contract exempts *in rem* actions against the vessel.

In the original complaint, clearly stated on its face, is the characterization of the suit as an action *in rem*. This characterization is also visible in the civil cover sheet attached to the complaint. In plain view of this characterization, GB Capital answered without objection, and the court allowed the suit to proceed even so far as to docket an Early Neutral Evaluation Conference.

Heston has argued that, by answering, GB Capital has consented to proceed; and by allowing the suit, the court has agreed; that the exemption to the mandatory arbitration clause was in force.(Appendix 5). Heston has argued in his *first* Rule 60(b) that, in so doing, the court and GB Capital were estopped from then asserting the arbitration clause, having made the election.. It is only later does the court and GB Capital reverse course and demand arbitration.

Normally, all questions (such as formation and performance) are bound in an arbitration agreement and are not permitted to be admitted by the court. However, in this instance, all questions and issues are fully before the court and reachable by the Plaintiff. Even if the arbitration clause were to later be imposed, the admissions made in the answer and other papers properly lodged within the record are admissible and cognizable by the court. Heston argues that, once having received them in the record, what ever matters that flow from those admissions made during the time the matter properly resided in court are freed from the constraints of the arbitration clause and must be fairly considered by the court. Heston contends that such questions as contract performance are still arbitrable, but the legality of taking the vessel, a question raised while the matter resided in court, is still in court – the court was in fact, the arbitrator. By dismissing, the court has denied Heston his right to petition for redress of those wrongs. GB Capital did not contest the taking of the vessel by shielding its actions with the arbitration clause, it openly admitted them into the record in an answer during an active proceeding. GB Capital freely admitted that it took the ‘the vessel without proper authority.

Heston argues that the matter of the taking of the “Glori B” has already been admitted to the court as has other ancillary matters.

Had the court allowed the adjudication of those controversies admitted into the record, it is very likely the interlocutory order and the deprivation of Heston of his beloved boat would not have been possible.

Heston prays the Court bring up the record and review de novo the questions and objections

raised by Heston in the lower courts on matters properly raised, such as the improper characterization of the Contract as maritime in nature, or the opportunity for the 'Court to see for itself how a local contract can be misused to invoke the Federal Arbitration Act. The Court shall find that the conclusions of law not fairly considered will require its attention

If the Court finds error, then the Interlocutory sale is an improper taking of Heston's property

Conclusion

The S/V "Glori B" and her interested party humbly submit this cause to the Court for consideration, in the hope that the Court will come to see the harm in the conduct of this matter; that the Court see fit to correct the injustice that occurred.

DATED: July 20, 2020

/s/

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