

No. 09-0703
IN THE
SUPREME COURT OF TEXAS

IN RE OLSHAN FOUNDATION REPAIR COMPANY, L.L.C. and
OLSHAN FOUNDATION REPAIR COMPANY OF DALLAS, LTD.,
Relators .

Real Parties **in** Interest: Robert and Marta Tingdale

Respondent: Hon. Gene Knize,
40th District Court, Ellis County, TX

RESPONSE TO PETITION
FOR WRIT OF MANDAMUS

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RESPONSIVE ISSUES PRESENTED

Reply Issue One: The court of appeals did not abuse its discretion in denying Olshan's petition for writ of mandamus because Olshan waited too long to file its writ of mandamus in the court of appeals.

Reply Issue Two: Judge Knize properly enforced the express terms of the arbitration clause in the Olshan contract which required the application of Texas arbitration law. (Responsive to Relators' Issues 1 & 2)

Reply Issue Three: Judge Knize did not abuse his discretion in holding that the subject arbitration clauses was unconscionable because it requires the Real Parties in Interest to pay an arbitrator exorbitant amounts of money to receive a ruling that the contract is void as a matter of law for violating the Texas Home Solicitation Act. (Responsive to Relators' Issue 4)

Reply Issue Four: Olshan's undisputed violation of the Texas Home Solicitation Act means that the subject contract and its arbitration clause never existed. (Responsive to Relators' Issue 3)

Reply Issue Five: Judge Knize did not abuse his discretion because the trial court must decide whether a valid arbitration agreement existed.

STATEMENT OF FACTS

I. Factual Background

In 2004, Olshan sent a representative to the Tingdales' home to sell the Tingdales the Cable-Lock Foundation Repair System to repair damage to their home.¹ Olshan's representative evaluated the Tingdales' home, made representations about the quality and characteristics of the Cable-Lock Foundation Repair System, answered the Tingdales' questions about the System and made an offer on behalf of Olshan to provide the services at the Tingdales' home at a particular cost.² All of the events surrounding this transaction occurred at the Tingdales' residence.³ Based on these representations, the Tingdales signed an agreement on March 22, 2004 for Olshan to provide them with these foundation repairs for the cost of \$43,450.⁴

Olshan initially installed ten pressed pilings beneath the Tingdales' home. After Olshan made its repairs, new damage began to appear. After several failed attempts by Olshan to adjust the pilings, the Tingdale hired their own engineer, Peter De la Mora, to investigate the problems. In a February 12, 2007 report, Mr. De la Mora concluded that Olshan had not repaired the home in a proper manner and that the damage to the Tingdales' home was caused by Olshan's faulty repairs.

¹ (Tingdale Mandamus Record at Relator Tab "D")

² (Tingdale Mandamus Record at Relator Tab "D")

³ (Tingdale Mandamus Record at Relator Tab "D")

⁴ (Tingdale Mandamus Record at Relator Tab "B", Tab "D") (Tingdale Mandamus at Appendix 3)

II. Procedural Background

The Tingdales filed suit on June 19, 2007.⁵ Olshan filed an original answer and plea in abatement on February 8, 2008. Olshan subsequently set their motion to abate for June 4, 2008. At the hearing before Judge Knize, the Tingdales contended that: (1) no contract or arbitration clause existed because the contract did not comply the Texas Home Solicitation Act, (2) the Federal Arbitration Act ("FAA") did not apply because the contract specifically called for the application of Texas arbitration law, and (3) requiring the use of the American Arbitration Association ("AAA") for arbitration was substantively unconscionable because of the expense required to perform a meaningless act.⁶ Judge Knize denied Olshan's motion to abate and motion to compel at the June 4, 2008 hearing.⁷ In response to Olshan warning the trial court that they would seek mandamus relief if he did not rule in their favor, Judge Knize asked at the June 4, 2008 hearing:

THE COURT:What other exception do I have to eliminate to make your job easier on mandamus?

MR. ROBERTS: I believe that's it.

THE COURT: Okay. Write it up. Take it up. All right. Thank you, gentlemen. ⁸

⁵(Tingdale Mandamus Record at Relator Tab "A")

⁶(Tingdale Mandamus Record at Relator Tab "E")

⁷(Tingdale Mandamus Record at Relator Tab "F" at 79)

⁸(Tingdale Mandamus Record at Relator Tab "F" at 79)

Despite the Court's request and with full knowledge that Olshan intended to file its petition for writ of mandamus, Olshan's counsel, Mr. Roberts, did not draft the order and submit it to the Court until December 29, 2008.⁹

Olshan did not file its petition for writ of mandamus with the Tenth Court of Appeals until April 20, 2009. Olshan waited approximately 10 ½ months after the court denied its motion and 4 months after the trial court signed the order before Olshan sought mandamus relief in the court of appeals.

On July 1, 2009, the Tenth Court of Appeals denied Olshan's petition for writ of mandamus in this case.¹⁰ Olshan filed its petition for writ of mandamus with this Court on August 21, 2009.

III. Similar Cases

Olshan sought to compel arbitration under the same or similar arbitration clause in trial courts located in Dallas, Fort Worth, Houston, Wise County, and Ellis County. These motions to compel arbitration were denied. Every appellate court which has looked at these arbitration clauses has denied Olshan's petitions for writs of mandamus.¹¹

⁹ (Appendices "A" and "B" to this response)

¹⁰ (Tingdale Mandamus at Appendix 2)

¹¹ These petitions for writ of mandamus were nearly identical and all were denied.

Olshan has now sought mandamus relief in this Court in most of these cases.¹²

On August 21, 2009, this Court denied Olshan's petition for writ of mandamus in Cause No. 09-0675; *In Re: Olshan Foundation Repair Company, LLC and Olshan Foundation Repair Company of Dallas, Ltd.; Real Party in Interest: Maria Duque* (Hereafter "*Duque*"). The Court has ordered briefing on the merits for:

(1) Cause No. 09-0474; *In Re: Olshan Foundation Repair Company, LLC and Olshan Foundation Repair Company of Dallas, Ltd.; Real Parties in Interest: Craig and Joy Waggoner* (Hereafter "*Waggoner*");

(2) Cause No. 09-0433; *In Re: Olshan Foundation Repair Company, LLC and Olshan Foundation Repair Company of Dallas, Ltd.; Real Parties in Interest: Charley and Gladys Tisdale* (Hereafter "*Tisdale*"); and

(3) Cause No. 09-0432; *In Re: Olshan Foundation Repair Company, LLC and Olshan Foundation Repair Company of Dallas, Ltd.; Real Parties in Interest: Kenneth and Vickie Kilpatrick* (Hereafter "*Kilpatrick*")

STANDARD FOR MANDAMUS RELIEF

Mandamus is an extraordinary remedy reserved only for when the trial court commits a clear abuse of discretion and when no adequate remedy by appeal exists. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135-36 (Tex. 2004). A trial court commits a clear abuse of discretion when it clearly fails to correctly analyze or apply the law to the facts. *Id.* at 135; *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). To show a clear abuse of discretion, a relator must establish "that the trial court could reasonably have reached only one decision" but refused to make that decision. *In re Prudential*

¹² Olshan has filed petitions for writs of mandamus with this court in *Duque*, *Tisdale*, *Kilpatrick*, *Tingdale* and *Waggoner*. Olshan has not filed a petition for writ of mandamus in this court in *Stanford*.

Inc. Co., 148 S.W.3d at 135. Even if a reviewing court would have decided the issue differently, it cannot alter the trial court's decision unless it was arbitrary or unreasonable. *Id.* An erroneous choice as a matter of law can be committed in one of the following ways:

- (i) By making a choice that is not within the range of choices pennitted by law;
- (ii) by arriving at its choice in violation of an applicable legal rule, principle, or criterion;
- or (iii) by making a choice that "[is] legally unreasonable in the factual-legal context in which it [is] made."

See W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L. J. 47, 63 (2006) (citing and quoting *Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 989-40 (Tex. App.-Austin 1987, no writ). Not one of the courts which have previously reviewed these issues has found that Olshan has satisfied this heavy burden.

ARGUMENT & AUTHORITIES

The trial court did not abuse its discretion in denying Olshan's motion to compel arbitration because: (1) the costs of arbitration would be procedurally unconscionable; (2) no valid written contract or arbitration clause existed because Olshan failed to comply with the Home Solicitation Act; and (3) Olshan caU1ot compel arbitration under the FAA because the arbitration clause specifically chose the application of Texas' arbitration laws. The court of appeals did not abuse its discretion in denying Olshan's petition for writ of mandamus because Olshan unduly

delayed seeking mandamus relief from the court of appeals. Anyone of these grounds provides a sufficient basis for denying the mandamus relief Olshan requests.

Since this Court has already requested briefing on similar issues in *Tisdale*, *Kilpatrick*, and *Waggoner*, the Tingdales will attempt to minimize repeating the same arguments and authorities that were presented in response to the petitions for writ of mandamus in those cases. Any substantive issues that the Court believes are important to the jurisprudence of Texas raised in this mandamus can be addressed in these three cases without granting the mandamus in this case. This mandamus should be denied not only for the same reasons addressed in these other cases, but also because Olshan unreasonably delayed seeking mandamus relief in the court of appeals.

In this response, the Tingdales will focus on Olshan's unprecedented delay in seeking mandamus relief in the court of appeals and on new authority from this court and the Houston Court of Appeals that supports the denial of mandamus in this case.

I. Olshan's petition for writ of mandamus should be denied because Olshan did not seek mandamus relief with the court of appeals in a diligent manner.

"[M]andamus relief may be denied to a party for a lack of diligence" or to those who "slumber on their rights." *Rivercenter Associates v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding). A four-month delay in filing a writ of mandamus justifies denying a petition for writ of mandamus. *Id.* Olshan filed its petition for writ

of mandamus in the court of appeals on April 20, 2009 which was over 10½ months after the trial court denied Olshan's petition for mandamus on June 4,2008.

The Tingdales anticipate that Olshan will erroneously contend that it could not file its mandamus in the court of appeals until the trial court signed its written order on December 31, 2009. This potential argument is not persuasive because Olshan is responsible for the delay in getting the order entered. During the hearings on the motion to compel arbitration in the trial court, Olshan warned the trial court on several occasions that it would seek mandamus relief if the court did not rule in its favor. In fact, the court was so aware of these threats that it asked Olshan if it had obtained all the rulings it needed for the mandamus and asked Olshan's counsel to write up the order:

THE COURT:What other exception do I have to eliminate to make your job easier on mandamus?

MR. ROBERTS: I believe that's it.

THE COURT: Okay. Write it up. Take it up. All right. Thank you, gentlemen. ¹³

Despite the Court's request and with full knowledge that Olshan intended to file its petition for writ of mandamus, Olshan's counsel, Mr. Roberts, did not draft the order and submit it to the Court until December 29,2008.¹⁴ The Waco Court of Appeals did

¹³ (Tingdale Mandamus Record at Relator Tab "F" at 79)

¹⁴ (Appendices "A" and "B" to this response)

not abuse its discretion in denying Olshan's petition for review because Olshan did not seek timely mandamus relief in the court of appeals.

II. The Texas General Arbitration Act prohibits the arbitration of this cause.

In both the *Tingdale* and *Duque* cases, the parties contend that the arbitration clause, drafted by Olshan, contained in the contract between the parties specifically selected the arbitration laws of the state of Texas Act ("TGAA") and excluded the FAA.¹⁵ Based on the requirements of the TGAA, the facts of this case mandate that this matter not be arbitrated.¹⁶

This Court denied Olshan's petition for writ of mandamus in *Duque* on August 21, 2009. In *Duque*, the arbitration clause Olshan was seeking to enforce reads as follows:

"Notwithstanding, any provision in this agreement to the contrary, any dispute, controversy, or lawsuit between any of the parties to this agreement about any matter arising out this agreement, shall be resolved by mandatory and binding arbitration administered by the American Arbitration Association ("AAA') pursuant to the arbitration laws in your state and in accordance with this arbitration agreement and the commercial arbitration rules of the AAA to the extent that any inconsistency exists between this arbitration agreement and such statutes

¹⁵ Under Chapter 171 of the Texas Civil Practice and Remedies Code, an arbitration agreement for the acquisition by one or more individuals of property or services for which the total consideration paid by the individual(s) is not more than \$50,000 is unenforceable unless all parties and their attorneys sign the agreement. *Tex. Civ. Prac. & Rem. Code*, §171.002 (a)(2). The public policy underlying this statute is that the Texas Legislature wanted to protect consumers just like the Real Parties in Interest from being forced to incur significant costs associated with arbitration to resolve disputes for transactions of this size. Since no attorney on behalf of the Real Parties in Interest signed the contract and since the cost of the services and property provided by Relators to Real Parties in Interest was less than \$50,000, neither the trial court nor this Court cannot enforce the arbitration agreement under the Texas General Arbitration Act.

¹⁶ Olshan contends that a presumption exists in favor of arbitration. The cases cited by Olshan for this presumption concern whether the claims in the case are subject to arbitration. No such presumption exists for determining whether the FAA pre-empts the TGAA or not.

by any court having jurisdiction and in accordance with the practice of such court.

This is the identical arbitration clause that Olshan now seeks to enforce against the Tingdales!¹⁷ Like *Duque*, Olshan's petition for writ of mandamus should be denied.

On August 20, 2009, the Fourteenth Court of Appeals in Houston denied a petition for writ of mandamus in *Atlas-Gulf Coast, Inc. v. Robert and Dorothy Stanford and In re Atlas-GulfCoast, Inc.*, 2009 Tex. App. Lexis 6555 (Houston 14th District, August 20, 2009)¹⁸ Atlas Gulf-Coast is a sister company of Olshan. As such, Atlas-Gulf Coast used an arbitration clause with similar wording to the clause in *Waggoner*:¹⁹

The contract here states that "any dispute, controversy, or lawsuit between any of the parties to this Agreement about any matter arising out of this Agreement shall be resolved by mandatory and binding arbitration administered by the American Arbitration Association ("AAA") pursuant to the Texas General Arbitration Act." *Id.* at 2.

In denying the petition for writ of mandamus, the court specifically cited the *Waggoner* opinion with approval and held that that the selection of the TGAA is "deemed to exclude the FAA." (*Id.* at 2)

Every appellate court that has looked at these arbitration clauses has ruled against Olshan and its related entities. The author of the *Stanford* opinion, Justice

¹⁷ (*Tingdale Mandamus Record at Relator Tab "B"*).

¹⁸ (*A copy of this opinion is attached as Appendix "C" to this response.*)

¹⁹ The difference between the arbitration clauses in *Waggoner* and *Duque* is that *Waggoner* uses the language "Texas General Arbitration Act." In *Duque* that language is replaced with "arbitration laws in your state." Although the arbitration clauses are stated differently, both chose the TGAA and exclude the FAA.

Yates, and chiefjustice of the Fourteenth Court of Appeals, Justice Hedges, were also two of the judges on the panel who issued the case Olshan relies so heavily upon in its petition for writ of mandamus, *TML Inc. v. Brooks*, 225 S.W.3d 783 (Tex. App.-Houston[14th Dist.] 2007, pet denied.) The Tingdales should be treated the same as the homeowners in Duque and Stanford and not forced arbitrate under an arbitration clause that is unenforceable under the TGAA.

III. Olshan's petition for writ of mandamus should be denied because arbitration would be unconscionable.

IV. The Court should deny Olshan's petition for writ of mandamus because the trial court properly held that a valid arbitration agreement did not exist because Olshan failed to comply with the Texas Home Solicitation Act.

The facts in this case supporting both of these issues are contained on pages 1 through 3 of this brief in the Statement of Facts. The legal authorities and arguments supporting these contentions are similar to those contained in the Responses filed by the Real Parties in Interest in *Kilpatrick, Tisdale and Waggoner*. The Tingdales have not repeated these arguments and authorities on these issues because this Court has requested briefing on the merits in those cases.

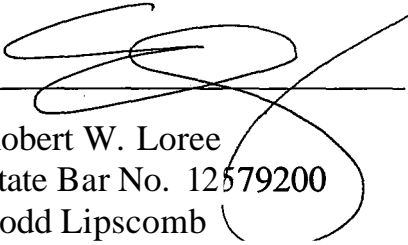
V. Even if the arbitration clause had been silent as to whether the court or arbitrator decides preliminary issues concerning enforceability of the arbitration agreement, the trial court and not the arbitrator, would still decide whether the Texas Home Solicitation Act voids the arbitration agreement because the trial court must decide whether a valid arbitration agreement even existed. (Not Briefed)

WHEREFORE, PREMISES CONSIDERED, the Real Parties in Interest, Robert and Marta Tingdale, respectfully request that this Court deny Relators' petition for writ of mandamus. The Real Parties in Interest also request that the court award them such other relief as may be proper.

Respectfully submitted,

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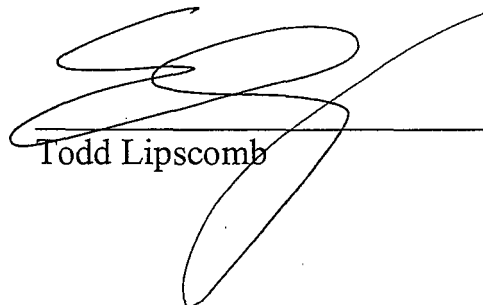
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