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COURT OF APPEALS

STATE OF NEW YORK

TOWN OF AMHERST,

Appellant,

-against-

NO. 64

GRANITE STATE INSURANCE,

Respondent.

20 Eagle Street
Albany, New York
May 2, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 64, Town of Amherst
3 v. Granite State Insurance. Thank you, Joe.

4 Counsel.

5 MR. SCHMIDT: Your Honors. May it please the
6 court. John Schmidt from Phillips Lytle on behalf of the
7 Town of Amherst. With me today is Nicholas Rotsko, one of
8 my colleagues.

9 I request one minute for rebuttal.

10 CHIEF JUDGE DIFIORE: You may have one minute,
11 sir.

12 MR. SCHMIDT: Thank you, Your Honor.

13 CHIEF JUDGE DIFIORE: You're welcome.

14 MR. SCHMIDT: Your Honor, the issue here today,
15 and the issue that the Fourth Department, respectfully,
16 erred on is who decides the gateway issue of arbitrability.

17 JUDGE GARCIA: Counsel, is your position that
18 this August 5th agreement is a modification or a waiver?

19 MR. SCHMIDT: Both, Your Honor. It's - - - and -
20 - - and I'd focus first - - - and - - - and there's another
21 issue. I have a two-part answer to that, your Honor. The
22 answer is yes.

23 The first part of the explanation is is that it
24 is an agreement to litigate. It's an express waiver of the
25 arbitration provision because the parties agree - - -

1 JUDGE GARCIA: But wouldn't that be instead of
2 the arbitration provision? It's not a waiver of the
3 arbitration provision. It seems to me the cases on waiver
4 from this court deal fairly exclusively with conduct. So
5 if you start to litigate an action, you can't turn around
6 and say, no, no, wait, we're going to arbitrate this,
7 because you've waived that right to arbitrate by engaging
8 in something of the process of court litigation.

9 So our other cases speak to modification where
10 there is a subsequent agreement that, in effect, supersedes
11 an arbitration agreement. So I'm having a little
12 difficulty understanding your position here as to waiver.

13 MR. SCHMIDT: Well, Your Honor, first, if the
14 court is going to reach that issue, then - - - not even by
15 implication, by fact, then it's - - - it's an acceptance of
16 the fact that the court decides that issue. It decides the
17 - - -

18 JUDGE GARCIA: But doesn't the decision of that
19 issue have an effect on what this court is going to do with
20 your arbitration issue?

21 MR. SCHMIDT: What - - -

22 JUDGE GARCIA: Because if it's a waiver, we've
23 said certain things; if it's a modification, we've said
24 certain things about how you resolve which form - - - which
25 form resolves the arbitrability issue.

1 MR. SCHMIDT: Well, Your Honor, with regard to
2 waiver and signing an agreement, which is pretty clear
3 conduct, much like participating in litigation, but with
4 regard to the modification issue, the cases that Granite
5 cites, in large part, if not exclusively, deal with - - -
6 they - - - they don't deal with challenges to the
7 arbitration provision; they deal with issues related to - -
8 - to whether or not the subsequent agreement supersedes the
9 substantive provisions of the original agreement.

10 And here, we have a direct challenge as to the
11 enforceability of the arbitration provision.

12 And I'd like to add one other point, Your Honor.
13 Here, we don't just have the written agreement to litigate,
14 but we also have, after this litigation was commenced, an
15 answer with counterclaims by Granite State Insurance
16 Company, an amended answer with counterclaims by Granite
17 State Insurance Company. They tried to serve a late notice
18 of claim, then they sought leave in the court
19 (indiscernible).

20 JUDGE GARCIA: So your argument is that their
21 conduct in that case was a waiver?

22 MR. SCHMIDT: The conduct was cumulative, yes,
23 and it resulted in a waiver. And as we stand here today -
24 - -

25 JUDGE GARCIA: Is that what - - - the basis the

1 Appellate Division went on? Was it - - -

2 MR. SCHMIDT: No. The Appellate Division order,
3 at the time, dealt with just simply the issue of the - - -
4 the agreement to litigate, the litigation agreement.

5 JUDGE STEIN: As I understood the whole waiver,
6 our waiver case, is that those cases dealt with implicit
7 waiver. Whereas to me, signing an agreement, if - - - if
8 it was a waiver, would be an explicit waiver.

9 MR. SCHMIDT: Absolutely, Your Honor.

10 JUDGE STEIN: So it - - - I mean, I don't know.
11 It's a little confusing that to me it seems you - - - it
12 seems to me that you - - - you're - - - you're sort of
13 melding the two, and you're saying that signing an
14 agreement is conduct like conduct that we've referred to as
15 an implicit waiver.

16 Are they two different things, or are they the
17 same thing; or - - - I'm not clear what your argument is.

18 MR. SCHMIDT: Well, it - - - it's an interesting
19 point, Your Honor. And New York has created the commercial
20 part for the - - - the efficient disposition of - - - of
21 litigation. And - - - and oftentimes, you face, gee, does
22 - - - has conduct created a contract? And - - - and here,
23 you've got the implied waiver cases - - -

24 JUDGE STEIN: Right.

25 MR. SCHMIDT: - - - where the court - - -

1 JUDGE STEIN: But this isn't that. I mean, maybe

2 - - -

3 MR. SCHMIDT: This is a contract. Yeah.

4 JUDGE STEIN: Yeah.

5 MR. SCHMIDT: It's - - - it's in black and white.

6 JUDGE STEIN: Yeah.

7 MR. SCHMIDT: It says, we agree to litigate. And
8 the parties did that, and then they did litigate. This
9 case has been concluded. Summary judgment was granted to
10 the Town of Amherst. The disputed residue - - - residue,
11 the 3.13 million dollars, that was granted to the Town of
12 Amherst.

13 JUDGE WILSON: Can I switch to the question of
14 who gets to decide this for a moment?

15 MR. SCHMIDT: Yes.

16 JUDGE WILSON: And tell me why the following
17 proposition was wrong. The arbitration provision in the
18 policy of insurance says, "The procedural rules applicable
19 to this arbitration shall, except as provided otherwise
20 herein, be in accordance with the Commercial Arbitration
21 Rules of the AAA."

22 Rule 7 of the AAA Commercial Rule says,
23 "Jurisdiction. The arbitrator shall have the power to rule
24 on his or own - - - her own jurisdiction, including any
25 objections with respect to the existence, scope, or

1 validity of the arbitration agreement or the arbitrability
2 of any claim or counterclaim."

3 So why haven't, here, the parties contractually
4 agreed that the question of the effectiveness of the napkin
5 waiver is to be determined by an arbitrator and not the
6 court?

7 MR. SCHMIDT: Because, Your Honor, this
8 arbitration provision is not the broad all issues including
9 arbitrability clause. The provision - - -

10 JUDGE WILSON: Except that it - - - except that
11 it incorporates the rule that seems to say that, no?

12 MR. SCHMIDT: But it states right in the text of
13 the insurance policy. The insurance policy that Granite
14 drafted and gave to Amherst, it says, "disputes related to
15 the interpretation of this policy".

16 And here, whether it's by waiver or by
17 modification, we're arguing that the enforceability of this
18 provision is an issue before the court. And because we're
19 challenging specifically the arbitration provision, that
20 means the court decides the issue, not an arbitrator.

21 The - - - and - - - and one thing I'd also need
22 to point out, Your Honor, is that after this case was
23 litigated in the trial court before Justice Timothy Walker,
24 who granted summary judgment to Amherst, Granite did not
25 move for a stay. They did not seek a stay to the

1 litigation.

2 So under the case law that deals with both
3 modification and waiver, we've got extreme prejudice to the
4 Town of Amherst because this case is done. It's - - - if -
5 - - if this court reverses the Fourth Department decision
6 and affirms the trial court order on the issue of
7 arbitrability, this case is done. That's the most
8 efficient resolution of disputes that one could ask for.
9 Otherwise, now we would have to go back and arbitrate this
10 case, or at least arbitrate the issue of arbitrability.

11 JUDGE WILSON: Is there a final judgment?

12 MR. SCHMIDT: There is, Your Honor.

13 JUDGE WILSON: And is there appeal taken from
14 that?

15 MR. SCHMIDT: It was, and then it was abandoned
16 under the Fourth Department rules. The case - - - those
17 three appeals were never perfected. And after nine months,
18 they're deemed dismissed with prejudice.

19 Your Honor, I'd also like to point out that in
20 our - - - in our - - - in our brief, and I won't belabor
21 the case law, but our brief, page 13 to 17, we lay out the
22 litany of this court's implied waiver by conduct cases.
23 But in those cases, particularly Zimmerman v. Cohen and its
24 progeny, Sherrill v. Grayco, Primex v. Wal-Mart, most
25 importantly, Credit Suisse v. Pitofsky, the courts, by and

1 large, say that waiver can occur by agreement or conduct.

2 So it's not just conduct. Waiver by agreement
3 occurs all the time. And I think this case recently, I - -
4 - I - - - I don't recall if it was contemporaneous with the
5 briefing on this case, or shortly before or after, although
6 it was a 2015 case, Cusumano, decided the - - - the issue,
7 the court decided the issue; it did not punt it to the
8 private arbitrator. And then also Monarch - - - excuse me,
9 Monarch v. National, 2016 case, same result.

10 Thank you, Your Honors.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 Counsel.

13 MR. VOSES: May it please the court. My name is
14 Marc Voses for respondent, Granite State Insurance Company.

15 Contrary to the position taken by Amherst, the
16 Fourth Department did not issue a bright-line rule that
17 arbitrability - - -

18 JUDGE RIVERA: Counsel, what's - - - what's the
19 point to the agreement on the napkin if you're required to
20 go to arbitration anyway? What - - - what would be the
21 point of it?

22 MR. VOSES: The purpose of the August 5th
23 agreement was to carve out and set aside for another day
24 the dispute between Amherst and Granite State. It was also
25 to set forth the equation by which the parties' respective

1 shares towards the settlement were applied to the accrued
2 interest.

3 Lastly, the August 5th agreement provided for the
4 escrow account in which the disputed funds would be held
5 pending the final resolution the parties disputed.

6 CHIEF JUDGE DIFIORE: And how did the napkin
7 agreement become a part of the policy?

8 MR. VOSES: It never did.

9 CHIEF JUDGE DIFIORE: Well, that's what I'm
10 asking.

11 MR. VOSES: It, of course, never did.

12 CHIEF JUDGE DIFIORE: And why it - - - what's
13 your response to that? Argue that.

14 MR. VOSES: The argument there is that, number
15 one, it did not effectuate a waiver, and the number two,
16 there was no modification. Number three, the policy itself
17 contains, in Section 6(m), the exclusive mechanism whereby
18 changes to the policy can be made. That is the exclusive
19 mechanism. The August 5th agreement does not comply with
20 the terms of the policy in that regard.

21 JUDGE STEIN: Was this a changed - - - but was
22 this a change to the policy, or was this a waiver of the
23 right to enforce the provision of the policy in this
24 particular instance?

25 MR. VOSES: The effect of the August 5th

1 agreement, according to the Fourth Department, and in line
2 with controlling precedent of this court, was to - - - was
3 - - - was whether or not it effected a modification to the
4 arbitration provision of the policy. It was not a wavering
5 - - - cannot be considered a waiver.

6 JUDGE STEIN: Well, do you - - - do you agree
7 that waiver and modification are two different things?

8 MR. VOSES: I do agree with that.

9 JUDGE STEIN: Let's start with that. Okay. And
10 - - -

11 MR. VOSES: I do agree with that.

12 JUDGE STEIN: And - - - and what determines
13 whether it's a waiver or whether it's a modification?

14 MR. VOSES: It sh - - -

15 JUDGE STEIN: Would it have to use the word, "I
16 waive the right to arbitrate"; is that was required? What
17 would make this a waiver, in your - - - in your mind?

18 MR. VOSES: It's interesting that the courts do
19 not provide parties with the exact language that needs to
20 be utilized. However, it has to be an intentional
21 relinquishment of a right that a party is otherwise - - -

22 JUDGE RIVERA: But can't you modify an agreement
23 by waiving a right that's under the agreement?

24 MR. VOSES: That's not the way the cases view
25 these types of - - - of waiver arguments, Your Honor.

1 In fact, "waiver" in this case, cannot be based
2 solely upon the use of the word litigate. The term
3 litigate in and of itself is ambiguous as a matter of law.
4 In fact, for the past fifty years, the Appellate Court, the
5 judges of the Appellate Courts of the State of New York
6 have used the term litigate to - - -

7 JUDGE STEIN: Isn't that almost exclusively in
8 the - - - in the context of collateral estoppel and res
9 judicata cases where - - - where we say full and fair
10 opportunity to litigate? Is - - - isn't that where that
11 comes from?

12 MR. VOSES: I don't believe that it is
13 exclusively from those types of cases. However, the use of
14 the word litigate to describe the act of resolving a
15 contest of issues has been used, as I mentioned, and - - -
16 and at least seventy-seven judges of the Appellate Courts
17 of the State of New York - - -

18 JUDGE STEIN: But - - - but you have to look at
19 the context of that, don't you? It's never been used in
20 this context.

21 MR. VOSES: I'm sorry. I - - -

22 JUDGE STEIN: Have you - - - did you cite any
23 cases in which it was used in this context, in - - - in
24 terms of discr - - - making a - - - a distinction, if there
25 is one, between litigation and arbitration?

1 MR. VOSES: Well, we cite the 1962 Court of
2 Appeals case in Chupka, and of course in that case, going
3 all the way back to 1962, it was in the dissent, and the
4 dissent did mention that the parties did not have the
5 opportunity to litigate the question in arbitration or in
6 court, thereby, in that case, at least - - -

7 JUDGE RIVERA: Can I just clarify, is - - - is it
8 your position that litigate, in this agreement, meant
9 arbitrate? That's what the parties meant?

10 MR. VOSES: That is - - -

11 JUDGE RIVERA: Is that what you're trying to say?

12 MR. VOSES: That is not what the extrinsic
13 evidence - - -

14 JUDGE RIVERA: Well, no - - -

15 MR. VOSES: - - - shows.

16 JUDGE RIVERA: Just looking at the agreement
17 itself.

18 MR. VOSES: The agreement, in and of itself, is -
19 - - is ambiguous as to what the parties meant.

20 JUDGE RIVERA: Okay.

21 MR. VOSES: Amherst wants the part - - - the - -
22 - the court to believe - - -

23 JUDGE STEIN: Well, if it's ambiguous, don't we -
24 - - don't we interpret it in - - - in the favor of - - -

25 JUDGE RIVERA: The town.

1 JUDGE STEIN: - - - of the town?

2 MR. VOSES: I don't see why that is. These are
3 two separate entities negotiating an agreement represented
4 by counsel. There is - - - this is not a situation where
5 anything is construed against the insurance company. These
6 are parties which were represented by counsel at the
7 mediation.

8 JUDGE STEIN: But - - - but don't be apply that
9 rule to contracts, generally, not just insurance policy?

10 MR. VOSES: Well, if that were the case, the
11 first paragraph of the handwritten August 5th agreement was
12 written by Thomas Jones, the attorney for the Town of
13 Amherst.

14 JUDGE RIVERA: You're saying they're the
15 drafters.

16 MR. VOSES: Of the provision - - -

17 JUDGE RIVERA: Of that part.

18 MR. VOSES: - - - in question of the August 5th
19 agreement. That's correct. And you - - -

20 JUDGE STEIN: Well, that's an interesting
21 question. Because each - - - each party drafted one
22 paragraph, right, and - - - and certainly, the attorney
23 representing your company had an opportunity to - - - to
24 see what had been drafted and to request changes in that,
25 correct?

1 MR. VOSES: Well, that's true, but there is an
2 affidavit submitted by that attorney in which he stated
3 that it was not his intent for the word litigate to operate
4 as a waiver or a modification of the policy.

5 And in fact, various case law from this court in
6 that negligence, oversight, or thoughtlessness will not
7 operate to effectuate a waiver.

8 JUDGE RIVERA: But is that the point that - - -
9 that he thought it meant arbitrate? I'm - - - I'm losing
10 your argument here. I'm sorry.

11 MR. VOSES: No, the - - - the - - - at the
12 mediation, there was discussion as to whether or not
13 Granite State would insist upon its contractual right to
14 arbitration. Mr. Capowski, the attorney for Granite State,
15 informed the parties that he did not have authority to - -
16 - to decide that at that time; he would have to go defer
17 the question to his client.

18 There was another individual, the claims handler
19 for - - - from Granite State in attendance at the
20 mediation, and similarly, that individual had to defer it
21 and - - - and "had to run it up" - - -

22 JUDGE STEIN: So what are you saying - - -

23 MR. VOSES: - - - from home.

24 JUDGE STEIN: - - - that the intent was, to leave
25 it ambiguous?

1 MR. VOSES: No. The intent was simply to carve
2 out and preserve for another day the dispute between
3 Amherst and Granite State concerning the amount at issue.

4 JUDGE STEIN: But the intent as to the word
5 litigate.

6 MR. VOSES: The intent - - - it was not resolved.

7 JUDGE STEIN: That's not what - - - and they
8 didn't say, you know, we intend to carve this out and
9 resolve this at a later time. They used the word litigate.
10 So the question is is, is that an intentional waiver.

11 MR. VOSES: That - - - that is not an intentional
12 waiver because - - -

13 JUDGE STEIN: I - - - I realize that's your
14 answer, but - - -

15 MR. VOSES: - - - the intentional waiver - - -
16 the intentional waiver has to refer, in some regard, to the
17 arbitration provision at issue. The argument that a - - -

18 JUDGE RIVERA: Okay. So then what would - - -

19 MR. VOSES: - - - waiver could have done - - -

20 JUDGE RIVERA: - - - this agreement have to have
21 said? Let's follow what - - - what your train of thought
22 there is, to actually constitute a waiver. The words, "we
23 waive"; is that - - - is that what you needed here?

24 MR. VOSES: I believe that there had to be some
25 other clear, unmistakable, and - - - and affirmative

1 statement by either Amherst or Granite State that either
2 party intended that the arbitration provision of the
3 insurance policy would not operate to require the parties
4 to dispute their - - - to resolve their dispute in that
5 form.

6 JUDGE WILSON: What about the - - -

7 MR. VOSES: That is absent in this case.

8 JUDGE WILSON: What about the waiver by conduct
9 here? This has apparently been litigated to judgment.

10 MR. VOSES: The - - - the important - - - thank
11 you for that question. The - - - the important thing to
12 note there is that this is a pre-answer motion to compel.
13 The issue that was decided by the trial court was issued on
14 Granite State's motion to compel arbitration. None of the
15 events described by counsel had occurred at this - - - at
16 the time that the trial court's order had been issued, on
17 May 15th, 2014.

18 At the same time, that - - - once the decision
19 came down, it became incumbent upon Granite State to
20 interpose, and answer, and any other affirmative - - -
21 asserted affirmative defenses and counterclaims in the
22 case, while at the same time perfecting its appeal to the
23 Fourth Department, which it did.

24 Amherst raced to - - - to conclusion with the
25 case without having the benefit of the Fourth Department

1 reviewing the trial court's decision concerning waiver or
2 modification. The trial court erred. The Fourth
3 Department held that the issue of whether or not the August
4 5th agreement modified the parties' contractual right to
5 arbitrate was for the arbitrators.

6 The effect of that modification on the trial
7 court order was to nullify all proceedings that took place
8 after it. It's as if they never occurred. Therefore,
9 there is no longer a judgment, as we currently stand, there
10 was no summary judgment decision, and this - - - this
11 dispute must be submitted to the arbitrators, because the
12 Fourth Department reached the correct conclusion, and it
13 should be affirmed.

14 I see my time is up.

15 CHIEF JUDGE DIFIORE: Thank you, Mr. Voses.

16 Mr. Schmidt.

17 MR. SCHMIDT: Your Honor, throughout - - - Your
18 Honors, with regard to that last point, there was never a
19 motion for stay, and the litigation has concluded. But in
20 rebuttal, there were couple of points I need to clarify.

21 First, counsel cited the modification provision
22 in the insurance policy as rendering the agreement to
23 litigate inoperative. But on the record in the court
24 below, counsel conceded that the modification provision
25 only applied to the substantive provisions of the insurance

1 policy, not the procedural points. And that was in the
2 record at pages 21 to 22.

3 Also, there was some question as to whether or
4 not the counsel for the insurance company had authority to
5 enter into the litigation agreement, and that was Mr.
6 Capowski. It was conceded on the record below that he did
7 have full authority. And that's at pages 23, 32 to 33, and
8 page 50.

9 Finally, with regard to - - - and not finally, I
10 got two points, actually, and I apologize for that. With
11 regard to modification and whether or not the litigation
12 agreement affected a modification, there was performance
13 under that. The agreement was executed, it was negotiated,
14 it was merged into one - - - one agreement, it was two
15 paragraphs. They didn't edit, add to, or subtract from the
16 - - - the paragraph that Amherst drafted; it was mutually
17 drafted, executed. There was performance.

18 And as a result, Granite State Insurance Company
19 received ten million dollars, all the money it was entitled
20 to under its insurance policy; it received the benefit, and
21 then agreed with Amherst - - -

22 JUDGE GARCIA: But so did you. Just to interrupt
23 on that. Isn't the purpose of this agreement to get by the
24 mediation hearing because there's a dispute going on over
25 the three million, and in order for this fund the settle

1 this and you get twenty something million, or whatever the
2 payment out is to the town, they have to have resolution of
3 this in some way.

4 So it seems to me, this agreement gets you by
5 that, so you receive your payout from the insurance fund,
6 and they receive their payout from the insurance fund.

7 So I think to say, they did it so they could
8 receive their money, perhaps, but it seems the purpose of
9 this entire agreement is so that you both can receive the
10 undisputed distribution from the fund.

11 MR. SCHMIDT: Absolutely, Your Honor. But we're
12 not contesting disagreement; they are. We wholeheartedly
13 embrace disagreement to litigate. And that whether or not
14 it modifies the policy - - -

15 JUDGE GARCIA: You embrace your interpretation of
16 the agreement to litigate, but my point is really, if you
17 step back up and you say, what is the purpose of entering
18 into this agreement, it was to get you by the mediation, to
19 distribute the funds, and to put off their resolution of
20 the 3.13 million for another day. Because without this
21 agreement, it seems to me the fund would not be able to pay
22 out what it intended to pay out under the agreement.

23 MR. SCHMIDT: That - - - that's accurate, Your
24 Honor. But - - - and - - - and this agreement was drafted
25 by both parties.

1 Finally, with regard to the issue of whether or
2 not a subsequent agreement can either modify or waive
3 agreement, I believe that's dealt with by this court in the
4 Pitofsky opinion, Credit Suisse v. Pitofsky. And with - -
5 -

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MR. SCHMIDT: Thank you.

8 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Town of Amherst v. Granite State Insurance, No. 64 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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