Supreme Court No. S179378

IN THE
SUPREME COURT OF CALIFORNIA

TARRANT BELL PROPERTY, LLC, et al.
Petitioners,

vs.

THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent
REYNALDO ABAYA, et al., Real Parties in Interest

SPANISH RANCH I, L.P.
Petitioner,

vs.

THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent
REYNALDO ABAYA, et al., Real Parties in Interest

After a Decision by the Court of Appeal
First Appellate District, Division Four
Civil Nos. A125496, A125714

Superior Court Alameda County, No. HG08418168
Hon. George C. Hernandez, Jr.

ANSWER TO PETITION FOR REVIEW BY REAL PARTIES IN INTEREST REYNALDO ABAYA, ET AL.

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Real Parties in Interest REYNALDO ABAYA, et al. ("Real Parties") respectfully request that the Court deny the Petition for Review of Tarrant Bell Property, LLC v. Superior Ct. 179 Cal. App. 4th (Cal. Ct. App. 2009) submitted by Petitioners MONTEREY COAST, LP, TARRANT BELL PROPERTY, LLC, and SPANISH RANCH I, LP (jointly "Petitioners").

QUESTIONS PRESENTED FOR REVIEW

1. Does California Code of Civil Procedure section 638[1] give a trial court discretion to deny a motion to compel judicial reference where the parties have contractually agreed to have certain disputes decided by judicial reference?

2. Here, there were numerous plaintiffs who had not contractually agreed to judicial reference, but shared identical claims with the reference plaintiffs. Under the circumstances, did Respondent Trial Court abuse its discretion by denying Petitioners' motion to compel judicial reference on the grounds that enforcement of the Reference provision would: adversely affect judicial economy by creating duplicative litigation; and, risk the potential of inconsistent rulings on common issues of law or fact?

3. Should Respondent's denial of the motion to compel reference be affirmed on the alternative ground that the reference provisions were unconscionable and void as against public policy?

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[1]Unless otherwise specified, all statutory citations are to the Code of Civil Procedure.

WHY REVIEW SHOULD BE DENIED

On its face, section 638 is permissive and gives the trial court discretion to deny reference: "A reference *may* be ordered upon the agreement of the parties ... ." *Emphasis added.* The Legislature's use of the word "may" is presumed to be permissive (*Hogya v. Superior Court*, 75 Cal. App. 3d 122, 133 (1977)), especially in the context of section 638 where the Legislature has used both the words "may" and "shall" in close proximity within the same context. *In re Richard E.*, 21 Cal. 3d 349, 353-54 (1978). In case there is any claimed ambiguity in the use of the word "may," section 638's legislative history clearly shows that when the Legislature last amended section 638, it substituted "may" for the original word "shall" in response to a staff recommendation that the trial court be given discretion. Under the circumstances, it is not surprising that both Respondent and the Court of Appeal found section 638 gave Respondent discretion to deny reference.

In their Petition, Petitioners completely sidestep section 638's legislative history. When the Legislature amended section 638 in 1982, its decision to give the Trial Court discretion was influenced by a Judiciary Committee staff report, which recognized that circumstances may arise when a matter would be "more properly or efficiently decided" by a judge, despite the existence of a judicial reference agreement. Respondent based its decision not to enforce the judicial reference agreements between Petitioners and select Real Parties on the same policy considerations contained in that report. Here, 51 Real Parties signed rental agreements with Petitioners which lacked a judicial reference provision. Had Respondent opted to enforce the judicial reference agreements against the

remaining Real Parties, then the case would be tried in two separate, parallel proceedings. This would result in duplicative efforts and increase costs. More importantly, it would create the potential of inconsistent rulings on common issues of law or fact.

Petitioners claim the decision here conflicts with two cases - *Greenbriar Homes Communities, Inc. v. Superior Ct.*, 117 Cal. App. 4th 337 (Cal. Ct. App. 2004) ("*Greenbriar*") and *Trend Homes, Inc. v. Superior Ct.*, 131 Cal. App. 4th 950 (Cal. Ct. App. 2005) ("*Trend*"). Its assertion is meritless. *Greenbriar* and *Trend* focused solely on the issue of whether certain reference provisions were unconscionable. They never discussed the discretionary language of section 638, its legislative history or whether the trial court had discretion to deny reference on any alternative grounds.

The potential for inconsistent rulings, duplication of effort, increased costs, and delays in resolution would render the appointment of a referee to try the cases of only some of the Real Parties both improper and inefficient. The Legislature amended Section 638 to avoid these very problems. The Appellate Court recognized this fact, and correctly held that Respondent's decision to deny Petitioner's Motion to Compel was justified and not an abuse of discretion. The Petition for Review should be denied.

STATEMENT OF THE CASE

This is an action by 120 Plaintiffs alleging substandard living conditions at the Spanish Ranch mobilehome park ("Park"), owned and operated at various times by Petitioners. Real Parties are current or former Park residents. Real Parties own their own homes, which are located on spaces in the Park. They lease spaces from the parkowner

pursuant to leases and rental agreements which are governed by the Mobilehome Residency Law (Cal. Civ. Code § 798, *et seq.*). Real Parties' Complaint seeks damages and equitable relief under alternative legal theories arising from substandard living conditions in the Park.

In December 2008, Petitioners specially appeared in the action by filing a motion compelling arbitration, to stay proceedings pending the outcome of arbitration, or, in the alternative, to have the matter tried by a referee pursuant to section 638. Petitioners alleged the majority of Real Parties had signed rental agreements that contained provisions requiring arbitration in the event of a dispute between the resident and the Park owners. These agreements also contained a provision that mandated referral of the case to a referee if the court invalidated the arbitration clause.

Real Parties opposed Petitioners' motion on numerous grounds, including the argument that requiring the cases of some, but not all, Real Parties to be heard by arbitration or judicial reference would ignore the long-standing public policy to promote judicial economy and prevent inconsistent judgments that undermine the integrity of the judicial system.

Respondent ultimately denied Petitioners' motion to compel arbitration in March 2009, and denied the motion to compel judicial reference in May 2009.[2] Respondent found that sending some Real Parties to a referee, while others remained in court, risked

[2]Respondent's decision to deny the motion to compel arbitration is the subject of a pending separate appeal filed by Petitioners.

inconsistent rulings. Respondent also found that splitting the action would defeat the purposes of the reference statute by duplicating efforts and increasing costs:

> Ordering two groups of plaintiffs to try their cases in separate but parallel proceedings would not reduce the burdens on this court or the parties, result in any cost savings, streamline the proceedings, or achieve efficiencies of any kind. The parties would be required to conduct the sam discovery, litigate and ultimately try the same issues in separate but parallel forums. A general reference would thus result in a duplication of effort, increased costs, and potentially, delays in resolution. Moreover, it would not reduce any burden on this Court, which would almost certainly have to hear, and decide, all of the same issues.

Petitioners filed a Petition for Writ of Mandate with the Court of Appeal seeking review of the order denying reference. Following oral argument on the writ petition, the Appellate Court affirmed in a published opinion issued December 2, 2009. *See Tarrant Bell Property, LLC v. Superior Ct.,* 179 Cal. App. 4th (Cal. Ct. App. 2009).

ARGUMENT

I

RESPONDENT DID NOT ABUSE ITS DISCRETION UNDER SECTION 638 BY DECLINING TO ENFORCE THE JUDICIAL REFERENCE PROVISION IN THE RENTAL AGREEMENTS BETWEEN PETITIONERS AND SELECT REAL PARTIES

Section 638 states:

> A referee <u>may</u> be appointed . . . upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee. . . . [*Emphasis added.]*

Traditionally, the word "may" denotes permissive action, while the word "shall" is commonly used in laws that are mandatory. *Hogya v. Superior Ct.*, 75 Cal. App. 3d 122,

133 (Cal. Ct. App. 1977). The use of the word "may" in section 638 indicates that the court has discretion to grant or deny appointment of a referee when only one party to a judicial reference agreement brings a motion to compel.

Although section 638 does not mention any circumstances that might inform a trial court's exercise of discretion, its legislative history does. When the Legislature considered amendments to section 638 in 1982, it initially considered mandating the enforcement of judicial reference provisions. The Legislature reconsidered making enforcement mandatory after a report from the State Assembly's Committee on the Judiciary:

> Should not the court have the *discretion to decide* that, *despite the existence of a pre-dispute agreement, the issues would be more properly or efficiently decided by the judge*? Therefore, should not this bill simply create a presumption that a court should compel a reference when parties have contractually agreed to one, thereby permitting the court to determine that such a reference would be inappropriate?

Tarrant, supra, 179 Cal. App. 4th at 1291, citing Assem. Com. On Judiciary, Analysis of Assem. Bill No. 3657 (1981-1982 Reg. Sess.) Mar. 18, 1982. [*Emphasis added*]

The Legislature accepted the recommendations of the Committee report, amending section 638 to give courts discretion on sending cases to a referee by substituting the word "may" for the word "shall."

Here, Respondent denied judicial reference because of concerns that sending some of the Real Parties to a referee while others remained in the court risked inconsistent rulings on common issues of law or fact. Respondent also found that splitting the action would defeat the purposes of the reference statute by duplicating efforts and increasing

costs. In essence, Respondent denied Petitioners' motion to compel because splitting the case between the court and referee would be inefficient from a judicial economy perspective and potentially improper if there were inconsistent rulings on common issues of law or fact. These were the same concerns raised in the Judiciary Committee report.

The fact that one ground for the denial of reference – the risk of inconsistent rulings – is also a statutory ground for denying arbitration is of no moment. Because the arbitration statute (section 1281.2) uses the word shall, it is mandatory, and a statutory exception was required to effect the underlying public policy of avoiding conflicting rulings in an arbitration setting. Cal. Civ. Proc. Code § 1281.2(c). Because section 638 is permissive, without limiting the court's discretion, no such statutory exception was necessary. Indeed it would be perverse for the public policy of avoiding conflicting rulings to be contravened by permitting the denial of arbitration, but compelling reference instead.

The standard of review for abuse of discretion is whether Respondent exceeded the bounds of reason. *See, e.g., Walker v. Superior Court*, 53 Cal. 3d 257, 272 (1991). Here, Respondent properly exercised its sound discretion.

II

PETITIONERS' RELIANCE ON *GREENBRIAR* AND *TREND* IS MISPLACED

Petitioners devote the majority of their argument to an analysis of *Greenbriar* and *Trend.* Contrary to their contention, however, the decision herein does not conflict with those cases. *Greenbriar* and *Trend* reversed decisions by trial courts invalidating judicial reference agreements on unconscionability grounds not at issue here. Although Real Parties raised the issue of unconscionability in its arguments before Respondent and the Appellate Court, the Appellate Court found it unnecessary to reach that issue. Moreover, that unconscionability argument was not predicated on the potential for conflicting rulings. *Tarrant*, 179 Cal. App. 4th at 1295.

In *Greenbriar*, the Court briefly discussed whether the trial court had abused its discretion when it denied a motion to compel judicial reference because it would lead to a multiplicity of lawsuits. Rather than focusing their argument on the discretionary language of section 638 and its legislative history, the real parties in *Greenbriar* instead made the strained argument that the Court's discretion to deny reference somehow was derived from section 1281.2. *Greenbriar*, *supra*, 117 Cal. App. 4th at 346. The appellate court rejected that argument, noting that section 1281.2 "is a specific statute that creates a special rule, which invalidates *only* arbitration agreements." *Id.* at 347.

Petitioners also quote the following language from *Greenbriar* to support of their position:

> Had the Legislature intended to allow judicial reference agreements to be invalidated on the basis of other pending or multiple actions, it could have adopted a statute so stating. Without such statutory authorization, however, both the trial court and [the appellate court] lack authority to invalidate an otherwise valid contractual agreement.

Id. at 348, citing *Certain Underwriters at Lloyd's of London v. Superior Ct.*, 24 Cal.4th 945, 968 (Cal. 2001).

In making that statement, however, the *Greenbriar* Court did not consider the discretionary language of section 638 or its legislative history. Had it done so, it would have learned that the Legislature intended to give courts discretionary authority to enforce otherwise valid judicial reference agreements when the enforcement of a reference agreement could impact the propriety and efficiency of litigating a case.

Petitioners assert that the appellate Court herein "appeared to ... rely upon the *arbitration* statutes to come to its conclusion here that the trial court had discretion to deny an agreed upon reference." Petition at 5. This assertion is baseless, as the opinion contains no language to support this argument. To the contrary, the Appellate Court *agreed* with the *Greenbriar* court's ruling that a court's discretion to deny a motion to compel judicial reference is completely unrelated to section 1281.2, noting: "The Third District promptly, *and rightly*, rejected that argument ... ." *Tarrant*, 179 Cal. App. 4th at 1294, *Emphasis added.* That discretion arises from section 638.

Like the *Greenbriar* Court, the *Trend* Court also focused on the issue of unconscionability. The *Trend* court reversed the trial court's ruling that reference agreements were unconscionable. It also rejected the argument that the risk of

inconsistent rulings from the referee and the trial court in multiple actions justified the trial court's decision not to enforce the reference agreement. *Trend*, *supra*, 131 Cal. App. 4th at 964. In rejecting this argument, the *Trend* Court merely parroted the *Greenbriar* decision. *Id.* The *Trend* Court, like the *Greenbriar* Court, did not examine section 638's language and legislative history or intent.

Under the above circumstances, the Appellate Court herein did not state that *Trend* and *Greenbriar* were wrongly decided; it merely found them distinguishable. There is no conflict.

III

THE APPELLATE COURT COULD HAVE AFFIRMED ON THE ALTERNATIVE GROUND THAT THE REFERENCE AGREEMENTS WERE VOID AS UNCONSCIONABLE AND AGAINST PUBLIC POLICY

Real Parties opposed the Petition on the alternative grounds that the reference agreements were unconscionable and void as against public policy. The Court of Appeal found it unnecessary to reach those issues. Real Parties raise it here solely as an additional question presented for review.

CONCLUSION

An examination of the legislative history of section 638 clearly shows the reasons why the Legislature gave courts the discretionary authority to grant or deny motions to compel judicial reference. The Legislature gave courts discretionary authority, rather than making the enforcement of judicial reference agreements mandatory, because of concerns that the enforcement of these agreements in certain situations may be improper or

inefficient. Respondent's grounds for denying Petitioners' motion to compel judicial reference are consistent with that legislative intent.

Moreover, the Appellate Court did not hold that *Greenbriar* or *Trend* were wrongly decided; instead, it distinguished them. There is no conflict and there is no error. The Petition should be denied.

Dated: January 27, 2010

Respectfully submitted,

ENDEMAN, LINCOLN, TUREK & HEATER

By: _____

HENRY E. HEATER
DAVID M. DAFTARY
Attorneys for Real Parties in Interest
REYNALDO ABAYA, et al.

CERTIFICATE OF WORD COUNT

The undersigned, counsel for the Real Parties in Interest, hereby certifies pursuant to Rule 8.504(d)(1), California Rules of Court, that the foregoing petition is proportionately space, has a 13-point typeface, and contains 2,545 words as computed by the word processing program Microsoft Word XP used to prepare the petition.

Dated: January 27, 2010

Respectfully submitted,

ENDEMAN, LINCOLN, TUREK & HEATER

By: _____

HENRY E. HEATER
DAVID M. DAFTARY
Attorneys for Real Parties in Interest
REYNALDO ABAYA, et al.

PROOF OF SERVICE

Re: Supreme Court No.: S179378
Superior Court Alameda County No.: HG08418168

Case Title: *Tarrant Bell Property, LLC v. The Superior Court of Alameda County; Reynaldo Abaya, et al.*

Spanish Ranch I, L.P. v. The Superior Corut of Alameda County; Reynaldo Abaya, et al.

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party to the above-entitled action. I am employed in the County of San Diego, and my business address is 600 B Street, Suite 2400, San Diego, California 92101.

On January 27, 2010, I served the attached ANSWER TO PETITION FOR REVIEW BY REAL PARTIES IN INTEREST REYNALDO ABAYA, ET AL. On the parties in the above-named case. I did this by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then placed the envelope in a U.S. Postal Service mailbox in San Diego, CA addressed as follows:

Court Clerk Superior Court of Alameda County Fremont Hall of Justice 39439 Paseo Padre Parkway Fremont, CA 94538	Clerk, Court of Appeal First Appellate District Division Four 350 McAllister Street San Francisco, CA 94102-3600
Frank Ozello, Esq. GRAY DUFFY, LLP 15760 Venture Blvd., 16th Floor Encino, CA 91436 *Attorneys for Defendant/Appellants, Spanish Ranch I, LP*	Robert S. Coldren, Esq. Robert G. Williamson, Esq. Daniel T. Rudderow HART, KING & COLDREN 200 Sandpointe, Fourth Floor Santa Ana, CA 92707 *Attorneys Specially Appearing for Cross-Appellant TARRANT BELL PROPERTY, LLC and MONTEREY COAST, L.P.*

Asim Desai, Esq. Margaret M. Drugan, Esq. Phillip Stuller, Esq. Carlson, Calladine & Peterson, LLP 333 S. Grand Avenue, Suite 3500 Los Angeles, CA 90071 *Co-Counsel for Defendants TARRANT BELL PROPERTY, LLC and MONTEREY COAST, L.P.*	

I, Kelly O'Connell-Martinez, declare under penalty of perjury that the foregoing is true and correct.

Executed on January 27, 2010, at San Diego, California.

Kelly O'Connell-Martinez

Kelly O'Connell-Martinez