1-14-2016

Principal Investments v. Harrison, 132 Nev. Adv. Op. 2 (Jan. 14, 2016)

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Nevada Law Journal

Principal Investments v. Harrison, 132 Nev. Adv. Op. 2 (Jan. 14, 2016)[1]

CONTRACT LAW: ARBITRATION WAIVER-BY-LITIGATION

Summary:

The Court held unless the arbitration agreement commits the question to the arbitrator with "clear and unmistakable"[2] language, a litigation-conduct waiver is presumptively for the court to decide because it is a waiver based on active litigation in court. Thus, the district court judge in this case did not err in addressing whether the moving party waived its right to arbitrate, instead of referring the question to the arbitrator.

Background:

Rapid Cash, a payday loan company, provided loans to named plaintiffs and other borrowers. Because the plaintiffs and others failed to repay their loans, Rapid Cash filed more than 16,000 collections actions in Clark County, NV justice court over the course of seven years. During that time, Rapid Cash secured thousands of default judgments against plaintiffs and other borrowers, using Maurice Carroll, d/b/a On-Scene Mediations as its exclusive process server.

Eventually, the number of same-day receipts and service of process prompted an investigation which revealed Carroll and On-Scene Mediations had engaged in "sewer service"- or falsely swearing that process had been served when it had not. Carroll was criminally convicted.

Accordingly, Plaintiffs filed a class action complaint against Rapid Cash, asserting multiple claims and damages but disavowing claims for individual tort or consequential damages. In response, Rapid Cash moved to compel arbitration based on its loan agreements, of which there were two versions: (1) Dungan/Harrison form; and (2) Quintino form. The Dungan/Harrison arbitration agreement specified that litigating one claim does not waive arbitration as to other claims and that either party my elect binding arbitration of any claim. However, the Quintino agreement requires a party to submit all claims (with claims defined broadly), that those claims undergo mandatory mediation, and if mediation does not resolve the issue, parties must then go to binding arbitration.

The district court denied the motion to compel arbitration, holding Rapid Cash waived its right to arbitration by bringing the previous collection actions in justice court. On appeal, the question before the Nevada Supreme Court was not only whether Rapid Cash waived its right to arbitrate, but also whether the waiver-by-litigation question is the decision of the court or the arbitrator.

Discussion:

Arbitration enforcement mirrors contract enforcement.

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[2] Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 221 (3rd Cir. 2007).

Under Federal Arbitration Act (FAA), arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[3] Thus, the right to enforce an arbitration agreement can be waived, the same as can any contract right under the right circumstances. However, because of the strong public policy favoring arbitration, any doubts should be resolved in favor of upholding arbitration.[4]

Waiver-by-litigation, as a matter of judicial proceeding, lies within the purview of the court.

The Supreme Court's guide to labor division under FAA indicates the parties, in their contract, have ultimate control over whether the waiver-by-litigation decision rests in the hands of the court or the arbitrator.[5] If the parties indicate in "clear and unmistakable" language that an arbitrator should control a certain matter, such a contract is binding. However, if the arbitration agreement is silent on the matter, the labor division is thus: courts are in charge of deciding "gateway questions of arbitrability,"[6] while arbitrators are in charge of deciding "procedural gateway matters."[7]

There is disagreement amongst the lower courts whether the Supreme Court has deemed waiver-by-litigation (a.k.a litigation-conduct waiver) to be a gateway question of arbitrability or a procedural gateway matter. Although the Supreme Court has generally characterized "waiver" as procedural gateway question within the purview of the arbitrator[8], the majority of lower courts have left the litigation-conduct waiver decisions to the court, pointing out that the Supreme Court cases arose out of arbitration non-compliance unrelated to judicial proceedings.[9] In contrast, because litigation-conduct waivers, specifically, involve control of judicial procedures, such decisions should rest with the court[10]—both because judicial power over judicial proceedings will comport with the expectations of the contracting parties and also because the court will have more expertise in such matters.

Thus, because litigation-conduct waivers involve determinations about active judicial proceedings, the Nevada Supreme Court sided with the majority of lower courts by placing the litigation-conduct waiver within the purview of the court, not the arbitrator, unless the parties expressly contract otherwise.

The District Court Judge Did not Err in Reviewing Waiver

Because neither the Dungan/Harrison arbitration form and the Quintino arbitration form use "clear and unmistakable" language to designate the arbitrator as decision-maker for

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[3] 9 U.S.C. § 2 (1947).

[4] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

[5] BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198, 1206-07 (2014).

[6] "[S]uch as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies." *Id.* at 1206.

[7] "[S]uch as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." *Id.* at 1207.

[8] *See, e.g.*, Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002); *BG Grp.*, 134 S. Ct. at 1207.

[9] Grigsby & Assocs., Inc. v. M. Sec. Inv., 664 F.3d 1350, 1353 (11th Cir. 2011).

[10] *Ehleiter*, 482 F.3d at 219.

litigation-conduct waiver matters, the court presumptively becomes the decision-maker. Thus, the district court did not err in reviewing the litigation-conduct waiver matter, rather than deferring judgment to an arbiter.

Rapid Cash did waive its rights to arbitration by engaging in collections litigation.

Public policy disfavors arbitration waivers and, thus, they should not be lightly inferred.[11] Waiver of rights requires the following elements: "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; (3) and prejudice to the party opposing arbitration resulting from such inconsistent acts."[12] Additionally, "only prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate."[13]

Here, Rapid Cash contends that neither elements (2) nor (3) are fulfilled and the prior collections litigation should not waive their right to arbitrate plaintiff's claims. However, the Court concludes, since the litigation does concern the same legal and factual issues as the prior litigation, and since the prior litigation was based on fraudulent service of process, Rapid Cash did waive its rights to arbitration by initiating that prior litigation. Additionally, the Court stresses that this arbitration can be waived even where a no-waiver arbitration clause exists.

Conclusion

Applying the Circuit Courts' majority view of *Howsam* and *B.G. Group*, the Court determined (1) an agreement must designate an arbitrator for waiver-by-litigation matters with "clear and convincing" language in order to overcome the presumption that (2) waiver-by-litigation matters are within the purview of the court as they concern judicial proceedings. The Court affirmed the ruling of the district court, holding the district court judge did not err in reviewing the waiver and denying Rapid Cash's motion to compel arbitration.

[11] Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812, 242 F.3d 52, 57 (2nd Cir. 2001).
[12] 3 Thomas H. Oehmke, *Commercial Arbitration* § 50:28, at 28-29 (3d ed. Supp. 2015).
[13] Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 133 (2d Cir. 1997).