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Tallman v. Eight Judicial District Court, 131 Nev. Adv. Op. 60673 (Sep. 24, 2015)

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CONTRACTS: ARBITRATION AGREEMENTS

Summary

The Court held that an employment arbitration agreement, which contains a clause waiving the right to initiate or participate in class actions, constitutes a valid contract, even though it is not signed by the employer. The Court further determined that the Federal Arbitration Act applies to all transactions involving commerce and does not conflict with the National Labor Relations Act, which permits and requires arbitration. Finally, the Court found that a party does not automatically waive its contractual rights to arbitration by removing an action to federal court.

Background

Donald Mika, Beryl Harter, and Dennis Tallman worked for CPS Security (CPS) as trailer guards. CPS required them to sleep in small trailers and only paid them for time spent responding to an alarm. All three signed two agreements: (1) short-form arbitration agreement, which contained concise language assenting to binding arbitration and providing information for modification, (2) long-form arbitration agreement which provided more detailed information regarding arbitration, a clause waiving the right to initiate or participate in class actions and a 30-day period to opt-out. All employees signed both agreements but CPS did not sign the long-form arbitration agreement.

Tallman sued CPS in state court asserting minimum wage and overtime claims individually and on behalf of others similarly situated. CPS successfully removed Tallman's Fair Labor Standards Act (FLSA) claims to federal court. Mika and Harter filed a second state suit against CPS and their complaint was combined with Tallman's state complaint and assigned to the district court. The District court denied their motions for class certification and issued an order to compel arbitration. Mika, Harter and Tallman petitioned the Nevada Supreme Court to exercise original mandamus jurisdiction over the district court's order.

The Court accepted mandamus review because (1) Nevada's case law may deceive the legal community that mandamus is readily available because the UAA does not provide for interlocutory direct appeal from an order compelling arbitration and (2) a previous Court decision invalidating class action waivers conflicts with a recent decision of the Supreme Court.

Discussion

The Nevada legislature has adopted the Uniform Arbitration Act of 2000 (UAA)⁴, as an extension of the Federal Arbitration Act to govern the rules and policies of

¹ By Marta Kurshumova.

⁴ Nev. Rev. Stat. § 38.206 to 38.248 (2001).

arbitration within the state. The Act favors the “efficient and expeditious enforcement” of arbitration agreements and provides for interlocutory appeals only from orders denying arbitration. The Court has held that the UAA does not authorize interlocutory appeals from orders compelling arbitration because the law would be rendered mute and written arbitration agreements – meaningless, should parties be allowed to appeal and, thus, delay the matter of arbitration.

Following the UAA’s failure to provide a mechanism for appeals from orders to compel arbitration, here, all parties agree that Petitioners have no “plain, speedy and adequate remedy” apart from writ of mandamus.⁷ Therefore, in seeking extraordinary writ of relief from an order compelling arbitration, Tallman should show (1) why an appeal from an arbitration decision does not afford “plain, speedy and adequate remedy in the ordinary course of law”⁸ and (2) that mandamus is needed to “compel the performance of an act that the law requires or to control a manifest abuse of discretion” by the district court.⁹

“[T]he long-form arbitration agreement, which contains the objected-to class action waiver, constitutes a valid contract.”

Tallman argues that he signed both agreements simultaneously but CPS failed to sign the long-form agreement, which renders that entire agreement null and void. Nevada law requires arbitration agreements be “contained in a record,” hence - be in writing, and not necessarily signed.¹¹ Therefore, the Court rejected Tallman’s argument and upheld Nevada courts’ policy favoring the enforcement of arbitration agreements.¹² Tallman signed the agreements, failed to object to the class-action waiver and to opt-out of that clause within the permissible 30-day period. Therefore, Tallman accepted CPS’ offer and is bound by its terms regardless of whether CPS signed the agreements.

The Court further rejected Mika and Harter’s argument that the CPS’ officers, who are also named as additional defendants, did not sign the agreements thus waiving their liability. The Court applied the principles of agency because the officers are employees of CPS and the execution of the agreements was part of the course of employment.

The class action waiver in the long-form arbitration agreement is valid.

Here, the cause of action arises out of NRS Chapter 608 establishing statutory overtime and minimum wage claims.¹⁴ Tallman relies on *Gentry v. Superior Court* when asking the Court to invalidate the class action waiver on the basis that should Tallman be compelled to arbitration individually, the potential recoveries and likely expenses would

⁷ NEV. REV. STAT. § 34.170 (1911).

⁸ *Id.*

⁹ *State ex rel. Masto v. Second Judicial Dist. Court*, 125 Nev. 37, 43-44 (2009).

¹¹ NEV. REV. STAT. § 38.219 (2001).

¹² *State ex rel. Masto*, 125 Nev. at 44.

¹⁴ NEV. REV. STAT. § 608 (1975).

render the statutory claims economically unfeasible.¹⁶ The court in *Gentry* further held that the right to class action is an unwaivable statutory right because of its public importance and is an impermissible interference with a party's ability to seek justice.¹⁷ Additionally, this Court previously held that "Nevada public policy favors allowing consumer class action proceedings when the class members present common legal and factual questions but their individual claims may be too small to be economically litigated on an individual basis."¹⁸

However, the recent Supreme Court decision in *AT&T Mobility LLC v. Conception* overruled *Gentry* establishing that class wide arbitration is inconsistent with the FAA and interferes with fundamental attributes of arbitration regardless of the economic feasibility of the claim.¹⁹ Therefore, this Court applies *Conception's* rule broadly to all types of claims and holds that the class action waiver in the long-form arbitration agreement is valid.

The FAA applies to any transaction, which involves commerce.

The Court held that the FAA applies to any transaction, which involves commerce and preempts state law regardless whether the preemption issue arises in state or federal court.²⁰ Here, the long-form arbitration agreement explicitly states that CPS "is engaged in transactions involving interstate commerce." Therefore, the FAA applies irrespective of whether the claims are based on federal or state statutes.

The National Labor Relations Act (NLRA)²² does not invalidate the class-action waiver.

The NLRA provides that it is unlawful for any employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by § 7."²³ Tallman relied on *In re D.R. Horton, Inc.* when arguing that the NLRA makes mandatory individual arbitration illegal.²⁴ However, this Court adopted the Fifth Circuit's conclusion in *Horton II* that the FAA and NLRA do not conflict, and the NLRA permits and requires arbitration.²⁵

CPS did not waive its contractual right to arbitration by removing Tallman's action and litigating it in federal court.

¹⁶ 165 P.3d 556, 567-8 (Cal. 2007).

¹⁷ *Id.*

¹⁸ *Picardi v. Eight Judicial District Court*, 251 P.3d 723 (2011).

¹⁹ 131 S.Ct. 1740 (2011).

²⁰ 9 U.S.C. § 2 (2013).

²² 29 U.S.C. § 151 (2014).

²³ 29 U.S.C. § 158(a)(1).

²⁴ *D.R. Horton, Inc.*, 357 N.L.R.B. No.184, 2012 WL 36274, *1 (Jan. 3, 2012).

²⁵ *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359-61 (5th Cir. 2013).

Tallman must demonstrate that CPS (1) knew of his right to arbitrate, (2) acted inconsistently with that right and (3) prejudiced the other party by his inconsistent acts.²⁶ Prejudice is shown (1) when the parties use discovery not available in arbitration, (2) when they litigate substantial issues on the merits, or (3) when compelling arbitration would require a duplicate of efforts.²⁷

Here, the Court held that a party does not automatically waive its contractual rights to arbitration by removing an action to federal court.²⁸ The Court reasoned that both parties had assumed the collective action waiver could not be enforced as to Tallman's FLSA claim and that "the federal court proceedings did not prejudice but may actually have facilitated eventual arbitration of Tallman's state law claims."

Conclusion

The Court upheld Nevada public policy favoring the enforcement of arbitration agreements and their clauses waiving the right to initiate or participate in class actions. The Court denied writ of relief of the district court's order to compel arbitration.

²⁶ Nevada Gold & Casinos, Inc. v. Am. Heritage, Inc., 121 Nev. 84, 90, 110 P.3d 481, 485 (2005).

²⁷ *Id.* at 485.

²⁸ Halim v. Great Gatsby's Gallery, Inc. 516 F.3d 557, 562 (7th Cir. 2008).