July 17, 2019

ADR Case Update 2019- 14

Federal Circuit Courts

- **LOWER COURT USES WRONG STANDARD TO DETERMINE MOTION TO COMPEL**

Abdullayeva v. Attending Homecare Services, LLC
2019 WL 2750125
United States Court of Appeals, Second Circuit
July 2, 2019

When Abdullayeva began work with Attending Healthcare she was required to join the Home Healthcare Workers Union. The CBA negotiated between the Union and Attending provided that all claims brought by the Union or Employees asserting violations of/ arising under FLSA, the NY HealthCare Worker Wage Parity Law, or NY Labor Law (NYLL) were subject to grievance and arbitration procedures. If the Union declined to process a grievance, an employee could submit their claim to mediation and, if not resolved, to arbitration. Abdullayeva sued Attending for FLSA and NYLL violations. Attending's motion to compel arbitration was denied and Attending appealed.

The United States Court of Appeals for the Second Circuit reversed and remanded. The district court concluded that the relevant part of the CBA failed the "clear and unmistakable" test applicable to the assessment of purported waivers of union members' right to bring statutory claims in court when such waivers are part of a CBA's arbitration provision. However, the "clear and unmistakable" standard is applicable only to the question of whether a union has waived its members' rights to bring statutory claims in court, not to the initial question whether an arbitration agreement exists. Applying the correct standard, the Court concluded that the Union was legally authorized to negotiate CBAs on Abdullayeva's behalf and that Abdullayeva was bound by the CBA so negotiated. The Court also found that the agreement clearly and unmistakably encompassed Abdullayeva's FLSA and NYLL claims, unambiguously requiring employees to arbitrate those claims. The district court read the term "may" in the CBA to mean that employees could choose whether to arbitrate or pursue their claim in court; however, this was best read as clarifying that when the Union declined to process grievances, employees had the option to submit their claim to mediation and arbitration or abandon the claim.

The district court also found that the clause violated due process because Abdullayeva had no part in arbitrator selection. As Abdullayeva's bargaining representative, the Union was authorized to negotiate the arbitration clause. The selection of the arbitrator was the product of the Union's negotiations with Attending.

New York

- **NO MANIFEST DISREGARD IN FEE AWARD**

In re Mark Steyn, et al., v. CRTV, LLC
2019 WL 2750457
Supreme Court, Appellate Division, First Department, New York
July 2, 2019

Television personality Mark Steyn and CRTV executed a "Binding Term Sheet" for the production and distribution of a television show. The Term Sheet provided that the document was governed by the laws of the US and the State of NY and that any disputes would be resolved by "confidential binding agreement" in accordance with the FAA and pursuant to AAA rules. In a separate letter memorandum, Oak Hill Media (OHM), an entity related to Steyn, was retained to provide services to Steyn related to guests and PR. When Steyn protested his termination due to poor performance, CRTV filed a demand for arbitration. Steyn and OHM served an answer and counterclaims. Prior to arbitration, CRTV objected to the arbitrator's jurisdiction over OHM's counterclaim. The arbitrator found in favor of Steyn and OHM, awarding damages and attorneys' fees. Steyn and OHM commenced an article 75 special petition to confirm the award. The court, at first, affirmed all awards. It later reversed itself and vacated the award of attorneys' fees. All parties appealed.

The Supreme Court, Appellate Division, First Department, New York reversed. The parties agreed that manifest disregard of the law was the only appropriate ground to vacate the arbitrator's award of attorneys' fees. NY law provides that arbitrators are not permitted to award attorneys' fees in arbitration, with three exceptions: where the statute provides for such an award, where it was authorized by express provision in the agreement, or where it was unmistakably clear that both parties intended such an award. The first two exceptions did not apply. Regarding the third, the arbitrator did not manifestly disregard the law because it was not unreasonable for the arbitrator to conclude that the unmistakably clear requirement did not apply. The arbitration clause incorporated AAA rules, and Rule 47(d) provided that an award of attorneys' fees may be made if all parties have requested such an award, which is what happened here. The Court also held that the arbitration award against CRTV and in favor of OHM should be vacated. There was no agreement to arbitrate between OHM and CRTV. OHM was not a named party in CRTV's original demand for arbitration; OHM's appearance was made on a counterclaim. CRTV objected to arbitration with regard to OHM and their participation in the arbitration did not waive that objection.

- **AWARD DID NOT VIOLATE PUBLIC POLICY; ARBITRATOR DID NOT EXCEED AUTHORITY**

In the Matter of Arbitration Between the Union v. Board of Ed. for Buffalo City School District
2019 WL 2896760
Supreme Court, Appellate Division, Fourth Department, New York
July 5, 2019

The Buffalo School District terminated the employment of school security guard Andrea Teresi because she did not possess the valid registration card required by NY General Business Law for employment as a security guard. The Union filed a grievance on Teresi's behalf and a demand for arbitration. Buffalo did not move to stay the arbitration. The arbitrator directed Buffalo to rescind Teresi's termination and award her lost pay. The court granted Teresi's petition to confirm the award and denied Buffalo's cross petition to vacate. Buffalo appealed.

The Supreme Court, Appellate Division, Fourth Department, New York affirmed. Buffalo contended that the award violated public policy requiring the registration of security guards. The public policy exception is narrow, with a two-prong test: first, where a court can conclude that a law prohibits the particular matters to be decided by arbitration and second, where the award itself violates well-defined constitutional, statutory, or common law of the State. Nothing in the General Business Law prohibited the resolution of this matter by arbitration. The award did not compel Buffalo to employ Teresi without a registration card; it ordered that her termination be rescinded and back pay be awarded from the time she received her renewed registration card. The Court rejected Buffalo's contention that the arbitrator exceeded his authority by finding that the CBA allowed arbitration of the dispute. By submitting to arbitration, Buffalo ran the risk that the arbitrator would find the dispute covered under the CBA.

Texas

- **MEMBERS AGREED TO ARBITRATE; WAIVED RIGHT TO MEDIATION WHEN PROCEEDED TO LITIGATION**

Rodriguez v. Texas Leaguer Brewing Company LLC and Nathan Rees
2019 WL 2939056
Court of Appeals of Texas, Houston (14th Dist.)
July 9, 2019

The Rodriguezes twice invested money in Texas Leaguer (TL) Brewing and twice signed Company Agreements. Both Agreements contained clauses that "Members and Managers" would first mediate and then arbitrate "disputes aris[ing] out of or relat[ing] to the Agreement." After TL manager Nathan Rees terminated the Rodriguezes' membership in TL due to refusal to co-sign an SBA Loan, the Rodriguezes sued TL and Rees for securities fraud, breach of and specific performance of the First Agreement, conversion, and breach of a loan agreement. TL's application to compel arbitration was granted; the Rodriguezes appealed.

The Court of Appeals of Texas, Houston (14th Dist.) affirmed in part, reversed in part, and remanded. The Rodriguezes argued that the arbitration provision was not an agreement to arbitrate due to the language providing that the party "*electing* arbitration shall by such notice to other Members or Managers name an arbitrator" (emphasis added). The Court found that this language, which went on to outline arbitrator selection and decisions, reflected a clear intent that if parties were unable to resolve a dispute in mediation, they would submit to binding arbitration at the election of either party. The Section did not require the consent of the other party when one party elected binding arbitration. The Rodriguezes also argued that mediation was a condition precedent to arbitration and that the trial court lacked authority to compel arbitration because mediation had not yet occurred; however, the Rodriguezes waived the right to mediation when they proceeded first to litigation.

The Rodriguezes argued that their membership also terminated their rights and obligations to arbitrate. In their claims, however, the Rodriguezes disputed that their membership had been terminated. Also, the Agreement did not clearly state that a member no longer had a right or obligation to arbitrate after termination.

The Rodriguezes also argued that the Second Agreement was unenforceable due to lack of mutual consideration. Regardless of whether this was the case, the court's arbitration judgment could be upheld based on the arbitration clause of the First Agreement.

The Rodriguezes asserted that their claims for securities fraud and breach of the loan agreement were outside the scope of the arbitration provision. Securities fraud claims such as this are within the scope of an agreement requiring arbitration of claims arising out of or relating to an agreement. The loan agreement, however, was not within the scope, with no evidence in the record demonstrating that it arose from or related to the First or Second Agreement.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.

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