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JUDICIAL

Federal

Ninth Circuit Reverses Order Invalidating Arbitration Agreements Based on Duress in *Dario Martinez-Gonzalez v. Elkhorn Packing Co.*

In *Dario Martinez-Gonzalez v. Elkhorn Packing Co.*, the Ninth Circuit Court of Appeals reversed a trial court's order refusing to enforce arbitration agreements between Dario Martinez-Gonzales ("Dario") and his former employers.

Elkhorn Packing Company ("Elkhorn") serves as a farm labor contractor for D'Arrigo Brothers ("D'Arrigo"), a California-based grower of vegetables. Dario resided in Mexicali, Mexico when he learned about an opportunity to work for Elkhorn in the United States. In 2016, Elkhorn accepted Dario's application, at which time Dario moved to Monterey County, California to start his job.

Elkhorn held orientations for incoming employees, asking approximately 150 new workers to sign employment paperwork. Elkhorn representatives directed employees to form lines, where they stood for as long as 40 minutes, to wait and sign new hire packets. Once at the front of the line, employees were told where to sign while pages were quickly flipped before them and representatives urged employees to hurry so that others could have a chance to sign. The employment packages included an arbitration agreement, written in Spanish. The contents of the agreement were not explained, a copy of the agreement was not provided, and employees were not told that they could consult an attorney before signing. Dario received the same treatment as other employees, although acknowledges that he did not ask for a copy of the agreement, seek to consult with an attorney, or even read the agreement. Both sides agree that Elkhorn never expressly told Dario that he had to sign the agreement to keep working for the company.

In California, a contract signed under economic duress may be rescinded. Economic duress involves a "wrongful act" that is "sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative" to agree to an unfavorable contract. On review, the appellate court held that Elkhorn had not engaged in any "wrongful act" under California law. In doing so, it noted that wrongful acts require more than "simple hard bargaining" or tough business tactics and must involve actions taken for a coercive purpose or in bad faith.

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While Dario claimed that Elkhorn committed a wrongful act by asking him to sign the arbitration agreement after he made the journey from Mexico to California, where he was dependent on Elkhorn housing and had already started working, the Ninth Circuit noted that such conduct did not constitute an impermissible threat, false claim, or coercive purpose. Instead, it was determined that the orientation's operation was a "practical business function" to gather hundreds of workers in a "single, unified orientation" and that construing the signing of the arbitration agreements as a wrongful act would encumber the "freedom of contract."

The appellate court also held that Dario failed to demonstrate a lack of reasonable alternatives, or an alternative that "a reasonably prudent person would follow" to avoid a coerced agreement. The court stated that Dario could have simply asked whether signing the arbitration agreements was necessary for him to keep his job. With no threat of termination or express statement that agreement was required, it was improper for the trial court to conclude that Dario lacked the ability to enter into a reasonable agreement. The arbitration agreements in question also expressly allowed the employees to revoke the contract within ten days, and nothing showed that Elkhorn interfered with Dario's right to do so, should he have so elected.

The court in *Elkhorn* emphasized that the economic duress doctrine is employed "reluctantly" and "only in limited circumstances" in reversing the district court's order refusing to enforce the arbitration agreements at hand. Although the court provided an avenue to enforce arbitration agreements despite less-than-ideal conditions, an emphasis on providing ample time to review agreements, ask questions, and revoke the agreement, if necessary, remains.

Ninth Circuit Court of Appeals Upholds Decision Voiding Forum-Selection, Non-Compete, and Non-Solicitation Clauses in an Employment Contract in *DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.*

In a decision bearing on oft-included language in employment agreements, the Ninth Circuit Court of Appeals held that a trial court did not abuse its discretion in denying transfer, nor did it err in holding the forum-selection, non-compete, and non-solicitation clauses in an employment contract void under California law. In doing so, it affirmed the denial of Howmedica Osteonics Corp.'s ("HOC") transfer motion and grant of partial summary judgment in favor of DePuy Synthes Sales, Inc. ("DePuy") and Jonathan L. Waber ("Waber").

Waber, a California resident, was hired by HOC in September 2017 as a Joint Replacement Sales Associate for the Palm Springs and Palm Desert areas. Waber signed an employment contract with HOC's parent company, Stryker Corporation ("Stryker"). The contract included a one-year non-compete clause, as well as forum-selection and choice-of-law clauses requiring adjudication of contract disputes in New Jersey.

In July 2018, Waber resigned and began working at DePuy, a competitor of HOC that operated in the same region, in apparent violation of the non-compete clause. After Stryker threatened enforcement of the non-compete clause, Waber sent notice declaring that he was exercising his right to void the forum-selection

and choice-of-law clauses under California Labor Code § 925 ("Section 925"). Section 925 states that an agreement that requires an employee who primarily resides and works in California, and is not represented by counsel, to agree to litigate disputes arising in California outside of the state, or otherwise give up protection of California law, is voidable by the employee. DePuy and Waber filed a preemptive declaratory judgment action in federal district court seeking a ruling that the forum-selection and choice-of-law clauses were void under Section 925 and that the non-compete clause was void under California Business and Professions Code § 16600. In response, Stryker filed a motion to dismiss or, in the alternative, transfer to federal court in New Jersey.

The trial court first considered whether there was a contractually valid forum-selection clause. Finding that each of the prerequisites outlined by Section 925 had been satisfied, it concluded that the forum-selection clause at issue was void under California law. The district court then evaluated Stryker's transfer request to find that both the requisite private factors—including the plaintiff's choice of forum and convenience to the parties—and the public factors—including familiarity with governing law and California's local interest, apparent in its strong public policy against enforcing out-of-state forum-selection clauses—weighed against transfer. Based on that analysis, the transfer request was denied.

Following a number of procedural mechanisms, the court granted partial summary judgment in favor of DePuy and Waber based on similar analysis to that outlined above. HOC appealed the trial court's decision.

On appeal, in considering the issue of whether federal or state law governed the validity of a forum-selection clause, the panel held that Section 925 does in fact determine the threshold question of whether Waber's contract contained a valid forum-selection clause, as federal law dictating transfer and *Stewart Organization, Inc. v. Ricoh Corp.* do not broadly preempt all state laws controlling how parties may agree to or void a forum-selection clause. If there is a valid forum-selection clause, federal law governs a court's decision on a motion to transfer, but where there is no valid forum-selection clause, as was the case here, state law applies and informs the analysis that would otherwise apply under federal law. As a result, the court held, state law governs the threshold issue of the validity of a forum-selection clause, while federal law governs the enforceability of any forum-selection clause found to be valid.

The panel also found that the district court did not err in applying the California choice-of-law rules. As the district court did not rely exclusively on California's public policy to deny transfer, but instead considered other relevant factors, the Ninth Circuit panel found no error in the district court's consideration of Section 925 as part of its transfer analysis. It instructed that, in addressing transfer motions in the absence of a forum-selection clause, a district court must evaluate both the convenience of the parties, as well as various public-interest considerations. Here, the appellate court found that the trial court appropriately considered such factors.

California

Arbitration Agreements in Employee Handbooks May Be Unenforceable

In *Mendoza v. Trans Valley Transport, et al.* the California Court of Appeal affirmed the trial court's decision and held that an arbitration agreement contained in an employee handbook could not be enforced by the employer, as, under the circumstances at issue, the parties did not enter into a binding agreement to arbitrate.

Plaintiff Jose Mario Mendoza ("Mendoza") applied for a driver position with FTU Labor Contractors, Inc. ("FTU") in June 2012. He only spoke Spanish and was unable to read or write in English. As such, he was unable to understand or complete FTU's employment application. In fact, when Mendoza informed FTU's owner and supervisor that he could not communicate in English, he was interviewed in Spanish and his application was completed for him. FTU hired Mendoza as a seasonal, temporary truck driver in September 2012.

When Mendoza began his employment, he met with FTU's director of human resources to review employment documents, including FTU's employee handbook, which contained an arbitration policy. While a translator was present at the meeting (per FTU's policy), and the director of human resources customarily provided a Spanish-language version of the employee handbook to non-English speaking new hires, Mendoza denies ever receiving one.

The FTU employee handbook was a 63-page document, and the arbitration policy was two and a half pages long beginning on its second page. The language of the policy required employees to submit to binding arbitration all disputes arising out of the employment context, and prohibited class, collective, and joint actions. There was nowhere for an employee or FTU to sign the arbitration policy, and Mendoza was asked only to sign acknowledgments that he had received the handbook itself. The first acknowledgment did not specifically reference FTU's arbitration policy, but instead generally stated that employees were required to abide by the conditions of employment contained within the FTU employee handbook. A second acknowledgment noted, however, that the employee handbook and policies contained therein were not intended to be construed as a contract of employment and that the FTU was permitted to amend or modify the handbook at any time.

In May 2015, Mendoza filed a putative class action complaint alleging wage and hour violations. A motion to compel arbitration was filed based on Mendoza's signature on acknowledgment forms and checklist forms, each of which referenced an "agreement" to arbitrate. Both documents were in English and had no corresponding Spanish-language version.

Mendoza opposed the motion and argued that the employee handbook did not create a binding agreement to arbitrate. He submitted a declaration indicating that he was not provided with any translation of the documents, nor did he receive an explanation of what the documents said. Mendoza's declaration further stated that he was told only that the documents had to do with insurance, and that he had to sign them if he wanted to work. Based on his declaration, Mendoza argued that

the alleged agreement to arbitrate was either void for lack of consent or voidable because he was deceived into execution.

The trial court evaluated several factors to determine whether the parties entered into an enforceable agreement to arbitrate. These factors included: the location of the arbitration provision and whether it stood out from the rest of the handbook; whether the handbook was intended only to be informational, not contractual; whether the employer could change the language in the handbook or acknowledgment forms at any time; whether the handbook was intended as a contract of employment; and whether the acknowledgment forms mentioned arbitration. Because the arbitration provision was not prominently distinguished from the rest of the handbook, the handbook was deemed to be informational rather than contractual. Moreover, as the handbook could be amended by FTU at any time and the acknowledgments failed to reference arbitration, the trial court held that there was no enforceable arbitration agreement between the parties. Based on this analysis, the trial court denied the motion to compel arbitration. The appellate court affirmed that denial.

While arbitration agreements in employee handbooks *can* pass muster under certain circumstances, *Mendoza* serves as a reminder of the significant risks associated with attempting to compel arbitration based on such an "agreement." Companies that wish to enforce arbitration agreements should therefore strongly consider utilization of standalone agreements that are far more likely to be deemed enforceable.

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