

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 11/01/05

DEPT. 89

HONORABLE JUDITH C. CHIRLIN

JUDGE

O. CHAVEZ

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

N. ALVARADO, CSL

Deputy Sheriff

NONE

Reporter

11:30 am

BS095987

Plaintiff

Counsel NO APPEARANCE

DIRECTV INC

VS

Defendant

CABLE CONNECTION INC ET AL

Counsel NO APPEARANCE

NATURE OF PROCEEDINGS:

RULING ON PETITION BY DIRECTV INC., TO VACATE ARBITRATION AWARD, TAKEN UNDER SUBMISSION ON AUGUST 10, 2005;

This case arises out of an action brought by a group of current and former independent businesses who sell DIRECTV-compatible satellite equipment - against DIRECTV, provider of direct broadcast satellite programming services. The independent businesses, Respondents herein, each have a contract with DIRECTV. Each contract specifies that disputes are to be resolved through arbitration applying American Arbitration Association ("AAA") procedures. The contracts also specify that any arbitration "shall be governed by the United States Arbitration Act ("FAA")."

Respondents initiated the arbitration on March 24, 2004, after they were ordered to do so by an Oklahoma court following the U.S. Supreme Court's ruling in Green Tree Fin. Corp. v. Bazzle, which held that an arbitrator should construe the parties' contracts to determine whether they intended to have class procedures in arbitration rather than having a court make that decision. 539 U.S. 444, 452-53 (2003). Pursuant to the Bazzle decision, the AAA had devised a three-phase structure for potential class arbitrations.

On March 11, 2005, a three arbitrator panel of the

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AAA issued a partial award for Respondents after the first "clause construction" phase, holding that the clause in question does not forbid class arbitration. The panel of arbitrators further found that "the determination of whether this action is maintainable as a class arbitration will be the subject of a further hearing to determine if the prerequisites to a class arbitration as set forth in rule 4 of the Association's Supplementary Rules of Class arbitration are met." The award was signed by two of the arbitrators; the third filed a written dissent.

DIRECTV then filed this petition, seeking to vacate the Arbitration Award. It argues that the arbitrators have exceeded their powers in determining that the contract permits class-wide arbitration and that they should have admitted and considered their extrinsic evidence. In determining whether to vacate the award, the Court must analyze the following issues: 1) whether the arbitrators properly applied California law; 2) whether the arbitrators should have admitted extrinsic evidence; and 3) whether the arbitrators made errors of law. When interpreting the contract, the arbitrators must apply California's substantive law on contract interpretation. Cal. Code Civ. Proc. §1858 states:

In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained

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therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

See also Moss Dev. Co. v. Geary, 41 Cal. App. 3d 1, 9 (1974). Thus, courts will not add a term about which a contract is silent. See id. Hence, the arbitrators had an obligation to ascertain the parties' mutual intent when forming the contract and thus enforce that which was agreed by the parties, but they did not have the authority to add a procedure for which the contract did not provide. Significantly, the arbitrators specifically found that the agreements were "silent with regard to the right to bring a class action," but then proceeded to construe the contracts to permit a class action.

Cal. Code Civ. Proc. §1286.2(a) states, in part:

The court shall vacate the award if the court determines any of the following:

(4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

(5) The rights of the party were substantially

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prejudiced by...the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

Petitioner first argues that the arbitrators exceeded their powers, an argument with which the Court concurs. The threshold question is whether the parties agreed to class-wide arbitration. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted...By permitting the courts to 'rigorously enforce' such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA." Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 479 (1989). Thus, the issue one must look at in interpreting arbitration agreements is "not whether the parties wanted a judge or an arbitrator to decide whether they agreed to arbitrate a matter. Rather the relevant question here is what kind of arbitration proceeding the parties agreed to." Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452-53 (2003).

California substantive law must be applied to

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determine the issues at hand. Neither side disputes this. Under California law, "the fundamental canon of contract interpretation is the ascertainment of the parties' intent." Appalachian Ins. Co. v. McDonnell Douglas Corp., 214 Cal. App. 3d 1, 11 (1989). As Petitioner has pointed out that, "in the construction of a contract, the office of the court is simply to ascertain and declare what, in terms or in substance, is contained therein, and not to insert what has been omitted or omit what has been inserted." Jensen v. Traders & General Ins. Co., 52 Cal. 2d 786, 790 (1959). Thus, "courts will not add a term to a contract about which the agreement is silent." Moss Dev. Co. v. Geary, 41 Cal. App. 3d 1, 9 (1974). See also Cal. Code Civ. Proc. §1858. Here, the arbitrators' award has essentially stated that the arbitration clause permits class arbitration, acknowledging, however, that the agreements are silent on the issue. Thus, the majority has essentially added a term to the contract.

Equity and public policy underlie courts' reluctance to construe silence as implying different obligations than that which the parties expressly agreed to. "[a]n arbitrator is confined to interpretation and application of the [governing] agreement; he does not sit to dispense his own brand of industrial justice." United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

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The United States Supreme Court has stated that "an arbitrator is confined to interpretation and application of the [governing] agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the [governing] agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). Here, the majority did not draw on the essence of the agreement made between the parties. Indeed, as set forth by the dissenting arbitrator, the majority did just the opposite.

The conclusion that the arbitrators erred in construing the contracts to permit class arbitration when not specifically provided for is further bolstered by the very nature of the contracts, which specifically and narrowly set out the limits of the powers of the arbitrators. To wit, the contracts expressly withhold the power to make errors of law or legal reasoning. Thus, the parties specifically provided that they did not agree to be bound by a legally flawed decision. Parties drafting with that degree of precision certainly could have explicitly set forth an intent to permit class-wide arbitration if they had so chosen.

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The Petitioner further asserts that majority erroneously refused to examine extrinsic evidence offered by it of the absence of intent to arbitrate on a class-wide basis. Petitioner had submitted sworn declarations of several retailers as well as its own drafter of the contract - all of which it claimed was material to the issue of the intent of the parties with regard to class actions. Respondents claim, among other things, that the arbitrators admitted the evidence, but gave it little weight. The transcript of the hearing reflects to the contrary. Indeed, the presiding arbitrator stated, at Exhibit E, page 3, lines 8-12, of the Petition:

We've all read the brief and we have read the declarations, but our view is that it's essentially a question of law and construction interpretation of the contract itself. And so the declarations are not of significance...it is denied.

The extrinsic evidence should have been admitted. "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." Wolf v. Superior Court, 114 Cal. App. 4th 1343, 1356

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(2004). Moreover, "where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning." Morey v. Vannucci, 64 Cal. App. 4th 904, 912 (1998). Further, the Morey Court goes on to state:

Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible. Id.

Because the contract was silent as to the parties' intent to allow class-wide arbitration and there was obviously a dispute as to whether class-wide arbitration should be allowed, the arbitrators should have looked to the extrinsic evidence see if it aided in discerning the parties' intent.

Indeed, it seems somewhat anomalous that the arbitrators could not ascertain the parties' intent from the plain language of the contract, but then determined that the only evidence of intent was "not

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of significance." The arbitrators erred in refusing to admit and consider the declarations proffered. In making such a determination, this Court is not suggesting how much weight should have been given to those declarations. Indeed, some of the declarations were from other independent dealers, not parties to this case, who had their own contracts with DIRECTV. California law requires courts (and thus arbitrators) to admit and give weight to evidence of the intent of the parties to the contract at issue. Declarations of other individuals with similar (or even identical) contracts may or may not be conclusive, but they ought at least to be considered, especially when presented with consistent declarations from the individual drafter of the contract as well. Here, there was no evidence that anyone intended for the contract to permit class actions. There is, however, extrinsic evidence showing that other retailers (with similar contracts) and the drafter did not intend class-wide arbitration. Those declarations should have been admitted and considered.

Furthermore, the majority erred in relying on California procedural law. "Pursuant to applicable case-law, ...the general rule is that a general choice-of-law clause only incorporates state substantive laws, but NOT state procedural laws. State procedural laws must be expressly incorporated into the contract." *Stone & Webster, Inc. v. Baker Process, Inc.*, 210 F. Supp. 2d 1177, 1187 (S.D. Cal. 2002).

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Here, the majority relied on California procedural law, not California substantive law. It looked to case law (Blue Cross of California v. Superior Court, 67 Cal. App. 4th 42 (1998) and Keating v. Superior Court, 21 Cal. 3d 584 (1982)) interpreting Cal. Code Civ. Proc. § 1281.3, a procedural rule. However as set forth in Parrish v. Cingular Wireless, 129 Cal. App. 4th 601, 615 (2005):

There is no statutory right to class arbitration. Class arbitration has been held permissible when the trial court, in the exercise of its discretion, finds that the interests of justice require class-wide relief. The fact that the procedural device of class treatment is not available in arbitration is "part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition', characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims."

Petitioner also correctly argues that the majority misconstrued the AAA Rules and Policies. The AAA's Supplementary Rules for Class Arbitrations states:

In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplemental Rules, or any other AAA Rules, to be a factor either in favor of or against

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permitting the arbitration to proceed on a class basis. (Exhibit B to the Petition, p.2)

So, when the majority stated that "the clause construction aspect under the [AAA] rules provides for class arbitration to be allowed unless the arbitrators find that the arbitration clause forbids it," they incorrectly applied the rule and made it a factor in determining the issue at hand. The arbitrators should not have even considered the Rule as a factor in setting forth their decision.

For the reasons set forth above, the Petition to Vacate is GRANTED. The Arbitration Award is VACATED.

**CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER**

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 11-01-05 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

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