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Three Appellate Courts Remand for Trial on Existence of Agreement to Arbitrate

By Liz Kramer on February 12, 2016

Most questions of arbitrability can be resolved on motion, using a summary judgment-like standard. However, just like summary judgment, if there are genuine disputes of material

fact about whether a claim must be arbitrated — like competing evidence about whether the parties ever formed an arbitration agreement — those should be determined by a trial. That is the lesson of three recent cases from the Third Circuit, the Ninth Circuit, and the Supreme Court of Alabama.

The two federal court opinions are short and sweet. In *Gib, LLC v. Salon Ware, Inc.*, 2016 WL 463429 (9th Cir. Feb. 5, 2016), the district court granted a motion to compel arbitration, despite the undisputed fact that the plaintiff never signed the written agreement and the fact that the plaintiff "raised a genuine issue of material fact by submitting a sworn declaration denying that the parties had entered into a written agreement." Because of that genuine issue of fact, the Ninth Circuit reversed and remanded for either a court or jury trial under Section 4 of the FAA.

In *Guidotti v. Legal Helpers Debt Resolution*, 2016 WL 521173 (3d Cir. Feb. 10, 2016), the Third Circuit is hoping that the third time is a charm for the district court. (This same case has previously been remanded to the district court, so this remand will be the district court's third attempt to resolve the arbitration issue.) The plaintiffs asserted statutory claims against many defendants who had pledged to offer debt relief. This order relates to whether two of those defendants could compel arbitration. Plaintiffs had signed one agreement with those defendants: an account application (without any arbitration clause). The dispute was over whether she also received an account agreement (which contained an arbitration clause) or whether that was otherwise validly incorporated into the application. After seven months of discovery on those issues, the district court denied the motion to compel discovery. It concluded that genuine issues of fact persisted about whether the account agreement was incorporated, but that was immaterial because the district court found the arbitration clause invalid under New Jersey law. The Third Circuit vacated that order and remanded the case for a jury trial, noting that the factual dispute must be resolved, and only then should the court consider whether New Jersey law invalidates the arbitration agreement (and whether that New Jersey law is preempted by the FAA).

Apparently, the problem of lower courts rushing to resolution of disputed issues on arbitrability is not unique to the federal courts. In *Dannelly Enterprises, LLC v. Palm Beach Grading, Inc.*, 2016 WL 360668 (Ala. Jan. 29, 2016), the Supreme Court of Alabama also remanded a case for a jury trial on the disputed issue of whether a sub-subcontractor agreed to arbitrate disputes. In *Dannelly*, a sub-subcontractor (Dannelly) submitted a bid to the

grading subcontractor (PBG), the bid was accepted, and PBG issued a work order. Neither the bid or the work order had arbitration clauses. However, PBG's "standard subcontract" has an arbitration clause, and PBG's contract with the general contractor also called for arbitration. PBG submitted an affidavit stating that Dannelly had agreed to the standard subcontract, but PBG was unable to locate the signed copy. Dannelly submitted a competing affidavit swearing that it had never signed the standard subcontract or otherwise agreed to its terms.

The trial court granted PBG's motion to compel arbitration. The Alabama Supreme Court reversed and remanded for a jury trial. It found there was a genuine dispute of material fact about whether Dannelly had ever agreed to arbitrate disputes with PBG, because both parties had submitted contradictory testimony and there were no other objective manifestations of Dannelly's assent. In addition, it found Dannelly was not a third-party beneficiary of the contract between PBG and the general contractor, because the arbitration language in that contract was specific to PBG and the general contractor and did not demonstrate any intent to bind third parties. Similarly, the court rejected an equitable estoppel argument, finding no evidence that Dannelly received benefits under PBG's contract with the general contractor.

These cases serve as an important reminder that the very existence of an arbitration agreement can be hotly disputed. For contract negotiators, that means it is critical to obtain (and retain) a signed copy of the final agreement including the arbitration clause. For advocates trying to enforce agreements, that means it is critical to recognize when to give up on motion practice and ask for a trial on the issue, so that you don't waste years on appeal, only to get sent back to square one.

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