THOMAS E. MITTENDORF, Plaintiff, v. STONE LUMBER COMPANY, an Illinois corporation, Defendant.

CV 94-225-PA

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

874 F. Supp. 292; 1994 U.S. Dist. LEXIS 20123

May 31, 1994, Decided

May 31, 1994, FILED

CASE SUMMARY

PROCEDURAL POSTURE: Defendant employer filed a motion to dismiss, for a lack of subject matter jurisdiction and the failure to state a claim, plaintiff employee's suit seeking declaratory relief against the enforcement of an arbitration and forum selection clause in an employment contract. The parties also filed discovery motions.

OVERVIEW: After the employee terminated his employment contract, the employer initiated arbitration proceedings pursuant to the employment contract. Subsequently, the employee filed a suit against the employer seeking declaratory relief against the enforcement of the contract's arbitration and forum selection clause. The court granted the employer's motion to dismiss and dismissed the suit for lack of subject matter jurisdiction. It also denied the parties' discovery motions as moot. The court held, against the employer's contentions, that the employment contract was not arbitrable under the Federal Arbitration Act (FAA), *9 U.S.C.S. § 1* et seq., because the FAA excluded employment contracts, such as the one in question, of workers engaged in interstate commerce. However, the court held that the arbitration and forum selection clause in the contract was enforceable because the employee had not shown that its terms were unfair or unreasonable. Finally, the court held that the employee had notice of the clause and that the employer's home state was a reasonable place for resolving the parties' disputes.

OUTCOME: The court granted an employer's motion to dismiss, for a lack of subject matter jurisdiction, the employee's suit seeking declaratory relief against the enforcement of an arbitration and forum selection clause in an employment contract. The court also denied the parties' discovery motions as moot.

COUNSEL:
[1]** MICHAEL G. HANLON, Portland, OR, Attorney for Plaintiff.

WILLIAM F. MARTSON, JR., STEVEN M. WILKER, Tonkon, Torp, Galen, Marmaduke & Booth, Portland, OR. AARON E. HOFFMAN, STUART DUHL, DAVID KAPLANSKY, Schwartz & Freeman, Chicago, Illinois, Attorneys for Defendant Stone Distribution Company.

JUDGES:
OWEN M. PANNER, U.S. District Court Judge

OPINIONBY:
OWEN M. PANNER

OPINION:

[*293] OPINION

PANNER, J.

Plaintiff Thomas E. Mittendorf brings this action for declaratory relief against defendant Stone Lumber Co. Defendant employed plaintiff as a lumber trader.

Defendant moves to dismiss for lack of subject matter jurisdiction and failure to state a claim. I grant defendant's motion to dismiss and deny the parties' discovery motions as moot.

BACKGROUND

Plaintiff is an Oregon citizen. Defendant is an Illinois corporation with its principal place of business in Chicago. On June 15, 1992, defendant employed plaintiff as a lumber trader in Beaverton, Oregon. Plaintiff traded lumber with customers throughout the United States.

On December 16, 1992, defendant required plain-

tiff to execute an Employee Commission Agreement in Chicago. The agreement shows that plaintiff had considerable independence as a **[**2]** broker and salesman. Defendant authorized plaintiff to purchase, sell, deliver, and hold lumber and building products. **[*294]** Defendant provided financing for plaintiff's customer accounts.

The Agreement also provided:

7. Arbitration

Stone and Employee shall submit all disputes arising out of this Agreement to binding arbitration before the American Arbitration Association in Chicago, Illinois. Any arbitration award shall be enforceable in the courts of the State wherein the party against whom enforcement is sought resides.

8. Invalid Provisions; Governing Law; Jurisdiction

This Agreement shall be governed by the laws of the State of Illinois. … With respect to all controversies for which arbitration is not available, such controversies shall be heard in a court of competent jurisdiction in Chicago, Illinois. Cost of travel is paid by whoever loses case.

Complaint, Exh. A, at 5.

On August 20, 1993, plaintiff wrote defendant that he was terminating his employment immediately "by reason of Stone Lumber Company's numerous material breaches of the Employee Commission Agreement." Id., Exh. B, at 1. In his complaint, plaintiff alleges that defendant failed to provide **[**3]** monthly commission statements, repay expenses, or account accurately for profits from futures trading.

In December 1993, defendant started arbitration under the rules of the American Arbitration Association (AAA). Defendant seeks $143,815.17 from plaintiff in that proceeding.

On February 2, 1994, plaintiff wrote the AAA, stating that it had no jurisdiction because plaintiff had terminated his agreement with defendant in August 1993. On February 28, 1994, the AAA notified plaintiff that it would proceed with arbitration absent a court order staying the arbitration.

STANDARDS

The court should not grant a motion to dismiss for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no facts in support of the claim. *Conley v. Gibson, 355 U.S. 41, 45–46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).* The court should construe the complaint in the light most favorable to the plaintiff. *Rosen v. Walters, 719 F.2d 1422, 1424 (9th Cir. 1983).* A motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) may attack the substance of the complaint's jurisdictional allegations even though the allegations are formally sufficient. **[**4]** *St. Clair v. City of Chico, 880 F.2d 199, 201* (9th Cir.), cert. denied, *493 U.S. 993, 107 L. Ed. 2d 539, 110 S. Ct. 541 (1989).*

DISCUSSION

I. Federal Arbitration Act

The Federal Arbitration Act (Act) applies to contracts involving foreign or interstate commerce. *9 U.S.C. §§ 1,* 2. Section 1 of the Act exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *9 U.S.C. §§ 1.*

Plaintiff contends that section 1 exempts all employment contracts. Neither the United States Supreme Court nor the Ninth Circuit has resolved this issue. See *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991); Mago v. Shearson Lehman Hutton Inc., 956 F.2d 932, 934 (9th Cir. 1992).* The circuit courts have disagreed. Compare *Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971)* (section 1 exempts employment contracts only for transportation workers); *Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972)* (same); *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers, 207 F.2d 450, 452 (3d Cir. 1953)* (same) and Miller Brewing **[**5]** *Co. v. Brewery Workers Local No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984)* (same), cert. denied, *469 U.S. 1160, 83 L. Ed. 2d 926, 105 S. Ct. 912 (1985)* with *United Elec., Radio & Mach. Workers v. Miller Metal Prods., 215 F.2d 221, 224 (4th Cir. 1954)* (Congress did not intend Federal Arbitration Act to cover employment contracts) and *Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 312 (6th Cir. 1991)* (same) (dictum).

[*295] As usual, the legislative history is inconclusive. *Signal–Stat Corp. v. Local 475, United Elec., Radio and Mach. Workers, 235 F.2d 298, 302 (2d Cir. 1956),* cert. denied, *354 U.S. 911 (1957).* Compare *Gilmer, 500 U.S. at 39–40* (Stevens, J., dissenting) (legislative history shows that Congress intended to exempt all employment contracts) and *Willis, 948 F.2d at 311* (same) with *Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76, 78 (D. Mass. 1993)* (legislative history shows that Congress intended to limit exemption to transportation workers). I will look to the statute itself.

Defendant construes the word "commerce" narrowly in section 1's exemption, arguing that only employment contracts for workers directly involved in interstate commerce **[**6]** are exempt. However, defendant would interpret the word "commerce" broadly when it appears elsewhere in the Act. Courts should interpret a word consis-

tently throughout a statute. See Archibald Cox, Grievance Arbitration in the Federal Courts, *67 Harv. L. Rev. 591, 599 (1954).* I see no critical difference between the phrase "engaged in foreign or interstate commerce" in section 1, and the phrase "involving commerce" in section 2.

Of course, had Congress intended to exempt all employment contracts from the Arbitration Act, it would have been simpler just to say so, rather than using the phrase, "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *9 U.S.C. § 1.* However, because Congress was exercising the full extent of its power over interstate commerce, the exception for "any other class of workers engaged in foreign or interstate commerce" should have the same broad scope. See *Miller Metal Prods., 215 F.2d at 224.* The Federal Arbitration Act does not govern employment contracts. (Although I may have indicated at oral argument that I agreed with defendant on this issue, I changed my mind after **[**7]** further reflection.) I need not determine whether the Act specifically exempts plaintiff's employment contract because lumber brokers are "engaged in … interstate commerce." Cf. *American Postal Workers Union v. U.S. Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987)* (employment contracts for postal workers are exempt from the Act because postal workers are actually engaged in interstate commerce).

II. The Contract is Enforceable

Besides requiring arbitration, the parties' agreement also provides that Illinois law applies to disputes and that a Chicago court will hear disputes not subject to arbitration. Plaintiff contends that the agreement is not enforceable because it is a contract of adhesion and against Oregon public policy. Plaintiff also contends that he received no new consideration for entering into the agreement and that defendant required him to sign.

Oregon generally favors arbitration clauses. See ORS 36.305; *Molodyh v. Truck Ins. Exchange, 77 Or. App. 619, 625, 714 P.2d 257 (1986),* aff'd, *304 Or. 290, 744 P.2d 992 (1987).* Forum selection clauses are prima facie valid and enforceable unless enforcement would be unreasonable or unjust, or fraud or **[**8]** overreaching are present. *Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514 (9th Cir. 1988);* cf. *Reeves v. Chem Indus. Co., 262 Or. 95, 98, 495 P.2d 729 (1972)* (applying similar standard under Oregon law). The opposing party must show that trial in the contractual forum would be so difficult that the party would effectively be deprived of its day in court. *Manetti-Farrow, 858 F.2d at 515.*

Plaintiff has not shown that the challenged provisions of the employment agreement are unfair or unreasonable. Plaintiff had notice of the provisions. Chicago is a reasonable place for resolving the parties' disputes. See *Carnival Cruise Lines, Inc. V. Shute, 499 U.S. 585, 594-95, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991)* (Florida was reasonable forum despite alleged hardship on Washington plaintiffs).

Plaintiff cites *Colonial Leasing Co. of New England v. Pugh Bros. Garage, 735 F.2d 380, 382 (9th Cir. 1984),* which applied Oregon law to invalidate the forum selection clause in a form lease. However, in diversity **[*296]** actions, federal law applies to forum selection clauses. Manetti-Farrow, 858-F.2d at 512-13.

Even if Oregon law did apply, in Colonial Leasing the clause **[**9]** was hidden in fine print at the bottom of a page and the lessees were unaware that they were dealing with an Oregon company. Here, the disputed clauses were clearly set out in the same size type as the rest of the contract. Plaintiff does not contend that he was unaware of the clauses. He knew that he was dealing with an Illinois business. Although he did not have a lawyer, that alone does not show such unequal bargaining power as to set aside the contract. The contract itself shows that plaintiff had quite a bit of independence.

I conclude that the arbitration, forum selection, and choice of law provisions here are enforceable. Even though the Federal Arbitration Act does not apply, the arbitration and forum selection provisions require that I grant defendant's motion to dismiss for lack of subject matter jurisdiction. See *Pauly v. Biotronik, GmbH, 738 F. Supp. 1332, 1335-36 (D. Or. 1990).*

CONCLUSION

Defendant's motion to dismiss (#12) is granted. Defendant's motion for protective order (#20) and plaintiff's motion to compel (#23) are denied as moot.

DATED this 31 day of May, 1994.

OWEN M. PANNER

U.S. District Court Judge