2017 IL App (1st) 163366-U

No. 1-16-3366

Order filed November 9, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MICHELE MIMS, on behalf of herself and similarly situated laborers,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 16 CH 09687
v.	)	Honorable Kathleen G. Kennedy, Judge, presiding.
ADECCO USA, INC.,	)	
Defendant-Appellant.	)	

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: As a matter of law, the circuit court did not err in denying defendant's motion to compel arbitration and stay the court proceedings pending resolution of the arbitration.

¶ 2 This appeal is taken from a circuit court order denying defendant's motion to compel arbitration and stay proceedings. For the reasons that follow, we affirm the circuit court's rulings.

¶ 3 BACKGROUND

¶ 4 Defendant, Adecco USA, Inc. is a staffing agency specializing in providing temporary day laborers for its corporate clients. Plaintiff Michele Mims works as a laborer on behalf of defendant.

¶ 5 On May 10, 2016, plaintiff filed an unfair labor practice charge against defendant with the National Labor Relations Board (NLRB). In the charge, plaintiff alleged that the mandatory arbitration provision in the parties' Dispute Resolution Agreement was invalid and unenforceable because it contained an arbitration provision waiving employees' rights to bring a class-action lawsuit. Plaintiff alleged the arbitration provision violated sections 7 and 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 157, 158 (1988).[1]

¶ 6 On July 22, 2016, plaintiff filed a class-action complaint in the circuit court of Cook County on behalf of herself and a purported class of similarly situated laborers alleging defendant violated certain state and municipal minimum wage laws. Plaintiff alleged the defendant violated the Illinois Day and Temporary Labor Services Act (IDTLSA) (820 ILCS 175/1 *et seq*. (West 2014)), the Illinois Minimum Wage Law (Wage Law) (820 ILCS 105/1 *et seq*. (West 2012)), and the Chicago Minimum Wage Ordinance (CMWO), Chi. Ord. 1-24-010.

¶ 7 These alleged violations were based on plaintiff's contentions that defendant failed to pay her and similarly situated employees the applicable minimum wage rate for all hours worked and

[1] Section 7 of the NLRA guarantees employees, among other rights, the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. § 157. Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" section 7 of the NLRA. 29 U.S.C. § 158.

by failing to compensate them for a minimum of four (4) hours as required by section 175/30(g) of the IDTLSA (820 ILCS 175/30(g) (West 2014)). On the same date, plaintiff moved for class certification pursuant to section 2-801 of the Illinois Code of Civil Procedure (735 ILCS 5/2-801 (West 2012)).

¶ 8 On August 26, 2016, defendant filed a motion with the circuit court requesting the court to compel plaintiff to arbitrate the claims in her class-action complaint on an individual basis as provided for in the arbitration provision contained in the parties' Dispute Resolution Agreement, rather than as a class or collective action, and to stay the proceedings pending resolution of the arbitration pursuant to sections 3 and 4 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 3, 4. Defendant asserted that the plaintiff signed the Dispute Resolution Agreement containing an arbitration provision requiring that all disputes, claims or controversies arising out of or relating to the employment relationship be resolved by binding arbitration pursuant to the FAA.

¶ 9 In response, plaintiff filed an amended unfair labor practice charge against defendant with the NLRB. In the charge, plaintiff argued that defendant's motion requesting the circuit court to compel arbitration and stay the proceedings amounted to further evidence of its attempts to interfere with, restrain, and coerce its employees in the exercise of their rights to engage in protected concerted activities under section 7 of the NLRA.

¶ 10 In the meantime, the acting regional director of the NLRB who investigated plaintiff's initial unfair labor practice charge she filed against defendant with the NLRB determined that the charge had merit and issued a complaint against defendant on September 10, 2016. On November 2, 2016, the NLRB moved for summary judgment on its complaint.[2]

[2] The NLRB's motion for summary judgment is currently pending before the Board.

¶ 11 On November 30, 2016, following oral argument, the circuit court denied defendant's motion to compel arbitration and stay the proceedings. This appeal followed.

¶ 12 ANALYSIS

¶ 13 Because no evidentiary hearing was held on the defendant's motion to compel arbitration, we review the circuit court's ruling *de novo*. *Watkins v. Mellen*, 2016 IL App (3d) 140570, ¶ 12. In addition, the construction of an arbitration provision is also reviewed *de novo*. *Guarantee Trust Life Insurance Co. v. Platinum Supplemental Insurance, Inc.*, 2016 IL App (1st) 161612,¶ 25.

¶ 14 Defendant initially contends the circuit court did not possess the authority to determine the "gateway" issue of arbitrability and that the court erred in finding it possessed such authority. Defendant maintains that the parties' Dispute Resolution Agreement delegated this authority to the arbitrator rather than the circuit court. We disagree and do not believe the circuit court erred in this regard.

¶ 15 " 'Arbitrability' refers to whether a particular claim or dispute is subject to arbitration under the parties' agreement." *Roubik v. Merrill Lynch, Pierce, Fenner & Smith*, 181 Ill. 2d 373, 382 (1998) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)). Courts distinguish between substantive and procedural arbitrability. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-85 (2002); *Roubik*, 181 Ill. 2d at 388; *Lumbermens Mutual Casualty Co. v. Broadspire Management Services, Inc.*, 623 F. 3d 476, 480-81 (7th Cir. 2010).

¶ 16 Procedural arbitrability is concerned with whether the parties have complied with the procedural prerequisites for arbitrating a particular dispute, such as timeliness, notice, laches, and estoppel. *Howsam*, 537 U.S. at 85; *Amalgamated Transit Union, Local 900 v. Suburban Bus*

Division of the Regional Transportation Authority, 262 Ill. App. 3d 334, 340-41 (1994). Matters of procedural arbitrability are generally decided by an arbitrator. *Howsam*, 537 U.S. at 85; *Lumbermens Mutual Casualty Co.*, 623 F. 3d at 481; *Roubik*, 181 Ill. 2d at 388. In contrast, disputes regarding the validity and scope of an arbitration provision are issues of substantive arbitrability that are generally decided by a court. *Howsam*, 537 U.S. at 84-85; *Roubik*, 181 Ill. 2d at 388.

¶ 17 The dispute in this case centers around the validity of the arbitration provision in the parties' Dispute Resolution Agreement, which raises an issue of substantive arbitrability properly decided by the circuit court rather than the arbitrator. Therefore, the circuit court did not err in finding that it possessed the authority to determine the "gateway" issue of arbitrability.

¶ 18 Defendant next maintains that even if we conclude the circuit court possessed the authority to determine the validity of the arbitration provision at issue, we should find the court erred in determining that the provision was invalid and unenforceable. Defendant argues that the circuit court's determination contravenes basic contract principals applicable to arbitration agreements. Again, we disagree.

¶ 19 Plaintiff's claims challenging the validity of the arbitration provision do not sound in contract, but in federal labor law. Plaintiff alleges the arbitration provision is invalid as a matter of federal labor law. The primary issue is whether an arbitration provision such as the one at issue here is invalid and unenforceable in violation of the NLRA if it contains a class-action waiver of employees' rights to engage in concerted activities.

¶ 20 The NLRB has squarely addressed the issue and has consistently found that sections 7 and 8(a)(1) of the NLRA preclude enforcement of arbitration provisions that waive employees'

rights to pursue employment-related claims on a collective or concerted basis. See, *e.g.*, *In re D.R. Horton, Inc.*, 357 N.L.R.B. 184, 2012 WL 36274, *8 (2012) (*Horton I*), *enf'd in part and granted in part*, *D.R. Horton, Inc. v. NLRB*, 737 F. 3d 344 (5th Cir. 2013) (*Horton II*); *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, 2014 WL 5465454 (2014) (*Murphy I*), enforcement denied in relevant part, *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F. 3d 1013 (5th Cir. 2015) (*Murphy II*).

¶ 21 There is a split of authority among the federal circuit courts of appeal on the issue as to whether an arbitration agreement that prevents an employee from filing or participating in a class-action lawsuit is valid and enforceable under the NLRA, and the United States Supreme Court has not yet ruled on the issue. The Ninth and Seventh circuit courts have deferred to the NLRB's opinion that arbitration agreements which foreclose employees from pursuing employment-related claims on a concerted basis not only violate the NLRA, but are also unenforceable under the FAA. See *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809, 196 L. Ed. 2d 595 (2017) (vacating district court's order compelling arbitration where employee-agreement contained a waiver of employees' rights to engage in concerted activities); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809, 196 L. Ed. 2d 595 (2017) (arbitration agreement mandating individual arbitration violated Sections 7 and 8 of NLRA).

¶ 22 Rulings of the NLRB and decisions of federal circuit courts construing the NLRA are persuasive authority. *American Federation of State, County and Municipal Employees, Council 31 v. State Labor Relations Bd.*, 216 Ill. 2d 569, 579 (2005). We believe that the Ninth and Seventh Circuit, along with the NLRB, present the most well-reasoned and persuasive analysis

of the issue. And until the United States Supreme Court rules otherwise, we continue to follow the reasoning set forth by the NLRB and the federal circuit courts in *Lewis* and *Morris*.

¶ 23 The U.S. Supreme Court "has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy," and that courts therefore must accord its legal rulings "considerable deference." *NLRB v. Curtin Matheson Scientific Inc.*, 494 U.S. 775, 787 (1990); see *Chevron, U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (interpretation of statute by agency charged with its administration, while not binding on courts, is entitled to deference). We find the circuit court properly deferred to the NLRB's decision in *Horton I* and followed the decisions of the federal circuit courts of appeal in *Lewis* and *Morris* in finding the arbitration provision invalid under Section 8(a)(1) of the NLRA because it interfered with employees' rights to engage in concerted activities granted in Section 7 of the NLRA.

¶ 24 Defendant alternatively argues that even though the arbitration provision waives employees' rights to engage in concerted activities, the provision should still be held valid and enforceable because the parties' Dispute Resolution Agreement contains an "opt-out" clause giving an employee the right to opt out of the arbitration provision within 30 days of executing the agreement. Nevertheless, we do not believe that the agreement's thirty (30) day opt-out clause saves the arbitration provision from invalidation under the NLRA.

¶ 25 "In adopting the NLRA, Congress specifically recognized and guaranteed to all workers the rights of free association and self-organization." *United Steelworkers of Am. AFL–CIO–CLC v. Johnson*, 830 F.2d 924, 927 (8th Cir.1987). The rights Congress granted workers under the NLRA are critical not only on an employee's first day of employment, but also in the days

thereafter. An employee cannot anticipate when he or she may be required to exercise those rights because the exercise of such rights generally depends on if and when an employer engages in an unfair labor practice, which is uncertain in point of time.

¶ 26 If an employer such as defendant can accomplish an end-run around the rights guaranteed to workers under the NLRA merely by asking its employees to contract away those rights, even allowing for a thirty (30) day opt-out clause, employers would be able to eviscerate the protections of the NLRA. For example, if an employee who failed to opt-out of an arbitration agreement at the inception of their employment later sought to bargain collectively or participate in a concerted activity a year or two into his or her employment, the employer could enforce the employee's agreement not to participate in such protected concerted activities.

¶ 27 The NLRB has addressed the issue of opt-out clauses with similar concerns. As mentioned, Section 8(a)(1) of the NLRA makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the NLRA. 29 U.S.C. § 158. The test for determining whether an employer violates Section 8(a)(1) is "whether the employer engaged in conduct that 'reasonably tends to interfere with, restrain, or coerce employees in the free exercise' of their protected rights." *N.L.R.B. v. Q-1 Motor Express, Inc.*, 25 F.3d 473, 477 (7th Cir. 1994) (quoting *N.L.R.B..v. Berger Transfer & Storage Co.*, 678 F.2d 679, 689 (7th Cir. 1982)).

¶ 28 The NLRB has held that an employee's ability to opt-out of an arbitration agreement containing a class-action waiver does not render the agreement lawful and that the employer's prescribed opt-out procedure itself improperly interferes with the substantive rights of employees under Section 7 of the NLRA to engage in collective action. See *On Assignment Staffing Servs.*

Inc., 362 N.L.R.B. 189, 2015 WL 5113231, *1 (2015), *rev'd per curiam*, *On Assignment Staffing Servs. Inc. v. N.L.R.B.*, No. 15-60642, 2016 WL 3685206 (5th Cir. 2016).

¶ 29 The NLRB held that opt-out procedures impermissibly interfere with employees' Section 7 rights by requiring them to affirmatively take steps prescribed by the employer to retain those rights. *On Assignment Staffing*, 362 N.L.R.B. 189, 2015 WL 5113231, *1. The NLRB reasoned that a procedure requiring employees to take affirmative steps to opt-out of an arbitration agreement that otherwise waived their Section 7 rights impermissibly interfered with the employees' exercise of those rights in violation of Section 8(a)(1) of the NLRA. *Id*. at *6. According to the NLRB, a procedure that required employees to obtain their employer's permission in order to preserve their Section 7 rights to engage in protected concerted activity, burdened the exercise of those rights and was unlawful. The NLRB also determined that such an opt-out procedure interfered with employees' Section 7 rights by putting them in a potentially employment-damaging predicament of having to make an observable choice revealing their support for, or rejection of, protected concerted activity. *Id*. at *6.

¶ 30 In sum, we do not believe that the Dispute Resolution Agreement's thirty (30) day opt-out clause saves the arbitration provision from invalidation under the NLRA. See *Tigges v. AM Pizza, Inc.*, 2016 WL 4076829, at *15-16 (D. Mass. July 29, 2016) (finding that the arbitration agreement's opt-out provision did not save it from invalidation under the NLRA); *Curtis v. Contract Management Services*, 2016 WL 547768 at *6 (D. Me. Sept. 29, 2016) (same); *In re Fresh & Easy, LLC*, 2016 WL 5922292, at *12 (Bankr. D. Del. Oct. 11, 2016) ("[T]he fact that the Plaintiff was given an opportunity to opt out of the Arbitration Agreement does not alter the Court's determination that the Class Waiver is unenforceable.").

¶ 31 Defendant finally contends that after the circuit court found that the class-action waiver was invalid and unenforceable, the court erred by disregarding the severability clause and not enforcing the remainder of the parties' Dispute Resolution Agreement. We disagree.

¶ 32 An agreement is not enforceable in part if the unenforceable provision is an essential part of the agreement. Restatement (Second) of Contracts § 184(1) (1981). "An unenforceable provision [of a contract] is severable unless it is 'so closely connected' with the remainder of the contract that to enforce the valid provisions of the contract without it 'would be tantamount to rewriting the [a]greement.' " *Wigginton v. Dell, Inc.*, 382 Ill. App. 3d 1189, 1198 (2008) (quoting *Abbott-Interfast Corp. v. Harkabus*, 250 Ill. App. 3d 13, 21 (1993)). Thus, the initial inquiry as to the issue of severability is whether the unenforceable provision is an essential part of the agreement. *Kepple & Company, Inc. v. Cardiac, Thoracic and Endovascular Therapies, S.C.*, 396 Ill. App. 3d 1061, 1066 (2009). If so, then the agreement is not severable and the entire agreement is void. *Id.*

¶ 33 In the instant case, the arbitration provision is clearly an essential part of the parties' Dispute Resolution Agreement. As defendant points out in footnote 5 on page 24 of its brief, "[e]nforcing the remainder of the Agreement, renders the Agreement silent as to class action proceedings and absent an express provision, the parties cannot submit to class action arbitration. *Stolt-Nielsen S.A. v. Animal Feeds In'l Corp.*, 559 U.S. 662, 684 (2010)." Therefore, if we were to sever the class action waiver and compel individual arbitration as defendant urges, plaintiff would be left with no forum to effectively vindicate her collective action claims, once again running afoul of the holdings discussed above. See *Curatola v. Titlemax of Tennessee, Inc., and TMX Finance of Tennessee, Inc.*, 2017 WL 3820971 at *6 (W.D. Tenn. 2017).

¶ 34 Since the unenforceable arbitration provision is an essential part of the Dispute Resolution Agreement, the remaining provisions of the agreement are not severable from the unenforceable arbitration provision, and the entire agreement is void and unenforceable. See, *e.g.*, *Kepple & Company, Inc.*, 396 Ill. App. 3d at 1066. We find that as a matter of law, the circuit court did not err in denying defendant's motion to compel arbitration and stay the court proceedings pending resolution of the arbitration.

¶ 35 Accordingly, we affirm the decision of the trial court.

¶ 36 Affirmed.