Young Lawyers: The Danger of Raising Baseless Arguments to Evade Arbitration

Charles E. Harris II – March 26, 2018

In *Hunt v. Moore Brothers, Inc.*, 861 F.3d 655 (7th. Cir. 2017), the Seventh Circuit affirmed a $7,500 sanction that Chief Judge Michael J. Reagan of the Southern District of Illinois imposed against an attorney for filing baseless motions in her effort to avoid arbitration. The district court relied on section 1927 of the Judiciary Code, which states that an attorney "who so multiplies [a] proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Either objective or substantive bad faith can support a section 1927 sanction. *Hunt*, 861 F.3d at 657–58.

As background, James Hunt, a Nebraska truck driver, entered into two independent contractor agreements to drive trucks for Moore Brothers, a small Nebraska company. After a dispute arose between the parties, the attorney filed a scathing lawsuit in the district court that included claims against Moore Brothers under section 1581 of the Criminal Code, 18 U.S.C. § 1581, for allegedly holding Hunt in peonage and for violating the RICO laws, 18 U.S.C. § 1962. But the agreements contained an arbitration clause requiring the parties to submit any disputes that "arise under this Agreement . . . to final and binding arbitration." *Id*. at 657–58. Accordingly, Moore Brothers filed a motion to stay the litigation and to compel arbitration under sections 3 and 4 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 3, 4.

The Attorney's Arguments

The attorney raised two main arguments in response to the motion to compel. *First*, she claimed that Hunt need not comply with the

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arbitration clause, because Moore Brothers had materially breached the agreements. And, *second*, she argued that the agreements fell outside the scope of the FAA, because Hunt was a transportation worker. *Hunt*, 861 F.3d at 657–58. Section 1 of the FAA exempts "contracts of employment of transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (interpreting 9 U.S.C. § 1).

The district court flatly rejected both arguments. First, it pointed out that, if a breach of an underlying contract could relieve a party from having to comply with an arbitration clause, "no one would ever arbitrate a contract dispute, because the arbitration agreement would go up in smoke as soon as the dispute arose." *Hunt*, 861 F.3d at 658. The court further concluded that the attorney's attempt to bring the agreements under the Act's transportation worker exception failed as the complaint admitted that Hunt entered into an independent contractor agreement—not an employment contract. The court thus granted Moore Brothers' motion and ordered the parties to try to agree on an arbitrator in accordance with the terms of their arbitration clause. *Id*.

The attorney wasn't giving up though. She filed a motion less than two months later reporting that the parties were unable to agree on an arbitrator and, seizing on this failure, to argue that the arbitration clause was merely an unenforceable "agreement to agree" under Nebraska law. The district court found this argument similarly meritless. It noted that a delay in the selection of an arbitrator doesn't affect the validity of an arbitration clause, and, regardless, the FAA would preempt conflicting Nebraska law. *Id*. The district court denied the attorney's motion and subsequently granted Moore Brothers' motion for sanctions.

Prior Dealings Between the District Judge and the Attorney

Hunt was not the first interaction between Judge Reagan and the attorney. In an earlier case in which the judge once described the attorney's filings as "obviously flawed," *Global Traffic Techs. v. KM Enters.*, No. 14-mc-0065-MJR-DGW (S.D. Ill. May 15, 2015), opposing counsel twice moved for sanctions against her. The first motion sought an order of contempt after the attorney filed unredacted versions of documents on appeal that Judge Reagan had ordered the parties to keep under seal. *See KM Enters. v. Global Techs.*, 725 F.3d 718, 734 (7th Cir. 2013). The judge admonished the attorney but declined to sanction her. The second motion sought sanctions in response to the attorney filing an allegedly frivolous motion for contempt. *See Global Traffic Techs.v. KM Enters.*, No. 14-mc-0065-MJR-DGW (S.D. Ill. July 19, 2016). The judge once again declined to sanction the attorney.

The Seventh Circuit Opinion

Writing for the unanimous panel, Chief Judge Diane Wood acknowledged that district courts have broad discretion to award sanctions under section 1927, and, thus, the court should reverse

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only if no reasonable person could have come to the same conclusion under the circumstances. *Hunt*, 861 F.3d at 659. Applying this standard, the Seventh Circuit held that the district court was entitled to "impose a calibrated sanction" on the attorney for "her conduct of the litigation, culminating in the objectively baseless motion she filed in opposition to arbitration." *Id*.

In scrutinizing the breadth of the complaint, the court noted that, although the disagreement between Hunt and Moore Brothers was a simple commercial dispute, the attorney "blew it up beyond all rational proportion" by asserting "frivolous" claims against Hunt. *Id*. All told, the court described the complaint as a "disaster."

The attorney's challenges to the arbitration clause fared no better in the court's eyes. It said that her arguments disregarded the "the long line of Supreme Court decisions upholding the enforceability of arbitration clauses exactly like the one" in the agreements, as well as the established precedent admonishing that the FAA "requires courts to place arbitration agreements on equal footing with all other contracts." *Id*. (quoting *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (2017) (internal quotation marks omitted)). Indeed, the court noted that, under these principles, the FAA preempts "whatever Nebraska law has to say" as to whether the arbitration clause was an unenforceable agreement to agree. *Id*.

The court also held that the "fact that an agreement to arbitrate leaves for later negotiations the selection of the particular arbitrator does not render that agreement so vague as to be unenforceable." *Id*. The court said that, if this were true, section 5 of the FAA, which provides that courts "shall designate and appoint an arbitrator" if the parties fail to do so, would be superfluous. 9 U.S.C. § 5. Not to mention, the Seventh Circuit had explicitly held before *Hunt* that "arbitration clauses remain enforceable if for any reason there is a lapse in the naming of an arbitrator." *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 791 (7th Cir. 2013) (internal quotation marks omitted).

Conclusion

Having litigated dozens of motions to compel, the author has seen many plaintiffs' attorneys try to circumvent arbitration by raising far-fetched arguments similar to the ones advanced in *Hunt*. Some lawyers may decide not to pursue sanctions because the motions seeking them require an investment of attorney time and there is always a fear that the court will be reluctant to impose sanctions even where an attorney has engaged in clear wrongdoing. *Hunt* shows that district courts may be willing to impose sanctions where an attorney engages in objectively unreasonable conduct. And if a district court does take that step, the decision makes clear that the standard for overturning the district court's judgment is demanding.

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