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Full of Sound and Fury, Signifying Nothing: Second Circuit Chides Employer's Unfair Arbitration Terms, Tet Still Enforces Agreement

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FULL OF SOUND AND FURY, SIGNIFYING NOTHING: SECOND CIRCUIT CHIDES EMPLOYER'S UNFAIR ARBITRATION TERMS, YET STILL ENFORCES AGREEMENT

By
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I. INTRODUCTION

In *Ragone v. Atlantic Video at Manhattan Center*, the United States Court of Appeals for the Second Circuit enforced an arbitration agreement after the defendants waived provisions that may have been unenforceable and unconscionable.[1] The Court also found that ESPN, a non-signatory to the arbitration agreement, could arbitrate the dispute as its business was linked to the employment contract.[2]

II. BACKGROUND

Rita Ragone worked as a make-up artist for Atlantic Video ("AVI") from February 2005 until April 2006.[3] During that time, ESPN, the cable sports channel, operated its morning sports show, "Cold Pizza," out of AVI's studio in New York City.[4] AVI fired Ragone in 2006, which Ragone alleged was done in response to her allegations of sexual harassment.[5] In response to her firing, Ragone filed a claim alleging employment discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII") as well as claims under the New York State Human Rights Law, and the New York City Human Rights Law.[6] She claimed that the defendants "subjected her to 'continuous sexual harassment [which] made [her] work

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[1] Ragone v. Atl. Video at Manhattan Ctr., 595 F.3d 115, 117 (2d Cir. 2010).
[2] *Id.* at 128.
[3] *Id.* at 118.
[4] *Id.*
[5] *Id.*
[6] *Ragone*, 595 F.3d at 117.

environment hostile, abusive and untolerable.'"[7] Her employment contract contained an agreement to arbitrate "any and all claims arising out of my employment or its termination."[8] Additionally, the arbitration agreement contained the following clauses, which Ragone claimed were unconscionable and therefore unenforceable:

> (a) impermissibly shortens the statute of limitations [for bringing any demand for arbitration] to ninety days, (b) requires that attorney's fees must be awarded to the prevailing party, (c) it prevents the plaintiff from appealing the arbitrator's award in court, and (d) it denies the plaintiff some of her rights in court by limiting her discovery rights and eliminating her right to a jury trial.[9]

The arbitration provision included a severability clause, which stipulated that all clauses found to be contrary to law must be modified in accordance "with the applicable federal and/or New York law."[10]

The district court applied New York law and found the arbitration agreement was not procedurally unconscionable because Ragone "failed to show that AVI engaged in high-pressure tactics or deception in procuring her signature on the agreement."[11] In addition, the court rejected Ragone's claim of unconscionability based on her not understanding the agreement.[12] The court reasoned that she couldhave asked questions, studied the provision, or had a lawyer

[7] *Id; see also* Pl. Compl. ¶ 21.
[8] *Ragone*, 595 F.3d at 118.
[9] *Id.* at 118-19.
[10] *Id.* at 119.
[11] *Id.* at 119-20.
[12] *Id.* at 120.

look at them.[13] AVI agreed to waive the fee and statute of limitation provisions and argued that the provision banning appeal did not preclude Ragone from attempting to vacate the arbitration decision in federal court.[14] These stipulations helped the district court conclude that the agreement was not unconscionable.[15] Finally, the court found that although ESPN was a non-signatory, it could compel arbitration because "it is clear that [Ragone's] claims of unlawful harassment and retaliation against AVI and ESPN rely on the concerted actions of both defendants and are substantially independent."[16]

III. ANALYSIS

A. Unconscionability

The Second Circuit explained its review of this case would be *de novo*.[17] The Court pointed out that the arbitration agreement specifically stated that "claims of sexual harassment" are arbitrable.[18] Additionally, because the FAA is the controlling law, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements."[19] Ragone claimed the arbitration agreement was unconscionable, and the Court noted the New York law of arbitration defined unconscionability as "so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms."[20] For a claim of unconscionability to stand, the agreement must be both procedurally and

[13] *Ragone*, 595 F.3d at 120.
[14] *Id.*
[15] *Id*.
[16] *Id.*
[17] *Id.*
[18] *Ragone*, 595 F.3d at 120.
[19] *Id.* at 121 (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).
[20] *Id.* (quoting Gillman v. Chase Manhattan Bank, N.A., 532 N.E.2d 824, 828 (N.Y. 1988)).

substantively unconscionable.[21] Procedural unconscionability deals with "the contract formation process and the alleged lack of a meaningful choice," while substantive unconscionability relates to a contract's content.[22]

The Second Circuit held that the agreement was not procedurally unconscionable.[23] The Court rejected Ragone's claim that she was offered the agreement "on a 'take it or leave it' basis" because such a claim is not sufficient under New York law to make an agreement procedurally unconscionable.[24] Next, the Second Circuit rejected Ragone's assertion that she did not read the arbitration agreement and could not be forced to arbitrate because it would "allow a party to avoid his legal obligation to read a document carefully before signing it just because the document is an arbitration agreement under which Title VII claims could be arbitrated."[25] Third, Ragone's lack of a college degree was not a basis to claim procedural unconscionability.[26] Therefore, the agreement was not procedurally unconscionable.[27]

Ragone also argued that her agreement was substantively unconscionable and that the district court erred by avoiding consideration of any of the disputed terms of the agreement because AVI waived them.[28] She believed the agreement should have been considered as a whole.[29] While the Court noted that this is a plausible argument, it was still inclined to reject it.[30] First, the severability clause of the agreement still applies because the district court did not find any provision

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[21] *Id*.
[22] *Id.* at 121-22 (quoting State v. Wolowitz, 96 A.D.2d 47 (N.Y. App. Div. 1983)).
[23] *Ragone*, 595 F.3d. at 122.
[24] *Id*.; *see* Nayal v. HIP Network Servs. IPA, Inc., 620 F. Supp. 2d 566, 571 (S.D.N.Y. 2009) (citing cases).
[25] *Ragone*, 595 F.3d at 122; *see* Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144, 150 (2d Cir. 2004).
[26] *Ragone*, 595 F.3d at 122.
[27] *Id.*
[28] *Id*.
[29] *Id.* at 123.
[30] *Id.*

of the agreement contrary to law.[31] The district court also refused to trigger the severability clause and the question of whether the clause could save the agreement is not raised in the appeal.[32] Next, regarding the clause forbidding appeal, Ragone did not present any evidence where she would be forbidden from moving to vacate an award in federal court.[33] In terms of the two remaining challenged clauses, the limitation of demand for arbitration and the award of attorneys' fees, the Court noted that Ragone did not present any New York case law where a court found waiver of arbitration clauses was unacceptable.[34] Instead, the Court cited New York case law supporting the waiver.[35] In summation, the Second Circuit held that the agreement was not procedurally or substantively unconscionable; thus, the Second Circuit was unwilling to void the arbitration agreement.[36]

However, the Court was not enthusiastic about its holding.[37] It noted that while a court shall compel arbitration when "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum," the arbitration agreement will be voided when the agreement "act[s] as a prospective waiver of a party's right to pursue statutory remedies."[38] The Court was unsure whether it would uphold the agreement had AVI not waived the contested portions of the agreement.[39] The Court agreed with Ragone's assertion that enforcement of these agreements

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[31] *Ragone*, 595 F.3d at 123.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 124.
[35] *Id.*; *see* In re Currency Conversion Fee Antitrust Litig., 265 F.Supp.2d 385, 411-12 (S.D.N.Y. 2003) (holding that "defendant's offer to pay arbitration-related fees and waiver of fee-shifting meant plaintiff could not rely on arbitration costs as ground for finding arbitration agreement unconscionable.") *and* Schreiber v. K-Sea Transp. Corp., 9 N.Y.3d 331 (N.Y. 2007) (holding that plaintiff should not be forced to pay for arbitration when doing so would preclude him from seeking arbitration).
[36] *Ragone*, 595 F.3d. at 125.
[37] *Id.*
[38] *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, 637 n.19 (1985)).
[39] *Id.*

> creates highly undesirable incentives to employers because it teaches employers to create as oppressive and one-sided arbitration agreements as possible (with the hopes of chilling employment discrimination actions) while maintaining the expectation that [they] can still enforce arbitration by simply stating 'Never Mind' to all the unenforceable provisions that never should have been included in the first place.[40]

However, because the Second Circuit felt that Ragone could assert her Title VII rights in arbitration, it is not necessary to void the entire agreement.[41]

B. Arbitration with ESPN

The Second Circuit lastly considered the district court's finding that Ragone must arbitrate her claims with ESPN, although ESPN did not sign the agreement and are never mentioned in the employment contract.[42] Under the doctrine of estoppel,

> [a] non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute where a careful review of 'the relationship among the parties, the contracts they signed…and the issues that had arisen' among them discloses that 'the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement the party has signed.'[43]

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[40] *Id.* at 126.
[41] *Ragone*, 595 F.3d at 126.
[42] *Id.* (quoting Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co., 271 F.3d 403, 406 (2d Cir. 2001)).
[43] *Id.* at 126-27.

The Court agreed with the district court's finding that a relationship existed between Ragone, AVI, and ESPN, which supported the doctrine of estoppel.[44] While ESPN was not in the arbitration agreement, Ragone understood ESPN to be her co-employer.[45] The Court then distinguished this case from *Ross v. American Express Co.*, where the Second Circuit found that American Express could not compel arbitration as a non-signatory because "the plaintiffs do not know Amex from Adam."[46] This case is different because of the relationship between Ragone and ESPN, in which Ragone knew she would work with ESPN personnel in the course of her employment.[47] Therefore, because of this relationship, ESPN could compel arbitration between AVI and Ragone.[48]

IV. SIGNIFICANCE

Ragone presents interesting issues for future litigation of arbitration agreements. First, the Court mentioned that there could be certain circumstances in which defendants could waive troubling portions of arbitration agreements and the court would still find the agreement unconscionable.[49] A voidable arbitration agreement must be one that a plaintiff "may [not] vindicate its statutory cause of action in the arbitral forum."[50] The Court cited only one case in which an arbitration agreement was held to be void under this circumstance, but the defendants never waived the disputed clauses.[51] Therefore, until the Second Circuit expresses what type of clause would void an agreement even if waived, those who

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[44] *Id.* at 127.
[45] *Id*.
[46] *Ragone*, 595 F.3d at 127*; see* Ross v. Am. Express Co., 547 F.3d 137, 146 (2d Cir. 2008).
[47] *Ragone*, 595 F.3d at 128.
[48] *Id.*
[49] *Id.* at 125.
[50] *Id.*
[51] *Id*; *see* In re Am. Express Merchants' Litig., 554 F.3d 300 (2d Cir. 2009).

create arbitration agreements still seem to be free to put in strong language that may frighten the other party from bringing an arbitration claim, only to waive that claim if an action is brought.

Second, the Second Circuit uses this case to show when a non-signatory can compel arbitration. When an employee understands the non-signatory to be a co-employer, the facts of the dispute are intertwined with the third party, and the employment contract stipulates that all controversies will be subject to arbitration, the non-signatory can estop the employee from seeking to avoid arbitration.[52] This case differs from *Ross v. American Express Co.* because the plaintiffs had neither interaction nor knowledge of American Express at all.[53] It will be interesting to see if the Second Circuit chooses to expand the circumstances under which a third party can compel arbitration. If the Court does not distinguish its holding at a later date, it seems that all employees who sign an employment contract with one party but who know they will work for another company can be estopped from avoiding arbitration when a dispute arises with the third-party employer.

[52] *Ragone*, 595 F.3d. at 127-28.
[53] *Id.* at 125; *see* Ross v. Am. Express Co., 547 F.3d 137, 146.