IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 17, 2016
Lyle W. Cayce
Clerk

No. 15-10360

NEFFERTITI ROBINSON, individually and on behalf of those similarly situated,

Plaintiff – Appellee

v.

J & K ADMINISTRATIVE MANAGEMENT SERVICES, INCORPORATED; KIMBERLY M. MEYERS,

Defendants – Appellants

v.

SANDRA HARRIS; GLORIA TURNER; JOAN STANTON; ANN KNIGHT,

Third Party Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Texas

Before CLEMENT, GRAVES, and COSTA, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

Appellants J&K Administrative Management Services, Inc. and Kimberly N. Meyers appeal the district court's order to compel collective arbitration of Neffertiti Robinson's complaint for unpaid overtime wages. Because the district court correctly applied *Pedcor Management Co. Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003), to compel arbitration, we **AFFIRM**.

FACTUAL AND PROCEDURAL HISTORY

J&K Administrative Management Services, Inc. entered into an arbitration agreement with each of its employees. The agreement required arbitration of "claims for wages or other compensation," "claims for a violation of any other federal, state or governmental law, statu[t]e, regulation or ordinance," and "claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim."

On January 23, 2014, Neffertiti Robinson, a former employee of J&K, sent a letter and arbitration complaint to J&K's counsel detailing claims for unpaid overtime wages under the Fair Labor Standards Act. After J&K failed to respond, Robinson filed a complaint for arbitration on behalf of herself and other similarly situated employees with JAMS, a private alternative dispute resolution coordinator. JAMS sent a notice of intention to initiate arbitration to J&K, which the company also disregarded. Four other former J&K employees, Sandra Harris, Gloria Turner, Joan Stanton, and Ann Knight, later filed notices of consent to join the collective arbitration.

Upon J&K's failure to respond to the notice of initiation of arbitration, Robinson filed a complaint and motion to compel arbitration of her claims, appoint JAMS as the arbitrator, and allow the arbitrator to determine whether collective arbitration was permitted by the agreement. The district court held, according to *Pedcor Management*, that the question of whether class arbitration is permissible should be decided by the arbitrator, and the agreement confirms that such questions should be deferred to arbitration. It also noted that it did not have to decide whether the agreement authorized collective arbitration, because the arbitrator can and should answer that question. Therefore, the district court ordered the parties to arbitrate the

claims under the agreement and dismissed the action with prejudice. J&K now appeals.

DISCUSSION

An order to compel arbitration is reviewed de novo. *Covington v. Aban Offshore Ltd.,* 650 F.3d 556, 558 (5th Cir. 2011). The court "perform[s] a two-step inquiry to determine whether to compel a party to arbitrate: first whether parties agreed to arbitrate and, second, whether federal statute or policy renders the claims nonarbitrable." *Dealer Computer Servs., Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884, 886 (5th Cir. 2009). We "divide the first step into two more questions: whether a valid agreement to arbitrate exists and whether the dispute falls within the agreement." *Id.*

I.

Before turning to the merits of this appeal, it is necessary to examine the parties' competing interpretations of the relevant law. We therefore begin with J&K's contention that *Pedcor Management* has since been abrogated and should not be applied to Robinson's action to compel arbitration.

A.

Preliminary issues in arbitration cases include gateway disputes, which typically require judicial determination, and procedural questions, which are to be reviewed by the arbitrator. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451-53 (2003) (plurality opinion). The arbitrability of disputes—in other words, the determination of whether the agreement applies to the parties' claims—is generally a gateway issue to be determined by the courts. *AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). This issue, however, is deferred to arbitration where the agreement espouses the parties intent to do so. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("[T]he 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'") (internal citations

omitted); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, . . . so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter.") (internal citation omitted); *Gen. Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 247 (5th Cir. 1998).

The same is true for the threshold question of whether class or collective arbitration is available under an arbitration agreement. In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. at 444, the Supreme Court reviewed a decision of the South Carolina Supreme Court holding that, as a matter of South Carolina law, courts must interpret silence as to class procedures as agreement to submit to them. The Supreme Court reversed, concluding in a plurality opinion that since the arbitration agreement in *Green Tree* included "sweeping language concerning the scope of the questions committed to arbitration," the availability of class arbitration should have been submitted to the arbitrator and not adjudicated by the court. *Id.* at 453.

We later adopted *Green Tree*'s reasoning. *See Pedcor Mgmt.*, 343 F.3d at 355. In *Pedcor Management*, a party to an arbitration agreement challenged an order compelling class arbitration. After reviewing *Green Tree*, we determined that the plurality opinion, along with a concurring opinion by Justice Stevens, constituted a majority that required the application of *Green Tree* by this court. *Id.* at 363. But *Pedcor Management* did not, as Robinson argues, stand for the proposition that the availability of class determination must always be decided by the arbitrator. Rather, it held that when an agreement includes broad coverage language, such as a contract clause submitting "*all* disputes, claims, or controversies arising from or relating to" the agreement to arbitration, then the availability of class or collective

arbitration is an issue arising out of the agreement that should be determined by the arbitrator. *Id.* at 359 (emphasis in original).

B.

J&K contends in two related arguments that *Stolt-Nielsen S.A. v. Animalfeeds International, Corp.*, 559 U.S. 662 (2010), abrogated *Pedcor Management*. First, J&K argues that *Stolt-Nielsen*'s statement that there was no majority opinion in *Green Tree* forbids us from applying *Pedcor Management*. Second, J&K asserts that *Stolt-Nielsen* enunciated a national policy against class arbitration that precludes arbitrators from determining the availability of class or collective procedures. We disagree.

In *Stolt-Nielsen* the Supreme Court clarified that *Green Tree* "did not yield a majority decision on any of the three questions," including the question of "which decision maker (court or arbitrator) should decide whether the contracts in question were 'silent' on the issue of class arbitration." *Id.* at 678-79. Thus, our conclusion in *Pedcor Management*, that the *Green Tree* plurality coupled with Justice Stevens's concurrence answered the question, was not accurate.[1] But, *Stolt-Nielsen* also refused to speak to this issue. *Id.* at 680 ("In fact, however, only the plurality decided that question. But we need not revisit that question here."). *Stolt-Nielsen*'s refusal to decide this issue is not sufficient to set aside *Pedcor Management*.

J&K's second contention is equally unavailing. In *Stolt-Nielsen*, the Supreme Court reviewed a petition to vacate an arbitration award that

[1] Another panel of this court recognized this issue but resolved the case without revisiting *Pedcor Management*. *See Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 634 n.3 (5th Cir. 2012) *abrogated by Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013) ("In *Pedcor* . . . a panel of this court held that the class arbitration decision should be made by an arbitrator rather than a court. The *Pedcor* panel premised its decision upon *Green Tree* . . . . The Supreme Court in *Stolt-Nielsen,* however, emphasized that, on this point, *Green Tree* was only a plurality decision." (internal quotation marks and citations omitted)).

questioned whether a party could be compelled to enter into class arbitration when the agreement is silent on such procedures. The court determined that *Green Tree*'s plurality opinion was not applicable to that dispute because *Green Tree* only answered the question of who decides whether class arbitration is available, not the standard for determining when it is in fact permissible. *Id.* at 679. As a result, the Supreme Court held that while it is clear "that parties may specify *with whom* they choose to arbitrate their disputes," *id.* at 683, "a party may not be compelled [by an arbitrator or court] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so," *id.* at 684.

Stolt-Nielsen does not overrule prior Supreme Court and Fifth Circuit decisions requiring questions of arbitrability, including the availability of class mechanisms, to be deferred to arbitration by agreement. Therefore, we continue to be bound by *Pedcor Management* under the rule of orderliness. *See, e.g., Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court. Indeed, even if a panel's interpretation of the law appears flawed, the rule of orderliness prevents a subsequent panel from declaring it void.").

J&K nevertheless argues, citing *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 776 (5th Cir. 2003), that the "rule of orderliness is inapplicable where an intervening decision of the Supreme Court or of the en banc Court of Appeals casts doubt on the prior ruling or the analysis employed to arrive at the ruling." In *Hoskins*, this court revisited its precedent because an intervening Supreme Court decision fundamentally changed the focus of the analysis for removal of a federal cause of action. But here, *Stolt-Nielsen* does not fundamentally alter the focus of the analysis of when to submit questions of class or collective

arbitrability to arbitration; instead it acknowledges that the Supreme Court has never answered that question. Therefore, the rule of orderliness mandates that *Pedcor Management* is controlling, and we are bound to apply it and its clear rule of law: if parties agree to submit the issue of arbitrability to the arbitrator, then the availability of class or collective arbitration is a question for the arbitrator instead of the court.

Having disposed of these preliminary arguments, we now review the district court's application of *Pedcor Management* to the facts of this case.

II.

Section (g) of the arbitration agreement subjects "claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim" to arbitration. J&K contends that section (g) does not allow deferral because it is silent as to class arbitration. J&K further contends that the panel may not read section (g) as deferring the arbitrability question because the agreement applies only between the company and Robinson and may not be read to include arbitration of Harris, Turner, Stanton, and Knight's non-party claims. These arguments, however, are a misguided attempt to bootstrap a preliminary proceeding into judicial review of an arbitration award that does not yet exist. J&K may be right that the agreement does not allow class or collective arbitration, but that is not the issue before the court. The issue is who decides if the arbitration agreement permits class or collective procedures.

Contract language similar to section (g) has been found to authorize deferral of arbitrability issues. In *Green Tree*, the plurality held that language submitting "[a]ll disputes, claims or controversies arising from or relating to this contract" to arbitration, 539 U.S. at 448, was sufficient for deferral, *id.* at 453. Similarly, in *Pedcor Management*, this court concluded that a clause submitting "any dispute . . . in connection with the [a]greement" included

determinations of class or collective arbitration. 343 F.3d at 359 (internal quotations omitted). And, in *Rent-A-Center, West, Inc. v. Jackson*, an agreement granting exclusive authority to an arbitrator "to resolve any dispute relating to the interpretation, applicability, enforceability or formation of [the] [a]greement," 561 U.S. 63, 66 (2010), was determined to be an unambiguous and proper delegation of authority under the Federal Arbitration Act, *id.* at 75-76.

Section (g) is materially similar to this contract language. It requires that "claims challenging the validity or enforceability of" the agreement must be arbitrated. Therefore, we conclude that section (g) is unambiguous evidence of the parties intention to submit arbitrability disputes to arbitration and that arbitration was properly compelled.

III.

J&K also asks that we appoint an independent arbitrator to hear Robinson's claims. The district court, however, already appointed JAMS as the arbitral forum when it granted Robinson's motion to compel, which included a request to "appoint JAMS as the arbitrator." Since neither party argues that the district court erred in appointing JAMS as the arbitral forum, any challenges to the appointment have been waived on appeal. Arbitration of Robinson's claims, including whether class procedures are permissible, should proceed as ordered with JAMS as the arbitral forum.

CONCLUSION

The judgment of the district court is **AFFIRMED**.

Print Form

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BILL OF COSTS

NOTE: The Bill of Costs is due in this office *within 14 days from the date of the opinion, See* FED. R. APP. P. & 5TH CIR. R. 39. Untimely bills of costs must be accompanied by a separate motion to file out of time, which the court may deny.

____ v. ____ No. ____________

The Clerk is requested to tax the following costs against: ____

COSTS TAXABLE UNDER Fed. R. App. P. & 5th Cir. R. 39	REQUESTED				ALLOWED (If different from amount requested)			
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Appendix or Record Excerpts								
Appellant's Brief								
Appellee's Brief								
Appellant's Reply Brief								
Other:								
			Total $		Costs are taxed in the amount of $			

Costs are hereby taxed in the amount of $ ______________________ this ______________________________ day of ________________________, __________.

LYLE W. CAYCE, CLERK

State of
County of ____

By ____
Deputy Clerk

I ____, do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This _____________ day of ____________________________, _____________.

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(Signature)

*SEE REVERSE SIDE FOR RULES
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Attorney for ____________________________________

FIFTH CIRCUIT RULE 39

39.1 Taxable Rates. *The cost of reproducing necessary copies of the brief, appendices, or record excerpts shall be taxed at a rate not higher than $0.15 per page, including cover, index, and internal pages, for any for of reproduction costs. The cost of the binding required by 5TH CIR. R. 32.2.3that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk shall, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.*

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. *Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.*

39.3 Time for Filing Bills of Costs. *The clerk must receive bills of costs and any objections within the times set forth in FED. R. APP. P. 39(D). See 5TH CIR. R. 26.1.*

FED. R. APP. P. 39. COSTS

(a) ***Against Whom Assessed.*** The following rules apply unless the law provides or the court orders otherwise;

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) ***Costs For and Against the United States.*** Costs for or against the United States, its agency or officer will be assessed under Rule 39(a) only if authorized by law.

©) ***Costs of Copies*** Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk’s office is located and should encourage economical methods of copying.

(d) ***Bill of costs: Objections; Insertion in Mandate.***

(1) A party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must – upon the circuit clerk’s request – add the statement of costs, or any amendment of it, to the mandate.

(e) ***Costs of Appeal Taxable in the District Court.*** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter’s transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

March 17, 2016

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 15-10360 Neffertiti Robinson, et al v. J & K Admin Mgmt Svc Inc., et al
USDC No. 3:14-CV-956

Enclosed is a copy of the court's decision. The court has entered judgment under FED R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

The judgment entered provides that appellants pay to appellees the costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

By: Jamei R. Schaeffer
Jamei R. Schaeffer, Deputy Clerk

Enclosure(s)

Mr. David J. Goodman
Mr. Eric Joseph Millner
Mr. Christopher Richard Miltenberger