

No. 08-1064

IN THE SUPREME COURT OF TEXAS

In re Polymerica, LLC d/b/a Global Enterprises, Inc.,

Relator.

Original Proceeding from the County Court at Law Number Six
El Paso County, Texas
The Honorable M. Sue Kurita, Presiding Judge

**RELATOR'S REPLY TO THE RESPONSE OF THE REAL
PARTY IN INTEREST**

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Relator Global Enterprises files this Reply to the Response filed by the Real Party In Interest, Angelica Soltero (“Soltero”).

ARGUMENT

Soltero’s Response to the Petition for Writ of Mandamus raises various arguments that are contrary to Texas law, and which are inconsistent with the language of the two arbitration agreements that she voluntarily signed.

Soltero argues that Global Enterprises did not preserve its argument concerning direct benefits estoppel in the trial court. (Response at 10). That assertion is wrong. The motions to compel arbitration filed by Global Enterprises in the trial court raised various arguments. (R. Tab B at 8-12, Tab F at 88, 94). In the trial court, Global Enterprises argued that Soltero had accepted benefits from her joint employers after receiving notice of the arbitration agreements of her joint employers. (R. Tab B, at 8, 10-12). Global Enterprises also directed the trial court’s attention to the decision in *In re Dallas Peterbilt, Ltd*, 196 S.W.3d 161 (Tex. 2006), and argued that an “employee’s acceptance of pay checks after receiving notice of a condition of employment constitutes acceptance of that employment condition as a matter of law.” (R. Tab B, at 8). That is the same benefit that Global Enterprises asserts in this proceeding as the type of benefit that should warrant the application of direct benefits estoppel. (Pet. for Writ of Mandamus at 11-12).

What is established by the record is further demonstrated by Soltero’s own arguments. Soltero’s response in this Court raises the same arguments that she made in the trial court to avoid the application of estoppel. In the trial court, Soltero argued that arbitration was not required because: (i) estoppel does not apply to “statutory

employment related claims” and (ii) Soltero’s lawsuit “does not seek to derive benefits from a contract.” (R. Tab C, at 12). In her response filed in this Court, Soltero again argues that estoppel does not apply because her claims are based on statutory obligations under Chapter 21 of the Texas Labor Code. (Response at 13). Additionally, Soltero argues in this Court that estoppel does not apply because her claims do not seek to derive a direct benefit from the contract containing the arbitration provision. (Response at 12). How can it be said that waiver has occurred if Soltero’s response in this Court raises the exact same arguments that she raised in response to the motions to compel arbitration that were filed in the trial court? That is probably part of the reason why the Eighth Court of Appeals already rejected Soltero’s claim of waiver when the mandamus petition was pending in that court. (Petition for Writ of Mandamus, Tab 4 at 5-6).

Soltero also argues that her obligations under the arbitration agreements must have expired on the termination of the joint employment relationship. (Response at 4). Accordingly, Soltero argues that the continuation of the joint employment relationship is a necessary condition to her obligations under the agreements. (*Id.*). Yet, Soltero does not bother to direct this Court to any language in the arbitration agreements that support this assertion. (*Id.*). The failure is not surprising since the arbitration agreements contemplate the opposite. The Dispute Resolution Plan which Soltero signed states that it applies to all disputes between “applicants for employment, Employees, or former Employees.” (R. Tab B at 22, 26). At the time of the termination that forms the basis of this lawsuit, Soltero was a former employee of Global Enterprises and dmDickason. (R. Tab A at 2; Tab B at 15). That fact is undisputed.

To make matters worse, Soltero makes this argument without the benefit of any authority, in Texas or otherwise. Soltero has not explained to this Court how an unconditional promise can somehow become conditioned on the occurrence of an event when the underlying agreements do not impose any conditions on a party's obligation to perform. Shouldn't this Court's interpretation of an arbitration agreement be based on the actual language of the agreement rather than extraneous conditions that a party seeks to impose in order to avoid the terms of that agreement? If a party's promise is unconditional when it is made, that party should not be permitted to impose additional conditions on the promise before the promise will actually mean something. *Cf. Atofina Petrochemicals, Inc. v. Continental Cas. Co.*, 185 S.W.3d 440, 444 (Tex. 2005) (refusing to impose a condition precedent under an agreement when the agreement did not support creating a condition precedent).

Soltero's argument is also contrary to Texas law. Numerous courts in Texas have held that "issues relating to the meeting of conditions precedent to arbitration, . . . are matters pertaining to procedural arbitrability; [and] matters of procedural arbitrability are to be determined at arbitration." *See, e.g., In re Frost Nat'l Bank*, No. 13-07-00748-CV, 2008 Tex. App. LEXIS 8570 (Tex. App.—Corpus Christi Nov. 7, 2008) (orig. proceeding). Federal court decisions under the Federal Arbitration Act have also rejected a party's attempt to avoid a contractual obligation to arbitrate that was premised on the excuse that the agreement had terminated. *See, e.g., Ottley v. Sheepshead Nursing Home*, 688 F.2d 883, 887 (2nd Cir. 1982) (arbitrator properly decided issue of whether employer's withdrawal from multi-employer association excused the adverse party's

obligation to arbitrate); *Redmon v. Society & Corp. of Lloyds*, 434 F.Supp.2d 1211, 1221 (M.D. Ala. 2006) (holding that factual question of whether disability insurance policies were in effect at the time of the plaintiff's claims presented a question to be resolved by the arbitrator); *Indian Harbor Ins. Co. v. Global Transport Sys.*, 191 F.Supp.2d 400, 403 (S.D.N.Y. 2002) (similar result). Soltero's argument that the joint employment relationship must have been in existence in order for her promise to have any legal effect is an attempt to impose a condition precedent that affects her obligations under the agreements.

Soltero argues that the Dispute Resolution Plan limits its application to claims asserted against dmDickason only. (Response at 22). The record contradicts this assertion. The very first page of the Dispute Resolution Plan states that the "plan will apply to any disputes between dmDickason/Global Enterprises and any applicant for employment, employee or former employee." (R.Tab B at 20).

Soltero claims that Global Enterprises rejected the arbitration agreements with an employee handbook; but that this handbook is wholly unenforceable. (Response at 3). According to Soltero, the employee handbook is enforceable for her benefit; but unenforceable for any other purpose. She does not bother to explain how the same agreement can be sufficient to revoke an arbitration agreement but wholly unenforceable at the exact same time. Her failure to address that question is noteworthy; but not surprising since cases under the Federal Arbitration Act have already rejected this argument. *Upstate Shredding, LLC v. Carloss Well Supply Co.*, 84 F.Supp.2d 357, 363 (N.D.N.Y.2000); *Valdiviezo v. Phelps Dodge Hidalgo Smelter, Inc.*, 995 F.Supp.1060,

1065 (D.Ariz. 1997); *Tepper Realty Co. v. Mosaic Title Co.*, 259 F.Supp. 688, 692 (S.D.N.Y. 1966). In *Tepper Realty*, the court rejected a similar attempt by a plaintiff to avoid arbitration: “plaintiffs cannot claim that [defendant] is a party to the first contract to enforce it against [defendant] in this action and be heard to deny that it is such a party for purposes of avoiding arbitration of claims clearly within the ambit of the arbitration agreement.” *Tepper Realty*, 259 F.Supp. at 692. The court held: “the plaintiffs cannot have it both ways. They cannot rely on the contract, when it works to their advantage, and repudiate it when it works to their disadvantage. To permit them to do so would not only flout equity, it would do violence, we think, to the congressional purpose underlying the Federal Arbitration Act.” *Id.*; *Upstate Shredding, LLC v. Carlross Well Supply Co.*, 84 F.Supp.2d 357, 363 (N.D.N.Y.2000) (a party cannot claim reliance on an agreement and at the same time disclaim reliance on the same agreement to avoid arbitration).

Soltero also argues that the deposition testimony of Valerie Scott somehow establishes that Global Enterprises never replaced the arbitration agreements after the termination of the joint employment relationship. (Response at 5). What is missing from Soltero’s characterization of this testimony is any explanation as to why this individual’s deposition testimony binds Global Enterprises, or even why her deposition testimony controls Soltero’s separate contractual obligations. There is nothing in the record to indicate that this witness was designated as a corporate representative to testify on any matter affecting Global Enterprises, or on any matter affecting Soltero’s contractual obligations. This witness was deposed on October 4, 2007, and she was at that time a former employee of Global Enterprises. (R. Tab F, at 133, 146). This witness could not

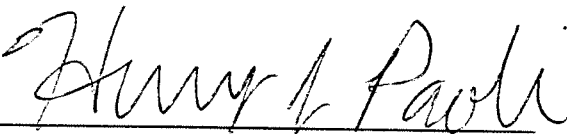
have testified as a representative of Global Enterprises absent a designation as a corporate representative; and there is no such evidence in the record.

Soltero claims that direct benefits estoppel requires that a party's claims be based on the arbitration agreement in order for estoppel to apply against that party. (Response at 12). This Court's analysis concerning direct benefits estoppel does not support Soltero's argument. *In re Weekley Homes, L.P.*, 180 S.W.3d 127 (Tex. 2005) (orig. proceeding). In *Weekley Homes*, this Court held that direct benefits estoppel may be based on a party's "receipt of direct benefits from a contract by means other than a lawsuit." *Weekley Homes*, 180 S.W.3d at 132. This Court then noted that the analysis for applying the theory in this manner focuses on the non-party's conduct during the performance of the contract. *Id.* By focusing on conduct outside of litigation, it cannot be said that estoppel would apply only if a party's claims in the lawsuit were based on the arbitration agreement. *See also St. Clair v. Brooke Franchise Corp.*, No. 2-06-216-CV, 2007 Tex. App. LEXIS 2805, at *18 (Tex. App.—Fort Worth Apr. 12, 2007) (orig. proceeding) (noting the distinct ways in which estoppel can apply as follows: "to be compelled to arbitrate, a nonsignatory must either (1) bring claims in a lawsuit that seek direct benefits from a contract containing an arbitration clause, or (2) deliberately seek and obtain substantial benefits from the contract itself outside of litigation"). Soltero's argument that estoppel requires a party to receive benefits under a contract while also relying on that contract in the lawsuit represents a misunderstanding of the rules for direct benefits estoppel announced by this Court.

PRAYER

For these reasons, Global Enterprises requests that this court grant its Petition and direct the trial court to compel arbitration of Soltero's claims against Global Enterprises, and direct the trial court to stay the action in the trial court until the conclusion of arbitration.

Respectfully submitted,

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VERIFICATION

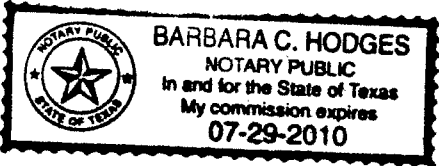
STATE OF TEXAS §
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COUNTY OF EL PASO §

BEFORE ME, a notary public in and for the State of Texas, on this day personally appeared Henry J. Paoli, who, on his oath, did depose and say that in the district court and in this court he is a co-counsel for the relator in this case; that he has read and reviewed the foregoing Reply to the Response of the Real Party In Interest; and based on his representation of the relator in this case, he has personal knowledge of the facts contained therein and they are true and correct, and supported by competent evidence included in the appendix or the record.

Henry J. Paoli
HENRY J. PAOLI

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this the 23rd day of February, 2009.

Barbara C. Hodges
Notary Public in and for the State of Texas



CERTIFICATE OF SERVICE

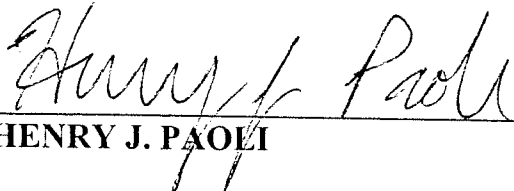
In accordance with Rule 9.5 of the Texas Rules of Appellate Procedure, I hereby certify that on February 23, 2009, a copy of the foregoing document was served upon the following persons:

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