Textile Unlimited, Inc. v. A. .BMH and Company, Inc.

United States Court of Appeals, Ninth Circuit, 2001.

240 F.3d 781.

■ Thomas, Circuit Judge. In this appeal, we consider, *inter alia,* the proper venue for a suit to enjoin an arbitration. Under the circumstances presented by this case, we conclude that the Federal Arbitration Act does not require venue in the contractually-designated arbitration locale.

I

Textile Unlimited, Inc. (“Textile”) claims that A. .BMH and Company, Inc. (“A. .BMH”) is, in the parlance of the industry, spinning a yarn by contending that the two companies had agreed to settle contract disputes by binding arbitration in Georgia. A. .BMH counters that Textile is warping the facts.

Over the course of ten months of this tangled affair, Textile bought goods from A. .BMH in approximately thirty-eight transactions. Each followed a similar pattern. Textile would send a purchase order to a broker in California containing the date, item number, item description, quantity ordered, and price. A. .BMH would respond with an invoice, followed by shipment of the yarn and an order acknowledgment. Both the invoice and the order acknowledgment contained a twist: additional terms tucked into the back of the invoice and the face of the acknowledgment, terms that had not adorned Textile’s purchase order. Specifically, the A. .BMH documents provided:

*Terms.* All sales of yarn by A. .BMH & Co., Inc. (“Seller”) are governed by the terms and conditions below. Seller’s willingness to sell yarn to you is conditioned on your acceptance of these Terms of Sale. If you do not accept these terms, you must notify Seller in writing within 24 hours of receiving Seller’s Order Confirmation. If you accept delivery of Seller’s yarn, you will be deemed to have accepted these Terms of Sale in full. You expressly agree that these Terms of Sale supersede any different terms and conditions contained in your purchase order or in any other agreement.

. . .

*Arbitration.* All disputes arising in connection with this agreement shall be settled in Atlanta, Georgia by binding arbitration conducted under the Commercial Arbitration Rules of the American Arbitration Association. The arbitrator will not be permitted to award punitive damages with respect to any dispute. Judgment upon the award rendered may be entered, and enforcement sought, in any court having jurisdiction. The total costs of arbitration, including attorneys’ fees, will be paid by the losing party.

*Governing Law and Venue.* This transaction shall be governed by and construed in accordance with the laws of the State of Georgia. If any court action is brought to enforce the provisions of this agreement, venue shall lie exclusively in the Superior Court of Fulton County, Georgia. You expressly consent to personal jurisdiction in the Superior Court of Fulton County, Georgia, and waive the right to bring action in any other state or federal court.

Textile did not request any alterations. However, after receiving a shipment in September 1998, Textile refused to pay, alleging that the yarn was defective. A. .BMH submitted the matter to arbitration in Atlanta, Georgia. The American Arbitration Association (“AAA”) notified both parties on January 10, 2000, that it had received the arbitration request. Textile did not object to the arbitration within the time provided by AAA rules. Textile eventually protested, contending that the arbitration clause had not been woven into the contract. Textile also argued that the objection period should have been lengthened because the initial notice had been sent to an attorney no longer with its law firm. Textile reserved the right to challenge the jurisdiction of the AAA, and indicated that nothing in the letter should be deemed a waiver.

With arbitration looming, Textile filed an action on April 10, 2000 in the United States District Court for the Central District of California to enjoin the arbitration. Unruffled, the AAA Arbitrator found on May 5, 2000 that the case was arbitrable. On June 26, 2000, Textile moved for a stay of the arbitration pending in Georgia. On July 17, 2000, the district court preliminarily enjoined both the pending arbitration and A. .BMH from any further action regarding arbitration of the dispute in question. A. .BMH timely appealed the district court’s order.

II

The district court correctly concluded that venue was proper in the Central District of California under 28 U.S.C. § 1391. Contrary to A. .BMH’s arguments, nothing in the Federal Arbitration Act (“FAA” or “the Act”), 9 U.S.C. § 1 *et seq.,* requires that Textile’s action to enjoin arbitration be brought in the district where the contract designated the arbitration to occur. [The court reviewed the judicial decisions interpreting the venue provisions of the Federal Arbitration Act.]

In sum, the district court correctly determined that venue was proper in the Central District of California. \* \* \* This result is consistent with the underpinnings of arbitration theory. One of the threads running through federal arbitration jurisprudence is the notion that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 648 (1986) (quoting United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582 (1960)). Requiring a party to contest the very existence of an arbitration agreement in a forum dictated by the disputed arbitration clause would run counter to that fundamental principle.

III

The district court did not abuse its discretion in granting the preliminary injunction. . . .

The district court found that Textile would suffer irreparable harm if the arbitration were not stayed, that the balance of hardships tipped in Textile’s favor and that it was in the public interest to stay arbitration. These findings were not clearly erroneous, and A. .BMH does not contest them on appeal.

Thus, to obtain a preliminary injunction, Textile needed only to show that serious questions were raised. The district court determined that not only were serious questions raised, but that Textile had shown a probability of success on the merits. The district court did not err in that assessment.

A

Section 2207 of the California Commercial Code controls contract interpretation when the parties have exchanged conflicting forms. See *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1443–44 (9th Cir.1986) (holding that a corresponding section of the Oregon U.C.C. statute applies in such circumstances). It provides:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer;

(b) They materially alter it; or

(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code.

Cal. Com.Code § 2207 (West 1964).

Under § 2207(1), an acceptance will operate to create a contract even if additional or different terms are stated *unless* the acceptance is expressly conditioned on assent to the new terms. If a contract is created under § 2207(1), then § 2207(2) defines the terms of the contract. . . . However, if the acceptance is expressly conditioned on the offeror’s assent to the new terms, the acceptance operates as a counteroffer. If the counteroffer is accepted, a contract exists and the additional terms become part of the contract. . . . To qualify as an acceptance under § 2207(1), an offeror must “give specific and unequivocal assent” to the supplemental terms. [The court relied upon *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440 (9th Cir. 1986), interpreting the Oregon enactment of UCC § 2–207.] If the new provisos are not accepted, then no contract is formed. However, even when the parties’ written expressions do not establish a binding agreement under § 2207(1), a contract may arise based upon their subsequent conduct pursuant to § 2207(3). Id.

A. .BMH argues that a contract including the arbitration clause was formed pursuant to § 2207(1) because the fine print provided that Textile was “deemed to have accepted these terms in full” if Textile did not respond in 24 hours. This contention is foreclosed . . . because Textile did not “give specific and unequivocal assent” to the supplemental conditions. Thus, a contract containing the new terms that A. .BMH attempted to pin on Textile was not formed under § 2207(1).

Part of . . . the rationale [in *Diamond Fruit Growers*, supra] was to avoid a rule which would allow one party to obtain “all of its terms simply because it fired the last shot in the exchange of forms.” Id. at 1444. In short, modern commercial transactions conducted under the U.C.C. are not a game of tag or musical chairs. Rather, if the parties exchange incompatible forms, “all of the terms on which the parties’ forms do not agree drop out, and the U.C.C. supplies the missing terms.”

A. .BMH also claims that a contract formed under § 2207(1) because its acceptance was not expressly made conditional on Textile’s assent to the additional or different terms. Thus, A. .BMH reasons, a contract was formed under § 2207(1) and we must turn to § 2207(2) to ascertain the contract terms. However, A. .BMH’s assertion is belied by the plain words of its documents which provide that “Seller’s willingness to sell yarn to you is conditioned on your acceptance of these Terms of Sale.” Thus, A. .BMH’s claim is unavailing.

B

Because no contract was formed under § 2207(1), our interpretation of the agreement must be guided by § 2207(3) which examines the conduct of the parties to determine whether a contract for sale has been established and the terms thereof. The parties do not dispute that through their actions, they formed a contract under § 2207(3).

The terms of an agreement formed pursuant to § 2207(3) are those terms upon which the parties expressly agreed, coupled with the standard “gap-filler” provisions of Article Two. The U.C.C. does not contain a “gap-filler” provision providing for arbitration. . . .

Under § 2207(3), the disputed additional items on which the parties do not agree simply “drop out” and are trimmed from the contract. . . . Thus, the supplemental terms proposed by A. .BMH, including the arbitration clause, do not festoon the contract between the parties.

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In sum, this action was properly venued in the Central District of California. The district court did not abuse its discretion in granting the preliminary injunction. To the contrary, the district court’s reasoning was correct in all respects.