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1 No. 135
In the Matter of Nicholas Schreiber,
Respondent-Appellant,
v.
K-Sea Transportation Corp. et al.,
Appellants-Respondents.

Thomas M. Canevari, for appellants-respondents.
Sanford F. Young, for respondent-appellant.
American Association for Justice, *amicus curiae*.

SMITH, J.:

The issue is the validity of a seaman's agreement to arbitrate his Jones Act claim against his employer, where the agreement was made after the seaman was injured. We hold, as did the Appellate Division, that post-injury arbitration agreements

are not prohibited, but that a hearing should be held to decide whether this arbitration agreement is enforceable. We disagree with the Appellate Division as to the burden of proof at the hearing; the burden should be on the party trying to invalidate the arbitration agreement.

Facts and Procedural History

Nicholas Schreiber was injured while working aboard the tug "Tasman Sea," owned by K-Sea Transportation Corp. Under admiralty law, Schreiber was entitled to "maintenance" from K-Sea (payments sufficient to provide him with food and lodging) while his injury prevented him from working. He was also entitled to sue K-Sea under the Jones Act (46 USC § 30104) if K-Sea's negligence caused his injury. K-Sea, pursuant to its interpretation of its collective bargaining agreement with Schreiber's union, began making maintenance payments to him of $15 per day.

Several weeks after the accident, K-Sea's claims manager, Alton Peralta, called Schreiber and made a proposal: K-Sea would increase its payments to two-thirds of Schreiber's regular wage, as an advance against settlement of any claims by Schreiber based on his injury, if Schreiber would agree to arbitrate those claims. Schreiber agreed, and Peralta sent him a written agreement with a short cover letter. The cover letter explained: "arbitration is a private process, and the outcome will be decided by one or more arbitrators, not by a jury." The

cover letter also told Schreiber, in bold letters: "You are not obligated to sign the agreement. You will continue to receive $15/day as maintenance, and medical cure at the Company's expense until you are fit for duty and/or reach maximum medical improvement, whether you sign the agreement or not."

Schreiber signed the agreement. It provided that he and K-Sea agreed to arbitrate all claims arising out of his injury under the rules of the American Arbitration Association (AAA). The agreement also provided: "Any filing fee, up to $750.00 and any deposit for compensation of the arbitrators shall be advanced by K-Sea, subject to subsequent allocation."

At the time of the agreement, Schreiber apparently expected to recover well from his injury. But the injury worsened, leaving him confined to a walking boot and unlikely ever to return to working at sea. Some 15 months after the injury, Schreiber sued K-Sea in Supreme Court, asserting Jones Act and other claims. K-Sea filed a demand for arbitration with the AAA, and sent the AAA a check for $750 "as K-Sea's portion of the filing fee." Its letter told the AAA that "the remainder of the filing fee is to be provided by Mr. Schreiber." The AAA responded by telling the parties that, since the amount of the claim was not stated in the demand, the minimum filing fee would be $10,000.

Schreiber petitioned Supreme Court to stay arbitration, and K-Sea cross-moved to compel arbitration. Supreme Court

granted Schreiber's petition. It rejected Schreiber's claim that the Federal Arbitration Act (FAA) rendered the agreement unenforceable, but held that K-Sea had failed to prove "that there was no deception or coercion on its part, and that Schreiber understood his obligations under the agreement." The Appellate Division, one Justice dissenting in part, reversed and directed a hearing on whether the agreement was enforceable. The Appellate Division majority concluded, as had Supreme Court, that K-Sea had an "obligation to show that the arbitration agreement is equitable," but found the issue could not be resolved without a hearing. Justice Andrias, dissenting, said the burden should be on Schreiber to demonstrate the invalidity of the arbitration agreement and concluded that, since he had not met that burden, arbitration should be compelled, though Schreiber should not be required to pay the $9,250 balance of the filing fee. The Appellate Division granted both parties leave to appeal.

The three opinions below reached three different conclusions, and we reach a fourth: There should be a hearing, at which the burden should be on Schreiber to show that the arbitration agreement is unenforceable. Though the Appellate Division erred in allocating the burden of proof, its order simply remands the case for a hearing, and we therefore affirm that order.

Discussion

Schreiber argues that the FAA forbids enforcement of

the arbitration agreement; that the Federal Employers Liability Act (FELA) also forbids it; and that, even if enforcement of the arbitration agreement is not barred by statute, it is barred by his status as a "ward of the admiralty." We reject all three arguments, but decide that the facts of this case warrant ordering a hearing on the agreement's enforceability.

I

Section 2 of the FAA (9 USC § 2) provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

This section reflects a federal policy favoring the arbitration of disputes (Moses H. Cone Memorial Hosp. v Mercury Constr. Corp., 460 US 1, 24 - 25 [1983]). The policy is applicable even to claims arising under protective statutes like the Jones Act (see Gilmer v Interstate/Johnson Lane Corp., 500 US 20, 26 [1991] ["statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA . . . [because by] agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a

judicial forum" (internal quotation marks and citation omitted)]; Fletcher v Kidder, Peabody & Co., 81 NY2d 623, 635 [1993]). Section 1 of the FAA (9 USC § 1), however, excludes from the scope of the FAA "contracts of employment of seamen." Schreiber argues that the arbitration agreement between him and K-Sea is part of his contract of employment and is therefore excluded from the FAA's coverage. He also argues that the exclusion implies a prohibition - i.e., that an arbitration agreement excluded from the FAA's coverage is unenforceable, even if it would otherwise be enforceable under state law.

We need not decide whether Schreiber is right about the enforceability of agreements excluded from the FAA by Section 1 (see O'Dean v Tropicana Cruises Intl. Inc., 1999 WL 33581, *1 - 2, 1999 US Dist LEXIS 7751, *3 - 4 [SD NY 1999] [holding an excluded agreement not inherently unenforceable]), because the agreement at issue here is not excluded from the FAA. It is not a "contract of employment"; it is a separate agreement, made after K-Sea had employed Schreiber, at a time when the occasion for arbitration - Schreiber's injury - already existed. We agree with all other courts to consider the question that an agreement like this is within the coverage of the FAA (see Terrebone v K-Sea Transp. Corp., 477 F3d 271, 278 - 280 [5th Cir 2007]; Nuñez v Weeks Marine, Inc., 2007 WL 496855, *1 - 5, 2007 US Dist LEXIS 10807, *4 - 19 [ED La 2007]; Barbieri v K-Sea Transp. Corp., 2006 WL 3751215, *7 - 8, 2006 US Dist LEXIS 91565, *21 - 26 [ED NY

2006]; Endriss v Eklof Marine Corp., 1998 WL 1085911, *4, 1998 US Dist LEXIS 23231, *12 - 16 [SD NY 1998]).

II

The FELA is relevant here because the Jones Act says that "[l]aws of the United States regulating recovery for personal injury to . . . a railway employee apply" to a Jones Act claim (46 USC § 30104 [a]). Section 5 of the FELA says that "[a]ny contract . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void" (45 USC § 55). On its face, this statute seems to pose no problem here, because K-Sea's contract with Schreiber does not purport to "exempt" K-Sea from "liability," but only to require that Schreiber's claim be arbitrated. In Boyd v Grand Trunk Western R. Co. (338 US 263 [1949]), however, the Supreme Court gave a broad reading to Section 5 of the FELA, holding that an agreement limiting an employee's choice of forum to a state or federal court in Michigan was void, on the theory that being subject to suit in a court of the employee's choice was part of the "liability created." Schreiber argues that the arbitration clause here is similar to the venue-selection clause in Boyd, since both clauses limit litigation to a particular forum.

We reject the analogy because there is a factor here not present in Boyd: the federal policy favoring arbitration. To hold, as Schreiber urges, that any agreement to arbitrate a Jones

Act claim is void would contradict that policy. We therefore conclude that an arbitration agreement is not a forbidden exemption from Jones Act liability. Again, the other courts to consider this question have reached the same conclusion (Terrebonne, 477 F3d at 280 - 286; Nuñez, 2007 WL 496855, *5 - 6, 2007 US Dist LEXIS 10807, *20 - 22).

III

As an alternative to his argument that federal statutes render the arbitration agreement void, Schreiber suggests that, because seamen are "wards of the admiralty," a contract between a seaman and his employer should be treated in the same way as, for example, a contract between a beneficiary and a trustee -- i.e., that such a contract is invalid unless it is shown to be fair to the seaman and untainted by deception, duress or any other factor that might bar its enforcement in equity. The "ward of the admiralty" doctrine was stated by Justice Story in Harden v Gordon (11 Fed Cas 480, 485 [C C Me 1823]) in this way:

> "[Seamen] are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired an advantage over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract in which they engage. If there is any undue inequality in

> the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction, is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable. . . . And on every occasion the court expects to be satisfied, that the compensation for every material alteration is entirely adequate to the diminution of right or privilege on the part of the seamen."

In Garrett v Moore-McCormack Co. (317 US 239, 247 [1942]), Justice Black quoted some of the above words of Justice Story, and added:

> "The analogy . . . between seamen's contracts and those of fiduciaries and beneficiaries remains, under the prevailing rule treating seamen as wards of admiralty, a close one. Whether the transaction under consideration is a contract, sale, or gift between guardian and ward or between trustee and cestui, the burden of proving its validity is on the fiduciary. He must affirmatively show that no advantage has been taken; and his burden is particularly heavy where there has been inadequacy of consideration."

K-Sea argues, in substance, that Justice Story's words of 1823, and even Justice Black's of 1942, are out of date. And indeed, there is something antiquated in the idea that seamen are less capable than other people of making contracts for themselves. Surely most seamen today are as intelligent and responsible as most others; the record shows that Schreiber himself writes lucid English, uses a computer, and has been involved in some business ventures. The federal courts have not,

however, abandoned the "ward of the admiralty" doctrine, though it has shown some signs of erosion (see Brinson v Linda Rose Joint Venture, 53 F3d 1044, 1048 [9th Cir 1995]).

The issue here is not the vitality of the "ward of the admiralty" doctrine in general, but whether it outweighs the policy favoring arbitration. We hold that it does not. Section 2 of the FAA says that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (9 USC § 2). The implication is that the party challenging the enforceability of an arbitration agreement has the burden of showing "grounds" for its "revocation." That burden is not shifted simply because the objecting party is a seaman. Schreiber is bound by his agreement with K-Sea unless he can show that fraud, unconscionability or some other defect justifies invalidating it.

IV

Though we agree with Justice Andrias, the dissenter in the Appellate Division, that the agreement here is, like other arbitration agreements, presumptively valid, we do not agree with Justice Andrias's conclusion that the result should be to compel arbitration without an evidentiary hearing. While Schreiber must bear the burden of proving the agreement invalid, the record does not conclusively show that he cannot do so.

There is no evidence that Peralta misled or intimidated Schreiber in their telephone conversation, and the cover letter

he sent to Schreiber with the proposed agreement clearly explains the choice Schreiber had to make -- including his choice, if he signed the agreement, to give up his right to a jury trial. There is, however, one troubling aspect of the agreement itself: the statement that K-Sea would advance any filing fee "up to $750.00." Anyone reading this statement in context would infer that the fee was likely to be around $750 or less -- but the fee actually demanded by the AAA was $10,000. If K-Sea expected the fee to be so far in excess of the one mentioned in the agreement -- and so far in excess of what most seamen can afford -- a fact-finder might conclude that K-Sea deceived Schreiber into signing. If Supreme Court finds that K-Sea intentionally misled Schreiber, and that if correctly informed he would not have agreed to arbitration, the arbitration agreement should be set aside. We imply no prejudgment of the issue: a hearing may well show that K-Sea acted in complete good faith. But there should be a hearing, at which the question is answered one way or the other (see Barbieri, 2006 WL 3751215, *9 [reaching a similar conclusion on almost identical facts]).

If Schreiber fails to show at the hearing that K-Sea obtained his agreement by intentionally deceiving him, Supreme Court should compel arbitration. Even in that event, however, Schreiber should not be compelled to bear costs which would effectively preclude him from pursuing his claim (see Green Tree Financial Corp.-Ala. v Randolph, 531 US 79, 92 [2000]). Thus,

any order compelling arbitration should be conditioned on K-Sea's agreement to bear any costs not waived by the AAA, subject later to reallocation of those costs by the arbitrator.

Accordingly, the order of the Appellate Division should be affirmed, without costs, and the certified question answered in the affirmative.

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Order affirmed, without costs, and certified question answered in the affirmative. Opinion by Judge Smith. Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

Decided November 27, 2007