FILED
United States Court of Appeals
Tenth Circuit

November 9, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DARRELL REEVES; JAMES KING; TODD A. ORCUTT,

Plaintiffs - Appellees,

v.

ENTERPRISE PRODUCTS PARTNERS, LP,

Defendant - Appellant.

No. 20-5020

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 4:19-CV-00570-JED-FHM)

Rachel B. Cowen, McDermott Will & Emery LLP, Chicago, Illinois, for Appellant.

Richard J. Burch, Bruckner Burch PLLC, Houston, Texas, for Appellees.

Before **TYMKOVICH**, Chief Judge, **BALDOCK** and **CARSON**, Circuit Judges.

TYMKOVICH, Chief Circuit Judge.

Darrell Reeves and James King worked as welding inspectors for Enterprise Products Partners through third party staffing companies, Cypress Environmental Management and Kestrel Field Services. Reeves brought a collective action claim to recover unpaid overtime wages under the Fair Labor

Standards Act, 29 U.S.C. § 216(b). King later consented to join the putative collective action and was added as a named plaintiff. Enterprise argues that both Reeves and King signed employment contracts with their respective staffing companies that should compel arbitration for both parties in this case.

We agree. Under the doctrine of equitable estoppel, we find that these agreements require the claims to be resolved in arbitration. Because Reeves and James's claims allege substantially interdependent and concerted misconduct by Enterprise and non-defendant signatories, Cypress and Kestrel, arbitration should be compelled for these claims. We reverse the district court's denial of Enterprise's motions to compel.[1]

I. Background

Enterprise is an integrated midstream energy company that gathers, treats, processes, transports, and stores natural gas. It engages with a variety of companies for third-party inspection services to assist in its pipeline construction. Enterprise uses Cypress and Kestrel, among others, for these services.

Reeves performed services for Enterprise through Cypress from April 2017 to December 2017 as a welding inspector. King similarly performed services for

[1] Although Enterprise moved against Reeves and King separately, both motions raise the same issue. Because the district court addressed it as one issue, we do the same in the following opinion. Although there are certain instances where we refer only to Reeves and Cypress, the analysis extends to the relationship between King and Kestrel.

Enterprise through Kestrel from January 2019 to October 2019 as a welding inspector.

Reeves and King both entered into separate employment agreements with their respective staffing companies. Both agreements included clauses that required them to individually arbitrate claims arising out of their employment with Cypress and Kestrel. In Reeves's employment agreement with Cypress, Reeves agreed to "resolve by arbitration all past, present, or future claims or controversies, including but not limited to, claims arising out of or related to my . . . employment . . ." Aplt. App. at 29. In King's mutual arbitration agreement with Kestrel, King agreed to "resolve by arbitration all past, present, or future claims or controversies, including but not limited to, claims arising out of or related to my . . . employment . . ." *Id.* at 80.

In July 2019, Reeves brought a collective action against Enterprise for unpaid overtime wages. He alleged that he and other similarly situated employees worked for Enterprise in excess of forty hours each week. Instead of paying them any overtime, Enterprise paid him and others a flat daily rate with no overtime compensation, regardless of hours worked. Reeves claimed that he is entitled to the FLSA's overtime mandate and should be paid overtime. King opted into the case on November 5, 2019.

Enterprise responded by filing motions to compel arbitration, arguing Reeves and King's respective employment agreements required arbitration. The district court denied the motions to compel, finding that the employment

agreements were not binding between Reeves or King and Enterprise, who was not a signatory to the agreement. Enterprise advanced a "concerted misconduct" or "intertwined-claims" theory of equitable estoppel, asking the district court to apply the arbitration clauses Reeves and King had agreed to in their employment agreements. The theory applies equitable estoppel in cases where the signatory plaintiff's claims either (1) rely on the terms of the written agreement containing the arbitration clause, or (2) raise allegations of "substantially interdependent and concerted misconduct by both the nonsignatory and the signatory to the contract." *MS Dealer v. Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999). The Oklahoma Court of Civil Appeals has used this theory of equitable estoppel in two previous cases. *See Cinocca v. Orcrist, Inc.*, 60 P.3d 1073 (Okla. Civ. App. 2002); *High Sierra Energy, L.P. v. Hull*, 259 P.3d 902 (Okla. Civ. App. 2011). Still, the district court declined to apply this theory of equitable estoppel because the Oklahoma Supreme Court has not yet adopted it. The district court found that even if it did apply the suggested equitable estoppel test, the alleged facts failed to justify equitable estoppel under either prong in this case. Therefore, the plaintiffs' claims were not subject to mandatory arbitration.

II. Analysis

Enterprise argues that (1) Oklahoma contract law requires applying an expanded equitable estoppel doctrine, and (2) Reeves and King's claims allege substantially interdependent and concerted misconduct by Enterprise and Cypress or Kestrel. We agree and find that the district court incorrectly concluded that

Reeves and King's claims did not allege substantially interdependent and concerted misconduct between Enterprise and the staffing companies.

A. Standard of Review

We review de novo the decision of the district court to grant or deny a motion to compel arbitration. *Avedon Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir. 1997) (citing *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 796 (10th Cir. 1995)); *see also 1mage Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1055 (10th Cir. 2006). Federal courts have a "liberal federal policy favoring arbitration agreements." *Nat'l Am. Ins. Co. v. SCOR Reins. Co.*, 362 F.3d 1288, 1290 (10th Cir. 2004) (internal citation omitted). And "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983).

Because estoppel is an equitable theory, however, some circuits have held that when a district court rules on a motion to compel that is based on estoppel, the review should be for an abuse of discretion rather than de novo. *See Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 395 (4th Cir. 2005); *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000). But other courts continue to apply a de novo standard even when a motion to compel is based on equitable estoppel. *See, e.g., Donaldson Co. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 731 (8th Cir. 2009); *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1044 & n. 1 (9th Cir. 2009); *Bouriez v. Carnegie Mellon Univ.*, 359 F.3d

292, 294 (3d Cir. 2004); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993).

This court has "not yet decided" what standard applies to a denial of a motion to compel arbitration based on equitable estoppel. *Jack v. CMH Homes Inc.*, 856 F.3d 1301, 1304 (10th Cir. 2017) (citing *Bellman v. i3Carbon, L.L.C.*, 563 F. App'x 608, 612–13 (10th Cir. 2014)). For this case, "there is no reason to depart from the de novo standard." *Donaldson*, 581 F.3d at 731. This case presents "at least mixed questions of law and fact." *Id.* In this circuit, "[w]here a mixed question primarily involves the consideration of legal principles, then a de novo review by the appellate court is appropriate" (internal citation omitted). *Osage Nation v. Irby*, 597 F.3d 1117, 1122 (10th Cir. 2010). Here, the district court's decision turned on whether the concerted misconduct equitable estoppel test applies, primarily an issue of law. We review this determination de novo.

B. Oklahoma Contract Law

The scope of the arbitration agreement, including the question of who it binds, is a question of state contract law. *Arthur Andersen L.L.P. v. Carlisle*, 556 U.S. 624, 630–31 (2009). "[T]raditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Id.* (internal quotation marks omitted). Accordingly, our task in these circumstances is to determine whether the relevant state's high court would permit the nonsignatory to enforce the

arbitration clause. *See Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 666 (10th Cir. 2007). If the state's high court has not explicitly decided the issue, the district court must "attempt to predict what the state's highest court would do." *Id.* (citing *Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 866 (10th Cir. 2003)). The court may "seek guidance from decisions rendered by lower courts in the relevant state, appellate decisions in other states with similar legal principles, district court decisions in interpreting the law of the state in question, and the 'general weight and trend of authority' in the relevant area of law." *Wade*, 483 F.3d at 666 (internal citations omitted).

The Oklahoma Supreme Court has yet to address concerted misconduct estoppel. *See Williams v. TAMKO Bldg. Prods., Inc.,* 451 P.3d 146, 153–54 (Okla. 2019) (attempt to bind nonsignatory purchasers). But the Oklahoma Supreme Court has noted that it would be more willing to enforce an arbitration agreement where "a signatory" was "avoiding arbitration with a nonsignatory" and the nonsignatory was seeking to resolve issues "that were intertwined with the agreement." *Carter v. Schuster*, 227 P.3d 149, 156 (Okla. 2009). In that situation, the court reasoned that the "signatory is merely being held to his previous agreement to arbitrate." *Id.*

Although several Oklahoma cases have employed equitable estoppel in the arbitration context, Reeves argues that the federal court should be "reticent to expand state law without clear guidance from its highest court." Aple. Br. at 16 (citing *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1295 (10th Cir. 2017)). State

appeal court decisions, however, are persuasive in determining the applicable equitable estoppel test. *See Wade*, 483 F.3d at 666; *In re Wholesale Grocery Products Antitrust Litigation*, 707 F.3d 917, 927 (8th Cir. 2013) (Benton, J., dissenting) (finding that an unpublished appeals court decision from Minnesota provided a "persuasive indication" of how the state supreme court would apply equitable estoppel). Moreover, evidence that state law and law from other jurisdictions "indicates a clear trend" can help give guidance to how we should apply state law. *Armjio*, 843 F.2d at 407. Many other states and circuits have adopted the Eleventh Circuit's understanding of equitable estoppel and nonsignatory parties. *See Autonation Fin. Servs. Corp. v. Arain*, 592 S.E.2d 96, 100 (Ga. Ct. App. 2003); *Grigson,* 210 F.3d at 1172, *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483 (Miss. 2005) (narrowing the "substantially interdependent" prong to only nonsignatories that have an alter ego, parent/subsidiary or agency relationship with the signatory); *Southern Energy Homes, Inc. v. Kennedy*, 774 So.2d 540 (Ala. 2000); *Meyer v. WMCO-GP, L.L.C.*, 221 S.W.3d 302 (Tex. 2006); *Luke v. Gentry Realty, Ltd.*, 96 P.3d 261 (Haw. 2004); *Hard Rock Hotel, Inc. v. Eighth Jud. Dist. Ct. of State in & for Cnty. of Clark*, 390 P.3d 166 (Nev. 2017); *Rossi Fine Jewelers, Inc. v. Gunderson*, 648 N.W.2d 812 (S.D. 2002); *Melendez v. Horning*, 908 N.W.2d 115 (N.D. 2018); *but see Doe v. Caramel Operator, L.L.C.*, 160 N.E.3d 518 (Ind. 2021) (refusing to endorse alternative theories of equitable estoppel); *Mundi*, 555 F.3d at 1046 (finding that "only those who have agreed to arbitrate

are obliged to do so"); *Ervin v. Nokia, Inc.*, 812 N.E.2d 534, 542–34 (Ill. App. Ct. 2004) (refusing to apply another theory of equitable estoppel because "arbitration is first a matter of consent").[2]

Here, there are two Oklahoma appellate court cases that affirmatively adopt the two-prong concerted misconduct equitable estoppel test. *See Cinocca*, 60 P.3d at 1073; *High Sierra Energy*, 259 P.3d at 902. In those cases, the court held that equitable estoppel applied for nonsignatories in two circumstances based on the Eleventh Circuit decision *MS Dealer*. *See* 177 F.3d at 942.

In the first circumstance, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. *Id.* at 947. That is not the case here, as Reeves and King's claims do not "arise out of and relate directly to the written agreement." *Id.* Alternatively, equitable estoppel applies when the signatory raises allegations of substantially interdependent and

[2] This court has previously applied the concerted misconduct equitable estoppel test based on a state appellate court's opinion. *See Lenox MacLaren v. Medtronic, Inc.*, 449 F. App'x 704, 709 (10th Cir. 2011) (unpublished). In *Lenox*, we did note, however, that we "need not decide whether the Colorado Supreme Court" would actually adopt the test because "we conclude that neither of those circumstances is present here." *Id.*

concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. *Id.* That is the case here.

C. Application

Reeves and King's claims allege substantially interdependent and concerted misconduct by both Cypress or Kestrel and Enterprise. We therefore conclude that Reeves and King are estopped from avoiding their duty to arbitrate their claims arising out of their employment relationship with Cypress or Kestrel.

"The linchpin for equitable estoppel is equity—fairness." *Grigson*, 210 F.3d at 528. Here, as in *Grigson*, to "not apply" this understanding of equitable estoppel "to compel arbitration would fly in the face of fairness." *Id.* It is "especially inequitable" when a "signatory non-defendant" such as Cypress or Kestrel, "is charged with interdependent and concerted misconduct with a nonsignatory defendant" such as Enterprise, and the signatory "in essence" becomes a party to the litigation. *Id.* Reeves and King cannot "have it both ways" and on "one hand, seek to hold the nonsignatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because defendant is a nonsignatory." *Id.* The alleged "misconduct" in this case is the fact Enterprise did not pay Reeves overtime wages. Cypress was the one who paid Reeves's salary and sent him records of his pay stubs. The same is true for King and Kestrel. Given that Cypress was the one who actually paid Reeves a flat day rate, the allegations of misconduct against the nonsignatory and the signatory are substantially

interdependent. This litigation will require Cypress and Kestrel to become involved and "in essence" make them parties. *See id.*

Reeves alleged in his original complaint that Enterprise "paid" him a "flat sum for each day worked, regardless of the number of hours." Aplt. App. at 11. He also wrote he "was required to report the days worked to Enterprise, not the hours he worked." *Id.* The employment agreement Reeves signed with Cypress stated that "employment is based on a specific project to be performed for a designated customer," and that "any concern arising out of the working relationship must be reported and addressed directly with Cypress." *Id.* at 28. The agreement went on to state Reeves understood Cypress's relationship with third-party customers was "critical" to the "employee's opportunity for employment." *Id.* at 29. Reeves knew that his work for Cypress would be mainly for its customers, such as Enterprise. This litigation will surely involve facts regarding the role Cypress had in his employment with Enterprise and the ensuing dispute. Reeves agreed to bring "any dispute, controversy, or claim arising out of or related in any way to the parties' employment relationship" in arbitration. *Id.* Reeves has already agreed to arbitrate these claims that would be substantially intertwined with Enterprise's alleged nonpayment of his wages.

The purpose of the doctrine of equitable estoppel is to prevent parties "playing fast and loose with the courts" and also to "protect[] the judicial system." *In re Coastal Plains Inc.*, 179 F.3d 197, 205 (5th Cir. 1999); *Grigson,* 210 F.3d at 530. Reeves and King cannot simply plead around Cypress and

Kestrel, who would have to become crucial parties to the litigation. While Reeves may have carefully left out any claims against Cypress in his pleading, his claims are "inherently inseparable" and integrally related from his relationship, employment, and agreement with Cypress. *Grigson*, 210 F.3d at 528.

In *Cinocca*, the Oklahoma Court of Civil Appeals found that an agreement between a law firm and a recently terminated employee to "return the computer back to its condition" was enough for the employee's claims against a nonsignatory agent who was hired to clear her computer to be "intertwined" with her claims against the signatory law firm. 60 P.3d at 1073, 1075. An attorney argued that the technology contractor hired by her law firm to wipe pertinent work data off her computer had exceeded his scope of authority by accessing her computer outside of her presence and deleting material without her approval. The contractor brought a motion to enforce the arbitration clause found in the attorney's separation agreement with the law firm. Even though the contractor was a nonsignatory, the court found that equitable estoppel compelled the attorney to arbitrate her claims because her claims against the nonsignatory were "inherently inseparable" from her claims against the signatory. *Id.* at 1075. The court also noted that her claims were within the scope of the agreement and related to the "rights and obligations arising under" the separation agreement. *Id.* at 1074. Surely Reeves's agreement covering "any concern arising" out of Reeves's employment with Cypress would include a payment claim against one of Cypress's customers. Aplt. App. at 28. Reeves's claims against Enterprise

clearly allege such intertwined claims regarding his employment with Cypress and Enterprise that Cypress would "in essence, become[] a party, with resulting loss, among other things, of time and money because it requires participation in the court proceedings." *Cinocca*, 60 P.3d at 1075. Although Reeves and King did not bring any explicit claims against their staffing companies, they are merely "seeking to avoid the agreement" by bringing a claim against Enterprise. But Enterprise is merely a customer of Reeves and King's main employers, Cypress and Kestrel. *Id.* at 1075.

Similarly, in *High Sierra*, the court found arbitration could be compelled so long as the claims rested on benefits in the agreement and alleged "substantially interdependent and concerted misconduct" by the nonsignatories and signatory. 259 P.3d at 902, 908. High Sierra Energy executed a sale agreement with several individuals for the purchase of multiple energy-services companies which included an arbitration clause. High Sierra retained some of these individuals as managers. Later on, High Sierra then sued *one* of these managers and other nonsignatory individuals for various claims, including misappropriation of trade secrets. The court found that because High Sierra's claims rested upon the benefits it expected to receive from its sale agreement, it was compelled to arbitrate its claims, even against the nonsignatories. *Id.* at 907. Finding the claims against nonsignatories and the signatory were "substantially 'intertwined'" and "aver[red] 'substantially interdependent and concerted misconduct.'" *Id.* at 908, 909.

Here, Reeves's claims against Enterprise are "clearly relate[d]" to his employment agreement and "substantially intertwined" with Cypress's conduct because it involves the income he expected to receive from Cypress during his employment. *Id.* The agreement states, "the Employer agrees to hire the Employee" and also authorizes Cypress to "deduct" from Reeves's salary for any personal use of company resources or "withhold" salary if Reeves fails to return company equipment. Aplt. App. at 28–29. Reeves's claims against Enterprise for his salary payments relate to Cypress's duties under his employment agreement. A party cannot use the lack of one's signature on a written contract to preclude enforcement of an arbitration clause, yet "maintain[] that other provisions of the same contract should be enforced to benefit him." *Lenox*, 449 F. App'x at 708. We do not find that the facts here are, as the district court claims, materially different than those in *Cinocca* and *High Sierra*. The district court even states that in *High Sierra*, the plaintiff's claims "rested on the benefits it had expected to receive under the purchase agreement." It then states that Reeves's claim is different because it relates to Enterprise's role under FLSA. However, it fails to acknowledge that Reeves's claim will be integrally intertwined to Reeves's right to his salary as an inspector for Cypress—which arises out of his employment agreement. We are merely holding Reeves and King to their "previous agreement to arbitrate." *High Sierra*, 259 P.3d at 908 (citing *Carter*, 227 P.3d at 156).

Reeves and King should honor the arbitration agreements that regulate their rights and benefits arising from their employment with Cypress and Kestrel. Moreover, Reeves and King have already consented to arbitrate any claims arising out of their employment, which would obviously include any issues with their employer's customers. Their claims against Enterprise are "integrally related" to their employment agreement with Cypress and Kestrel and allege "substantially interdependent and concerted misconduct" by both their staffing companies and Enterprise. *High Sierra*, 259 P.3d at 908–909.

III. Conclusion

For the foregoing reasons, we **REVERSE** the district court's order denying Enterprise's motions to compel arbitration and **REMAND** for proceedings consistent with this opinion.

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RE: 20-5020, Reeves, et al v. Enterprise Products Partners
Dist/Ag docket: 4:19-CV-00570-JED-FHM

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Richard Jennings Burch
Julianne Lomax

CMW/sls