

PRACTICE POINTS

Financial Hardship Can Nullify Employee's Obligation to Arbitrate Statutory Claims

By Lally Gartel – February 13, 2018

In [*Adams v. Kent Sec. of N.Y., Inc.*](#), 2017 NY Slip Op 09274 (Dec. 28, 2017), a New York appellate court held that an arbitration agreement may not be enforceable if the plaintiff can demonstrate that its cost-shifting and venue provisions create sufficient financial hardship to prevent the plaintiff from pursuing his or her statutory claims.

Plaintiff Adams, a resident of New York, was a former employee of the defendant. His employment contract contained a clause requiring that all employment-related claims be submitted to arbitration in Miami, Florida. The arbitration clause provided that the prevailing party could recover reasonable attorney fees and all other arbitration expenses.

Adams brought a class-action lawsuit in New York state court against his employer for the untimely payment of wages. The employer moved to compel arbitration, arguing that Adams had agreed to arbitrate his employment claims. Adams argued that due to his limited financial means, the venue and cost-shifting provisions of the arbitration agreement prevented him from asserting his rights under New York's wage-and-hour laws and rendered the arbitration agreement unenforceable.

The court held that that, even though New York has a "long and strong public policy favoring arbitration," the trial court erred in failing to address Adams's contention that his financial circumstances would preclude him from pursuing his claims in the arbitral forum. The court cited [*Matter of Brady v. Williams Capital Group, L.P.*](#), 14 NY3d 459 [2010]) for the proposition that it would be against public policy for an arbitration agreement to prevent the "effective vindication of statutory rights." *Brady* held that courts faced with such questions should consider the following factors: "(1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum."

Applying those factors, the court held that Adams had made a preliminary showing that the venue and fee-shifting provisions of the arbitration agreement could preclude him from pursuing his statutory wage-and-hour claims. The court remanded the case for further proceedings, instructing the trial court to examine evidence regarding the plaintiff's income, assets, and the expected costs and fees to arbitrate the dispute in Florida. The court also ruled that, when considering whether the costs associated with arbitration would preclude the plaintiff from pursuing his statutory claims, the trial court also could consider the risk that Adams might have to pay the defendant's legal fees and expenses.

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