

**IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT**

NETCO, INC., et al.,)	
)	
Plaintiffs-Respondents,)	
)	
vs.)	SD26064
)	
JIMMY V. DUNN, et al.,)	
)	
Defendants-Appellants.)	

RESPONDENTS’ ALTERNATIVE APPLICATION FOR TRANSFER

COME NOW Respondents Netco, Inc. and Schmitz & Associates, Inc., and, alternatively to their Motion for Rehearing En Banc, move this Court, pursuant to Mo. R. Civ. P. 83.02, to transfer this case to the Missouri Supreme Court to address the following questions of general interest or importance, and to re-examine the following issues of existing law within the meaning of Rule 83.02.

QUESTIONS OF GENERAL INTEREST OR IMPORTANCE

AND ISSUES OF EXISTING LAW THAT SHOULD BE RE-EXAMINED

1. Whether plaintiffs who deny making an arbitration agreement, and support their denial with substantial, competent affidavit and deposition testimony establishing that there are genuine issues of material fact on that issue, are entitled to either a jury trial under the Federal Arbitration Act, 9 U.S.C. § 4, or a full evidentiary before the trial court under the Missouri Arbitration Act, RSMo § 435.355.

2. Whether this Court, under the guise of enforcing the Federal Arbitration Act’s policy favoring arbitration, abused its judicial power by disregarding well-established contract,

agency, alter ego and estoppel principles and elements in order to compel non-signatories to arbitrate their claims.

3. Whether the common law defense of continuing economic duress or business compulsion, as recognized by courts in this State, is a valid defense to an argument that non-signatories voluntarily accepted the benefits of a contract containing an arbitration provision and are therefore estopped to deny arbitration.

STATEMENT OF FACTS

Plaintiffs filed their lawsuit alleging, in essence, that the eleven named Defendants conspired to misappropriate Plaintiffs' businesses. In response, Defendants filed a Motion to Compel Arbitration and to Stay Litigation, contending that Plaintiffs are bound to arbitrate under two arbitration provisions and five legal theories: express contract, agency, alter ego, third-party beneficiary and estoppel. The parties filed respective briefs on the arbitrability issues, which were supported by affidavits and, in the case of Plaintiffs, also by deposition testimony.

After oral argument and months of careful consideration of the voluminous record in this case, the trial court denied Defendants' Motion to Compel Arbitration, concluding that Plaintiffs were not bound to arbitrate under either arbitration provisions. The trial court did not conduct an evidentiary hearing at which live witnesses were presented and cross-examined, although a jury trial or, alternatively, a bench trial was repeatedly requested by Respondents in pleadings and in oral argument. Indeed, none of the Defendants or their witnesses have ever been cross-examined in this case.

On appeal, this Court reversed the trial court's conclusion with respect to one of those arbitration provisions, holding that Plaintiffs are bound to arbitrate under the Pro Net Arbitration Agreement.¹ This Court found that Netco was bound to arbitrate (1) by express

¹ Because the Pro Net issue was dispositive, the Court did not reach the issue of arbitrability under the other purported arbitration agreement.

agreement and (2) because it had accepted the benefits of Pro Net membership and therefore was estopped to deny arbitration. The Court held that Schmitz Associates was also estopped to deny arbitration, basing its decision in part on an alter ego-type analysis. However, virtually every single fact upon which the Court relied in making those findings was directly refuted by substantial, competent evidence.² Although it expressly found that three of the Defendants (Global, Evans and Evans Associates) were not Pro Net members -- and thus not parties to the Pro Net Arbitration Agreement -- this Court nevertheless compelled Plaintiffs to arbitrate *all* of their claims against *all* of the Defendants.

LEGAL BASIS FOR TRANSFER

I. Whether plaintiffs who deny making an arbitration agreement, and support their denial with substantial, competent affidavit and deposition testimony establishing that there are genuine issues of material fact on that issue, are entitled to either a jury trial under the Federal Arbitration Act, 9 U.S.C. § 4, or a full evidentiary before the trial court under the Missouri Arbitration Act, RSMo § 435.355.

Whether a party has the right to a jury trial or full evidentiary hearing on disputed issues of fact as to arbitrability is an issue of first impression in this State. The Federal Arbitration Act (“FAA”) expressly provides the right to a jury trial where, as here, there are disputed issues of material fact. 9 U.S.C. § 4. Although some state courts in other jurisdictions have

² The few facts the Court relied upon that were not controverted were background facts or otherwise insufficient, as a matter of law, to support estoppel or alter ego.

held that the right under the FAA to a jury trial applies in a state court proceeding, Missouri courts have not yet addressed this issue. *See, e.g., Premiere Automotive Group, Inc. v. Welch*, 794 So.2d 1078, 1083 (Ala. 2001); *England v. Dean Witter Reynolds*, 811 S.W.2d 313, 314 (Ark. 1991); *Adler v. Rimes*, 545 So.2d 421, 422 (Fl. App. 1989).

Nor have Missouri courts considered whether the Missouri Arbitration Act provides the right to a jury or bench trial. RSMo § 435.355. That Act states that if a party denies the making of an arbitration agreement, “the court shall proceed summarily to the determination of the issue so raised” *Id.* § 435.355.1.

Few rights are more precious to our system of justice than the constitutional right to a jury trial and the right to cross-examine witnesses. *See* Mo. Const. Art. 1, §§ 10, 22(a); *Williams v. Board of Educ., Cass R-VIII Sch. Dist.*, 573 S.W.2d 81 87 n.3 (Mo. App. 1978) (citing *Pettus v. Casey*, 358 S.W.2d 41, 44 (Mo. 1962)). Given these fundamental, constitutionally protected rights, the right to a trial – whether a jury or bench trial – to resolve disputed issues of fact as to arbitrability cannot seriously be in dispute. Where, as here, there are genuine issues of material fact as to whether a party waived his right to a jury trial by agreeing to arbitrate, it would work a double travesty if he were also denied his constitutional right to cross-examine the defendant about the very assertions purporting to show that the plaintiff had waived his right to a jury trial on the merits of his claim.

The Missouri Arbitration Act authorizes a trial court to “summarily determine” the issue of arbitrability. It is well-settled that issues of credibility are for the trial court to resolve. *Evans v. Stirewalt*, 2005 WL 729568 (Mo. App. S.D. 2005); *Jarrell v. Director of Revenue*, 41 S.W.3d 42 (Mo. App. S.D. 2001). But even a trial court is *not* authorized to make

credibility determinations on conflicting affidavits. *See New Prime, Inc. v. Professional Logistics Mgmt Co., Inc.*, 28 S.W.3d 898, 904 (Mo. App. S.D. 2000); *Horne v. Ebert*, 108 S.W.3d 142, 147 (Mo. App. W.D. 2003). Rather, as is implicit in *New Prime* and *Horne*, the trial court must conduct a trial – whether by jury or full evidentiary hearing -- to assess the witnesses’ credibility. As stated by the Missouri Supreme Court, trial courts are in a better position than an appellate court to judge the credibility of witnesses. *In re Adoption of W.B.L.*, 681 S.W.2d 452 (Mo. banc 1984). Thus, a jury trial is expressly mandated by the FAA, and, given the foregoing authority, a jury or bench trial is implicitly mandated under the Missouri Arbitration Act.

In particular, estoppel, the primary basis of this Court’s Opinion, is a question of fact that cannot be resolved on conflicting affidavits. That is because estoppel must be proven by “clear and satisfactory evidence.” *See also Peerless Supply Co. v. Industrial Plumbing & Heating Co.*, 460 S.W.2d 651, 666 (Mo. 1970); *Van Kampen v. Kauffman*, 685 S.W.2d 619, (Mo. App. S.D. 1985). Obviously, where there are diametrically opposed affidavits, as here, the evidence is not “clear and satisfactory.”

In this case, the Appellate Court necessarily made credibility determinations on conflicting affidavits, accepting Appellants’ version of events as true, and disregarding Respondents’ contrary affidavits and deposition testimony. This it was not entitled to do. *See New Prime, Inc.*, 28 S.W.3d at 904; *Horne*, 108 S.W.3d at 147; *Evans v. Stirewalt*, 2005 WL 729568 at*1; *Jarrell*, 41 S.W.3d at 45-46.

The following is a prime example of the fact that the affidavits in this case were diametrically and irreconcilably opposed: Plaintiffs argued that no arbitration agreement

existed because Pro Net rejected Netco's membership application. In support of that argument, Plaintiffs submitted the affidavit – and audiotape recording -- of Paul Brown, Pro Net's agent, who admitted that, at Pro Net's direction, he *rejected* Netco's application because Netco had amended the terms of the contract. In response, Defendants submitted the Affidavit of Harold Gooch, who conceded that Netco was asked to submit a new application, but that Pro Net later changed its mind and accepted it as modified by Netco. Of course, once a contract has been rejected, there is no power to accept it. In finding that a valid contract was created when Pro Net accepted the application, the Court necessarily accepted Gooch's *implication* that the contract had not been rejected, wholly disregarding Plaintiffs' *unequivocal* evidence that the application had, in fact, been rejected.

This is but one example of this Court making a credibility determination based on conflicting affidavits. The record is replete with other examples where the Appellate Court accepted as true a fact that was directly controverted by Plaintiffs' evidence.

Plaintiffs in this case filed with the trial court a demand for a jury trial or, in the alternative for an evidentiary hearing before the trial court. Plaintiffs reiterated that request to this Court in their Response Brief. As established above, Plaintiffs are entitled to a jury trial or, at the very least a full evidentiary hearing before the trial court on the disputed issue of the making of an arbitration agreement.

II. Whether this Court, under the guise of enforcing the Federal Arbitration Act's policy favoring arbitration, abused its judicial power by disregarding well-established contract, agency, alter ego and estoppel principles and elements in order to compel non-signatories to arbitrate their claims.

Arbitration is *strictly* a matter of contract; a party cannot be compelled to submit a dispute to arbitration that he has not agreed to submit. *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418 (1986); *Greenwood v. Sherfield*, 895 S.W.2d 169, 174 (Mo. App. S.D. 1995). Indeed, arbitration “is a matter of consent, not coercion.” *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754, 764 (2002). This Court violated these fundamental principles when it ignored elementary contract law principles in compelling Plaintiffs to arbitrate.

a. This Court’s holding that Defendants Global, Evans and Evans Associates are entitled to enforce Pro Net arbitration even though, it held, they are not Pro Net members (and thus not signatories to the Pro Net arbitration agreement) is contrary to *Prickett v. Lucy Lee Hosp., Inc.*, 986 S.W.2d 947 (Mo. App. S.D. 1999); and *Lake Ozark Constr. Indus., Inc. v. North Port Assoc.*, 859 S.W.2d 710, 714 (Mo. App. W.D. 1993).

b. This Court’s holding that Plaintiffs are estopped to deny arbitration despite conflicting affidavit and deposition testimony is contrary to: *Peerless Supply Co. v. Industrial Plumbing & Heating Co.*, 460 S.W.2d 651, 666 (Mo. 1970) (estoppel must be proven by clear and satisfactory evidence); and *Van Kampen v. Kauffman*, 685 S.W.2d 619, 625 (Mo. App. S.D. 1985) (same).

c. This Court’s holding that Plaintiffs had the power to accept Netco’s Pro Net membership application after Pro Net had expressly rejected it is contrary to: *Boehm v. Reed*, 14 S.W.3d 149 (Mo. App. W.D. 2000); *Beck v. Shrum*, 18 S.W.3d 8 (Mo. App. E.D. 2000); and *Abrams v. Four Seasons Lakesites*, 925 S.W.2d 932 (Mo. App. S.D. 1996).

d. This Court's suggestions that Schmitz Associates is the alter ego of Netco despite the absence of any evidence that Schmitz Associates was used to perpetrate a fraud or wrong, and without sufficient, undisputed evidence of control over Schmitz Associates is contrary to: *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32 (Mo. banc 1999); *Fairbanks v. Chambers*, 665 S.W.2d 33 (Mo. App. W.D. 1984); *Blackwell Printing Co. v. Blackwell-Wielandy Co.*, 440 S.W.2d 433 (Mo. 1969); *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641 (Mo banc 2002).

e. This Court's holding that Defendants and Schmitz Associates (which are not Amway businesses) are eligible for Pro Net membership despite the provision of Pro Net's Bylaws limiting membership to Amway businesses ignores the well-established contract construction principles in *Stephens v. Brekke*, 977 S.W.2d 87 (Mo. App. S.D. 1998); and *Eisenberg v. Redd*, 38 S.W.3d 409 (Mo. banc 2001).

f. This Court's holding that Appellants and Respondents are members of Pro Net despite Pro Net's failure to satisfy an express condition precedent to membership (*i.e.*, written acceptance of membership stating the class of membership) as set forth Pro Net's Bylaws is also contrary to the contract construction principles in *Stephens v. Brekke*, 977 S.W.2d 87 (Mo. App. S.D. 1998); and *Eisenberg v. Redd*, 38 S.W.3d 409 (Mo. banc 2001).

III. Whether the common law defense of continuing economic duress or business compulsion, as recognized by courts in this State, is a valid defense to an argument that non-signatories voluntarily accepted the benefits of a contract containing an arbitration provision and are therefore estopped to deny arbitration.

This is an issue of first impression in this State. Although Missouri courts recognize the existence of the economic duress doctrine, it has not been asserted as a defense to estoppel in this State. *See State ex rel. State Highway Comm'n v. City of St. Louis*, 578 S.W.2d 712 (Mo. App. E.D. 1978); and *Coleman v. Crescent Insulated Wire & Cable Co.*, 168 S.W.2d 1060 (Mo. 1943). Courts in other states, however, have recognized that estoppel will not lie where, as here, an arbitration clause is unilaterally imposed on a person who has no economically feasible opportunity to opt out of the provision. *See Powertel, Inc. v. Bexley*, 743 So.2d 570, 575 (Fla. 1st DCA 1999).

Here, Plaintiffs presented substantial, competent evidence from non-parties hereto, including an agent of Defendants, who testified not only that were they were threatened that their BSMs business would be cut off if they did not join Pro Net, but that when they refused to deal with Pro Net or were otherwise viewed with disfavor by it, their BSMs business was, in fact, taken away, just like Plaintiffs' business was. Indeed, Plaintiffs even presented the affidavit of the person who exerted that coercion, who admitted doing so on behalf of Defendants. These facts call out for application of the continuing economic duress doctrine to defeat estoppel.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request this Court to transfer this case to the Missouri Supreme Court to address these questions of general interest or importance, and to re-examine the foregoing issues of existing law.

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CERTIFICATE OF SERVICE

I hereby certify that I did on this 28th day of April, 2005, cause a copy of the foregoing
RESPONDENTS' APPLICATION FOR TRANSFER, to be served via overnight mail,
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