AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between PAMELA HERRINGTON, individually and on behalf of all others similarly situated, Claimant, and WATERSTONE MORTGAGE CORPORATION, RESPONDENT.	AAA No. 51 160 00393 12

Before:
George C. Pratt
Arbitrator

PARTIAL FINAL AWARD ON CLAUSE CONSTRUCTION
July 11, 2012

The dispute giving rise to this arbitration is Claimant Herrington's complaint that Respondent Waterstone has failed to pay its mortgage loan officers minimum wages and overtime premium pay as required by the Fair Labor Standards Act (FLSA), 20 USC §201 et seq. and in violation of Respondent's standard Loan Originator Employment Agreement.

PROCEDURAL BACKGROUND

In November 2011 Claimant brought a class-action suit in the United States District Court for the Western District of Wisconsin. Waterstone moved to dismiss or

stay the action on the ground that Herrington's claims were subject to an arbitration agreement.

The arbitration clause in the form Agreement, insofar as pertinent here, reads:

> {A]ny dispute between the parties concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship shall be resolved through binding arbitration in accordance with the rules of the American Arbitration Association applicable to employment claims. Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement. (Agreement § 13; emphasis added).

On its motion, Waterstone sought not only to require the dispute to be arbitrated, but also to bar Herrington from pursuing any class or collective relief in the arbitration. Waterstone argued that the underscored language quoted above waived any claim by Herrington to join with others in pursuing her wage claims. Herrington argued in opposition that her statutory FLSA claim would not be subject to arbitration, and that in any event, the waiver provision in the arbitration clause violated the National Labor Relations Act because it would require her to give up her right under the statute to bring claims collectively.

The District Court disagreed with Herrington's contention that FLSA claims could only be brought in the district court, but agreed with Herrington on the waiver issue and severed the underscored language from the Agreement. Accordingly, the Court granted Waterstone's motion to require arbitration, and stayed the District Court action pending the outcome of the arbitration. After noting that Waterstone "requests explicitly that a collective action proceed in arbitration rather than federal court in the event the court invalidates the collective action waiver" (D. Ct. Decn. at 16), the Court ordered that

Herrington's "claim must be resolved through arbitration, but she must be allowed to join other employees to her case." (*Id.* at 18). Neither party appealed the District Court's decision.

By demand dated March 23, 2012, Herrington commenced this arbitration, attaching, as her demand, the Class Action Complaint she had filed in the District Court. At the initial hearing the parties agreed that as a threshold matter it should be determined what kind of an arbitration this will be. Herrington contended that this proceeding should proceed as a class arbitration under the AAA's Supplementary Rules for Class Arbitration ("Supplementary Rules"), which permit an "opt-out" proceeding similar to that allowed by Rule 23 of the Federal Rules of Civil Procedure. Waterstone was understood at the initial hearing to contend that this should be a "collective" proceeding of the type authorized by 29 USC §216(b), which provides that an action for unpaid minimum wages or unpaid overtime compensation may be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated", but that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party" (an "opt-in" proceeding).

A briefing schedule was established, and the parties have now submitted their initial and responsive briefs. Oral argument is not necessary. Following the directions of the Supplementary Rules, § 3, Herrington submitted her initial brief as an Application for Clause Construction, arguing that the arbitration clause in the parties' Agreement should be construed so as to permit this arbitration to proceed as a class arbitration. Waterstone opposed, contending that under applicable Supreme Court precedent, "Claimant should only be allowed to join others to this arbitration exclusively by way of

permissive joinder, to the exclusion of either an opt-in or opt-out class arbitration and the notice provisions associated with such procedures." (Waterstone Initial Brief at 1).

Rule 3 of the Supplementary Rules require that the arbitrator determine, as a threshold matter, "whether the applicable arbitration clause permits the arbitration to proceed on behalf of . . . a class." For the reasons that follow, I conclude that the arbitration clause in the parties' Agreement does permit this arbitration to proceed as a class arbitration on behalf of a class.

Waterstone's Position.

Waterstone argues that Supreme Court precedent requires the conclusion that class arbitrations are impermissible and that joinder is the only viable option. In support it argues that under *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so" (*Id.* at 1775; italics by Waterstone) and that "arbitration is a matter of consent" (*Id.at 1775*). It further contends that, even though the sentence in the arbitration clause waiving joinder has been stricken by the District Court and is not enforceable, nevertheless under this Agreement as written originally, the presence of the waiver clause made clear the intention that Herrington could not join her claim with others in this arbitration.

Waterstone argues that the AAA's Supplementary Rules for Class Arbitrations do not apply here; that it has never consented to a collective arbitration; that joinder is the only process that Herrington might use to bring other employees into this arbitration; and that there should be no class or collective-action certification and no notice

provisions imposed. It also suggests that the decision by the National Labor Relations Board in *In re D.R. Horton, Inc.*, 357 NLRB No. 184, Case No. 12-CA-25764, on which the District Court relied, may be reversed on appeal.

Herrington's Position.

Herrington contends that by drafting the arbitration clause to require arbitration of any dispute "in accordance with the rules of the American Arbitration Association applicable to employment claims", Waterstone had agreed to a class arbitration; that the AAA applies its Supplementary Rules for Class Arbitrations to FLSA collective actions; that arbitrators in other arbitrations have applied the Supplementary Rules to FLSA claims and courts have upheld them; that Waterstone agreed in the District Court to a collective arbitration; that *Stoldt-Nielsen* does not bar a class arbitration here; and that the parties' intent should be determined without reference to the stricken, unlawful prohibition on joinder.

DISCUSSION

There are three ways that an arbitration might be structured to hear FLSA claims of multiple employees for unpaid minimum wages and overtime wages. The first would be by having the complaining employees join at the beginning as co-claimants in the arbitration. The second would be by following the model of the FLSA for actions in the federal district court, that is, by having an opt-in procedure that would provide notice to all potentially affected employees that they could join in the arbitration. The third would be through a class arbitration procedure, here under the AAA's Supplementary Rules

for Class Arbitrations, which basically follow the pattern of Rule 23 of the Federal Rules of Civil Procedure in providing an opt-out procedure whereby the entire class is given notice of the arbitration and any class member may then opt out of the proceeding.

Waterstone argues for the first type – joinder. Although before the District Court and at the initial hearing in this arbitration Waterstone at least acquiesced in the second – opt-in – procedure, it has now stood firmly against any procedure that provides notice to the other potentially affected employees, i.e., either the second or third types.

It is significant that Waterstone has insisted that this dispute be arbitrated. However, claims under a statute, such as the FLSA, that is "designed to further important social policies may be arbitrated" only so long as "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." (*Green Tree Financial – Alabama v. Randolph,* 531 US 79, 90 [2000]. Under that principle, and contrary to Waterstone's current position, Herrington would at least be entitled to the statutory opt-in procedure.

By initially suing in federal court, Herrington in effect asked for the second type, the opt-in procedure; but now that she has been forced into arbitration, she seeks only the third type, a class arbitration. Whether a class arbitration is permitted in a particular case is a matter for the arbitrator to determine by construing the parties' arbitration agreement. (*Green Tree Financial Corp. v. Bazzle,* 539 US 444, 453 [2003]). Typically in past cases, the agreements in question have been silent on whether a class arbitration might be maintained. The plurality opinion in *Bazzle* indicated that the issue that the arbitrator there should determine on remand was whether the agreement *prohibited* class arbitration. In *Stoldt-Nielsen S.A. et al. v. AnimalFeeds International*

Corp., 130 S. Ct. 1758 [2010], however, the majority opinion pointed out differences between a bilateral arbitration and a class-action arbitration and indicated the need for a "contractual basis" for proceeding on a class basis. The Court also noted that merely agreeing to submit a dispute to an arbitrator was insufficient evidence of an agreement to a class arbitration.

Much of the *Stoldt* discussion, however, was dicta. The Court actually held that because the parties had stipulated that there had been *no agreement* about class arbitration, it could not be allowed. Waterstone exaggerates when it asserts that there can be no class arbitration unless the parties have "expressly" agreed to it. All that *Stoldt* requires, if indeed its dicta should be viewed as binding, is that there be a "contractual basis" for finding that the parties had agreed to the class method.

Here, the parties agreed that any dispute would be "resolved through binding arbitration in accordance with the rules of the American Arbitration Association applicable to employment claims". (Agreement § 13). Thus the agreement was more than simply to submit the dispute to the arbitrator. It was an agreement to arbitrate the dispute under those rules of the AAA that are applicable to employment claims. The AAA does have a set of rules that are expressly "applicable to employment claims". They are entitled "Employment Arbitration Rules and Mediation Procedures." Waterstone argues that only those rules apply.

The AAA, however, also has Supplementary Rules for Class Arbitrations, which "shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ('AAA') where a party submits a dispute to arbitration on behalf of or against a class or purported class,

and shall supplement any other applicable AAA rules." (Supplementary Rules 1(a)). Thus, the Supplementary Rules supplement the Employment Rules, and by agreeing to arbitrate under the AAA rules, Waterstone agreed to all of its applicable rules – both the Employment Rules and the Class Arbitration rules.. Together, they constitute the AAA rules that are "applicable to employment claims." Since Herrington has submitted this dispute as a class action "on behalf of all others similarly situated", under Supplementary Rule 1(a) she has triggered application of the Supplementary Rules for this proceeding. Consequently, the parties' Agreement would permit a class arbitration unless the waiver clause defeats that construction of the Agreement. I turn, therefore, to the waiver clause.

Waterstone argues that there can be no conclusion that Waterstone agreed to a class arbitration when in the waiver clause it had provided that "Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement", a sentence that would seem to negate any agreement or consent to a class arbitration. In response, Herrington points out that even if taken at face value, that sentence would not preclude a class arbitration otherwise agreed to, because any member of the class, in order to be similarly situated to Herrington, would also have to be a "party to this Agreement".

A more substantive response to Waterstone's position is Herrington's contention that the District Court has concluded that because the waiver clause is contrary to federal law, it must be severed from the rest of the Agreement. The Court has also directed that in this arbitration Herrington "must be allowed to join other employees to her case". Since I am bound to follow the court's order, (Supplementary Rules §1(c)), I

must read the agreement as if there were no waiver clause. Waterstone's argument that as a matter of evidence of intent, the waiver clause must be weighed despite the District Court's ruling, is rejected. It would simply be letting in the back door what the District Court has barred from entry through the front door. Moreover, the invalidated waiver clause was put into the Agreement by Waterstone, and Waterstone should not be able to benefit from its act of incorporating that illegal waiver into a form agreement that it required, as alleged, all of its mortgage loan officers to sign. Furthermore, by providing in its Agreement for arbitration "in accordance with the rules of the American Arbitration Association", which rules include the Supplementary Rules for Class Arbitrations, and at the same time by including in the same paragraph the waiver clause, Waterstone at the very least created an ambiguity, which must be construed against the party who drafted the Agreement – Waterstone.

CONCLUSION

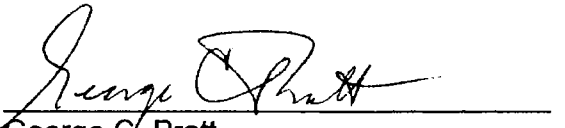
As required by Supplementary Rule 3, my "reasoned, partial final award on the construction of the arbitration agreement" is that the applicable arbitration clause permits this arbitration to proceed on behalf of a class. All further proceedings in this class arbitration are stayed for thirty days from the date of this Clause Construction Award to permit any party to move a court of competent jurisdiction to confirm or to vacate this award.

Any party who makes such an application to a court shall simultaneously notify the AAA Case Manager and me of the application. The party that seeks court review of this award shall also promptly inform the AAA Case Manager and me of the court's

ruling. Whether a further stay of the proceedings is to be granted will be determined on a future application.

SO ORDERED:

Dated: Uniondale, New York
July 11, 2012



George C. Pratt
Arbitrator