No. 09-142

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| NORTH AMERICAN JET CHARTER, Et Al, | ) | Appeal from the Circuit Court of Cook County, Illinois |
| Plaintiff-Appellee | ) | |
| vs. | ) | No. 08 M1 138631 |
| VINCENT DONOHUE, | ) | The Honorable Moria S. Johnson |
| Defendant-Appellant. | ) | |

## POINTS AND AUTHORITIES

## NATURE OF THE CASE

This is a breach of contract action filed by an employer North American Jet Plaintiff against its former employee Vincent Donohue. Plaintiff sought enforcement of a written employment agreement dated September 15, 2007 ("Agreement"). C 81 – 86. The Agreement contained the following provision: "12. Arbitration: All disputes between the parties hereto arising out of or relating to this Agreement, or any breach of Sections 6, 7, 8, 9 and/or 10 of the Agreement, shall be settled by a panel of one arbitrator in binding arbitration administered in compliance with the commercial arbitration rules of the American Arbitration Association. The party requesting arbitration shall, in its notice, set forth the questions to be decided, describe in reasonable detail the nature and specifics of the dispute, identify the relevant provisions of this Agreement and set forth in reasonable detail a proposal for response to such questions. The arbitrator shall be selected by mutual agreement of the Employee and Employer and if unable to agree, the Employee and the Employer shall each choose an arbitrator and the arbitrator shall be selected by mutual agreement of the two selected arbitrators. Such arbitration shall be conducted in Chicago, Illinois. Each party shall bear their own costs for the arbitration. In rendering its decision, the arbitration panel shall apply the laws of the State of Illinois (other than as conflicts as law rule). The arbitrators' award shall be final and binding on the parties and may be enforced by any court of competent jurisdiction." C 86.

Two weeks later, on October 1, 2007, the parties entered into a Contract For Tuition Advance And Repayment And Non-Competition ("Contract"). C 06 – 12.

The Contract contained a virtually identical arbitration clause: "14. Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by binding arbitration in Chicago, Illinois, administered by the American Arbitration Association, in accordance with its Commercial Arbitration Rules." C 10. The Contract was drafted by Plaintiff's counsel and was Plaintiff's form Contract. C 66. It was "unilaterally presented to Mr. Donohue during a training session; he was told that he needed to sign the document immediately or training would not continue. C 66. He was not provided an opportunity to review the contract or consult an attorney, as contemplated at Paragraph 9 of the Contract." C 09

Despite this clear arbitration provision, agreed to by both parties ***twice***, Plaintiff filed suit in the Circuit Court of Cook County. Donohue moved to compel arbitration. The trial court erred in denying Donohue's motion.

## STATEMENT OF THE ISSUES

1. Did the trial court err as a matter of law in failing to enforce the plain language of the parties' Agreement and Contract, which provided for arbitration of any and all disputes?

2. Did the trial court err as a matter of law in ruling that Donohue waived his right to arbitration where, upon suit, Donohue promptly moved to compel arbitration and took no other action in the litigation to submit this claim to the jurisdiction of the Court?

3. Should plaintiff be sanctioned pursuant to Illinois Supreme Court Rule 375, and under the Court's inherent power to discipline vexatious litigants, for filing

this lawsuit in the wrong forum in breach of the Agreement and the Contract, failing to read the Agreement, or the Contract it attached to its Complaint, causing needless expense to both parties, and wasting this court's time?

## JURISDICTION

1. This Court has jurisdiction pursuant to Illinois Supreme Court Rule 307(a)(1) in that this is an appeal from the denial of a Motion to Compel Arbitration.

2. Donohue appeared through counsel on September 11, 2008. C 36.

3. On September 11, 2008, Donohue moved to compel arbitration. C 37-48.

4. The trial court entered the order denying the Motion to Compel Arbitration on December 17, 2008. C 102.

5. This appeal was timely filed on January 14, 2009 pursuant to Illinois Supreme Court Rule 307(a)(1). C 101.

## STATUTES INVOLVED

1. The Federal Arbitration Act 9 U.S.C. Section 1.

2. The Uniform Arbitration Act, 710 ILCS Section 5.

## STATEMENT OF FACTS

1. Plaintiff filed its complaint on May 9, 2008. C 04.

2. Plaintiff apparently runs a private plane service. C 04.

3. Defendant Donohue is a pilot who was hired to fly airplanes for Jet. C 04.

4. Plaintiff Jet alleged that it procured flight training for Donohue in the amount of $10,000. That amount was required to cover the cost of training Mr.

Donohue to fly an Eclipse jet. Plaintiff alleged in its complaint that it spent an additional $2500 to train Donohue. C 04 – 12.

5. On September 15, 2007, the parties entered into the Agreement.

6. The Agreement contained the Arbitration Clause: "12. Arbitration: All disputes between the parties hereto arising out of or relating to this Agreement, or any breach of Sections 6, 7, 8, 9 and/or 10 of the Agreement, shall be settled by a panel of one arbitrator in binding arbitration administered in compliance with the commercial arbitration rules of the American Arbitration Association. The party requesting arbitration shall, in its notice, set forth the questions to be decided, describe in reasonable detail the nature and specifics of the dispute, identify the relevant provisions of this Agreement and set forth in reasonable detail a proposal for response to such questions. The arbitrator shall be selected by mutual agreement of the Employee and Employer and if unable to agree, the Employee and the Employer shall each choose an arbitrator and the arbitrator shall be selected by mutual agreement of the two selected arbitrators. Such arbitration shall be conducted in Chicago, Illinois. Each party shall bear their own costs for the arbitration. In rendering its decision, the arbitration panel shall apply the laws of the State of Illinois (other than as conflicts as law rule). The arbitrators' award shall be final and binding on the parties and may be enforced by any court of competent jurisdiction." C 86.

7. Two weeks later, on October 1, 2007, the parties entered into a "Contract for Tuition Advance and Replayment and Non-Competition" ("Contract"). C 06 - 12. The Contract was drafted by Plaintiff Jet. C 66 – 68.

8. The contract contained the following relevant provisions relating to the tuition advance:

> Section 1: Tuition Advance. On behalf of Employee, NAJC shall advance to VINCENT DONOHUE, the amount of $10,000.00 for the benefit of Employee's tuition, and $2,500.00 for hotel, airfare and meals for the Training ("Training"). The advanced tuition is a loan. In consideration for this loan, Employee will execute a promissory note evidencing the loan and Employee's obligations to NAJC arising out of the loan. C 06.
>
> Section 2: Loan Forgiveness. If Employee successfully completes the Training, and thereafter continues to be employed by NAJC, the full amount of the Employee's tuition will be forgiven after 12 continuous months of Employee's employment by NAJC after Employee's successful completion of training. C 06

9. Section 14 of the Contract provided in relevant part that: "***Any controversy or claim arising out of or relating to this Agreement, or the breach thereof,*** *shall be settled by* ***binding arbitration*** *in Chicago, Illinois, administered by the American Arbitration Association* in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." C 10.

10. This, in two weeks, the parties agreed ***twice*** to resolve all disputes through arbitration.

11. After he was sued, Donohue's Mississippi attorney made a settlement offer to the plaintiff. Plaintiff Jet rejected the settlement offer. C 66 – 68.

12. It is undisputed that Donohue took no discovery in this lawsuit.

13. It is undisputed that Donohue did not answer the complaint.

14. It is undisputed that Donohue's only action in this lawsuit was to file a Motion to Compel Arbitration.

15. Donohue's attorney filed the Motion to Compel arbitration within 7 days of filing his appearance with leave of Court. C 34, C 36 – 40.

16. It is undisputed that Plaintiff Jet delayed the resolution of that motion by failing to file its response on time and by requesting a lengthy extension of time. C 54 – 55.

17. On December 17, 2008, the Trial Court denied the Motion to Compel Arbitration. The Court's Order contained no findings of fact. C 102.

## STANDARD OF REVIEW

Illinois courts review a denial of a motion to compel arbitration under a *de novo* standard. *Hutcherson v. Sears Roebuck & Company*, 342 Ill. App. 3d 109, 115, 793 N.E.2d 886, 890 (1st Dist. 2003). Here, the court did not hold a fact hearing, did not make any factual findings, and there are no facts in dispute. The Court's decision was based on a purely legal analysis. *Id.* Therefore, its decision should be reviewed under a *de novo* standard.

## ARGUMENT

### I. UNDER THE PLAIN LANGUAGE OF THE PARTIES' AGREEMENT, THIS CASE SHOULD NOT HAVE BEEN FILED IN COURT, BUT, RATHER THIS MATTER SHOULD HAVE BEEN PROMPTLY SENT TO ARBITRATION.

Under Illinois law, contracts are to be construed according to their plain meaning. *See e.g., Zurich Ins. Co. v. Raymark Industries*, 145 Ill. App.3d 175, 187, 494 N.E.2d 634, 642 (Ill. App. Dist.1 05/27/1986) (contracts are to be construed according to their plain meaning); *Hutcherson,* 342 Ill. App.3d at 116, 793 N.E.2d at 890; *First Options Of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 1924 (1995).

Jet and Donohue entered into a Contract For Tuition Advance And Repayment And Non-Competition on October 1, 2007. C 06. The Contract, provided, among other things, that Donohue would fly certain Eclipse jets to and from various locations in the United States. There is no question that the Agreement and Contract arise out of interstate commerce. C 06 – 12; C 81 – 86, 88 – 89.

Among other things, the Contract provided that: "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by binding arbitration in Chicago, Illinois, administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." C 10.

The Commercial Arbitration Rules of the AAA provide that "the parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the [AAA] or under its Commercial Arbitration Rules." AAA Rule R-1 (attached hereto as Appendix A-5). "Rule 47(a) provides that '[n]o judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.'" *Bishop v. We Care Hair Development Corp.*, 316 Ill. App. 3d 1182, 1193, 738 N.E.2d 610, 619 (1st Dist. 2000) (citing Martindale-Hubbell Dispute Resolution Directory 6-30 (1996)).

The Agreement and Contract provided certain benefits to each party. Plaintiff obtained its choice of venue. Plaintiff, obviously based in Chicago, wanted any disputes with its pilot to be resolved in the Chicago area. Plaintiff also obtained the benefit that any disputes would be resolved under Illinois law, clearly a benefit to a local company. Plaintiff obtained the benefit that the dispute would be resolved expeditiously by the American Arbitration Association (the "AAA"), a well-respected arbitration organization. Donohue also obtained these benefits.

Both parties could be certain that the AAA would resolve any disputes, particularly this $12,500 dispute, long before any court could resolve the dispute. Both parties could rest assured that the AAA would not allow depositions or costly discovery in the proceeding.

Despite the plain language of the Agreement and the Contract, Jet filed this lawsuit in the Municipal Division. Jet did not contend that the Agreement or Contract were void or unenforceable or unconscionable. Jet's lawyers attached a copy of the

Contract to the Complaint and requested that the Court ***enforce*** the Contract by awarding Jet the cost it allegedly incurred to train Donohue.

After he was served with this lawsuit, Donohue promptly moved to Compel Arbitration. Plaintiff wrongfully declined to arbitrate this matter. *See e.g., Atlas v. 7101 Partnership*, 109 Ill. App. 3d 236 (1st Dist. 1982); *Kostakos v. KSN Joint Venture No. 1*, 142 Ill. App. 3d 553 (1st Dist. 1986). Donohue took no other action in the litigation and did not file an answer, serve discovery, answer discovery, or notice any depositions. Donohue was consistent that the dispute should be arbitrated promptly in accordance with the plain language of the parties' agreement.

Plaintiff and its attorneys simply failed to read the agreement, which requires the arbitration of this matter. This Court should construe the Agreement and the Contract according to their plain meaning.

In sum, the Agreement provided for the arbitration of all disputes and this dispute should have been arbitrated promptly.

## II. THE FEDERAL ARBITRATION ACT APPLIES AND REQUIRES ARBITRATION OF THIS DISPUTE.

As courts have noted on numerous occasions, the Federal Arbitration Act was enacted "to overcome judicial resistance to arbitration." *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204, 1207, 546 U.S. 440, 443 (2006). As the Supreme Court noted: "Section 2 [of the FAA] embodies the national policy favoring arbitration and places arbitration agreements on the equal footing with all other contracts." *Id.*

Section 2 provides in relevant part: "A written provision in…a contract…to settle by arbitration a controversy thereafter arising out of such contract…or an

agreement in writing to submit to arbitration an existing controversy arising out of such a contract…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 1208 (citing 9 U.S.C. § 2).

In *Buckeye Check Cashing*, the United States Supreme Court held that the Federal Arbitration Act applies to all agreements to arbitrate. *Id.* at 1209.

Under Section 2 of the Federal Arbitration Act, it is extremely difficult to void an arbitration clause. Plaintiff Jet was required to establish "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. Sec. § 2. Plaintiff, of course, did no such thing. Rather, Plaintiff filed this lawsuit to enforce the Agreement. There Plaintiff took on an enormous burden, namely, vacating ***two separate arbitration agreements!*** Plaintiff did not attempt to meet that burden.

### A. The Trial Court Erred In Failing To Apply the Federal Arbitration Act To This Case.

The Trial Court did not apply the Federal Arbitration Act to this dispute and, accordingly, made a legal error. *See generally, Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204, 546 U.S. 440 (2006). Indeed, the trial court's decision appears to be a classic example of judicial hostility to arbitration. The Federal Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983).

### B. Plaintiff Did Not Make The Requisite Showing Under The Federal Arbitration Act Of "Such Grounds As Exist At Law Or In Equity For The Revocation Of Any Contract."

Plaintiff made no attempt to argue that there were any grounds that would entitle Plaintiff to revoke the contract or the arbitration clause in the contract. C 058. Accordingly, under the Federal Arbitration Act, the trial court was required to grant Donohue's motion to compel arbitration and to stay this case pending the outcome of the proceedings before the American Arbitration Association. 9 U.S.C. § 2.

In sum, if the Federal Arbitration Act applies to this dispute, and it does, Plaintiff's waiver arguments do not meet the required standard for "revocation" of the agreements and must be rejected. The trial court erred in failing to apply the Federal Arbitration Act.

## III. PLAINTIFF'S ARGUMENTS THAT THE DONOHUE "WAIVED" THE ARBITRATION CLAUSE ARE COMPLETELY WITHOUT MERIT.

In its Response to the Motion to Compel Arbitration, Plaintiff argued that the Donohue "waived" its right to arbitration by (a) writing a settlement letter to Plaintiff's attorneys; (b) filing a jury demand; and (c) Donohue's filing of an unpaid wage claim with the Illinois Department of Labor. C 57-60.

Plaintiff cited two cases in support of its claim: *Woods v. Patterson Law Firm, P.C.* 381 Ill. App. 3d 989, 997, 886 N.E.2d 1080, 1087 (1st Dist. 2008) (holding that a law firm waived its right to arbitration by participating in the litigation for 17 months before raising the issue); *Bishop v. We Care Hair Development Corp.*, 316 Ill. App.

3d 1183, 1199, 738 N.E.2d 610, 623 (1st Dist. 2000) (affirming the trial court's decision to compel arbitration).

The Illinois courts have set forth some principles under which the right of arbitration can be waived. First, Illinois law provides a presumption against waiver. *Bishop*, 316 Ill. App.3d at 1191. *See also, Jacobs v. C & M Video, Inc*., 248 Ill. App. 3d 654 (1993); *First Condominium Development Co. v. Apex Construction and Engineering Corp.,* 126 Ill. App. 3d 843 (1984). The right of arbitration, like any other contractual right, can be waived. *Id.* However, according to the Bishop Court, "a party waives its right to arbitrate by submitting arbitrable issues to a court for decision." *Id.* Illinois Courts also consider the delay in the party's assertion of its right to arbitrate and any prejudice the delay caused the plaintiff. *Id*. In sum, the Illinois courts have been exceedingly reluctant to find that the right of arbitration has been waived. *E.g., Kinkel v. Cingular Wireless, LLC,* 857 N.E.2d 250, 223 Ill.2d 1, 306 Ill.Dec. 157 (Ill. 10/05/2006) (Court rejects numerous challenges to form contract providing for arbitration).

### A. Donohue Was Extremely Prompt In Moving To Compel Arbitration.

Donohue promptly asserted his right to arbitrate by filing a Motion to Compel arbitration. Donohue retained Illinois counsel to represent him on or about September 3, 2008. C 34. Donohue filed his Motion to Compel Arbitration on September 12, 2008, less than nine days after Illinois counsel first communicated with Plaintiff. C 37-40. Thus, Donohue was extremely prompt in asserting his right to arbitration.

### B. Other Than Move To Compel Arbitration, Donohue Took No Other Action In This Litigation.

Other than moving to compel arbitration, Donohue took no other action in this lawsuit. Donohue did not file a counterclaim or assert any offset against Plaintiff's claim. Donohue did not attempt to take discovery. Donohue did not answer the complaint. Donohue did not file a counterclaim in the Circuit Court of Cook County. *See e.g., Kostakos v. KSN Joint Venture No. 1*, 142 Ill. App. 3d 533 (1986) (eight month delay in moving to compel arbitration was not a waiver as the party seeking to enforce the arbitration agreement did not take discovery); *City of Centralia v. Natkin & Co.*, 257 Ill. App. 3d 993 (1994) (refusing to find a wavier where the Defendant filed for arbitration after the city filed its complaint in court).

### C. Plaintiff Has Suffered No Prejudice.

It is obvious that Plaintiff suffered no prejudice. Had Plaintiff's lawyers simply read the Agreement, which they attached to the Complaint, they would have noticed that the parties had unequivocally agreed to submit this dispute to arbitration. Once Donohue notified it of the existence of the arbitration clause, Plaintiff should have promptly agreed to stay the litigation pending the outcome of the AAA arbitration. C 66 – 67.

### D. Donohue Has Been Prejudiced.

Donohue, who clearly signed Plaintiff's form Employment Agreement, has been severely prejudiced as he has had to hire a lawyer and engage in costly litigation that never should have been filed in the first place. Plaintiff should have promptly acknowledged its mistake (breaching its own form employment agreement and

Tuition Contract) and dismissed the lawsuit or agreed to allow the lawsuit to be stayed. C 66 – 67.

**E. Plaintiff's Other Arguments Are Frivolous.**

The Illinois cases discussing a waiver of the right of arbitration uniformly require proof that the other party submitted a claim to the Court – and thus, acted inconsistently with the right of arbitration. *See, Bishop v. We Care Hair Development Corp.*, 316 Ill. App. 3d 1182, 738 N.E.2d 610, (1st Dist. 2000). *See, Kinkel v. Cingular Wireless, LLC,* 857 N.E.2d 250, 223 Ill.2d 1, 306 Ill.Dec. 157 (Ill. 10/05/2006).

Plaintiff argues that Donohue's filing of a wage claim before the Illinois Department of Labor waived his right to arbitration. Most importantly, Donohue's unpaid wage claim was not filed before the Court, but, rather was filed with the Illinois Department of Labor, pursuant to the Illinois Wage Payment and Collection Act 820 ILCS Section 115/1. Also of importance, the Illinois Department of Labor had no statutory or legal authority to resolve any of Jet's contractual claims against Donohue. Jet is seeking to collect on a promissory note. The Illinois Department of Labor had no jurisdiction over that claim. Its jurisdiction was limited to the resolution of the wage claim. 820 ILCS Section 115/11. In sum, filing an administrative wage claim did not waive any right of arbitration.

Plaintiff also argued that Donohue "agreed" to waive arbitration. In support of this "argument" Plaintiff cites a settlement offer prepared by Donohue's Mississippi lawyer. C 66 – 67. Obviously, the letter of Mr. McAllister was a

settlement offer (to settle the case for $3000), which, obviously, was not accepted. Plaintiff has no right to assert such an agreement without proof that it agreed to be bound as well.

In sum, the trial court erred as a matter of law in failing to enforce the plain language of the Agreement.

Even under an abuse of discretion standard, the trial court's decision should be reversed in that it is contrary to well-settled Illinois precedent and the express language of the parties' agreement. The ruling appears to reflect an unfortunate example of judicial resistance to arbitration.

## IV. PLAINTIFF SHOULD BE SANCTIONED PURSUANT TO RULE 375 – PLAINTIFF'S POSITION IS FRIVOLOUS AND HAS CAUSED SUBSTANTIAL EXPENSE TO DONOHUE.

It is rather obvious that Plaintiff had a duty to file this claim before the American Arbitration Association. After all, Plaintiff inserted an arbitration clause in ***two separate agreements signed two weeks apart!*** Failing that, Plaintiff had a duty to agree to Donohue's Motion to Compel Arbitration. Plaintiff's actions, in causing expense, dragging out the litigation, and violating its own form Employment Agreement and Tuition Contract, lack any good faith basis under Illinois law and warrant sanctions. *See, Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill.App.3d 571, 742 N.E.2d 829, (Ill.App. 12/29/2000).

## CONCLUSION

In summary, Defendant Vincent Donohue respectfully requests that this Court reverse the judgment of December 18, 2008 and order that this case be stayed

pending the outcome of arbitration before the American Arbitration Association. Donohue also requests that this Court grant his request for sanctions pursuant to Illinois Supreme Court Rule 375 and inherent power of this Court and grant him all attorney's fees and defense costs incurred in the defense of this action, including all attorney fees and costs incurred in this appeal.

Respectfully submitted,

VINCENT DONOHUE

By: _____
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## CERTIFICATE OF SERVICE

Edward X. Clinton, Jr., an attorney, hereby certifies that he caused three (3) copies of the Opening Brief And Argument Of Plaintiff-Appellant to be served on the following persons by hand delivery on this 29th day of September 2009:

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_____

## CERTIFICATE OF COMPLIANCE

I certify that that brief conforms to the requirements of Rules 341(a) and (b). The length of the brief is 16 pages.

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