

# THE DAILY RECORD

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## Arbitration Clause Not Pertinent To Dispute

BY NORA A. JONES, ESQ., EDITOR

Is arbitration required where the employment agreement contained an attachment that included an arbitration provision? Should the court stay the instant action to compel arbitration in this suit for wrongful discharge and false representations?

Looking carefully at the employment agreement and the facts of the case in *David Ahern v. Northern Technologies International Corp. and G. Patrick Lynch*, U.S. District Court Chief Judge David G. Larimer concluded that the parties did not intend all employment issues to be resolved through arbitration. Entertaining motions from both parties, the U.S. District Court for the Western District of New York denied defendants' motions to compel arbitration or to transfer venue, and granted in part plaintiff's cross-motion to recover fees and costs.

### Background

Plaintiff, David Ahern, was recruited and hired to be regional sales and marketing manager for Northern Technologies International Corp. (NTI) starting September 1, 2000. An offer letter, with attachments, outlined the employment arrangement.

The two-page August 23, 2000 employment letter contained several attachments, including a job description, a summary of employment benefits, and a "confidentiality and non-compete agreement."

Alleging wrongful discharge, false representations and fraud in connection with being hired, plaintiff filed a diversity action asserting that NTI grossly overstated its sales, misleading Ahern to his detriment.

It is the "confidentiality" agreement that is at the heart of the instant action, where the defendants move to stay the instant action and compel plaintiff to submit to arbitration, or, alternatively, to transfer venue to the District Court of Minnesota.

Plaintiff opposes these motions and cross-moves for costs and fees associated with service.

### Motion To Compel Arbitration

When Ahern accepted the employment offer, he was directed to sign a "Confidentiality and Non Competition Agreement." This document contains an arbitration provision, which would subject a dispute to arbitration in Minneapolis.

Defendants claim that this provision should be enforced and that plaintiff should be required to arbitrate his claims asserted in this suit.

Plaintiff contends that the arbitration provision is not so broad as to affect the instant dispute.

Citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 513 U.S. 52, 62 (1995), the court noted that it is a "common law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it."

Relying on this principle, Judge Larimer noted that NTI prepared the agreement at issue, and required Ahern to sign it.

Despite the purpose of the Federal Arbitration Act, the parties can only be compelled to arbitrate if in fact they agreed to do so. See, for example, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989) and *State of NY v. Oneida Indian Nation of New York*, 90 F3d 58 (2d Cir. 1996).

"In my view, this agreement is a narrow agreement to arbitrate certain specific issues and no more," wrote Judge Larimer. "First of all, the agreement itself is styled 'Confidentiality and Non Competition Agreement.' That title alone suggests a narrow interpretation dealing with two general topics: confidentiality concerning proprietary information and a promise not to compete."

Unconvinced by the defendants' request to compel arbitration, Judge Larimer denied their motion to compel, stating, "Although the Federal Arbitration Act favors arbitration, it cannot be read as compelling individuals to do something that they never intended to do."

### Motion To Change Venue

Pursuant to 28 U.S.C. § 1404(a), defendants move for a change of venue for the convenience of the parties and witnesses.

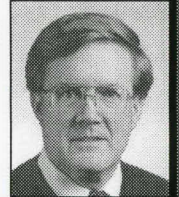
Quoting *Filmline (Cross Country) Productions, Inc. v. United Artists, Inc.*, 865 F2d 513, 521 (2d Cir. 1989), the court noted that "a defendant moving for a change of venue bears the burden of making out a strong case for a transfer. \*\*\* To prevail on the motion, the movant must make a 'clear showing' that the litigation in the proposed transferee district would be more convenient and would better serve the interests of justice."

Carefully reviewing the factors in this case, Judge Larimer concluded that since the plaintiff resides here, the offer of employment was made here, and at least some of the plaintiff's job duties involved activities in western New York, "plaintiff's choice of forum should not be disturbed."

Although the court identified factors that

## WHAT THE COURT RULED

*David Ahern v. Northern Technologies International Corp. and G. Patrick Lynch*, U.S. District Court Western District of New York



CHIEF JUDGE  
DAVID G. LARIMER

INDEX NO. 01-CV-6527

ISSUE: Should the plaintiff be compelled to arbitrate his dispute with his former employer?

RULING: The arbitration clause in the employment agreement was drafted in narrow reference to only certain issues, and not the dispute at hand.

### ATTORNEY FOR PLAINTIFF:

Christian D. Hancey, Esq. and  
J. Nelson Thomas, Esq.

ATTORNEYS FOR DEFENDANT: Robert J. Tracey, Esq.

might support a change of venue, no compelling reasons warranted a transfer out of the district selected by the plaintiff.

"Generally, plaintiff's choice of forum should control. *Iragorri v. United Technologies Corp.*, 274 F3d 65, 70 (2d Cir. 2001) ... Because defendants have failed to carry their burden to make a 'clear showing' that the transferee forum is more convenient under § 1404(a), their motion to transfer is denied."

### Cross-Motion For Fees

The record shows that on October 30, 2001, a request for waiver of service of summons was served on the defendants. Defendants failed to return the acknowledgement of receipt and failed to comply with the request for waiver within the specified time.

Plaintiff subsequently served the defendants, and now seeks to recover \$1,845 in attorneys' fees and \$50 in costs related to the service.

Federal Rule of Civil Procedure 4(d)(5) states that "The costs to be imposed on a defendant ... for failure to comply with a request to waive service of a summons shall include costs subsequently incurred in effecting service ..., together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service."

Finding plaintiff's request for payment of 16.2 billable hours to be unreasonable, Judge Larimer approved \$80 in attorneys' fees and \$50 for the process server.

"Plaintiff's cross-motion for costs and fees is granted in the amount of \$130," concluded the court.