

RECENT DEVELOPMENTS

represented in a class action or arbitration. Circuit City argued that California's anti-retaliation statute offers sufficient protection to current employees. The court agreed with Gentry that the fear of retaliation would often deter a current employee from pursuing individual litigation despite the statute.

Finally, an employee may not be aware that their employer has violated their statutory right to overtime pay. The court found that because Circuit City told their employees that they were not

eligible for overtime pay, there was a greater likelihood that these employees would be unaware their rights had been violated.

The court ordered the trial court on remand to consider the above three factors. If the trial court concludes that the class arbitration waiver interferes with employees' ability to enforce their unwaivable statutory rights, it must invalidate the waiver clause.

UNIFORM COMMERCIAL CODE

UNCERTIFIED CHECK IS MERELY CONDITIONAL PAYMENT

E.P. Towne Ctr. Partners, L.P. v. Chopsticks, Inc., ___ S.W.3d ___ (Tex. App.—El Paso 2007).

FACTS: E.P. Towne Center Partner, L.P. ("Towne Center") leased a restaurant in its shopping center to Chopsticks, Inc. Chopsticks sued Towne Center for violation of an exclusivity clause and Towne Center filed a counter suit for breach of contract alleging non-payments of rents. The disputes were resolved in mediation. The settlement agreement required Chopsticks to pay Towne Center a lump sum followed by four monthly payments. Chopsticks timely made the lump sum payment and tendered an uncertified check for the first monthly payment. When Towne Center attempted to deposit the check, it was returned for insufficient funds.

Towne Center contacted Chopsticks to secure an alternative payment. Chopsticks said to redeposit the check, but Towne Center no longer possessed it. There was a dispute as to whether Towne Center requested a cashier's check. Chopsticks subsequent monthly check was deposited without incident.

Pursuant to the terms of the settlement agreement, Towne Center filed a motion for entry of judgment. The trial court denied the motion concluding that the settlement agreement was incomplete and ambiguous and that Chopsticks had fulfilled its obligations. Towne Center appealed.

HOLDING: Reversed.

REASONING: Towne Center argued that Chopsticks breached

the agreement when the first monthly installment check was dishonored. The court stated that "[a]n uncertified check is merely a conditional payment for an obligation and payment is made absolute when the check is presented and honored." Because Chopsticks' check was returned for lack of funds, its obligation to make an installment payment was not performed. The court found Chopsticks' non-performance was a breach of the agreement entitling Towne Center to enforcement under the agreement.

Chopsticks argued Towne Center was estopped from denying that the terms of the agreement were satisfied by accepting the second monthly payment. It also argued that its previous and subsequent payments were substantial performance of its obligations. Finally, Chopsticks argued that since only one payment was untimely, its breach was immaterial.

Because Chopsticks proffered no support for its estoppel argument, this argument was rejected. The court found that the payments were essential to the performance of the agreement, so the doctrine of substantial performance was not available to Chopsticks. Finally, the court held that any non-performance was a breach of the agreement and therefore material.

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