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Second Circuit rules Trump parties forfeited arguments on appeal

by James F. Bogan III

Takeaway: The importance of preserving issues for appeal when litigating a case before a trial court – from the outset of the case all the way through post-trial motions – cannot be overstated. As a general matter, a party must affirmatively present an argument to a trial court to preserve that argument for appeal. In a recent fraud case involving Donald J. Trump, The Trump Corporation, and members of Mr. Trump's family, the Second Circuit ruled that the Trump defendants had failed to preserve their leading appellate argument by failing to present the argument to the district court. *Doe v. Trump Corp*., --- F.4th ----, Nos. 20-1228-cv & 20-1278-cv, 2021 WL 3176760 (2d Cir July 28, 2021). The Second Circuit panel also concluded that the "multi-level marketing" company that allegedly made secret payments to the Trump defendants, and which had become embroiled in the case through third-party discovery, had likewise forfeited an appellate argument. The Second Circuit's decision illustrates how arguments – especially in the context of a motion to compel arbitration – should be preserved for appeal.

In *Doe v. Trump*, four pseudonymous plaintiffs (Jane Doe, Luke Loe and Richard and Mary Moe) brought a putative class action against The Trump Corporation, Donald J. Trump, and members of his family ("the Trump Defendants"), based on alleged misrepresentations that induced them to enter into business relationships with a third party, ACN Opportunity, LLC ("ACN"), a "multi-level marketing" business that recruits individuals to work as "Independent Business Owners" ("IBOs"). Among other allegations, the plaintiffs alleged that the Trump Defendants accepted millions of dollars in secret payments from ACN while at the same time publicly misrepresenting their independence from ACN; that partnering with ACN would be profitable; and that the Trump Defendants' promotion of ACN reflected their independent due diligence of ACN. The plaintiffs further alleged that, as the direct result of the fraud perpetrated by the Trump Defendants, they signed up with ACN as IBOs and suffered substantial monetary losses. Each of the plaintiffs paid ACN a fee for the privilege of serving as an IBO and agreed in a written contract with ACN to submit any disputes to arbitration.

The plaintiffs filed suit in the United State District Court for the Southern District of New York. The district court granted in part and denied in part a motion to dismiss the complaint, then granted plaintiffs leave to serve Rule 45 subpoenas on ACN. The Trump Defendants moved to compel arbitration, arguing that they could enforce the arbitration agreements between the plaintiffs and ACN under the equitable estoppel doctrine. ACN likewise moved to compel arbitration after plaintiffs moved to compel ACN to comply with the plaintiffs' subpoenas.

The district court denied the motions to compel arbitration filed by the Trump Defendants and ACN, and the Second Circuit affirmed the district court's rulings. Moreover, the appellate panel concluded that the Trump Defendants and ACN had waived significant appellate arguments by failing to present them to the district court.

The Trump Defendants' leading argument, based on *Contec Corp. v. Remote Sol. Co*., 398 F.3d 205 (2d Cir. 2005), contended that the district court should have not have decided any of the arbitrability issues and should have instead referred those issues to an arbitrator for resolution.

The panel concluded that the Trump Defendants had waived this argument. They did not argue to the district court that it lacked the power to resolve the arbitrability issues. Instead, they moved the district court to compel arbitration, asking for a ruling in their favor. While they mentioned *Contec* "in a passing string cite for the limited proposition that questions of arbitrability may be delegated to the arbitrator" (2021 WL 3176760, at *8), they did not brief the issue below. "This casual citation to *Contec*, without further explanation or argument, neither made nor preserved any such argument. … This argument was waived." *Id*.

The panel likewise found that ACN waived an appellate argument. On appeal, ACN sought to compel arbitration of the plaintiffs' claims against the Trump Defendants under the equitable estoppel doctrine. But in its arbitration submissions to the district court, ACN never raised the equitable estoppel doctrine. ACN argued it had preserved the issue by incorporating by reference the Trump Defendants' arbitration submissions, which included equitable estoppel arguments. But "[s]uch conclusory and generalized references to previously filed briefs are inadequate to preserve an issue for appeal," and the Trump Defendants' briefs merely argued that they (and not ACN) were entitled to invoke the doctrine. The panel concluded: "Because ACN failed to raise this argument before the district court, ACN has forfeited it." *Id*. at *13.