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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MARYJO K. TISOR,

Plaintiff and Respondent,

v.

MARKETSHARE PARTNERS, LLC et
al.,

Defendants and Appellants.

A134327

(San Francisco County
Super. Ct. No. CGC11510218)

Appellants MarketShare Partners, LLC (MarketShare) and Insperity PEO Services, L.P. appeal from an order denying their motion to compel arbitration. They argue that they presented sufficient evidence of an arbitration agreement between them and respondent Maryjo K. Tisor. We disagree and affirm.

I.

FACTUAL AND PROCEDURAL
BACKGROUND

This dispute arises from respondent’s employment with appellant MarketShare.¹ According to MarketShare’s controller, it was MarketShare’s “policy and practice” to

¹ Appellants omitted several key documents—including respondent’s complaint—from their notice designating the clerk’s transcript. We therefore have little information about the circumstances surrounding respondent’s employment, the nature of her allegations against appellants, or even what type of business appellants conduct. According to appellants’ opening brief, respondent was employed by appellant MarketShare from February 25, 2008 to February 19, 2010. The facts in this section are taken from the declarations submitted by appellants in connection with appellants’ motion to compel arbitration. It is clear from the register of actions that respondent filed a declaration of

provide all new employees with a 41-page document titled “Employee and Independent Contractor Handbook” (Handbook), which is divided into chapters. Appellants provided a blank copy of the entire Handbook to the trial court. Chapter 1 of the Handbook, titled “Introduction,” states that the provisions of the Handbook “do not form an employment contract. [MarketShare] reserves the right to revise, modify, delete or add to any and all policies, procedures, work rules or benefits stated in this Handbook or in any other document, except for the policy of ‘at will’ employment and the agreement to arbitrate disputes.”

Chapter 5 of the Handbook, titled “Employee Responsibilities,” includes the following paragraph: “**Arbitration** ¶¶ It is understood and agreed that any and all disputes arising out of or relating to your employment at or by the Company that cannot be resolved through the Company’s internal complaint resolution process or other informal mediation shall be settled **exclusively by final and binding arbitration.** (See ‘Exhibit B’).” (Boldface in original.) “Exhibit B” apparently is actually a reference to “Appendix B” to the Handbook (at pages 31 through 33), a three-page form titled “Mutual Agreement to Arbitrate Claims.” The form states that it is an agreement to arbitrate “[a]ny and all disputes arising out of or in any way relating to my employment at or by [MarketShare] which we have not resolved through informal mediation.” Appendix B includes a paragraph titled “Sole and Entire Agreement,” which provides: “This Agreement is the complete agreement between us on the subject of arbitration of claims. This Agreement supersedes and replaces any prior or current oral or written understandings or discussions on the subject. Except as specifically set forth in this Agreement, neither of us is relying on any representations (whether oral or written) on the outcome, enforceability or meaning of this Agreement.” The final page of Appendix B contains lines for dates and signatures of a MarketShare representative and

her counsel, as well as exhibits, in support of her opposition to the motion to compel arbitration. However, neither her opposition nor any supporting documents are included in the appellate record.

an employee, neither of which is signed and dated. No signed copy appears in the appellate record.

Appellants provided to the trial court two pages of the Handbook that were purportedly signed by respondent. The first is the last page of Appendix C (which appears at pages 34 through 37 of the Handbook), a document titled “Employee Inventions Agreement,” governing any new contributions or inventions created during employment.² Appellant’s signature also appears on a form titled “Acknowledgement and Agreement,” on the last page (p. 41) of the Handbook.³ The form acknowledges having received a copy of the Handbook and understanding its provisions, and states that the signer understands that the Handbook is furnished “solely for [the signer’s] information.” The acknowledgement form also provides: “I further understand that none of the statements in the handbook (other than this Acknowledgement and the agreement to arbitrate) are intended to create any contractual or other legal obligations. I also understand that [MarketShare] may at any time modify or rescind any policy, benefit, or practice described in the handbook, except for its policy of at-will employment, the arbitration agreement and policies required by law.” The form concludes: “I acknowledge that it is my responsibility to read and become familiar with the contents of the handbook and to request assistance in understanding any portion of it that is not clear to me.” MarketShare’s comptroller declared that during respondent’s employment, respondent did not raise any concerns to her regarding the agreement to arbitrate contained in the Handbook.

According to the register of actions, respondent filed a complaint for wrongful discharge against appellants on April 14, 2011. Appellants filed a motion to compel

² Respondent states in her appellate brief that she “appear[s]” to have signed the inventions agreement, but that “the actual date of her signature is uncertain and in dispute.” She later states that she “disputes that the date or the printed name is her handwriting.”

³ Respondent states that appellants did not require her “to sign any other agreement for reasons that are beyond the scope and record of this appeal.”

arbitration. (Code Civ. Proc., § 1281.2.)⁴ They argued that respondent agreed to arbitrate her claims, as evidenced by the fact that she signed the Handbook’s acknowledgement form. Respondent opposed the motion. Although the opposition is not included in the appellate record (*ante*, fn. 1), we infer from appellants’ reply that respondent contended that signing the Handbook’s acknowledgement form (as opposed to Appendix B to the Handbook, containing the arbitration agreement) was insufficient to show that she agreed to arbitrate her claims.

The trial court denied the motion to compel arbitration, concluding that appellants had not provided sufficient evidence that there was a signed agreement to arbitrate the parties’ dispute. This timely appeal followed.

II. DISCUSSION

Appellants renew their argument that they provided sufficient evidence of an agreement to arbitrate. “ ‘Code of Civil Procedure section 1281.2 provides in material part: “On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy . . . , the court shall order the petitioner and the respondent to arbitrate the controversy *if it determines that an agreement to arbitrate the controversy exists . . .*” . . . Thus, “the right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract. [Citations.]” . . . There is no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate. [Citation.] It follows that when presented with a petition to compel arbitration, the trial court’s first task is to determine whether the parties have in fact agreed to arbitrate the dispute. [¶] We apply general California contract law to determine whether the parties formed a valid agreement to arbitrate. [Citations.]’ (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-89, italics added by *Marcus & Millichap.*)” (*Romo v. Y-3 Holdings, Inc.* (2001) 87 Cal.App.4th 1153, 1158 (*Romo*).) The party

⁴ All statutory references are to the Code of Civil Procedure.

seeking arbitration bears the burden of establishing the existence of a valid agreement to arbitrate by a preponderance of the evidence, and if the party opposing the motion raises a defense to enforcement, that party bears the burden of proving any fact necessary to the defense by a preponderance of the evidence. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) Interpretation of a written document where extrinsic evidence is unnecessary is a question of law we review de novo. (*Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164, 1169-1170 (*Mitri*); *Romo, supra*, at p. 1158.)

We agree with the trial court that appellants provided insufficient evidence that the parties entered into a mutual agreement to arbitrate their dispute, as contemplated by appellant MarketShare's arbitration agreement contained in Appendix B to the Handbook. *Romo, supra*, 87 Cal.App.4th 1153 and *Mitri, supra*, 157 Cal.App.4th 1164 are instructive. In support of its motion to compel arbitration in *Romo*, defendant employer submitted a 44-page employee handbook that was divided into sections. (*Romo* at p. 1155.) The final page of the section containing a " 'Mutual Agreement to Arbitrate Claims' " contained lines for dates and signatures of the employee and the employer, neither of which was signed or dated. (*Id.* at pp. 1155-1156.) The employee did sign the section of the handbook titled " 'Employee Acknowledgement,' " stating that the employee had read and understood the contents of the employee handbook. (*Id.* at p. 1156.) The trial court denied the motion to compel, and the appellate court affirmed. (*Id.* at pp. 1157-1158, 1160.) The court noted that the employee handbook contained two "separate and severable agreements," (1) the agreement to arbitrate, and (2) an agreement to be bound by the benefits, policies, rules, and procedures contained within the remaining sections of the handbook. (*Id.* at p. 1159.) The preamble to the section containing the arbitration agreement identified the document as an " 'Agreement to Arbitrate,' " and language stating that it was " 'the complete agreement of the parties *on the subject of arbitration of disputes*' " suggested that it was intended as a stand-alone agreement. (*Ibid.*, original italics.) The fact that the section containing the arbitration agreement contemplated a signature from the employee separate from the employee

acknowledgement also suggested that the arbitration agreement was “a separate and severable agreement.” (*Ibid.*)

The court in *Mitri, supra*, 157 Cal.App.4th 1164, also concluded that an arbitration agreement contained in an employee handbook was a separate agreement from the handbook. (*Id.* at pp. 1167-1168, 1170-1171.) Like defendants in *Romo* and appellants here, defendants in *Mitri* presented evidence to the trial court that plaintiff employee had signed an acknowledgement of the handbook, but not the relevant arbitration agreement. (*Id.* at pp. 1167-1168.) The arbitration agreement stated that “ ‘[a]s a condition of employment, all employees are required to sign an arbitration agreement.’ ” (*Id.* at p. 1170.) The fact that the agreement contemplated a signed separate agreement undermined defendants’ argument that the acknowledgement of the employee handbook itself was intended to constitute an arbitration agreement between the employer and its employees. (*Id.* at pp. 1170-1171.) Like the arbitration agreements in *Romo* and *Mitri*, Appendix B (containing the “Mutual Agreement to Arbitrate Claims”) contemplated a signature from the employee separate from the acknowledgement of the Handbook. This suggests that Appendix B was a separate and severable agreement, and the acknowledgement form signed by respondent did not constitute an agreement to arbitrate.⁵ (*Romo, supra*, 87 Cal.App.4th at p. 1159; *Mitri, supra*, 157 Cal.App.4th at pp. 1167-1168.)

It is true that, unlike the employee handbook in *Romo, supra*, 87 Cal.App.4th at page 1159 (which did not contain the words “ ‘arbitrate’ ” or “ ‘arbitration’ ”), the Handbook in this case specifically refers to arbitration, stating that “any and all disputes” shall be resolved by arbitration. However, the Handbook then specifically refers to the

⁵ The “Employee Inventions Agreement” signed by respondent likewise appears to have been intended as a separate, stand-alone agreement, as it states that it was the “[e]ntire” and “complete” agreement between the parties on employee inventions, and it contemplated separate signatures by a MarketShare representative and the employee. As evidence that respondent supposedly agreed to arbitration, appellants direct this court to the signature page of the inventions agreement, which states that respondent had read “ALL OF THIS AGREEMENT AND UNDERSTAND IT COMPLETELY.” However, the inventions agreement makes no reference to arbitration.

separate arbitration agreement, stating “See ‘Exhibit B.’ ” Appendix B, in turn, states that it is “the *complete agreement between us on the subject of arbitration of claims,*” language again suggesting it was intended as a stand-alone agreement. (Italics added.) (*Romo, supra*, 87 Cal.App.4th at p. 1159.)

It is also true (as appellants argue) that the “Acknowledgment and Agreement” signed by respondent also refers to the arbitration agreement, unlike the employee acknowledgements signed by the employees in *Romo, supra*, 87 Cal.App.4th at page 1159 and *Mitri, supra*, 157 Cal.App.4th at page 1168. The language of the acknowledgment form in this case nonetheless suggests that the arbitration agreement was intended to be separate. The acknowledgement form provides that “none of the statements in the handbook (other than this Acknowledgement *and the agreement to arbitrate*) are intended to create any contractual or other legal obligations.” (Italics added.) In other words, the arbitration agreement, *as distinguished from the handbook*, created legal obligations, which were not contemplated by the separate acknowledgement.

Appellants’ reliance on *Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215 is misplaced. In *Condee*, unlike here, defendants attached a *signed* copy of the relevant arbitration agreement to their petition to compel arbitration. (*Id.* at pp. 217-218.) Although no evidence was introduced to verify the authenticity of the signature, its authenticity was never challenged. (*Id.* at p. 218.) The trial court nonetheless denied the petition, concluding that the arbitration agreement was not properly authenticated. (*Id.* at p. 217.) The appellate court reversed, noting that the procedure governing petitions to compel arbitration does not require that arbitration agreements be authenticated, in the same way that documents must be authenticated before they are offered into evidence at a trial. (*Id.* at pp. 218-219.) The court concluded that a party moving to compel arbitration “need only allege the *existence* of an agreement and support the allegation as provided in [California Rules of Court,] rule 371 [now 3.1330].” (*Id.* at p. 219, original italics.) Because defendants met this requirement in

Condee, “the burden shifted to [the parties opposing arbitration] to prove the falsity of the purported agreement.” (*Ibid.*)

Appellants argue that, like defendants in *Condee*, they complied with California Rules of Court, rule 3.1330 by attaching a copy of the relevant arbitration agreement to their motion, thus shifting the burden to respondent to prove the falsity of the agreement. They also contend that respondent “[f]ailed” to provide evidence of the documents she acknowledged receiving, to meet her burden to defend against the agreement. *Condee* is inapposite, however, because defendants there provided a *signed* copy of the relevant arbitration agreement. (*Condee v. Longwood Management Corp.*, *supra*, 88 Cal.App.4th at p. 218.) Here, appellants demonstrated, at most, that MarketShare had a company policy of requiring its employees to arbitrate, but not that respondent herself accepted the terms of the arbitration agreement. Nowhere do appellants allege that respondent signed the relevant arbitration agreement, as contemplated by the document, and thus did not meet their burden to show the “existence” of a written arbitration agreement (§ 1281.2), that is, that the parties “ ‘in fact agreed to arbitrate the dispute.’ ” (*Romo*, *supra*, 87 Cal.App.4th at p. 1158; see also *Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1219, fn. 8 [suggesting that *Condee* conflicts with *Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th 394, insofar as *Condee* held that party meets burden of establishing existence of arbitration agreement merely by *alleging* its existence, without more].)

Citing *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, appellants also argue that, by continuing to work for MarketShare for two years after having signed an acknowledgement of the Handbook (which specifically referred to the arbitration of disputes), respondent manifested her consent to be bound by an agreement to arbitrate, thus evidencing that there was an implied-in-fact arbitration agreement. The court in *Mitri*, *supra*, 157 Cal.App.4th at page 1172 rejected a similar argument, and the court’s analysis is applicable here: “[In *Craig*], the appellate court rejected an employee’s contention the evidence was insufficient to show she entered a binding arbitration agreement with her employer. The court cited evidence the employer sent the employee

a memorandum informing her of the employer's new dispute resolution program, emphasized 'IT APPLIES TO YOU,' and explained '[i]t will govern all future legal disputes between you and the Company.' ([*Craig*] at p. 419.) Unlike the arbitration provision in the [Handbook], the memorandum in *Craig v. Brown & Root, Inc.*, established in and of itself the employer's dispute resolution program, and did not include an express requirement that its employees sign an arbitration agreement. Therefore, *Craig v. Brown & Root, Inc.* is inapposite."

“ ‘In sum, we conclude that, read as a whole, the [appendix to the Handbook containing the arbitration agreement] contemplated that the arbitration of disputes provision would be effective only if both [employer and employee] assented to that provision. Since the [parties] did not assent to this provision[,] the parties did not agree to binding arbitration.’ (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.*, *supra*, 68 Cal.App.4th at p. 91.)

III.
DISPOSITION

The order denying arbitration is affirmed. Respondent shall recover her costs on appeal.

Sepulveda, J.*

We concur:

Reardon, Acting P.J.

Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.