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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

RAMIRO CARRILLO et al.,
Plaintiffs and Respondents,
v.
FANTE, LLC,
Defendant and Appellant.

A134520

(San Mateo County
Super. Ct. No. CIV505477)

Defendant Fante, LLC (Fante) appeals from an order denying its motion to compel arbitration and stay these proceedings brought by plaintiffs Ramiro Carrillo and Alejandro Cruz. The trial court denied the motion on the ground that the arbitration provisions on which Fante relies are not enforceable contractual provisions. We disagree and shall reverse.

Background

Plaintiffs, former employees of Fante, brought this action against Fante asserting numerous claims arising out of their employment, including wage and hour violations and wrongful termination. When plaintiffs moved for leave to amend their complaint to add class action allegations and a claim under the Labor Code Private Attorney General Act of 2004 (Lab. Code, § 2698 et seq.), Fante filed a motion to stay the action and compel arbitration. Fante asserts that both plaintiffs agreed to submit all disputes arising out of their employment to binding arbitration. Plaintiffs opposed the motion on several grounds, including the assertion that the purported arbitration agreements are not binding contractual provisions.

The disputed arbitration provisions are contained in an employee handbook that Fante distributed to all employees. The handbook begins in chapter 1, entitled “Introductory Policies,” with an introduction that reads in part as follows: “This Employee Handbook (the ‘Handbook’) is designed to familiarize you with the policies, practices, and benefits of Fante, Inc. [d.b.a. Casa Sanchez Foods] (‘CSF’ or the ‘Company’). [¶] Although the Handbook is not a contract and is not intended to create any express or implied contractual obligations, you are required to read and understand the provisions of the Handbook.” The arbitration policy is set out at page 4 of the handbook and states that “[a]ny and all controversies, claims, or disputes with anyone . . . arising out of, relating to, or resulting from your employment with the Company, or the termination of your employment with the Company shall be subject to binding arbitration under the Arbitration Rules set forth in California Code of Civil Procedure [¶] . . . [¶] Except as provided by the Rules, arbitration shall be the sole, exclusive and final remedy for any dispute between you and the Company.”¹

¹ The entire arbitration policy reads as follows: “Arbitration. Any and all controversies, claims, or disputes with anyone (including the Company and any employee, officer, director, shareholder or benefit plan of the Company in their capacity as such or otherwise) arising out of, relating to, or resulting from your employment with the Company or the termination of your employment with the Company shall be subject to binding arbitration under the Arbitration Rules set forth in California Code of Civil Procedure Section 1280 through 1294.2, including section 1283.05 (the ‘Rules’) and pursuant to California law. Disputes which will be arbitrated include any statutory claims under state or federal law, including, but not limited to, claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act, the California Fair Employment and Housing Act, the California Labor Code, claims of harassment, discrimination or wrongful termination and any statutory claims. This arbitration policy also applies to any disputes that the Company may have with you. [¶] Procedure. Any arbitration will be administered by the American Arbitration Association (‘AAA’), by a neutral arbitrator selected in a manner consistent with its National Rules for the Resolution of Employment Disputes. The arbitrator shall have the power to decide any motions brought by any party to the arbitration, including discovery motions, motions for summary judgment and/or adjudication and motions to dismiss and demurrers, prior to any arbitration hearing. The arbitrator shall issue a written decision on the merits. The arbitrator shall have the power to award any remedies, including attorneys’ fees and costs, available under applicable law. The Company will pay for any administrative or hearing fees charged by the arbitrator or AAA except that you shall pay the first \$200.00 of any filing fees associated with any arbitration you initiate. The arbitrator shall

At the rear of the handbook, there appear on separate pages two acknowledgement and agreement forms. The first reads in full as follows: “ACKNOWLEDGMENT AND AGREEMENT REGARDING THE COMPANY’S ARBITRATION POLICY [¶] This is to acknowledge that I have received a copy of the Company’s Arbitration Policy and understand the Company’s promise to arbitrate all employment-related disputes and I agree that any and all controversies, claims, or disputes with anyone (including the Company and any employee, officer, director, shareholder or benefit plan of the Company in their capacity as such or otherwise) arising out of, relating to, or resulting from my employment with the Company or the termination of my employment with the Company, including any breach of this Agreement, shall be subject to binding arbitration under the Arbitration Rules set forth in California Code of Civil Procedure Section 1280 through 1294.2, including section 1283.05 (the ‘Rules’) and pursuant to California law.”

The second form reads in relevant part as follows: “ACKNOWLEDGMENT AND AGREEMENT [¶] This is to acknowledge that I have available to me through the Human Resources department a copy of the Company’s Employee Handbook and understand that it sets forth the terms and conditions of my employment as well as the duties, responsibilities and obligations of employment with the Company. I understand and agree that it is my responsibility to read and familiarize myself with the provisions of the Employee Handbook and to abide by the rules, policies and standards set forth in the Employee Handbook. [¶] I also acknowledge that, except for the policy of at-will employment, the terms and conditions set forth in this handbook may be modified, changed or deleted at any time without prior notice to me and other employees provided

administer and conduct any arbitration in a manner consistent with the Rules and that to the extent that the AAA’s National Rules for the Resolution of Employment Disputes conflict with the Rules, the Rules shall take precedence. [¶] Remedy. Except as provided by the Rules, arbitration shall be the sole, exclusive and final remedy for any dispute between you and the Company. Accordingly, except as provided for by the Rules, neither you nor the Company will be permitted to pursue court action regarding claims that are subject to arbitration. Notwithstanding, the arbitrator will not have the authority to disregard or refuse to enforce any lawful Company policy, and the arbitrator shall not order or require the Company to adopt a policy not otherwise required by law which the Company has not adopted.”

such changes are in writing and approved by the President of Company. Any agreement of any kind pertaining to my employment must be in writing. [¶] . . . [¶] I further agree, in accordance with the Company's Employee Nondisclosure and Confidentiality Agreement executed by me and the Company, that I will submit any dispute arising under or involving my employment with the Company or the termination of my employment to binding arbitration and I hereby expressly waive any right to a trial by jury. I agree that arbitration shall be the exclusive forum for resolving all disputes arising out of or involving my employment with Company or the termination of that employment."

Both plaintiffs signed and dated both forms, copies of which apparently were placed in their respective personnel files.² In denying Fante's motion for a stay and to compel arbitration, the trial court provided the following explanation of its ruling: "The purported agreement to arbitrate is part of Defendant Fante's Employee Handbook and is unenforceable. The purported agreement to arbitrate (Page 43 of the handbook) is not a stand-alone agreement. The Employee Handbook in its 'Introduction' (Page 2) states: 'Although the Handbook is not a contract and is not intended to create any express or implied contractual obligations, you are required to read and understand the provisions of the Handbook.' Because the Handbook contains the 'Arbitration Policy' and states it is 'not a contract' the Court may not compel Plaintiffs to arbitrate their claims against Defendant. The request for a stay of the instant proceedings is therefore DENIED."

Fante timely noticed its appeal from the order denying the petition to compel arbitration.

Discussion

Fante first challenges the denial of its motion on the ground that plaintiffs failed to file their opposition to the motion within the 10 days required by Code of Civil Procedure

² Atop the first form the following instruction appears: "*Please print and sign the acknowledgment form below and return it to Human Resources. This will let the Company know you have received the Arbitration policy.*" The second form contains a similar instruction: "*Please print and sign the acknowledgment form below and return it to Human Resources. This will let the Company know that you have read the handbook. It is your responsibility to read and understand the contents of the handbook.*"

section 1290.6, so that the court assertedly was required to deem true the allegation in its moving papers that plaintiffs had entered a binding agreement to arbitrate. Fante's motion, noticed for hearing on November 28, 2011, was served and filed on October 27, 2011, plaintiffs served and filed opposition papers on November 10, and Fante served and filed a reply on November 16. On November 18 plaintiffs served and filed another declaration stating that their original opposition had been two days late because of a calendaring error made by counsel's office manager when the moving papers were received while the attorney was visiting his mother in England. The trial court did not abuse the discretion explicitly conferred by section 1290.6 by implicitly extending the time for submission of the opposition papers. Plainly no prejudice resulted. (*MJM, Inc. v. Tootoo* (1985) 173 Cal.App.3d 598, 603; *Atlas Plastering, Inc. v. Superior Court* (1977) 72 Cal.App.3d 63, 68.)

Fante's challenge to the trial court's ruling on its merits has more substance. The underlying facts are clear and undisputed. Hence, whether the documents that plaintiffs signed give rise to an enforceable agreement to arbitrate their claims presents a question of law for the independent determination of this court. (*CPI Builders, Inc. v. Impco Technologies, Inc.* (2001) 94 Cal.App.4th 1167, 1171-1172 ["When 'there is no evidence extrinsic to the contract or no conflict in the extrinsic evidence or the conflicting evidence is entirely written, a reviewing court is not bound by the finding of the trial court, but instead subjects the contract to independent review.' "].)

There is no question but that plaintiffs received the employee handbook containing the provisions quoted above, and that both signed the two pages that acknowledge receipt and agree to submit all employment-related disputes to binding arbitration. While the introduction to the handbook does state that "the Handbook is not a contract and is not intended to create any express or implied contractual obligations," this qualification cannot reasonably be understood to apply to the provisions in the two forms that plaintiffs were requested to copy and sign, and which they did sign. The employee handbook consists of some 40 pages and covers numerous matters of company policy. The introductory section makes clear that the company is not binding itself contractually to its

employees to never modify any of those policies, and in fact—as plaintiffs stress in arguing unconscionability—the handbook states explicitly at several places that the company reserves the right to revise its policies at any time. Thus, for example, Fante reserves the right prospectively to modify its policy of requiring employment disputes to be arbitrated, and to no longer enter arbitration agreements with its employees. However, that is not to say that such a change of policy would relieve Fante of the obligation to arbitrate disputes that it has already agreed to arbitrate with employees.

The two acknowledgement and agreement forms signed by the plaintiffs do explicitly and unequivocally bind the parties to arbitrate their employment-related disputes. The language could not be clearer. Plaintiffs, in one document, “agree that any and all controversies, claims, or disputes with anyone (including the Company and any employee, officer, director, shareholder or benefit plan of the Company in their capacity as such or otherwise) arising out of, relating to, or resulting from my employment with the Company or the termination of my employment with the Company), including any breach of this Agreement, shall be subject to binding arbitration” In the other, they again agree to “submit any dispute arising under or involving my employment with the Company or the termination of my employment to binding arbitration.” That Fante has not contractually bound itself to forever insist on arbitration does not alter the unambiguous meaning of these provisions under which it has agreed with those who sign the forms to submit any of their employment-related disputes exclusively to arbitration.

The point is emphasized by another provision that is contained in the page entitled “Acknowledgment and Agreement.” This page also contains (in addition to an acknowledgement that employment with Fante is at-will) the following promise: “I agree to abide by the terms of the Employee Nondisclosure and Confidentiality Agreement executed by me and the Company.” While this commitment by the employee may duplicate a commitment contained in another document, it is no less a binding commitment of the employee because Fante retains the right to modify its nondisclosure

policies.³ Similarly, because Fante has the right to modify its arbitration policy in the future, those who agree to observe the current policy, as plaintiffs have done, are nonetheless contractually bound by their promise.

Plaintiffs assert the arbitration agreements should not be enforced for several other reasons, but none has merit. Fante was entitled to file its petition to compel arbitration without having made a prior demand for arbitration because plaintiffs filed this action in breach of their contractual obligation to arbitrate. Code of Civil Procedure section 1281.7 explicitly acknowledges the right to file such a petition in lieu of filing an answer to the plaintiffs' complaint. *Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633, 640-641, on which plaintiffs rely, held only that a request and refusal to arbitrate are necessary before an independent action to compel arbitration may be brought. It did not hold that any such prior request is necessary in response to a complaint seeking to litigate the claim subject to arbitration.

Fante did not waive its right to demand arbitration because it did not file its petition until some five months after the complaint was filed on May 11, 2011. In its answer filed one month later, on June 15, 2011, and in its case management statement filed on August 16, 2011, Fante asserted that plaintiffs' claims are subject to arbitration. When Fante filed its petition to compel arbitration on October 27, 2011, a motion to amend the complaint was pending and little else had occurred in the action. Fante had taken no action inconsistent with its contention that the claims should be arbitrated and there was no basis to consider its demand to have been waived. (See, e.g., *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1194-1198.)

Finally, the arbitration agreements are not unenforceable because they are unconscionable, as plaintiffs also contend. Even assuming that there is procedural unconscionability because the agreements are adhesion contracts presented on a take-it-or-leave-it basis, and because the plaintiffs were not given copies of the arbitration rules

³ Were Fante to modify those policies in a manner unacceptable to an employee, the employee of course could terminate employment, but it would have no claim for breach of contract because the company changed its policy.

incorporated into the agreements (e.g., *Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393), the agreements contain no provision that is substantively unconscionable, and both elements must be present to render the agreements unenforceable. (*Id.* at p. 391.) Although Fante has reserved the right to modify its employment practices, it has not reserved the right to modify the terms of the arbitration agreements to which both parties are bound. And, unlike the provisions in the cases cited by plaintiffs, the arbitration agreements here do not depart from the provisions of California law limiting Fante's right to recover attorney fees if successful, restrict appropriate discovery, or authorize limited access to the courts more favorable to Fante than to plaintiffs. (Cf. *id.* at pp. 393-397; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 715-719, 725.) Nor do the agreements limit plaintiffs' potential recovery (*Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1407), severely limit the plaintiffs' right to a participatory hearing (*Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1665-1667), or impose on plaintiffs unaffordable fees. (Cf. *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 90-92.) Delegating the choice of a neutral arbitrator to the American Arbitration Association pursuant to its National Rules for the Resolution of Employment Disputes is not, as plaintiffs suggest, the equivalent of selection by Fante, nor is there any requirement that the selection of the arbitrator be made by the court. In short, plaintiffs have pointed to no provision of the arbitration agreements that is not entirely neutral or that provides any reason in fairness to deny effect to those agreements.

Disposition

The order denying the motion to compel arbitration and stay these proceedings is reversed.

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.