Filed 5/17/12 Dizon v. Super. Ct. Ca1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

LOVELY DIZON, **Petitioner,** **v.** **THE SUPERIOR COURT OF MARIN COUNTY,** **Respondent;** **JPMORGAN CHASE & CO. et al.,** **Real Parties in Interest.**	**A134739** **(Marin County Super. Ct. No. CIV1003951)**
NAVINCHNANDRA PATEL et al., **Petitioners,** **v.** **THE SUPERIOR COURT OF MARIN COUNTY,** **Respondent;** **JPMORGAN CHASE & CO. et al.,** **Real Parties in Interest.**	**A134746** **(Marin County Super. Ct. No. CIV1003951)**

THE COURT:[*]

In these writ proceedings,[1] we grant relief from an order compelling arbitration and staying proceedings pending the arbitrator's decision.

[*] Before Simons, Acting P.J., Needham, J. and Bruiniers, J.

BACKGROUND

In her second amended complaint, plaintiff Lovely Dizon (plaintiff) asserts a negligence claim against defendants Navinchnandra Patel and Damayanti Patel (the Patels), owners of a Travelodge Hotel in San Rafael. Plaintiff claims that as a result of being assigned to a bed bug-infested room at the Patels' hotel on June 2 and 3, 2010, she suffered several hundred insect bites and permanent injuries, including allergic reactions, skin rashes, headaches, dizziness, nausea, and physical and mental pain and suffering. Plaintiff's prayer for relief seeks, among other things, special damages, including past and future wage loss.[2]

Plaintiff's complaint also includes three causes of action against her former employer, defendants/real parties in interest JP Morgan Chase & Co. and JP Morgan Chase Bank (collectively referred to herein as Chase), brought under the California Fair Employment and Housing Act (FEHA, Gov. Code, § 12900 et seq.). Plaintiff alleges that she commenced employment with Chase on June 1, 2010. Plaintiff's FEHA discrimination complaint (which is attached to her civil complaint) states that on the night of June 2, 2010, plaintiff stayed at a Travelodge in San Rafael so she could attend Chase training seminars in the area. That night, plaintiff suffered injuries from bed bugs at the Patels' hotel, which disabled her. Plaintiff's FEHA causes of action allege that Chase failed to engage in the interactive disability accommodation process required by statute, failed to provide reasonable accommodations, and wrongfully terminated plaintiff's

---

[1] On the court's own motion, the above-captioned petitions are ordered consolidated for purposes of decision, to promote judicial efficiency.

[2] By way of stipulation, the Patels have "admit[ted] liability for the bed bug bites that the plaintiff suffered during the night from June 2-3, 2010 while she was a guest at their Travelodge Hotel . . .." The stipulation also provides that ". . . defendants make no admission regarding the nature and extent of plaintiff's alleged injuries, causation regarding those injuries, medical expenses, wage loss, general damages, and comparative fault (regarding the conduct of plaintiff and any other person or entity whether or not a party to this action)." While this stipulation was not before respondent superior court at the time of the challenged ruling and is therefore not a basis for our decision (see *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1200, fn. 9; *Butler v. Superior Court* (2000) 78 Cal.App.4th 1171, 1181), nothing in the stipulation would alter our decision.

employment on July 23, 2010. Among other claimed damages, plaintiff alleges that Chase is responsible for her lost wages.

Also pending is the Patels' cross-complaint for equitable indemnity and declaratory relief against Chase. The Patels' cross-complaint asserts Chase is obligated to indemnify the Patels for any damages recovered by plaintiff against the Patels, as Chase was at fault in causing plaintiff's injuries. The cross-complaint also seeks a declaration of the relative rights and obligations of the Patels and Chase with respect to plaintiff's damages.[3]

Chase brought a petition to compel arbitration and to stay the action, based on the existence of an arbitration agreement between plaintiff and Chase. Plaintiff and the Patels opposed Chase's petition to compel arbitration, asserting the arbitration agreement should not be enforced under Code of Civil Procedure section 1281.2, subdivision (c) (hereafter referred to as section 1281.2(c)).[4] Following a hearing, respondent issued its order granting Chase's petition to compel arbitration, staying the Patels' cross-complaint and plaintiff's causes of action against Chase, and permitting plaintiff to proceed with her negligence action against the Patels in court.

Respondent's ruling gave rise to these two writ proceedings. The first petition (case no. A134739) was filed by plaintiff, and the second petition (case No. A134746) was filed by the Patels.[5] As plaintiff and the Patels seek the same relief, hereafter, when we jointly refer to those parties, we shall use the term "petitioners."

---

[3] Chase filed a demurrer to the cross-complaint, which the Patels opposed. The demurrer has not been resolved, as respondent stayed the demurrer pending the outcome of the ordered arbitration. The parties' briefs filed in this court argue the merits of Chase's demurrer. We do not decide these questions, for two reasons. First, respondent has not yet resolved the demurrer, and it would be inappropriate for this court to do so in the first instance. Second, it is unnecessary for this court to determine the substantive issues raised in Chase's demurrer, given the conclusions we reach in this opinion, *post*.

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

[5] This court has previously recognized that writ review is appropriate to address questions concerning the application of section 1281.2(c). (*Prudential Property & Casualty Ins. Co. v. Superior Court* (1995) 36 Cal.App.4th 275.)

DISCUSSION

Where a written agreement to arbitrate a controversy is found to exist, a trial court must order the parties thereto to arbitrate that controversy, unless it determines that the case falls within one of several exceptions. (§ 1281.2.) The exception relevant to these proceedings is contained in section 1281.2(c), which applies when "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." If the trial court determines that section 1281.2(c) applies, "the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding." (§ 1281.2(c).)

Section 1281.2(c) " 'addresses the peculiar situation that arises when a controversy also affects claims by or against other parties not bound by the arbitration agreement.' " (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393.) "While there is a strong public policy in favor of arbitration, there is an 'equally compelling argument that the Legislature has also authorized trial courts to refuse enforcement of an arbitration agreement [or stay the arbitration] when … there is a possibility of conflicting rulings. …' [Citation.]" (*Fitzhugh v. Granada Healthcare and Rehabilitation Center, LLC* (2007) 150 Cal.App.4th 469, 475.)

Petitioners, relying on section 1281.2(c), urged respondent to refuse to compel arbitration of plaintiff's claims against Chase. Respondent declined to do so, since it found section 1281.2(c) inapplicable to this case. We find it appropriate to review its decision under the de novo standard, but would reach the same decision under the substantial evidence or abuse of discretion standards. (See *Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 484 [whether a party may

invoke section 1281.2(c) is a question of statutory construction subject to de novo review]; *Birl v. Heritage Care, LLC* (2009) 172 Cal.App.4th 1313, 1318 [arbitration order is generally reviewed for abuse of discretion, but the de novo standard applies where the trial court's ruling presents a pure question of law]; *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 708-709 [de novo review is appropriate where the trial court's decision is based on undisputed facts, and the trial court determined that section 1281.2(c) did not apply]; *Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1405-1406 [if the decision of whether the prerequisites to section 1281.2(c) exist was a factual decision, the substantial evidence standard applies, but if the court's decision was a legal one, the de novo standard of review applies].)[6]

Preliminarily, we observe the parties do not dispute that in this case, "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party" under section 1281.2(c). It is apparent that this prerequisite to the application of section 1281.2(c) is met here, as the parties to the arbitration agreement (plaintiff and Chase) are also parties to nonarbitrable claims (brought by plaintiff and the Patels against Chase).

In rejecting the applicability of section 1281.2(c) to the factual scenario presented in this case, respondent first found that the Patels and Chase "cannot be said to have participated in the same or a series of related transactions that caused [p]laintiff's different damages." Respondent stated that plaintiff's negligence claim against the Patels seeks damages for bodily injuries caused by bed bug bites, and plaintiff does not charge Chase with responsibility for the bed bug infestation or a successive tort contributing to plaintiff's bodily injuries. Similarly, respondent observed that plaintiff's claims against Chase are all employment-related claims, for which the Patels are not alleged to be

---

[6] As respondent found section 1281.2(c) inapplicable, it did not proceed to determine which of the four alternative dispositions contained in the statute should be selected. Had it reached that question, we would review its determination under the abuse of discretion standard. (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1290 (*Rowe*).)

responsible. Respondent concluded that "the defendants cannot be said to have participated in the same or a series of related transactions" since "[a] determination of the Patels' liability for [p]laintiff's insect bites does not depend on any facts or law involved in determining … Chase's liability for its employment decision." Chase asserts respondent's reasoning provides an ample basis for our denial of these petitions.

Notwithstanding the disparate liability theories alleged against the Patels and Chase, we believe plaintiff's bed bug exposure at the Patels' hotel and her subsequent employment difficulties with Chase due to plaintiff's alleged bed bug-related disabilities constitute a "series of related transactions" within the meaning of section 1281.2(c). We find persuasive plaintiff's contention that, as pled, these two incidents, occurring within a short time of each other, are causally related. As plaintiff puts it, "[i]f not for [plaintiff's] experience at the Travelodge, she would have had no dispute with Chase." In other words, absent plaintiff's injuries from bed bugs at the Patels' hotel, plaintiff's employment-related problems with Chase would not have arisen. Aside from these two transactions being related to each other in that manner, plaintiff alleges that she suffered an identical form of damages from each transaction—lost wages—for which she claims the Patels and Chase share responsibility.

As for the possibility of conflicting rulings prong of section 1281.2(c), respondent rejected the notion that "there is a possibility of conflicting rulings on a common issue of law or fact," in the respective arbitration and court proceedings. Respondent stated that plaintiff relied on cases "involv[ing] several defendants alleged to have caused or contributed to Plaintiff's indivisible or successive injuries in the same or series of related transactions, or who otherwise bore joint or comparative liability for the same injury suffered by the Plaintiffs." Respondent reiterated that "[t]he distinct events underlying each claim are not part of the same or related series of transactions" and "[a] determination of the Patels' negligence liability does not depend on any facts or law involved in determining … Chase's liability for its employment decisions." Again, Chase defends respondent's reasoning.

We have already determined that plaintiff's bed bug exposure at the Patels' hotel and her employment-related difficulties with Chase constitute a "series of related transactions" under section 1281.2(c), even though plaintiff's liability theories against the Patels and Chase differ. Additionally, it is apparent that inconsistent rulings could occur with respect to plaintiff's claimed wage loss, if the issue of lost wages is separately adjudicated during plaintiff's arbitration against Chase and plaintiff's trial against the Patels. To illustrate this point, petitioners persuasively assert that the following scenario could occur: The arbitrator could reject plaintiff's employment claims against Chase, and deny plaintiff any recovery for lost wages. However, a different result could obtain in the court action, since the Patels, in defending against plaintiff's claims[7] and/or in connection with their own cross-complaint,[8] might persuade a jury to find that Chase, and not the Patels, are responsible for plaintiff's wage loss, due to Chase's alleged FEHA violations. Our Supreme Court has endorsed the application of section 1281.2(c) under similar circumstances. (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 350 ["…[I]n the contractual arbitration proceeding, the arbitrator might conclude that the [plaintiffs] were not legally entitled to damages in any amount from the unidentified, and effectively uninsured, motorist, and therefore could not obtain anything from [plaintiffs' insurer]. In the pending action, however, the superior court might conclude that the [plaintiffs] were indeed legally entitled to damages in some amount from the

---

[7] In apparent reliance on an "empty chair" defense, which is "the trial tactic of using the empty chair to ascribe fault to an actor who is not present to defend himself" (*Everman v. Superior Court* (1992) 8 Cal.App.4th 466, 470), the Patels have made clear that, in defending against plaintiff's claims against them, they intend to assert that Chase is liable for plaintiff's lost wages. Chase appears to concede that such an assertion would properly be made by the Patels in the court action (though Chase maintains that the stipulation mentioned in footnote 2, *ante*, eliminated any such liability issue). We do not resolve any question about the scope of the stipulation in these writ proceedings.

[8] As previously mentioned, Chase has filed a demurrer to the Patels' cross-complaint, which respondent has not yet resolved. (See fn. 3, *ante*.) However, regardless of the viability of the Patels' cross-complaint, Chase's alleged liability for plaintiff's lost wages will remain an issue in this case. (See fn. 7, *ante*.)

unidentified, and effectively uninsured, motorist, and therefore could obtain such sum from [plaintiffs' insurer]"].)

The purpose of section 1281.2(c) is to ensure "that common issues of fact and law will be resolved consistently, and only once." (*Mount Diablo Medical Center v. Health Net of California, Inc.* (2002) 101 Cal.App.4th 711, 727.) Consistent with that purpose, the issue of Chase's liability for plaintiff's lost wages should not be concurrently litigated in separate forums. Section 1281.2(c) plainly applies to this case, and respondent erred in concluding otherwise.

As respondent erred in finding section 1281.2(c) inapplicable to this case, we shall compel respondent to vacate its order compelling arbitration of plaintiff's claims against Chase and its accompanying order staying portions of the litigation pending the ordered arbitration. But this does not end the analysis. Once a court determines that the exception of section 1281.2(c) applies, the court must exercise its discretion to determine which of the four alternative dispositions contained in the statute should be applied. (*Rowe, supra,*153 Cal.App.4th at p. 1288, fn. 6 ["The court's discretion under section 1281.2, subdivision (c) does not come into play until it is ascertained that the subdivision applies . . ."].) Because respondent did not reach this question in light of its determination that section 1281.2(c) was inapplicable—a decision we reverse—it must now consider this question. Petitioners invite us to resolve this question in the context of these writ proceedings. We find it inappropriate to make this discretionary determination in the first instance. Instead, respondent shall address the question upon issuance of the remittiturs.[9]

DISPOSITION

In accordance with our notification to the parties that we might do so, we will direct issuance of a peremptory writ in the first instance. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-180.) Petitioners' right to relief is obvious, and no useful purpose would be served by issuance of an alternative writ, further briefing,

---

[9] The petitions raise various other issues, which need not be addressed in light of our conclusions.

and oral argument. (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; see *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237, 1240-1241; see also *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1240-1244.)

Let a peremptory writ of mandate issue directing respondent superior court to vacate the portion of its January 3, 2012, order granting Chase's motion to compel arbitration and staying proceedings, and to issue a new and different order (1) stating that the exception contained in section 1281.2(c) applies to this case, (2) resolving which of the four options set forth in section 1281.2(c) should be selected,[10] and (3) taking other action consistent with the views expressed in this opinion.

In the interests of justice, and to prevent any further delay in the proceedings, this opinion shall be final as to this court seven days from the date of its filing. (Cal. Rules of Court, rule 8.490(b)(3).) Petitioners shall recover their costs. (*Id.*, rule 8.493(a)(1)(A), (2).)

---

[10] Respondent possesses discretion to determine whether to solicit further briefing or argument from the parties before it selects between the four statutory options.