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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

AZUBUIKE STANLEY ONYI,

Plaintiff and Respondent,

v.

WINDSOR OAKRIDGE HEALTHCARE
CENTER L.P., et al.,

Defendants and Appellants.

A135367

(Alameda County
Super. Ct. No. RG11594401)

Defendants Windsor Oakridge Healthcare Center, L.P. (Windsor), Windsor Oakridge G.P., Inc., Lawrence and Simi Feigen, S&F Management Company, LLC and Juana Dominguez (jointly, defendants) appeal from an order denying their motion to compel arbitration of wrongful termination claims by former employee Azubuike Onyi. The trial court found Dominguez was not a party to the arbitration agreement and reasonably concluded that arbitration of the claims against the other defendants could result in conflicting rulings. Accordingly, we affirm.

BACKGROUND

Onyi was working as a certified nursing assistant at a nursing home in Oakland when it was acquired by Windsor in August 2010 and became known as Windsor Healthcare Center of Oakland. He was given a stack of papers to sign, including a two-page document captioned “AGREEMENT TO BE BOUND BY ALTERNATIVE

DISPUTE RESOLUTION POLICY.”¹ Onyi signed the papers after his shift and returned them to Windsor a day or two later. He did not see anyone sign the papers on Windsor’s behalf, and was not provided with a copy of the executed arbitration agreement at any time during his employment.

The two-page arbitration agreement was prefaced by the following statement in bold face. “**PLEASE NOTE: . . . [¶] Unlike the provisions of the Company Employee Handbook, the terms of this Agreement To Be Bound By Alternative Dispute Resolution Policy are contractual in nature.**” On the second page, it stated: “IN CONSIDERATION FOR AND AS A MATERIAL CONDITION OF EMPLOYMENT WITH THE COMPANY, AND IN CONSIDERATION FOR THE COMPANY’S RETURN AGREEMENT TO BE BOUND BY THE COMPANY’S ADR PROGRAM AND HAVE ANY AND ALL CLAIMS IT MAY ENJOY AGAINST ME RESOLVED IN THIS FORUM, AND PAY THE ARBITRATION FEES AS DESCRIBED THEREIN, IT IS AGREED THAT THE . . . DISPUTE RESOLUTION POLICY ATTACHED HERETO WHICH PROVIDES FOR FINAL AND BINDING ARBITRATION, IS THE EXCLUSIVE MEANS FOR RESOLVING COVERED DISPUTES” Signature and date lines for Windsor Healthcare Center of Oakland and the employee followed on the same page.

Onyi, who is Nigerian, was terminated in February 2011. His complaint against the Windsor defendants and Dominguez, filed in September 2011, alleged that during his employment Dominguez, also a nursing assistant, made numerous offensive statements about Nigerians and Africans; that nursing home administrator David Farrell, assistant administrator Craig Danby and other employees treated African employees less favorably than other employees; that Onyi was falsely accused of sleeping on the job and getting into bed with a nursing home resident; and that he was terminated shortly after complaining about Dominguez’s conduct.

¹ We will refer to this document as the arbitration agreement.

Defendants moved to compel arbitration. David Farrell, the facility's administrator, attested that he "executed a number of agreements on behalf of the facility related to, among other things, the initial staffing of the facility as of the commencement of its operations on August 1, 2010" and that among these was "an Agreement to Be Bound by Alternative Dispute Resolution Policy between Azubuike Stanley Onyi and the facility dated as of August 1, 2010. . . ." According to Farrell's declaration, "[i]t was as of August 1, 2010, and remains to this day, the intent of the facility, its ownership, and its management to be bound by the terms of those arbitration agreements"

When the motion to compel was argued in February 2012, Onyi's counsel observed that Farrell's declaration did not clarify exactly *when* he signed the arbitration agreement. After additional discovery and another hearing on the subject, defendants' counsel offered in writing to stipulate that "[o]n or about September 28, 2011, David Farrell signed the Arbitration Agreement in the space on that document designated as the space for signature by 'Windsor Healthcare Center of Oakland.' Mr. Farrell did so after discovering, as a result of a review of Plaintiff's personnel file prompted by the filing of this lawsuit, that the Arbitration Agreement did not contain a signature in the space designated as the space for signature by 'Windsor Healthcare Center of Oakland' despite Windsor's general practice, as of August 1, 2010, to have an authorized representative sign agreement[s] such as the Arbitration Agreement in the space designated as the space for signature by 'Windsor Healthcare Center of Oakland' prior to placing such agreement in the personnel files of its employees." Windsor also offered to stipulate that "When he signed the Arbitration Agreement, Mr. Farrell also wrote the date '8/1/10' in the space adjacent to his signature in order to reflect that his signature was intended to memorialize his assent to the terms of the Arbitration Agreement, on behalf of 'Windsor Healthcare Center of Oakland,' as of August 1, 2010."

Onyi was not satisfied with the proposed stipulation, and on March 23, 2012, proceeded with Farrell's deposition. Farrell testified that he signed the arbitration agreement on August 1, 2010: "Q. Did you sign the agreement—a copy of which is attached as Exhibit A, did you sign that on August 1st of 2010? [¶] A. Yes. I see my

signature here. I signed numerous documents on those days. Yes. [¶] Q. Okay. And did you sign all—strike that. [¶] By the way, how do you know you signed it on August 1st of 2010? [¶] A. I see my date here, and my signature. I don't remember signing this particular one, but I signed many things those days. This was—when we take over facilities, of course, this is normal practice, walking through and taking over—walking through the staff to bring them onto Windsor payrolls. [¶] Q. So the only way—just so that it's clear, the only way that you know that you signed this document on August 1, 2010 is because of the date you see on it, right? [¶] A. Yes, and remembering all the times that I was signing documents of numerous employees on August 1st, yes, I certainly remember signing many things, and that's my signature.”

Farrell's testimony notwithstanding, defendants reiterated in a subsequent brief that Farrell signed the arbitration agreement in September 2011. When the hearing resumed on April 27, 2012, the trial court questioned the discrepancy between Farrell's testimony and defendants' written representations. Windsor argued that the date of execution was legally irrelevant, and that Farrell had truthfully attested he signed it “as of,” as opposed to on, August 1, 2010.

The court denied the motion to compel arbitration. “Defendants have failed to meet their burden of demonstrating by a preponderance of the evidence the existence of a valid agreement to arbitrate. [Citations.] The evidence establishes that no agreement to arbitrate was entered into during Plaintiff's term of employment. The Court does not find credible Defendants' proffered evidence to the contrary.” The court alternatively denied the motion because the claims against Dominguez were not subject to arbitration and raised the possibility of conflicting rulings.

Defendants filed this timely appeal.

DISCUSSION

A. Standard of Review and Arbitration Principles

Pursuant to Code of Civil Procedure section 1281.2, subdivision (c),² the court, may, in its discretion, refuse to compel arbitration or may stay arbitration where “[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.” (§ 1281.2, subd. (c); *Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC* (2007) 150 Cal.App.4th 469, 475.) “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, as here, there is a possibility of conflicting rulings.’ ” (*Fitzhugh, supra*, at p. 475.)

The court properly exercised its discretion under section 1281.2, subdivision (c). An employer is liable under Government Code section 12940 if a nonsupervisory employee harasses another employee based on race, national origin, ancestry or other specified characteristics “if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.” (Gov. Code, § 12940, subd. (j)(1).) An employee may also be held personally liable for such harassment, whether or not the employer knew or should have known about it. (Gov. Code, § 12940, subd. (j)(3).) Onyi alleged Government Code section 12940 claims against the Windsor defendants, based primarily on their alleged failure to address Dominguez’s behavior, and also against Dominguez as an individual. It is thus possible that an arbitration against the Windsor defendants could result in a finding of liability for their failure to correct Dominguez’s actions, while a subsequent trial of Onyi’s claims against Dominguez could produce a finding of no liability. Alternatively, the factual allegations about Dominguez could be rejected in arbitration but found true in a court

² All further statutory references are to the Code of Civil Procedure unless otherwise noted.

action against her. (See, e.g., *Best Interiors, Inc. v. Millie & Severson, Inc.* (2008) 161 Cal.App.4th 1320, 1330.) The trial court had a reasonable basis to conclude that arbitration of the claims against the Windsor defendants raised the possibility of conflicting rulings on common issues.

Defendants nonetheless contend section 1281.2, subdivision (c) is inapplicable because the complaint alleges Dominguez was Windsor's agent and, therefore, that she is bound by and entitled to enforce the arbitration agreement as though she were a signatory to it. We disagree.

“The term “third party” for purposes of [Code of Civil Procedure] section 1281.2 . . . must be construed to mean a party that is not bound by the arbitration agreement.’ [Citation.] ‘[I]n many cases, nonparties to arbitration agreements are allowed to enforce those agreements where there is sufficient identity of parties.’ ” (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1407.) Defendants rely on Onyi's boilerplate allegation that “each of the Defendants . . . was at all times relevant hereto the agent, employee or representative of the remaining Defendants and was acting, at least in part, within the course and scope of such relationship.” (Italics added.) But the assertion that each defendant was the other defendants' “agent, employee *or* representative,” phrased in the alternative, does not persuade us that Onyi is claiming Dominguez, whom he *specifically identified in the complaint as a Windsor employee*, was also acting as their agent. Nor do the complaint's factual allegations suggest an agency theory. To the contrary, the thrust of the complaint is that Dominguez is personally liable under Government Code section 12940, subdivision (j)(3) for her actions in Windsor's employment, while the Windsor defendants are liable under subdivision (j)(1) for failing to stop her and, to some extent, for their own acts of discrimination or harassment. This, then, is not a case where the claims against all defendants are “based on the same facts and theory and are inherently inseparable.” (*Cf. Laswell, supra*, at p. 1407 [nonsignatories were related corporate and partnership entities and claims against all defendants were inseparable]; *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1287 [nonsignatories to contract sued for breach as alter ego of signatory defendant]; *Dryer v.*

Los Angeles Rams (1985) 40 Cal.3d 406, 418 [nonsignatory defendants could be liable in breach of contract action only as agents of signatory defendants].)

Nor, for the same reason, is this an appropriate case for the application of equitable estoppel to bar Onyi from resisting arbitration on the basis of his claims against Dominguez. “ “[T]he equitable estoppel doctrine applies when a party has signed an agreement to arbitrate but attempts to avoid arbitration by suing nonsignatory defendants for claims that are ‘ “based on the same facts and are inherently inseparable” ’ from arbitrable claims against signatory defendants.” ’ ” (*Rowe v. Exline, supra*, 153 Cal.App.4th at p. 1287.) This, as explained above, is not such a case. The trial court correctly rejected defendants’ claim that Dominguez is effectively a party to the arbitration agreement for purposes of section 1281.2, subdivision (c).

Because the court properly exercised its discretion under section 1281.2, subdivision (c), we will not consider its finding that defendants failed to prove the existence of a valid arbitration agreement.

DISPOSITION

The order denying the motion to compel arbitration is affirmed.

Siggins, J.

^We concur:

Pollak, Acting P.J.

Jenkins, J.