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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

HOMEPORT INSURANCE SERVICES, INC., et al., Plaintiffs and Respondents, v. WILLIAM LUNDY, Defendant and Appellant.	B236276 (Los Angeles County Super. Ct. No. NC054268)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ross M. Klein, Jr., Judge. Affirmed.

Mower, Carreon & Desai, Patrick A. Carreon, James A. Burton for Defendant and Appellant.

Russell, Mirkovich & Morrow, Joseph N. Mirkovich, and Margaret E. Morrow for Plaintiffs and Respondents.

This appeal concerns the enforceability of a provision in a settlement agreement in which appellant William Lundy agreed not to seek reemployment with respondents SSA Terminals LLC, SSA Terminals (Long Beach) LLC, and SSA Pacific, Inc. (collectively "SSA"). After Lundy suffered injuries while working for SSA as a longshoreman in the Port of Long Beach, he filed a workers' compensation claim against SSA and a personal injury action against the City of Long Beach; SSA was contractually required to indemnify and defend the City of Long Beach. The parties settled both cases pursuant to written settlement agreements that included a provision waiving Lundy's right to seek reemployment with SSA. When Lundy continued to accept work assignments with SSA in breach of the "no reemployment" provision, SSA brought this action for specific performance and injunctive relief. The parties filed cross-motions for summary judgment, disputing whether the "no reemployment" provision violated California Labor Code section 132a, the Longshore and Harbor Workers' Compensation Act (LHWCA), or the California Fair Employment and Housing Act (FEHA). We conclude that the trial court properly granted summary judgment for SSA and denied summary judgment for Lundy because there was no evidence of any discriminatory or retaliatory motive by SSA in seeking to include the "no reemployment" provision in Lundy's settlement agreement. We accordingly affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Lundy is a longshoreman in the International Longshore and Warehouse Union (ILWU). SSA Terminals LLC, SSA Terminals (Long Beach) LLC, and SSA Pacific, Inc. are employers of longshoreman. Homeport Insurance Services, Inc. (Homeport) provides insurance for SSA, including workers' compensation insurance under the LHWCA.

As a "non-steady" longshoreman, Lundy is assigned to an employer on a day-to-day or per job basis. An employer requests longshore personnel through the Pacific Maritime Association (PMA), the collective bargaining and payroll agent for longshore employers. PMA consolidates all longshore labor orders and notifies the ILWU's dispatch halls of the need for personnel. If a longshoreman wants to work on a particular

day, he or she must sign up at the local dispatch hall and seek an assignment from the appropriate "board," categorized by the type of work involved. The longshoreman with the fewest hours worked that month is given priority for the assignment, and once the job is completed, the longshoreman can return to the dispatch hall for a new assignment. Longshoreman with disability-related work restrictions usually are assigned to the Casualty Board, but the dispatch procedure remains the same, with priority for any assignments on that board going to the longshoreman with the fewest hours worked.

On May 18, 2006, Lundy was working as a longshoreman for SSA in the Port of Long Beach. He suffered industrial injuries when the truck he was operating collided with a guide post on port property leased by SSA from the City of Long Beach. Lundy, represented by counsel, filed a workers' compensation claim with the United States Department of Labor for benefits under the LHWCA.

Lundy, represented by separate counsel, also filed a personal injury action against the City of Long Beach in which he alleged that his driving accident was caused by a dangerous condition of property owned by the City. SSA's lease of the port property obligated it to defend and indemnify the City for claims that arose on the premises, including the claims alleged in Lundy's personal injury complaint. SSA accepted the defense of Lundy's complaint from the City.

In January 2008, while Lundy's workers' compensation claim and personal injury action were still pending, Lundy's treating physician released him to return to light duty work with no heavy lifting. Upon being released to work, Lundy began submitting requests for light duty assignments to the PMA through his union's health benefits office. According to Lundy, an injured longshoreman is required to submit such requests when he or she has not yet applied for a formal disability accommodation under the ILWU-PMA ADA Reasonable Accommodation Policy. Lundy later submitted a formal request for a reasonable accommodation to the Joint Port Labor Relations Committee, and was granted an accommodation exempting him from certain types of work. Since that time, Lundy has remained on light duty and has received his dispatch assignments solely from the Casualty Board.

In May 2008, Lundy agreed to settle his workers' compensation claim and his personal injury action for a total payment of $175,000, with a net payment to Lundy of $100,000 after deducting his attorney's fees and costs. As part of the settlement, Homeport agreed to waive its lien for benefits paid under the LHWCA in the amount of $112,742.60. According to Lundy's attorneys in both cases, SSA and Homeport insisted in negotiations that neither matter would settle unless Lundy agreed to a provision barring him from working for SSA or any other company insured by Homeport in the future. However, neither SSA nor Homeport disclosed to Lundy's attorneys their reasons for conditioning the settlement on his waiver of reemployment. After consulting with his attorneys in both cases, Lundy consented to the "no reemployment" provision.

On May 12, 2008, the parties attended a hearing on the personal injury action to place their settlement on the record before the trial court. Lundy's attorney was present at the hearing and Lundy appeared by telephone. The terms of the settlement were stated on the record, including the following recitation by the City's counsel: "[T]he settlement is contingent upon approval of the [workers' compensation settlement] by the Department of Labor and that Mr. Lundy will understand that he will no longer work for any Stevedoring Services of America or SSA Marine employer or any employer insured by Homeport Insurance Company; that the settlement takes care of any future medical claims that he might have and that the settlement also takes care of any liens, that Mr. Lundy is responsible for all liens in this case except for the Pacific Maritime Association lien which has already been taken care of by Homeport Insurance Company." Lundy confirmed at the hearing that he understood the terms of the settlement and had sufficient time to discuss the settlement with his counsel. Neither Lundy nor his counsel raised any concerns about the "no reemployment" provision at that time. At the conclusion of the hearing, the trial court noted on the record: "Mr. Lundy, you can feel that you got vigorous representation and there was a vigorous opposition and I think it was a very good settlement for you, sir."

Following the hearing, the City sent a written settlement agreement to Lundy's counsel in the personal injury action. The agreement included a general release of claims

by Lundy against the City, its assigns, and all others acting on its behalf. The agreement also stated that the settlement was contingent upon obtaining approval of a workers' compensation settlement by the United States Department of Labor. Paragraph 12 of the agreement, entitled "Plaintiff's Future Employment," provided as follows: "Plaintiff specifically agrees, at any time, in the future, never to work for any company insured by or in any way affiliated with Homeport Insurance, including but not limited to SSA Marine, SSA Terminals, SSAT and Pacific Maritime Services." The settlement agreement with the City was signed by Lundy and his personal injury attorney.

Homeport sent a separate written settlement agreement to Lundy's counsel in the workers' compensation case. Paragraph 1(n) of the agreement, entitled "Adequacy of Settlement," included the following provision: "As part of this consideration, claimant has agreed not to return to work for any Homeport Insurance insured. If claimant does return to work with a Homeport Insurance insured, he is in violation of this agreement and is to return all settlement amounts. This clause has been explained to the claimant in full by his attorneys of record." The settlement agreement with SSA and Homeport was signed by Lundy and his workers' compensation attorney. Homeport then submitted the settlement agreement to the Department of Labor for approval under the LHWCA.

In June 2008, the Department of Labor issued an order approving the settlement agreement in Lundy's workers' compensation case ("DOL order"). The DOL order provided, in pertinent part, as follows: "The District Director, pursuant to the authority vested by . . . the Longshore and Harbor Workers' Compensation Act, . . . finds that the money amount is commensurate with the claimant's disability and that the Agreement was not secured under duress, approves the agreed settlement, and effects a final disposition of this claim, discharging the liability of the employer and insurance carrier for any further payment of compensation and medical care under the Longshore Act." The order did not include any express findings on the "no reemployment" provision.

Pursuant to the terms of the settlement agreements, Lundy was paid a total of $175,000 and Homeport waived its lien of $112,742.60. However, following the settlement of his workers' compensation and personal injury claims, Lundy repeatedly

breached the "no reemployment" provision in the settlement agreements by accepting dispatch assignments to work for SSA on nine occasions. According to SSA, because Lundy's assignments are made through his union's dispatch hall on a day-to-day or per job basis, SSA is unable to monitor whether Lundy has been dispatched to work for an SSA entity on any given day until he has completed the assignment. SSA was able to determine that Lundy was accepting dispatches with SSA entities only by reviewing its payroll records after the fact. Upon learning that Lundy was accepting these assignments, SSA sent a letter to his attorney requesting that Lundy cease his attempts to obtain employment with SSA. When Lundy continued accepting dispatch assignments with various SSA entities, SSA and Homeport filed this action for specific performance of the personal injury settlement agreement and a permanent injunction barring Lundy from working at any Homeport-insured company, including SSA.

The parties filed cross-motions for summary judgment. Lundy did not dispute that he had breached the "no reemployment" provision in the settlement agreement by accepting assignments to work for SSA. Rather, Lundy contended that the provision was void and unenforceable because it constituted unlawful discrimination and retaliation in violation of section 132a of the California Labor Code, section 49 of the LHWCA, and FEHA. The trial court concluded that Lundy's evidence did not support an inference of discriminatory animus or disparate treatment by SSA, but instead showed that Lundy had voluntarily agreed to the settlement provision with the assistance of counsel and had ratified the settlement by refusing to return the consideration paid. However, the trial court further concluded that, while the "no reemployment" provision was enforceable as to SSA, it was too uncertain to be enforceable as to Homeport because it failed to identify which entities other than SSA were insured by Homeport. The trial court therefore granted summary judgment for SSA, but denied summary judgment for Homeport.[1] The court also denied Lundy's summary judgment motion. Following entry of a final

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[1] Homeport thereafter dismissed its complaint against Lundy without prejudice, and is no longer a party to this action.

judgment permanently enjoining Lundy from working for SSA, Lundy filed a timely notice of appeal.

DISCUSSION

On appeal, Lundy challenges the trial court's order granting summary judgment for SSA and denying summary judgment for Lundy. In asserting that the trial court erred in its summary judgment ruling, Lundy does not dispute that he entered into a written settlement agreement in connection with his personal injury action against the City, and that he breached the "no reemployment" provision in that agreement by continuing to accept dispatch assignments to work for SSA. Rather, Lundy's principal argument on appeal is that the "no reemployment" provision is void and unenforceable as a matter of law because it is contrary to the express provisions and public policy of section 132a of the Labor Code, section 49 of the LHWCA, and FEHA.

I. Standard of Review

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action . . . ." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 850.) The party opposing summary judgment "may not rely upon the mere allegations or denials of its pleadings," but rather "shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.*, *supra,* at p. 850.)

We review a trial court's ruling on a summary judgment motion de novo. (*Aguilar v. Atlantic Richfield Co.*, *supra,* 25 Cal.4th at p. 860.) We consider all the evidence

presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We affirm summary judgment where the moving party demonstrates that no triable issue of material fact exists and that it is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).).

II. The "no reemployment" provision in Lundy's settlement agreement is enforceable as to SSA.

As our Supreme Court has observed, """[t]he law favors settlements."" (*Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 930.) A settlement agreement accordingly "is considered presumptively valid." (*Ibid.*) When parties to a pending litigation enter into a settlement agreement, they enter into a binding contract that is subject to the general law governing all contracts. (*Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 745.) "Courts seek to interpret contracts in a manner that will render them ' "lawful, operative, definite, reasonable, and capable of being carried into effect[.]"" (*Ibid.*) While courts generally will not enforce a contract that is either illegal or against public policy, """courts have been cautious in blithely applying public policy reasons to nullify otherwise enforceable contracts."" (*Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 183-184; see also *VL Systems, Inc. v. Unisen, Inc.* (2007) 152 Cal.App.4th 708, 713 ["Freedom of contract is an important principle, and courts should not blithely apply public policy reasons to void contract provisions."].) A party seeking to avoid enforcement of a contract on public policy grounds has the burden """"to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people."""" (*Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 839.) "'Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case.' [Citation.]" (*Dunkin v. Boskey*, *supra*, at p. 183.)

Labor Code section 132a prohibits an employer from discharging or in any manner discriminating against an employee for filing a workers' compensation claim. (Lab.

Code, § 132a, subd. (1).) Section 49 of the LHWCA similarly provides that it "shall be unlawful for any employer . . . to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer. . . ." (33 U.S.C. § 948a.) FEHA makes it an unlawful employment practice to, among other acts, discriminate against an employee on the basis of a physical disability and to retaliate against an employee for opposing a discriminatory practice. (Gov. Code, § 12940, subds. (a), (h).)

The parties have not cited, nor is this Court aware of, any published California decision that has considered whether a "no reemployment" provision in a settlement agreement violates federal or state laws prohibiting discrimination and retaliation in employment. Several courts outside of California have held that a settlement provision waiving the right to seek future employment with the settling employer does not, in and of itself, constitute unlawful discrimination or retaliation against the settling employee. (See, e.g., *Jencks v. Modern Woodmen of America* (10th Cir. 2007) 479 F.3d 1261, 1266-1267; *Kendall v. Watkins* (10th Cir. 1993) 998 F.2d 848, 850-851; *Wittig v. Allianz, A.G.* (Hawaii Ct.App. 2006) 145 P.3d 738, 746.) In support of his argument that the mere inclusion of the "no reemployment" provision in his settlement agreement was both discriminatory and retaliatory, Lundy primarily relies on the Fourth Circuit decision in *Norfolk Shipbuilding & Drydock Corp. v. Nance* (4th Cir. 1988) 858 F.2d 182 (*Norfolk*), and on the administrative decision that preceded it in *Norfolk Shipbuilding & Drydock Corp. v. Nance* (BRB No. 86-2436, Nov. 23, 1987) 20 BRBS 109, 1987 WL 107404.

In *Norfolk*, the parties entered into a written settlement of employee Nance's claim for workers' compensation benefits under the LHWCA. (*Norfolk*, *supra*, 858 F.2d at p. 184.) Following the approval of the written settlement agreement by the Department of Labor, the employer discharged Nance on the ground that he orally had agreed to resign as a condition of the settlement. (*Ibid*.) The Benefits Review Board determined that Lance's discharge constituted unlawful discrimination under the LHWCA based on the employer's admitted policy of requiring the resignation of any employee who settled a workers' compensation claim. (*Norfolk Shipbuilding & Drydock Corp. v. Nance*,

supra, 1987 WL 107404, p. *3.) The Benefits Review Board reasoned that a "'generalized animus against longshore claimants as a class'" could be inferred from the employer's testimony that its purpose in uniformly seeking resignations from employees who filed workers' compensation claims was that such employees were "generally regarded with disfavor." (*Ibid*.)

On appeal, the Fourth Circuit declined to consider whether the employer's general policy of conditioning workers' compensation settlements on employee resignations violated the LHWCA because there was substantial evidence to support a finding that Nance's discharge was itself discriminatory. (*Norfolk, supra*, 858 F.2d at p. 185.) Specifically, the employer admitted that it sought Nance's resignation because there was "friction" resulting from his workers' compensation claim and the employer wanted to "clean the slate" by removing Nance from the company. (*Ibid*.) The Fourth Circuit concluded that the employer's testimony "on its desire to enter into such an agreement in the case of Nance in order to 'clean the slate' of friction or hostility associated with his claim [was] substantial evidence of discriminatory intent." (*Id*. at p. 187.)

In this case, however, Lundy did not present any evidence that SSA acted with a discriminatory or retaliatory intent when it conditioned the settlement of Lundy's claims on his waiver of a right to seek reemployment. There was no evidence that SSA sought the inclusion of the "no reemployment" provision because of any animus associated with Lundy's industrial injuries or his filing of a workers' compensation claim. Nor was there any evidence that SSA or Homeport had a uniform policy of requiring every employee who settled a workers' compensation claim to waive the right to any future employment with SSA as a condition of settlement. Instead, the undisputed facts demonstrate that the "no reemployment" provision was part of a carefully negotiated settlement between the parties and was supported by adequate consideration to Lundy. Lundy was represented throughout the settlement negotiations by counsel in both his workers' compensation and personal injury cases, and he specifically discussed the "no reemployment" provision with his attorneys in each case before agreeing to be bound by the provision.

In exchange for his general release of claims and his agreement not to seek reemployment with SSA, Lundy received a settlement payment of $175,000, along with a waiver of Homeport's lien of $112,742.60. Lundy orally agreed to the terms of the personal injury settlement, including the waiver of his right to reemployment, in open court, and represented to the trial court that he understood the settlement terms and had sufficient time to discuss them with his counsel. Both Lundy and his counsel signed two written settlement agreements, each of which included a "no reemployment" provision in plain and unambiguous terms, and the fully executed workers' compensation settlement agreement was submitted to the Department of Labor for approval. The Department of Labor approved the workers' compensation settlement agreement without modification, and Lundy thereafter accepted the consideration paid.[2]

In an effort to show that the inclusion of the "no reemployment" provision was itself discriminatory and retaliatory, Lundy argues that he did not have any history of job performance or safety problems prior to his May 2006 accident. However, SSA is not asserting that Lundy should be precluded from accepting dispatch assignments with SSA-related entities due to his prior work performance, but rather is basing its enforcement action on Lundy's agreement not to seek reemployment with SSA as an express term of his settlement. Lundy also asserts that, prior to his May 2006 accident, he had suffered non-industrial injuries that necessitated substantial time off from work, and that SSA never required him to waive his right to reemployment when he was ready to return to work from such injuries. Yet there is no evidence that the "no reemployment" provision was sought by SSA because Lundy attempted to return to work from an industrial injury. Instead, the record reflects that the provision was included as part of a global settlement

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[2] Notably, both in his appellate brief and at oral argument, Lundy contended that the "no reemployment" provision was severable such that if the provision was held to be invalid, the rest of the settlement agreement would remain fully enforceable, including the consideration paid to Lundy. Lundy thus seeks to be relieved of his contractual obligation not to accept reemployment with SSA without being required to return the substantial monetary payment that he received in exchange for making such promise.

of Lundy's pending workers' compensation and personal injury claims. As further evidence of retaliation, Lundy points to a statement in SSA's reply brief in support of its request for a preliminary injunction in which SSA's counsel noted that monetary damages for Lundy's breach of the settlement agreement would not provide an adequate legal remedy because "[i]f Mr. Lundy were to file a new claim for injury compensation based on his continuing to work at plaintiffs' terminals, the cost to plaintiffs could be enormous." This isolated statement, however, does not demonstrate that either SSA or Homeport intended to discriminate or retaliate against Lundy for filing a workers' compensation claim by barring him from any future employment with SSA.

Under these circumstances, we conclude that the "no reemployment" provision in Lundy's settlement agreement is enforceable as to SSA. We do not suggest that a settlement provision waiving the right to seek reemployment may never constitute unlawful discrimination or retaliation under California or federal law. In this particular case, however, the record reflects that the "no employment" provision was the result of a carefully negotiated global settlement agreement which was supported by adequate consideration to Lundy and was approved in writing by the parties, their attorneys, and the Department of Labor. Because Lundy failed to present any evidence that the inclusion of the "no reemployment" provision was discriminatory or retaliatory, the trial court did not err in granting summary judgment for SSA and in denying summary judgment for Lundy.[3]

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[3] In light of our conclusion that the "no reemployment" provision may be lawfully enforced by SSA, we need not address the parties' remaining arguments regarding the alleged severability of the provision from the settlement agreement, the scope of Lundy's general release of claims, or the collateral estoppel effect of the DOL order in this case.

DISPOSITION

The judgment is affirmed. SSA shall recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.