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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KEVIN LEWIS et al.,

Plaintiffs and Respondents,

v.

24 HOUR FITNESS USA, INC.,

Defendant and Appellant.

B239912

(Los Angeles County
Super. Ct. No. BC437680)

APPEAL from an order of the Superior Court of Los Angeles County, Elizabeth Allen-White, Judge. Reversed.

Law Offices of Stephen Glick, Stephen Glick and Anthony Jenkins, for Plaintiffs and Respondents.

Akin Gump Strauss Hauer & Feld LLP, Rex S. Heinke, Gregory W. Knopp and Orly Degani; and Littler Mendelson, PC, Keith A. Jacoby, Brandie N. Charles and Judy M. Iriye, for Defendant and Appellant.

This is the second appeal from the trial court's refusal to enforce an arbitration agreement between defendant, 24 Hour Fitness USA, Inc., and plaintiffs Kevin Lewis, Amanda Nguyen, Shane Nicol and Fareh Zoberi. Defendant argues the trial court erred in severing the Private Attorneys General Act and Unfair Competition Law claims as nonarbitrable and ordering these claims litigated before arbitration. We conclude our prior decision adjudicated all of plaintiffs' claims and is the law of the case.

Accordingly, we reverse the trial court's order.

On May 14, 2010, plaintiffs filed a complaint against defendant. On June 4, 2010, plaintiffs filed their first amended complaint on behalf of themselves and a class consisting of California sales counselors, fitness trainers and managers employed by defendant. The first amended complaint alleged violations of: Labor Code sections 201 through 203, 226, subdivisions (a) and (e), 510, 1174, 1194(a), and 1198; Industrial Welfare Commission Order 2-2001; Business and Professions Code section 17200 et seq.; and the Labor Code Private Attorneys General Act of 2004. (Lab. Code § 2699, subdivisions (a) and (f).)

On July 29, 2010, defendant filed a motion to compel arbitration and stay court proceedings. Defendant argued plaintiffs' claims were subject to arbitration under the arbitration policy in the employee handbook. The arbitration agreement requires all disputes to be resolved by an arbitrator through final and binding arbitration including disputes relating to trade secrets, unfair competition, compensation, termination and state statutes, if any address the same subject matters, and all other statutory and common law except worker's compensation claims. The arbitration agreement is governed by the Federal Arbitration Act. The arbitration agreement contains a class action and class arbitration waiver. The arbitration agreement provides, "[T]here will be no right or authority for any dispute to be brought, heard, or arbitrated as a class action (including without limitation opt out class actions or opt in collective class actions), or in a representative or private attorney general capacity on behalf of a class of persons or the general public."

The trial court denied the motion on September 20, 2010. The trial court ruled *Stolt-Nielsen S.A. v. Animal Feeds Internat. Corp.* (2010) 130 S. Ct. 1758 did not preempt *Gentry v. Superior Court* (2007) 42 Cal.4th 443. The trial court found the class action waiver was unenforceable as against public policy as stated in *Gentry*. The trial court also found defendant waived arbitration. This was based on defendant's statement that it did not seek enforcement of the arbitration provision if the court found the class waiver provision unenforceable.

On November 3, 2011, we reversed the trial court order in an unpublished opinion. (*Lewis v. 24 Hour Fitness USA, Inc.* (Nov. 3, 2011, B227869 [nonpub. opn.].) We found plaintiff failed to present any evidence the class action waiver was substantively unconscionable. We also found defendant had not forfeited its right to challenge the class action waiver ruling. In addition, this court stated: "We need not address: the parties' preemption contentions; the arguments as to the trial court's stated reasons for refusing to enforce the arbitration agreements; and the arbitrability of any individual cause of action as plaintiffs never raised this precise issue here or in the trial court. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 681; *Tutti Mangia Italian Grill, Inc. v. American Textile Maintenance Co.* (2011) 197 Cal.App.4th 733, 740.)" On November 30, 2011, we denied plaintiff's petition for rehearing.

On remand, defendant sought an order requiring plaintiff to arbitrate their individual claims. In opposition, plaintiff argued the trial court should sever the language in the arbitration agreement prohibiting their private attorney general enforcement under Labor Code section 2698 et seq. Plaintiffs relied on *Brown v. Ralphs Grocery Company* (2011) 197 Cal.App.4th 489, 502-503. Plaintiffs also contended this court's November 3, 2011 decision and subsequent order denying plaintiff's petition for rehearing are not the law of the case as to their claims under the Private Attorneys General Act and Unfair Competition Law. They further argued the arbitration agreement is unenforceable because the Private Attorneys General Act and Unfair Competition Law waivers are substantively unconscionable. In the alternative, plaintiffs requested the Private Attorneys General Act and Unfair Competition Law claims proceed in court prior to the

arbitration of their individual claims under Code of Civil Procedure section 1281.2, subdivision (c).

On February 27, 2012, the trial court heard oral argument on defendant's motion to compel arbitration. The trial court proposed severing the Private Attorneys General Act and Unfair Competition Law claims because they were nonarbitrable under *Brown v. Ralphs Grocery Company*. The trial court found our prior decision did not "specifically indicate that the [Private Attorneys General Act] claims and the [Unfair Competition Law] claims should be arbitrated." On March 12, 2012, the trial court ruled: "The [Private Attorneys General Act] representative suit and [Unfair Competition Law] claim waivers are severed from the arbitration agreement [. . .] [P]laintiffs' [Private Attorneys General Act] representative suit and [Unfair Competition Law] injunctive relief claims shall proceed in this Court prior to the arbitration of their individual claims pursuant to [Code of Civil Procedure section 1281.2, subdivision (c)]." Defendant filed its notice of appeal on March 20, 2012.

Under the law of the case doctrine, "[t]he decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in a subsequent retrial or appeal in the same case." (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491; *Kowis v. Howard* (1992) 3 Cal.4th 888, 892-893.) Our Supreme Court has stated: "Generally, the doctrine of law of the case does not extend to points of law which might have been but were not presented and determined in the prior appeal. [Citation.] As an exception to the general rule, the doctrine is . . . held applicable to questions not expressly but implicitly decided because they were essential to the decision of the prior appeal. [Citations.]" (*Olson v. Cory* (1983) 35 Cal.3d 390, 399; *Estate of Horman* (1971) 5 Cal.3d 62, 73.) The law of the case doctrine is applicable even when the prior appellate opinion is erroneous. (*Morohoshi v. Pacific Home, supra*, 34 Cal.4th at p. 491; *People v. Stanley* (1995) 10 Cal.4th 764, 786.)

Here, our prior opinion adjudicated the arbitrability of plaintiff's claims under the Private General Attorneys Act and Unfair Competition Law. We ruled plaintiffs forfeited

their argument as to “arbitrability of any individual cause of action as plaintiffs never raised this precise issue here or in the trial court.” We cited *Pearson Dental Supplies, Inc. v. Superior Court*, *supra*, 48 Cal.4th at p. 681 and *Tutti Mangia Italian Grill, Inc. v. American Textile Maintenance Co.*, *supra*, 197 Cal.App.4th at p. 740 to support our forfeiture finding. This ruling applies to the arbitrability of plaintiffs’ Private General Attorneys Act and Unfair Competition Law claims. Our prior ruling on the arbitrability of these claims is law of the case.

The order under review is reversed. Defendant, 24 Hour Fitness USA, Inc., shall recover its costs on appeal from plaintiffs, Kevin Lewis, Amanda Nguyen, Shane Nicol and Fareh Zoberi.

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TURNER, P. J.

We concur:

KRIEGLER, J.

FERNS, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.