Filed 3/16/17 Mohsenin v. Adventure-16 CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ALIA MOHSENIN, Plaintiff and Respondent, v. ADVENTURE-16, INC. et al., Defendants and Appellants.	B262528 (Los Angeles County Super. Ct. No. BC544992)

APPEAL from an order of the Superior Court of Los Angeles County. Maureen Duffy-Lewis, Judge. Reversed and remanded with directions in part, and affirmed in part.

JW Howard | Attorneys, John W. Howard for Defendants and Appellants.

Cantor Law, Zachary M. Cantor for Plaintiff and Respondent.

Appellants Adventure 16, Inc. (A-16), Mark Castberg, Erika Fiksdal, Andrew Hartman, and John Mead (individual appellants) appeal from an order denying their motion to compel arbitration. Alia Mohsenin (Mohsenin) sued appellants over events occurring during his employment by A-16. Appellants' subsequent motion to compel arbitration of Mohsenin's claims was denied by the trial court, which found that the arbitration agreement was both procedurally and substantively unconscionable. We reverse as to A-16, and affirm as to the individual appellants.

FACTUAL BACKGROUND

Mohsenin was a sales associate in A-16's "Boot-Fitting Department," hired on July 1, 2002. Upon hiring, A-16 gave him over 20 documents and required him to sign at least five of them. One of those documents was a written arbitration agreement which, pursuant to A-16 policy, is given to all new employees. Mohsenin and three representatives of A-16 signed the arbitration agreement on June 29, 2002. A-16 provided testimony by declaration of its human resources manager that arbitration agreements are "provided separately from the 'new hire' documents," that the "employee is urged to consult an attorney prior to signing," that this advice is "echoed in the [Arbitration] Agreement itself," and that "[t]hat occurred with respect to Mohsenin." A-16 also averred that it does not coerce employees into signing such contracts, that signing them has never been a condition of employing anyone, and that it advises managers that a new employee may refuse to sign its arbitration agreement without fear of losing his or her job.

Mohsenin stated in his declaration in opposition to the motion to compel arbitration that "[o]n or about June 28, 2002," he was "coerced into signing various form documents related to my employment with Adventure 16, one of which was the Arbitration Agreement." He was not given any

opportunity to read through, comprehend, or ask questions about the arbitration agreement even though he asked more than once for more time, and he stated that the arbitration agreement was presented to him as a term or condition of employment.

Mohsenin also testified he was not verbally made aware that he could consult legal counsel before signing the arbitration agreement, it was not separated from the other documents he signed, it was not marked in any way that would have alerted him to its significance, and he was not alerted to its general use or purpose.

The arbitration agreement covers "all claims arising out of or related to my employment with Adventure 16," but carves out claims involving "injunctive or equitable relief." Any arbitration must be conducted according to the Model Employment Arbitration Procedures of the American Arbitration Association, and the arbitration "shall be conducted in the city in which the employee was last employed by Adventure 16." The fee provision requires fees to be borne by the parties equally on a pro rata basis, and requires each party to deposit them in advance.

A-16 terminated Mohsenin on July 22, 2013.

PROCEDURAL HISTORY

Mohsenin filed his lawsuit on May 8, 2014, alleging 13 causes of action, including claims for racial and national origin discrimination, retaliation, wage claims, wrongful termination, and emotional distress. Appellants' "Amended Motion to Dismiss and to Compel Arbitration" was filed on July 24, 2014.

All evidence was submitted by declaration. A hearing was held on February 25, 2015. The trial court issued an order denying appellants' motion, ruling by minute order that the "evidence [was] in favor of the

plaintiff," and that the arbitration agreement was thus procedurally and substantively unconscionable. The court found that the evidence showed Mohsenin was in an unbalanced position of power and felt forced to sign, proving procedural unconscionability. The court accepted his argument that the evidence offered in the declaration of appellant's principal witness was of no persuasive force as she was not employed by appellant until after Mohsenin was hired. The court also found the "one-page [arbitration] agreement [to be] vague as to the governing substantive and procedural rules." Finally, the court noted that the individual defendants were not parties to the contract, and denied the motion as to them. There is no reporter's transcript, and appellants did not ask the trial court for a statement of decision. This appeal was timely filed.[1]

DISCUSSION

I. Contentions

Appellants[2] argue the trial court should have compelled arbitration because the arbitration agreement was neither procedurally nor substantively unconscionable. In addition, the individual defendants contend they had authority to compel arbitration because they are third party beneficiaries of the contract.

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[1] An order denying a motion to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a); see, *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 349.)

[2] Although appellants use the singular "Appellant" throughout their briefing, we observe that the Notice of Appeal was filed on behalf of all defendants. As that notice must be broadly construed (Cal. Rules of Court, rule 8.100(a)(2)), we consider this appeal to be on behalf of all defendants.

II. The Relevant Law Relating to Defense of Unconscionability

A party seeking to compel arbitration must first prove the existence of an enforceable arbitration agreement. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).) And, "[b]ecause unconscionability is a contract defense, the party asserting the defense bears the burden of proof." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911 (*Sanchez*).)

Unconscionability refers to """"an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."" [Citation.] [Thus,] the doctrine . . . has both a procedural [element one] and a substantive [element two], the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results. "The procedural element . . . generally takes the form of a contract of adhesion, "'which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'"" [Citation.]"' (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1133 (*Sonic II*).)

""""[Procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine . . . ." [Citation.] But they need not be present in the same degree. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural

unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" (*Sanchez*, *supra*, 61 Cal.4th at p. 910.)

In determining whether an agreement is procedurally unconscionable, "courts focus on 'two factors: oppression and surprise.'" (*Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal.App.4th 619, 631.) ""'Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form.'"" (*Pinnacle*, *supra*, 55 Cal.4th at p. 247.)

The analysis pertains to "'the fairness of an agreement's actual terms and to assessment of whether they are overly harsh or one-sided. [Citations.]'" (*Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 218 (*Penilla*); see also *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113 (*Armendariz*).)

III. The Agreement Is Not Substantively Unconscionable

Appellants contend the arbitration agreement is not substantively unconscionable because it is mutual; they have agreed to pay all of the costs of the fee-splitting provision of the agreement, rendering that objection moot; and excluding equitable and injunctive relief from the scope of the agreement is permissible.

The term "substantive unconscionability" refers not to agreements that are a "simple old-fashioned bad bargain," but to agreements with terms that are "unreasonably favorable to the more powerful party." (*Sanchez*, *supra*, 61 Cal.4th at p. 911.) In determining whether a particular agreement is substantively unconscionable, the "paramount consideration" is mutuality of the obligation to arbitrate. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 664.)

A. The Arbitration Agreement Was Mutual

Appellants contend the arbitration agreement was an enforceable, mutual agreement to arbitrate, under the authority of *Armendariz*, *supra*, 24 Cal.4th at page 120. Appellants are correct.

Because this argument relates only to the terms of the arbitration agreement itself, and no extrinsic evidence was presented on this point, the issue of mutuality presents a question of interpretation of a contract, subject to de novo review. (*Performance Team Freight Systems, Inc. v. Aleman* (2015) 241 Cal.App.4th 1233, 1238.) In determining whether the terms of a contract are mutual, we give those terms their ordinary and popular meanings. (Civ. Code, § 1644.) Here, the contract is titled " . . . Mutual Agreement to Arbitrate Claims." Its crucial section on "Claims Covered" is written in a manner that is broadly applicable to all contracting parties. The contract was not signed solely by Mohsenin, but by multiple representatives on behalf of A-16, its human resources representative, its manager, and its president; each affirmed that A-16 was obligated by this contract.

Mohsenin focuses on the provisions of the agreement which use the first person pronoun (e.g., "I recognize . . . , I agree . . . , I will obtain . . . ," etc.) and claims they mean that A-16 never bound *itself* to arbitrate anything. However, that construction is belied by the title of the agreement ("Adventure 16 Mutual Agreement to Arbitrate Claims") and by the expansive "Claims Covered" section, which is bilateral if fairly construed. In addition, the signature lines for three representatives of A-16 eliminate any ambiguity concerning whether the agreement is mutual. We conclude that the expressed intent of the parties was for A-16 and Mohsenin to create a mutually binding contract to arbitrate.

This District examined a substantially similar arbitration agreement in *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, and found no substantive unconscionability. As here, first person pronouns were repeatedly used, but the agreement also explicitly covered "all disputes," just as this one covers "all claims." (*Id.* at p. 1475.) The arbitration agreement is a mutual agreement to arbitrate.

B. The Fee Provision Is Not Substantively Unconscionable

Appellants next contend the fee-splitting provision is not substantively unconscionable, while Mohsenin contends it makes arbitration prohibitively expensive. Appellants are correct.

On its face, the agreement calls for an equal division of costs of any arbitration, viz., "[t]he fees and costs charged by the arbitrator shall be borne equally by the parties on a prorata basis. Each party shall deposit with the arbitrator in advance their [*sic*] share of the estimated fees and costs of the arbitrator."

Mohsenin has the burden of proving substantive unconscionability, yet he as failed to present any evidence that supports this contention. While "in the context of employment arbitration," the "'proper inquiry is what dispute resolution mechanism the parties reasonably expected the employee to be able to afford'" (*Sanchez*, *supra*, 61 Cal.4th at p. 920; *Sonic II*, *supra*, 57 Cal.4th at p. 1164 [accord]), this inquiry is to be resolved "'at the time of entering the agreement.'" (Civ. Code, § 1670.5; *Sanchez,* at p. 920.) Further, this inquiry is entirely factual, requiring knowledge of the employee's financial condition at that time.

We cannot know whether this provision was prohibitively unaffordable to Mohsenin when the parties entered into the contract. Mohsenin, who bore the burden of proving his contract defense, presented no evidence on this

issue. He cites his complaint's third page to argue that he "did not earn enough income to afford paying half the cost of arbitration upfront." Even ignoring the complaint's unverified status, this citation does not detail his income or wealth at any time, let alone on the date of the contract; nor did he provide any evidence of the potential cost of the arbitration.

Mohsenin's reliance on *Penilla, supra*, 3 Cal.App.5th 205, is inapposite. As *Penilla* points out, the burden of showing the likelihood of prohibitive cost is on the party resisting the motion to compel arbitration. (*Id.* at p. 218.) Thus, there is no evidence to support the contention that the presence of this provision renders the contract substantively unconscionable.[3]

C. Exclusion of Equitable Injunctive Relief Is Permissible

Appellants correctly contend the exclusion of equitable or other injunctive relief from arbitration does not render the arbitration agreement substantively unconscionable.

The arbitration agreement excludes "claims . . . (4) for injunctive or equitable relief." As the contract indicates, Mohsenin's access to those remedies is not extinguished, contrary to his argument. Rather, he may seek to obtain such remedies and relief in a court of law if he so chooses.

This provision is merely an acknowledgement of California law. Even where, unlike here, an arbitration agreement is silent on the matter, the California Arbitration Act (Code Civ. Proc., § 1280 et seq.) preserves the ability of any party to apply to a court for equitable remedies and relief, including not only injunctive relief, but also restraining orders, writs of

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[3] We note but do not consider the evidence that "[i]n the instant case, A-16 is willing to pay all arbitration costs and fees." That statement, made under penalty of perjury in the superior court is not considered because courts are "required to determine the unconscionability of the contract 'at the time [the contract] was made.' [Citation.]" (*Sanchez*, *supra*, 61 Cal.4th at p. 920; Civ. Code, § 1670.5.)

possession, and receivers. (Code Civ. Proc., § 1281.8, subd. (b); *Sanchez*, *supra*, 61 Cal.4th at p. 922.) "[A]n arbitration agreement is not substantively unconscionable simply because it confirms the parties' ability to invoke undisputed statutory rights." (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1247-1248 (*Baltazar*) [rejecting this argument "regardless of whether [the employer rather than the employee] is, practically speaking, more likely to seek provisional remedies"].) Thus, this clause is not substantively unconscionable.

While the trial court also held that the agreement is vague as to the governing substantive and procedural rules, we do not agree. The arbitration agreement specifies that the arbitration shall be conducted according to the Model Employment Arbitration Procedures of the American Arbitration Association (AAA). No party has suggested that such rules do not exist.[4] Our Supreme Court's holding in *Baltazar, supra*, 62 Cal.4th at page 1246, that failure to attach the AAA rules to the arbitration agreement does not support a claim of *procedural* unconscionability absent a specific argument as to a particular rule has two-fold significance here. No such specific objection has been made and, if made, it would address the issue of *procedural* rather than *substantive* unconscionability.

Because both elements must be present before a court may refuse to enforce an arbitration clause or contract, and we conclude that this arbitration agreement is not substantively unconscionable, consideration of the parties' contentions as to procedural unconscionability is therefore unnecessary.

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[4] The version of these rules as they may have been titled at the time the arbitration agreement was signed is not available; the current version is titled "Employment Arbitration Rules and Mediation Procedures."

IV. The Argument that the Agreement Violates Public Rights Was Forfeited

Mohsenin contends for the first time on appeal that the arbitration agreement violated public rights. We decline to consider this argument as it was not raised below. (*Titan Corp. v. Aetna Casualty & Surety Co.* (1994) 22 Cal.App.4th 457, 465, fn. 5.) Additionally, Mohsenin cites no authority and makes no cogent argument that all of his claims are subject to any per se public policy rule; he thus waives these arguments. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.)[5]

V. The Order Is Affirmed as to the Individual Appellants

Appellants also contend the individual appellants could enforce this contract as third party beneficiaries. This contention lacks merit.

Before Mohsenin bore any burden of establishing his defense, each appellant bore the burden of showing that he, she, or it could enforce the arbitration agreement at all. (*Pinnacle*, *supra*, 55 Cal.4th at p. 236.)

In the trial court, no evidence was presented in support of the motion to compel arbitration, either by A-16 or by the individual defendants, as to the employee-defendants' status in the company. Rather, in the trial court, they filed general denials of the allegations of the complaint; each individual defendant also alleged as an affirmative defense that there had been a "misjoinder of parties," i.e., that there was no reason at all for Mohsenin even to include any of them as defendants in this lawsuit.

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[5] Because Mohsenin does not support his argument on appeal that appellants waited too long to compel arbitration, we also do not consider it. Similarly, we do not consider arguments which the parties raised for the first time at oral argument. (*Estate of McDaniel* (2008) 161 Cal.App.4th 458, 463; *People v. Harris* (1992) 10 Cal.App.4th 672, 686.)

While, on appeal, they now assert the trial court's ruling was "incorrect as a matter of fact," the record clearly indicates the individual defendants made no factual contention to support this assertion in their motion to compel arbitration. Also, the affirmative defenses which they asserted are inconsistent with a contention that they have any right to enforce the arbitration agreement. Thus, there was no basis upon which the trial court could conclude that these defendants are third party beneficiaries of the arbitration agreement as they now claim on appeal. Simply stated, no such argument was made below and no facts supporting such an argument were presented to the trial court; thus, there is an absence of facts or contentions below upon which the trial court could reach a different conclusion. (See *Curcio v. Svanevik* (1984) 155 Cal.App.3d 955, 960 [party may not argue new theory on appeal]; compare *Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362 [judgment affirmed for failure of appellant to present adequate record].)

On this record, appellants cannot meet their burden to demonstrate the trial court erred. (*Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 226-227.) The trial court's ruling as to the individual defendants is affirmed.

DISPOSITION

The order denying the motion to compel arbitration is reversed as to A-16 and is affirmed as the individual appellants. The case is remanded to the trial court with directions to enter an order granting the motion to compel arbitration as to A-16, and to consider staying that arbitration to avoid potentially inconsistent outcomes with respect to the individual defendants

(Code Civ. Proc., § 1281.2, subd. (c)). The parties shall bear their own costs on appeal.

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GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

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