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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MICHAEL CORSELLI,

Plaintiff and Appellant,

v.

SERVICE CORPORATION
INTERNATIONAL et al.,

Defendants and Respondents.

E056131

(Super.Ct.No. CIVDS1113143)

OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge.

Affirmed.

Thomas & Solomon, Annette M. Gifford and Sarah E. Cressman for Plaintiff and Appellant.

Gurnee, Mason & Forestiere and Steven H. Gurnee, John A. Mason and Candace H. Shirley; Stinson Morrison Hecker and Lonnie J. Williams, Jr., for Defendants and Respondents.

The trial court denied plaintiff and appellant Michael Corselli's petition to compel arbitration of various employment related claims he wishes to assert against his former employer and various affiliated companies and individuals, defendants and respondents Service Corporation International, et al. Mr. Corselli asks us to reverse the order denying his petition, arguing that, contrary to the determination of the trial court, he proved the existence of an agreement to arbitrate, and he did not waive arbitration.

We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

Mr. Corselli worked as a "Funeral Director/Embalmer" at two different locations in Riverside and San Bernardino Counties from approximately 1982 through October 2, 2009.¹ His petition, filed on November 17, 2011, sought to compel arbitration of claims against his employer for "unpaid overtime and other wages and compensation due" under various provisions of California law. The named respondents include the corporation that operates the two locations where Mr. Corselli worked, SCI California Funeral Services, Inc. (SCI Funeral), as well as various affiliated corporations and several officers of those affiliated corporations. Mr. Corselli was, at least according to respondents, an employee of California Cemetery and Funeral Services, LLC (CCFS), one of the respondent corporate affiliates.²

¹ Respondents' brief asserts that Mr. Corselli's petition makes no reference to his employment between 1982 and October 2007, but respondents are incorrect on this point.

² Mr. Corselli's briefing, both on appeal and in the superior court, does not attempt to identify which of the respondent entities was Mr. Corselli's employer, instead
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On November 3, 2009, Mr. Corselli filed his notice of “Consent to Become a Party Plaintiff” in a lawsuit filed in the United States District Court for the District of Arizona, styled *James Stickle et al. v. Service Corporation International et al.*, U.S. District Court for the District of Arizona, case No. 2:08-cv-00083 (*Stickle*). In *Stickle*, along with other class members, Mr. Corselli sought “payment of unpaid wages under Federal or State law, including overtime wages, and related relief,” against his employer, including all of the respondents in the present case except for CCFS and SCI Funeral. In addition, on June 17, 2010, Mr. Corselli filed an identical notice of “Consent to Become a Party Plaintiff” in another action in the federal District of Arizona, styled *Eleanor Riggio et al. v. Service Corporation International et al.*, U.S. District Court for the District of Arizona, case No. 2:10-cv-1265 (*Riggio*).

As a party in *Stickle*, Mr. Corselli participated in substantial litigation and discovery prior to April 25, 2011, when the district court granted defendants’ motion to decertify the class. Mr. Corselli apparently continues to participate in *Riggio*, which respondents represent remains pending as of the filing of their brief in this appeal.

In this case, after a hearing, the trial court denied Mr. Corselli’s petition to compel arbitration. It found Mr. Corselli had not carried his burden to prove the existence of an

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arguing that all respondents, including entities and individuals, are bound by the same arbitration agreement with Mr. Corselli, and identifying them collectively as his employer. To the extent this difference represents a dispute between the parties, it is not one that we need to resolve for purposes of the present appeal.

agreement to arbitrate. It further found that Mr. Corselli's participation in litigation in federal court had waived any right to arbitrate he might otherwise have had.

II. DISCUSSION

A. Standard of Review

“Ordinarily, we review a denial of a petition to compel arbitration for abuse of discretion. [Citation.] However, where the trial court's denial of a petition to arbitrate presents a pure question of law, we review the order de novo. [Citation.]” (*California Parking Services, Inc. v. Soboba Band of Luiseño Indians* (2011) 197 Cal.App.4th 814, 817.) The trial court's resolution of disputed facts normally will be upheld if supported by substantial evidence. (*Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1282.)

However, the substantial evidence test is inappropriate in situations where the trier of fact has concluded that the party with the burden of proof did not carry its burden and that party appeals. (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465-466 (*Sonic*)). “[W]here the issue on appeal turns on a failure of proof . . . the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) “uncontradicted and unimpeached,” and (2) “of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.” [Citation.]” (*Id.* at p. 466.)³

³ We note Mr. Corselli's argument that our review of both issues raised in this appeal—existence of an agreement to arbitrate, and waiver—should be de novo, rather
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B. Analysis

1. Existence of an Agreement to Arbitrate

Neither Mr. Corselli nor respondents have been able to discover a copy of a written agreement to arbitrate between Mr. Corselli and respondents. However, it is undisputed that it is the normal practice of respondents to enter into such agreements with all employees. Mr. Corselli has submitted copies of the agreements of certain other employees, and infers that he too must have signed a substantively identical agreement at some point. Although Mr. Corselli's inference is not implausible, the evidence does not compel a finding in his favor as a matter of law. As such, the trial court's determination that he failed to prove existence of an agreement to arbitrate must be affirmed.

A party seeking to compel arbitration bears the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) The trial court determined as trier of fact that Mr. Corselli had failed to carry that burden. (See *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 356-357 ["The trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination on the issue of arbitrability."].) We review the record to determine whether Mr. Corselli's

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than a more deferential standard. We disagree, but in any case, even if we were to review this record de novo, we would reach the same conclusion.

evidence of an agreement compels a finding in his favor as a matter of law. (See *Sonic, supra*, 196 Cal.App.4th at p. 466.)

Mr. Corselli's evidence of an agreement to arbitrate includes the arbitration agreements of several other employees, including one other California employee. He also presented the affidavit of Karen Johnson, a "Human Resources Administrator," stating that she acts as "custodian for certain personnel records for SCI and its subsidiary and affiliated companies." Mr. Corselli relies on this affidavit, submitted in earlier litigation attempting to compel arbitration *against* the wishes of an employee of respondents, for the statement that "[i]t was the regular course of business for an employee or representative of SCI and/or its subsidiary or affiliated companies . . . to make the attached [arbitration] Agreement."⁴ Finally, Mr. Corselli submitted a declaration of his own, in which he confirms that he signed all paperwork required of him by respondents during the course of his employment, and has "no reason to believe that [he] was an exception to SCI's regular business practice of requiring employees to execute arbitration agreements."

This evidence, however, is insufficient to compel a finding in Mr. Corselli's favor as a matter of law, as would be necessary for us to reverse. (See *Sonic, supra*, 196

⁴ It is questionable whether Ms. Johnson's affidavit is fairly read as Mr. Corselli reads it, to mean that SCI and its affiliates have a policy of requiring all employees to enter into similar agreements; more probably, this affidavit does no more than authenticate the one attached arbitration agreement. Nevertheless, it is undisputed that respondents do, in the normal course of business, require all employees to sign an arbitration agreement; it is not clear why Mr. Corselli might have been an exception to this rule.

Cal.App.4th at p. 466.) Ms. Johnson's affidavit indicates that the arbitration agreement her declaration authenticates "was made at or near the time" of that employee's hiring. None of the arbitration agreements submitted by Mr. Corselli date from any time close to when he first was hired, in 1986, so as to support the inference that respondents' policy of requiring arbitration agreements as a condition of employment was in place at that time. Nor is there anything in the record indicating that Mr. Corselli signed new employment documents when he changed work location in October 2007, and again in May 2009. There is no evidence of when respondents put into effect their policy of entering into arbitration agreements with all employees, nor any evidence of any procedures in place to ensure employees who might have been hired before the policy was instituted also signed such agreements as a condition of continued employment. Mr. Corselli does not even aver that he remembers signing an agreement to arbitrate, though he did not retain a copy; he only declares that he "understand[s]" that respondents had "represented that it was in the regular course of business for employees to execute arbitration agreements" and that he had "never refused to sign any paperwork" that he was given. Thus, there are holes in Mr. Corselli's evidence leaving ample room for a judicial determination in respondents' favor regarding the existence of an arbitration agreement.

In short, Mr. Corselli's evidence shows that it is possible that he entered into an agreement to arbitrate with his employers, but it does not compel such a finding as a matter of law. As such, the trial court's determination as trier of fact that he did not prove by a preponderance of the evidence the existence of an agreement to arbitrate must be affirmed.

2. Waiver

The trial court determined that even if Mr. Corselli had established the existence of an agreement to arbitrate, he waived his right to arbitration. Because we affirm the trial court's ruling with respect to the logically prior issue of the existence of an agreement to arbitrate, Mr. Corselli's arguments regarding waiver are moot.

Nevertheless, we briefly note that, if the issue were not moot, we would uphold the trial court's finding of waiver.

“Generally, the determination of waiver is a question of fact, and the court's finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.]” (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.) When “the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.” [Citation.]” (*Ibid.*) Here, the undisputed facts in the record relating to the waiver issue do not compel only one inference, so we apply a substantial evidence standard of review. (See *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1450 [“Only “in cases where the record before the trial court establishes a lack of waiver as a matter of law, [may] the appellate court . . . reverse a finding of waiver made by the trial court.””].)

Although no single test delineates the nature of the conduct that will constitute a waiver of arbitration, California courts have often looked to the following factors:

“(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether “the litigation machinery has been substantially invoked” and the parties “were well into

preparation of a lawsuit” before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) “whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place”; and (6) whether the delay “affected, misled, or prejudiced” the opposing party. [Citations]’ [Citation.]” (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992 (*Sobremonte*).)

The arbitration agreements in our record provide that any claim (with the sole exception, not relevant here, of claims based on employment discrimination) “must be presented in writing by the claiming party to the other within one year of the date the claiming party knew or should have known of the facts giving rise to the claim.” Failure to present the claim in writing within one year means that “the claim shall be deemed waived and forever barred even if there is a federal or state statute of limitations which would have given more time to pursue the claim.” Mr. Corselli had notice of the facts giving rise to his claims here at least as of the date his consent to become a party plaintiff was filed in *Stickle*, November 3, 2009—those claims arise from the same facts as the present case, even if based on a different body of law. He made no written demand for arbitration until more than one year later, on April 1, 2011. Assuming Mr. Corselli entered into an agreement to arbitrate with similar terms, any claims he had would be waived and the petition to compel arbitration would be properly denied, on this basis alone.

Moreover, as a party in *Stickle* and *Riggio*, Mr. Corselli has participated in, and apparently continues to participate in, substantial litigation and discovery. Although Mr. Corselli asserts that *Stickle* and *Riggio* involve only claims under federal law, as noted, *any* claims related to his employment should have been presented in writing for resolution through arbitration, under the terms of the arbitration agreements in our record. As such, the evidence of Mr. Corselli’s litigation activity weighs against him under several of the relevant factors. (See *Sobremonte, supra*, 61 Cal.App.4th at p. 992.)

We conclude from our examination of the record that the trial court’s determination of waiver was supported by substantial evidence. Indeed, on this record, we would uphold the trial court’s finding of waiver on any standard of review.

III. DISPOSITION

The order appealed from is affirmed. Respondents shall recover their costs on appeal.

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HOLLENHORST

Acting P. J.

We concur:

RICHLI

J.

MILLER

J.