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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ILCE GONZALEZ,

Plaintiff and Respondent,

v.

RM HQ, LLC,

Defendant and Appellant.

E061066

(Super.Ct.No. CIVRS1304859)

OPINION

APPEAL from the Superior Court of San Bernardino County. Joseph R. Brisco, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, John L. Barber, Katherine E. Akamine, and Brittany H. Bartold for Defendant and Appellant.

Rodriguez & King, Rob A. Rodriguez, Richard A. Apodaca; Law Offices of Damien J. Miranda and Daniel J. Miranda for Plaintiff and Respondent.

I

INTRODUCTION

Plaintiff and respondent Ilce Gonzalez, a restaurant employee, sued her employer, for sexual harassment and discrimination and other claims. Appellant and defendant RM HQ, LLC (RM HQ) challenges the trial court's denial of its petition to compel arbitration on the grounds it waived the right to compel arbitration.

A petition to compel arbitration may be denied where the moving party acts inconsistently with the right to arbitrate and its delay causes prejudice to the opposing party. (*Zamora v. Lehman* (2010) 186 Cal.App.4th 1, 17; *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 947-949.) We hold substantial evidence supports the trial court's ruling and affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

We derive the factual and procedural background from the complaint and other submissions to the trial court made part of the record on appeal.

A. *Real Mex Employment—2008-2011*

In 2008, Gonzalez began working for Real Mex Restaurants, Inc. (Real Mex). On the same day she was hired, Gonzalez was required to sign some documents without an opportunity to review or read them. The hourly employment application form included a clause in Spanish and English about arbitration, stating: "I am giving up my right to file a lawsuit against the Company in connection with any dispute I may have arising out of or

related in any way to employment with the Company. . . . I understand and agree that I will submit all such disputes to final and binding arbitration in accordance with the Company's Dispute Resolution Policy.”

Gonzalez also signed a Dispute Resolution Agreement in Spanish. The English version of the Dispute Resolution Agreement states it covers claims of employment discrimination, that Gonzalez's signature constituted an acknowledgement of her agreement to final and binding arbitration, and that she “had been given sufficient time to read & understand” the agreement and “to consult with legal counsel.”

Real Mex provided Gonzalez with a copy of its 28-page handbook in English, stating that the employer and employee agreed to waive the right to a jury trial and to submit any claim to “**final and binding arbitration.**” In September 2011, Gonzalez signed another arbitration agreement, presented to her in both Spanish and English.

B. RM HQ Employment—2012

After Real Mex filed for bankruptcy in October 2011, RM HQ acquired its assets and rehired Gonzalez under a new employment contract in April 2012. A restaurant cook presented Gonzalez with another Dispute Resolution Agreement in English, containing the same arbitration agreement. The cook told Gonzalez she had to sign the agreement to keep her job and seniority. Gonzalez signed but she did not read or understand the agreement since it was in English. The parties disagree about whether she received a Spanish version of the agreement. A new employee handbook provides a similar dispute resolution policy as before, based on “**final and binding arbitration.**”

C. The Employment Lawsuit

On July 12, 2013, Gonzalez sued defendants for sexual harassment and discrimination and other claims, based on conduct occurring between October 2011 and August 2012. On September 30, 2013, Shawna T. Rasul, RM HQ's lawyer, sent a letter, stating that her law firm¹ represented RM HQ. Rasul asserted RM HQ was not a successor in interest to Real Mex. Instead, RM HQ had rehired Gonzalez on April 11, 2012, and had no potential liability to her before that date. Rasul did not mention arbitration in the September letter.

In October 2013, Gonzalez added RM HQ as a Doe defendant and dismissed Real Mex. On November 13, Rasul asked Gonzalez to stipulate within one week to binding arbitration to avoid a petition to compel arbitration. No stipulation occurred but no petition was filed after the week had expired.

On December 12, 2013, RM HQ filed an at-issue memorandum, demanding a jury trial of five to seven days, posting jury fees, and not mentioning arbitration. On December 18, defendant RM HQ filed a general denial without listing the right to arbitrate as one of its 36 affirmative defenses. A trial setting conference was scheduled for January 3, 2014.

On December 26, 2013, Gonzalez served discovery—form interrogatories and document requests—on RM HQ. The discovery was due on January 30, 2014. Rasul requested an extension to respond without mentioning arbitration.

¹ Lewis Brisbois Bisgaard & Smith.

On February 3, 2014, Gonzalez served a notice of deposition for RM HQ's human resources investigator for March 21, 2014. On February 13, Rasul requested another extension on the outstanding discovery until February 18. RM HQ did not serve timely responses to the outstanding discovery. On February 28, Gonzalez served requests for admissions and additional interrogatories.

On March 3, 2014, Gonzalez informed RM HQ that it had waived any objections to discovery by not submitting timely responses and Gonzalez planned to file a motion to compel responses. On March 5, a new attorney, Katherine Erickson Akamine of the same law firm, notified Richard Apodaca, Gonzalez's lawyer, that Rasul was out on emergency leave and that RM HQ was filing an "imminent petition to compel arbitration." On March 6, Apodaca notified Akamine that (1) Gonzalez would not stipulate to a stay of discovery; (2) RM HQ had taken steps inconsistent with the right to arbitrate; and (3), that Gonzalez would be unfairly prejudiced by a petition to compel arbitration. On March 10, Gonzalez served a demand for inspection of RM HQ's premises. On March 11, RM HQ filed another at-issue memorandum. RM HQ filed its petition to compel arbitration on March 14, 2014.

The trial court found that RM HQ had delayed filing the petition to compel arbitration and its "actions in this litigation are inconsistent with any intent to invoke arbitration. Rather, they amount to a waiver of any right to compel arbitration." The trial court denied the petition.

III

STANDARD OF REVIEW

The question of waiver of the right to arbitrate is generally a question of fact, not of law, and the trial court's finding of waiver is binding if it is supported by substantial evidence. (*St. Agnes Medical Center v. PacificCare of California* (2003) 31 Cal.4th 1187, 1196; *Augusta v. Keehn & Associates* (2011) 193 Cal.App.4th 331, 337.) On review: "We infer all necessary findings supported by substantial evidence [citations] and 'construe any reasonable inference in the manner most favorable to the judgment, resolving all ambiguities to support an affirmance.'" (*Lewis v. Fletcher Jones Motor Cars Inc.* (2012) 205 Cal.App.4th 436, 443.) "For us, the question is whether the trial court's decision is supported by substantial evidence. If it is, we must affirm." (*Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557.)

IV

WAIVER OF THE RIGHT TO ARBITRATE

The right to arbitrate may be waived. (Code Civ. Proc., § 1281.2, subd. (a).) Waiver does not require a voluntary relinquishment of the right to arbitrate, and a party may waive the right without any intent to do so. In order to prove waiver, a party must demonstrate: ""(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration."" (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1203, citing *U.S. v. Park Place Associates, Ltd.* (9th Cir. 2009) 563 F.3d 907, 921.) Furthermore, "[t]here is

no single test for waiver of the right to compel arbitration, but waiver may be found where the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with willful misconduct.” (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211-212.)

Other relevant factors in finding waiver include: ““[W]hether ‘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; . . . whether a party delayed for a long period before seeking a stay; . . . ‘whether important intervening steps . . . had taken place’; and . . . whether the delay ‘affected, misled, or prejudiced’ the opposing party.”” (*St. Agnes Medical Center v. Pacific Care of Calif, supra*, 31 Cal.4th at p. 1196.) A waiver of the right to arbitrate may properly be implied from “any conduct which is inconsistent with the exercise of that right.” (*McConnell v. Merrill Lynch* (1980) 105 Cal.App.3d 946, 951.) Courts must “view the litigation as a whole and determine if the parties’ conduct is inconsistent with a desire to arbitrate.” (*McConnell*, at p. 952, fn. 2.)

In this case, RM HQ first raised the issue of arbitration on November 13, 2013. RM HQ could have filed a petition to arbitrate in lieu of an answer (Code Civ. Proc., § 1281.7) and sought a stay of the pending action. (Code Civ. Proc., § 1281.) Instead, RM HQ filed an answer without asserting arbitration as a defense and responded to discovery by repeatedly asking for extensions. By failing to respond to outstanding discovery, RM HQ

waived any objections. (Code Civ. Proc., §§ 2030.290; 2031.300.) RM HQ delayed filing a petition to compel arbitration until March 14, 2014.

The “failure to plead arbitration as an affirmative defense constitutes a waiver of that defense.” (*Guess?, Inc. v. Superior Court, supra*, 79 Cal.App.4th at p. 557, citing *California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442; *Ross v. Blanchard* (1967) 251 Cal.App.2d 739, 742.) Although not a conclusive bar, “the failure to plead arbitration as an affirmative defense is an act inconsistent with the later assertion of a right to arbitrate.” (*Guess,?* at p. 558.) Inexplicably, RM HQ did not allege arbitration as one of its 36 affirmative defenses even though it had already raised the issue a month earlier in November 2013. (*Augusta v. Keehn & Associates, supra*, 193 Cal.App.4th at p. 338, citing *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 997.)

RM HQ also did not mention arbitration in its at-issue memorandums. Similarly in *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1451, the appellate court affirmed the trial court’s finding that defendant’s conduct was inconsistent with an intent to arbitrate after six months of delay, efforts to conduct discovery, and the failure to “assert arbitration in its case management statement.”

The unreasonable delay in filing the petition to compel arbitration was also inconsistent with asserting the right to arbitrate. A petition to compel arbitration “should be brought within a reasonable time.” (*Zamora v. Lehman, supra*, 186 Cal.App.4th at p. 17.) Many cases have reached that conclusion. In *Guess?*, the appellate court held there

was waiver after a four-month delay. (*Guess?, Inc. v. Superior Court, supra*, 79 Cal.App.4th at p. 557.) In *Sobremonte v. Superior Court, supra*, 61 Cal.App.4th at page 996 a 10-month delay was held unreasonable. In *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1228, a five-and-a-half-month delay was unreasonable.

On the issue of prejudice to Gonzalez, we assume the trial court impliedly found prejudice. (*Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1195.) Apparently, RM HQ only decided to invoke arbitration after it had inadvertently waived objections to discovery and Gonzalez appeared to have the upper hand. Obviously, Gonzalez would be prejudiced by losing her advantage in discovery. We hold that “reasonable inferences concerning the extent and consequences of the discovery obtained [or not obtained] by defendants support the trial court’s finding of waiver.” (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211.)

V

DISPOSITION

Because we hold RM HQ waived any right to arbitrate, we do not need to reach the issues of the enforceability of the arbitration agreement. Based on a deferential standard of review, we hold there is substantial evidence to support the trial court's ruling. We affirm the judgment. Gonzalez, the prevailing party, shall recover her costs on appeal.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.