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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DEONNA FLOYD, Plaintiff and Respondent, v. PRECISION CASTPARTS CORP. et al., Defendants and Appellants.	E069678 (Super.Ct.No. CIVDS1705582) OPINION

APPEAL from the Superior Court of San Bernardino County. Gilbert G. Ochoa, Judge. Affirmed.

Bryan Cave Leigton Paisner, Julie W. O'Dell, Michael E. Olsen and Jennifer Steeve; Lewis Brisbois Bisgaard & Smith and Julie W. O'Dell, for Defendants and Appellants.

Law Offices of Carlin & Buchsbaum, Ana L. De La Torre and John F. Litwin, for Plaintiff and Respondent.

I.

INTRODUCTION

Plaintiff and respondent, Deonna Floyd, filed a complaint in San Bernardino Superior Court against her former employer, defendants and appellants, Precision Castparts Corp., Alu-Forge, Inc. and Justin Smith (collectively, Precision). Precision moved to compel Floyd's arbitration of the lawsuit alleging Floyd had attended a company meeting and was provided a copy of the arbitration policy that had an opt-out provision which required Floyd to exercise her right to opt-out of the policy within 30 days. (Code Civ. Proc., § 1281.2.)[1] Although the arbitration agreement was not signed by the parties, Precision claimed the parties had an implied-in-fact agreement to arbitrate their disputes. The trial court denied Precision's motion to compel arbitration.

On appeal, Precision argues (1) the trial court erred in finding Floyd did not have notice of the arbitration agreement based on evidence presented in the motion and at the hearing on Precision's motion to compel arbitration; and (2) the trial court's refusal to issue a statement of decision constitutes reversible error. Floyd counters that the trial court's decision was correct because there was no express or implied agreement to arbitrate the parties' case.

Based on our review of the record, we decline to infer an implied-in-fact agreement to arbitrate the parties' dispute. We conclude the trial court did not commit

[1] Unless otherwise noted, all references are to the Code of Civil Procedure.

any error and affirm the trial court's order denying Precision's motion to compel arbitration.

II.

FACTS AND PROCEDURAL HISTORY

In January 2014, Floyd began working for Precision as a customer service manager. As part of her duties, Floyd was the assistant expert compliance manager responsible to ensure accurate financial compliance reports with federal Sarbanes-Oxley Act regulations.[2] In February 2016, Floyd allegedly discovered that the new production manager at Precision was changing dates and manipulating dollar amounts in the compliance reports. After Floyd reported the illegal activities to the company's controller, Floyd suffered a hostile work environment and was terminated by Precision in August 2016.

In March 2017, Floyd filed a complaint against Precision in the San Bernardino Superior Court alleging causes of action for (1) wrongful termination in violation of public policy, (2) retaliation in violation of Labor Code section 1102.5, and (3) intentional infliction of emotional distress. Precision filed an answer to the complaint. Precision then moved the court for an order to compel Floyd to arbitrate the case. The

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[2] The Sarbanes-Oxley Act is a federal law enacted as a reaction to a number of major corporate and accounting scandals. The law requires top management to individually certify the accuracy of financial information. <http://www.wikipedia.org/wiki/Sarbanes-Oxley-Act> [as of May 14, 2019].

trial court denied Precision's motion to compel arbitration and denied Precision's oral request for a statement of decision. Precision filed a timely notice of appeal.

III.

DISCUSSION

A. *Precision's Motion to Compel Arbitration*

Precision argues that the trial court erred in ruling that Floyd lacked notice of the arbitration agreement in denying its motion to compel arbitration. We disagree.

If a party petitions the court to compel arbitration claiming "the existence of a written agreement to arbitrate a controversy," and that a "party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists. . . ." (§ 1281.2.) In determining a motion to compel arbitration, section 1280 et seq. sets forth the procedures for the summary determination of whether a valid agreement to arbitrate exists. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 356; see also *Provencio v. WMA Securities, Inc.* (2005) 125 Cal.App.4th 1028, 1030-1031.)

"Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement . . . that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.)

In order to find an arbitration agreement valid, the following elements must be met: (1) a third party decision maker; (2) a mechanism for ensuring neutrality with respect to the rendering of the decision; (3) a decision maker who is chosen by the parties; (4) an opportunity for the parties to be heard; and (5) an agreement that the decision is binding on the parties. (*Cheng-Canindin v. Renaissance Hotel Associates*, (1996) 50 Cal.App.4th 676, 684.)

The basic rule is that "the existence of *some* agreement to arbitrate must be found by the court before it may proceed to direct an arbitration." (*Berman v. Renart* (1963) 222 Cal.App.2d 385, 388.) "Because arbitration is a contractual matter, a party that has not agreed to arbitrate a controversy cannot be compelled to do so." (*Sparks v. Vista Del Mar Child & Family Services* (2012) 207 Cal.App.4th 1511, 1518.) When the parties dispute the existence of a contract, and the evidence is conflicting, a factual question arises as to whether the agreement to arbitrate actually exists. (*Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 202 (conc. & dis. opn. of Kennard, J.); *Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208.) Likewise, the issue of whether there was lack of mutual consent presents a question of fact. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1269.)

In deciding a motion to compel arbitration, "[t]he trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence, and any oral testimony the court may receive at its discretion, to reach a final determination. [Citation.]" (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842.) "'If

the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]'" (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 60.)

In support of its motion to compel arbitration, Precision argued the parties had an implied-in-fact agreement to arbitrate. (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416.) Precision submitted the company's arbitration policy, and a declaration from their human resource employee, Noemi Cortez, asserting that Floyd's name was on the February 24, 2016, employee meeting sign in sheet. Ms. Cortez's declaration states that Precision implemented a new arbitration policy, the policy required arbitration, and that Floyd had not provided an opt-out form to the company within 30 days after receiving notice of the policy. Precision argues this evidence unquestionably demonstrates the existence of an implied-in-fact agreement to arbitrate the dispute.

Although the trial court acknowledged that the parties' arbitration agreement did not need to be signed in order for the parties to be bound, the court found Precision had not demonstrated Floyd's knowledge of the company's arbitration policy by Ms. Cortez's declaration. The trial court concluded that there was no implied-in-fact arbitration agreement between the parties for the court to enforce. We agree with the trial court that Precision failed to meet its burden of proof and did not establish an implied-in-fact agreement existed between the parties.

The lack of a perfected written arbitration agreement does not necessarily establish the absence of an agreement to arbitrate. (*Basura v. U.S. Home Corp.* (2002) 98 Cal.App.4th 1205, 1216.) An implied-in-fact agreement to arbitrate may be found where the employee's continued employment constitutes acceptance of an agreement proposed by the employer. (*Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 11.) Thus, an employer's agreement to pay severance benefits is an enforceable unilateral contract if the employee accepts the benefit offer by continuing employment. (*Chinn v. China Nat. Aviation Corp.* (1955) 138 Cal.App.2d 98, 99-100.)

"An implied-in-fact contract is based on the conduct of the parties. (Civ. Code, § 1621.) Like an express contract, an implied-in-fact contract requires an ascertained agreement of the parties." (*Unilab Corp. v. Angeles-IPA* (2016) 244 Cal.App.4th 622, 636.) "'Implied-in-fact contracts are found in cases with unexecuted arbitration agreements when (1) employees have knowledge of the arbitration agreement and (2) employees continue to work after *receipt* of the arbitration agreement. In such cases, courts have held that the employees' continued employment constitutes their acceptance of the agreements to arbitrate.'" (*Gorlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1507, italics added.) The existence of an implied-in-fact agreement to arbitrate depends upon the party's conduct, which may be deemed to estop the party from denying such an agreement. (*Douglass v. Serenivision, Inc.* (2018) 20 Cal.App.5th 376, 387-388.) Whether a party's conduct constitutes consent is fact specific. (*Id*. at p. 388.) In *Craig v. Brown & Root, Inc., supra*, 84 Cal.App.4th 416, the trial court granted a motion to

compel arbitration after the employer presented evidence showing that copies of its memorandum and brochure containing the arbitration agreement were sent twice to Craig, once in 1993, then again in 1994. Brown & Root's declarations and documents were circumstantial evidence from which the court was entitled to infer that Craig had received the company's memorandum and brochure. The *Craig* court found that there was substantial evidence that (1) the memorandum and brochure were "received" by Craig in 1993, and again in 1994; (2) that Craig continued to work for Brown & Root until 1997; and (3) that she agreed to be bound by the terms of the dispute resolution program including its provision for binding arbitration by continuing employment. (*Id.* at pp. 421-422.)

On the other hand, in *Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164, the court reached a contrary conclusion where the employee handbook stated that all employees were required to sign an arbitration agreement, and that all employees would provide a copy of their signed arbitration agreement. In that case, the employer failed to submit any evidence of the existence of an arbitration agreement signed by either plaintiff. Further, while the employer argued the plaintiffs had accepted a unilateral contract to arbitrate by continuing to work for the company after receiving the handbook, the handbook's arbitration provision only put the plaintiffs on notice that they would be required to sign a separate arbitration agreement. (*Id.* at pp. 1166, 1172.)

Precision argues that an implied-in-fact agreement to arbitrate existed because Floyd continued employment following notice of the new dispute resolution policy that

included the opt-out provision. In contrast to the situation in *Craig*, and analogous to the situation in *Mitri*, Floyd did not sign the arbitration agreement's acknowledgment form, acknowledging that she had "received" the company's dispute resolution policy. Acknowledging receipt of the policy was important because in bold capitalized print, it advises the employee to "PLEASE READ THIS POLICY CAREFULLY" and further states that by continuing employment after receipt of the policy, unless the employee has timely opted out, the employee will be bound to arbitrate all disputes between the employee and company. Precision's arbitration policy form additionally stated in bold capitalized print:

"I ACKNOWLEDGE THAT I HAVE RECEIVED THE COMPANY'S DISPUTE RESOLUTION POLICY. I UNDERSTAND THAT I AM RESPONSIBLE FOR READING AND ABIDING BY THE POLICY. I UNDERSTAND THAT MY CONTINUED EMPLOYMENT CONSTITUTES ACCEPTANCE OF THE POLICY UNLESS I TIMELY EXERCISE MY RIGHT TO OPT OUT BY FOLLOWING THE OPT OUT PROCEDURES IN THIS POLICY."

As the trial court reasonably recognized, Floyd was giving up an important right and the court could not impute Floyd's "receipt" of a copy of the policy or knowledge of the opt-out policy simply because her signature was on the employee meeting sign in sheet without additional evidence. Ms. Cortez's declaration does not establish that Floyd "received" a copy of the arbitration policy at the employee meeting on February 24, 2016. Although Ms. Cortez states in her declaration that "[t]he employees in attendance

signed their name on a sign in sheet to record which employees had been provided with a copy of the Policy," the actual sign in sheet only lists the "topics of discussion" and has no column where the employee could have initialed or acknowledged receiving a copy of the arbitration policy while signing in at the meeting.

Furthermore, Ms. Cortez's declaration does not state that she personally witnessed Floyd being given a copy of Precision's new arbitration policy when Floyd signed into the meeting. Ms. Cortez's declaration states that Precision provided "notice" of the arbitration policy to its current employees and states that a copy of Precision's arbitration policy was attached to Ms. Cortez's declaration as an exhibit. Therefore, we cannot infer that Floyd *received* a copy of Precision's arbitration policy at the meeting, sufficient to establish the existence of an implied-in-fact agreement based on Floyd's knowledge of the opt-out provision.

Nor is Floyd's failure to execute the "opt-out" provision evidence of her agreement to be bound by the arbitration policy in the absence of evidence that she had personal knowledge of it. Precision had the burden of establishing that Floyd knew of the opt-out provision. (*Rosenthal v. Great Western Fin. Securities Corp., supra*,14 Cal.4th at p. 413.) We cannot speculate on what "notice" was given to Precision's employees at the meeting.

We reject Precision's argument that Floyd was put on "inquiry" notice to investigate whether the company had an arbitration policy upon signing her name on the company's meeting attendance sign in sheet. An implied-in-fact contract consists of

obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words. (*Gorlach v. Sports Club Co.*, *supra*, 209 Cal.App.4th at p. 1508.) Floyd's signature on a meeting sheet is not, in and of itself, sufficient to create conduct that would substantiate the existence of an implied-in-fact agreement to arbitrate the parties' employment case. (Civ. Code, § 1621.) Notice that arbitration was a topic of discussion does not infer Floyd's personal knowledge of the policy's opt-out provision. Indeed, the February 24, 2016, meeting sign in sheet identifies four employment topics discussed. Therefore, we cannot infer the company's discussion of the arbitration policy was anything more than superficial, particularly in light of the unsigned arbitration agreement which is dated "10/2017."

We also reject Precision's argument that Floyd's opposition to the motion to compel arbitration constitutes a party admission that she received a copy of the arbitration policy at the time she attended the February 24, 2016, meeting.

Floyd's opposition stated: "In the midst of all this chaos that was taking place at Defendant Precision, Defendants held a staff meeting, in or about February 24, 2016, in which an arbitration agreement was suddenly announced during the staff meeting." Defendants presented Plaintiff with an arbitration agreement shortly after she blew the whistle on one of Defendant Precision's own Managers."

Relying on *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152 and *Setliff v. E .I. Du Pont De Nemours & Co.* (1995) 32 Cal.App.4th 1525, 1536, Precision argues that Floyd's counsel's argument is a binding admission that Floyd

received a copy of the arbitration policy at the meeting. We disagree. An attorney's argument in pleadings is not evidence. (*Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc.* (2013) 218 Cal.App.4th 272, 283.)

On occasion, an attorney's recitation of facts, where reliable, can be used as a party's admission. (*Mangini v. Aerojet-General Corp.*, *supra*, 230 Cal.App.3d at p. 1152.) However, here Floyd's counsel clarified that the statements made in Floyd's opposition were not party admissions and were inaccurate. After being questioned by the trial court, Floyd's counsel explained: "My mistake was that I thought the plaintiff had heard the arbitration policy being announced at the meeting, but I actually spoke to her, and she indicated that she doesn't even recall the arbitration being discussed at the staff meeting."

Absent any indicia of reliability of counsel's statements, there is no evidence that Floyd received a copy of the arbitration policy at the employee meeting.

Based on the record before us, we conclude that Precision failed to meet its burden of proof to establish an enforceable implied-in-fact contract existed. The record is devoid of facts that would establish Precision gave "notice" of the arbitration's opt-out policy to Floyd at the meeting. Therefore, the trial court did not err in denying Precision's motion to compel arbitration.

B. *Precision's Request for a Statement of Decision*

After the trial court allowed the parties to argue their respective positions, the court announced its ruling on the record. Precision then asked the trial court to issue a statement of decision but the court denied the request. Precision contends that the trial court's failure to provide a statement of decision constitutes reversible error. We disagree that the trial court committed reversible error in denying a statement of decision for the following reasons.

In arbitration related proceedings, a statement of decision shall be made by the court, if requested pursuant to section 632, whenever an order or judgment is appealable. (§ 1291; *Metis Development, LLC v. Bohacek* (2011) 199 Cal.App.4th 748, 755.) Section 632 requires a litigant's request for a statement of decision be "made within 10 days after the court announces a tentative decision . . . and must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision." (§ 632.) Precision had the right to request a statement of decision when the court denied the motion to compel arbitration. (§ 1291; See *Charlton Co. v. Aerfab Corp.* (1976) 56 Cal.App.3d 808, 811-812; *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 237.)

Notwithstanding the apparent mandatory language of the statute, article VI, section 13 of the California Constitution prohibits a reviewing court from setting aside a judgment due to trial court error unless that error is prejudicial. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1107.) Under the harmless error standard, if the omitted findings would

have been adverse to the appellant, their omission does not warrant reversal unless there is prejudice. (*Id.* at p. 1113.)

Here, the trial court erroneously concluded that Precision did not have a right to request a statement of decision while denying Precision's motion to compel arbitration. However, when Precision asked the court for a statement of decision it did not advise the court of the controverted issues (§ 632) Here, reversal is not required because failure "to issue a requested statement of decision is not reversible per se, but is subject to harmless error review." (*F.P. v. Monier*, *supra*, 3 Cal.5th at pp. 1108, 1114.) Where a trial court fails to make a finding on an issue that could only be decided in a way that would not invalidate the judgment, the failure does not affect the substantial rights of the complaining party and does not warrant a reversal. (*Id.* at p. 1114.)

Having reviewed the record and the briefs, it is apparent that all omitted findings were adverse to the appellant, such that their omission is not prejudicial. The trial court found that Precision did not prove the existence of an express or implied agreement to arbitrate, and we agree with that conclusion, so remanding the matter to the trial court would be an empty exercise. The law neither does nor requires idle acts. (Civ. Code, § 3532.)

Moreover, the record demonstrates that the trial court understood the parties' legal and factual arguments and made findings of fact and conclusions of law. The trial court noted that the arbitration policy was unsigned, Precision had not provided testimony through Ms. Cortez's declaration that demonstrated Floyd's knowledge of the arbitration

policy, and although Floyd's signature was on the employee meeting sign in sheet, that fact did not establish that Floyd was present throughout the entire meeting or that she was given a copy of the arbitration policy and had *knowledge* of the opt-out policy. Precision has not demonstrated how the omission of findings in a statement of decision would have altered the outcome.

In evaluating whether the failure to issue a statement of decision is prejudicial or harmless error, a reviewing court should address the principal controverted issues relevant and essential to the judgment and directly related to the trial court's determination of the ultimate issues in the case. (*R. E. Folcka Construction, Inc. v. Medallion Home Loan Co.* (1987) 191 Cal.App.3d 50, 53; *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 45-46.)

Precision has not demonstrated that the lack of a more detailed statement of decision caused prejudice or a miscarriage of justice. The record shows the trial court made an oral statement of decision on the record that explicitly found that Precision had failed to meet its burden of proof to demonstrate an implied-in-fact agreement existed between the parties because Precision had not established Floyd's knowledge of the opt-out provision in the arbitration policy. The trial court stated: "I don't think there's a requisite knowledge here. . . . There's no signature. There's no mutual assent. . . . Could have been a very easy thing to get your employee's signatures to give up a very important right."

The trial court's statement fairly disclosed the basis for the denial of Precision's motion. We conclude that the trial court's statements at the hearing provides an adequate basis for denying Precision's motion to compel arbitration because Precision failed to meet its burden of proof at the hearing. We therefore reject Precision's request that we order the trial court to issue a statement of decision as to its factual and legal conclusions that led to its decision to deny Precision's motion to compel arbitration.

IV.

DISPOSITION

The judgment is affirmed. Floyd is awarded her costs on appeal.

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CODRINGTON
Acting P. J.

We concur:

SLOUGH
J.

RAPHAEL
J.