

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CARLOS MORALES,

Plaintiff and Respondent,

v.

NORITZ AMERICA CORPORATION,

Defendant and Appellant.

G044749

(Super. Ct. No. 30-2010-00415438)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kazuharu Makino, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, John L. Barber, Jeffry A. Miller, Stefanie K. Vaudreuil and Brittany H. Bartold for Defendant and Appellant.

Van Etten Suzumoto & Sipprelle, Keith A. Sipprelle and Joshua D. Mendelsohn for Plaintiff and Respondent.

* * *

Plaintiff Carlos Morales sued his former employer, defendant Noritz America Corporation, and its Japanese parent company, Noritz Corporation (Noritz), asserting causes of action under California's Fair Employment and Housing Act (Gov. Code, § 12900 et seq.), plus a count for wrongful termination in violation of public policy. Defendant moved to compel arbitration of the claims. The trial court denied the motion, concluding (1) defendant failed to prove the existence of an arbitration agreement, and (2) subsequent employee handbooks not containing arbitration clauses superseded the agreement in the handbook in effect when defendant hired plaintiff. Defendant appeals the ruling. (Code Civ. Proc., § 1294, subd. (a); all further statutory references are to the Code of Civil Procedure unless otherwise indicated.) We affirm.

FACTS AND PROCEDURAL BACKGROUND

According to the complaint, plaintiff worked for defendant from 2002 to 2010. It alleged defendant failed to prevent what is described as “a disturbing pattern of sexually harassing conduct” by the company's senior executives and retaliated against plaintiff by firing him after he complained about the behavior.

Defendant filed a motion to compel arbitration. A supporting declaration by Tsuyoshi Kitamura, “presently . . . Chief Financial Officer for [defendant],” stated defendant “had a policy whereby [it] required . . . employees to sign a mutual [a]rbitration [a]greement as a condition of employment” and “the 2002 Employee Handbook that was in effect at the time [plaintiff] was hired” contained an arbitration agreement.” An unsigned copy of the two-page 2002 arbitration agreement was attached to the declaration as exhibit 3.

Kitamura asserted he had “personal knowledge of [defendant's] methods for the maintenance and keeping of employee personnel files,” which it “maintained in

the normal course of business” He “reviewed [plaintiff’s] . . . file” and claimed it “[c]ontained . . . a signed . . . Arbitration Agreement that bears plaintiff’s signature [incorporated as exhibit 1],” plus “a signed Acknowledgement [incorporated as exhibit 2] affirming that [plaintiff] received and understood the Employee Handbook and agreed to [its] terms, including arbitration.”

Exhibit 1 is a single page document purporting to be the second page of defendant’s arbitration agreement with plaintiff. It contains two, single-sentence paragraphs followed by a signature and the date August 21, 2002. The first paragraph states, “This agreement sets forth the entire agreement between the parties and supersedes any and all prior or contemporaneous agreements and understandings, whether written, oral or implied, pertaining to the subject matter of this agreement.” The next paragraph, printed in bold and capital letters, provides “[t]his arbitration agreement is a waiver of all rights to a civil jury trial, for a claim of harassment, discrimination, wrongful termination, or any other claim arising out of your employment.”

Exhibit 2 is also a one-page document, dated August 21, 2002, entitled “Acknowledgment,” printed in bold, capital letters, and underlined. Below the title are five paragraphs. A line next to each paragraph contains the initials “CM.” At the bottom of the form is a line with the hand-printed name “Carlos Morales,” and below it a second line with a signature. As pertinent to this appeal, the document acknowledged the person who initialed and signed it had received, read, understood, and agreed to the terms of the employee handbook and that, “except for [plaintiff’s] at-will status and the arbitration agreement, [defendant] may change any policy or practice . . . in its sole discretion.”

Plaintiff opposed the motion on three grounds: (1) Defendant failed to establish he had agreed to arbitration; (2) any arbitration agreement had been superseded by subsequent events; and (3) the arbitration agreement was unconscionable. In a supporting declaration, plaintiff asserted he contacted Noritz in 2001 “regarding a

proposed venture that would involve Noritz . . . selling its tankless water heaters in the United States.” Shortly thereafter, he learned Noritz “had decided to pursue [his] concept” and it hired him in August 2001, paying his “salary . . . by way of wire-transfers . . . to my bank account”

Plaintiff further claimed Noritz did not “establish[]” defendant until December 2001. He admitted working at defendant’s “California] headquarters,” but claimed he “remained an employee of Noritz . . . and continued to receive [his] salary by way of wire transfers from Noritz” In March 2002, a Noritz executive informed plaintiff “that [he] would begin to receive [his] paychecks from [defendant]”

Plaintiff’s declaration stated, “I do not recall ever seeing th[e] ‘[a]rbitration [a]greement’” or “receiving a copy of the 2002 Employee Handbook” But he did acknowledge “receiv[ing] from [defendant] copies of its . . . 2004 and . . . 2008 Employee Handbook[s]” Copies of these handbooks were attached to the declaration. The 2004 handbook states “[i]t replaces all previously issued handbooks, policies, benefit statements, or memoranda,” and would “be governed by, interpreted under, and construed in accordance with the laws of the State of California” with “[v]enue for any dispute . . . in Los Angeles.” The 2008 handbook contains similar provisions, except it provides for “[v]enue [of] any dispute . . . in Orange County.” Neither handbook contains an arbitration agreement or refers to arbitration of disputes.

In addition, plaintiff claimed that in January 2005, he “signed a one[-]page letter agreement . . . regarding the new terms of [his] employment as [defendant’s] General Manager of Sales and Marketing.” A copy of this agreement was attached to the declaration. The agreement states “[a]ll . . . policies and procedures as contained in [defendant’s] employee handbook or elsewhere apply to your employment,” and “[t]his is the entire agreement between [defendant] and you concerning the at-will nature of our relationship and supersedes all prior oral or written agreements to the contrary.”

Each party filed evidentiary challenges to the other party's supporting declarations. Plaintiff objected to Kitamura's declaration on the grounds of lack of foundation, speculation, and improper authentication. To support these objections plaintiff's declaration, stated "in 2002, . . . Kitamura was not employed by the Noritz organization," and "did not become affiliated with [defendant] until approximately 2008." Plaintiff also claimed defendant "was just starting up in 2002" and, at the time, "had no Human Resources Department or Human Resources Manager" and "no system for maintaining employee personnel files."

The court denied the motion to compel arbitration. First, it found defendant "has not proved by the preponderance of the evidence the existence of the arbitration agreement," noting the exhibits attached to Kitamura's declaration "have not been properly authenticated." Second, it also ruled the 2002 handbook's arbitration agreement "appear[s] to have been superseded by subsequent [e]mployee [h]andbooks"

DISCUSSION

1. Background

While California public policy supports the use of arbitration (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 568-569), "[t]here is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate. [Citation.]' [Citation.]" (*City of Vista v. Sutro & Co.* (1997) 52 Cal.App.4th 401, 407.) "It follows that when presented with a petition to compel arbitration, the trial court's first task is to determine whether the parties have in fact agreed to arbitrate the dispute." (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 89.) "Whether the parties formed a valid agreement to arbitrate is determined under general California contract law. [Citations.]" (*City of Vista v. Sutro & Co., supra*, 52 Cal.App.4th at p. 407.)

Defendant argues we should review the trial court's ruling under a de novo standard. But the primary issues in this appeal are factual in nature: Whether the parties entered into an agreement to arbitrate disputes arising from plaintiff's employment and, assuming such an agreement existed, whether subsequent changes to the parties' relationship superseded its enforceability. While the court hears the petition "in a summary way in the manner . . . provided by law for the making and hearing of motions" (§ 1290.2), in "ruling on a petition to compel arbitration, the superior court may consider evidence on factual issues such as contract formation bearing on the threshold issue of arbitrability. [Citation.]" (*City of Vista v. Sutro & Co.*, *supra*, 52 Cal.App.4th at p. 407.) Hence, "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. [Citation.]" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.)

Contrary to defendant's assertion this case involves conflicts in the evidence and in the inferences to drawn from the evidence. "Where the trial court's decision on arbitrability is based upon resolution of disputed facts, we review the decision for substantial evidence. [Citation.] In such a case we must "accept the trial court's resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of the credibility of witnesses and the weight of the evidence.'" [Citation.]" (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.)

2. *Existence of Arbitration Agreement*

Finding it failed to properly authenticate the documents attached to Kitamura's declaration, the trial court held defendant failed to carry its burden of

proving the existence of an arbitration agreement. Defendant disagrees, arguing it presented prima facie evidence of that contract by “quot[ing] pertinent portions . . . in its motion . . . and attach[ing] the signed arbitration agreement and employee handbook acknowledgement to Kitamura’s declaration.” In addition, relying on our decision in *Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, defendant argues it “was not required to follow normal document authentication procedures in moving to compel arbitration.”

With certain exceptions, section 1281.2 declares “[o]n petition of a party to an arbitration agreement alleging 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” Defendant argues it satisfied section 1281.2 by complying with California Rules of Court, rule 3.1330. That rule provides “[a] petition to compel arbitration . . . must state, in addition to other required allegations, the provisions of the written agreement and the paragraph that provides for arbitration. The provisions must be stated verbatim or a copy must be attached to the petition and incorporated by reference.”

However, this rule merely sets forth the pleading requirements for a petition to compel contractual arbitration. In *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, the Supreme Court held “when a petition to compel arbitration is . . . accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. 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.” (*Id.* at p. 413.)

The trial court held defendant failed to carry its burden of proof because the documents attached to Kitamura’s declaration were not properly authenticated. “A

document is not presumed to be what it purports to be, and it must be authenticated in some fashion before it is introduced into evidence. [Citations.]” (*Fakhoury v. Magner* (1972) 25 Cal.App.3d 58, 65; see also *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 525 [“in some legal systems it is assumed that documents are what they purport to be, unless shown to be otherwise” but “[w]ith us it is the other way around” and “[g]enerally speaking, documents must be authenticated in some fashion before they are admissible in evidence”].) Under Evidence Code section 1400, “Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.”

Kitamura’s supporting declaration claimed he “ha[d] personal knowledge of [defendant’s] methods for the maintenance and keeping of employee files,” and he “reviewed [plaintiff’s] personnel file,” asserting it contained an arbitration agreement “bear[ing] plaintiff’s signature” and a “signed [a]cknowledgement” that plaintiff received, read, understood, and agreed to the 2002 employee handbook’s terms. But he did not claim to be the custodian of the company’s personnel records. Nor did Kitamura state he witnessed plaintiff sign the arbitration agreement and acknowledgement form, or that he was familiar with plaintiff’s signature, or even that he had compared the signatures on exhibits 1 and 2 with an exemplar of plaintiff’s known signature. (*Joint Holdings & Trading Co. v. First Union Nat. Bank of North Carolina* (1975) 50 Cal.App.3d 159, 166 [“The trial court acted within its discretion in concluding that Bank failed to carry its burden of authentication” where its “authentication witness had not seen Bruder sign his name, nor had he made a side-by-side comparison of the Bruder signatures”]; *Palma v. Leslie* (1935) 6 Cal.App.2d 702, 709 [foundation for introduction of document insufficient where witness admitted he had not seen party sign it, nor was he not familiar with party’s handwriting].)

Plaintiff denied any recollection of having seen the 2002 employee handbook, or the arbitration agreement, or signing the latter document. He also disputed Kitamura's claim defendant regularly maintained personnel files in 2002. He claimed Kitamura was not employed by either defendant or its parent corporation in 2002 and only began to work for defendant in 2008. Plaintiff asserted that, in 2002, defendant lacked a system to maintain personnel files or personnel to do so. Defendant failed to present any evidence rebutting these claims.

To overcome the authentication obstacle, defendant relies on *Condee v. Longwood Management Corp.*, *supra*, 88 Cal.App.4th 215. There we held "it is not necessary to follow the normal procedures of document authentication" (*id.* at p. 218) because section 1281.2 "does not require the petitioner to introduce the agreement into evidence. A plain reading of the statute indicates that as a preliminary matter the court is only required to make a finding of the agreement's existence, not an evidentiary determination of its validity." (*Condee v. Longwood Management Corp.*, *supra*, 88 Cal.App.4th at p. 219.)

For two reasons, we decline to follow *Condee* in this case. First, our opinion in *Condee* acknowledged "although no evidence was ever introduced to verify the signature's authenticity, it was never challenged." (*Condee v. Longwood Management Corp.*, *supra*, 88 Cal.App.4th at p. 218.) Thus, the existence of an executed arbitration agreement was not at issue in *Condee*. Here, plaintiff denies any recall of executing the arbitration agreement proffered by defendant to support its motion to compel arbitration. Defendant's reliance on *Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754 and *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416 lacks merit for the same reason. In *Hotels Nevada*, the party opposing arbitration did not deny the agreement contained an arbitration clause, but argued the entire contract was void because of fraud in its execution. In *Craig*, the arbitration opponent acknowledged

the employee handbooks contained an arbitration clause, but claimed, unsuccessfully, that she never received them.

The second reason for declining to follow *Condee* is our recent decision in *Toal v. Tardif* (2009) 178 Cal.App.4th 1208 where, in recognizing *Rosenthal v. Great Western Fin. Securities Corp., supra*, 14 Cal.4th 394 “clearly stated that a court, before granting a petition to compel arbitration, *must* determine the factual issue of ‘the existence or validity of the arbitration agreement[.]’” (*Toal v. Tardif, supra*, 178 Cal.App.4th at p. 1219), we concluded “[t]o the extent *Condee* conflicts with *Rosenthal* our Supreme Court’s decision is controlling” (*id.* at p. 1219, fn. 8). As noted above, *Rosenthal* declares the moving party’s burden extends beyond merely pleading the existence of a purported arbitration agreement.

Therefore, we conclude the trial court did not err in finding defendant failed to establish the existence of an arbitration agreement by a preponderance of the evidence.

3. *Effect of Subsequent Employment Agreement and Revised Employee Handbooks*

As an alternative ground for its ruling, the trial court found the 2002 arbitration agreement was superseded by the subsequent revised employee handbooks defendant issued in 2004 and 2008, neither of which provided for arbitration of employment-related issues. Relying on *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, defendant argues the evidence fails to show any express or implied repudiation of the 2002 arbitration agreement.

Again, the record supports the trial court’s ruling. A written contract may be modified by another written agreement. (Civ. Code, § 1698, subd. (a).) Plaintiff presented evidence he entered into an employment agreement with defendant as its general manager for sales and marketing with a new salary in 2005. The 2005 agreement stated: “As a full-time employee, you will be entitled to all benefits. All [defendant’s]

policies and procedures as contained in its employee handbook or elsewhere apply to your employment. [¶] . . . [¶] This is the entire agreement between [defendant] and you concerning the at-will nature of our relationship and supersedes all prior oral or written agreements to the contrary.”

When plaintiff and defendant’s president signed the 2005 contract, the effective employee handbook was the version issued in 2004. That handbook expressly superseded the 2002 handbook. Not only did it fail to mention arbitration, its reference to Los Angeles County as the “[v]enue for any dispute” implied employee-related conflicts would be litigated in a judicial forum. The term venue is “synonymous with” the phrase “‘place of trial.’” (*Milliken v. Gray* (1969) 276 Cal.App.2d 595, 598.) The 2008 handbook also failed to mention arbitration and only modified the venue provision by naming Orange County as the place to litigate disputes.

To the extent the 2005 employment contract and the 2004 and 2008 handbooks created any ambiguity about the appropriate procedure for resolving employment issues, it must be construed against defendant, the party who drafted them. (Civ. Code, § 1654.) Thus, the terms of the 2005 employment agreement, its incorporation of the then-effective 2004 handbook, the absence of any reference to arbitration in that handbook or the 2008 revision along with the handbooks express references to “[v]enue for any dispute” in Los Angeles County and Orange County, support the conclusion that, even if the parties entered into an arbitration agreement in 2002, the subsequent contract and later handbooks superseded it.

Citing language in the 2002 handbook and the acknowledgement form stating it could change policies and practices except an employee’s “at-will status and the arbitration agreement,” defendant argues it could not “change or repudiate the arbitration agreement.” This argument takes the quoted language out of context. The 2002 employee handbook states: “Except for employment at-will status and the arbitration agreement, [defendant] reserves the right to change, in its sole discretion, all such

policies and practices . . . for any employee.” (Italics added.) Similarly, the acknowledgement provided: “I understand and agree that, except for employment at-will status and the arbitration agreement, [defendant] may change any policy or practice . . . *in its sole discretion.*” (Italics added.) The emphasized language reflects the parties could mutually agree to alter an employee’s status or the arbitration agreement and the evidence supports a conclusion that is exactly what occurred in 2005.

Defendant’s reliance on *Martinez v. Scott Specialty Gases, Inc., supra*, 83 Cal.App.4th 1236 is also unavailing. There, when hired, the plaintiff received an employee handbook that provided for arbitration and signed the attached arbitration agreement. The defendant-employer then issued a new handbook also providing for arbitration, but the plaintiff refused to sign the attached acknowledgement containing an agreement to arbitrate disputes. After the plaintiff’s termination he and his wife sued the defendant. The trial court entered summary judgment for the defendant on its defense the parties had agreed to arbitrate all of the issues raised in the complaint. On appeal, the plaintiff argued the defendant repudiated the earlier arbitration agreement he signed by issuing a new handbook and arbitration agreement which he had refused to execute. Here, plaintiff claims the prior agreement to arbitrate was superseded by the revised employee handbooks, particularly in light of his execution of a new employment agreement with defendant that both superseded the prior employment agreement and incorporated the then effective 2004 handbook.

Thus, we conclude the trial court properly found plaintiff carried his burden of establishing subsequent events rendered the purported 2002 arbitration agreement unenforceable.

4. *Unconscionability*

The trial court’s minute order denying the motion to compel arbitration does not mention plaintiff’s unconscionability defense. But during the hearing, the court

commented, “I think there’s some unconscionability issues with the arbitration agreement anyway, but . . . we don’t . . . need to reach that” On appeal, both parties extensively discuss the merits of the unconscionability defense, focusing on this court’s recent decision in *Mayers v. Volt Management Corp.* (2012) 203 Cal.App.4th 1194. Since the trial court did not rule on that ground and we conclude it properly denied the motion on the grounds discussed above, it is unnecessary for us to resolve this issue.

DISPOSITION

The order is affirmed. Respondent shall recover his costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

O’LEARY, P. J.

IKOLA, J.