Filed 6/10/15 Kohsuwan v. Dynamex CA4/3

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**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.**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

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| CHARINTORN KOHSUWAN et al.,<br><br>Plaintiffs and Respondents,<br><br>v.<br><br>DYNAMEX, INC., et al.,<br><br>Defendants and Appellants. | G049522<br><br>(Super. Ct. No. 30-2012-00594430)<br><br>ORDER MODIFYING OPINION; CHANGE IN JUDGMENT |

It is ordered that the opinion filed on June 1, 2015 be modified as follows:

On page 7, the last sentence in the section entitled "DISPOSITION," which states, "Plaintiffs are entitled to costs on appeal," shall be deleted and replaced with the following sentence: "Defendants are entitled to costs on appeal."

This modification changes the judgment.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.

Filed 6/1/15 (unmodified verson)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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| CHARINTORN KOHSUWAN et al.,<br>Plaintiffs and Respondents,<br>v.<br>DYNAMEX, INC., et al.,<br>Defendants and Appellants. | G049522<br>(Super. Ct. No. 30-2012-00594430)<br>O P I N I O N |

Appeal from an order of the Superior Court of Orange County, Gail Andrea Andler, Judge. Reversed.

Sheppard, Mullin, Richter & Hampton, Ellen M. Bronchetti, Karin Dougan Vogel and Ron Holland for Defendants and Appellants.

Law Offices of Lisa L. Maki, Lisa L. Maki; The Luti Law Firm and Anthony N. Luti for Plaintiffs and Respondents.

* * *

Defendants Dynamex, Inc. and Dynamex Operations West, LLC moved to compel arbitration of a putative class action complaint filed by plaintiffs and respondents Charintorn Kohsuwan, Phairat Prommi, and Gustavo Menacho. Defendants' motion was based on an arbitration paragraph in a contract they had with each of the plaintiffs.

The trial court found either the arbitration paragraph, the contract that contained the arbitration paragraph, or both, were unconscionable and denied the motion to compel arbitration. Defendants argue the language of the arbitration paragraph dictates that the arbitrator should decide arbitrability and whether the arbitration paragraph is unconscionable. We agree the arbitration paragraph delegated the issue of arbitrability to the arbitrator and reverse.

## FACTS AND PROCEDURAL HISTORY

Defendants own a transportation company; plaintiffs are drivers who work for them. As a condition of driving for defendants, plaintiffs were required to sign an "Independent Contractor Operating Agreement" (Agreement). The Agreement denominates plaintiffs as independent contractors. Plaintiffs dispute this and assert they are employees.

The Agreement contains an arbitration paragraph that states in part: "All disputes and claims arising under, out of, or relating to this Agreement, including an allegation of breach thereof, and disputes arising out of or relating to the relationship created by this Agreement or prior agreements between us, including any claims or disputes arising under any state or federal laws, statutes, or regulations, and any disputes as to the rights and obligations of the parties, including the arbitrability of disputes between the parties, shall be fully resolved by arbitration in accordance with Texas's Arbitration Act and/or the Federal Arbitration Act."

The Agreement provides arbitration is to be conducted pursuant to the rules of the American Arbitration Association. The venue for the arbitration is Dallas, Texas.

Arbitration fees are to be borne equally by the parties, unless payment of such fees would be a "substantial financial hardship" on plaintiffs, in which case defendants are to pay the entire amount.

Plaintiffs filed a class action against defendants seeking payments for unpaid wages, overtime, meal breaks, and various penalties, and for injunctive and equitable relief. Defendants filed a motion to compel arbitration and to dismiss the class claims.

Plaintiffs opposed the motion on several grounds, including the overall unconscionability of the arbitration paragraph. They also argued the clause delegating the question of arbitrability to the arbitrator was unconscionable. Plaintiffs asserted arbitrability is for the court and not the arbitrator to decide. They claimed allowing an arbitrator to make such a determination weighed in favor of defendants because of the arbitrator's financial self-interest in finding arbitrability. In response, defendants emphasized the arbitration paragraph contained a clause that authorized the arbitrator to determine arbitrability.

The court denied the motion, finding the "subject agreement" was procedurally and substantively unconscionable. It is unclear from the minute order whether the court was referring to the entire Agreement or arbitration paragraph alone; it appears to be a combination of both.

Procedurally, the court found the "agreement" was adhesive, plaintiffs being the weaker party vis-à-vis the drafting. Further, plaintiffs had to sign the "agreement" if they wanted to keep working for plaintiffs. In addition, the pros and cons of arbitration were never explained.

The court found the "agreement" was also substantively unconscionable because plaintiffs had to incur travel expenses to individually arbitrate their claims in Texas although they worked in California. Moreover, they had to pay half of the arbitration costs.

## DISCUSSION

*1. Delegation Clause*

Although the parties raise several other arguments, this case hinges on one issue: who decides whether the arbitration paragraph is unconscionable, the court or the arbitrator.

Under the Federal Arbitration Act (9 U.S.C. § 1 et seq.; FAA) the court determines the enforceability of an arbitration agreement unless the parties agree otherwise pursuant to what is commonly referred to as a delegation clause. (*Ajamian v. CantorCO2e, LP* (2012) 203 Cal.App.4th 771, 781-782.) California case law applies the same principle. (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 553.)

"A delegation clause requires issues of interpretation and enforceability of an arbitration agreement to be resolved by the arbitrator." (*Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1559 (*Malone*).) To be enforceable, a delegation clause must meet two requirements. First, it "must be clear and unmistakable." (*Id.* at p. 1560.) Second it cannot "be revocable under state contract defenses such as fraud, duress, or unconscionability. [Citations.]" (*Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 242.)

*2. Authority to Interpret the Delegation Clause*

Who decides the enforceability of a delegation clause depends on whether a party is challenging the enforceability of the delegation clause itself or is attacking the entire arbitration paragraph. (*Malone, supra*, 226 Cal.App.4th at p. 1559.) If the challenge is to the arbitration paragraph as a whole, the delegation clause is severed and, under that authority the arbitrator decides whether the entire arbitration paragraph is enforceable. (*Ibid*.; See *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 73 (*Rent-A-Center*).) If, however, a party challenges the delegation clause itself, the court

determines whether it is enforceable. (*Malone*, at p. 1559; *Rent-A-Center*, at p. 73.) If the court decides the delegation clause is enforceable, then the arbitrator will decide the enforceability of the remainder of the arbitration paragraph. (*Malone*, at p. 1559.)

Here plaintiffs contend both the delegation clause and the entire arbitration paragraph are unconscionable and thus unenforceable. Therefore, under *Malone*, it was the trial court's responsibility to decide the enforceability of the delegation clause. (*Malone*, *supra*, 226 Cal.App.4th at p. 1560.)

*3. Enforceability of Delegation Clause*

The trial court did not rule on the enforceability of the delegation clause but instead decided the question of the validity of the entire arbitration paragraph. Thus, the enforceability of the delegation clause is still pending. There are no disputed issues of fact on this issue and therefore we determine enforceability as a matter of law. (*Malone*, *supra*, 226 Cal.App.4th at p. 1562.)

As explained above, to be enforceable the delegation clause must satisfy two conditions. First, it must be clear and unmistakable. In this case, the language of the delegation clause specifically states that, among other issues, "the arbitrability of disputes between the parties[] shall be fully resolved by arbitration." The provision is clear and there has been no suggestion otherwise.

Second, the delegation clause must not be unconscionable. In their brief, in one paragraph and with virtually no argument, plaintiffs conclude the delegation clause is substantively unconscionable. In support they rely on *Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138 (*Murphy*) and *Ontiveros v. DHL Express* (*USA*), *Inc.* (2008) 164 Cal.App.4th 494 (*Ontiveros*). Plaintiffs do not discuss either case but instead only refer to the conclusion in each that an arbitration agreement is unconscionable if it contains a delegation clause. Plaintiffs' failure to develop the claim with reasoned legal argument could be deemed to forfeit the issue. (*Benach v. County of*

*Los Angeles* (2007) 149 Cal.App.4th 836, 852.) But even on the merits the argument does not persuade.

*Murphy* and *Ontiveros* have both been abrogated by recent cases. (*Malone*, *supra*, 226 Cal.App.4th 1551; *Tiri v. Lucky Chances, Inc.*, *supra*, 226 Cal.App.4th at p. 248; *AT&T Mobility LLC v. Concepcion* (2011) __ U.S. __ 131 S.Ct. 1740, 1748 (*Concepcion*); *Rent-A-Center*, *supra*, 561 U.S. at pp. 73-74.) These cases make clear that parties may delegate questions of enforceability to an arbitrator, as was done here.

In their opposition to the motion to compel arbitration plaintiffs argued the delegation clause is unconscionable because it gives the arbitrator a financial incentive to decide he or she has jurisdiction. This contention does not withstand scrutiny.

In *Malone*, the court analyzed and rejected this argument and held the opposition based on the arbitrator's alleged self-interest is preempted by the FAA. (*Malone*, *supra*, 226 Cal.App.4th at p. 1564.) It cited *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 where, relying on both FAA and its interpretation in *Concepcion*, *supra*, __ U.S. __ 131 S.Ct. 1740, the California Supreme Court ruled that an unconscionability defense could "'not facially discriminate against arbitration and must be enforced evenhandedly'" and further "'must not disfavor arbitration as applied.'" (*Malone*, at pp. 1568-1569, italics omitted.) *Malone* concluded the argument based on the financial self-interest of the arbitrator was "nothing more than an expression of a judicial hostility to arbitration, based on the assumption that a paid decision maker cannot be unbiased, and it, therefore, is wholly barred by the FAA." (*Malone*, at p. 1569.)

In their opposition to the motion to compel, plaintiffs also argued the delegation clause was unconscionable because it required them to arbitrate the question of arbitrability in Texas to determine whether an arbitration would proceed. But venue does not apply solely to the delegation clause and thus cannot be considered in analyzing the unconscionability of the delegation clause.

Contentions that the entire arbitration paragraph is unconscionable are not sufficient to challenge the delegation clause itself. "[A]ny claim of unconscionability must be specific to the delegation clause. [Citation.]" (*Tiri v. Lucky Chances, Inc.*, *supra*, 226 Cal.App.4th at p. 244, citing *Rent-A-Center*, *supra*, 561 U.S. at p. 73; italics omitted.) Thus, the several arguments in plaintiffs' brief directed toward the unconscionability of other provisions in the arbitration paragraph are unavailing.

In sum, the delegation clause is not unconscionable but is enforceable and the arbitrability of the claims is to be decided by an arbitrator.

**DISPOSITION**

The order is reversed. The case is remanded to the superior court with directions that the court should enter an order granting the motion to compel arbitration on the limited question of the arbitrability of plaintiffs' claims. Plaintiffs are entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.