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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| MARGARITO CALVILLO et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>ARAKELIAN ENTERPRISES, INC.,<br><br>Defendant and Respondent. | B270477<br><br>(Los Angeles County Super. Ct. No. BC488201) |

APPEAL from orders and a judgment of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Affirmed.

Gary Rand & Suzanne E. Rand-Lewis and Suzanne E. Rand-Lewis for Plaintiffs and Appellants.

Epstein Becker & Green, Adam C. Abrahms, William O. Stein and Amy B. Messigian for Defendant and Respondent.

## I. INTRODUCTION

Plaintiffs, Margarito Calvillo and Jose L. P. Guzman, appeal from orders and a judgment following denial of their petition to vacate an arbitration award. Plaintiffs sued defendant, Arakelian Enterprises, Inc., doing business as Athens Services. Plaintiffs assert we should reverse two orders. First, plaintiffs argue we should reverse the order denying their motion to vacate the arbitration award. Second, plaintiffs argue we should reverse the order granting defendant's motion to compel arbitration. We disagree and affirm those two orders.

## II. BACKGROUND

### A. Plaintiffs' Complaint

On July 12, 2012, plaintiffs filed their complaint against defendant and Andy Lucero. Mr. Calvillo is 53 years old. Mr. Guzman is 37 years old. Both were former employees of defendant which is in the waste collection business. Defendant has its primary place of business in Los Angeles, California. Mr. Lucero was plaintiffs' manager.

Plaintiffs allege the following. Mr. Calvillo and Mr. Guzman were truck drivers and began working for defendant in 2007. Mr. Lucero became their manager in 2008. Mr. Lucero began to harass plaintiffs. Mr. Lucero stated Mr. Calvillo was too old. Mr. Lucero wanted to get rid of Mr. Calvillo. Mr. Lucero changed plaintiffs' shifts, shortened their hours and sent them home before their shift ended in an effort to get them to quit. Mr. Lucero called plaintiffs and yelled at them. He questioned

plaintiffs on why they were taking the amount of time that they needed.

In September 2010, Mr. Guzman was assaulted at work by a co-worker wielding a knife. Mr. Guzman reported the incident to Mr. Lucero and the police. Mr. Guzman requested Mr. Lucero investigate the incident. Mr. Lucero told Mr. Guzman to forget about the incident. This caused Mr. Guzman extreme stress and anxiety. Mr. Guzman developed high blood pressure. Mr. Guzman was not informed he could file for worker's compensation benefits regarding the workplace injury and resulting disability.

Plaintiffs worked in unsafe vehicles and had to drive dangerous trucks. Plaintiffs complained they had to lift and carry too much weight, which caused them back problems. Plaintiffs complained to Mr. Lucero about the harassing and constant hostile environment, as well as the working conditions. Nothing was done. Mr. Calvillo developed neck, back and stomach problems due his work environment. Mr. Calvillo also fell at work due to the unsafe conditions. Mr. Calvillo requested time to go visit the doctor. Mr. Lucero stated Mr. Calvillo was too old and political. Mr. Calvillo was also not advised of his right to file for worker's compensation benefits for his workplace injury and resulting disability.

Plaintiffs complained of Mr. Lucero's practice of requiring the trucks to carry more than the maximum amount of allowable weight. Plaintiffs also complained the trucks were being left loaded with waste and recycling which violated an unspecified code requirement. On November 8, 2010, plaintiffs filed a complaint with defendant's human resources department against Mr. Lucero. Plaintiffs had a meeting scheduled with defendant's general manager at 2:00 p.m. that day. At the meeting, plaintiffs

were handed their paychecks and told they were fired. Defendant's general manager stated plaintiffs were too political.

Plaintiffs allege 11 causes of action: contract breach; good faith and fair dealing implied covenant breach; wrongful termination in violation of public policy; violation of the Fair Employment and Housing Act for age and disability discrimination; intentional infliction of emotional distress; negligence; violation of Civil Code sections 51 and 51.7; violation of Business and Professions Code section 17200; violation of the Consumers Legal Remedies Act; intentional misrepresentation, negligent misrepresentation, and concealment; and violation of Labor Code sections 512 and 1198 for denial of rest breaks, meal periods and overtime pay.

Plaintiffs requested as relief general, special, compensatory and punitive damages. Plaintiffs also requested a preliminary and permanent injunction to purge all derogatory information in plaintiffs' employment records. Plaintiffs also sought to bar all dissemination of such information to future employers, employees or others. No other injunctive relief was sought.

B. Motion to Compel Arbitration

On October 23, 2012, defendant and Mr. Lucero moved to compel arbitration and for the action to be stayed. They argued that in March 2010, plaintiffs received both an English and Spanish version of two documents--a "Mutual Arbitration Policy" and "Employee Agreement to Arbitrate" (the arbitration agreements). The arbitration agreements provide in pertinent part: "The [Mutual Arbitration Policy] applies to Company [defendant] employees, regardless of length of service or status,

and covers all disputes relating to or arising out of an employee's employment with the Company or the termination of that employment. Examples of the type of disputes or claims covered by the [Mutual Arbitration Policy] include, but are not limited to, claims against employees for fraud, conversion, misappropriation of trade secrets, or claims by employees for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation under the Americans with Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and its amendments, the California Fair Employment and Housing Act or any other state or local anti-discrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code, or any other legal or equitable claims and causes or action recognized by local, state or federal law or regulations. The [Mutual Arbitration Policy] does not cover workers' compensation claims, unemployment insurance claims or any claims that could be made to the National Labor Relations Board. Because the [Mutual Arbitration Policy] changes the forum in which you may pursue claims against the Company and effects [*sic*] your legal rights, you may wish to review the [Mutual Arbitration Policy] with an attorney or other advisor of your choice. The Company encourages you to do so."

Pursuant to their terms, the arbitration agreements are governed solely by the Federal Arbitration Act. The Arbitration Rules of ADR Services, Inc. govern the arbitration procedures. The arbitration agreements specifically provide for mutuality of obligations: "Your decision to accept employment or to continue employment with the Company constitutes your agreement to be bound by the [Mutual Arbitration Policy]. Likewise, The [*sic*]

Company agrees to be bound by the [Mutual Arbitration Policy]. This mutual obligation to arbitrate claims means that both you and the Company are bound to use the [Mutual Arbitration Policy] as the only means of resolving any employment-related disputes." The arbitration agreements also state plaintiff's maximum out-of-pocket expense for arbitration costs under ADR Services, Inc. was an amount equal to the local civil court filing fee. Defendant would pay the remaining fees and costs.

Defendant and Mr. Lucero submitted a declaration from Peter Webster, defendant's human resources director. Mr. Webster declared he had personal knowledge that defendant requires its employees to sign an arbitration agreement covering disputes arising out of their employment. Mr. Webster also declared that true and correct copies of plaintiffs' signed arbitration agreements were attached to the motion to compel arbitration. Copies of the Spanish language arbitration agreements with signatures purporting to be plaintiffs' were attached.

Plaintiffs argued no valid arbitration agreements existed. Plaintiffs argued they never signed the arbitration agreements. Plaintiffs submitted their own declarations and asserted they never: saw the arbitration agreements prior to being shown the documents by their counsel; received copies; nor signed the arbitration agreements. Plaintiffs also argued the arbitration agreements were unconscionable. Plaintiffs contended the agreements were procedurally unconscionable because they were adhesive employment contracts. Plaintiffs argued the agreements were substantively unconscionable because they allegedly waived their rights under the Consumers Legal

Remedies and the Fair Employment and Housing Acts. Plaintiffs also argued the arbitration agreements limited discovery.

In reply, defendant submitted Mr. Lucero's declaration. Mr. Lucero declared he communicated defendants' new 2008 employment policies to plaintiffs. He also declared plaintiffs signed acknowledgements of these policies in his presence. Mr. Lucero declared that in March 2010, Keng Balaco-Wong met with plaintiffs regarding new policies. Attached to Mr. Lucero's declaration were copies of plaintiffs' signed arbitration agreements.

The trial court granted the motion to compel arbitration and stayed the action. The trial court found plaintiffs signed the arbitration agreements. Among other things, the trial court compared plaintiffs' signatures on the arbitration agreements with those on their declarations.

### C. Arbitration Proceedings, Arbitrator's Rulings and Motions to Vacate the Award

The arbitration hearing was held on July 28 and 29, and August 1, 2014 before Retired Judge Patricia Collins. On April 30, 2015, the arbitrator issued her award in favor of defendant and Mr. Lucero and against plaintiffs. The arbitrator specifically rejected plaintiffs' argument that the arbitrator could re-determine the arbitrability issue, citing the ADR Services, Inc. arbitration rules.

On August 7, 2015, plaintiffs moved to vacate the arbitration award. Plaintiffs argued the arbitrator refused to consider the arbitrability issue, which exceeded her powers under Code of Civil Procedure section 1286.2, subdivision (a)(4).

Defendant argued that under section 7 of the ADR Services, Inc. arbitration rules, the arbitrator lacked the power to rule on her own jurisdiction. Rule 7 of the arbitration rules of ADR Services, Inc. provides in pertinent part, "Unless the issue of arbitrability has been previously determined by the court, the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." The trial court denied plaintiffs' motion to vacate the award on January 19, 2016. The pending court action was subsequently dismissed.

## III. DISCUSSION

### A. Standards of Review

The order granting the motion to compel arbitration is reviewable on appeal here, where there has been entry of judgment or an appealable order. (Code Civ. Proc., §§ 906, 1294.2; *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 648-649.) The order denying plaintiffs' motion to vacate the arbitration award is appealable. (Code Civ. Proc., §§ 904.1, subd. (a)(10), 1294, subd. (b).) We review the written arbitration agreements de novo. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1360; *Abramson v. Juniper Networks, Inc.*, *supra*, 115 Cal.App.4th at pp. 649-650.) We review the trial court's resolution of disputed facts for substantial evidence. (*Fagelbaum & Heller LLP v. Smylie*, *supra*, 174 Cal.App.4th at p. 1360; *Metalclad Corp v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1716.)

Plaintiffs make three arguments as to why the arbitration agreements are unenforceable: insufficient evidence existed to demonstrate plaintiffs agreed to arbitrate their claims; the Labor Code, Fair Employment and Housing Act and Consumers Legal Remedies Act claims were not arbitrable; and the arbitration agreements were unconscionable. Plaintiffs further contend the trial court erred by denying their motion to vacate the award because the arbitrator exceeded her powers. We address only those arguments that were raised in plaintiffs' brief. At oral argument, plaintiffs raised a number of contentions that were not presented in their brief with proper headings and development of the issues. We will not consider those contentions. (*Provost v. Regents of Univ. of Calif.* (2011) 201 Cal.App.4th 1289, 1294; *Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114.)

B. The Parties' Agreements to Arbitrate

Plaintiffs assert the evidence presented to demonstrate that they had agreed to arbitrate their claims was insufficient. Plaintiffs argue Mr. Webster lacked personal knowledge that plaintiffs signed the arbitration agreements. This argument is unpersuasive. Substantial evidence supports the trial court's finding that plaintiffs agreed to arbitrate. Mr. Webster declared he is a human resources manager for defendant. He declared he had personal knowledge of the documents attached to the motion to compel arbitration, including the signed arbitration agreements.

Additionally, the trial court compared the signatures on the arbitration agreements with those on plaintiffs' declarations and found: "[T]he arbitration agreements filed by defendants . . .

have signatures that mostly look like the same handwriting style as those signatures on plaintiffs' own declarations separately filed on 11/9/12." The Court of Appeal has held: "Witness signatures can be authenticated by a variety of means including . . . comparison by the trier of fact . . . ." (*Estate of Ben-Ali* (2013) 216 Cal.App.4th 1026, 1037; Evid. Code, § 1417; see *Estate of Nielson* (1980) 105 Cal.App.3d 796, 801.)

Plaintiffs also argue defendants did not present evidence of mutual intent to enter into the arbitration agreements. This argument is meritless. The arbitration agreements state plaintiffs' acceptance of or continued employment with defendant was an agreement to be bound by the arbitral provisions. Additionally, by signing the arbitration agreements, plaintiffs acknowledged receipt and review of the documents. Accordingly, substantial evidence supports the trial court's finding the parties agreed to arbitrate their disputes. We need not address plaintiffs' arguments concerning whether Mr. Lucero's declaration was untimely.

### C. The Labor Code, Fair Employment and Housing Act and Consumers Legal Remedies Act Claims were Arbitrable

Plaintiffs argue that several of the claims in their complaint were not arbitrable. Plaintiffs contend their Labor Code claims were pursuant to Labor Code section 229 and were not arbitrable. Labor Code section 229 provides in pertinent part, "Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate." This argument is meritless. As noted,

the Federal Arbitration Act governs the arbitration agreements. Under federal and state law arbitration is a matter of consent or agreement by the parties. (*Granite Rock Co. v. International Brotherhood of Teamsters* (2010) 561 U.S. 287, 298; *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1355.) The parties' agreements that their disputes would be governed by the Federal Arbitration Act are under California contractual law enforceable choice of law provisions (*Biller v. Toyota Motor Corp.* (9th Cir. 2012) 668 F.3d 655, 662-663; *Harris v. Bingham McCutchen LLP* (2013) 214 Cal.App.4th 1399, 1404; *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1120-1121.) Thus, we apply the Federal Arbitration Act to the present disputes. The Federal Arbitration Act preempts the Labor Code section 229 limitation on the duty to arbitrate. (*Perry v. Thomas* (1987) 482 U.S. 483, 492; *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 687.)

Additionally, plaintiffs do not assert a claim for collection of due and unpaid wages under Labor Code section 229. Rather, plaintiffs' Labor Code claims are in part for failure to provide rest breaks and meal periods under Labor Code section 512. In addition, plaintiffs' Labor Code claims are for the failure to permit inspection of an employee's personnel records under Labor Code section 1198.5. None of these claims fall within Labor Code section 229. (See *Lane v. Francis Capital Management LLC*, *supra*, 224 Cal.App.4th at p. 684.)

Plaintiffs also assert the arbitration agreements required the Fair Employment Housing and Consumers Legal Remedies Acts claims be waived. This argument is also meritless. The arbitration agreements require arbitration of these causes of action, not waiver of the claims. Our Supreme Court has held:

"'[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' [Citation.] [Fn. omitted.]" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 98-99 (*Armendariz*) [regarding Fair Employment and Housing claims]; *Lane v. Francis Capital Management LLC*, *supra*, 224 Cal.App.4th at p. 686 ["[T]he fact that a claim is based on a nonnegotiable or unwaivable right does not preclude arbitration of that claim."].) Accordingly, the Fair Employment and Housing Act claim was arbitrable so long as plaintiffs could fully vindicate the statutory cause of action in the arbitral forum. (*Armendariz*, *supra*, 24 Cal.4th at pp. 100-102; *Lane v. Francis Capital Management LLC*, *supra*, 224 Cal.App.4th at p. 686.) The Consumers Legal Remedies Act claim was also arbitrable as to damages. (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 317 (*Cruz*); *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1084 (*Broughton*).)

Our Supreme Court held a suit to enjoin false advertising under the Consumers Legal Remedies Act for plaintiffs acting as private attorney generals on the public's behalf is not arbitrable. (*Cruz*, *supra*, 30 Cal.4th at p. 307; *Broughton*, *supra*, 21 Cal.4th at pp. 1079-1080.) Plaintiffs make *no* allegations in which they seek a public injunction under the Consumers Legal Remedies Act. We conclude all of plaintiffs' claims under the Labor Code, the Fair Employment and Housing Act and the Consumers Legal Remedies Act were arbitrable.

D. The Arbitration Agreements are not Unconscionable

Plaintiffs also assert the arbitration agreements are unconscionable. Both state and federal laws favor enforcement of valid arbitration agreements. (*Armendariz*, *supra*, 24 Cal.4th at p. 97; *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 25 [strong public policy in favor of arbitration].) However, courts will not enforce arbitration provisions that are unconscionable or contrary to public policy. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (U.S.), LLC* (2012) 55 Cal.4th 223, 247 (*Pinnacle Museum*); *Armendariz*, *supra*, 24 Cal.4th at p. 114.) The party opposing arbitration, in this case plaintiffs, bear the burden of proving that an arbitration agreement is unenforceable based on unconscionability. (*Pinnacle Museum*, *supra*, 55 Cal.4th at p. 247; *Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 708.)

Our Supreme Court has stated: "'Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.]'" (*Pinnacle Museum*, *supra*, 55 Cal.4th at p. 246; *Armendariz*, *supra*, 24 Cal.4th at p. 114.) Both procedural and substantive unconscionability must be shown. However, they need not be present to the same degree and are evaluated on a sliding scale. (*Pinnacle Museum*, *supra*, 55 Cal.4th at p. 246; *Armendariz*, *supra*, 24 Cal.4th at p. 114.) Our Supreme Court explained, "'[T]he more substantively oppressive

the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citation.]" (*Pinnacle Museum*, *supra*, 55 Cal.4th at p. 247; accord, *Armendariz*, *supra*, 24 Cal.4th at p. 114.)

We find there was a modest level of procedural unconscionability. The employment agreements were adhesive contracts. (See *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 915 [adhesive nature of contract is sufficient to establish some degree of procedural unconscionability]; *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 243.) We turn now to the issue of substantive unconscionsability.

Plaintiffs assert the arbitration agreements were substantively unconscionable on two grounds. They argue the arbitration agreements failed to identify the set of rules governing the arbitration. They also argue the arbitration agreements limited discovery to an unconscionable level. We do not find substantive unconscionability. As noted, the arbitration agreements identified the ADR Services, Inc. arbitration rules as the governing rules. Under Rule 17 of the ADR Services, Inc. arbitration rules: "The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration. [¶] With respect to arbitration of employment claims, the parties are entitled to discovery sufficient to adequately arbitrate their claims, including access to essential documents and witnesses, as determined by the arbitrator(s)." The arbitration rules thus provided for adequate discovery. (See *Armendariz*, *supra*, 24

Cal.4th at pp. 104-105; *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1475-1476.) Accordingly, the arbitration agreements were not unconscionable to the degree they may be declared unenforceable.

## E. The Trial Court Did Not Err by Denying the Motion to Vacate the Award

Plaintiffs also assert the arbitrator exceeded her authority by not ruling on the issue of arbitrability in violation of Code of Civil Procedure section 1286.2, subdivision (a)(4). Plaintiffs' argument fails. An arbitrator's powers are limited by the terms of the arbitration agreements. (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1185; *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 375.) The arbitration agreements provided that the proceedings would be governed by the ADR Services, Inc. arbitration rules. As noted, Rule 7 of the ADR Services, Inc. arbitration rules provides the arbitrator with the power to determine his or her jurisdiction, "Unless the issue of arbitrability has been previously determined by the court . . . ." It is undisputed the trial court determined the arbitrability issue prior to the matter proceeding to arbitration. Thus, under the arbitration agreements and Rule 7 of the ADR Services, Inc. arbitration rules, the arbitrator lacked the power to determine her own jurisdiction. The trial court did not err by denying plaintiffs' motion to vacate the arbitration award.

## IV. DISPOSITION

The orders and judgment are affirmed. Defendant, Arakelian Enterprises, Inc., doing business as Athens Services, may recover its appeal costs from plaintiffs, Margarito Calvillo and Jose L. P. Guzman.

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TURNER, P. J.

I concur:

KRIEGLER, J.

BAKER, J., Concurring

I do not believe Title 9 United States Code section 2 governs the arbitration agreements at issue and thereby preempts Labor Code section 229. With that caveat, I join the majority's opinion.

BAKER, J.