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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

BRITTNEY LEE, Plaintiff and Appellant, v. CALIFORNIA COMMERCE CLUB, INC., Defendant and Respondent.	B276171 (Los Angeles County Super. Ct. No. BC596924)

APPEAL from an order of the Superior Court of Los Angeles County, John Shepard Wiley Jr., Judge. Affirmed.

Diversity Law Group, Howard L. Magee and Kwanporn Mai Tulyathan; Hyun Legal and Dennis S. Hyun for Plaintiff and Appellant.

Littler Mendelson, Kevin V. Koligian and Irene V. Fitzgerald, for Defendant and Respondent.

Brittney Lee appeals the order granting California Commerce Club's motion to compel arbitration of her employment-related claims and dismissing her class action claims.[1] Lee contends the trial court erred in granting California Commerce Club's motion because her agreement to arbitrate employment disputes is unenforceable. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Lee's Employment Application and Job Offer*

In May 2015 Lee applied for a job as a "runner" at a casino owned by California Commerce Club, doing business as

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[1] Although orders compelling arbitration generally are not appealable (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 648), an order dismissing class claims while allowing individual claims to survive is treated as an appealable order under the "death knell doctrine." (See *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757 [under the "death knell doctrine," when an "order effectively [rings] the death knell for the class claims, [the court] treat[s] it as in essence a final judgment on those claims, which [is] appealable immediately"]; *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 766 [recognizing death knell doctrine is applicable to orders compelling a plaintiff to pursue individual claims in arbitration and dismissing action as to all other members of the class].) While there is some question whether an order compelling arbitration is immediately appealable when, as here, made as part of the same order dismissing class claims (see Code Civ. Proc., § 906; *Cortez v. Doty Bros. Equipment Co.* (2017) 15 Cal.App.5th 1, 10), we defer resolution of that issue to another day. (See *Phillips*, at pp. 767-768 [treating appeal of an order granting a motion to compel arbitration as a petition for writ of mandate]; see also *Cortez*, at p. 10 [same].)

Commerce Casino. On May 15, 2015 Commerce extended an offer of employment to Lee and informed her she would be required to sign an arbitration agreement and undergo a medical examination before beginning her employment. Lee signed the arbitration agreement on May 18, 2015 and underwent the medical examination around that time. On May 20, 2015 Commerce informed Lee the job offer was being rescinded because she had failed the medical examination.

2. *The Arbitration Agreement*

The arbitration agreement signed by Lee consists of two pages and is titled, "Arbitration Agreement and Mandatory Dispute Resolution Process." It states, "In consideration for California Commerce Club, Inc. . . . employing you or continuing to employ you, and the mutual promises set forth herein, you and the Company . . . agree to the following: [¶] I agree to conform to the rules and regulations of the Company, and I acknowledge that my employment and compensation can be terminated with or without cause or notice, at any time, at the option of either the Company or myself. Any offer of employment is contingent upon obtaining and maintaining a current work permit issued by City of Commerce."

The agreement further states both parties agree to submit "any dispute" to an informal dispute resolution process prior to commencing any legal action. If the dispute cannot be resolved through the informal process, "then all claims relating to my recruitment, employment with, or termination of employment from the Company shall be deemed waived unless submitted to final and binding arbitration by JAMS . . . ." The agreement sets forth a bullet-point list of requirements for the arbitration, such as location, applicable arbitration rules and arrangements for

payment of the arbitrator. One bullet point reads, "Class Action Waiver: All claims must be brought in the employee's individual capacity, and not as a plaintiff or participating class member in any purported class, collective, consolidated or representative proceeding . . . ."

The concluding paragraphs of the agreement state, "I again acknowledge that my employment with the Company is at-will. This means that I or the Company may terminate the employment relationship at any time, for any reason, and without notice. [¶] . . . [¶] . . . YOU WILL NOT BE OFFERED EMPLOYMENT UNTIL THIS FORM IS SIGNED AND RETURNED BY YOU. [¶] . . . BY SIGNING BELOW, YOU ARE ATTESTING THAT YOU HAVE READ AND UNDERSTOOD THIS DOCUMENT AND ARE KNOWINGLY AND VOLUNTARILY AGREEING TO ITS TERMS, INCLUDING YOUR WAIVER OF A RIGHT TO HAVE THIS MATTER LITIGATED IN A COURT OR JURY TRIAL, OR TO HAVE THIS MATTER RESOLVED ON A CLASS, COLLECTIVE, CONSOLIDATED OR REPRESENTATIVE BASIS."

Lee signed the agreement on May 18, 2015 on the line marked "Applicant."[2]

3. *Lee's Lawsuit*

On October 6, 2015 Lee filed this lawsuit against Commerce on behalf of herself and all others similarly situated alleging disability discrimination, failure to accommodate, failure to engage in the interactive process and failure to prevent

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[2] Although the agreement includes a signature line for a Commerce representative, the copy in the record on appeal is not signed by Commerce. Lee does not contend the absence of Commerce's signature affects the enforceability of the agreement.

discrimination in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.); preemployment discrimination (Cal. Code Regs., tit. 2, § 11070), wrongful termination in violation of public policy, invasion of privacy and unfair business practices (Bus. & Prof. Code, § 17200 et seq.).

The basis for Lee's lawsuit was the allegation that the preemployment medical examination required by Commerce was unlawful and not related to her ability to perform job-related functions. Upon learning Lee had failed the examination, she contended, Commerce "unlawfully terminated [her] employment and rescinded her employment." Lee alleged Commerce violated FEHA and public policy by "uniformly and systematically appl[ying] [its] illegal corporate policy requiring Plaintiff and Class Members to undergo medical examinations and ultimately terminating their employment when Defendant[] perceived Plaintiff and Class Members to suffer from disabilities."

4. *The Motion To Compel Arbitration*

In response to the complaint Commerce moved to compel arbitration of Lee's individual claims, to dismiss the class claims and to stay this action pending the completion of the arbitration. Commerce argued Lee had agreed to arbitrate all employment-related claims, including any claims related to recruitment, employment and termination of employment, and she had waived any right to maintain a class action to pursue those claims. Commerce included with its motion a copy of the arbitration agreement signed by Lee and the declaration of Commerce's executive director of human resources, Jose Garcia, who stated it was Commerce's practice to present the arbitration agreement to employees "upon the commencement of their employment." Garcia further declared it was Commerce's practice to explain the

arbitration agreement to the employee at the time he or she was asked to sign it. Garcia declared, based on information and belief and Commerce's practices, this was the practice followed with Lee.

5. *Lee's Opposition to the Motion*

In opposition to Commerce's motion Lee acknowledged signing the arbitration agreement but argued it was unenforceable because Commerce had promised her actual employment in exchange for her agreement to arbitrate and Commerce had never fulfilled that promise. Thus, according to Lee, there was no consideration for, or mutual assent to, the agreement. Lee further argued the agreement was unenforceable because it was illusory and unconscionable.

Lee submitted a declaration in support of her opposition in which she stated she "signed the Agreement with the expectation that I would be hired and actually perform work and receive pay. In other words, I would not have signed the Agreement and undergone a medical examination unless I was actually being hired to work by Defendant."

6. *Commerce's Reply in Support of Its Motion*

In reply Commerce argued sufficient consideration for the agreement was provided in the form of mutual promises to submit disputes to arbitration. Commerce also argued Lee's subjective expectations of employment were not relevant to the enforceability of the contract. Finally, Commerce argued the agreement was neither illusory nor unconscionable.

7. *The Court's Order Granting Commerce's Motion to Compel Arbitration*

After hearing argument from the parties the trial court granted Commerce's motion to compel arbitration, dismiss the

class claims and stay the case pending arbitration. In a three-page order the court found the arbitration agreement was valid and enforceable. The court found the consideration offered by Commerce was sufficient, stating, "[H]er consideration literally was consideration: Commerce Casino considered Lee for possible employment and sent her for testing, which unfortunately she did not pass. The chance to try out, however, is an opportunity to get a foot in the door. It can be valuable indeed. This consideration supports the contract's enforceability." The trial court further found the mutual promise to submit claims to arbitration constituted additional consideration for the agreement. Finally the court stated the contract was neither illusory nor substantively unconscionable.

DISCUSSION

1. *Governing Law and Standard of Review*

There is a strong public policy in favor of arbitration. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 971-972; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) Still, "[a]lthough '[t]he law favors contracts for arbitration of disputes between parties' [citation], '"there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate."'" (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744; accord, *AT&T Technologies, Inc. v. Communications Workers of America* (1986) 475 U.S. 643, 658 [106 S.Ct. 1415, 89 L.Ed.2d 648] ['"arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"']; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*)*, LLC*

(2012) 55 Cal.4th 223, 236 (*Pinnacle*) [""a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit""]; *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 704 [same].)

Thus, the threshold question presented by every petition to compel arbitration is whether an enforceable agreement to arbitrate exists. (See *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228, __ [133 S.Ct. 2304, 2309, 186 L.Ed.2d 417] [it is an "overarching principle that arbitration is a matter of contract"]; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 626 [105 S.Ct. 3346, 87 L.Ed.2d 444] ["the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute"]; *Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 787 (*Esparza*) ["[t]here is a strong public policy favoring contractual arbitration, but that policy does not extend to parties who have not agreed to arbitrate"]; *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, 204 ["in ruling on a petition to compel, the court must determine whether the parties entered into an enforceable agreement to arbitrate that reaches the dispute in question"].)

The party seeking to compel arbitration bears the burden of proving by a preponderance of the evidence the existence of an agreement to arbitrate. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 240.) Only if an agreement has been proved does the burden shift to the party opposing arbitration to demonstrate a defense to the enforcement

of the agreement. (*Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 972; *Rosenthal,* at pp. 409-410.)

"'[G]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate.'" (*Pinnacle, supra,* 55 Cal.4th at p. 236; *Flores v. Nature's Best Distribution, LLC* (2016) 7 Cal.App.5th 1, 9 (*Flores*).) """"The words of a contract are to be understood in their ordinary and popular sense.' [Citations.]" [Citation.] Furthermore, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."'" (*Flores,* at p. 9; see Civ. Code, § 1641.) Consent must be communicated by each party to the other. (Civ. Code, § 1565, 3d. par.) "'Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.'" (*Esparza, supra,* 2 Cal.App.5th at p. 788; accord, *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 173.)

We review de novo the superior court's interpretation of an arbitration agreement that does not involve conflicting extrinsic evidence. (*Rosenthal v. Great Western Fin. Securities Corp.*, *supra,* 14 Cal.4th at p. 413; *Flores, supra,* 7 Cal.App.5th at p. 9; *Esparza, supra,* 2 Cal.App.5th at p. 787.)

2. *The Arbitration Agreement Is Enforceable*

On appeal Lee has transformed her contention there was no consideration for the agreement into an argument that Commerce failed to perform its obligations under the agreement;

however, her substantive argument remains the same.[3] Lee contends the arbitration agreement cannot be enforced because Commerce has failed to fulfill its promise to employ her.

In support of her argument the agreement is unenforceable, Lee relies on the general proposition that "[a]n action to compel arbitration 'is in essence a suit in equity to compel specific performance of a contract.'" (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 29 [applying statute of limitations for action to compel performance of a contract to petition to compel arbitration]; accord, *Bunker Hill Park Ltd. v. U.S. Bank National Assn.* (2014) 231 Cal.App.4th 1315, 1329 ["a petition to compel arbitration is, consistently with the contractual nature of arbitration, "'simply a suit in equity seeking specific performance of [a] contract'"'].) Because specific performance is a remedy for breach of contract, a party seeking specific performance must prove the elements of a breach of contract. (See *Darbun Enterprises, Inc. v. San Fernando Community Hospital* (2015) 239 Cal.App.4th 399, 409 ["[t]o obtain specific performance, a plaintiff must make several showings, in addition to proving the elements of a standard breach of contract"].) Lee argues Commerce cannot seek performance of the contract (arbitration) unless it can prove the elements of a breach of contract claim, including that it fulfilled its own obligations under the contract, that is employing her. (See *ibid.* [elements of

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[3] Even if Lee's argument were considered a new legal theory, we have discretion to consider a question of law to be applied to undisputed facts raised for the first time on appeal. (See *C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1492; *Greenlake Capital, LLC v. Bingo Investments, LLC* (2010) 185 Cal.App.4th 731, 739, fn. 6.)

breach of contract include "'plaintiff's performance or excuse for nonperformance'"].)

Lee's analysis fails for three reasons. First, her argument is inconsistent with the allegations in her complaint. Lee brought a claim for wrongful termination and repeatedly referred in the complaint to her "employment" with Commerce. Having alleged Commerce employed her, Commerce is entitled, as was the trial court, to rely on Lee's allegation in determining whether the parties' arbitration agreement is properly enforced. (See *Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 614 ["when a plaintiff alleges a defendant acted as an agent of a party to an arbitration agreement, the defendant may enforce the agreement even though the defendant is not a party thereto"].)

Second, notwithstanding the general proposition that seeking to compel arbitration is analogous to seeking specific performance, Lee has not cited any authority supporting her argument a party seeking to enforce an arbitration agreement must first prove it has performed under the contract. In fact, the rule proposed by Lee makes no sense. The contractual duty to arbitrate must be enforceable even after an alleged breach of the contract by the party seeking to enforce that duty. Otherwise, a claim for breach of contract could not be arbitrated without the court first determining whether the party seeking arbitration had performed his or her contractual obligations. Requiring that procedural step not only ignores the parties' agreement to arbitrate their disputes, but also necessitates judicial mini-trials to decide whether to compel arbitration, undermining the "'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.'" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 380.)

In short, while seeking to compel arbitration may in some ways be analogous to a suit for specific performance, the analogy does not mean that an alleged breach or failure to perform precludes enforcement of the agreement to arbitrate the dispute. (See *Thorup v. Dean Witter Reynolds, Inc.* (1986) 180 Cal.App.3d 228, 237 ["[t]he mere fact of a contractual breach in no way impairs the continuing efficacy of the arbitration provision: the very purpose of arbitration is to resolve the controversy created by the alleged breach"]; see also *Bunker Hill Park Ltd. v. U.S. Bank National Assn.*, *supra,* 231 Cal.App.4th at p. 1329 [rejecting contention party seeking to compel arbitration must meet requirements for seeking declaratory relief because "[f]or purposes of section 1281.2, the statute that expressly governs petitions to compel arbitration, all a petitioner is required to show before arbitration 'shall' be ordered is the existence of a valid agreement to arbitrate the issue underlying the petition and the opposing party's refusal to arbitrate the controversy"]; *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 545 ["a party's contractual duty to arbitrate disputes may survive termination of the agreement giving rise to that duty"].)

Third, even if a failure to perform could prevent enforcement of the arbitration agreement, Commerce satisfied its obligations under the parties' agreement. As discussed, Lee agreed to arbitrate disputes "[i]n consideration for [Commerce] employing you or continuing to employ you." Lee contends this constituted a promise she would "actually perform work and receive pay." Lee's claim is belied by the plain language of the

agreement, which, at most, created an at-will employment relationship.[4]

Where, as here, the parties have unambiguously agreed to an at-will employment relationship, "there is no expectation, protectible by law, that employment will continue, or will end only on certain conditions . . . ." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 350 (*Guz*).) "Precisely because employment at will *allows* the employer freedom to terminate the relationship as it chooses, the employer does not frustrate the employee's contractual rights merely by doing so. In such a case, 'the employee cannot complain about a deprivation of the benefits of continued employment, for the agreement never provided for a continuation of its benefits in the first instance.'" (*Ibid.*) In light of these well-settled principles, an employee has no breach of contract claim where the employment contract specified at-will employment. (See *Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 829 ["[P]laintiff's third cause of action, for breach of contract, was correctly adjudicated summarily against her. There is no dispute that defendant's employee handbook and other pertinent documents stated clearly that her employment was at will . . . ."]; *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1390 [summary judgment upheld on breach of contract claim where employment was at will].)

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[4] The agreement states that employment "can be terminated with or without cause or notice, at any time, at the option of either the Company or myself," and "I again acknowledge that my employment with the Company is at-will. This means that I or the Company may terminate the employment relationship at any time, for any reason, and without notice."

Lee has not explained why this rule should not be applied to job applicants, as well as current employees. If an employer can terminate employment at any time for any lawful reason without violating an at-will employment contract, there is no reason termination cannot occur prior to the time a prospective employee actually begins work. (See *Guz, supra,* 24 Cal.4th at p. 335, fn. 8 [""[T]he courts have not deemed it to be their function, in the absence of contractual, statutory or public policy considerations, to compel a person to accept or retain another in his employ, nor to compel any person against his will to remain in the employ of another.""].)

Here, quite properly, Lee does not assert a breach of contract claim based on Commerce's decision not to employ her. (See *Jersey v. John Muir Medical Center, supra*, 97 Cal.App.4th at p. 829; *Halvorsen v. Aramark Uniform Services, Inc., supra,* 65 Cal.App.4th at p. 1390; see also *Guz*, *supra,* 24 Cal.4th at p. 350.) Whether or not Commerce's requirement of a medical examination as a condition to employment was lawful, Commerce did not fail to perform under the contract.

Moreover, as the trial court correctly observed, the promise to employ Lee cannot be understood as anything other than a promise of the opportunity of employment—a promise Commerce fulfilled by extending Lee an offer of employment, giving her preemployment paperwork and sending her for a physical examination. This interpretation of the contract is confirmed by the multiple contingencies on employment expressly set forth in the agreement. For example, the agreement states, "I agree to conform to the rules and regulations of the Company . . . . Any offer of employment is contingent upon obtaining and maintaining a current work permit issued by City of Commerce."

The agreement further states, "YOU WILL NOT BE OFFERED EMPLOYMENT UNTIL THIS FORM IS SIGNED AND RETURNED BY YOU." Thus, Lee had to fulfill the conditions precedent of conforming to the rules and regulations, obtaining a work permit and signing the agreement before employment was possible. Further, the plain language stated that, by signing the agreement, Lee was eligible to receive only an "offer" of employment.

Finally, Lee argues there was no mutual assent because she would not have signed the agreement had she understood she might not be hired. However, as discussed, the plain language of the agreement explicitly states the offer of employment was conditional. As Lee acknowledged in her memorandum of points and authorities in opposition to the motion to compel, "[t]he clear wording of the Arbitration Agreement must control over [a party's] subjective intent . . . ." (See *Esparza, supra,* 2 Cal.App.5th at p. 788.)

DISPOSITION

The order granting Commerce's motion to compel arbitration, dismissing Lee's class action claims and staying this action pending the completion of the arbitration is affirmed. Commerce is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J. BENSINGER, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.