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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JUDY ALEXANDER et al., Plaintiffs and Respondents, v. COMMUNITY HOSPITAL OF LONG BEACH, Defendant and Appellant.	B238220 (Los Angeles County Super. Ct. No. BC426353)

APPEAL from an order of the Superior Court of Los Angeles County. Michael Johnson, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, John L. Barber and Laura J. Anson for Defendant and Appellant.

The Law Offices of Maryann P. Gallagher and Maryann P. Gallagher for Plaintiffs and Respondents.

SUMMARY

Community Hospital of Long Beach ("CHLB") appeals from an order denying its petition to compel arbitration of an employment action filed by respondents. We affirm.

BACKGROUND

In November 2009, respondents Judy Alexander, Lisa Harris and Johann Hellmannsberger filed a complaint against CHLB alleging *inter alia* sexual harassment, sexual orientation discrimination, and wrongful termination in connection to their employment with CHLB. The complaint named as defendants CHLB, Memorial Counseling Associates Medical Group Inc., d/b/a MCA, and Does 1-100.[1] In January 2010, CHLB filed an answer raising numerous affirmative defenses but did not raise arbitration. The answer did state the CHLB "reserves herein the right to assert additional defenses in the event discovery indicates that they would be appropriate."

In October 2010, the court granted CHLB's motion to postpone or stay the deposition of its employees pending resolution of criminal proceedings against respondents and in April 2011 the court granted CHLB's motion to stay all discovery. The discovery stay was vacated in May 2011.

In August 2011, CHLB substituted new counsel.[2]

On December 1, 2011, CHLB filed a petition to compel arbitration. CHLB contended that respondents had each entered into a binding arbitration agreement. CHLB also contended that its delay in seeking arbitration did not prejudice respondents because the discovery conducted during the case would have been permitted in arbitration and the arbitration agreement was not unconscionable.

CHLB attached to its petition copies of a "Mutual Agreement to Arbitrate Work-Related Complaints" (Mutual Agreement) signed by Alexander on February 25, 2004, by

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[1] Plaintiffs filed an amendment to the complaint in May 2010 naming Memorial Psychiatric Health Services Inc. (MPHS). In December 2011, CHLB filed a motion for leave to file a cross-complaint against MPHS seeking indemnification.

[2] The docket shows that the substitution of attorney was filed with the court in October 2011.

Harris on July 1, 2001 and by Hellmannsberger on January 18, 2005. The Mutual Agreement stated: "I acknowledge receipt of a copy of the [CHLB] Complaint Resolution and Arbitration Procedure, which is attached to and incorporated into this agreement. As a condition of my employment [with CHLB], I agree to submit to an impartial arbitrator any work-related complaints, as set forth in that procedure, that I may have against [CHLB] or any of its officers, managers, employees or agents." Copies of the CHLB "Complaint Resolution and Arbitration Procedure" referred to in the Mutual Agreement were not provided to the court.

CHLB's arbitration petition also contained copies of an "Acknowledgement of Receipt" (Acknowledgement) signed by Alexander on March 9, 2005, by Harris on March 2, 2005, and by Hellmannsberger on March 3, 2005. The Acknowledgement states in the first paragraph: "This is to acknowledge that I have received a copy of [CHLB's] Employee Handbook . . . , effective March 1, 2005 and . . . agree to read the contents of this Handbook thoroughly, to gain a complete understanding of, and to comply with all policies and procedures contained herein . . . ."

In the seventh paragraph, the Acknowledgement states: "I acknowledge that I have been provided with CHLB's Mandatory Arbitration Policy, which is incorporated into the Employee Handbook. I understand that it is my obligation to read all of the Handbook's policies and become familiar with them . . . ." CHLB's petition attached a copy of the Mandatory Arbitration Policy in the Employee Handbook dated March 1, 2005.[3]

CHLB also submitted the declaration of Norman Rasmussen, an officer and treasurer of CHLB, who stated that he was unaware of the existence of an arbitration agreement until new counsel was substituted into the case. Rasmussen stated that CHLB

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[3] CHLB's arbitration petition also contained copies of an "Employee Acknowledgement and Agreement as to the Term of Employment" signed by Alexander on February 25, 2004 and Hellmannsberger on January 18, 2005. The Employee Acknowledgement states: "This is to acknowledge that I have received a copy of [CHLB] Employee Handbook on the date shown below and I agree to read and comply with all of the provisions of the Employee Handbook." It does not mention arbitration.

was acquired in April 2011 and was essentially a shell corporation with no remaining employees.

On December 12, 2011, respondents filed their opposition to the petition to compel, arguing there was no enforceable arbitration agreement, any arbitration agreement was unconscionable, and CHLB had waived its right to compel arbitration by failing to raise arbitration as a defense in its answer by engaging in litigation for two years before bringing a motion to compel arbitration. Respondents attached declarations in which each stated that when hired, she "was not given any attachments about an arbitration procedure" and "In March 2005, I was called into Human Resources to sign documents, but I was not given an employee manual at that time, I was just told to sign some documents."

In its reply filed on December 19, 2011, CHLB argued in essence that the signed Mutual Agreements and Acknowledgments established that respondents unambiguously waived their right to jury trial, that CHLB had not acted inconsistently with its intent to arbitrate because CHLB had conducted only limited discovery (in contrast to respondents) and had not filed any motions on any substantive issues. CHLB's reply attached a declaration from counsel concerning discovery and motions in the case and a copy of its answer.

At the hearing on December 23, 2011, after argument by counsel, the court adopted its tentative ruling and denied the motion.

In its December 23, 2011order, the trial court found that CHLB had failed to carry its burden of establishing the existence of enforceable arbitration agreements. The court noted that the dates of the Mutual Agreements were July 1, 2001, January 18, 2005 and February 25, 2004, but the arbitration procedure it seeks to enforce was dated March 1, 2005. The court also noted that CHLB did not submit the arbitration procedure referenced in the Mutual Agreement, respondents submitted declarations stating that they did not receive any attachments, and CHLB did not submit a competent declaration establishing that the arbitration procedure was provided to respondents or establishing the terms of the arbitration procedure at the time each Mutual Agreement was executed.

The trial court's order also found that CHLB had waived any right it might have had to compel arbitration, finding that "CHLB's delay has been extensive and has caused prejudice" and by "failing to seek arbitration until 18 months after the case was filed" CHLB had circumvented the expected benefits from a speedy and relatively inexpensive arbitral forum. Also in December 2011, CHLB filed a motion for leave to file a cross-complaint against MPHS seeking indemnification.

On December 29, 2012, CHLB filed the instant appeal.

DISCUSSION

On appeal, CHLB argues that the trial court erred when it "found the arbitration agreements unenforceable based on an incomplete analysis of the doctrine of unconscionability" and when it found waiver due to prejudice to respondents despite the fact that the "arbitration agreements provided that the right to arbitration was mutual, and [r]espondents were free to invoke it at any time." Respondents on appeal note that CHLB failed to challenge the trial court's finding that it failed to meet its burden of establishing the existence of an enforceable agreement.

Under Code of Civil Procedure section 1281.2, if upon a petition to compel arbitration, a court determines that a written agreement to arbitrate the controversy exists, the court shall order arbitration of the controversy. (Code Civ. Proc., § 1281.2.) "'[U]nder California law, "'[a]rbitration is recognized as a matter of contract, and a party cannot be forced to arbitrate something in the absence of an agreement to do so.'"'" (*Sparks v. Vista Del Mar Child & Family Services* (2012) 207 Cal.App.4th 1511, 1517-1518; *Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 683.)

"The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement." (*Flores v. Evergreen at San Diego, LLO* (2007) 148 Cal.App.4th 581, 586.) Here, CHLB has failed to meet its burden. The Mutual Agreement cited in and attached to CHLB's petition to compel arbitration states "I acknowledge receipt of a copy of the [CHLB] Complaint Resolution and Arbitration Procedure, which is attached to and *incorporated into* this agreement." (Italics added.) It then goes on to state that "[a]s a condition of my employment [with CHLB], I agree to

submit to an impartial arbitrator any work-related complaints, *as set forth in that procedure*, that I may have . . . ." (Italics added.) But CHLB has not provided a copy of, or even quoted, the referenced "Complaint Resolution and Arbitration Procedure" leaving unknown the terms of the allegedly agreed-upon arbitration procedure and the scope of the "work-related complaints" encompassed by it. (*See Cheng-Canindin*, *supra*, 50 Cal.App.4th at p. 684 [listing attributes necessary for a dispute resolution mechanism to be deemed an "arbitration"]; *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323 ["the scope of arbitration is . . . a matter of agreement between the parties"].)

The decision in *Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563 is instructive. In that case, plaintiffs signed applications acknowledging that they had viewed a warranty video and read a sample warranty and consented to the terms of those documents "'including the binding arbitration provision contained therein,'" but defendant "did not produce a copy of either the video or the sample warranty booklet referred to in the application." (*Id.* at pp. 569-570, capitalization and italics omitted.) Thus, the court in *Adajar* concluded, "the terms of the arbitration to which plaintiffs supposedly agreed cannot be determined" or, put differently, defendant "failed to prove the existence of an arbitration contract and the plaintiffs' waiver of their right to jury trial." (*Id.* at p. 570.) Like the court in *Adajar* we may not simply infer that the terms of the "Mandatory Arbitration Policy" in the Employee Handbook dated March 1, 2005, were identical to the "Complaint Resolution and Arbitration Procedure" referenced in the Mutual Agreements which were all signed prior to March 1, 2005. (See *Id.* at p. 570 [declining to infer that terms or warranty booklets issued after close of escrow were the same as sample booklets referenced in application.)

Similarly, CHLB's reliance on the Acknowledgements submitted with its petition is ineffective to establish the existence of an arbitration agreement. Those Acknowledgements state: "I acknowledge that I have been provided with CHLB's Mandatory Arbitration Policy, which is incorporated into the Employee Handbook. I understand that it is my *obligation to read* all of the Handbook's policies and become

familiar with them, and to ask my supervisor, or a representative of the Department of Human Resources, if I have any question or if I do not understand anything in any statement, or Policy, or in the Handbook." (Italics added.) Respondents, however, submitted declarations in opposition to the petition stating that they did not receive a copy of the employee handbook at the time they signed the Acknowledgements. The trial court relied on those declarations and noted that CHLB had not submitted a competent declaration demonstrating that respondents received the arbitration procedure. CHLB does not challenge the court's finding that respondents did not receive the employee handbook, nor does it cite any law to support its claim that a contract with crucial absent provisions—here, the entirety of the arbitration procedure—is enforceable.

We agree with the trial court that CHLB failed to demonstrate by a preponderance of the evidence that enforceable arbitration agreements existed with respondents. Accordingly, we need not address CHLB's remaining contentions.

DISPOSITION

The order of the trial court denying CHLB's petition to compel arbitration is affirmed. Costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.