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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

ERIC BAKER, an Individual, JERI BAKER, an Individual, KELI CLARK, an Individual and ALLISON CUMMINGS, an Individual. Plaintiffs and Respondents, v. TOGNAZZINI FAMILY, INC. et al., Defendants and Appellants.	2d Civil No. B247137 (Super. Ct. No. CV110002) (Los Angeles County)

Appellants Mark Tognazzini and Bonnie Tognazzini, owners of Dockside Restaurant, Inc., Tognazzini's Dockside Too, Inc., and Tognazzini Family, Inc., appeal from an order denying their motion to compel arbitration and motion to dismiss a class action complaint for Labor Code wage and hour violations, unfair business practices (Bus. & Prof. Code, § 17200), and civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698). Appellants contend that the arbitration provision in its Dispute Resolution Policy agreement invalidates all class action claims. The trial court concluded that the arbitration provision was vague and unconscionable, and that any implied waiver of the PAGA claim violates public policy. We affirm.

Facts and Procedural History

Appellants own and operate Tognazzini's Dockside Restaurant, Inc. and Tognazzini's Dockside Too, Inc., a restaurant and retail fish market in Morro Bay.[1] On January 3, 2011, former employees Eric Baker, Jeri Baker, Kelli Clark, and Shawn Clark, filed a class action complaint for violation of wage and hour provisions of the Labor Code and unfair business practices (causes of action 1 through 9). On September 13, 2012, the trial court granted leave to file a second amended complaint adding respondent Allison Cummings as a fifth lead plaintiff. The second amended complaint named Cummings as the sole representative plaintiff on the 10th cause of action to recover civil penalties pursuant to Labor Code section 2699 et seq. Cummings worked for appellants from August 28, 2011 until January 2012 and allegedly suffered the same Labor Code violations as the original plaintiffs.

Appellants moved to compel arbitration based on a "Dispute Resolution Policy" (DPR) that Cummings signed on her first day of work. (Copy attached as Exhibit "A") The DPR states in pertinent part: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." Cummings also signed an "Offer of Employment" and a "Confirmation of Receipt" acknowledging that her employment was at-will.

Appellants claimed that the DPR invalidated the class action claims and PAGA representative claim. In opposition to the motion to arbitrate/dismiss, Cummings declared that the DPR was not explained to her and that she had to sign the documents in order to be hired. Mark Tognazzini testified that all employees are given the DRP to sign, that no employee ever refused to sign it, and that if a prospective employee refused to sign the DRP it would "strike a flag" and cause a concern.

[1] The restaurant and fish market were previously operated by Tognazzini Family, Inc. prior to the corporation's dissolution.

The trial court denied the motion to compel arbitration/motion to dismiss on the ground there was no evidence that the parties intended to arbitrate anything other than contract claims concerning Cumming's at-will status. The trial court concluded that the DPR was too "vague" and "nebulous" to enforce, that it was procedurally and substantively unconscionable, and that the PAGA cause of action to recover civil penalties is a proxy claim that cannot be waived in arbitration.

Mutual Agreement to Arbitrate

Under the Federal Arbitration Act (FAA; 9 U.S.C. §§ 1-16) and California law, arbitration agreements are enforceable except upon such grounds that exist at law or in equity for voiding a contract. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 98 (*Armendariz*).) "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." (*Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 684 [130 S.Ct. 1758, 1175].) Appellants bear the burden of proving the existence of an arbitration agreement "and the party opposing arbitration [Cummings] bears the burden of proving any defense, such as unconscionability. [Citations.] Where the evidence is not in conflict, we review the trial court's denial of arbitration de novo. [Citation.]" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US)*, L LC (2012) 55 Cal.4th 223, 236.)

The arbitration provision is set forth in a one-page, stand alone document that was not signed by appellants. The DRP states that any claim arising out of or relating to "this contract" shall be arbitrated but does not define or reference what the "contract" is. The Offer of Employment, which was signed by Cummings, states: "This letter reflects the entire understanding as to the employment being offered to you; all prior negotiations, understandings, agreements, ect [sic] [a]re integrated into this letter *and are not valid unless specifically stated in this letter*. The terms of your employment as stated in this letter cannot be changed except in writing, signed by both you and an authorized officer of Tognazzini's Dockside Restaurant and Fish Market." (Italics added.)

The Offer of Employment conflicts with the Confirmation of Receipt, also signed by Cummings, which states that "any and all policies or practices can be changed at any time by the Company."[2] Like ships passing in the night, the Offer of Employment does not address arbitration and the DPR does not refer to the Offer of Employment. Appellants argue that the documents should be interpreted to incorporate one another but the incorporation by reference must be clear and unequivocal and be called to the attention of party signing the documents. (*Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 54.) "Consent is not mutual, unless the parties all agree upon the same thing in the same sense." (Civ. Code, § 1580.)

The trial court concluded that if the DPR is an agreement to arbitrate, it is too vague to enforce because "[t]he arbitration provision does not define the term 'this contract'. . . . Compounding the lack of clarity over what constitutes the contract, there is no evidence as to whether the parties intended to submit anything other than contract-type claims concerning [Cumming's] at-will status to the arbitrator." It did not err. "[A]rbitration, as a matter of contract between the parties, is a way to resolve only those disputes which the parties have agreed to submit to arbitration. [Citation.]" *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, 518.)

There is no evidence that Cummings agreed to arbitrate or waive her statutory right to sue for wage and hour violations. The PAGA cause of action is to recover civil penalties on behalf of the state and current and former employees. (Lab. Code, § 2699 et seq.; *Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 337.) PAGA is a mechanism by which the state enforces state labor laws by authorizing an aggrieved employee to sue as the proxy of the state's labor law enforcement agencies. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) It provides that 75 percent of the

[2] The Confirmation of Receipt states: "I have received my copy of the Company's employee handbook." Cummings declared that she was never given a copy of the employee handbook.

civil penalties collected shall be paid to the state and 25 percent distributed to the "aggrieved employees." (Lab. Code, § 2699, subd. (g)(1) & (i).) "Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part." (Lab. Code, § 2699, subd. (g)(1).)

In *E.E.O.C. v. Waffle House, Inc.* (2002) 534 U.S. 279, 297-298 [151 L.Ed.2d 755, 771] the United States Supreme Court held that an employer could not compel the U.S. Equal Employment Opportunity Commission to arbitrate a Title VII claim filed on behalf of an employee who signed an arbitration agreement. The same principle applies here. Cummings is suing as a proxy of the state. "The purpose of the PAGA is not to recover damages or restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the Labor Code. [Citation.]" (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501.) "Because an aggrieved employee's action under the Labor Code Private Attorneys General Act of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. . . . [A]n action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties' [citation]." (*Arias v. Superior , supra,* 46 Cal.4th at p. 986.)

Public Policy

Appellants claim that the DRP implicitly waives the right to bring a PAGA representative action but such an arbitration provision would violate public policy. (Civ. Code, § 1668.) Like the employer in *Armendariz,* appellants may not require prospective employees to waive their statutory remedies under the Labor Code. "[C]ertain statutory rights are unwaivable. 'This unwaivability derives from two statutes that are themselves derived from public policy. First, Civil Code section 1668 states: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." "Agreements whose

object, directly or indirectly, is to exempt [their] parties from violation of the law are against public policy and may not be enforced." [Citation.] Second, Civil Code section 3513 states: "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." [Citations.]' (*Armendariz*, supra, 24 Cal.4th at p. 100.)" (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1076-1077.)

Unconscionability

It is settled that an arbitration agreement is unenforceable if it is unconscionable at the time it was made. (*AT &T Mobility LLC v. Concepcion* (2011) 563 U.S. __, __ [131 S.Ct. 1740, 1746] (*Concepcion*); *Armendariz, supra,* 24 Cal.4th at p. 114.) Unconscionability has a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, and the later on overly harsh or one-sided results. (*Ibid*.) Procedural and substantive unconscionability " 'must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.]" (*Ibid*.)

Where an employee is required to consent to arbitration as a condition of employment with no opportunity to negotiate, the agreement is procedurally unconscionable. (*Armendariz, supra,* 24 Cal.4th at pp. 114-115.) Cummings was required to sign the DRP and no one explained what it meant or what she was signing. Appellants argue that it is all explained in an employee's handbook, but Cummings was not provided a copy. (*Ante,* fn. 2.)

Substantive unconscionability focuses on overly harsh or one-sided results. "An arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction . . . or series of transactions or occurrences." (*Armendariz, supra,* 24 Cal.4th at p. 120.) There is no evidence that the arbitration provision requires appellants to arbitrate claims it may have against a former employee.

Cummings was required to sign an Acknowledgement of Receipt which provides that appellants can change the ADR policies and rules at any time. Dispute

resolution agreements granting the employer the unilateral power to modify the contract are illusory and substantively unconscionable where it requires the employee to relinquish his or her judicial rights. (*Al-Safin v. Circuit City Stores, Inc.* (9th Cir. 2005) 394 F.3d 1254, 1261; *Sparks v. Vista Del Mar Child & Family Services* (2012) 207 Cal.App.4th 1511, 1523.) The trial court correctly found that appellants "gave itself total power, at its sole discretion, to change any policies or practices at any time, including the terms of the arbitration agreement. . . . Such a provision renders the agreement illusory and substantively unconscionable."

Appellants argue that the covenant of good faith and fair dealing, which is implied in every contract, saves the arbitration provision from being illusory. The cases cited by appellants are inapposite and do not involve agreements to arbitrate hour and wage law violations. (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 706 [sexual harassment claim]; *24 Hour Fitness Inc .v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213-1214 [same].) Nor have appellants cited controlling authority that a prospective employee (i.e., Cummings) may contractually waive a PAGA claim on behalf of the state and all other employees.

Concepcion

In *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*), our Supreme Court held that class action waivers are unenforceable in wage and hour cases if the trial court finds that a class action would be more effective in vindicating the employees' statutory rights. Appellant argues that *Gentry* was overruled by *Stolt-Nielsen S.A. v. AnimalFeeds International Corp., supra*, 599 U.S. 662 [130 S.Ct. 1758], which holds that if an arbitration agreement does not expressly or implicitly authorize a class action, a plaintiff cannot pursue claims on a class basis in an arbitral forum. (*Id.*, at p. 686-687 [130 S.Ct. at pp. 1775-1776].)

In *AT&T Mobility LLC v. Concepcion, supra*, 563 U.S. __, __ [131 S.Ct. 1740, 1746-1747] (*Concepcion*) the United States Supreme Court overturned the rule established by our Supreme Court in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, that the right to class-wide arbitration may not be waived in a consumer arbitration

agreement. The *Concepcion court* concluded that mandatory class arbitration "disfavored" arbitration and sacrificed the key advantages associated with quick dispute resolution through arbitration. (*Id.*, at p. __ [131 S.Ct. at p. 1751.) *Conception*, however, did not specifically address *Gentry* which holds that an arbitration agreement may be unenforceable if it bars an employee from vindicating his or her statutory rights.

Relying on *Concepcion*, appellants argue that the FAA trumps state law and requires that arbitration agreements be enforced as written, even if the arbitration agreement does not provide for class-based or representative arbitrations. (See *Kinecta Alternative Financial Solutions, Inc. v. Superior Court*, *supra*, 205 Cal.App.4th at p. 519 [dismissing class-based claims in favor of individual arbitration].) Based on appellants' construction of the law, a company dispute resolution policy could be used to get prospective employees to waive an unwaivable statutory right.[3] Common sense tells us that an arbitration agreement cannot be foisted upon prospective employees to shield an employer from on-going Labor Code violations. Under federal law, arbitration agreements may not be used to prospectively waive a party's right to pursue statutory remedies. (*American Exp. Co. v. Italian Colors Restaurant* (2013) __ U.S. __, __ [133 S.Ct. 2304, 2310-2311] "If the FAA preempted state law as to the unenforceability of the PAGA representative action waivers, the benefits of private attorneys general actions to enforce state labor laws would in large part, be nullified." (*Brown v. Ralphs Grocery Co.*, *supra*, 197 Cal.App.4th at p. 501.)

[3] Our Supreme Court has granted review on this very issue, i.e., whether an arbitration agreement overrides the statutory right to bring representative claims under the PAGA. (*Iskanian v. CLS Transp. of Los Angeles LLC* (2012) 206 Cal.App.4th 949, review granted Sept, 19, 2012, No S204032; see also *Brown v. Superior Court* (2013) 216 Cal.App.4th 1302, review granted Sept, 11, 2013, No. S211962; *Franco v. Arkelian Enterprises, Inc.* (2012) 211 Cal.App.4th 314, review granted Feb. 13, 2013, No. S207760; *Compton v. Superior Court* (2013) 214 Cal.App.4th 873, review granted June 13, 2013, No. S210261.)

Conclusion

In *Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 516, the Court of Appeal concluded: "*Concepcion* implicitly disapproved the reasoning of the *Gentry* court" but noted that "the United States Supreme Court did not directly address the precise issue presented in *Gentry.* Under the circumstances we decline to disregard the California Supreme Court's decision without specific guidance from our high court. [Citation.]" (*Id.*, at p. 507.) Until our Supreme Court holds otherwise, we too are obliged to follow *Gentry*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Wise adjudication has its own time for ripening. (*Sierra Club. v. California Dept. of Parks & Recreation* (2012) 202 Cal.App.4th 735, 738.)

We need not comment on the continuing viability of *Gentry* because appellants failed to make a threshold showing that Cummings agreed to arbitrate individual and representative claims for unpaid work and PAGA civil penalties. "[T[he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion,' [citations]." (*Stolt-Nielsen S.A. v. AnimalFeeds International Corp. supra,* 559 U.S. at p. 681 [130 S.Ct. at p. 1773].) Absent a binding agreement to arbitrate, there is no FAA preemption.

The order denying appellants' motion to compel arbitration and motion to dismiss the PAGA cause of action for civil penalties is affirmed. Cummings is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Charles S. Crandall, Judge

Superior Court County of Los Angeles

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