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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

ROBERT LANGLEY, Plaintiff and Respondent, v. PENSKE MOTOR GROUP, LLC, et al., Defendants and Appellants.	B275610 (Los Angeles County Super. Ct. No. BC591797)

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

Fisher & Phillips, Danielle Hultenius Moore, Wendy McGuire Coats and Megan E. Walker for Defendants and Appellants.

Lavi & Ebrahimian, Joseph Lavi, Jordan D. Bello and Vincent Granberry for Plaintiff and Respondent.

Penske Motor Group, LLC, D. Longo, Inc., and Longo Lexus (collectively, Appellants) appeal an order of the Los Angeles Superior Court denying their motion to compel Robert Langley (Langley) to arbitrate the employment claims contained in his complaint for damages and restitution filed in that court. Following an evidentiary hearing, the court found Appellants had failed to prove Langley had electronically signed and consented to be bound by Appellants' arbitration agreement. As substantial evidence supports the trial court's order, we affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

Langley worked for Appellants for over 20 years, until May 30, 2014. On August 19, 2015, he filed suit against Appellants, alleging discrimination, wrongful termination, and retaliation.

On November 30, 2015, Appellants filed a motion to compel arbitration, basing their motion on the circumstances that (1) their practice was to require that employees agree to an "Open Door and Dispute Resolution [arbitration] Policy" (Agreement), indicating that agreement by "electronically signing" the document; (2) Langley had electronically signed such a document on May 29, 2013, through Appellant's online portal (called

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1 We set out the relevant facts from the testimony at the evidentiary hearing to which the parties stipulated and which took place on March 24, 2016. Although the parties filed extensive declarations in support of and in opposition to the motion to compel arbitration and objections to certain of those declarations, none was admitted at the evidentiary hearing. Instead, the trial court held an evidentiary hearing, a procedure mandated by *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413, when, as in the present case, there is a material conflict in the evidence proffered by the parties.

Complí) in which he indicated his assent to the Agreement, and (3) Langley had never exercised his right to opt out of the Agreement.[2]

The parties stipulated to an evidentiary hearing on the motion, which was held on March 24, 2016. As the trial court stated at that hearing and in its later-issued minute order, the scope of the hearing was to determine whether Langley had signed the Agreement.

The evidence offered at the hearing established that Appellants began using the Complí "secure" computer system for employee documents and communication in 2012. The Complí system required employees to log into the system using their employee numbers and a unique password. According to Jillian Brooks (Brooks), the human resources manager for Appellants, management had access to employee numbers but not the employees' passwords. Brooks identified the arbitration policy that Appellants contended Langley had signed on May 29, 2013, and from which she stated he had never opted out. She acknowledged that if he had never seen the Agreement he would not be aware of his right to opt out. Brooks denied receiving complaints that managers were signing documents on behalf of

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[2] In his written opposition to the motion to compel arbitration, Langley had declared that: (1) he had never seen nor signed the Agreement; (2) his policy is to avoid signing arbitration agreements; (3) he was never told that by working for Appellants he would be required to arbitrate any claims; (4) he reviewed "employment policies" on the Complí website, but not "binding agreements;" (5) because he had not seen the Agreement he did not know he could opt out; (6) if he had known about the opt-out provision he would have opted out; (7) management had informed him they would indicate for him on Complí that he had reviewed documents from time to time even if he did not review the documents himself within the time limits established by management for their review; and (8) contrary to Appellants' claims, he had not himself completed various other tasks that appeared on Complí. As discussed in the body of this opinion, his hearing testimony was consistent with that in his declaration.

employees. On cross-examination, she stated that the human resources manager, human resources director and administrators in her department have the ability to reset passwords of employees and anyone with the employee's employee number had the ability to create a permanent password for an employee and gain access the Complí system. Employee numbers are visible on the badges worn by employees.

Langley testified he worked for Appellants for over 20 years. When he needed a new password, he obtained a new temporary password from the sales managers at the dealerships at which he worked. He estimated he obtained new passwords five to eight times. Each time he did so, the sales manager would reset the password in the Complí system, and then Langley would reset it to a new personal password.

Langley denied ever seeing or signing the Agreement, although he had read various policies which had been posted on the Complí system. He did not gain access to the Complí system as often as management expected. Employees' e-mail addresses and employee identification numbers were widely known at the dealerships. When employees were paid, their pay "vouchers" we left on a desk for the employees to pick up; the employee's identification number was in plain view. Employee identification numbers also were visible on the sides of the computers used by the finance managers, sales managers and some of the salesmen at the dealerships.

Langley stated that Chris McCarty (McCarty), the general manager at the dealership at which Langley worked at the time in question, told him three or four times that if an employee did not sign or acknowledge documents in the Complí system, then "management would do it for [him]." Langley described McCarty as being upset when he made this statement at a

meeting at the dealership. Langley acknowledged reviewing policy documents that were in the Complí system.

Mark Petrie (Petrie), who became Chief Technology Officer for Complí after the date at which Appellants contended that Langley had signed the Agreement while working for Appellants,[3] testified that he was familiar with the privacy characteristics of the Complí software at the time Langley was supposed to have signed the Agreement, and testified that only someone with the appropriate log-in credentials had the ability to gain access to the individual employee's documents and review or sign them. In order to access documents in the Complí system and sign them: (1) a user must log in with his user name (his employee number) and password; (2) at that point, the user is granted a "session" by the server; (3) the user then can view the document he is to read; (4) to complete the particular task, the user must enter his or her private password. Complí logs all password changes, including instances in which an individual other than the particular employee changes a password for an employee. A record is maintained of "forgot password" requests, which indicates that the user is obtaining a new temporary password. As an alternative to a "forgot password" request, administrators have the ability to reset the password for the employee and then tell the employee the new password. If this occurs, the first time thereafter the employee logs in the system will prompt the user to create a new, unique, permanent password.

Petrie testified that, if an administrator knows the employee number and e-mail address of the employee, he could obtain a new temporary password and a new permanent password for the employee. This gives that

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[3] Petrie began his employment at Complí four months prior to his testimony.

person full access to the documents the employee was to read, review and sign. This would include the Agreement at issue in this case. The person who signed the Agreement was logged in with Langley's credentials.

McCarty testified that neither he nor other managers at the dealerships had administrator rights on the Complí system; this meant that they did not have access to employees' passwords. He denied that he had told employees that managers would sign any documents appearing in the Complí system on behalf of employees who did not do so; nor was he aware of any other managers who stated that they would do so. He denied signing documents on behalf of any employee and denied hearing that any other manager had done so. Sergio Orozco, the current fleet manager at the dealership owned by Appellants at which Langley had worked, and an employee there during Langley's employment by Appellants, corroborated McCarty's testimony that he had never told employees that management would sign for an employee in the Complí system if the employee did not.

Nazar Pailevanian (Pailevanian), was the internet sales manager, and later the fleet sales manager for Longo Lexus between February 2009 and February 2013, a location at which Langley had also worked. Pailevanian routinely attended sales meetings. At a sales meeting late in 2012, he heard McCarty tell employees that McCarty or other managers would access an employee's Complí system documents and sign those documents for the employee if the employee did not do so. Pailevanian frequently forgot his passwords and would get new ones from the sales managers.

Following written closing arguments, on May 31, 2016, the trial court issued its minute order denying Appellants' motion to compel arbitration. The court determined that Appellants had not met their burden to establish by a preponderance of evidence that Langley had signed the Agreement,

instead finding that "it was wholly possible for the [Appellants'] employees to [place Langley's] electronic signature on the [Agreement]."

Appellants timely appealed the denial of their motion.[4]

CONTENTIONS

Appellants contend this Court should review the trial court's determination de novo and that the trial court erred in its finding Langley did not sign the Agreement. Alternatively, Appellants contend substantial evidence does not support the trial court's finding. Appellants also contend Langley's conduct in remaining employed by Appellants after receiving "notice" of the Agreement in an e-mail created an implied-in-fact agreement to arbitrate. Appellants err in each of their contentions.

DISCUSSION

I. Standard of Review

"[Code of Civil Procedure] [s]ection 1281.2 requires a court to order arbitration 'if it determines that an agreement to arbitrate . . . exists . . . .' (§ 1281.2.)" (*Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1153.) "Sections 1281.2 and 1290.2 create a summary proceeding for resolving petitions to compel arbitration. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972; *Rosenthal v. Great Western Fin. Securities Corp.* [, *supra*,] 14 Cal.4th [at p.] 413.) The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 . . . .)

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[4] An order denying a motion to compel arbitration is an appealable order. (Code Civ. Proc., § 1294, subd.(a).)

The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence, and any oral testimony the court may receive at its discretion, to reach a final determination. (*Engalla v. Permanente Medical Group, Inc., supra,* at p. 972.)" (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 841-842 (*Ruiz*).) We review such determinations for substantial evidence. (See *Ruiz*, at p. 842*,* citing *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959. 970.)[5]

This is a case in which an electronic signature is alleged to have been affixed. Pursuant to the Uniform Electronic Transactions Act (Civ. Code §§ 1633.1 et seq.) an electronic signature has the same legal effect as a handwritten signature (Civ. Code. § 1633.7, subd. (a)). That signature, as with any writing, must be authenticated before the writing, or secondary evidence of its content, may be received in evidence. (Evid. Code, § 1401; *People v. Goldsmith* (2014) 59 Cal.4th 258, 271.) Appellants have the burden of producing evidence sufficient to sustain a finding that the writing, or in this case the signature, is that of the person whose signature it is purported to be. (Evid. Code, § 1400.) When the signature is "electronic," Civil Code section 1633.9, subdivision (a) applies: "An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the

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5 As in *Ruiz*, no party asked for a statement of decision (see Code Civ. Proc., §§ 631, 1291); unlike in *Ruiz*, the trial court in the present case filed a two-page minute order setting out reasons for its ruling. While we need not rely on that minute order (e.g.*, J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.th 6, 15-16 [an appealed judgment or order which is correct for any reason will be affirmed even though the trial court's reasoning was erroneous]), as we discuss in the text, *post*, the trial court's reasoning in this case was correct.

electronic record or electronic signature was attributable." We also review such an evidentiary determination for substantial evidence. (See *Ruiz, supra*, 232 Cal.App.4th at p. 842.)

Appellants' argument that our review should be de novo is based on their claim that "the question [did] not turn on the credibility of extrinsic evidence" ignores both the holdings in the cases cited above and the plain and focused statements in the trial court's minute order as to the "striking" evidence that "there were serious 'backdoors' in the use of signin [*sic*] password[s] that allowed access by the defendant's employees" to sign Langley's name to the Agreement.[6]

II. Substantial Evidence Supports the Trial Court's Ruling

Appellants contend "Langley presented no evidence undermining Complí's data entry showing that Langley had signed the Agreement." Appellants characterize Langley's testimony as "self-serving." They also discount the testimony of Pailevanian, the former fleet manager, corroborating Langley's testimony that Appellants' general manager had told employees that management at the dealership would sign employees' names in the Complísystem if the employees did not do so. And they disregard the testimony of Petrie, the chief technology officer for Complí, that there are "backdoors" that enable a person to defeat the security of the Complí system with an employee's employee identification number and e-mail address.

Instead, Appellants rely on testimony that, but for the backdoors into the Complí system, would support a claim that Langley himself changed his password one week prior to electronically signing the Agreement on May 29, 2013, leading to the inference that he must have signed the Agreement

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[6] As we next discuss, it was for the trial court to assess and determine the credibility of each witness.

himself; and on McCarty's testimony that he had never told employees that management would electronically sign their names in the Complí system if the employee did not.

The trial court was not persuaded. It clearly found credible Langley's testimony that he never used the "forgot password" function himself, but always "had to go to the sales manager" for a new password. The trial court made specific mention in its ruling that anyone with an employee's employee number and e-mail address could access the Complí system and sign documents "on behalf" of the employee, making specific note of Petrie's testimony regarding the existence of "backdoors [into the system] to sign employees' names and defeat the security of the Complí system." And it specifically relied on the fact that General Manager McCarty had warned employees that if they did not review and sign documents in the Complí system, management would do so.

These were determinations by the trial court concerning the credibility of witnesses. We do not reverse such determinations unless they are not supported by substantial evidence. Rather, we interpret the facts in the light most favorable to the party prevailing below and indulge in all reasonable inferences in support of the trial court's order. (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 625.)

As Langley points out, the burden in this court is on Appellants to establish that the evidence which Appellants presented was (1) """uncontradicted and unimpeached""" and (2) """of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding""" in favor of respondent. (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196

Cal.App.4th 456,466, citing *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1528.) This they did not do.

Our review of the evidence leads us to conclude there was significant substantial evidence to support the trial court's determinations, and to affirm the ruling below.

III. Appellants Forfeited Their Argument that There Was an Implied-in-Fact Agreement

Appellants also contend that Langley "assented to the ADR policy by continuing to work for [Appellants] after receiving notice of the ADR policy" in a May 21, 2013 e-mail. Langley contends, and we agree, that Appellants forfeited this issue by not raising it in the trial court.

A. Relevant Legal Standards

An appellant many not raise a new theory of liability for the first time on appeal; such an issue is forfeited unless (with exceptions not relevant here) it is first raised in the trial court. (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874; G*reenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767; *Gonzalez v. County of Los Angeles* (2004) 122 Cal.App.4th 1124, 1131.) "'However, it is well settled that when the issue raises a pure question of law, . . . we may consider the issue for the first time on appeal.' (*Gilliland v. Medical Board* (2001) 89 Cal.App.4th 208, 219.)" (*Gonzalez*, at p. 1131.) While we may consider purely legal issues raised for the first time on appeal, "the issue is one within our discretion, and we are not required to consider this new theory, even if it raised a pure question of law. [Citations.]" (*Greenwich*, at p. 767.)

B. Appellants Forfeited This Issue

At no time did Appellants raise this argument below. They did not advance it at the time of the evidentiary hearing, or in their written closing argument filed thereafter.

And, when they had the opportunity to make this argument at the evidentiary hearing, they instead argued Langley was aware of the ADR policy to make a different point: Langley was not credible. At no point did Appellants argue an implied-in-fact contract had been created, nor did Appellants cite any authority to that effect. Accordingly, this argument is forfeited.

DISPOSITION

The May 31, 2016 order denying Appellants' motion to compel arbitration is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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