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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

YESENIA JIMENEZ, Plaintiff and Respondent, v. ALTAMED HEALTH SERVICES CORPORATION, Defendant and Appellant.	B285096 (Los Angeles County Super. Ct. No. BC89587)

APPEAL from an order of the Superior Court of the County of Los Angeles, Terry Green, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez, John L. Barber, and Corinne D. Spencer, for Defendant and Appellant.

Employee Justice Legal Group, Kaveh S. Elihu and Sylvia Panosian, Shegerian & Associates, Carney R. Shegerian and Anthony Nguyen, for Plaintiff and Respondent.

INTRODUCTION

Altamed Health Services Corporation (defendant) willingly litigated the merits of Yesenia Jimenez's (plaintiff) wrongful termination lawsuit in the trial court for almost two years without raising arbitration as a defense. But as trial approached, defendant changed attorneys and filed a motion to compel arbitration and stay the proceeding. The trial court denied the motion, finding that defendant had waived the right to compel arbitration by waiting nearly two years before bringing the motion. Defendant timely appealed.

On appeal, defendant contends that it could not waive its right to compel arbitration because plaintiff had already waived her right to proceed in the trial court by signing the arbitration agreement. Defendant also contends that the trial court applied the wrong test for determining waiver and "conflated" mere delay with the requirement of prejudice.

We hold that defendant forfeited its contention that plaintiff's signature of the arbitration agreement prevents her from asserting defendant waived its right to compel arbitration. Even if we were to reach defendant's argument, the California Arbitration Act, which is incorporated into the parties' arbitration agreement, provides that the right to compel arbitration can be waived.

We also hold that the trial court applied the appropriate Supreme Court test for determining waiver and that substantial evidence supports the trial court's waiver finding. We therefore affirm the order denying the motion to compel arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's Employment and Agreement to Arbitrate

Defendant hired plaintiff as a full-time medical assistant on August 2, 2006. On February 26, 2013, plaintiff signed a three-page "EMPLOYMENT AT-WILL AND ARBITRATION AGREEMENT." The agreement provided, inter alia, that "any claim, dispute, and/or controversy that [plaintiff] may have against [defendant] . . . or [defendant] may have against [plaintiff], shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act ('FAA'), in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery)." The agreement also provided that "[a]ll rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8 shall apply and be observed." Defendant terminated plaintiff's employment on September 18, 2014.

B. Plaintiff's Lawsuit

On July 29, 2015, plaintiff filed a wrongful termination action against defendant asserting eight causes of action and alleging that defendant terminated her employment because of her mental disabilities and in retaliation for engaging in protected activities. Defendant answered the complaint on September 11, 2015, but did not plead the parties' arbitration

agreement as an affirmative defense, despite asserting 42 other affirmative defenses.

C. Discovery and Other Litigation Activities in the Trial Court

The same day defendant answered the complaint, it also propounded interrogatories and document demands. Plaintiff propounded her own written discovery in December 2015 and defendant produced responsive documents to plaintiff, including a copy of the parties' arbitration agreement.

On September 15, 2016, defendant took plaintiff's video-taped deposition. During the deposition, defendant marked the arbitration agreement as an exhibit and questioned plaintiff briefly about its execution.

Between September 2016 and February 2017, defendant propounded supplemental written discovery to which plaintiff responded. Defendant also subpoenaed plaintiff's medical records from four different medical facilities or physicians. And, during September and October 2016, plaintiff deposed four percipient witnesses.

The parties also conducted expert witness discovery, each designating two expert witnesses and defendant demanding an independent medical examination of plaintiff. Defendant then deposed plaintiff's experts.

D. Mediation, MSC, and Trial Continuances

On October 11, 2016, the parties participated in a voluntary mediation and on March 14, 2017, the parties participated in a mandatory settlement conference. The action, which was originally set for trial on March 20, 2017, was

thereafter continued twice at the request of defendant's counsel, resulting in an additional three-month delay in bringing the matter to trial.

E. Defendant's Substitution of Attorneys and Motion to Compel Arbitration

On July 26, 2017, with the trial then set for September 11, 2017, defendant filed a substitution of attorneys replacing its former attorney with the law firm of Lewis, Brisbois, Bisgaard & Smith. The next day, defendant applied ex parte to continue the trial date or, in the alternative, to shorten time for notice of a motion to compel arbitration. Plaintiff filed a written opposition to the ex parte application. The trial court heard the ex parte application on July 27, 2017, and issued a minute order that day continuing the trial to October 16, 2017, and setting the motion to compel arbitration for hearing on September 5, 2017.

On August 11, 2017, defendant filed its petition to compel arbitration. Defendant maintained that the arbitration agreement was valid and enforceable and was not procedurally or substantively unconscionable. Anticipating a waiver defense, defendant also argued that it had not waived its right to arbitrate because: it had not acted inconsistently with the right to arbitrate; it had not invoked "litigation machinery;" it had not conducted any discovery or obtained any information that it could not have conducted or obtained in arbitration; and its delay in seeking to arbitrate did not prejudice plaintiff or result in the loss of evidence. Defendant supported its motion with declarations from: its general counsel asserting that he did not make any decision to forego arbitration; its vice president of human resources authenticating the arbitration agreement signed by

plaintiff; its clinic administrator asserting that on February 26, 2013, he attended a meeting at plaintiff's clinic during which the arbitration agreement was distributed and explained to employees, some of whom, including plaintiff, signed the agreement; and its litigation counsel attaching excerpts and an exhibit from plaintiff's deposition and detailing the procedural background of the action in the trial court.

On August 22, 2017, plaintiff filed her opposition to the motion. Among other defenses to the enforcement of the arbitration agreement, plaintiff argued that defendant had waived the right to arbitrate because: it failed to assert arbitration as an affirmative defense; it failed to move to compel within the applicable limitations period or within a reasonable time; it had engaged in substantial discovery; and she had been prejudiced by the delay, including being deprived of the speed and efficiency of arbitration.

Defendant filed a reply on August 28, 2017, arguing that plaintiff had failed to demonstrate any prejudice she suffered as a result of the delay in seeking to compel arbitration and that defendant had reserved in its answer the right to assert additional affirmative defenses.

On September 5, 2017, the trial court held a hearing on the motion to compel arbitration. At the outset of the hearing, the trial court observed that "if [the] law of waiver means anything, it means you waived [the right to arbitrate] if you wait until the day of trial to make the motion [to compel arbitration]." Defendant's counsel then argued that plaintiff had not been prejudiced because the discovery that had taken place in the trial court would also have taken place in the arbitration. The trial court responded by explaining: "I have no problem with the

arbitration agreement. If this motion had been brought two years ago or [a] year-and-a-half ago, I would grant it probably. I hadn't heard from the other side, but I probably would have granted it. [¶] So as you focus the issues, I also think . . . there's merit to what you say, but we have a doctrine in the law that is waiver of the right to compel arbitration and we had that one case . . . . It's [Sobremonte] versus Superior Court. [¶] . . . [¶] It seems right on point, you know, and the doctrine has to mean something. [¶] If the Court of Appeal wants to erase this doctrine and effectively do away with it on the reasons you state, that the proceedings are parallel, [the court] can do that. But as long as we have the doctrine, the doctrine has to mean something. If it doesn't mean [waiver results from] moving on the day of trial, it doesn't mean anything. [¶] So . . . you have a lot of merit to what you are saying, but the consequence of agreeing with you is to erase this doctrine of law."

Plaintiff's counsel argued that plaintiff had been prejudiced because, had defendant timely compelled arbitration, the matter would have been resolved expeditiously in that forum in less than a year, instead of the two years plaintiff spent litigating in the trial court.

The trial court concluded by stating, "If there is ever going to be a waiver, it's going to be now. [¶] Now, the Court of Appeal may say they don't like this doctrine anymore and do away with it. . . . [T]he motion to compel arbitration is denied."

That same day, the trial court issued a minute order which stated: "The [m]otion of [d]efendant . . . to [c]ompel [a]rbitration is [denied]."

DISCUSSION

A. Standard of Review

"A right to compel arbitration may be waived. Under Code of Civil Procedure section 1281.2, subdivision (a), the trial court may deny a petition to compel arbitration if it finds the moving party has waived the right." (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211 (*Davis*).)

"Although the burden of proof is heavy on the party seeking to establish waiver, which should not lightly be inferred in light of public policy favoring arbitration, a determination by a trial court that the right to compel arbitration has been waived ordinarily involves a question of fact, which is binding on the appellate court if supported by substantial evidence. The appellate court may not reverse the trial court's finding of waiver unless the record as a matter of law compels finding nonwaiver. [Citations.]" (*Davis*, *supra*, 59 Cal.App.4th at p. 211.) "If more than one reasonable inference may be drawn from undisputed facts, the substantial evidence rule requires indulging the inferences favorable to the trial court's judgment. [Citations.]" (*Ibid.*)

Under the substantial evidence standard of review, "[w]e imply all necessary findings supported by substantial evidence [citations] and "'construe any reasonable inference in the manner most favorable to the judgment, resolving all ambiguities to support an affirmance'" [citation]." (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 443 (*Lewis*).) The testimony of a single witness, including a party, may be sufficient. (Evid. Code, § 411; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

The parties dispute whether the substantial evidence or the de novo standard of review governs our determination of this appeal. Defendant argues that the de novo standard applies because the facts, including any reasonable inferences, are undisputed. Plaintiff counters that the substantial evidence standard applies because the parties dispute the reasonable inferences that may be drawn from the undisputed facts.

We agree with plaintiff that the substantial evidence standard applies because the parties dispute the inferences to be drawn from the facts. For example, defendant contends that even though it admittedly delayed almost two years before seeking to compel arbitration, no inference of prejudice should be drawn merely from that delay. Plaintiff, however, maintains that we can infer from the length of the delay and timing of the motion to compel that plaintiff has lost the advantages of arbitration, including the speedy and efficient resolution of her claims against defendant. In light of that dispute, we must review defendant's contentions on appeal for substantial evidence.

B. Forfeiture

Defendant's first argument is that there can be no waiver of the right to arbitrate in this case because plaintiff waived her right to proceed in the trial court by signing the arbitration agreement. We agree with plaintiff that defendant forfeited this argument by failing to raise it in the trial court. (*In re Marriage of E. and Stephen P.* (2013) 213 Cal.App.4th 983, 991.)

Even if we were to reach defendant's argument that the parties' agreement to arbitrate prevents a finding that defendant waived the right to arbitrate, defendant's argument has no merit.

The Employment At-Will Arbitration Agreement signed by plaintiff expressly provides that claims and disputes are to be decided "in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq. . . .)." Section 1281.2, subdivision (a) of the Act expressly provides that the right to compel arbitration can be waived. In light of the express incorporation of the Act, including its waiver provision, into the parties' agreement, defendant's argument fails.

C. Waiver

1. Legal Principles

The legal principles governing the application of a waiver defense to binding contractual arbitration are well established. "State law, like the FAA, reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims. [Citation.] Although a court may deny a petition to compel arbitration on the ground of waiver (§ 1281.2, subd. (a)), waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof. [Citations.]" (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).)

"While 'waiver' generally denotes the voluntary relinquishment of a known right, it can also refer to the loss of a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right. [Citations.] In the arbitration context, '[t]he term "waiver" has also been used as a shorthand statement for the conclusion that a contractual right to arbitrate has been lost.' [Citation.]" (*St. Agnes, supra*, 31 Cal.4th at p. 1195, fn. 4.)

"Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration. [Citations.]" (*St. Agnes, supra*, 31 Cal.4th at pp. 1195-1196.) As the court in *Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 425-426 explained, "In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the 'bad faith' or 'wilful misconduct' of a party may constitute a waiver and thus justify a refusal to compel arbitration."

Quoting the Court of Appeal decision in *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980 (*Sobremonte*) with approval, the court in *St. Agnes, supra*, 31 Cal.4th at page 1196 enumerated six factors that it deemed "relevant and properly considered in assessing waiver claims": """(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced'

the opposing party.'" (*Sobremonte*[], *supra*, 61 Cal.App.4th at p. 992, quoting *Peterson v. Shearson/American Exp., Inc.* (10th Cir. 1988) 849 F.2d 464, 467-468.)"

The court in *St. Agnes, supra*, 31 Cal.4th 1187 further explained that because "prejudice also is critical in waiver determinations," "merely participating in litigation, by itself, does not result in waiver," and therefore "courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses . . . . [¶] Rather, courts assess prejudice with the recognition that California's arbitration statutes reflect '"a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution"' and are intended '"to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing."' [Citation.] Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantively impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." (*Id.* at pp. 1203-1204.)

2. Analysis

Defendant contends that the trial court applied the wrong test for determining waiver because it relied on the six-factor test in *Sobremonte, supra*, 61 Cal.App.4th 890, instead of the three-factor test applied by other cases such as the earlier decision in *Davis, supra,* 59 Cal.App.4th 205. According to defendant, under the facts of this case, which involve the employment context and an arbitration agreement that provides for extensive civil

discovery, the six-factor *Sobremonte* test "dilutes the prejudice element" and therefore should not govern the issue of waiver.

We find no merit in defendant's contention. The Supreme Court in *St. Agnes, supra*, 31 Cal.4th 1187 not only quoted the six-factor test in *Sobremonte, supra*, 61 Cal.App.4th 980, it expressly deemed those factors relevant and properly considered in assessing waiver claims. As the court in *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 944-945 (*Burton*) explained, *St. Agnes* approved of a six-factor test but, because the assessment of waiver is not a mechanical process, no one of those factors is predominant. Accordingly, the court in *Burton* applied only four of the six factors to assess waiver under the specific facts of that case. (*Id*. at p. 945.)

In *Lewis, supra,* 205 Cal.App.4th 436, the defendant also argued that the trial court applied the "'wrong test.'" (*Id.* at p. 445.) The court in *Lewis* rejected that argument, explaining, "In *St. Agnes*, the California Supreme Court adopted as the California standard the same multifactor test employed by nearly all federal courts for evaluating waiver claims. [Citations.] [¶] [But n]o one of these factors predominates and each case must be examined in context. [Citation.] [¶] [The defendant] contends the trial court applied the 'wrong test' in evaluating [the plaintiff's] waiver claim because the court applied the 'four (4) factor test' from our decision in *Burton* rather than the 'five-factor test[]' the Ninth Circuit applied in *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114 (*Cox*). [The defendant], however, fails to recognize both *Burton* and *Cox* applied the same six-factor test the California Supreme Court described in *St. Agnes*. [¶] In *Burton*, we specifically identified only four of the six *St. Agnes* factors because the remaining two clearly did not

apply on the facts presented. (*Burton, supra*, 190 Cal.App.4th at pp. 944-945.) We nonetheless evaluated the waiver claim under the *St. Agnes* standard. (*Burton*, at pp. 944-945, 947-948.) . . . The trial court here did not apply the wrong test." (*Id.* at pp. 444-445.)

Here, the trial court stated that the *Sobremonte* decision was "right on point" and found defendant's delay in seeking to arbitrate prejudiced plaintiff and amounted to a waiver. We will therefore assess the waiver defense under the two relevant *St. Agnes* factors to determine if the court's findings are supported by substantial evidence.

a. Unreasonable Delay

It is well established that "[a] demand for arbitration must not be unreasonably delayed. . . . [A] party who does not demand arbitration within a reasonable time is deemed to have waived the right to arbitration. [Citations.] As the party seeking to compel arbitration, [the defendant] had the responsibility to timely seek relief either to compel arbitration or dispose of the lawsuit, before the parties and the court have wasted valuable resources on ordinary litigation. [Citations.] . . . . [A] party's unreasonable delay in demanding or seeking arbitration, in and of itself, may constitute a waiver of a right to arbitrate. [Citation.]" (*Lewis*, *supra*, 205 Cal.App.4th at pp. 445-446, internal quotation marks omitted.)

Under this factor, we review the evidence to determine whether it supports the trial court's implicit finding that defendant's delay was unreasonable. There is no dispute that defendant actively litigated in the trial court for almost two years without mentioning, much less formally raising, the arbitration

agreement as a defense. Defendant offered no excuse for the delay. Moreover, plaintiff was forced to prepare for three different trial dates over a period of three months and was only weeks from the September 11, 2017, trial date when defendant applied ex parte on July 27, 2017 to continue the trial or shorten time on its motion to compel arbitration. (See *Burton*, *supra*, 190 Cal.App.4th at p. 949 ["Indeed, Burton's 11th-hour arbitration petition was so untimely that she had to move ex parte to shorten the time to be heard"].) These facts amply support the trial court's conclusion that defendant's delay in asserting its right to arbitrate was unreasonable.

b. Resulting Prejudice

"[T]he critical factor in demonstrating prejudice is whether the party opposing arbitration has been substantially deprived of the advantages of arbitration as a ""speedy and relatively inexpensive"" means of dispute resolution." (*Burton*, *supra*, 190 Cal.App.4th at p. 948, quoting *St. Agnes, supra*, 31 Cal.4th at p. 1204.) "Arbitration loses much, if not all, of its value if undue time and money is lost in the litigation process preceding a last-minute petition to compel." (*Ibid*., quoting *Sobremonte*, *supra*, 61 Cal.App.4th at p. 996; see also *Diaz v. Professional Community Management, Inc*. (2017) 16 Cal.App.5th 1190, 1216 ["A significant delay in seeking arbitration may, in itself, result in a finding of prejudice"].)

Here, defendant's long, unexplained delay in seeking to enforce its right to arbitrate supported a reasonable inference that the delay was prejudicial. The lengthy delay undermined the important public policy in favor of arbitration and impaired plaintiff's ability to take advantage of the benefits and efficiencies

of arbitration. Had defendant asserted its right to arbitrate at the outset of the proceeding in July or August 2015, plaintiff presumably would have been ordered to arbitrate her claims under the terms of the parties' agreement. Given the less formal nature of arbitration, it is reasonable to infer that plaintiff's claims against defendant would have been resolved more expeditiously through arbitration than in the trial court. Due to defendant's unreasonable delay in moving to compel arbitration, however, plaintiff was deprived of these arbitration benefits. The trial court's finding of prejudice was therefore supported by substantial evidence.

Defendant argues plaintiff suffered no prejudice from its delay in seeking arbitration because its "unique" arbitration agreement "compromises speed and efficiency in favor of enhanced procedural rights" for the parties. According to defendant, the arbitration agreement incorporates "judicial" rules of procedure and evidence and permits discovery "as if the case were pending in a court of law." Therefore, defendant contends, plaintiff was not prejudiced by the nearly two-year delay because, while the case was pending in the trial court, "the parties were able to engage in the same discovery and preparation they would have engaged in had the case been in arbitration."

At oral argument, plaintiff agreed that discovery under the parties' agreement is as broad as discovery in the trial court. It remains the case, however, that the arbitration agreement incorporates Code of Civil Procedure section 1283.05, which allows depositions for discovery, but only with leave of the arbitrator. (Code Civ. Proc., § 1283.05, subd. (e).) Similarly, section 1283 allows depositions to be taken for use as evidence, not discovery, but only if the witness is unavailable and only

upon an order issued by the arbitrator. Depositions in civil litigation are not similarly restricted.

Even assuming the discovery available in arbitration is substantially similar to that available in the trial court, defendant's delay in invoking the arbitration agreement nevertheless deprived plaintiff of another advantage of arbitration, i.e., knowing from the outset of the proceeding the identity of the adjudicator of the dispute. Due to defendant's delay, plaintiff was misled into believing for almost two years that a Superior Court judge would preside over the pretrial proceedings and that her claims would ultimately be resolved by a jury, only to have that significant expectation undercut by the untimely motion. Had defendant made its motion at the outset, plaintiff would have had the full benefit of the stability and predictability that flow from the timely selection of an arbitrator at the commencement of an arbitration. (See *Burton*, *supra*, 190 Cal.App.4th at p. 949 [evidence that doctor specifically designated experts based on assumption they would testify at trial before a jury rather than before an arbitration panel supported trial court's implicit determination that granting patient's belated arbitration request deprived doctor of benefits available through arbitration].)

More importantly, creating an exception to the multi-factor test discussed in *Sobremonte* and *St. Agnes* whenever an arbitration agreement contains "enhanced procedural rights," as defendant urges, would leave litigants like plaintiff vulnerable to unreasonable and bad faith efforts to compel arbitration after spending extensive time and resources litigating the matter in court. We decline defendant's invitation to recognize an

exception to the traditional doctrine of waiver that would expose plaintiffs to that kind of gamesmanship.

Because the trial court's express and implied findings of unreasonable delay and resulting prejudice were supported by sufficient evidence, there is no merit to defendant's appeal.[1] We therefore affirm the order denying the motion to compel arbitration.

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[1] Because we affirm the trial court's order based on its finding of waiver, we do not need to reach the parties' other contentions regarding the enforceability of the arbitration agreement.

DISPOSITION

The order denying the motion to compel arbitration is affirmed. Plaintiff is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JASKOL, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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