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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

JOSE ORTIZ, Plaintiff and Respondent, v. ROBERTS TOOL CO., INC., Defendant and Appellant.	B280442 (Los Angeles County Super. Ct. No. BC626244)

APPEAL from order of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Affirmed.

Honigman Miller Schwartz and Cohn, Matthew S. Disbrow, for Defendant and Appellant.

Gartenberg Gelfand Hayton, Aaron C. Gundzik, Rebecca G. Gundzik, for Plaintiff and Respondent.

Plaintiff and respondent Jose Ortiz filed the operative first amended complaint alleging various wage and hour causes of action[1] against his former employer, appellant and respondent Roberts Tool Co., Inc. (Roberts). Roberts' motion to compel arbitration was denied after the trial court ruled the arbitration agreement was unenforceable on unconscionability grounds. We affirm.

BACKGROUND

The Motion to Compel Arbitration

Ortiz began working for CMI, the predecessor to Roberts, in 2003. On June 19, 2006, Ortiz signed a two-paragraph arbitration agreement with CMI. In response to Ortiz's complaint, Roberts filed a motion to compel arbitration based on the 2006 agreement. The arbitration agreement provides as follows:

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[1] The causes of action alleged included the following: failure to provide meal and rest breaks (Lab. Code, § 226.7); inaccurate wage statements (*id.*, § 226, subd. (a)); failure to pay unpaid wages at the time of discharge (*id.*, §§ 201–202); failure to pay all hours worked (*id.*, § 204 and IWC Wage Order); failure to pay overtime (*id.*, § 510); and violation of Business and Professions Code section 17200. The operative complaint also included class action and Private Attorney General allegations and a demand for penalties under Labor Code section 2699.

> "In the event an employee has any dispute with or claim against the company or its employees related to (a) termination of his or her employment, (b) unlawful harassment, (c) unpaid wages, or (d) unlawful discrimination, binding arbitration will be the sole and exclusive means by which to resolve such a dispute or claim. If the employee wishes to pursue such dispute or claim, it must be submitted for binding resolution in accordance with the rules of the American Arbitration Association ('AAA'). Employees understand he or she is giving up any right to a jury trial.
>
> "Each party will pay his own costs for legal representation at any arbitration proceeding. CMI agrees to pay for all costs of the arbitrator and arbitration administrative fees."

Opposition, Reply, and Ruling of the Trial Court

Ortiz opposed the petition to compel arbitration, arguing that the arbitration agreement was both procedurally and substantively unconscionable. Roberts filed a reply. The trial court heard argument and denied the motion after finding the agreement unconscionable.

DISCUSSION

Roberts argues the trial court erred in finding the arbitration agreement unenforceable under the Federal

Arbitration Act (AAA). Roberts takes issue with the trial court's finding that the agreement was both procedurally and substantively unconscionable. We disagree.

Standard of Review

"The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

"There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]" (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

"In this case the trial court made factual findings based on at least some material disputed evidence. . . . Accordingly, '[t]o the extent there are material facts in dispute, we accept the trial court's resolution of disputed facts when supported by substantial evidence; we presume the court found every fact and drew every permissible inference necessary to support its judgment. (*Engineers & Architects* [*Assn. v. Community Development Dept.* (1994)] 30

Cal.App.4th [644,] 653.)' (*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 953.)" (*Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal.App.4th 619, 630 (*Carlson*).)

Principles of Unconscionability

Unconscionability refers to the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243 (*Baltazar*).) Unconscionability has both procedural and substantive elements. Procedural unconscionability focuses on oppression or surprise due to unequal bargaining power; substantive unconscionability is found in overly harsh or one-sided results. (*Ibid.*; *Sonic–Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1133 (*Sonic II*).) "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 912 (*Sanchez*).)

Although procedural and substantive unconscionability must both be present to support a finding that a contract is unconscionable, they need not be present in the same degree. (*Baltazar*, *supra*, 62 Cal.4th at p. 1243.) The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required. (*Id.* at p. 1244, citing *Armendariz v. Foundation Health Psychcare Services,*

Inc. (2000) 24 Cal.4th 83, 114 (*Armendariz*).) Contracts vary in procedural fairness—those freely negotiated by roughly equal parties have no procedural unconscionability, while contracts of adhesion involving surprise or resulting from sharp practices involve a greater degree of procedural unconscionability. (*Ibid.*) Contracts of adhesion involve a danger of oppression and overreaching, and courts must be particularly attentive to this danger in the employment setting. (*Ibid.*, citing *Armendariz*, *supra*, 24 Cal.4th at p. 115.)

Our Supreme Court has described the characteristics of substantively unconscionable contracts as overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided. (*Baltazar*, *supra*, 62 Cal.4th at p. 1244.) At the same time, a simple bad bargain between parties does not establish substantive unconscionability, in the absence of terms that are unreasonably favorable to the more powerful party. (*Id.* at p. 1245) The harm of unconscionable contracts is that they impair the integrity of the bargaining process, are inconsistent with the public interest or public policy, or impermissibly alter fundamental duties imposed by the law. Such contracts may involve fine-print terms, contain provisions that negate the reasonable expectations of the nondrafting party, or impose unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction. (*Id.* at pp. 1244–1245); *Sonic II*, *supra*, 57 Cal.4th at p. 1145.)

Even as to standard form contracts—which the arbitration agreement in this case is not—one who assents to a contract without reading it is bound by its terms and cannot complain about its provisions. (*Sanchez*, *supra*, 61 Cal.4th at p. 914.) It is generally unreasonable to neglect to read a written agreement before signing it, even if assured there is no need to read the agreement. (*Id*. at p. 915.)

Preclusive Power of the FAA

Ortiz and Roberts agree the FAA applies to the arbitration agreement. "Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 336 (*Concepcion*.) The provision reflects a liberal federal policy favoring arbitration. (*Id*. at p. 339.) "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, [citation], and enforce them according to their terms, [citation]." (*Ibid*.)

"The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.' This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive

their meaning from the fact that an agreement to arbitrate is at issue." (*Concepcion*, *supra*, 563 U.S. at p. 339.) "Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (*Id*. at p. 343.)

"'[A]fter *Concepcion*, unconscionability remains a valid defense to a petition to compel arbitration.' 'What is new,' we said, 'is that *Concepcion* clarifies the limits the FAA places on state unconscionability rules as they pertain to arbitration agreements. It is well established that such rules must not facially discriminate against arbitration and must be enforced evenhandedly.'" (*Sanchez*, *supra*, 61 Cal.4th at pp. 912–913.)

Analysis

Procedural Unconscionability

Ortiz made two arguments in the trial court on procedural unconscionability. First, he argued he did not speak or read English with ease at the time he signed the agreement, citing to *Carmona v. Lincoln Millenium Car Wash, Inc.* (2014) 226 Cal.App.4th 74 (*Carmona*). Second, the agreement was presented in English and Ortiz did not have the opportunity to negotiate its terms before signing, which resulted in a contract of adhesion.

The trial court found that the agreement was a contract of adhesion. The court drew the inference that Roberts drafted the agreement and had superior bargaining power. Crediting Ortiz's declaration that a "woman from H.R." gave him the agreement and told him to sign, the court reasoned that Ortiz believed he was required to sign it, and someone in Ortiz's situation would not feel he was free to disregard the instruction without adverse consequences. As a factual matter, the court concluded that Ortiz was required to sign the agreement.

The court also found, based on disputed evidence, that Ortiz had limited ability "to communicate effectively in English," adding a layer of misunderstanding and at least some degree of surprise. Finally, the court commented on the failure to attach the rules of AAA to the arbitration agreement, which in "the present case raises a unique problem as to plaintiff's ability to understand the nature of the rules or where such rules could be even located."

The trial court's finding that the arbitration agreement is a contract of adhesion is supported by conflicting, but substantial evidence, and we therefore accept that findings for purposes of appeal. Roberts was in a superior position to Ortiz. Ortiz stated in his declaration that a human resources person told him he had to sign the agreement, which supports a finding that he had no opportunity to negotiate and that an element of surprise was present. The agreement therefore contains a modest degree of procedural unconscionability.

Substantive Unconscionability

Ortiz argued in the trial court that the agreement was "permeated with substantively unconscionable provisions which cannot be severed," because (1) the agreement lacks mutuality in that only the employee is required to arbitrate, and (2) the agreement requires an employee to pay for his own legal representation, although the Labor Code and other applicable laws permit an employee to recover attorney fees. This is correct.

We first address the trial court's finding that the arbitration agreement was substantively unconscionable due to a lack of mutuality. In the court's view, "the arbitration agreement as a whole is more of a relinquishment of rights by [Ortiz] than a mutual agreement of terms. [¶] The agreement was signed after [Ortiz] was already employed, [it] extracts from the employee, the right to sue his employer in court, and recover his attorney's fees if he were to prevail on various labor code violations."

The court determined that the plain language of the contract could not be construed to require Roberts to arbitrate any dispute it might have with Ortiz, resulting in a unilateral agreement requiring Ortiz to resort to arbitration in a dispute with the company, "[but n]ot vice-versa." Severance of the substantively unconscionable terms "would render the already very short agreement unintelligible and nonexistent." Nothing in the agreement benefits the

employee in "providing a neutral forum that is mutual," so the agreement is not bilateral.

We agree with the trial court's analysis, and we reject Roberts' contention that the trial court's interpretation is inconsistent with the reasoning in *Baltazar*. The plaintiff in *Baltazar* argued "that the arbitration agreement at issue is unfairly one-sided because it lists only employee claims as examples of the types of claims that are subject to arbitration." (*Baltazar*, *supra*, 62 Cal.4th at p. 1248.) The *Baltazar* parties agreed to arbitrate "'any claim or action arising out of or in any way related to the hire, employment, remuneration, separation or termination of Employee,'" and "the disputes subject to arbitration '*include but are not limited to:* claims for wages or other compensation due; claims for breach of any employment contract or covenant (express or implied); claims for unlawful discrimination, retaliation or harassment . . . , and Disputes arising out of or relating to the termination of the employment relationship between the parties, whether based on common law or statute, regulation, or ordinance.'" (*Ibid.*) Our Supreme Court disagreed that the agreement lacked mutuality: "The arbitration agreement at issue here makes clear that the parties mutually agree to arbitrate all employment-related claims: that is, 'any claim or action arising out of or in any way related to the hire, employment, remuneration, separation or termination of Employee.' That provision clearly covers claims an employer might bring as well as those an employee might bring. The illustrative list of

claims subject to the agreement is just that; the agreement specifically states that such claims '*include but are not limited to*' the enumerated claims, thus making clear that the list is not intended to be exhaustive. It thus casts no doubt on the comprehensive reach of the arbitration agreement. It is not particularly remarkable that the agreement's list of examples might highlight certain types of claims that employees often bring, since part of the purpose of the agreement is to put employees such as Baltazar on notice regarding the scope of the agreement, thus eliminating any possible surprise. The examples do not alter the substantive scope of the agreement, nor do they render the agreement sufficiently unfair as to make its enforcement unconscionable." (*Id.* at p. 1249.)

There is no similarity between the agreement in *Baltazar* and the agreement in this case. Ortiz agreed to arbitrate his employment-related claims, but unlike the *Baltazar* agreement, there is not a hint of language indicating Roberts was required to arbitrate any claim against its employee. There is no inclusive language in Ortiz's arbitration agreement suggesting that the scope of the agreement was not limited to only those claims brought by Ortiz. Accepting as correct Roberts' argument that California law does not require strict mutuality, the fact remains in this case that the agreement lacks any indicia of

mutuality.[2] Substantive unconscionability was established on this issue.

We now turn to the agreement's blanket statement that "Each party will pay his own costs for legal representation at any arbitration proceeding." In *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 235 (*Carbajal*), the arbitration agreement required the employer and employee to be "'responsible for your own attorneys' fees.'" "Several courts have held an arbitration provision is substantively unconscionable when it purports to deprive an employee of his or her statutory right to recover attorney fees if the employee prevails on a Labor Code claim for unpaid wages and other benefits, or on a discrimination claim under the California Fair Employment and Housing Act (Gov. Code, § 12940 et seq.; FEHA). (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 799–800 [] [arbitration provision substantively unconscionable because

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[2] Roberts' reliance on *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1475, is misplaced, because the agreement in *Roman* "covered 'all disputes,'" but no similar language is found in the agreement with Ortiz. For similar reasons, *Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 251–252, is of no assistance to Roberts, where the arbitration agreement provided "for arbitration of 'all disputes and claims arising out of or relating to the submission of [the] application' and 'all disputes . . . which might arise out of or relate to my employment with the company.'" The expansive language in *Nguyen* stands in stark contrast to the narrow arbitration agreement between Ortiz and Roberts.

it stripped employee of right to recover attorney fees on Lab. Code claims and potentially required employee to pay employer's attorney fees]; *Serafin* [*v. Balco Properties Ltd., LLC* (2015)] 235 Cal.App.4th [165,] 183–184 [arbitration provision substantively unconscionable because it required employer and employee to bear own attorney fees and thereby denied employee statutory right to recover attorney fees if she prevailed on FEHA claims]; *Serpa* [*v. California Surety Investigations, Inc.* (2013)] 215 Cal.App.4th [695,] 709–710 [(*Serpa*)] [same]; see also *Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, 1249; *Trivedi* [*v. Curexo Technology Corp.* (2010)] 189 Cal.App.4th [387,] 394–395 [*Trivedi*][3].)" (*Id.* at p. 251.)

Roberts argues that the agreement does not prohibit Ortiz from recovery of his statutory attorney fees, because the agreement does no more than state the American rule that parties are responsible for their own attorney fees, and the AAA rules allow an award of attorney fees in accordance with applicable law. This contention has been rejected in other cases, and we agree with those authorities. "The arbitration provision's plain language requires the parties to be responsible for their own attorney fees without any exceptions. Nothing in the provision's language suggestions the parties intended to limit or qualify this provision by also granting the arbitrators broad authority to award all types of relief authorized by law. '[W]hen there are conflicting

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[3] Disapproved on other grounds in *Baltazar*, *supra*, 62 Cal.4th at p. 1248.

clauses the more specific clause controls the more general.' (*Rebolledo v. Tilly's, Inc.* (2014) 228 Cal.App.4th 900, 920.) CW Painting may not avoid the consequences of its deliberate choice to limit its employees' statutory right to attorney fees by advancing an interpretation contrary to the plain language of the arbitration agreement it drafted. Indeed, other courts have rejected similar arguments seeking to avoid the conclusion that an arbitration provision that alters a party's statutory right to attorney fees is substantively unconscionable. (*Serpa, supra,* 215 Cal.App.4th at pp. 709–710 [rejecting contention arbitration provision was not substantively unconscionable because arbitrator could reject plain language of term requiring parties to bear their own attorney fees and instead award fees consistent with FEHA]; *Trivedi, supra,* 189 Cal.App.4th at pp. 395–396 [rejecting contention that arbitration provision was not substantively unconscionable because AAA rules allowed arbitrator to award attorney fees consistent with applicable law despite contrary term in arbitration provision].)" (*Carbajal*, *supra*, 245 Cal.App.4th at pp. 251–252.)

Severability

Roberts argues that even if the attorney fee provision is substantively unconscionable, it may be severed and the balance of the agreement enforced. (See *Serpa*, *supra*, 215 Cal.App.4th at pp. 709–710 [where the "arbitration

agreement is not otherwise permeated by unconscionability, the offending provision, which is plainly collateral to the main purpose of the contract, is properly severed and the remainder of the contract enforced"].) A trial court has discretion to determine whether to sever an unconscionable provision in an arbitration agreement. (See *Carlson*, *supra*, 239 Cal.App.4th at p. 639; *Trivedi, supra,* 189 Cal.App.4th at p. 398.)

There is no basis for finding an abuse of discretion in the trial court's refusal to sever offending portions of the arbitration agreement. The two primary components of the agreement—Ortiz's agreement to arbitrate his employment-related disputes and the allocation of attorney fees—are both substantively unconscionable and permeate the agreement. Severance of those two subjects would provide for an arbitration bearing no similarity to the terms of the agreement.

DISPOSITION

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

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

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