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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

TAELYN LEWIS, Plaintiff and Respondent, v. APPLE AMERICAN GROUP, LLC, Defendant and Appellant.	B275193 (Los Angeles County Super. Ct. No. BC590908)

APPEAL from an order of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Affirmed.

Apple American Group and Natalja M. Fulton for Defendant and Appellant.

Mahoney Law Group and Dionisios Aliazis for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Apple American Group, LLC appeals from an order denying its motion to compel arbitration pursuant to Code of Civil Procedure section 1281.2. Plaintiff Taelyn Lewis was an employee of defendant. Plaintiff brought an action against defendant pursuant to the Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.) for various Labor Code violations. Notably, plaintiff brought the PAGA action solely on a representative basis.

Defendant moved to compel arbitration pursuant to an arbitration agreement between the parties. Plaintiff does not dispute the validity of the arbitration agreement. However, plaintiff asserted the agreement did not apply to the PAGA representative action. The trial court agreed, citing *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*).

Defendant contends the trial court erred by finding *Iskanian* applied. Defendant asserts that the arbitration agreement at issue does not contain a PAGA representative action waiver. Further, defendant contends the trial court should have resolved whether the court or the arbitrator determines arbitrability. Defendant also argues the threshold issue of whether plaintiff was an aggrieved party under PAGA should have been resolved by the arbitrator under the delegation clause.

We affirm the order. As we will explain below, defendant asserted before the trial court that the arbitration agreement did contain a PAGA representative action waiver, which brings this case squarely within *Iskanian*. We decline to consider defendant's new argument on appeal. Defendant also forfeited

any arguments concerning arbitrability and the delegation clause.

II. BACKGROUND

A. The Arbitration Agreement

Defendant is a multi-state business operating restaurants throughout California. Plaintiff worked for defendant as a server. On September 5, 2013, plaintiff signed a document entitled "RECEIPT OF DISPUTE RESOLUTION PROGRAM AND AGREEMENT TO ABIDE BY DISPUTE RESOLUTION PROGRAM" (the arbitration agreement). The arbitration agreement incorporated a document entitled "DISPUTE RESOLUTION PROGRAM" as part of the agreement. The arbitration agreement contained a provision governing the scope of arbitration: "In signing this Agreement, both the Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration and that this binding arbitration will be the sole and exclusive final remedy for resolving any such claim or dispute. We also agree that any arbitration between the Company and me will be on an individual basis and not as a class or collective action." Arbitrable claims include claims for wages or other compensation. The dispute resolution program document describes the scope of arbitrable claims: "Claims and disputes subject to arbitration include all those legal claims you may now or in the future have against the Company . . . , and all claims that the Company may now or in the future have against you,

whether or not arising out of your employment or termination, except as expressly excluded . . . ."

The arbitration agreement is governed by the Federal Arbitration Act: "I understand and agree the Company is engaged in transactions involving interstate commerce and that my employment involves such commerce. I agree that the Federal Arbitration Act shall govern the interpretation, enforcement, and proceedings under this Agreement." Additionally, the arbitration agreement contains a delegation clause: "I agree that the arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, arbitrability, applicability, enforceability or formation of this Agreement including, but not limited to, any claim that all or any part of this Agreement is void or voidable."

B. Plaintiff's Complaint

On August 10, 2015, plaintiff filed a complaint against defendant pursuant to PAGA for violations of the Labor Code. Plaintiff alleged violations for failure to: pay minimum wages; pay overtime wages; provide rest periods; provide meal periods; timely pay wages upon separation; and provide accurate itemized wage statements. Plaintiff brought the action on a representative basis for herself and all aggrieved employees. Plaintiff asserted she was not bringing any individual claims.[1]

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[1] Plaintiff sought as relief, inter alia, unpaid wages pursuant to Labor Code section 558. Immediately before oral argument defendant submitted for our consideration the case of *Esparza v. KS Industries,* L.P. (Aug. 2, 2017, F072597) 2017 WL 3276363,

C. Defendant's Motion to Compel Arbitration

On February 22, 2016, defendant moved to compel arbitration under Code of Civil Procedure section 1281.2. Defendant asserted the arbitration agreement was enforceable and applied to plaintiff's complaint. Defendant contended the arbitration agreement contained a PAGA representative action waiver. Defendant argued *Iskanian* should not be followed because it was preempted by the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.). Defendant argued that under the arbitration agreement plaintiff could only bring her claims on an individual basis, not on behalf of others.

Plaintiff asserted the arbitration agreement did not apply because the parties never agreed to arbitrate representative PAGA causes of action. Plaintiff also contended *Iskanian* was applicable because the California Supreme Court specifically held that the FAA did not preempt California public policy which prohibited the waiver of PAGA representative causes of action. (See *Iskanian, supra*, 59 Cal.4th at p. 384.)

The trial court agreed with plaintiff and denied the motion to compel arbitration. This appeal followed.

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which held that a PAGA action seeking unpaid wages under Labor Code section 558 is subject to arbitration. During the discussion of that case at oral argument, counsel for plaintiff withdrew the request for this relief.

III. DISCUSSION

A. Standard of Review

We review a trial court's resolution of disputed facts for substantial evidence. (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461-462.) Where the parties have presented no conflicting extrinsic evidence, we interpret de novo an arbitration agreement as to whether it applies to a particular controversy. (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1202; *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1670.)

"The FAA reflects the fundamental principle that arbitration is a matter of contract. Section 2, the 'primary substantive provision of the Act,' [citation], provides: [¶] 'A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be 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. [¶] The FAA thereby places arbitration agreements on an equal footing with other contracts, [citation], and requires courts to enforce them according to their terms, [citation]. Like other contracts, however, they may be invalidated by 'generally applicable contract defenses, such as fraud, duress or unconscionability.' [Citation.]" (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 67-68; accord, *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339; *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1142-1143.)

B. Arbitrability and Delegation Clause

Defendant contends that pursuant to the delegation clause, the trial court should determine who decides the arbitrability of plaintiff's representative PAGA claims, the court or the arbitrator. Defendant also asserts under the delegation clause that the threshold question of whether plaintiff is an "aggrieved employee" under the Labor Code should be resolved by the arbitrator in the first instance.[2] We find defendant has waived or forfeited these arguments. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

A claim of error may be impliedly waived if the appellant failed to bring the error to the trial court's attention in an appropriate manner. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1; *Imperial Bank v. Pim Electric, Inc.* (1995) 33 Cal.App.4th 540, 546.) In the motion to compel arbitration, defendant did not assert the trial court should determine whether the court or the arbitrator should decide the arbitrability of plaintiff's representative PAGA claims. Nor did defendant argue the issue of "aggrieved employee" should be decided by the arbitrator.[3] Rather, defendant argued, "The

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[2] Defendant cites to an unpublished decision of the Court of Appeal multiple times in its brief. Other than certain exceptions not applicable here, unpublished opinions are not to be relied on by a court or a party in any other action. (Cal. Rules of Court, rule 8.1115(a).)

[3] Defendant's threshold argument is also unavailing on a different ground. A PAGA claim cannot be split between an arbitrable individual claim and a nonarbitrable representative claim. (*Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th

Agreement in this case is unequivocal: the arbitration process to which Plaintiff agreed cannot involve multiple employees. While plaintiff herself can arbitrate her wage and hour claims and seek civil penalties on her own behalf, she cannot seek civil penalties on behalf of any other . . . current or former employees, because the Agreement and Program Booklet bar the arbitrator from hearing claims involving multiple employees." Based on defendant's arguments, defendant sought a ruling by the trial court that plaintiff's representative PAGA claims were waived. We thus find defendant has implicitly waived its arguments concerning arbitrability and the delegation clause.

C. New Theory on Appeal—Arbitration Agreement Did Not Contain Representative PAGA Action Waiver

As asserted before the trial court, defendant contended the arbitration agreement contained a representative PAGA action waiver. It then asserted *Iskanian* was wrongly decided. Faced with such an argument, the trial court correctly found that *Iskanian* applied and denied defendant's motion to compel arbitration. Our Supreme Court held that a rule against representative PAGA action waivers is not preempted by the FAA. (*Iskanian, supra*, 59 Cal.4th at p. 384 ["We conclude that the rule against PAGA waivers does not frustrate the FAA's objectives because . . . the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state Labor and Workforce

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408, 421; *Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 649; *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1123-1124.)

Development Agency."]; see *Sakkab v. Luxottica Retail North America, Inc.* (9th Cir. 2015) 803 F.3d 425, 431 [finding the FAA did not preempt rule in *Iskanian* proscribing waiver of representative PAGA action].) We are bound by *Iskanian* and affirm the trial court's order. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. . . . The decisions of this court are binding upon and must be followed by all the state courts of California."].)

For the first time on appeal, defendant argues that the arbitration agreement does *not* have a representative action waiver. We have discretion on appeal to consider an appellant's new theory on a pure question of law. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767.) We decline to consider this new argument. First, there appears to be a factual dispute as to whether the arbitration agreement has a representative action waiver, as evidenced by defendant's opposing theories. Thus, this is not a pure question of law on appeal. Even if it was, defendant has now advanced a theory on appeal that is the opposite of its prior theory before the trial court. We find this to be unfair to the trial court and the opposing party to permit this change of theory on appeal. "There is nothing shocking about these rules. They are consistent with the adversary system's appreciation that lawyers in civil litigation must be given adequate breathing room to select whatever trial strategies they deem appropriate. . . . [¶] [W]here a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial

error." (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.)

Even if we considered defendant's argument that the arbitration agreement did not contain a representative PAGA action waiver, we would still affirm the order. As asserted by defendant, the arbitration agreement is silent regarding representative claims. The parties agreed that any arbitration would be "on an individual basis." There is a distinction between representative and individual claims. (See, e.g., *Iskanian, supra*, 59 Cal.4th at p. 391 [distinguishing between the plaintiff's individual claims and representative PAGA claim]; *Reyes v. Macy's, Inc., supra*, 202 Cal.App.4th at p. 1121 [same].) Under the rules of contract interpretation, the contract is read as a whole, and ambiguities are resolved against the drafter, in this instance, defendant. (Civ. Code, §§ 1648, 1654; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247.) Thus, we find the arbitration agreement's language does not indicate that the parties agreed to the arbitration of representative claims. A representative PAGA action was not within the scope of arbitrable claims between the parties. (See *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662, 684 ["[A] party may not be compelled under the FAA to submit to . . . arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."].)

Because we have resolved all the issues on appeal above, we need not decide the parties' remaining arguments. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 259.)

IV. DISPOSITION

The order is affirmed. Plaintiff Taelyn Lewis may recover her costs on appeal from defendant Apple American Group, LLC.

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LANDIN, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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