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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

JOEL CUMMINGS, Plaintiff and Respondent, v. EUREKA RESTAURANT GROUP, LLC, Defendant and Appellant.	2d Civ. No. B294120 (Super. Ct. No. 18CV00849) (Santa Barbara County)

Appellant Joel Cummings sued his former employer, respondent Eureka Restaurant Group (Eureka), for labor law violations. Relying upon an "e-signed" agreement Eureka petitioned to compel arbitration. Cummings denied signing Eureka's arbitration agreement. (Code Civ. Proc., § 1281.2.)[1]

The parties did not conduct discovery on the issue of arbitrability. They submitted conflicting declarations in support

[1] Unlabeled statutory references are to the Code of Civil Procedure.

of their claims. Eureka belatedly requested a continuance to begin discovery only after the trial court issued a tentative decision denying Eureka's demand for arbitration.

The court denied Eureka's petition, unpersuaded that Cummings affixed an electronic signature (e-signature) to an arbitration agreement. Substantial evidence supports this finding. The court did not abuse its discretion by refusing to suspend the hearing so that Eureka could begin discovery and prepare for live testimony. We affirm.

FACTS AND PROCEDURAL HISTORY

Cummings worked at Eureka's Santa Barbara restaurant from February 2016 to June 2017. In 2018, he brought a class action lawsuit alleging that Eureka did not provide meal periods, rest periods, accurate wage statements, or pay all wages owed upon termination. He makes an unfair competition claim and seeks civil penalties.

Eureka petitioned to compel contractual arbitration. Its declarations state that it uses an electronic system to recruit employees. Job seekers apply online and consent to electronically access, review and sign documents. Candidates create an account with a unique username and password and agree to keep their credentials confidential. Eureka cannot reset passwords or access these accounts.

New hires complete their employment documentation on a computer at the restaurant. They log in with their username and password and fill in biographical and tax information. The documents include an arbitration agreement and arbitration rules and procedures. A print-out shows Cummings's e-signature on an arbitration agreement (Agreement) under his username "Joelkillsit." New employees who sign the Agreement waive their

right to a jury trial or to bring a class action; those who do not wish to arbitrate may sign an "opt out" clause.

Cummings opposed the arbitration petition, denying that he e-signed the Agreement. He declared that he went to the restaurant to complete the electronic documentation. After he started the process, but before he reached the screen with the Agreement, Eureka's manager Caitlin Lyons gave him a copy of the food menu to study and asked him to write down his username and password so she could complete his electronic "paperwork." Cummings denies e-signing the Agreement or authorizing Lyons to apply his e-signature. He asserts that no eyewitness saw him press a button to e-sign the Agreement.

In rebuttal, Caitlin Lyons declared that she initiated Cummings's online paperwork and received emails indicating he completed it. She did not ask Cummings for his username or password and he did not supply them. She did not access his account, sign documents on his behalf, or ask Cummings to study the menu.

In a written decision the court stated, "Someone clicked the software buttons to express agreement to the arbitration agreement. It was either Cummings or Lyons." The court concluded, "This is a close case. Both sides present plausible scenarios. After considering the totality of the arguments and evidence, the court determines that Eureka has not met its burden to show that Cummings acted so as to manifest assent to the Agreement. [Citation omitted.] In the absence of sufficient proof of an agreement to arbitrate, the motion to compel arbitration is denied."

DISCUSSION

1. Appeal and Review

A hearing to compel arbitration is a summary proceeding in which "the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) The petitioner must prove the existence of a valid arbitration agreement. (§ 1281.2.) An order denying the petition is appealable. (§1294, subd. (a).)

If the court denies arbitration after weighing conflicting evidence, we review the decision using the substantial evidence standard. (*Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th 408, 415*; Muller v. Roy Miller Freight Lines, LLC* (2019) 34 Cal.App.5th 1056, 1061.) Here, the facts are disputed: Eureka contends that Cummings e-signed the Agreement and Cummings denies doing so. The court's rulings on discovery requests and the presentation of live testimony at the hearing are reviewed for an abuse of discretion. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 540; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 414 (*Rosenthal*).)

2. Eureka's Untimely Discovery Request

Parties to a special proceeding to compel arbitration have a right to discovery. (*Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412, 427; § 2017.010 [allowing discovery of relevant non-privileged material].) Parties are not deprived of due process despite the summary nature of the proceeding because they may seek discovery on matters relevant to the enforceability of an arbitration agreement. (*Rosenthal*, *supra*, 14 Cal.4th at p. 412.)

Eureka acknowledges its discovery rights. It made no attempt to exercise them before the hearing. It did not ask for a continuance to depose Cummings after he declared that Lyons took his username and password then e-signed the Agreement without his knowledge or consent. Instead, it offered Lyons's declaration denying Cummings's claim.

Eureka waited until it saw the tentative ruling in Cummings's favor before asking the court—in an unauthorized "sur-reply"—to suspend the hearing so that Eureka could institute discovery "aimed at establishing what actually occurred" on Cummings's first day at the restaurant. Cummings opposed the request as untimely, arguing that Eureka "had months to marshal all [its] evidence." The court did not suspend the hearing. It heard oral argument, took the matter under submission and denied the petition.

Parties must make *timely* discovery requests and cannot make an initial demand for discovery at trial. "[D]efendant cannot claim the benefits of the civil discovery rules without demonstrating compliance with its requirements" for timely discovery requests. (*People v. Dixon* (2007) 148 Cal.App.4th 414, 444.) Eureka sought to begin discovery after the court prepared for the hearing by reading 129 pages of argument and evidence and issuing a tentative ruling. Litigants cannot waste judicial resources by delaying discovery until prompted by an unfavorable tentative ruling.

The court did not abuse its discretion by implicitly denying Eureka's belated request to start discovery. Eureka does not "assert [it] actually had insufficient time to conduct discovery before [the] hearing of the petition, or that [it] sought and [was] refused discovery of any matter pertinent to the enforceability of

the arbitration clause." (*Rosenthal*, *supra*, 14 Cal.4th at p. 412.) Where, as here, the parties have chosen to rely on their own recollections of the transaction, written evidence and declarations, this choice does not mean they were unfairly denied information needed to oppose or support the petition to compel arbitration. (*Id.* at pp. 412-413. Compare *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 378-379 [plaintiffs sought and were refused discovery, leading to a motion and order compelling the production of documents].)

3. The Court Was Not Required to Conduct an Evidentiary Hearing to Resolve Conflicts

An arbitration petition "is heard 'in a summary way in the manner . . . provided by law for the making and hearing of motions.' That 'manner' does not entitle one to an evidentiary hearing." (*Ashburn v. AIG Financial Advisors, Inc.* (2015) 234 Cal.App.4th 79, 96, quoting § 1290.2.) "There is simply no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony." (*Rosenthal*, *supra*, 14 Cal.4th at p. 414. Accord: *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1157 [arbitrability is proven by declaration and documentary evidence, "'with oral testimony taken only in the court's discretion'"].)

Eureka did not ask the court to resolve evidentiary conflicts with live testimony. It filed papers the night before the hearing stating "should Eureka deem it necessary, Eureka will request that the Court, at its discretion, receive oral testimony in reaching its determination on [a] renewed petition to compel arbitration."

The court did not abuse its discretion by resolving evidentiary conflicts without live testimony. (*Rosenthal*, *supra*, 14 Cal.4th at p. 414.) Neither party asked the trial court to hear oral testimony. At most, Eureka made an untimely and ambiguous suggestion, just before the hearing, that it might make a possible future request for oral testimony should it "deem it necessary." Under the circumstances, the court did not exceed the bounds of reason by proceeding without live testimony. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 [abuse of discretion is shown if "the trial court exceeded the bounds of reason"].)

4. Sufficiency of the Evidence

Eureka claims it proved the authenticity of Cummings's e-signature and the court had to enforce the Agreement. The parties' declarations conflict. "In such a case we must '"accept the trial court's resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of the credibility of witnesses and the weight of the evidence."' [Citation]." (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.)

An e-signature has the same legal effect as a handwritten one. (Civ. Code, § 1633.7, subd. (a).) The proponent has the burden of proving the authenticity of an e-signature. (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 843-844 (*Ruiz*); Evid. Code, § 1401.) An e-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 electronic record or electronic signature was attributable." (Civ. Code, § 1633.9, subd. (a).)

Ruiz is instructive. An employer petitioned to compel arbitration of Ruiz's labor law claims, attaching the written agreement and a declaration from its manager asserting that Ruiz e-signed it. In opposition, Ruiz declared that he did not sign the agreement. The manager's reply attempted to authenticate the signature. (*Ruiz*, *supra*, 232 Cal.App.4th at pp. 839-840.) The trial court concluded that the employer failed to establish the existence of an arbitration agreement. (*Id.* at p. 841.)

The court in *Ruiz* affirmed the denial of the petition to arbitrate because the employer did not carry its burden of proving authenticity. The manager's declaration that each employee is required to log into the company's system using a "unique login ID and password" did not explain how the e-signature was "the act of Ruiz," who denied signing the arbitration agreement. (*Ruiz*, *supra*, 232 Cal.App.4th at p. 844.)

Eureka's human resources manager declared that Cummings "signed and acknowledged" the Agreement, as shown by an electronically executed copy of it with his name, unique username, and the date he signed it. Under *Ruiz*, the mere existence of an agreement, apparently e-signed by an employee, does not prove it was "the act" of the employee. The creator of Eureka's software described how prospective employees create accounts with a unique username and password; he concluded that Cummings "used his unique username and password to electronically sign" the Agreement. The software creator assumed that Cummings did not share his username and password; if someone else logged in, using this information, the e-signature was not "the act" of Cummings.

Cummings denied e-signing the Agreement. He claimed that restaurant manager Lyons obtained his username and password and used them to affix his e-signature without his knowledge or consent. Lyons disputed Cummings's claim. The trial court believed Cummings. We cannot reassess witness credibility or reweigh evidence on appeal. Cummings's declaration is sufficient to prove that he did not e-sign the Agreement. (Evid. Code, § 411 [direct evidence from one witness "is sufficient for proof of any fact"].)

DISPOSITION

The judgment (order denying the arbitration petition) is affirmed. Respondent is entitled to recover his costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Pauline Maxwell, Judge

Superior Court County of Santa Barbara

Karasik Law Firm and Gregory N. Karasik; Davtyan PLC and Emil Davtyan, for Plaintiff and Respondent.

K&L Gates, Spencer Hamer, Christopher J. Kondon, Saman M. Rejali and Kate G. Hummel, for Defendant and Appellant.