Filed 8/22/12 Rocha v. Kinecta Fed. Credit Union CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

EVA ROCHA, Plaintiff and Appellant, v. KINECTA FEDERAL CREDIT UNION et al., Defendants and Respondents.	B238401 (Los Angeles County Super. Ct. No. BC457246)

APPEAL from an order of the Superior Court of Los Angeles County, Richard L. Fruin, Jr., Judge. Affirmed.

René L. Barge and Gary S. Bennet for Plaintiff and Appellant.

Jackson Lewis, David G. Hoiles, Jr., and Karen D. Simpson, for Defendant s and Respondents.

Plaintiff, Eva Rocha, appeals from a November 15, 2011 order compelling arbitration of her individual wage and hour causes of action but dismissing her class claims. We conclude: the order under review are appealable; both defendants, Kinecta Federal Credit Union and Kinecta Alternative Financial Solutions, Inc., may compel arbitration; the agreement to arbitrate does not permit classwide arbitration; any issue concerning title 29 United States Code section 157 has been forfeited; and the trial court

did not abuse its discretion in refusing to continue the hearing date on the motion to compel arbitration. We affirm the order under review.

Defendants moved to compel arbitration of plaintiff's individual causes of action and dismissing her class claims. Plaintiff was employed by Nix Check Cashing in October 2006 as a manager in training. One month later she became a senior teller. Subsequently Nix Check Cashing was acquired by defendants. Plaintiff became an employee of Kinecta Alternative Financial Solutions, Inc., a wholly-owned subsidiary of Kinecta Federal Credit Union. Her job title was changed to branch supervisor with no pay change. On December 17, 2007, plaintiff was asked to sign an arbitration agreement with Kinecta Federal Credit Union and its wholly-owned subsidiaries.

The arbitration agreement contains no provision which permits an employee to pursue a class action in the arbitral forum. The arbitration agreement provides in relevant part: "I further agree and acknowledge that the Credit Union and I will utilize binding arbitration to resolve all disputes that may arise out of the employment context. Both the Credit Union and I agree that any claim, dispute and/or controversy that either I may have against the Credit Union . . . or the Credit Union may have against me, arising from, or related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Credit Union shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. Sections 1280 *et seq.*, including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). Included within the scope of this Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise, with exception of claims arising under the National Labor Relations Act, which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, Employment Development

Department claims, or proceedings before the California Department of Fair Employment and Housing, or the United States Equal Employment Opportunity Commission (although if I choose to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to the provisions of this Agreement). . . . I understand and agree to this binding arbitration provision, and both I and the Credit Union give up our right to trial by jury of any claim I or the Credit Union may have against each other."

First, defendants argue that plaintiff may not appeal. Because all of her class claims have been dismissed, the orders under review are appealable. (Code Civ. Proc., § 906; *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757; *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1288.) There is no merit to defendants' argument the Federal Arbitration Act appeal provisions preempt this state's class action appealability jurisprudence. The limited preemptive effect of the Federal Arbitration Act has not been extended beyond title 9 United States Code section 2. (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1354 [holding in *Hall Street Associates L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576, 584 concerning exclusive vacatur grounds under the Federal Arbitration Act not entitled to preemptive effect]; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 407-410 [jury trial requirement in 9 U.S.C. §§ 9-10 not applicable to state court litigation]; *Muao v. Grosvenor Properties* (2002) 99 Cal.App.4th 1085, 1091 [appeal provisions in 9 U.S.C. § 16 do not preempt this state's appellate review rules]; *Siegel v. Prudential Ins. Co. of America* (1998) 67 Cal.App.4th 1270, 1290 ["[N]either sections 10 and 12 nor the manifest disregard of the law rule preempt the California rule which prevents reweighing the merits of an arbitrator's decision."].)

Second, plaintiff argues that Kinecta Alternative Financial Solutions, Inc. is not a party to the arbitration agreement. The arbitration agreement is between plaintiff and Kinecta Federal Credit Union and its wholly owned subsidiaries. The complaint alleges that Kinecta Federal Credit Union is a subsidiary of Kinecta Alternative Financial Solutions, Inc. Thus, the arbitration agreement extends to Kinecta Federal Credit Union.

Even if the express language of the arbitration agreement did not apply to Kinecta Federal Credit Union, agency and equitable estoppel principles support the trial court's order to arbitrate. (*Crowley v. Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1069-1073; *Nguyen v. Tran* (2007) 157 Cal.App.4th 1032, 1036-1037; *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 762; see *DMS Services, Inc. v. Superior Court* (2012) 205 Cal.App.4th 1346, 1356.)

Third, plaintiff argues that the trial court erred in failing to apply the class action waiver analysis in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 453-456. To begin with, plaintiff has no right to seek classwide arbitration as defendants never agreed to permit such. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___, ___ [131 S.Ct. 1740, 1750-1751] ["The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."]; *Stolt-Nielsen v. AnimalFeeds International Corp.* (2010) 559 U.S. ___, __ [130 S.Ct. 1758, 1775]; *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, 513-519.) *Gentry*, with its classwide arbitration analysis, is irrelevant and thus has no application here. In any event, plaintiff's brief one and one-half page declaration presents little evidence concerning the so-called *Gentry* factors. As a result, *Gentry* does not warrant setting aside the trial court's ruling. (*Kinecta Alternative Financial Solutions, Inc. v. Superior Court*, *supra*, 205 Cal.App.4th at p. 517; *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 498.)

Fourth, plaintiff argues the arbitration agreement, which in effect serves to bar class-based relief, violates title 29 United States Code section 157. This contention was not presented in the trial court. It has thus been forfeited. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 681; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 30-31; *Tutti Mangia Italian Grill, Inc. v. American Textile Maintenance Co.* (2011) 197 Cal.App.4th 733, 740; *Brown v. Ralphs Grocery Co., supra,* 197 Cal. App. 4th at p. 498, fn. 4; *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 19, fn. 12; *Countrywide*

Financial Corp. v. Bundy (2010) 187 Cal.App.4th 234, 264; see *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 185, fn. 1.)

Fifth, plaintiff argues the trial court should have continued the hearing on the motion to compel arbitration. Citing federal decisions, plaintiff argues she should have been permitted to propound a limited number of discovery devices concerning the *Gentry* factors. The trial court did permit limited discovery on issue pertinent to the motion to compel arbitration. We review a continuance request denial for an abuse of discretion. (*Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 532.) Plaintiff has failed to demonstrate an abuse of discretion occurred. As noted, the present case cannot involve the *Gentry* factors as there was no agreement to arbitrate class claims.

The order under review is affirmed. Defendants, Kinecta Federal Credit Union and Kinecta Alternative Financial Solutions, Inc., shall recover their costs on appeal from plaintiff, Eva Rocha.

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TURNER, P. J.

We concur:

ARMSTRONG, J. KRIEGLER, J.