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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

CESAR MACHUCA, Plaintiff and Appellant, v. NATIONWIDE LEGAL, LLC et al., Defendants and Respondents.	B285047 (Los Angeles County Super. Ct. No. BC591111)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Feffer, Judge. Affirmed.

Law Offices of Kyle Todd, Kyle Todd and Maximilian Lee for Plaintiff and Appellant.

Wilson Turner Kosmo, Leonid M. Zilberman, Christina C.K. Semmer and Krystal N. Weaver for Defendants and Respondents.

Plaintiff and appellant Oscar Machuca (Machuca) appeals a judgment confirming an arbitration award in favor of defendants and respondents Nationwide Legal, LLC (Nationwide), his former employer, and Reyna Alvarez (Alvarez), his former supervisor (collectively, Nationwide or Defendants), in an employment discrimination case.

The issues presented are whether the trial court erred in granting Nationwide's motion to compel arbitration, and thereafter, whether the trial court erred in confirming the award. We perceive no error in either ruling and therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On August 12, 2015, Machuca filed suit against Nationwide and Alvarez pursuant to the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), alleging statutory causes of action for unlawful harassment and discrimination based on national origin, and failure to prevent harassment and discrimination, as well as common law claims for wrongful termination in violation of public policy and intentional infliction of emotional distress.

On February 3, 2016, Nationwide filed a motion to compel arbitration and stay the action pending arbitration, on the ground that the parties had entered into an express agreement to arbitrate all employment-related disputes. Attached to its papers was a two-page arbitration agreement (the Agreement) that Machuca had signed.

Machuca opposed the motion to compel arbitration on the ground that Nationwide had not signed the Agreement, and therefore there was no legally binding agreement to arbitrate. Machuca also argued the Agreement was unconscionable, both

procedurally and substantively. He asserted the Agreement was procedurally unconscionable because he was required to sign it as a condition of employment, and the Agreement was substantively unconscionable because it limited his right to recover attorney fees to statutory claims on which he prevailed, and because it failed to attach a copy of the applicable Employment Arbitration Rules and Mediation Procedures (Rules) of the American Arbitration Association (AAA).

The trial court ruled the absence of Nationwide's signature on the Agreement did not render it unenforceable and rejected Machuca's defense of procedural and substantive unconscionability. It granted the motion to compel arbitration and stayed superior court proceedings pending completion of the arbitration.

The matter proceeded to arbitration and was resolved on a defense motion for summary judgment. In a 45-page award, the arbitrator ruled, inter alia: Defendants met their burden to establish Machuca was terminated for legitimate business reasons based on his poor work performance, and Machuca failed to show his termination was pretextual. Although there was evidence that Alvarez, of Guatemalan descent, said "little Mexican" and "beaners" in conversations with others, those were stray comments that Machuca overheard and did not show discriminatory motivation or animus. Such comments were infrequent and did not create a pervasive abusive environment which altered the conditions of his employment. Because Machuca's claims of discrimination and harassment failed, there was no triable issue with respect to his cause of action for failure to prevent discrimination and harassment. Also, there was no triable issue with respect to the cause of action for intentional

infliction of emotional distress because the alleged conduct was not outrageous as a matter of law.

Thereafter, Defendants filed a petition to confirm the award. In opposition, Machuca argued the award should be vacated because (1) in sustaining Defendants' evidentiary objections, the arbitrator refused to hear material evidence and thereby substantially prejudiced Machuca's right to bring his FEHA case; and (2) the arbitrator exceeded his powers by applying California statutory law rather than the AAA Rules under which the parties agreed to arbitrate, and by improperly allowing Defendants to proceed with a dispositive motion for summary judgment.

The trial court rejected Machuca's arguments that the arbitrator had prejudiced his rights by refusing to hear material evidence, and that the arbitrator had exceeded his powers. Machuca filed a timely notice of appeal from the judgment confirming the award.

CONTENTIONS

Machuca contends: (1) the trial court erred in compelling arbitration (a) because Nationwide did not sign the Agreement and (b) because the Agreement was unconscionable, both procedurally and substantively; and (2) the trial court thereafter erred in confirming the award because (a) the arbitrator struck Machuca's material evidence and thereby substantially prejudiced his right to bring his FEHA action and (b) the arbitrator exceeded his powers in applying formal rules of evidence and in allowing Defendants to bring a dispositive summary judgment motion.

DISCUSSION

I. *The trial court properly granted Defendants' motion to compel arbitration.*

1. *Appealability.*

As a preliminary matter, we dispose of Defendants' argument that Machuca cannot challenge the order granting Defendants' motion to compel arbitration because he failed to file a timely notice of appeal from the April 16, 2016 order granting Defendants' motion to compel arbitration.

Unlike an order denying a motion to compel arbitration, an order *granting* a motion to compel arbitration is not directly appealable; appellate review of an order compelling arbitration must await appeal from a final judgment entered after arbitration. (Code Civ. Proc. § 1294, subd. (a); *Garcia v. Superior Court* (2015) 236 Cal.App.4th 1138, 1149.)[1] On September 12, 2017, Machuca filed a timely notice of appeal from the July 14, 2017 judgment confirming the arbitration award. Thus, the earlier order granting Defendants' motion to compel arbitration is reviewable on Machuca's appeal from the judgment confirming the award.

2. *Standard of appellate review*.

As the trial court stated in its ruling on the motion to compel arbitration, the party moving for arbitration bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, and a party opposing the motion bears the burden of proving by a preponderance of the

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

evidence any fact necessary to its defense. (*Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1284.)

There is no uniform standard of appellate review for evaluating a trial court's ruling on a motion to compel arbitration. (*Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 686.) " ' "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 [ruling] rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]" ' " (*Ibid.*)

3. *The trial court properly found the parties entered into a valid arbitration agreement even though Nationwide did not sign the Agreement.*

Machuca contends the trial court erred in compelling arbitration because Nationwide's Agreement specifically required the signatures of both parties, and the failure of a Nationwide representative to sign the Agreement is fatal to its attempt to enforce it.

In ruling on the motion to compel arbitration, the trial court found no merit to Machuca's theory that Nationwide's failure to sign the Agreement precluded its enforcement. The trial court stated: "This argument has been roundly rejected in the context of employment arbitration agreements. (See, e.g., *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 397 [(*Cruise*)].) In *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 177 [(*Serafin*)], . . . the court observed: 'Just as with any written agreement signed by one party, an arbitration agreement can be specifically enforced against the signing party regardless of whether the party seeking enforcement has also signed it.' "

Machuca contends these decisions are not controlling in this matter. As discussed below, Machuca's attempt to avoid *Cruise* and *Serafin* is unavailing.

a. *The* Cruise *decision*.

The *Cruise* court found "the fact that only [the employee] manually signed the employment application [containing the arbitration provision] is of no moment. In *Lara v. Onsite Health, Inc.* (N.D. Cal. 2012) 896 F.Supp.2d 831 (*Lara*), the employee contended the arbitration agreement lacked mutuality because the employer did not sign it. In response, the employer argued its intent to be bound was evidenced by the fact that the arbitration agreement was printed on its company letterhead. (*Id*. at p. 844.) [¶] The *Lara* court concluded the employer intended to be bound by the agreement and that its letterhead was intended to authenticate the agreement. (*Lara*, *supra*, 896 F.Supp.2d at p. 844.) It explained: 'The signature of a party to be bound by a contract "need not be manually affixed, but may in some cases be printed, stamped or typewritten." [Citation.] However, if there is no manual signature, it must still be shown "that the name relied upon as a signature was placed on the document or adopted by the party to be charged with the intention of authenticating the writing. In other words the defendant must intend to appropriate the name as a signature." [Citations.]' (*Lara*, *supra*, 896 F.Supp.2d at p. 844.) [¶] *Lara* found the employer 'intended to be bound by the Arbitration Agreement. First, [the employer's] intent is evidenced by the fact that the Agreement is printed on its company letterhead and, because [the employer] submitted its offer of employment in this manner, the Court finds that [the employer] intended to authenticate its name as a signature. . . . Second, [the

employer's] intent to be bound is further evidenced by the fact that it presented the Agreement to [the employee] as part of its New Hire packet, with a letter explaining that [the employee] must complete and sign all documents to be processed. . . . Third, the Agreement itself binds both parties to arbitration, repeatedly referring to "you and Onsite Health, Inc.," or "you and the Company." . . . This language establishes that both parties are bound to arbitrate any disputes, with the exception of injunctive relief. Thus, the Agreement is written in terms of both parties' obligations and evidences [the employer's] intent to be bound. See *Armendariz* [*v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 117–118 (*Armendariz*)] (recognizing the "modicum of bilaterality" required in an arbitration agreement) . . . .' (*Lara*, *supra*, 896 F.Supp.2d at p. 844, citations omitted.)" (*Cruise*, *supra*, 233 Cal.App.4th at pp. 397–398.)

Applying these principles, the *Cruise* court stated: "Here, we readily conclude Kroger intended to be bound by the arbitration clause in its employment application. Kroger's intent is evidenced by the fact that the employment application was printed on its company letterhead and the arbitration clause declared Kroger's intent to be bound thereby ['(7) the Company likewise agrees to mandatory final and binding arbitration of any Covered Disputes . . . .']. Under these circumstances, we conclude Kroger intended to . . . authenticate its name as a signature, so as to bind both parties to arbitration." (*Cruise*, *supra*, 233 Cal.App.4th at pp. 398–399.)

b. *The* Serafin *decision.*

In *Serafin*, the employee "claim[ed the lack of [the employer's] signature makes the parties' agreement 'illusory and lack[ing] consideration.' However, the writing memorializing an

arbitration agreement need not be signed by both parties in order to be upheld as a binding arbitration agreement. In *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, the court explained, 'it is not the presence or absence of a *signature* [on an agreement] which is dispositive; it is the presence or absence of evidence of an *agreement* to arbitrate which matters.' [Citation.] Evidence confirming the existence of an agreement to arbitrate, despite an unsigned agreement, can be based, for example, on 'conduct from which one could imply either ratification or implied acceptance of such a provision.' ([Citation]; see *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 420–423 [despite absence of a signed writing acknowledging receipt of the memorandum and brochure containing the arbitration provision, the employee's continued employment constituted implied acceptance of the agreement].)

"In this case, not only was the agreement authored by Balco, and printed on [its affiliate's] letterhead, but Balco's later conduct evinces an intent to be bound by the arbitration agreement when it invoked the arbitration process to recover the $10,798.08 overpayment allegedly made to Serafin, and when it filed the motion to stay Serafin's employment litigation and to compel arbitration. [¶] Just as with any written agreement signed by one party, an arbitration agreement can be specifically enforced against the signing party regardless of whether the party seeking enforcement has also signed, provided that the party seeking enforcement has performed or offered to do so. (Civ. Code, § 3388.)[2] Serafin does not, and cannot, dispute that

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2 Civil Code section 3388 states: "A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has

Balco has at all times performed all the duties required of it under the arbitration agreement. In this case, Balco has carried its burden in proving the arbitration agreement is a mutually binding agreement." (*Serafin*, *supra*, 235 Cal.App.4th at pp. 176–177, fn. omitted, original italics.)

c. *Machuca's arguments to the contrary are unpersuasive*.

Machuca argues that that unlike the agreements analyzed in the cited cases, the instant Agreement expressly called for the employer's signature.

We note the Agreement included the following language: (1) "*By signing below*, the Company and I acknowledge and agree that all claims . . . shall be submitted to final binding arbitration"; and (2) "*By our signatures below*, the Company and I each voluntarily and knowingly waive any and all of our rights to have any such arbitrative claims or disputes heard or adjudicated in any other type of forum." (Italics added.)

However, the language in the Agreement calling for both parties' signatures does not dictate a different result. There is no meaningful distinction between a situation such as this, where an arbitration agreement calls for both parties' signatures but only one party was a signatory, and a situation in which an arbitration agreement has signature lines for both parties but only one party signs the agreement. In either case, the arbitration agreement contemplates that both parties will affix their signatures to the document. Ultimately, the issue is whether, notwithstanding the absence of a party's signature, the nonsignatory evinced an intent to be bound by the agreement.

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performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance."

(*Cruise*, *supra*, 233 Cal.App.4th at pp. 397–399; *Serafin*, *supra*, 235 Cal.App.4th at pp. 176–177.)

Here, in granting the motion to compel arbitration, the trial court impliedly found that Nationwide evinced an intent to be bound by the Agreement.[3] Substantial evidence supports the trial court's factual finding with respect to Nationwide's intent to be bound by the Agreement. First, Nationwide's intent to be bound is reflected in the fact that it prepared the Agreement, which is captioned "Nationwide Legal, LLC Acknowledgement and Agreement for Mandatory Binding Arbitration and Dispute Resolution," and presented it to Machuca for his signature. Further, the Agreement itself binds both parties to arbitration, repeatedly stating "the Company and I" agree to arbitration.[4] In addition, Nationwide's "later conduct evince[d] an intent to be bound by the arbitration agreement when it invoked the arbitration process" (*Serafin*, *supra*, 235 Cal.App.4th at p. 176); as indicated, in response to Machuca's lawsuit, Nationwide moved to compel arbitration and to stay trial court proceedings.

Machuca attempts to distinguish *Serafin* in that there, it was the employer who initiated the arbitration proceedings and thereby demonstrated its intent to be bound by arbitration. However, in *Serafin*, the proceedings began with a demand by the

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[3] Machuca submitted on the tentative ruling and thus did not challenge the trial court's implied finding that Nationwide had established its intent to be bound by the Agreement.

[4] In addition to the two provisions quoted from the Agreement, stating that by signing below "the Company and I" agree to arbitration, there were additional references in the Agreement that "the Company and I" agree to arbitration, that did not include the "by signing below" language.

employer to the AAA to arbitrate a conversion claim against its former employee, who allegedly had received an overpayment of wages. (*Serafin*, *supra*, 235 Cal.App.4th at p. 171.) Here, Defendants could not invoke arbitration until after Machuca initiated his lawsuit against them.[5]

Machuca also contends the trial court erred in its application of Civil Code section 3388. Machuca asserts that in concluding the nonsignatory employer was entitled to enforce the Agreement, the trial court failed to make the second finding required by the statute, i.e., that "the case is otherwise proper for enforcing specific performance." (*Ibid.*)

As noted, Machuca submitted on the tentative ruling and thus did not contend below that the trial court had failed to make a finding that the case was otherwise proper for specific performance. (Civ. Code, § 3388.) We conclude the trial court impliedly determined that specific performance of the Agreement was otherwise proper, and reject Machuca's contention the trial court should have made a finding to the contrary. Machuca's theory is that specific performance is unfair here due to lack of mutuality in that the employer, by not signing the Agreement, retained its right to bring a civil action against him. However, our earlier conclusion that substantial evidence supports the existence of an agreement to arbitrate disposes of Machuca's argument with respect to a lack of mutuality.

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[5] Machuca's argument that Defendants' filing of a peremptory challenge (§ 170.6) was inconsistent with an intent to arbitrate is meritless. Out of an abundance of caution, in the event the motion to compel arbitration were denied, Defendants were entitled to challenge the assigned judge.

In sum, the trial court properly held the absence of Nationwide's signature on the Agreement was not a bar to its enforceability.

4. *No merit to Machuca's contention the Agreement is unconscionable, both procedurally and substantively*.

Next, Machuca contends that even if this court finds that both parties agreed to arbitration, the trial court erred in compelling arbitration because the Agreement is unconscionable, both procedurally and substantively. Machuca asserts the Agreement (1) is procedurally unconscionable because he was required to agree to arbitration as a condition of employment, and (2) is substantively unconscionable because it limited the right to attorney fees and did not attach the AAA Rules that would govern arbitration. We agree with the trial court that the Agreement is not unenforceable on the basis of unconscionability.

a. *General principles.*

Unconscionability has both a procedural and a substantive component under California law. (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1469 (*Roman*).) Procedural unconscionability focuses on the elements of oppression and surprise. (*Ibid*.) Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the terms of the bargain are hidden in a prolix printed form drafted by a party in a superior bargaining position. (*Ibid*.) Surprise also may result from the failure to attach a copy of the arbitration rules to the arbitration agreement. (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 690 (*Lane*).)

Substantive unconscionability focuses on the actual terms of the arbitration agreement and evaluates whether they create overly harsh or one-sided results. (*Roman*, *supra*, 172 Cal.App.4th at p. 1469.) "Substantive unconscionability 'may take various forms,' but typically is found in the employment context when the arbitration agreement is 'one-sided' in favor of the employer without sufficient justification, for example, when 'the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration.' [Citations.]" (*Id*. at p. 1470.)

Both procedural *and* substantive unconscionability must appear before a contract or term will be deemed unconscionable, but they need not be present to the same degree. (*Armendariz*, *supra*, 24 Cal.4th at p. 114; *Roman*, *supra*, 172 Cal.App.4th at p. 1469.) A sliding scale is applied so that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz*, *supra*, 24 Cal.4th at p. 114; accord, *Roman*, *supra*, at p. 1469.) The burden is on Machuca, as the party challenging the arbitration agreement, to prove his defense of procedural and substantive unconscionability. (*Crippen v. Central Valley RV Outlet* (2004) 124 Cal.App.4th 1159, 1164–1165.)

" 'Unconscionability is ultimately a question of law, which we review de novo when no meaningful factual disputes exist as to the evidence.' [Citation.]" (*Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1562.)

As discussed below, Machuca merely showed some procedural unconscionability, without any substantive

unconscionability. Therefore, Machuca failed to meet his burden to establish his defense of unconscionability.

b. *Machuca's argument with respect to procedural unconscionability.*

Machuca is correct that procedural unconscionability exists when the stronger party drafts the contract and presents it to the weaker party on a " 'take-it-or-leave-it basis.' " *(Serafin*, *supra*, 235 Cal.App.4th at p. 179.) Here, the declaration of Grace Pacho, a payroll manager and human resources coordinator at Nationwide, indicates that Machuca was required to sign the Agreement as a condition of employment.

However, merely because an arbitration agreement is adhesive does not render it automatically unenforceable as unconscionable. (*Serafin*, *supra*, 235 Cal.App.4th at p. 179.) "[W]here the arbitration provisions presented in a contract of adhesion are highlighted for the employee, any procedural unconscionability is 'limited.' (*Roman*, *supra*, 172 Cal.App.4th at p. 1471 [limited procedural unfairness where the arbitration agreement 'was contained on the last page of a seven-page employment application, underneath the heading 'Please Read Carefully . . .' ']*.)*" (*Serafin*, *supra*, at p. 179.) For example, in *Serafin*, "the arbitration provisions were unquestionably highlighted for [the employee] in the two-page, freestanding document, relating solely to arbitration, that she received and signed." (*Serafin*, *supra*, 235 Cal.App.4th at p. 179.)

Similarly, in the instant case, the arbitration provisions were clearly highlighted for Machuca in a separate two-page document entitled "Nationwide Legal, LLC Acknowledgement and Agreement for Mandatory Binding Arbitration and Dispute Resolution" that he signed. Thus, the procedural

unconscionability of the contract of adhesion is limited. (*Serafin*, *supra*, 235 Cal.App.4th at p. 179.)

c. *Machuca's arguments with respect to substantive unconscionability.*

(1) *The failure to attach a copy of the AAA Rules to the Agreement.*

Machuca contends the Agreement is *substantively* unconscionable because Nationwide did not provide him with the AAA's then current Rules, nor did Nationwide advise him where to locate the Rules.

The argument is meritless because the failure to attach relevant rules to an arbitration agreement is an element of *procedural*, rather than substantive, unconscionability (*Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1406 [contract merely referenced Better Business Bureau arbitration rules without attaching them]); the failure to attach arbitration rules may give rise to procedural unconscionability based on surprise to the party opposing arbitration. (*Lane*, *supra*, 224 Cal.App.4th at p. 690.) In *Lane*, the failure to attach a copy of the relevant AAA rules did not render the agreement procedurally unconscionable because the arbitration rules referenced in the agreement were readily available on the Internet. (*Id*. at p. 691.) Here, as the trial court noted, "there [was] no representation that [Machuca] was incapable of finding the rules himself."

In any event, Machuca's argument with respect to Nationwide's failure to attach the AAA Rules to the Agreement is relevant only to the issue of *procedural* unconscionability—it has no bearing on the other essential element of *substantive* unconscionability.

(2) *The Agreement's attorney fee provision*.

Machuca's other argument with respect to substantive unconscionability relates to the Agreement's attorney fee provision.

In this regard, the Agreement states: "The fees of the arbitrator and all other costs that are unique to the arbitration process shall be paid by the Company. Otherwise, each party shall be solely responsible for paying their own costs for the arbitration including, but not limited to, their own attorneys' fees and expert witness fees. *However, if either party prevails on a statutory claim which affords the prevailing party their attorneys' fees or where there is a written agreement providing for such fees, the arbitrator may award reasonable attorneys' fees to the prevailing party*." (Italics added.)

Machuca contends this provision is substantively unconscionable because it limits his opportunity to seek attorney fees "only to those 'statutory claims' on which he prevails," and it precludes him from recovering attorney fees in the event he were to prevail solely on his common law claims (such as intentional infliction of emotional distress and wrongful termination) which were predicated on Nationwide's alleged statutory violations.

There is no merit to Machuca's claim the attorney fee provision improperly denies him the right to recover attorney fees on his common law claims. To reiterate the trial court's ruling: "Plaintiff's argument is not persuasive. This attorney fee provision tracks the language of [section] 1021, which provides for the recovery of attorneys' fees only if permitted by statute or contract. Plaintiff provides no support for the proposition that [his] common law claims would entitle him to attorneys' fees."

Nor has he provided any support for that proposition in his briefs on appeal.

In sum, Machuca failed to meet his burden to show the Agreement suffers from any degree of substantive unconscionability. Therefore, the trial court properly found unconscionability is not a defense to the enforcement of the Agreement.

Accordingly, the trial court properly granted Nationwide's motion to compel arbitration.

II. *Trial court properly granted Defendants' petition to confirm the award after denying Machuca's request that the award be vacated.*

In response to Defendants' petition to confirm the award, Machuca opposed the petition and requested that the award be vacated.[6] Machuca sought vacatur on the following grounds: (1) pursuant to section 1286.2, subdivision (a)(5), his rights were substantially prejudiced by the arbitrator's refusal to hear evidence material to the controversy, and (2) pursuant to section 1286.2, subdivision (a)(4), the arbitrator exceeded his powers by applying California evidence and civil procedure law, rather than the AAA Rules under which the parties agreed to arbitrate. The trial court rejected Machuca's arguments that the award should be vacated on either of these grounds. We now review those rulings.

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[6] "A response to a petition under this chapter may request the court to dismiss the petition or to confirm, correct or vacate the award." (§ 1285.2.)

1. *No merit to Machuca's contention the award should have been vacated because his rights were substantially prejudiced by the arbitrator's refusal to hear evidence material to the controversy*.

a. Machuca's argument with respect to the arbitrator's evidentiary rulings.

Machuca contends the arbitrator improperly excluded the bulk of his evidence, preventing him from presenting his case and resulting in summary judgment for the Defendants. Machuca specifies the arbitrator's rulings striking the following: (1) the declarations of two of his co-workers, Alberto Aguirre and Alex Terriquez, which were stricken on the ground the declarations did not comply with section 2015.5 [declarations must be signed under penalty of perjury];[7] (2) paragraphs 11 and 13 of Machuca's declaration, stricken because they contradicted his deposition testimony, as well as paragraphs 16 and 23 of his declaration, stricken as hearsay; (3) evidence of five other employment lawsuits filed against Nationwide (Exhibit K), stricken as irrelevant; and (4) portions of the deposition testimony of Alvarez and Dennis Quimpo, stricken as hearsay.

Machuca contends the excluded evidence was material to his case. For example, according to Machuca, the Aguirre declaration provided independent verification of his claim that Alvarez engaged in a pattern of anti-Mexican harassment. The Terriquez declaration substantiated Machuca's positive work performance, rebutting Nationwide's claim he was terminated

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[7] We note Machuca submitted two other declarations in opposition to summary judgment which were duly executed under penalty of perjury, namely, his own declaration and the declaration of his attorney.

due to poor performance. The deposition testimony of Alvarez and Quimpo described a work environment where managers' known racism went unchecked. The excluded portions of Machuca's declaration explained Alvarez's harassment of him, which was also noticed by his co-workers. Finally, the other litigation against Nationwide was relevant, particularly a 2012 lawsuit for national origin harassment and discrimination.[8]

b. *No merit to Machuca's argument; the arbitrator's exercise of his discretion to exclude objectionable evidence did not amount to a refusal to hear evidence material to the controversy.*

Rule 30 of the AAA Rules, incorporated by reference into the Agreement, states in relevant part: "The parties may offer such evidence as is *relevant and material* to the dispute and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute. . . . [¶] . . . [¶] *The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary*. The arbitrator may in his or her discretion direct the order of proof, bifurcate proceedings, *exclude cumulative or irrelevant testimony or other evidence*, and direct the parties to focus their presentations on issues the decision of

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[8] Contrary to Machuca's arguments, the arbitrator's evidentiary rulings did not eviscerate his case. As reflected in the declaration of Machuca's attorney, Kyle Todd, Machuca submitted extensive evidence in opposition to the summary judgment motion, including numerous deposition transcripts, as well as declarations, interrogatory responses, documents produced by Defendants, and other exhibits. The arbitrator sustained in part, and overruled in part, Defendants' objections, which eliminated only some of Machuca's opposing evidence.

which could dispose of all or part of the case." (Italics added.) Thus, the parties' Agreement vested the arbitrator with the power to exclude objectionable evidence.

The arbitrator did so. In connection with the motion for summary judgment, the arbitrator ruled on Nationwide's objections and disallowed portions of Machuca's proffered evidence. While Machuca contends the evidence which was excluded was material to his case and would have helped him prove his claims, Machuca has not argued that any of the evidentiary rulings was erroneous.

Rather, Machuca's theory is that the arbitrator exceeded his powers and erred in applying the inapplicable Code of Civil Procedure and the Evidence Code because AAA Rule 30 states "conformity to legal rules of evidence shall not be necessary." We note Rule 30 is consistent with California law, which provides that the arbitrator is not bound by the "rules of evidence and rules of judicial procedure." (§ 1282.2, subd. (d); accord, *Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 164 (*Evans*).) Contrary to Machuca's argument, AAA Rule 30 merely provides that the arbitrator is not constrained by the formal rules of evidence—but it does not require the arbitrator to disregard ordinary principles governing the admission of evidence. Further, an arbitrator has broad discretion in conducting the hearing and in ruling on the admission of evidence (*Evans*, *supra*, at p. 164), and an arbitrator's decisions cannot be judicially reviewed for errors of fact or law even if the error is apparent and causes substantial injustice. (*Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.* (2008) 44 Cal.4th 528, 534.)

Thus, the arbitrator had discretion under Rule 30 to exclude objectionable evidence and he was not precluded by Rule

30 from applying California statutory law in ruling on the objections. The arbitrator exercised his discretion to exclude portions of the evidence that Machuca submitted in opposition to summary judgment, and Machuca has not demonstrated that the arbitrator abused his discretion in sustaining any of Defendants' objections.

Therefore, there is no merit to Machuca's argument that the arbitrator substantially prejudiced his rights by refusing to hear evidence material to the controversy. (§ 1286.2, subd. (a)(5).) That provision is "a safety valve in private arbitration that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case." (*Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 439.) Here, the arbitrator simply made a series of evidentiary rulings, none of which has been shown to be improper. Thus, Machuca was not unfairly prevented from presenting his case.

2. *No merit to Machuca's argument the award should have been vacated because the arbitrator exceeded his powers in allowing Defendants to move for summary judgment*.

Finally, Machuca contends the trial court should have vacated the award because the arbitrator violated AAA Rule 27 by allowing Defendants to move for summary judgment without making any determination that "the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case."[9] The argument is meritless.

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[9] Rule 27, pertaining to dispositive motions, states: "The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case."

As a preliminary matter, the Agreement itself authorizes the filing of a motion for summary judgment, stating: "Each party shall be afforded the opportunity to bring a motion for summary judgment or summary adjudication in conjunction with the arbitration process."

Further, Machuca has not shown the arbitrator in fact violated Rule 27. Although Machuca contends the arbitrator was required to make a finding *on the record* that Defendants met their threshold under Rule 27, there is no support for the assertion that the arbitrator was obligated to make an express finding in that regard. We conclude that in entertaining the motion for summary judgment, the arbitrator implicitly found "substantial cause that the motion [was] likely to succeed and dispose of or narrow the issues in the case." (Rule 27.) Further, the fact the summary judgment motion ultimately was granted supports the arbitrator's implied finding that the motion was likely to succeed.

Also, it appears that at no time during the arbitration process did Machuca ever object to the arbitrator's proceeding with the motion for summary judgment. Rather, the first time Machuca argued the arbitrator improperly entertained the summary judgment motion without making the required finding under Rule 27 was in his opposition to the petition to confirm the award. Machuca's failure to raise this issue before the arbitrator amounts to a waiver. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 30 ["we cannot permit a party to sit on his rights, content in the knowledge that should he suffer an adverse decision, he could then raise the illegality issue in a motion to vacate the arbitrator's award"].)

For all these reasons, we reject Machuca's contention the arbitrator exceeded his powers in allowing the summary judgment motion to proceed.

DISPOSITION

The judgment confirming the arbitration award is affirmed. The parties shall bear their respective costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.