Filed 12/5/17 Los Angeles Thoracic and Cardiovascular Foundation v. Merrill Lynch, Pierce et al.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LOS ANGELES THORACIC AND CARDIOVASCULAR FOUNDATION, Plaintiff and Respondent, v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. et al., Defendants and Appellants.	B271229 (c/w B272227) (Los Angeles County Super. Ct. No. BC604260)

APPEAL from an order of the Superior Court of Los Angeles County. Elizabeth Allen White, Judge. Reversed and remanded with directions.

Norton Rose Fulbright US, LLP, Eric A. Herzog and Cristina C. Longoria for Defendant and Appellant Merrill Lynch, Pierce, Fenner & Smith Inc.

James Schaedler, in pro. per.; Price, Crooke, Gary & Hammers, Incorporated, and Stephen G. Hammers for Defendant and Appellant James Schaedler.

Cypress, LLP and Mark P. Lynch; Fiduciary Law Services, Inc., and Vatche J. Zetjian for Plaintiff and Respondent.

Defendants and appellants Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), and its employee James Schaedler (Schaedler) (collectively defendants) challenge a trial court order denying their petition to compel arbitration.

We conclude that the problematic portion of the arbitration agreement—the choice of law provision—can be severed from the otherwise enforceable arbitration agreement. We therefore reverse the trial court's order with directions to sever the choice of law provision from the arbitration agreement and enter a new order granting defendants' petition to compel arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Factual Background*

A. The Parties

This case stems from the handling of a trust account that Juanita S. Earley maintained with Banc of America Investment Services, Inc. (BAIS). Plaintiff and respondent Los Angeles Thoracic and Cardiovascular Foundation (LA Thoracic) is a charitable foundation that claims to be a residual beneficiary of Mrs. Earley's trust and her "successor in interest."

Merrill Lynch became BAIS's successor in interest after the two companies merged in 2009. Schaedler was an employee of BAIS and a financial advisor to Mrs. Earley.

B. <u>Mrs. Earley's BAIS Account; The Arbitration Agreement; The Choice of Law Provision</u>

On March 31, 2005, Mrs. Earley met with Schaedler and another BAIS employee regarding the opening of her BAIS account. After their discussion, Mrs. Earley signed a Brokerage Account Application (the BAIS Application) to open an investment account with BAIS. At the time Mrs. Earley signed the BAIS Application, she received a Customer Agreement, which included the terms and conditions associated with being a BAIS account holder. By signing the BAIS Application, Mrs. Earley certified that she had "received, read, underst[oo]d and agree[d] to the disclosures set forth in this application and the terms set forth in the separate Customer Agreement, and agree[d] to be bound by such terms and conditions as are currently in effect."

Mrs. Earley further certified that she "underst[oo]d that Section 16 on page 3 of the Customer Agreement contains a pre-dispute arbitration clause requiring all disputes under this agreement to be settled by binding arbitration" and that she had "received, read, underst[oo]d and agree[d] to such arbitration provisions."

Section 16 of the Customer Agreement is titled in bold letters, in a larger font than the text of that section, "Arbitration." It provides, in relevant part: "This agreement contains a predispute arbitration clause. By signing an arbitration agreement the parties agree as follows: [¶] *(a) All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided* *by the rules of the arbitration forum in which a claim is filed.* [¶] *(b) Arbitration awards are generally final and binding; a party's ability to have a court reverse or modify an arbitration award is very limited.* [¶] *(c) The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.* [¶] *(d) The arbitrators do not have to explain the reason(s) for their award.* [¶] *(e) The panel of arbitrations will typically include a minority of arbitrators who were or are affiliated with the securities industry.* [¶] *(f) The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible for arbitration may be brought in court.* [¶] *(g) The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this agreement.*

"All controversies between you and [BAIS] and each of their . . . employees . . . arising out of or concerning any o[f] your accounts . . . or breach of this or any other agreements between the parties . . . shall be binding by arbitration only before the National Association of Securities Dealers, Inc.[1]

"*The law of the state of New York will apply in all respects, including but not limited to determination of applicable statutes of and available remedies, except insofar as New York law is inconsistent with the arbitration code of the National Association*

---

[1] According to defendants' opening brief, the National Association of Securities Dealers, Inc. (NASD), is the predecessor to the Financial Industry Regulatory Authority (FINRA). Based upon the assumptions and arguments in the parties' briefs, it seems that the FINRA rules would govern the parties' arbitration proceeding.

of Securities Dealers, Inc., in which case the arbitration code will apply . . . . Any award entered in any such arbitration may be enforced and rendered to final judgment by any court having jurisdiction over the parties."

II. *Procedural Background*

On December 15, 2015, plaintiff filed its complaint against defendants. The complaint alleges three causes of action: financial elder abuse, vicarious liability, and negligent supervision.

On January 20, 2016, Merrill Lynch moved to compel arbitration. Schaedler joined in Merrill Lynch's petition.

Plaintiff opposed the petition, arguing, inter alia, that the arbitration agreement is unenforceable because it unlawfully deprives plaintiff of its statutory financial elder abuse claim due to the New York choice of law provision in the agreement.

After entertaining oral argument, the trial court denied the petition to compel arbitration, partly on the grounds that the case involved "unwaivable statutory rights" under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.).

Defendants timely appealed the trial court's order.

DISCUSSION

I. Standard of review

We review the trial court's order de novo. (*Crippen v. Central Valley RV Outlet, Inc.* (2004) 124 Cal.App.4th 1159, 1164.)

II. The trial court erred in refusing to sever the New York choice of law provision and then enforce the arbitration agreement

There is a strong public policy favoring the enforceability of arbitration agreements. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 96–97 (*Armendariz*); *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1204.) That said, we will not enforce an arbitration agreement that functions as an advance waiver of a claimant's statutory rights. (*Armendariz*, *supra*, at pp. 99–100; see also *Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 248–250; *Bickel v. Sunrise Assisted Living* (2012) 206 Cal.App.4th 1, 12–13 (*Bickel*).) Thus, while California strongly favors enforcement of choice of law provisions (*Harris v. Bingham McCutchen LLP* (2013) 214 Cal.App.4th 1399, 1404), we will not enforce such a provision if doing so would lead to the forfeiture of a party's statutory rights.

Enforcing the choice of law provision in the arbitration agreement here would do just that. The choice of law provision mandates that New York law govern the parties' dispute. Because, as defendants concede, New York does not provide the same heightened statutory remedies for the protection against elder abuse as does California, we will not enforce it.

In urging us to reverse, defendants argue that even though New York has not yet enacted a statute identical to California's elder abuse law, that does not foreclose an arbitrator from hearing and deciding claims based on theories of financial elder abuse. We disagree. Unlike California law, New York law does not adequately protect persons pursuing claims for financial elder abuse. (*Huggins v. Randolph* (2014) 991 N.Y.S.2d 735, 739–740.)

We similarly reject defendants' contention that finding the choice of law provision to be unenforceable would effectively create a rule that all arbitration agreements potentially enforceable against senior citizens must have chosen California law to govern. We only decide that, based upon the allegations and relevant documents in this case, the choice of law provision here is unenforceable.

Having found the choice of law provision unenforceable, we must next determine whether that provision can be severed from the arbitration agreement. "Generally speaking, when an arbitration agreement contains a single term in violation of public policy, that term will be severed and the rest of the arbitration agreement enforced." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 466; see also *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 658–660.) Because the choice of law provision can readily be separated from the parties' agreement to arbitrate, we agree with defendants that that term should be severed from the remainder of the agreement and the parties may proceed to arbitration under California law.[2]

---

[2] We are not convinced by LA Thoracic's contention at oral argument that this conclusion amounts to an improper reformation of the contract. It is well-established that we do not rewrite contracts. (*Series AGI West Linn of Appian Group Investors DE, LLC v. Eves* (2013) 217 Cal.App.4th 156, 164; *Armendariz*, *supra*, 24 Cal.4th at pp. 124–125 [courts cannot cure contracts by reformation or augmentation]; Civ. Code, § 1670.5 [allowing courts to sever unconscionable contractual provisions but not rewrite them].) By severing the offending choice of law provision, we are not rewriting the parties' contract. Rather, we are simply striking the unenforceable provision and making clear

LA Thoracic argues that severance is inappropriate because, pursuant to *Armendariz*, other portions of the arbitration agreement are unconscionable, rendering the entire arbitration agreement unenforceable. Assuming, without deciding, that *Armendariz* applies to this context,[3] we are not convinced.

Armendariz requires a right to adequate discovery, a written decision allowing limited judicial review, the ability to recover the types of relief that would be available in court, limited forum costs, and a neutral arbitrator. (*Armendariz*, *supra*, 24 Cal.4th at pp. 91, 102–103; see also *Abramson v. Juniper Networks, Inc.*, *supra*, 115 Cal.App.4th at pp. 653–653.) Nothing in the parties' arbitration agreement vitiates these requirements. (*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 956–957.) It follows that the agreement is not substantively unconscionable.[4]

---

that California law, the law that LA Thoracic seeks to have apply to this dispute, applies.

[3] The parties dispute whether the *Armendariz* factors apply outside the employment context.

[4] Both procedural and substantive unconscionability must be present before a court can refuse to enforce an arbitration provision based on unconscionability. (*Abramson v. Juniper Networks, Inc.*, *supra*, 115 Cal.App.4th at p. 655.) Because substantive unconscionability is absent here, we need not determine whether the arbitration agreement was also procedurally unconscionable.

DISPOSITION

The order is reversed. The trial court is directed to sever the New York choice of law provision from the arbitration agreement, making clear that California law, including the Elder Abuse Act, applies. The trial court shall then enter an order granting defendants' petition to compel arbitration. Defendants are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

______________________, Acting P. J.
ASHMANN-GERST

We concur:

__________________________, J.
CHAVEZ

__________________________, J.*
GOODMAN

---

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