Filed 8/4/17 Khaligh v. Superior Court CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

REY KHALIGH et al., Petitioners, v. THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, Respondent; CONSUMERTRACK, INC., Real Party in Interest.	B272388 (Los Angeles County Super. Ct. No. BC586457)

ORIGINAL PROCEEDING; petition for writ of mandate; Frederick C. Shaller, Judge. Petition granted.

LA Superlawyers and William W. Bloch for Petitioners.

No appearance for Respondent.

Gordon & Rees, Debra Ellwood Meppen, Alexis Amber and Don Willenburg for Real Party in Interest.

We reverse the order compelling Rey Khaligh and Laura Flores to arbitrate their claims against their former employer, ConsumerTrack, Inc. (CTI), because the arbitration provisions of their respective employment agreements are unenforceable.

BACKGROUND

Flores and Khaligh sued CTI, alleging unfair competition and violation of various Labor Code statutes, including: failure to pay required overtime; failure to furnish proper wage statements; and failure to provide meal and rest periods.[1] They sought damages, restitution, injunctive relief, civil penalties under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.), and attorney fees and costs.

---

[1] The operative complaint is the first amended complaint. Khaligh and Flores sought relief pursuant to Labor Code sections 201 [immediate payment of wages], 203 [penalty for tardy payment of wages postemployment], 210 [civil penalty for failure to pay wages], 221 [repayment of wages to employer], 225.5 [penalty for withholding wages], 226 [itemized statement], 226.3 [civil penalty for failure to provide itemized statement], 226.7 [meal/rest break], 510 [overtime], 512 [meal periods], 551 [one day's rest in seven days], 552 [maximum consecutive working days], 558 [civil penalty for violation of work hours/day statutes], 1194 [attorney's fees and costs awarded to employee in civil action to recover wages/overtime], 1197 [minimum wage], 1197.1 [penalty for paying less than minimum wage], and 1198 [maximum number of work hours].

CTI moved to compel arbitration based on the arbitration provisions in the employment agreements that Flores signed on February 1, 2013, and Khaligh signed on June 5, 2014.[2] Under the

[2] Flores's and Khaligh's agreements are substantively identical. Flores's agreement provides: "Dispute Resolution. All claims, disputes, controversies, or disagreements of any kind whatsoever ('claims'), including any claim arising out of or in connection with Employee's employment or the termination of Employee's employment, that may arise between Employee and CTI shall be submitted to final and binding arbitration, in accordance with the rules of the American Arbitration Association and shall take place in Los Angeles County. Claims covered by this arbitration provision include, but are not limited to the following: (1) alleged violations of federal, state, or local constitutions, statutes, regulations, or ordinances, including, but not limited to antidiscrimination and harassment laws; (2) allegations of a breach of a contractual obligation; and (3) alleged violations of public policy. The following are expressly excluded from this arbitration provision and are not covered by this Agreement: (I) claims related to workers' compensation or unemployment Insurance; (II) administrative claims filed with government agencies such as the Equal Employment Opportunity Commission (EEOC), Department of Fair Employment and Housing (DFEH), or the National Labor Relations Board (NLRB); and (III) claims that are expressly excluded by statu[t]e. In consideration for and as a material condition of Employee's employment with CTI, Employee agrees that final and binding arbitration is the exclusive means for resolving the claims outlined in this Agreement. However, this Agreement does not in any way alter the at-will status of Employee's employment. This Agreement is a waiver of all rights Employee may have to a civil court action on any dispute outlined in this Agreement. Accordingly, only an arbitrator, not a judge or jury, will decide the dispute, although the arbitrator has the authority to award any type of relief that could otherwise be awarded by a judge or jury. The fees and costs of the arbitration shall be borne equally by the parties. Notwithstanding

heading of "Dispute Resolution" (underlining omitted), both provisions require final and binding arbitration, with certain exceptions, of all claims between each employee and CTI pursuant to American Arbitration Association rules. Employees may file certain administrative claims with federal or state agencies. CTI is permitted to file an action in court "for damages" and "equitable relief" to pursue three types of claims against the employees: (1) Disclosure of CTI's proprietary information; (2) Violation of the covenant not to solicit; and (3) Violation of the noncompete clause.

The dispute resolution provisions further provide that "fees and costs of the arbitration shall be borne equally by the parties."

The arbitration provisions are part of the preprinted employment agreements. CTI gave Khaligh, a candidate for a staff position in its media department, one day, and gave Flores, a candidate for a staff position in Human Resources, two days, to sign the agreement and accept the job offers.

In opposition to the motion to compel arbitration, Khaligh stated in her declaration: "I received the offer on June 4, 2014 to work in the media department, and by its terms the offer expired the next day. I was told that until I signed the offer I was not an employee, and I felt pressured to immediately sign this offer, without having any opportunity to show it to someone, nor could I negotiate any terms in that contract. Nobody explained any of the

---

the foregoing, nothing about this Section 13 shall prohibit or otherwise affect the rights of CTI to enforce the terms of Sections 5 [covenant not to solicit or service CTI's suppliers, customers, vendors, or marketing partners], 6 [covenant against use of information to compete against CTI], and Exhibit C [confidential information and nondisclosure agreement] by suit for damages or the ability of CTI to seek equitable relief. To the extent this Section is contradictory or otherwise inconsistent with Sections 5, 6, and Exhibit C, those sections shall govern."

provisions of the contract to me. [¶] . . . A single day would not have been enough time for me to consult a lawyer (nor did I have a lawyer at that time, nor did I have any appreciation for what was in the document as far as my rights were). I had no idea what the arbitration provisions meant, nor understand I was giving up a right to trial by jury, while CTI kept the rights to go to court to sue me. I had the economic pressures of needing the job, and at the time it looked like a good opportunity."

Flores stated in her declaration: "I received the offer on January 30, 2014 to work in [Human Resources], and by its terms the offer expired February 1, 2013. I was told that until I signed the offer I was not an employee, and I felt pressured to immediately sign this offer, without having any opportunity to show it to someone, nor could I negotiate any terms in that contract. Nobody explained any of the provisions of the contract to me. [¶] . . . The time between getting the contract and the deadline, two days, would not have been enough time for me to consult a lawyer (nor did I have a lawyer at that time, nor did I have any appreciation for what was in the document as far as my rights were). I had no idea what the arbitration provisions meant, nor understand I was giving up a right to trial by jury, while CTI kept the rights to go to court to sue me. I had the economic pressures of needing the job, and at the time it looked like a good opportunity."

Respondent court granted the motion to compel arbitration, but conditioned its order on CTI's paying all arbitration costs. Khaligh and Flores timely filed their joint petition for writ of mandate. We requested opposition to the petition and notified the parties of our intention to issue a peremptory writ. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.)

DISCUSSION

Khaligh and Flores contend that because the arbitration provisions are both procedurally and substantively unconscionable, the trial court erred in ordering the matters to arbitration. We agree.

Because the facts are not disputed, we review the court's ruling de novo. (See *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*); *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 82 (*Carmona*).)

A court will not compel arbitration where the agreement is both procedurally and substantively unconscionable. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243 (*Baltazar*); *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 115 (*Armendariz*).) An agreement is procedurally unconscionable based on either of two factors: oppression or surprise. (*Baltazar*, *supra*, 62 Cal.4th at p. 1243.) Overly harsh or one-sided terms, unequal bargaining power, and lack of negotiation and meaningful choice indicate oppression. (*Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 218 (*Penilla*); see also *Armendariz*, *supra*, 24 Cal.4th at p. 113.) Unfair surprise results from misleading bargaining conduct or other circumstances indicating that a party's consent was not an informed choice. (*Pinnacle*, *supra*, 55 Cal.4th at p. 246; *Penilla*, *supra*, 3 Cal.App.5th at p. 216.)

Contracts of adhesion, the California Supreme Court has explained, " ' "bear within them the clear danger of oppression and overreaching." ' " (*Baltazar*, *supra*, 62 Cal.4th at p. 1244.) Courts "must be 'particularly attuned' to this danger in the employment setting, where 'economic pressure exerted by employers on all but the most sought-after employees may be particularly acute.' [Citation.]" (*Ibid.*) Thus, where an employer requires an employee with unequal bargaining power to accept

employment on condition that the employee sign an agreement containing an arbitration provision on a "take-it-or-leave-it basis," the arbitration provision is procedurally unconscionable. (*Armendariz*, *supra*, 24 Cal.4th at p. 115; *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 114 (*Martinez*).)

An arbitration provision is substantively unconscionable when the terms " 'are "unreasonably favorable to the more powerful party." ' " (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911 (*Sanchez*).) The " 'paramount consideration is mutuality.' " (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1287.) Thus, courts have found substantively unconscionable provisions that allow an employer the option of seeking damages or injunctive relief in court without providing the same option for the employee. (*Sanchez*, *supra*, 61 Cal.4th at p. 921; *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1147-1148.) A provision that requires an employee to share the fees and costs of arbitration related to unwaivable statutory rights is also substantively unconscionable. (*Armendariz*, *supra*, 24 Cal.4th at pp. 111-112.)

Courts evaluate procedural and substantive unconscionability based on a " 'sliding scale' ": "[T]he 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.)

I.

Here, CTI offered employment to the petitioners on a take-it-or-leave-it basis with only a short time to decide whether to sign the agreement. CTI does not claim that the agreements were negotiable or that the petitioners had the bargaining power to change the terms of their employment: They were both candidates for staff positions, not highly sought-after job applicants.

Under these circumstances, the arbitration agreements are procedurally unconscionable. (See *Martinez*, *supra*, 118 Cal.App.4th 114; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1534.)

II.

The arbitration provisions are substantively unconscionable in three important regards. They: (1) require employees to share arbitration fees and costs on their unwaivable statutory claims; (2) allow the employer to seek damages in court while barring employees from doing so; and (3) allow the employer, but not the employee, to seek a permanent injunction in court.

Khaligh and Flores sought relief under the Labor Code for violation of pay, meal, rest break, and wage statement requirements. (Lab. Code, §§ 201, 203, 225.5, 226.3, 226.7, 512.) These are unwaivable statutory rights. (See *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, 148-149.) An agreement that requires an employee to arbitrate unwaivable statutory rights cannot generally require the employee to bear expenses "that the employee would not be required to bear if he or she were free to bring the action in court." (*Armendariz*, *supra*, 24 Cal.4th at pp. 110-111; accord, *Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 254.) Here, because the challenged arbitration agreements require that petitioners share the fees and costs of arbitrating such claims, this provision is substantively unconscionable. (See *Armendariz*, *supra*, 24 Cal.4th at pp. 111-112.)

CTI contends that its offer to pay the fees cures the impropriety and, in any case, the AAA rules, which the parties agreed would apply, provide that the employer pay all the costs of arbitration except the employee's $200 filing fee. Offering to pay the fees after a dispute arises, however, does not cure the improper

cost-sharing provision. (See *Martinez*, *supra*, 118 Cal.App.4th at p. 116; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 181 (*Mercuro*).) Nor does the AAA rule that requires the employer to pay the cost of arbitration cure the problem because the face of an agreement requiring cost sharing is likely to discourage an employee from asserting his or her rights, and is therefore unconscionable. (See *Armendariz*, *supra*, 24 Cal.4th at pp. 110-111.)

Also weighing in favor of substantive unconscionability is the different treatment of claims the parties would most likely assert. The agreements allow the employer to go to court to seek damages and equitable relief to vindicate the types of claims this employer would likely assert. In particular, the arbitration clauses gave CTI the option to seek damages where it claims that an employee violated the non-compete, non-solicitation, confidentiality, or nondisclosure covenants. The employees, by contrast, were required to arbitrate the claims they would most likely assert, namely, Labor Code violations. This is a classic case of substantive unconscionability. (See, e.g., *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 248-249 (*Carbajal*); *Mercuro*, *supra*, 96 Cal.App.4th at p. 176.)

The agreement also gives the employer the option to seek a permanent injunction for violation of non-compete, non-solicitation, confidentiality, or nondisclosure covenants while the employee is prohibited from seeking injunctive relief in court, for example, under PAGA.

CTI cites two cases holding that permanent injunctive relief is available as a remedy for the misappropriation of trade secrets. (See *DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864; *Dairy Dale Co. v. Azevedo* (1931) 211 Cal. 344.) Although true, it is irrelevant: Injunctive relief is available in arbitration. (*O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 278;

Mesa Shopping Center-East, LLC v. O Hill (2014) 232 Cal.App.4th 890, 901-902, fn. 5.) CTI does not, however, cite any case that held that an arbitration carve-out for damages and injunctive relief regarding claims relating to trade secrets or breaches of confidentiality was not unconscionable. Indeed, many California courts have held that such a carve-out renders the arbitration provision unconscionable. (*Carbajal*, *supra*, 245 Cal.App.4th at p. 249; *Carmona*, *supra*, 226 Cal.App.4th at p. 87; *Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal.App.4th 619, 634, 639-640; *Martinez*, *supra*, 118 Cal.App.4th at p. 115.)

CTI contends, however, that in an appropriate case an employer is permitted to carve out claims that it may vindicate in court despite the employee being restricted to arbitration of his or her claims. CTI relies on a statement in *Armendariz* that carve-outs may be permitted when an employer has a "justification grounded in something other than the employer's desire to maximize its advantage based on the perceived superiority of the judicial forum." (*Armendariz*, *supra*, 24 Cal.4th at p. 120.) CTI argues that it has such a justification in this case because such relief is crucial when the employee breaches a confidentiality agreement. We disagree.

" '[A] contract can provide a "margin of safety" that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable. [Citation.] However, unless the "business realities" that create the special need for such an advantage are explained in the contract itself, . . . it must be factually established.' " (*Armendariz*, *supra*, 24 Cal.4th at p. 117, quoting *Stirlen v. Supercuts, Inc.*, *supra*, 51 Cal.App.4th at p. 1536.) CTI offers no facts to support the requisite business reality or special need for its one-sided carve-out in this case.

CTI also defends its reservation of carve-out rights by pointing out that it exempted certain employee claims from arbitration: "(I) claims related to workers' compensation or unemployment insurance; (II) administrative claims filed with government agencies such as the Equal Employment Opportunity Commission (EEOC), Department of Fair Employment and Housing (DFEH), or the National Labor Relations Board (NLRB); and (III) claims that are expressly excluded by statu[t]e." These exemptions do nothing to ensure mutuality. Workers' compensation, unemployment benefits, EEOC claims, and DFEH actions come within completely separate adjudicatory systems dealing with claims that are not arbitrable. (*Mercuro*, *supra*, 96 Cal.App.4th at p. 176; see Lab. Code, § 5300 et seq.; Unemp. Ins. Code, § 1951 et seq.) Providing that nonarbitrable claims are not encompassed within the arbitration agreement does not justify the carve-out for the types of claims that CTI would likely pursue against the employees.

III.

For the foregoing reasons, the arbitration agreements are both procedurally and substantively unconscionable. Where an arbitration agreement includes only one substantively unconscionable term, the court may excise that term and enforce the remainder of the arbitration agreement. However, severance does not save an arbitration agreement which contains more than one unconscionable term. (*Little v. Auto Stiegler, Inc.*, *supra*, 29 Cal.4th at pp. 1071–1075; *Armendariz*, *supra*, 24 Cal.4th at pp. 124–125; *Penilla*, *supra*, 3 Cal.App.5th at p. 223; *Samaniego v. Empire Today, LLC, supra,* 205 Cal.App.4th at p. 1149; *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 826.) Where, as here the arbitration provision contains more than one unconscionable term, the arbitration clause is not enforceable.

As there is not a plain, speedy, and adequate remedy at law, and in view of the fact that the issuance of an alternative writ would add nothing to the presentation already made, we deem this to be a proper case for the issuance of a peremptory writ of mandate "in the first instance." (Code Civ. Proc., § 1088; *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1237-1238; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1240-1241.)[3]

[3] Having determined that the agreements are unconscionable and the arbitration provisions are unenforceable, we do not address Flores and Khaligh's contentions regarding PAGA.

DISPOSITION

THEREFORE, let a peremptory writ issue, commanding respondent superior court to vacate its order of April 16, 2016 (granting the motion to compel arbitration), and to issue a new and different order denying same in Los Angeles Superior Court case No. BC586457, titled *Rey Khaligh et al. v. ConsumerTrack, Inc.*

The parties shall bear their own costs in these writ proceedings.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.