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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

PAUL BARRIS, Plaintiff and Respondent, v. MITCHELL PLETCHER et al., Defendants and Appellants.	B259129 (Los Angeles County Super. Ct. No. BC520643)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Robert L. Hess, Judge. Affirmed.

Herrera & Associates, P.C., Alex H. Herrera for Plaintiff and Respondent.

Long & Delis, T. Patrick Long, Warren B. Campbell for Defendants and Appellants.

INTRODUCTION

Defendants, Mitchell Pletcher and Mitchell Anthony Productions, LLC (the production company) appeal from an order denying their motion to compel arbitration. (Code Civ. Proc., § 1294, subd. (a) [an order denying a motion to compel arbitration is directly appealable.].) Plaintiff, Paul Barris was employed by the production company as a featured dancer for a theatrical show. He filed a complaint against defendants and others for various causes of action, including violations of the Fair Employment and Housing Act. Defendants moved to compel arbitration, citing an arbitration agreement signed by plaintiff and the production company. Plaintiff opposed the motion on various grounds, including the ground that the agreement was unconscionable. The trial court denied the defendants' motion. In the appeal, defendants contend the agreement is not unconscionable and should be enforced. In the alternative, defendants contend that if the clause providing for payment of arbitration costs is unconscionable, the trial court's failure to sever the unconscionable clause was an abuse of discretion. We affirm the order denying the motion to compel arbitration.

BACKGROUND

A. Plaintiff's Complaint

In a verified complaint filed on September 9, 2013, plaintiff alleges the following. Mr. Pletcher resides in Irvine, California. He is the sole shareholder, director, and officer of the production company, a California corporation based in Irvine. Mr. Pletcher is the sole shareholder, director, and officer of Concord Investment Counsel, Inc., a California corporation.

Plaintiff was hired by Mr. Pletcher for the position of featured dancer in a musical theater production called "Beautiful" in Beverly Hills, California. Mr. Pletcher is the owner and producer of the musical. Plaintiff and the production company entered into a written agreement, called "Independent Contractor's Agreement" (agreement) concerning

plaintiff's services and compensation, which Mr.Pletcher signed on behalf of the production company. Defendants made misrepresentations regarding the production team's experience and false promises regarding compensation and schedules. Defendants breached their obligations, including promises regarding compensation and cast position. Mr. Pletcher sexually harassed female cast members which plaintiff was forced to witness. Defendants created a hostile work environment for this to occur. Plaintiff complained to defendants about the sexual harassment toward employees. Mr. Pletcher sent an email to all cast members impugning plaintiff's character.

Plaintiff alleges numerous causes of action against defendants, including: libel per se; false light; fraud; constructive fraud; conspiracy to defraud; intentional and negligent misrepresentation; intentional interference with economic advantage; written and oral contract breach; breach of the implied covenant of good faith and fair dealing; violations of the Fair Employment and Housing Act (disparate impact, failure to prevent harassment and discrimination, and hostile work environment); infliction of intentional emotional distress; intentional misclassification as an independent contractor; and unfair business practices in violation of Business and Professions Code section 17200. Plaintiff alleged the agreement contained an arbitration clause. He alleged the cause of action for breach of written contract was outside the scope of the arbitration clause. Further, plaintiff objected to the arbitration clause on the ground it was unconscionable procedurally, due to inequality in bargaining power, and unconscionable substantively, due to the requirement plaintiff arbitrate in expensive federal arbitration procedures which plaintiff could not afford.

B. Motion to Compel Arbitration

1. Defendants' Motion

On June 3, 2014, Mr. Pletcher filed a motion to compel arbitration and stay the action. The production company joined the motion. In a memorandum of points and authorities, Mr. Pletcher cited to the agreement, which contains an arbitration provision: " 'In the event of *any dispute arising under or involving any provision of this Agreement or any dispute regarding claims involving unlawful discrimination and/or unlawful harassment, not arising out of the termination of employment, or the termination of employment* (with the exception of . . . any wage and hour matter within the jurisdiction of the California Labor Commissioner), *contractor* [plaintiff] *and the Company agree to submit any such dispute to binding arbitration* pursuant to the provisions of the Federal Arbitration Act, 9 U.S.C. section 1, et. Seq. [sic], if applicable, or the provisions of Title of Part III [sic] of the California Code of Civil Procedure, commencing at Section 1280 et. seq. . . . if the Federal Arbitration Act does not apply to contractor's employment . . . .'" (Italics added by defendants.) The provision further provides: "Contractor and the company agree that arbitration shall be the exclusive forum for resolving all disputes arising out of or involving the contractor's employment with the Company or the termination of that employment (with the exception of . . . any wage and hour matter within the jurisdiction of the California Labor Commissioner[.]" "The contractor and the Company shall each bear their own costs for legal representation at any such arbitration and the cost of the arbitrator, court reporter, if any, and any incidental costs of arbitration."

Under the agreement, plaintiff had the position of featured dancer. He agreed to participate in rehearsals and performances of the stage show. The agreement provided the work week would be determined by the director but would generally be five days a week, with potential for six to seven day weeks. Compensation was $200 per day for each rehearsal day and $250 per performance or, if there were two performances in one

day, $150 per performance. "Beautiful" would be produced at the Saban Theater, the estimated date for the first performance was April 12, 2013, and the show would run for 12 weeks.

Mr. Pletcher contended that under both state and federal law, the arbitration provision should be enforced as to all of plaintiff's claims. He contended that, since all claims arose out of the agreement, none are severable.

In a declaration in support of the motion to compel arbitration, Mr. Pletcher declared he was an investment manager. He was employed by the production company as the "President, Producer, and Director, for the building of the stage show Beautiful." The production company was funded entirely by Mr. Pletcher and a corporation owned by Mr. Pletcher. Plaintiff and the production company entered into the agreement on January 7, 2013. Mr. Pletcher warned plaintiff the project was a risky venture, few musicals ever make it to production, and there was no guarantee his services would be needed. In February 2013, the Saban Theater was given a $100,000 deposit to secure the theater as a venue for the project. The production company spent and lost $400,000 on the venture.

2. Plaintiff's Opposition

On August 6, 2014, plaintiff filed his opposition. In a memorandum of points and authorities, plaintiff argued the arbitration provision is unconscionable, defendants waived the right to arbitrate, the agreement is void and against public policy, plaintiff is not subject to the arbitration clause, claims are not subject to arbitration, and/or, in the alternative, the independent claims should be severed whereby no stay is necessary. He contended the provision was procedurally unconscionable in that it was a standardized contract drafted by Mr. Pletcher, it was presented on a take-it-or-leave-it basis, there were no negotiations regarding the terms of the agreement, the defendants refused to hire plaintiff without plaintiff first agreeing to sign the agreement, and defendants had overwhelming bargaining power. Attached to the memorandum of points and authorities

were Independent Contractor's Agreements between the production company and three other cast members, Keith Somers, Brittany O'Connor, and Jessica Prince, that were identical to plaintiff's agreement except for the provisions concerning the cast member's role in the production and compensation. Plaintiff argued the agreement is substantively unconscionable because it produces an arbitrator proposed by defendants, the use of JAMS or AAA is precluded, and arbitration costs are apportioned to the employee without regard to the merits of the claim, which prices plaintiff out of the dispute resolution process.

Plaintiff submitted a declaration in support of his opposition to the motion to arbitrate in which he declared: "As a condition of my employment, Mr. Pletcher forced me, and every cast member, to sign an Independent Contractor Agreement. Mr. Pletcher did not allow for any negotiations, and presented the agreement on a 'take it or leave it' basis. The [agreement] was drafted entirely by Mr. Pletcher[,] . . . Mr. Pletcher used the same agreement for the entire cast, regardless of the role. The process of signing the agreement and agreeing to the terms presented were dictator like in that Defendants had overwhelming bargaining power, and I had none. I was left with no choice but to either accept it as is, or not get the job." During his 18-year career as a professional dancer, plaintiff was featured on television programs and worked as a dancer or choreographer with celebrities. The agreement provided rehearsals would begin January 21, 2013 and run for 12 weeks and performances would begin April 12, 2013 and run for 11 weeks. When plaintiff signed on to the production he "cleared [his] schedule" for the first month of performances. He booked other work for himself that did not conflict with the original schedule. During rehearsals, it became apparent that Mr. Pletcher had no experience in the production of theater. Although Mr. Pletcher did not know what he was doing, he oversaw the script and creative aspects of the show himself instead of hiring professionals. Mr. Pletcher constantly changed the script, musical numbers, and choreography. Mr. Pletcher's sole concept for the show was to plagiarize the film "Burlesque." Mr. Pletcher changed the opening date, so that the performances now conflicted with other work plaintiff had booked. Subsequently, Mr. Pletcher changed the

opening date again. Plaintiff lost out on other jobs because he cleared his schedule in order to be available for work on this production. Mr. Pletcher told plaintiff that, in February 2013, he secured the Saban Theater for the show. In March 2013, Mr. Pletcher began to split up the rehearsal days by gender of the cast members, with the result plaintiff was scheduled for fewer rehearsal days per week.

Plaintiff's attorney submitted a declaration declaring that, in May 2013, he informed Mr. Pletcher that plaintiff was willing to arbitrate his claims using JAMS because JAMS uses a fee waiver protocol, which "would make arbitration possible." If plaintiff qualified for a fee waiver, the costs of arbitration would shift to Mr. Pletcher. Mr. Pletcher rejected using JAMS.

Also included in the motion papers was a November 26, 2013 minute order in *Somers v. Pletcher et al,* Superior Court No. BC507823 ("*Somers*"), reflecting a hearing and ruling, by Honorable Robert L. Hess, on a motion by defendants to compel arbitration. The minute order states: "The Court rules as follows: [para.] The arbitration agreement is procedurally unconscionable as it is presented on a take it or leave it basis. [para.] The agreement is also substantially unconscionable because it does not provide for discovery and it requires each party to bear one-half the costs of arbitration without shifting. [para.] The motion is denied."

3. Defendants' Reply to Plaintiff's Opposition

In a reply memorandum of points and authorities, defendants contended plaintiff failed to demonstrate that: the agreement was sufficiently procedurally or substantively unconscionable to prevent enforcement of the arbitration agreement; any waiver of the right to arbitrate occurred; the agreement is void or against public policy; or any issues are severable. In a single sentence, without argument, defendants asked the court to sever

those portions, if any, that the court found unconscionable and enforce the rest of the agreement pursuant to Civil Code, section 1670.5.[1]

In a supplemental declaration, Mr. Pletcher declared he formed the production company in 2012. It was capitalized with $500,000 through debt instruments sold to Mr. Pletcher and other entities. He wrote the musical that the production company attempted to produce in 2013. He had never put on a musical before. He had "virtually no negotiating power with experienced dancers and actors." Plaintiff told Mr. Pletcher that plaintiff's agent had told plaintiff to have an arbitration provision put into his contract. Plaintiff rejected Mr. Pletcher's offer of a position as an ensemble dancer. Plaintiff stated he had lots of jobs available and would only do the show if he could work around his busy schedule and be paid more as a featured dancer. Moreover, plaintiff stated he wanted to be employed as an independent contractor, as he could not commit to be an employee with all the other work he did and he preferred to pay his own taxes. Mr. Pletcher agreed and prepared a contract summarizing the terms plaintiff wanted. Plaintiff and Mr. Pletcher went over the arbitration provision they added to the agreement, and plaintiff signed the agreement.

C. Order Denying Motion to Compel Arbitration

On August 29, 2014, a hearing was held on the motion to compel arbitration. Judge Hess presided. The text of the minute order states in its entirety: "DEFENDANTS [sic] NOTICE OF MOTION TO COMPEL ARBITRATION AND STAY ACTION; [para.] The cause is called for hearing. [para.] The motion is denied on the same basis as the prior motions." There was no court reporter.

The prior motions the court apparently referred to were Mr. Pletcher's motions to

[1] Civil Code, section 1670.5 provides: "(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

compel arbitration in *Somers*, and *O'Connor v. Pletcher*, Superior Court no. BC517543 ("*O'Connor*"). This case, *Somers*, and *O'Connor* all involve the same arbitration agreement and were brought by cast members against Mr. Pletcher in connection with the same production. Judge Hess made the rulings in each case.[2] In each of the two prior cases, Judge Hess ruled that the arbitration agreement was procedurally unconscionable because it was presented on a take it or leave it basis and substantially unconscionable because it did not provide for discovery and required each party to bear one-half the costs of arbitration without cost-shifting.[3] In *O'Connor*, Judge Hess also found the requirement the plaintiff must pay her own attorney fees was in violation of the Fair Employment and Housing Act and was substantively unconscionable. (*Ibid.*)

DISCUSSION

A. Adequacy of the Record

Defendants failed to provide a reporter's transcript or suitable substitute (Cal. Rules of Court, rule 8.137[4] [settled statement][5]) of the hearing on the motion to compel

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[2] Defendants acknowledge that the court referred to the *Somers* ruling, and plaintiff does not disagree.

[3] In *O'Connor*, the trial court specifically found that the arbitration provision was presented to the plaintiff as a condition of her employment, Mr. Pletcher had superior bargaining power, Mr. Pletcher was the one who wanted the arbitration provision included in the agreement in order to protect himself, and the cost allocation provision violated the Fair Employment and Housing Act, which alone, was sufficient to find substantative unconscionability. Mr. Pletcher acknowledged at oral argument that he had drafted the arbitration provision, which he took from other agreements he had previously used, and tendered it to every cast member at the same time.

[4] Hereinafter, all references to rules refer to the California Rules of Court.

arbitration. A party challenging a judgment or order has the burden of showing reversible error by an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.) In the absence of an adequate record on appeal, the judgment is presumed correct and must be affirmed. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *Ballard v. Uribe, supra*, 41 Cal.3d at pp. 574-575.)

We provided the parties an opportunity to brief the issue of the adequacy of the record. Defendants responded, explaining "[t]he only oral proceedings were perfunctory arguments on the written motion. No evidence was submitted or taken at the oral hearing. The only submissions to the trial court were the papers filed in support of and in opposition to the motion to compel arbitration." Plaintiff did not brief this issue.

We conclude the record is adequate to show whether or not there is reversible error. The apparent reference to the *Somers* and *O'Connor* rulings renders the minute order in this case a sufficient record of the court's ruling. All the papers filed on the motion that were before the court at the hearing are contained in the record. In these circumstances, although lacking a reporter's transcript or settled statement, the record is minimally sufficient for us to be able to review for substantial evidence the court's resolution, express or implied, of the disputed facts necessary to support the legal determination that the arbitration agreement was unconscionable. (*Chin v. Advanced Fresh Concepts Franchise Corp*. (2011) 194 Cal.App.4th 704, 708; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527 fn. 2.) " '[I]n the absence of indications to the contrary, a general finding includes a finding of all the special facts necessary to sustain it.' [Citations.]" (*Albonico v. Madera Irrigation Dist*. (1960) 53 Cal.2d 735, 741.)

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5 Rule 8.137(b)(1) provides that an appellant intending to proceed by settled statement must prepare "a condensed narrative of the oral proceedings" for settlement by the trial judge.

B. Legal Standards

Both state and federal laws favor enforcement of valid arbitration agreements. (*Armendariz* (2000) 24 Cal.4th at 83, 97 (*Amendariz*).) However, courts will not enforce arbitration provisions that are unconscionable or contrary to public policy. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (U.S.), LLC* (2012) 55 Cal.4th 223, 247 (*Pinnacle*); *Armendariz, supra,* 24 Cal.4th at p. 114.) The party opposing arbitration, in this case plaintiff, bears the burden of proving that an arbitration agreement is unenforceable based on unconscionability. (*Sanchez v. Valencia Holding Co. LLC* (2015) 61 Cal.4th 899, 911 (*Sanchez*); *Pinnacle, supra,* 55 Cal.4th at p. 247.)

"Under California law, courts may refuse to enforce any contract found 'to have been unconscionable at the time it was made,' or may 'limit the application of any unconscionable clause.' Cal. Civ. Code Ann. § 1670.5(a) (West 1985)." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___, ___ [131 S.Ct. 1740, 1745-1746].)

" '"One common formulation of unconscionability is that it refers to ' "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."' [Citation.] As that formulation implicitly recognizes, the doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results."' [*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1133 (*Sonic II*).] [para.] "'The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." [Citation.] But they need not be present in the same degree. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." [Citations.] In other words, 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].) Courts may find a contract as a whole 'or any clause of the contract' to be unconscionable. (Civ. Code, § 1670.5, subd. (a).) [para.] As we stated in *Sonic II*: 'The unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as " ' "overly harsh"" (*Stirlen v. Supercuts, Inc.*[, *supra*, 51 Cal.App.4th at p. 1532]), " 'unduly oppressive'" (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925 . . .), " 'so one-sided as to "shock the conscience"" (*Pinnacle*[, *supra*, 55 Cal.4th at p. 246]), or 'unfairly one-sided' (*Little [v. Auto Stiegler, Inc.* (2003)] 29 Cal.4th [1064,] 1071 . . .). All of these formulations point to the central idea that unconscionability doctrine is concerned not with "a simple old-fashioned bad bargain" [citation.], but with terms that are "unreasonably favorable to the more powerful party" [citation]. These include "terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction." [Citation.]' (*Sonic II, supra*, 57 Cal.4th at p. 1145.) . . . [para.] . . . The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." (*Sanchez, supra*, 61 Cal.4th at pp. 910-911.)

" 'When the weaker party is presented the clause and told to "take it or leave it" without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present.' [Citations.]" (*McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 91; accord, *Sanchez*, 61 Cal.4th at p. 915.)

"Unconscionability is ultimately a question of law, which we review de novo when no meaningful factual disputes exist as to the evidence. . . . We review the court's resolution of disputed facts for substantial evidence. . . . When the trial court makes no

express findings, we infer that it made every implied factual finding necessary to support its order and review those implied findings for substantial evidence." (*Chin v. Advanced Fresh Concepts Franchise Corp*., *supra*, 194 Cal.App.4th at p. 708.) "When the validity of an arbitration clause turns on a factual determination[,] '[t]he standard on appeal is whether there is substantial evidence to support the trial court's finding.' [Citation.]" (*Stirlen v. Supercuts, Inc.*, *supra*, 51 Cal.App.4th at p. 1527 fn. 2.)

C. Fair Employment and Housing Act Claims and Arbitration

"It is indisputable that an employment contract that required employees to waive their rights under the [Fair Employment and Housing Act] to redress sexual harassment or discrimination would be contrary to public policy and unlawful. [para.] . . . "[A]n arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the [Fair Employment and Housing Act]." (*Armendariz, supra,* at pp. 100-101; accord, *Ellis v. U.S. Security Associates* (2014) 224 Cal.App.4th 1213, 1220-1221.)

In the context of Fair Employment and Housing Act claims, our Supreme Court required certain protections to prevent such waiver: the arbitration agreement may not limit the damages normally available under the statute (*Armendariz, supra*, 24 Cal.4th at p. 103); there must be discovery sufficient to adequately arbitrate the employee's statutory claim (*id.* at p. 106); there must be a written arbitration decision and judicial review "'sufficient to ensure the arbitrators comply with the requirements of [the] statute'" (*ibid.*); and the employer must "pay all types of costs that are unique to arbitration" (*id.* at p. 113). (Accord, *Sonic II, supra*, 57 Cal.4th at p. 1130; *Little v. Auto Stiegler, Inc.* (2003) 29 Cal. 4th 1064, 107.)

Here, the arbitration provision applies to Fair Employment and Housing Act claims.[6] The requirement that plaintiff and the production company shall "bear their own costs for legal representation at any such arbitration and the cost of the arbitrator, court reporter, if any, and any incidental costs of arbitration" abrogates plaintiff's right under the Fair Employment and Housing Act to have the employer pay all costs and fees that are unique to arbitration. This is a violation of public policy as a matter of law. (*Armendariz*, *supra*, 24 Cal.4th at pp. 103, 113; see *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1087.)

To the extent defendants contend that the Fair Employment and Housing Act does not apply because plaintiff is an independent contractor, not an employee, based on plaintiff's request and his label in the agreement, we disagree with the contention. "The determination of employee or independent-contractor status is one of fact if dependent upon the resolution of disputed evidence or inferences[.]" (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 348.) The trial court's decision "must be upheld if substantially supported. . . . If the evidence is undisputed, the question becomes one of law[,] but deference to the [trial court's] view is appropriate. The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*Ibid*.) Employee, within the meaning of the Fair Employment and Housing Act, is defined as "[a]ny individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written. [para.] (1) Employee does not include an independent contractor as defined in Labor Code section 3353." (2 CCR 11008(b)) Labor Code section 3353 provides, " ' Independent contractor' means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." Terms of the agreement and plaintiff's declaration indicate defendants set plaintiff's

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[6] As noted, the arbitration agreement provides "arbitration shall be the exclusive forum for resolving all disputes arising out of or involving the contractor's employment with the Company[.]" (*Supra*, at p. 3.)

lunch breaks, controlled when plaintiff could stretch, and could fire plaintiff at will. Defendants also controlled where, when, and for how many hours plaintiff would rehearse and unilaterally required plaintiff to take a personality test. As noted, the fact that plaintiff was labeled an independent contractor in the agreement is not dispositive. Substantial evidence supports a finding plaintiff was an employee for purposes of the application of the Fair Employment and Housing Act.[7]

D. Unconscionability

1. Procedural Unconscionability

Defendants contend the arbitration provision is not procedurally unconscionable. We disagree.

Substantial evidence supports a finding that the agreement is an adhesive contract and thus oppressive. Plaintiff declared Mr. Pletcher imposed the contract on him and every other cast member, on a take it or leave it basis, as a condition of employment, with no opportunity to negotiate. "The process of signing the agreement and agreeing to the terms presented were dictator like[.]" (See *Armendariz, supra*, 24 Cal.4th at pp. 114-115 [an arbitration agreement imposed on employees as a condition of employment and with no opportunity to negotiate is adhesive].) "[T]he adhesive nature of [a] contract is sufficient to establish some degree of procedural unconscionability." (*Sanchez, supra*, 61 Cal.4th at p. 915.)

Moreover, there was evidence plaintiff was induced to enter into the agreement by misrepresentations made by defendants, which deprived him of an opportunity for meaningful negotiation and choice. As indicated in plaintiff's declaration or in

[7] This conclusion for purpose of determining arbitrability does not preclude the trial court from making its own determination, based on evidence and argument presented to it at the time, whether plaintiff is an employee and the Fair Employment and Housing Act applies.

provisions of the agreement, representations were made by Mr. Pletcher: (1) there was a stage show that was going to be produced, when in fact, according to plaintiff's declaration, the script, musical numbers, and choreography constantly changed; (2) Mr. Pletcher knew how to produce the show, when in fact he had no experience, did not know what he was doing, and did not hire professionals to do the job; (3) plaintiff would be paid for each day he rehearsed and there would normally be five days of rehearsal per week, when in fact plaintiff's rehearsal days were cut in half; (4) the show would open on or about April 12, 2014, when in fact the opening date was pushed back twice; and (5) the Saban Theater had been secured for the original opening date, when in fact it was not secured, if at all, until after the agreement was entered into.

As there is substantial evidence the contract is one of adhesion and Mr. Pletcher induced the plaintiff to enter into it by unfair means, the trial court correctly ruled the arbitration provision was procedurally unconscionable.

2. Substantive Unconscionability

Substantive unconscionability focuses on overly harsh or one-sided results. (*Sonic-Calabasas*, *supra*, 57 Cal.4th at p. 1133; *Little*, *supra*, 24 Cal.4th at p. 1071.) Defendants contend the agreement was not substantively unconscionable.

As noted, the arbitration provision, which applies to Fair Employment and Housing Act claims, violates public policy in that it requires plaintiff to pay costs of arbitration. An arbitration provision which violates public policy is substantively unconscionable. (*Sanchez*, *supra*, 61 Cal.4th at p. 911; *Armendariz*, *supra*, 24 Cal.4th at pp. 91; *Wherry v. Award, Inc*. (2011) 192 Cal.App.4th 1242, 1248 ["Elimination of or interference with any of these basic provisions [of the Fair Employment and Housing Act] makes an arbitration agreement substantively unconscionable"]; *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 Cal.App.4th 494, 510.)

Moreover, the arbitration provision requires each party to bear his own costs for legal representation. This requirement abrogates plaintiff's right to the discretionary

recovery of attorney fees as a prevailing party to a Fair Employment and Housing Act claim. (Gov. Code § 12965, subd. (b) ["In civil actions brought under this section, the court, in its discretion, may award to the prevailing party . . . reasonable attorney's fees and costs, including expert witness fees"].) " 'In [Fair Employment and Housing Act] actions, attorney fee awards, which make it easier for plaintiffs of limited means to pursue meritorious claims . . . "are intended to provide 'fair compensation to the attorneys involved in the litigation at hand and encourage[] litigation of claims that in the public interest merit litigation.' " [Citation.]' (*Chavez v. City of Los Angeles* [(2010)] 47 Cal.4th [970,] 984.)" (*Trivedi v. Curexo Technology Corp*. (2010) 189 Cal.App.4th 387, 394.) As the arbitration provision requires plaintiff to pay his own attorney fees in contravention of his rights under the Fair Employment and Housing Act, the provision is substantively unconscionable. (See *Id.*, 189 Cal.App.4th at pp. 394-396; *Wherry v. Award, Inc.*, *supra*, 192 Cal.App.4th at p. 1249.)

Further, plaintiff stated in the verified complaint he could not afford the costs of arbitration proceedings. His attorney declared plaintiff could not afford to arbitrate unless the parties used JAMS, because JAMS offered fee shifting. Contrary to defendants' contention that plaintiff makes no showing he is unable to pay his share of the arbitration fees, the foregoing is substantial evidence the cost provision rendered arbitration unaffordable for plaintiff. As arbitration is the exclusive forum for resolving all disputes and arbitration costs must be shared between the parties, the evidence plaintiff cannot afford to pay costs means the arbitration provision deprives plaintiff of access to any forum in which to adjudicate his claims. (See *Sonic II*, *supra*, 57 Cal.4th at pp. 1144-1145 [" 'it is substantively unconscionable to require a consumer to give up the right to utilize the judicial system while imposing arbitral forum fees that are prohibitively high. Whatever preference for arbitration might exist, it is not served by an adhesive agreement that effectively blocks every forum for the redress of disputes, including arbitration itself.' [Citation.]"].) This is an overly harsh and oppressive result.

Defendants do not contend plaintiff failed to present evidence that arbitration was not affordable at the time the agreement was entered into. (See *Sanchez*, *supra*, 61 Cal.

4th at p. 920 ["courts are required to determine the unconscionability of the contract 'at the time it was made.' [Citation]"].) "'Because a predispute arbitration agreement is an agreement to settle future disputes by arbitration, the proper inquiry is what dispute resolution mechanism the parties reasonably expected the employee to be able to afford. Absent unforeseeable (and thus not reasonably expected) circumstances, there is no reason to think that what an employee can afford when a wage dispute arises will materially differ from the parties' understanding of what the employee could afford at the time of entering the agreement.' (*Sonic II*, *supra*, 57 Cal.4th at p. 1164.)" (*Ibid*.)

Even if it could have reasonably been expected at the time of entering into the agreement that plaintiff would be able to afford arbitration, there is evidence events occurred that were not reasonably expected, that rendered arbitration unaffordable when the disputes arose. The agreement indicated plaintiff would be paid by the day, with a schedule generally of at least five days of work per week. However, Mr. Pletcher cut back the rehearsal schedule and thus plaintiff's pay. This evidence plaintiff received less compensation than the parties expected is substantial evidence that arbitration costs which may have been affordable when the agreement was entered into were not affordable at the time of the dispute.

The trial court correctly concluded the arbitration provision is unconscionable.

E. Severance

Defendants contend that if the payment of costs provision is unconscionable, the trial court abused its discretion by not severing the provision.[8] In a reply brief in support of the motion to compel arbitration, they asked the trial court to sever any unconscionable

[8] To the extent defendants contend the Court of Appeal should, on its own, sever any unconscionable portion, order the remainder enforced, and stay trial court proceedings, defendants forfeited the contention by alluding to the issues but not briefing them with any specificity. (*St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese* (1990) 223 Cal.App.3d 1354, 1372, fn. 6.)

portions and enforce the rest of the agreement. They made this request in a single sentence, without argument. The record before us does not reflect the trial court ruled on the request or indicate defendants asked the court to make a ruling at the hearing. When the record reflects no ruling in the trial court on a party's objection and it does not appear the party prompted the court to make a ruling, we deem the objection forfeited. (*Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1247 [a party's "failure to prompt the court to rule on its request and obtain such a ruling amounted to a forfeiture of its request"]; accord, *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1319; *Mikels v. Rager* (1991) 232 Cal.App.3d 334, 349, fn. 2 ["Normally it is up to the objecting party to obtain a ruling on such objections, and if they fail to do so, the objection will be deemed to have been waived"].) Defendants forfeited the contention.

Were we to conclude the court's denial of the motion to compel arbitration reflects an implied ruling denying the severance request, we would not disturb the trial court's decision. Civil Code section 1670.5 provides, "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (See *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 83.) "[Civil Code section 1670.5] appears to give a trial court some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement. But it also appears to contemplate the latter course only when an agreement is 'permeated' by unconscionability." (*Armendariz*, *supra*, 24 Cal.4th at p. 122; see also Civ. Code, § 1599 ["Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."].)

Severance is within the sound discretion of the trial court, and we review a determination for abuse of discretion. (*Armendariz*, *supra*, 24 Cal.4th at p. 122.) Based on the nature and degree of the unconscionability in the formation and substance of the

arbitration agreement described above, it is not unreasonable to conclude " 'the arbitration agreement is so " 'permeated' by unconscionability [it] could only be saved, if at all, by a reformation beyond our authority." [Citations.]' [Citation.]" (*Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 119.) "[W]hen the agreement is rife with unconscionability, as here, the overriding policy requires that the arbitration be rejected (*Armendariz*, *supra*, 24 Cal.4th at p. 127)." (*Wherry v. Award, Inc.*, *supra*, 192 Cal.App.4th at p. 1250.) Accordingly, the trial court's exercise of discretion denying arbitration rather than severing the unconscionable provisions was not an abuse of discretion.

DISPOSITION

The order denying the motion to compel arbitration is affirmed. Plaintiff, Paul Barris, may recover his appeal costs from defendants Mitchell Pletcher and Mitchell Anthony Productions, LLP.

KIRSCHNER, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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