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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RAYMOND FREEMAN, Plaintiff and Appellant, v. HANMI BANK, Defendant and Respondent.	B259370 (Los Angeles County Super. Ct. No. BC475753)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Recana, Judge. Affirmed.

Law Offices of Alfred Vargas and Alfred Vargas for Plaintiff and Appellant.

Carothers DiSante & Freudenberger and Dan M. Forman for Defendant and Respondent.

INTRODUCTION

Raymond Freeman appeals from a judgment confirming arbitration awards in favor of respondent Hanmi Bank. He contends the trial court erred in sending his claims to arbitration pursuant to an arbitration clause in a 2003 employment agreement. He argues that when he was terminated in 2011, he was not contractually obligated to arbitrate his claims against respondent. For the reasons set forth below, we conclude the trial court properly granted respondent's petition to compel appellant to arbitrate his claims. Accordingly, we affirm.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

On December 22, 2011, appellant filed a complaint for damages against respondent, alleging causes of action for (1) disability discrimination/failure to accommodate, (2) race discrimination, (3) breach of a written contract, (4) breach of the covenant of good faith and fair dealing, (5) wrongful termination in violation of public policy, and (6) intentional infliction of emotional distress. The complaint alleged that plaintiff was employed by respondent as an appraisal review officer from October 29, 2003 to February 25, 2011. Beginning in June 2009, appellant began feeling pain in his left arm, which he attributed to "leaning on his left elbow" while reading appraisals. Later that month he was diagnosed with a left shoulder impingement. In August 2010, appellant informed his supervisors of the diagnosis, and told them he would need to leave early twice a week for treatment. In September 2010, over the objections of his supervisors, appellant began leaving work 20 minutes early for physical therapy. On or about February 25, 2011, without prior notice, appellant was informed that his position was being outsourced, and his employment was terminated.

Respondent filed an answer generally denying the allegations, and raising numerous affirmative defenses, including the defense that appellant's claims were subject to mandatory arbitration. On April 27, 2012, respondent filed a petition to compel arbitration of the action, arguing that a written agreement between the parties contained an arbitration clause providing for mandatory arbitration of all employment-related claims. In the attached written agreement, the arbitration clause provides in relevant parts:

"Any controversy or claim, including but not limited to statutory claims, arising out of or relating to this Agreement or breach thereof, or arising out of or relating to Employee's employment or termination of employment shall be submitted and resolved by final and binding arbitration under the terms of the Federal Arbitration Act and in a manner consistent with the California Code of Civil Procedure section 1280 et seq. (The California Arbitration Act). The arbitration process will begin upon service of a written request of the complaining party served on the other within thirty (30) calendar days of the event, which forms the basis of the controversy or claim. . . . Time is of the essence; if the request is not served within said thirty (30) days, the complaining party's claim(s) shall be forever waived and barred before any and all forums, including, without limitation, arbitration or judicial forums. The Arbitrator shall be neutral. The Arbitrator may permit discovery allowed under The California Arbitration Act, . . . and also may allow for additional discovery where appropriate. . . . The Arbitrator may grant all available statutory damages. The decision of the Arbitrator shall be in a written form that is sufficient to allow for judicial review; and shall be final and binding, and judgment thereon may be entered in any court having jurisdiction thereof. [Respondent] will bear all arbitration costs, including paying for the arbitrator's fees and the forum costs . . . ."

Appellant, in propria persona, opposed the petition. He contended that the "entire contract, or at minimum the arbitration clause," must be set aside due to respondent's purported discriminatory conduct in providing one contract containing no arbitration clause to Korean and Korean-American employees, and another contract containing an arbitration clause to all other employees. Appellant further contended that the contract was unconscionable because it was a contract of adhesion and contained a 30-day limitations period for all claims.

According to appellant, he was sent two employment contracts prior to his employment with respondent. He signed both documents on October 9, 2003, and returned them to respondent. Respondent subsequently countersigned one document -- the one entitled "Employment Agreement" -- and returned it to him.[1]

Copies of both documents were attached to appellant's pleading. The first document (hereinafter Employment Offer) was a two-page letter from Oh Hoon Kwon, senior vice-president and chief operating officer, offering appellant a position as "Vice President (A)-Credit Review/ Loan Appraisal Review Officer." Appellant would be paid $70,000 annually, plus benefits. "In consideration for this employment, [appellant agreed to] conform to all of the policies and regulations of [respondent] contained in the employee handbook or otherwise communicated to you during your employment with [respondent]." The Employment Offer provided that appellant's employment was at will, and stated that "[n]o representative of [respondent] other than the senior management, i.e., VP (A)/Personnel Officer, Chief Operating Officer and the President, has any authority to enter into any agreement of employment for any specific period of time or to make any

[1] Appellant was initially employed by Pacific Union Bank, which was later acquired by respondent. There is no dispute that respondent is the successor-in-interest to Pacific Union Bank, and acquired all rights and obligations under the Employment Agreement.

agreement contrary to the at-will agreement." The Employment Offer contained no arbitration clause.

The other document was a six-page contract identical to the document submitted by respondent with its petition to compel arbitration. Entitled "Employment Agreement," the document was dated October 29, 2003 and signed by appellant (October 9) and thereafter by Kwon. According to its terms, the Employment Agreement was "entered into" on October 29, 2003. It stated that respondent was employing appellant as "Vice President (A)-Credit Review/Loan Appraisal Review Officer" for a one year term, at an annual salary of $70,000, plus benefits. The Employment Agreement provided that after the one year term, the parties either would enter into a new agreement or continue the Employment Agreement on a month-to-month basis until the agreement was terminated by either party upon thirty (30) days written notice. The agreement incorporated by reference the employment handbook, and it included a severability clause. It also contained a merger clause stating the Employment Agreement "supersede[d] any prior agreements" between the parties. The merger clause further provided that "[n]o amendment or modification of the terms of this Agreement shall be valid unless made in writing and signed by Employee and by the Chief Operating Officer." Finally, the Employment Agreement contained the arbitration clause detailed above.

In a declaration, appellant asserted that he had been mistakenly sent the Employment Offer, as it should have been provided only to Korean employees. He also stated that in 2004, a Korean friend formerly employed by respondent told appellant that "Koreans did not have to sign long contracts with arbitration clauses." Appellant asserted that he was unable to obtain a declaration from his Korean friend or even disclose the friend's name due to the friend's fear of

retaliation. However, "[a]lthough my Korean friend is not willing to produce a declaration at present, he is willing to testify at trial upon subpoena." Finally, appellant stated that he had refused to sign a similar employment agreement in 2004 and 2005 after learning of respondent's discriminatory practices.

In reply, respondent argued that appellant's claims of discrimination should be addressed in arbitration. It also waived the 30-day limitations period provision in the Employment Agreement, and requested that the trial court sever that provision in accordance with the severability clause in the agreement.

On July 6, 2012, the trial court granted respondent's petition to compel arbitration. After severing the provision imposing a 30-day limitations period, the trial court determined that the arbitration clause in the Employment Agreement was not unconscionable. It further ruled that "[t]he issue of separate contracts for Koreans and non-Koreans stated in plaintiff's Declaration is an issue that should be heard and considered by the Arbitrator."

Before the arbitral hearing on appellant's claims was held, appellant filed a petition with the arbitrator seeking a summary ruling as to the validity of the employment contract, on the ground that "the contract violated public policy, is unconscionable and unfair." The arbitrator found appellant had failed to meet his burden of proof and dismissed the petition.

Following an evidentiary hearing on the merits of appellant's claims, the arbitrator determined that appellant had failed to present sufficient evidence to support a prima facie case on his claims for disability discrimination, racial discrimination, wrongful termination in violation of public policy (FEHA), breach of implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. As to the remaining claims, the arbitrator determined that appellant had failed to meet his burden of proof. Specifically, as to appellant's

claim that respondent had breached the Employment Agreement by failing to provide him with a 30-day notice of termination, the arbitrator held that the notice requirement was superseded by a February 28, 2006 employees acknowledgment of receipt and understanding (2006 Acknowledgment), stating that "both [respondent] and I will have the right to terminate this relationship at any time, with or without advance notice and with or without cause." In a separate written ruling, the arbitrator awarded respondent reasonable attorney fees and costs in the amount of $12,000, pursuant to a prevailing party fee provision in the Employment Agreement.

On April 17, 2014, appellant -- represented by current counsel -- filed a petition for an order vacating the arbitrator's rulings. He argued that the arbitration awards should be vacated because: (1) the contractual arbitration clause was unconscionable, as "it is an adhesion contract with an unfairly short (30-day) statute of limitations for all claims"; and (2) the arbitration clause was void and unenforceable because "it expired and was superseded when the parties adopted new terms of employment in 2006." As to the latter argument, appellant contended that the 2006 Acknowledgment -- first produced by respondent during the arbitration -- constituted a new employment contract.

Appellant attached the 2006 Acknowledgment, a one-page document stating that appellant had received a copy of the employee handbook. The document further provided that appellant's employment was "at will." However, it contained no description of appellant's position or duties. Nor did it include a merger clause, a severability clause or an arbitration clause. It was signed only by appellant.

In response to appellant's petition to vacate the arbitration awards, respondent argued that there was no basis to vacate the awards, as (1) the trial court had severed the 30-day limitations period provision, and had found that the

arbitration clause was not unconscionable; and (2) the arbitrator had ruled that the 2006 Acknowledgment modified only the 30-day termination notice period in the Employment Agreement, leaving the remaining terms unchanged. Respondent requested the trial court enter an order confirming the arbitration awards.

Appellant filed a reply, arguing that the 2006 Acknowledgment could not modify the 30-day notice period in the Employment Agreement because that agreement provided that it could be amended or modified only by a written agreement signed by both parties. It was undisputed that the 2006 Acknowledgment was signed only by appellant. Appellant asked the trial court to reconsider its decision to compel arbitration in light of the 2006 Acknowledgment.

On August 6, 2014, the trial court denied appellant's petition to vacate the arbitration awards and granted respondent's petition to confirm the awards. It determined that appellant had not met his burden of showing that the arbitrator had exceeded his powers. Judgment in favor of respondent and against appellant was entered August 27, 2014. Appellant timely appealed.

DISCUSSION

Appellant contends the trial court erred in granting respondent's petition to compel arbitration, as there was no valid agreement between the parties to arbitrate appellant's claims. Appellant contends (1) that the parties did not agree to arbitrate, as the only valid employment agreement was the 2006 Acknowledgment, which contained no arbitration clause; (2) that the arbitration clause in the Employment Agreement was void as against public policy because it was presented as a term of employment only to non-Asian employees in violation of anti-discrimination laws; and (3) that the arbitration clause was unconscionable and therefore unenforceable despite the trial court's purported severance of the provision imposing a 30-day limitations period.

A. *There was a Valid Agreement to Arbitrate.*

Appellant contends that when he was terminated in 2011, he was not covered by an employment contract containing an arbitration clause. We disagree. The record demonstrates the parties entered into two agreements when appellant was hired. The first agreement, the Employment Offer, was signed by appellant on October 9, 2003. The second agreement, the Employment Agreement, was signed by appellant on October 9 and thereafter by Kwon. By its terms, it was "entered into" on October 29, 2003. The Employment Agreement specifically provides in its merger clause that all prior agreements between the parties are superseded. Thus, the earlier Employment Offer, containing no arbitration clause, was superseded by the later Employment Agreement, containing an arbitration clause.

Appellant argues that the Employment Agreement expired and was replaced by another employment contract containing no arbitration clause, viz., the 2006 Acknowledgment. Initially, we note that in opposing respondent's petition to compel arbitration, appellant never suggested the Employment Agreement had been superseded by a later agreement. Indeed, in his complaint, appellant asserted a cause of action for breach of the 30-day notice provision in the Employment Agreement. Although appellant's petition to vacate the arbitration awards contended that the 2006 Acknowledgment superseded the Employment Agreement, that contention was arguably forfeited, as appellant could have raised it in his opposition to the petition to compel arbitration. Appellant contends he remembered the 2006 Acknowledgment only after respondent produced it during arbitration, but appellant signed the Acknowledgment in 2006, and nothing suggests its terms were concealed from him. Nevertheless, we exercise our discretion to consider appellant's argument that the 2006 Acknowledgment

superseded the Employment Agreement, as it presents a question of law based on undisputed facts.

Independently reviewing the 2006 Acknowledgment, we conclude it cannot be interpreted to create a wholly new employment contract. First, the 2006 document is not entitled an employment agreement, but rather an "Employee Acknowledgment of Receipt and Understanding." Unlike the Employment Agreement -- a six-page document containing 25 separately enumerated contractual provisions -- the 2006 Acknowledgment is a one-page document. Its four short paragraphs do not even address appellant's work duties or compensation; nor is the document signed by both parties. Accordingly, the 2006 Acknowledgment cannot be deemed a new employment contract superseding the Employment Agreement. Rather, it either modified the Employment Agreement, as the arbitrator found, or was ineffective due to the lack of respondent's signature, as appellant argued. In either event, the arbitration clause in the Employment Agreement remained in effect when appellant was terminated in 2011, and appellant was contractually obligated to arbitrate his claims against respondent.[2]

B. *Any Error in Compelling Arbitration was Harmless*.

Appellant next contends that the trial court erred in compelling him to arbitrate his claims without first determining whether the arbitration clause was

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[2] We reject any suggestion that the 2006 Acknowledgment's silence on the issue of arbitration constitutes an agreement between the parties to excise the arbitration clause from the Employment Agreement. "Where one agreement identifies arbitration as the forum for resolving disputes, and a subsequent document omits any reference to such a forum, "'any doubts must be resolved in favor of arbitration.'"" (*Jenks v. DLA Piper Rudnick Gray Cary US LLP* (2015) 243 Cal.App.4th 1, 17, quoting *Ramirez-Baker v. Beazer Homes, Inc*. (E.D. Cal. 2008) 636 F.Supp.2d 1008, 1017.)

void as being contrary to the public policy against racial discrimination. Any error, however, was harmless. Appellant's allegation that different employment contracts were provided to Koreans and non-Koreans was unsupported by admissible evidence. Appellant's own declaration asserted merely that he had been told by a friend that Koreans were not required to sign contracts with arbitration clauses. This hearsay was insufficient to raise an inference of discrimination. Nor did appellant produce any other evidence indicating respondent engaged in discriminatory practices. Absent such evidence, the trial court properly granted respondent's petition to compel arbitration.[3]

C. *The Arbitration Clause was not Unconscionable as the 30-Day Limitations Period Provision is Severable.*

Finally, appellant contends the arbitration clause was unenforceable, as it was procedurally and substantively unconscionable. However, he identifies no substantively unconscionable provision other than the provision imposing a 30-day limitations period. Although he acknowledges that the trial court severed that provision, he contends, without case authority, that the court could not sever the provision because the 30-day limitations period provision is so egregious that it "permeates the entire arbitration agreement." We disagree. In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 124, the California Supreme Court held that "[i]f the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the

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[3] Appellant's suggestion that he could present an unnamed witness at trial to testify to respondent's discriminatory practices was insufficient to establish a prima facie case that the arbitration clause was invalid. A hearing on a petition to compel arbitration is a summary proceeding (see Code Civ. Proc., § 1290.2). Allowing a party to avoid arbitration by offering to present evidence at trial would defeat the purpose of the proceeding designed to determine the arbitrability of the party's claims.

illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." Here, the provision imposing a 30-day limitations period is collateral to the main purpose of the contract -- the employment relationship between the parties -- and the provision can be excised without reforming the contract. In short, the trial court acted within its discretion in severing the provision imposing a 30-day limitations period. After severance of that provision, we conclude the arbitration clause is not substantively unconscionable and, accordingly, it is enforceable.

In sum, the trial court properly compelled arbitration of appellant's employment-related claims against respondent. As appellant does not contest the arbitrator's findings and rulings, the trial court did not err in confirming the arbitration awards.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.