Filed 2/15/17 Chau v. Pre-Paid Legal Services CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JIMMY CHAU, Plaintiff and Respondent, v. PRE-PAID LEGAL SERVICES, INC., etc., Defendant and Appellant.	B270277 (Los Angeles County Super. Ct. No. BC576499)

APPEAL from a judgment of the Superior Court of Los Angeles County. Maureen Duffy-Lewis, Judge. Reversed.

Crowe & Dunlevy, Thomas B. Snyder; Sheppard, Mullin, Richter & Hampton, Shannon Z. Petersen, Karin Dougan Vogel, and Mercedes A. Cook for Defendant and Appellant.

No appearance for Respondent.

Respondent Jimmy Chau filed a complaint against appellant Pre-Paid Legal Services, Inc., dba LegalShield ("LegalShield") for breach of contract and negligence, claiming that the corporation failed to provide him with competent legal counsel in a construction dispute. LegalShield moved to compel arbitration, pursuant to its membership agreement with Chau. The trial court denied LegalShield's motion to compel. LegalShield appeals.

LegalShield argues that the court erred when it found that the contract's provision entitled "Settlement of Disputes" was not an enforceable arbitration provision, finding that the paragraph was "not an arbitration clause," and that Chau did not sign the written contract. We disagree and reverse.

FACTS AND PROCEDURAL HISTORY

On December 21, 2001, Chau filled out a membership application for LegalShield's services. LegalShield provides pre-paid legal services to members around the country by matching them with qualified attorneys in their geographic area. The application did not set forth the terms of the membership. Instead, the terms were to be included in a "written contract." The application stated that the application and the written contract together "constitute[d] the entire agreement between the company and the member . . . ."[1]

The LegalShield agent with whom Chau spoke did not provide him with the written contract. The application stated that the written contract would be mailed to the applicant within fourteen days. If the applicant did not receive the written contract during that time period, it was his "responsibility to call

---

[1] Throughout this opinion we distinguish the signed "application" from the unsigned "written contract."

the Pre-Paid Legal Home Office . . . to obtain a copy." By signing the application, the applicant indicated that he understood that "the written contract sets forth the terms of [his] membership," and that he agreed to be bound by those terms. Chau signed the application and enclosed his first installment payment. He did not recall receiving the written agreement in the mail, and never signed the written contract. The record does not contain a written contract signed by Chau. Over the next 10 years, Chau continuously paid the monthly fee and used LegalShield's several multiple times.

In 2013, a designated LegalShield attorney represented Chau in a construction dispute, pursuant to Chau's membership contract. After the proceedings were resolved against Chau, he filed a complaint against LegalShield for breach of contract and negligence, alleging that the corporation failed to provide him with competent legal counsel. LegalShield responded with a motion to compel arbitration. In support of this motion, it cited General Provision K in the LegalShield written contract which reads:

> **"K. Settlement of Disputes:** In the event of a dispute, the parties will agree on an impartial attorney who will decide such dispute and that decision will be binding on all parties to such dispute."

Chau opposed LegalShield's motion to compel arbitration, claiming that he had not agreed to arbitrate disputes. He asserted that the clause was "not conspicuous" within the agreement. He pointed out that the "Settlement of Disputes" provision "does not stand out with bolded or enlarged font, is not entitled 'Arbitration of Disputes,'" and that the written contract

"does not even mention the word 'arbitration'" within the seven pages of the contract written in "size 10 font." He claimed that a lay person could not equate the language used with binding arbitration.

Chau also argued that even if the clause were susceptible of being an arbitration agreement, he never agreed to arbitrate. He declared that the LegalShield agent who spoke with him during the application process did not mention an arbitration agreement. He also claimed that he did not remember receiving the written contract in the mail, and that he never signed the written contract. Therefore, he did not consent to arbitration, rendering the agreement unenforceable.

In its reply, LegalShield asserted both that the arbitration agreement was enforceable and that Chau agreed to it implicitly by invoking the express terms of the written contract for over ten years. LegalShield noted that the clause bore the bolded title "Settlement of Disputes," and argued that an agreement to submit disputes to an impartial "third party" sufficiently indicated an agreement to arbitrate.

The trial court denied LegalShield's motion to compel arbitration. The minute order from the proceedings states, "The section to which moving party refers (Paragraph K) is not an arbitration clause. Plaintiff did not sign the contract for or with an arbitration clause." LegalShield now appeals this order. Chau did not file a respondent's brief on appeal, so we consider the arguments Chau made in his opposition to the motion to compel in the trial court.

STANDARD OF REVIEW

The Federal Arbitration Act ("FAA") applies to contracts regulating interstate commerce under the commerce clause. (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 238.) Under the FAA and California case law, there is a strong public policy favoring contractual arbitration. (*Rice v. Downs* (2016) 247 Cal.App.4th 1213, 1223.) Any doubt regarding the validity of arbitration should be settled in favor of arbitration. (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 685-686, 699.)

An order denying a motion to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).) Contractual interpretation is reviewed de novo unless the interpretation turns on the credibility of extrinsic evidence, in which case courts apply a substantial evidence standard. (*American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1245.) When there is no conflict in extrinsic evidence, courts review the interpretation of a contract de novo. (*City of Hope National Medical Center v. Genetech, Inc.* (2008) 43 Cal.4th 375, 395.) Here, we review the trial court's findings of fact under a substantial evidence standard and the courts legal conclusions regarding the contract de novo. (*Apex LLC v. Sharing World, Inc.* (2012) 206 Cal.App.4th 999, 1090.)

I. The provision is not invalid merely for failing to mention "arbitration."

LegalShield argues that the trial court erred in finding that the "Settlements of Disputes" provision in the written contract is not an arbitration clause because it lacks the term "arbitration." We agree. Though California courts have not explicitly resolved

whether the word "arbitration" is required for an arbitration agreement to be valid, the Ninth Circuit and other federal courts hold that the word 'arbitrate' need not appear for an arbitration clause to bind the parties. (*Wosley, Ltd. v. Foodmaker, Inc.* (9th Cir. 1998) 144 F.3d 1205, 1208 (*Wosley*)[quoting *AMF, Inc., v. Brunswick Corp.* (E.D. N.Y. 1985) 621 F. Supp. 456, 460]; *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.* (2d Cir. 1988) 858 F.2d 825, 830-831 (*McDonnel Douglas*).) Rather, the agreement must demonstrate the parties' intention to submit disputes to a specified third party for binding resolution. (*McDonnell Douglas, supra,* at pp. 830-831.) Thus, an agreement to submit a dispute for decision by a third party is sufficient to constitute an agreement to arbitrate. (*Wosley*, *supra*, 144 F.3d at p. 1208 [quoting *AMF, Inc. v. Brunswick, supra,* 621 F. Supp. at p. 460].)

The "Settlement of Disputes" section of the LegalShield written contract states, "In the event of a dispute, the parties will agree on an impartial attorney who will decide such dispute and that decision will be binding on all parties to such dispute." The use of an "impartial attorney" to settle disputes and bind the parties demonstrates that the clause is intended to require arbitration. In light of the public policy that favors arbitration, we hold that the absence of the term "arbitration" does not render the clause unenforceable as an arbitration clause.

II. Chau cannot disaffirm his agreement based on the lack of signature or not having received the agreement.

LegalShield contends that Chau cannot contest the validity of the agreement on the basis that he did not sign the contract.

Though Chau declared that he did not recall receiving the written contract containing the provision, and that the agent with whom he spoke when he applied did not mention arbitration, LegalShield asserts that the arbitration clause was binding because Chau used the company's services numerous times and acknowledged his responsibility to obtain the agreement (which contained the arbitration clause) in his application.

A party who has not agreed to arbitrate a controversy cannot be compelled to do so. (*Harris v. Tap Worldwide, LLC*, (2016) 248 Cal.App.4th 373, 380.) However, an individual who avails himself of the benefits provided by another otherwise binding contract containing an arbitration clause is subject to the contract's arbitration clause. (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 76.) A party cannot use his own lack of diligence to avoid an arbitration agreement. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1215.) Nor may a party avoid an agreement to arbitrate solely on the ground that he or she failed to read it or on the ground that the terms of the agreement were provided subsequent to the transaction. (*Hill v. Gateway 2000* (7th Cir. 1997) 105 F.3d 1147, 1148 (*Hill*).)

LegalShield analogizes to *Hill* to support its position. We find the analogy apt. In *Hill*, the plaintiffs purchased a computer from Gateway over the phone. (*Hill, supra,* 105 F.3d at p. 1148.) Subsequently, Gateway mailed them a contract containing an arbitration provision along with the computer. The agreement stated that it would govern unless the computer was returned within thirty days. The plaintiffs did not return the computer within that time period. The court held that the plaintiffs accepted the agreement when they failed to return the device

within the allotted thirty days. The court found that the plaintiffs could not avoid the arbitration clause based on their failure to read the contract. (*Ibid*.)

Much like the plaintiffs in *Hill* accepted the terms of the agreement when they failed to return the computer, Chau accepted the benefits of the LegalShield membership agreement. Chau used LegalShield's services for thirteen years before filing this action, signaling his implicit acceptance of the terms of the written contract, and the signed application placed on his shoulders the obligation to obtain a copy of the written agreement. While we uphold the trial court's finding that he did not sign the agreement under the substantial evidence standard, we find that a lack of a signature does not legally invalidate the agreement.

We find the dissent's broad reading of *Flores v. Nature's Best Distribution, LLC* (2016) 7 Cal.App.5th 1 (*Flores*) unpersuasive. In *Flores*, the Court of Appeal concluded the agreement to arbitrate was unenforceable because it was "ambiguous regarding (1) whether the arbitration provision of the Agreement (not a grievance and arbitration procedure of a collective bargaining agreement) applied to any or all of plaintiff's claims against any or all of defendants in the instant actions and (2) the governing rules and procedures for any such arbitration." (*Flores*, at p. 17.) Here, there is no question the arbitration provision covered Chau's claims. In addition, there was no ambiguity as to which arbitration rules would apply. The parties did not specify that the rules of a particular alternative dispute resolution provider will govern the arbitration. As a result, the California Arbitration Act (CAA) (See § 1280 et seq.) applies. Sections 1282 through 1284.3 contain the rules that govern the

conduct of arbitration proceedings. "[T]he statutory scheme sets forth the basic parameters of such proceedings unless the parties specifically agree otherwise . . . ." (*Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 705; *Royal Alliance Associates, Inc. v. Liebhaber* (2016) 2 Cal.App.5th 1092, 1107.)[2]

DISPOSITION

The order denying the motion to compel arbitration is reversed. Appellant is awarded costs on appeal.

BIGELOW, P. J.

I concur:

GRIMES, J.

---

[2] We also disagree with the dissent's conclusion that this case should be remanded for a determination of whether the agreement was unconscionable. As the dissent notes, this issue was not raised in the trial court, nor was it raised on appeal. Under such circumstances, we decline to eschew our judicial role and advocate the issue on behalf of Chau.

RUBIN, J. – Dissenting.

I respectfully dissent.

In *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 (*AT&T Mobility*), the Supreme Court observed that the Federal Arbitration Act was "enacted in 1925 in response to *widespread judicial hostility* to arbitration agreements." (*Id*. at p. 339; italics added.) Whether or not such hostility was justified in the 1920's, judicial hostility is seriously on the wane in the 21st Century. Quite to the contrary, both before and after *AT&T Mobility*, the relationship between the judiciary and arbitration agreements appears to more resemble a romance. The effect of this adoration is that hundreds of thousands, perhaps more, workers, consumers, civil rights advocates, and others have been deprived by contract of the right to the jury or court trial otherwise guaranteed to them. (Cal. Const., art. 1, § 16; U.S. Const., 7th Amend.)

The majority opinion today adds Jimmy Chau to the list of those who have lost this right. Before I turn to Mr. Chau's case, I give some context to the current law regarding defenses to an arbitration clause.

A. *What AT&T Mobility Did Not Do*

AT&T Mobility did not disable a party from challenging an agreement containing an arbitration clause if the agreement was invalid for reasons that did not target arbitration agreements alone. The court expressly acknowledged the Federal Arbitration Act's savings clause covered this very issue. Section 2 of the act provides that arbitration agreements are generally enforceable "save upon grounds as exist in law or equity for the revocation of

any contract." The *AT&T Mobility* court said: "This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*AT&T Mobility, supra*, 563 U.S. at p. 339.) Consistent with the distinction made in *AT&T Mobility,* in California, general " 'principles of contract law determine whether the parties have entered a binding agreement to arbitrate.' [Citations.]" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

B. *"Generally applicable contract defenses"*

Although the Supreme Court pointed to several defenses that survive its *AT&T Mobility* decision, including fraud and duress, California jurisprudence addressing the validity of arbitration agreements post *AT&T Mobility* has largely considered the defense of unconscionability. (See, e.g., *Magno v. The College Network* (2016) 1 Cal.App.5th 277; *Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227.) Seemingly less adjudicated has been whether an arbitration agreement has been formed at all. In other words, was there mutual assent? Some courts have found no arbitration agreement when a purported arbitration provision is contained in an employee handbook or other documents handed in a packet to an employee upon commencing employment. Although the words "arbitration" and "agreement" may be found somewhere in the assorted documents, those courts have found no mutual assent to arbitrate. (See *Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781; *Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164.)

The appeal here presents a different type of contract formation case. The contract between the parties for legal referral services contains only one sentence that could be perceived as obligating the parties to arbitrate:

> "**K. Settlement of Disputes:** In the event of a dispute, the parties will agree on an impartial attorney who will decide such dispute and that decision will be binding on all parties to such a dispute."

Neither the word "arbitrate" nor the word "arbitration" is found anywhere in paragraph K or anywhere else in the seven-page agreement.[1] The word "dispute" is not defined in the agreement, nor does it state whether it applies to (1) disputes between LegalShield and Chau, (2) disputes between Chau and any attorney referred to him, or (3) some other form of disputes. Although the words "party" and "parties" appear throughout the agreement, the document suggests that those terms refer to those

---

[1] I agree with the majority that the absence of the words "arbitrate" or "arbitration" may not always be fatal to a petition to compel arbitration. On the other hand, as the majority points out, there is no California case on point. Some out-of-state authorities suggest "arbitration" need not always be present. (See *Wosley, Ltd. v. Foodmaker, Inc.* (9th Cir. 1998) 144 F.3d 1205, 1208 [quoting *AMF, Inc. v. Brunswick Corp.* (E.D.N.Y. 1985) 621 F. Supp. 456; *McDonnell Douglas Finance v. PA Power & Light Co.* (2d Cir. 1988) 858 F.2d 825, 830-831.) Be that as it may, as discussed further in text, the failure to include "arbitration" in the clause relied upon to force the plaintiff to submit disputes to arbitration raises serious questions of whether the parties ever agreed to arbitrate. An affirmative answer to that question should only be reached on clear proof of the parties' mutual assent.

persons involved in an underlying dispute with Mr. Chau, not to LegalShield itself. (See Appellant's Appendix, 38-43, ¶¶ IV, V, IX (B, E, F(5), K).) The agreement containing the arbitration clause is signed by LegalShield but not Chau. On December 21, 2001, Chau did sign a membership application referring to a written agreement, but the record is not clear when the written agreement was signed by LegalShield.

More glaringly, Paragraph K does not describe the method by which this attorney is to be selected, where the attorney is to be licensed, whether the attorney may be one who has previously accepted referrals from LegalShield, what qualifications and experience the attorney is to have, what dispute resolution procedures are to be employed, the arbitration rules, whether the attorney is to be guided by general principles of law and equity, whether discovery will be permitted, whether injunctive relief is available, whether the resulting determination is enforceable in court, and whether Chau is obligated to pay all or a portion of fees up front. All of this uncertainty reinforces the fundamental question in this case: To what did Mr. Chau actually agree?

A recent case from our colleagues in the Fourth District sheds considerable light on the prerequisite of mutual assent under circumstances similar to that present here. In *Flores v. Nature's Best Distribution, LLC* (2016) 7 Cal.App.5th 1 (*Flores*), the plaintiff had sued for wrongful termination, disability discrimination and other wrongs. The defendants filed a petition to compel arbitration. In support of the petition, the defendants offered a document entitled "Agreement for Alternat[iv]e Dispute Resolution" that the plaintiff had signed. The agreement provided, among other things, that: (1) in consideration of the plaintiff's employment, "employee and Company agree to submit

all legal equitable and administrative disputes to the American Arbitration Association (AAA) for mediation and binding arbitration"; (2) certain disputes covered by a collective bargaining agreement were excluded; (3) the parties waived the right to a court and jury trial and the right to appeal; (4) the arbitration shall be conducted under the AAA arbitration rules; and (5) the cost of the arbitration was to be shared equally by the parties. (*Id*. at p. 2.)

The trial court denied the petition. The stated ground was that the plaintiff had "met her burden to show that the Arbitration Agreement is unenforceable." (*Flores, supra,* 7 Cal.App.5th at p. 8.) The trial court's analysis was consistent with a finding of unconscionability. The defendant appealed.

The court of appeal's focus was not on whether the agreement was unconscionable but whether there was an agreement to arbitrate at all. The appellate court described its inquiry as containing two components: (1) does an agreement exist; and (2) whether there is any defense that would make the agreement unenforceable. (*Flores, supra,* 7 Cal.App.5th at p. 9; see *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.)

The court started its analysis in this way: " 'California contract law applies to determine whether the parties formed a valid agreement to arbitrate. [Citations.] General contract law principles include that "[t]he basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.] . . . 'The words of a contract are to be understood in their ordinary and popular sense.' [Citations.]" [Citation.] Furthermore, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably

practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)' " (*Flores, supra,* 7 Cal.App.5th at p. 9, quoting *Mitri v. Arnel Management Co., supra*, 157 Cal.App.4th at p. 1170.)

In concluding that the parties did not enter into a binding arbitration agreement, the court found significant: One, that only Flores signed the agreement; not her employer. In our case the legal services company signed the agreement but Chau did not. Two, the agreement failed to properly distinguish between AAA arbitration and mediation/arbitration under the applicable collective bargaining agreement. Here, the agreement states only that an attorney will "decide" the "dispute," but identifies neither how the decision will be made, or to what disputes it applies. Three, the agreement did not identify which AAA rules would govern the arbitration. In our case, there is no mention of applicable arbitration rules or procedures or even the method by which an arbitrator would be selected if the parties did not agree. It is true that LegalShield sought to compel "arbitration," but the clause on which it relies does not state whether the decision will be made by "baseball arbitration," a trial-like proceeding, or some other unexpressed process.[2]

The conclusion the *Flores* court reached is the one I believe should govern the present case: "We cannot conclude the parties reached agreement on the matter of submitting any or all of plaintiff's claims to final and binding arbitration as contemplated

---

[2] The majority purports to solve this problem by implying the procedures of the California Arbitration Act. I find it difficult to believe that Chau impliedly agreed to the procedures of the California Arbitration Act when the agreement did not even clearly specify that he was agreeing to *arbitration*.

by the Agreement. The trial court therefore did not err by denying the petition; we do not need to analyze whether the arbitration provision was procedurally and/or substantively unconscionable." (*Flores, supra,* 7 Cal.App.5th at p. 11.)

C. *A Word on Unconscionability*

Since the *Flores* court found no agreement to arbitrate was entered into, it had no reason to discuss whether an otherwise binding agreement was nevertheless unenforceable because it was unconscionable. In my view, there is no reason to address unconscionability because this court should affirm the trial court on lack of formation of an agreement to arbitrate.

Even if I were to conclude that the parties entered into an arbitration agreement, I would still remand the case to the trial court to consider unconscionability. Unconscionability, as one of the generally recognizable contract defenses, may invalidate an arbitration agreement. (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 385.) If the court finds that the arbitration clause was unconscionable at the time it was made, the court may refuse to enforce the contract or may sever the arbitration clause from the contract as a whole so as to avoid unconscionability. (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 254.)

The procedural setting of this case is unusual in that Chau, apparently being without a lawyer, has not filed appellate briefs. In the trial court, he successfully persuaded the court that there was no agreement. The trial court, therefore, was not called upon to determine unconscionability. And there is some question whether unconscionability was actually before the court.

Although Chau may not have used the word "unconscionable" in his arguments before the trial court, that

doctrine permeated the points he expressly made. As I develop more fully below, Chau argued that, because the arbitration provision was in a document he did not receive or sign and the language was hidden in the document, it would be unfair to hold him to the current arbitration clause.

To be invalidated for unconscionability, the clause must be both procedurally and substantively unconscionable. (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1280.) Courts consider elements of surprise and oppression that would cause the agreement to be one-sided. (*Id.* at pp. 1280-1281.) These considerations include whether the party providing the contract offered an easily accessible copy of the rules governing arbitration, and whether each side possessed adequate bargaining power and understood the nature of their agreement to arbitrate. (*Carbajal v. CWPSC, Inc., supra,* 245 Cal.App.4th at pp. 243-245.)

Although Chau did not use "unconscionable" in the trial court, his arguments there sounded in unconscionability. For instance, Chau stated he did not recall receiving the written contract containing the arbitration provision and that the LegalShield agent did not mention arbitration during Chau's application process. Chau argued that the contract did not contain the term "arbitration," and that the clause was buried in a seven-page contract written in a small font. In reviewing these arguments in the context of the record, I believe Chau adequately raised the issue of unconscionability in the trial court. The trial court did not rule on unconscionability because, instead, it adopted Chau's arguments and found that there was no agreement to arbitrate. Under the circumstances, I would at the

least remand to allow the trial court to consider whether the agreement is unconscionable.

RUBIN, J.