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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

JESSICA HERNANDEZ, Plaintiff and Respondent, v. AUTOZONE, INC., et al., Defendants and Appellants.	B280206 (Los Angeles County Super. Ct. No. MC026385)

APPEAL from an order of the Superior Court of Los Angeles County. Randolph A. Rogers, Judge. Reversed.

Arena Hoffman, Michael Hoffman, Alex W. Craigie, and Amy C. Hirsh for Defendants and Appellants.

Brown Associates, Victor H. Jaime and Tomas Wanner for Plaintiff and Respondent.

AutoZone, Inc. (AutoZone) and Jose Vilchez (Vilchez) (collectively "appellants") appeal from an order denying their petition to compel arbitration.

Jessica Hernandez (respondent), a former employee of AutoZone, filed this action against appellants alleging sexual harassment, battery, and negligence arising from her employment. Respondent agreed to arbitrate all disputes "arising out of or related to" her employment or termination of employment with AutoZone. Respondent specifically alleged that Vilchez carried out multiple incidents of harassment and battery "during business hours while (respondent) was on duty in [AutoZone's] employment and . . . during the course and scope of [Vilchez's] employment at [AutoZone]." Respondent also specifically alleged that, at all relevant times, Vilchez "was an agent and servant, acting within the course and scope of his employment with [AutoZone]."

The trial court denied appellants' petition to compel arbitration pursuant to Code of Civil Procedure section 1281.2, subdivision (c) (section 1281.2(c)), which allows a court to deny a petition to compel arbitration where the matter involves a "third party" and there is a possibility of conflicting rulings. The trial court reasoned that because there is no arbitration agreement between Vilchez and respondent, Vilchez was a "third party" under section 1281.2(c).

Section 1281.2(c) is inapplicable. Vilchez was not a "third party," but acted as an agent of AutoZone. Because section 1281.2(c) does not apply, the court had no discretion to deny arbitration under this provision. We therefore reverse the order.

FACTUAL BACKGROUND

Respondent was an employee of AutoZone between November 3, 2014 and June 22, 2015. Employees of AutoZone were required to acknowledge that they read, understood, and

agreed to be bound by AutoZone's "Dispute Resolution Agreement" (agreement). The agreement was maintained within AutoZone's electronic "Policy Center." Employees accessed the Policy Center through a unique user identification and password. Respondent acknowledged the agreement in the Policy Center on November 8, 2014.

The agreement applied to AutoZone employees whose original hire date was November 1, 2011, or later. Under the terms of the agreement, respondent agreed to arbitrate "any dispute arising out of or related to [her] employment with AutoZone or one of its affiliates." Such disputes included, among other things, "disputes regarding the employment relationship . . . termination, retaliation, or harassment . . . and all other state statutory and common law claims." The agreement provided that it was "governed by the Federal Arbitration Act, 9 U.S.C. Section 1 et seq."

PROCEDURAL HISTORY

On June 16, 2016, respondent filed a complaint against AutoZone and Vilchez, alleging causes of action for quid pro quo sexual harassment, battery, and negligence. Respondent alleged that at all times, Vilchez was "an agent and servant, acting within the course and scope of his employment" at AutoZone.

According to respondent's allegations, Vilchez was her "immediate supervisor" and an employee of AutoZone. All acts and conduct alleged "were done during business hours while [respondent] was on duty in [AutoZone's] employment and done during the course and scope of [Vilchez's] employment at [AutoZone]." Specifically, between December 7, 2014, and April 21, 2015, Vilchez "physically assaulted and sexually harassed [respondent] by pinching her and patting her on the back on a regular basis." When respondent asked Vilchez to stop, he "became angry and belligerent and continued to make physically

[*sic*] contact with [respondent]." At all times, the sexual harassment was unwanted.

Respondent's negligence claim is brought against AutoZone alone, and does not name Vilchez. In it, respondent alleges that AutoZone was negligent in failing to ensure that her employment was free of harassment and allowing Vilchez to be her immediate supervisor.

On August 8, 2016, appellants sent a letter to respondent's counsel requesting that respondent submit to arbitration. On August 18, 2016, respondent's counsel sent appellants a letter declining to submit to arbitration on the ground that the agreement was an unenforceable contract of adhesion.

On October 6, 2016, appellants filed their motion to compel arbitration and stay further proceedings. Appellants argued that the agreement covered respondent's harassment and battery claims, and that the agreement was binding as to respondent's claims against Vilchez. Appellants cited *JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1241 (*JSM Tuscany*) and *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 271-272 for the proposition that an individual can be compelled to arbitrate with a nonsignatory defendant when the conduct is inextricably intertwined with the contract containing the arbitration clause. Appellants cited *Thomas v. Perry* (1998) 200 Cal.App.3d 510, 516 (*Thomas*) for the proposition that non-signatory defendants are entitled to invoke arbitration agreements when it is alleged that they acted within the course and scope of their employment.

Respondent opposed the motion on the ground that the agreement was (1) a contract of adhesion; (2) illusory; and (3) procedurally and substantively unconscionable. Respondent also argued that pursuant to section 1281.2(c), the action against

Vilchez created the possibility of conflicting rulings on common issues of law and fact.[1]

The trial court denied appellants' motion to compel arbitration pursuant to section 1281.2(c). The court reasoned that "(1) there exists no arbitration agreement between [respondent] and Vilchez, (2) the preponderance of the facts at issue in this litigation are predicated on the alleged actions of Vilchez against [respondent], and (3) there exists a strong possibility of inconsistent rulings should the Court order AutoZone to arbitration while keeping Vilchez as a party to the instant action."

The court's order denying arbitration was entered on November 30, 2016. On January 10, 2017, appellants filed their notice of appeal.

DISCUSSION

I. Standard of review

When "'the language of an arbitration provision is not in dispute, the trial court's decision as to arbitrability is subject to de novo review.' [Citation.]" (*JSM Tuscany, supra*, 193 Cal.App.4th at p. 1235.)

Respondent argues that the proper standard of review is abuse of discretion. However, the cases respondent cites in support of her argument support application of a de novo standard in this case. (See *Lindemann v. Hume* (2012) 204 Cal.App.4th 556, 565 ["the correct interpretation of [section 1281.2(c)], like any other issue of statutory interpretation, is a

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[1] Section 1281.2(c) provides an exception to a court's mandatory duty to order arbitration where: "A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact."

question of law subject to de novo review"]; *Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1406 (*Laswell*) ["whether a defendant is in fact a third party for purposes of [section 1281.2(c)] is a matter of law subject to de novo review].) In *Laswell,* a patient sued a health facility, its operator, owner, and manager. (*Laswell, supra*, at p. 1402.) The trial court denied the defendants' petition to compel arbitration, partly on the ground that certain defendants were not parties to the arbitration agreement. (*Id.* at p. 1404.) The Court of Appeal reversed, finding that the exception found in section 1281.2(c) was inapplicable as none of the defendants was a "third party" under that statute. (*Laswell*, at pp. 1406-1407). In discussing the standard of review, the court explained:

> "If the prerequisites of the exception exist in a particular case, i.e., there are third parties not subject to arbitration on claims arising out of the same transaction or related transactions, and a possibility of conflicting rulings on common issues of law or fact, then the trial court has discretion to deny or stay arbitration. [Citation]. '"The court's discretion under [the exception, however,] does not come in to play until it is ascertained that the subdivision applies. . . ."' [Citation.]"

(*Laswell, supra*, 189 Cal.App.4th at pp. 1405-1406.)

The question of whether a defendant is, in fact, a third party for the purposes of section 1281.2(c) is a matter of law subject to de novo review. (*Laswell, supra,* 189 Cal.App.4th at p. 1406.)

II. The exception found in section 1281.2(c) is inapplicable because Vilchez is not a "third party"

The exception to arbitration found in section 1281.2(c) applies only when the matter involves a third party not subject to arbitration. (*Laswell, supra,* 189 Cal.App.4th at p. 1405.)

Individual defendants who are not parties to a contract containing an arbitration clause are not "third parties" under section 1281.2(c) if they were acting as agents for the signatory defendant. (*RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1520.) As agents of the signatory defendant, such individual defendants are entitled to the benefit of the arbitration agreement. (*Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406, 418 ["If, as the complaint alleges, the individual defendants, though not signatories, were acting as agents for the Rams, then they are entitled to the benefit of the arbitration provisions"].)

In *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199 (*24 Hour Fitness*), for example, an individual brought an action against her former employer and various employees for alleged sexual harassment in the workplace. She alleged that the named employees were "acting within the scope of their managerial authority." (*Id.* at p. 1206.) The plaintiff argued, among other things, that "the existence of assertedly nonarbitrable claims against individual employees barred [24 Hour Fitness] from raising the arbitration agreement." (*Ibid.*) The court disagreed, citing ample authority for its conclusion that "[w]hile these defendants are not parties to the contract between [the plaintiff] and [24 Hour Fitness], they are entitled to the benefit of the arbitration agreement if, as the complaint alleges, they were acting as agents for [24 Hour Fitness]. [Citations.]" (*Id.* at p. 1210.)

"By the allegations of respondent's own complaint," Vilchez was "at all times acting on behalf of [AutoZone] in the course and scope of [his] employment." (*Thomas, supra*, 200 Cal.App.3d at p. 516.) Thus, Vilchez is entitled to invoke the arbitration

agreement, and is not a third party under section 1281.2(c).[2] (*Thomas*, at p. 516; *24 Hour Fitness, supra,* 66 Cal.App.4th at p. 1210.)

DISPOSITION

The order is reversed. Appellants are awarded their costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT

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[2] Because we have determined that the trial court erred in applying section 1281.2(c), we need not address appellants' alternative argument that, because the Federal Arbitration Act exclusively governs the agreement between the parties, federal law preempts enforcement of section 1281.2(c). However, we note that appellants failed to raise this argument in the trial court. (See *In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1346 ["[a] claim of error is forfeited on appeal if it is not raised in the trial court"].)