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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

YENY MARTA GALLEGOS, Plaintiff and Respondent, v. DISPENSING DYNAMICS INTERNATIONAL, INC. et al., Defendants and Appellants.	B271721 (Los Angeles County Super. Ct. No. BC600072)

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

Law Offices of Herb Fox and Herb Fox; Law Offices of Alisa Goukasian and Alisa Goukasian for Plaintiff and Respondent.

Seyfarth Shaw, Elisabeth Watson, Kiran A. Seldon and Larry M. Lawrence; Rutan & Tucker, Steven J. Goon, Brandon L. Sylvia and Kimberly Court for Defendants and Appellants.

Appellants Dispensing Dynamics International, Inc. and Priority Business Services, Inc., appeal from the trial court's order denying their motion to compel arbitration of Yeny Marta Gallegos's claims arising from her employment at Dispensing Dynamics International. Appellants based their claims on an arbitration agreement contained in an application for new employment Gallegos submitted to Priority in November 2014. The trial court denied the motion to compel arbitration, finding the arbitration clause did not apply to the prior employment. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Yeny Marta Gallegos was placed at Dispensing Dynamics International, Inc. (DDI) by Priority Business Services, Inc. (Priority), a contract employment provider, in November 2006. In December 2013, Priority ceased providing services to DDI and Gallegos ceased being Priority's employee; Gallegos continued to be employed by DDI until October 2014, although her employer of record was Dream Team, a separate agency. Almost one year after her relationship with Priority ceased, in November 2014, Gallegos submitted what Priority described as a "new hire application" to Priority, which included an arbitration agreement.[1]

That Arbitration Agreement, dated as of November 12, 2014, provided in part: "The parties to this Agreement agree to arbitrate any and all disputes, claims, or controversies (Claims) they may have against each other, including their current and former agents, owners, officers, directors, or employees which arise from the employment relationship between Employee and Employer or the termination thereof." The Agreement also provided "Employee understands that s/he would not be hired by the Employer if s/he

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[1] Priority does not assert, and the record does not reflect, that Gallegos's prior employment agreement with Priority contained an arbitration clause.

did not sign this agreement. Employee has signed it in consideration of employment by the Employer."

The moving parties submitted no evidence that Priority offered any position to Gallegos after she submitted the application in November 2014, and the trial court stated it appeared that Priority never placed Gallegos in a position after that time.

Gallegos filed suit for claims related to her prior employment at DDI and Priority and DDI moved to compel arbitration under the 2014 application. The only evidence submitted concerning the meaning of the agreement was the Declaration of Ann Page, Director of Human Resources for Priority. That declaration described Gallegos's employment through Priority from 2006 through December 31, 2013, and described what she termed the "new hire application" in November 2014. That "new-hire application packet" contained the arbitration agreement at issue; Ms. Page did not testify that the terms were open to negotiation.

The trial court heard and denied the motion to compel arbitration on March 23, 2016. The court concluded, "The arbitration agreement contains no affirmative indication that it was intended to look backwards to plaintiff's employment with Priority in 2013, and nothing before the Court suggests that the parties all intended to or agreed to retroactive application. Because there was a complete break in the employment relationship when plaintiff was discharged in 2014, the Court is persuaded that very explicit retroactive language would be required."

DISCUSSION

I. *We Review This Agreement De Novo to Determine Its Intended Effect*

California's strong public policy favoring arbitration only applies where the parties have agreed to arbitrate. Thus,"[t]o establish a valid agreement to arbitrate disputes, '[t]he petitioner bears the burden of proving the

existence of a valid arbitration agreement by [a] preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation]." (*Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 787.)

Moreover, arbitration is, in essence, a creature of contract. As a result, the court must determine whether the dispute in question is one that the parties actually agreed to arbitrate. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.) (See also *Granite Rock Co. v. Teamsters* (2010) 561 U.S. 287, 297 ["a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*"].)

In deciding the scope and nature of the parties' agreement, this court applies California law. (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 243-244 (*Sandquist*) [""When deciding whether the parties agreed to arbitrate a certain matter. . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts" [citing *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944]."])

Finally, where, as here, there is no conflict in the extrinsic evidence introduced by the parties with respect to the interpretation of the meaning of the agreement, our review is de novo. (*Esparza, supra*, 2 Cal.App.5th at p. 787.)

II. *Principles Governing Interpretation of Arbitration Provisions*

The California Supreme Court, in *Sandquist*, identified two seminal principles to be applied to our consideration of arbitration agreements. First, where the proper allocation between arbitration and court determination is uncertain, all doubts must be resolved in favor of arbitration. However, when there are ambiguities in the written agreement, we construe the agreement against the drafter. The drafter may "leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt,

therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party." (*Sandquist, supra*, 1 Cal.5th at p. 248, quoting Rest.2d Contracts.)

Particularly because the agreement at issue here was prepared by Priority and apparently presented without any opportunity for amendment, any ambiguity must be construed in favor of Gallegos.[2] (*Sandquist, supra,* 1 Cal.5th at p. 248 ["where, as here, the written agreement has been prepared entirely by the employer, it is a 'well established rule of construction' that any ambiguities must be construed against the drafting employer and in favor of the nondrafting employee]".)

III. *The Language of the Agreement Does Not Compel Its Application to Employment That Terminated Before Its Effective Date*

Appellants assert that the plain language of the agreement, coupled with the legal presumption in favor of arbitration, compels arbitration in this case because the agreement must be interpreted to cover Gallegos's claims arising out of her prior employment at DDI.[3] First, they assert that the language "any and all disputes" is language that must be read broadly. Gallegos does not dispute the fact that the agreement covers a broad range of

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[2] This agreement is thus a classic example of a contract of adhesion: "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694.)

[3] Appellant DDI filed an opening brief, in which it both joined Priority's brief, raised similar arguments as to retroactive application of the agreement, and asserted it should be entitled to enforce the agreement as a third-party beneficiary. The appellants filed a joint reply brief. In light of our disposition of the retroactivity issue, we need not address DDI's separate arguments.

issues; rather, she argues that the limitation is temporal. Appellants, however, argue that the breadth of the language includes all periods, before and after the effective date of the agreement. They rely on a series of cases that, after examining the circumstances of the relationship between the parties, permitted parties in on-going relationships to enter arbitration agreements that had retroactive effect.

Although the majority of the cases on which appellants rely were decided by federal courts, and the issue before us is governed by California law, the approach taken by the federal courts in those cases—to interpret the agreements at issue in light of the parties' expectations and relationships-was largely consistent with the instruction of *Sandquist*.[4]

That reliance on the expectations and intent of the parties is critical was made clear by the Second Circuit's discussion of an early case relied on by Appellants, *Coenen v. Pressprich* (2d. Cir. 1972) 453 F.2d 1209. In *Holick v. Cellular Sales of New York, LLC* (2d. Cir. 2015) 802 F.3d 391, the court explained that *Coenen* and similar cases' approval of an expansive, and

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[4] The only California case relied on by appellants for their argument that a retroactive application is required was *New Linen Supply v. Eastern Environmental Controls, Inc.* (1979) 96 Cal.App.3d 810. The issue before the court in that case was whether the party petitioning for arbitration had unreasonably delayed in seeking arbitration or had waived arbitration by repudiating the agreement. The parties had an on-going distributorship relationship which predated the arbitration agreement, and the dispute concerned the termination of that relationship after the arbitration agreement was signed. Nothing in the agreement stated, or suggested, that the parties intended to limit arbitration to one time period of that relationship. In a single paragraph discussion, the court declined to imply a temporal restriction on arbitration. This pre-*Sandquist* case, which states no bright line rule, does not compel the result appellants seek here, where there are two temporally distinct employment relationships with no specification in the new agreement that either party intended it to apply to the earlier, terminated, relationship.

retroactive, temporal scope of arbitration provisions did not require all broadly worded provisions to be read to be retroactive in application; instead, "the correct approach is to assess whether the parties intended for the arbitration clause to cover the present dispute." (*Id.* at 398.) The *Holick* court determined that the agreement should not be applied retroactively because it changed the parties's contractual obligations in a manner that impacted the arbitrability question. (*Ibid.*)

The bright line application sought by appellants is not mandated by the cases, nor is it appropriate here. First, there was not a continuous employment relationship between Gallegos and Priority. The evidence Priority submitted demonstrates that its employment of Gallegos terminated in December 2013, and that the arbitration agreement signed 11 months later was in the context of her application to be rehired;[5] there was no employment relationship alleged by either party during that intervening time period.[6] The new agreement expressly stated: "Employee understands that she would not be hired by the Employer if she did not sign this Agreement." This language must be read together with the rest of the Agreement, and does not require the conclusion that the Agreement applies to a prior period of employment. Any ambiguity created by the drafting must, as discussed above, be resolved in favor of Gallegos, and there is nothing in the agreement

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5 Gallegos has argued to this Court, although not expressly to the trial court, that the Agreement cannot be enforced because the consideration, future employment, failed. Appellants assert that Gallegos has waived that issue. Because we do not believe the Agreement can be applied to this lawsuit, we will not reach that issue.

6 Appellants assert on appeal, without citation to the record, that there was a mere "break" in a single employment relationship. Because they did not argue this at the trial court, but rather submitted the Page declaration describing the termination of Gallegos's employment in 2013, that argument is forfeited.

that would have led her to believe that she was agreeing to arbitrate disputes arising from her earlier employment, rather than any that might arise from the new employment she was seeking.[7]

It is, of course, possible for a party to agree to arbitrate disputes that arose prior to the effective date of an arbitration agreement. (See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 103, fn. 8, dissapproved on another ground in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 340 [employer and employee may "freely negotiat[e]" an arbitration agreement after a dispute has arisen, distinguishing this situation from mandatory employment arbitration agreements].) The record here does not demonstrate that Gallegos did so.

At best, as Gallegos asserts, the language of the agreement is ambiguous as to its temporal scope. The broad language in the opening paragraph cannot be read without reference to the limiting language in the closing paragraph. Because there is no dispute that the agreement was drafted by Priority, we must, as *Sandquist* instructs us, prefer the temporally limited meaning

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[7] Even in circumstances unlike the one presented here where the relationship between the parties is unbroken, a retroactive change unilaterally imposed by one party may improperly interfere with the expectations of the other party. (*Cobb v. Ironwood Country Club* (2015) 233 Cal.App.4th 960, 965-966 [modification of existing agreement that changes arbitration provision is restricted by the implied covenant of good faith and fair dealing].) In this case, the record does not demonstrate that the prior agreement between the parties contained a similar or identical arbitration provision-or any arbitration provision at all. As a result, we cannot conclude that an interpretation making future employment contingent on an unstated waiver of trial as to a discrete past period of employment was within Gallegos's reasonable understanding of the 2014 agreement.

posited by Gallegos and conclude that the November 2014 agreement does not apply to the dispute at issue in this litigation.

DISPOSITION

The order denying arbitration is affirmed. Respondent is to recover her costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

MENETREZ, J.*

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