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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOSE VINCENTE DE LA CRUZ,

Plaintiff and Respondent,

v.

STANDARD DRYWALL, INC.

Defendant and Appellant.

B270433

(Los Angeles County
Super. Ct. No. BC591790)

APPEAL from an order of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Affirmed.

Mahoney Law Group, Kevin Mahoney, Katherine J. Odenbreit, Morgan Glynn and Anna R. Salusky for Plaintiff and Respondent.

Finch, Thornton & Baird, Chad T. Wishchuk and Kathleen A. Donahue for Defendant and Appellant.

Defendant and appellant Standard Drywall, Inc. (Standard) appeals an order denying its petition to compel arbitration of a putative class action complaint filed by plaintiff and respondent Jose Vincente De La Cruz (De La Cruz or plaintiff).¹

The essential issue presented is whether the trial court properly found Standard failed to meet its initial burden to show the existence of a valid arbitration agreement.

We conclude the trial court properly determined that Standard failed to establish that it was a party to either of the two arbitration agreements on which it sought to rely. Therefore, the order denying the petition to compel arbitration is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On August 19, 2015, De La Cruz filed this putative class action against Standard, his former employer. Standard is a construction company that performs carpentry and drywall work in California and throughout the Western United States. Plaintiff alleges that he was employed by Standard as a plasterer from approximately April 2010 to October 20, 2013. During the course of his employment plaintiff traveled daily to job sites in various California counties.

In the lawsuit, plaintiff seeks relief on behalf of himself and a putative class consisting of all nonexempt hourly-paid employees currently or formerly employed by Standard in California during the class period, which plaintiff defines as the period commencing four years prior to the filing of the complaint through the date of certification. Plaintiff asserts causes of

¹ An order denying a petition to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).)

action for failure to pay all wages, failure to provide meal periods, failure to provide rest periods, failure to pay wages of terminated or resigned employees, unfair competition, and failure to reimburse business expenses.

a. *Petition to compel arbitration.*

In lieu of an answer, on December 18, 2015, Standard filed a petition to compel arbitration of each cause of action alleged in the complaint. Standard asserted that its construction employees in California, including De La Cruz, work pursuant to collective bargaining agreements, including: the Southern California Master Labor Agreement between United General Contractors, Inc. and the Southwest Regional Council of Carpenters and Local Unions in the Twelve Southern California Counties and Nevada Affiliated with the United Brotherhood of Carpenters and Joiners of America (hereafter, Carpenters' Agreement) (attached as Exhibit 1 to petition to compel arbitration); and the Southwest Drywall/Lathing Master Agreement between Drywall/Lathing Conference of the Western Wall & Ceiling Contractors Association, Inc. and the Southwest Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America (hereafter, Drywall/Lathing Agreement) (Exhibit 2 to petition to compel arbitration). Standard contended that plaintiff's claims in this action are subject to the arbitration procedures set forth in these two collective bargaining agreements.²

The moving papers were also supported by the declaration of Susan Baldassari, Standard's senior accountant and payroll

² We note the agreements at Exhibit 1 and Exhibit 2 are unexecuted.

supervisor. The declaration stated in relevant part: “5. The Southwest Regional Council Of Carpenters and its affiliated unions (‘Southwest Regional Council’) is a labor organization representing employees in the carpentry, drywall, and related trades in multiple states in the construction industry, an industry affecting commerce. [¶] 6. At relevant times, [Standard] has recognized the Southwest Regional Council as the collective bargaining representative for ‘carpenter’ and ‘drywall’ employees in Southern California. This recognition is memorialized in the Southern Regional Council’s current master agreements with the United General Contractors, Inc. and the Western Wall & Ceiling Contractors Association, Inc. (the ‘Southwest Regional Council Agreements.’) The Southwest Regional Council Agreements governed employment of Southwest Regional Council members at [Standard]. A true and correct copy of the 2012-2016 Southwest Regional Council Agreement with the United General Contractors, Inc., is attached to the Petition as Exhibit 1. A true and correct copy of the 2012-2016 Southwest Regional Council Agreement with the Western Wall & Ceiling Contractors Association, Inc. is attached to the Petition as Exhibit 2.”

b. *Opposition to petition to compel arbitration.*

In opposition, De La Cruz contended the petition to compel arbitration should be denied because Standard failed to establish that he and Standard were parties to the collective bargaining agreements at issue.

De La Cruz argued, “Defendant fails to establish that it is a party to which the collective bargaining agreements apply. The . . . Carpenters’ Agreement, attached to Defendant’s Petition as Exhibit 1, is between United General Contractors, Inc. and the

Southwest Regional Council of Carpenters. The . . . Drywall Agreement, attached to Defendant's Petition as Exhibit 2, is between Drywall/Lathing Conference of the Western Wall & Ceiling Contractors Association, Inc. and Southwest Regional Council of Carpenters of the United Brotherhood of Carpenters and Joiners of America. However, Defendant sets forth no facts establishing that it is a party to either of these collective bargaining agreements or that it is affiliated with United General Contractors, Inc. and/or Drywall/Lathing Conference of the Western Wall & Ceiling Contractors Association, Inc. The only fact set forth by Defendant is that 'at relevant times, [Standard] has recognized the Southwest Regional Council as the collective bargaining representative for "carpenter" and "drywall" employees in Southern California.' "

De La Cruz also argued that Standard failed to set forth "any facts suggesting that Plaintiff was subject to either of the collective bargaining agreements attached to Defendant's Petition. The only fact Defendant provides is, 'In 2010, Plaintiff . . . was dispatched from Local Union 2361 of the Southwest Regional Council in Orange, California to work at [Standard].' (Baldassari Decl., ¶ 7.) Defendant fails to provide any facts about Local Union 2361 or any facts concerning what collective bargaining agreements apply to the local union."

c. Hearing and trial court's ruling.

On February 1, 2016, the matter came on for hearing. The parties stood on their papers. The trial court denied Standard's petition to compel arbitration, setting forth its rationale as follows:

The threshold issue is whether there exists an enforceable arbitration agreement. The initial burden lies with the

defendant petitioning to compel arbitration to show by a preponderance of evidence that there exists an enforceable arbitration agreement between the parties. Therefore, Standard, as the petitioning party, bore the burden to demonstrate that an enforceable agreement to arbitrate exists between it and De La Cruz.

Standard “points to Paragraphs 5 and 6 of the declaration of Susan Baldassari to support its contention that it is party to the two collective bargaining agreements on which it bases the instant petition. [¶] However, those portions of Ms. Baldassari’s declaration offer no support to defendant’s contention that it is a member of the United General Contractors, Inc. or the Western Wall & Ceiling Contractors Association, which would thus make [Standard] a party to the agreements. [¶] The pertinent paragraphs in the Baldassari declaration provide, firstly in Paragraph 5, where Ms. Baldassari states ‘The Southwest Regional Council of Carpenters and its affiliated union is a labor organization representing employees in the carpentry, drywall, and related trades in multiple states in the construction industry, an industry affecting commerce.’ [¶] Paragraph 6: ‘At all relevant times [Standard] has recognized the Southwest Regional Council as the collective bargaining representative of the carpentry and drywall employees in Southern California.’

The trial court found “the cited portions of Ms. Baldassari’s declaration provide no evidentiary support for defendant’s argument that it is a party to either of these collective bargaining agreements. Defendant is not a signatory to either agreement. [¶] Ms. Baldassari’s declaration likewise does not constitute evidence that defendant was a member of either the United

General Contractors, Inc. or Western Wall & Ceiling Contractors Association, Inc.

“Defendant points to plaintiff’s failure to introduce evidence showing that [Standard] is not a union contractor. But this argument again impermissibly seeks to shift the burden on a petition to compel arbitration to the opposing party. [¶] It is the defendant’s burden to establish that an enforceable arbitration agreement exists between the parties, and absent a showing that [Standard] is a union contractor and party to the collective bargaining agreements cited, [defendant has] failed to satisfy its initial burden.

“By the same token, defendant has also failed to meet its initial burden to show that plaintiff . . . is a union member bound by the collective bargaining agreements of which defendant seeks to compel arbitration in this matter. [¶] Defendant’s declaration of Susan Baldassari provides only that plaintiff was dispatched from Local Union 2361 of the Southwest Regional Council in Orange, California, to work at [Standard]. Defendant offers no documentation to support its assertion, and there is a lack of evidence to support its argument that plaintiff is subject to the agreements.”

The trial court also addressed Standard’s request “that in the event the Court concludes that defendant failed to introduce evidence sufficient to meet its initial burden, a full evidentiary hearing be held. Typically, courts deciding a petition to [compel] arbitration hold such an evidentiary hearing where there exists a factual dispute as to the applicability of an arbitration provision to a dispute. [¶] The present case is distinguishable from most cases cited by defendant in that defendant has altogether failed to meet its initial burden to demonstrate that either of the

present parties are subject to a written valid arbitration agreement. [¶] Since defendant has failed to meet its initial burden to show that there's a valid agreement to arbitrate the dispute, the Court is going to deny defendant's petition to compel arbitration."

Standard's counsel then requested the opportunity to provide additional evidence to support the petition to compel arbitration, asserting the evidence is "easily obtainable." The trial court declined to reopen the matter, stating, "Well, but you didn't supply the evidence." Counsel added, "Your Honor, if we knew that you required some additional cumulative evidence we would have – we could have brought witnesses today." The trial court replied, "Well, I'm sure everybody says that after a trial."

Standard timely appealed the order denying its petition to compel arbitration.

CONTENTIONS

Standard contends: the trial court erred in holding that Standard had not proven the existence of the Southwest Regional Council Agreements and their applicable arbitration provisions by a preponderance of the evidence; the trial court erred in shifting the burden of establishing waiver of arbitration to Standard to prove that it had not waived arbitration; and the trial court erred in not granting Standard a further evidentiary hearing.

DISCUSSION

1. General principles.

On a petition to compel arbitration, the "petitioner bears the burden of proving the existence of a valid arbitration agreement by the 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.] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citations.]” (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972 (*Engalla*).)

2. *Trial court properly concluded that Standard failed to meet its burden to show it was a party to the two collective bargaining agreements at issue.*

As the trial court recognized, the Baldassari declaration merely indicated that Standard “had recognized” the Southwest Regional Council as the collective bargaining representative for carpenter and drywall employees in Southern California. However, the Baldassari declaration failed to show that Standard was a party to either of the two collective bargaining agreements attached to its petition to compel arbitration.

The Baldassari declaration does not show the connection, if any, between Standard and United General Contractors, Inc., the entity which entered into the agreement with the Southwest Regional Council of Carpenters (found at Exhibit 1). Likewise, the Baldassari declaration does not show any connection between Standard and the California Drywall/Lathing Conference of the Western Wall & Ceiling Contractors Association, Inc., the entity which entered into the agreement with the Southwest Regional Council of Carpenters (found at Exhibit 2).³

³ In addition to the Baldassari declaration, Standard's opening brief draws on the allegations of its unverified petition to compel arbitration for evidentiary support. However, the facts relevant to enforcement of the arbitration agreement are to be

In sum, Standard, the movant, failed to meet its burden to establish it was a party to the two arbitration agreements on which it sought to rely. Therefore, the trial court properly denied Standard's petition to compel arbitration.

3. *No abuse of discretion in trial court's refusal to reopen the matter.*

Standard contends that because the trial court applied a "heightened and improper burden of proof" to the petition to compel arbitration, it should have granted the opportunity for a further evidentiary hearing in the matter. The argument is meritless.

It is well established that on a petition to compel arbitration, the petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence. (*Engalla, supra*, 15 Cal.4th at p. 972.) The trial court did not apply a heightened or improper burden of proof. As discussed above, it applied settled principles to the evidentiary showing contained in the moving papers and found the movant's showing to be insufficient. Nor is there any merit to Standard's claim that the trial court improperly shifted the burden to Standard to prove that it had not waived arbitration; the trial court properly assigned the burden to Standard in the first instance to prove the existence of a valid arbitration agreement covering this dispute.

"proven by affidavit or declaration and documentary evidence." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) Therefore, the allegations contained in Standard's unverified petition to compel arbitration are of no assistance to Standard.

Further, although Standard sought the opportunity to present additional evidence, Standard did not make an offer of proof as to what additional evidence it could proffer at a continued hearing. The trial court was not required to speculate that Standard was capable of presenting additional evidence that would cure the inadequacy of its moving papers. On this record, we perceive no abuse of discretion in the trial court's refusal to reopen the matter.

DISPOSITION

The order denying Standard's petition to compel arbitration is affirmed. De La Cruz shall recover his costs on appeal.

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EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.