Filed 12/18/19 Avila v. P&L Development, LLC CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JESUS AVILA, Plaintiff and Respondent. v. P&L DEVELOPMENT, LLC, Defendant and Appellant.	B293278 (Los Angeles County Super. Ct. No. BC688206)

APPEAL from an order of the Superior Court of Los Angeles County, Terry A. Green, Judge. Reversed and remanded.

Jackson Lewis, Dylan B. Carp and Sehreen Ladak for Defendant and Appellant.

Law Offices of Ramin R. Younessi, Ramin R. Younessi, Samvel Geshgian and Michael H. Chang for Plaintiff and Respondent.

P&L Development, LLC (P&L), appeals from an order denying its motion to compel arbitration of Jesus Avila's claims brought under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.). P&L contends the trial court erred in finding the arbitration agreement was void because of fraud in the execution. The court based its ruling on the fact Avila did not understand English, and the arbitration agreement was not explained to him. The court did not reach whether the arbitration agreement was procedurally and substantively unconscionable.

We conclude Avila has not met his burden to show the arbitration agreement was void because of fraud in the execution. We reverse the denial of P&L's motion to compel arbitration and remand for the trial court to consider whether the arbitration agreement was procedurally and substantively unconscionable in light of the Supreme Court's recent opinion in *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111 (*OTO*).

BACKGROUND AND PROCEDURAL HISTORY

A. *The Allegations in the Complaint*

Avila alleges he was hired as a forklift driver in 2008 by P&L's predecessor, Aaron Industries, Inc. Avila became an employee of P&L after it acquired Aaron Industries in late 2013 or early 2014. In October 2015 Avila suffered an injury to the left side of his face, which limited his ability to work. Avila promptly notified Dania Navarro, P&L's human resource representative, of his disability and medical condition. Avila went on temporary disability leave in October 2015. On August 12, 2016, while Avila was on leave, P&L terminated his employment.

Avila had provided P&L with a doctor's note extending Avila's medical leave to October 14, 2016, but Navarro told Avila he was terminated because "someone else would be filling your position; we cannot wait until you get better." Following the oral termination, Navarro sent Avila a letter stating P&L could not accommodate Avila's request to extend his leave of absence "due to [his] already reaching [his] maximum time available and because [his] leave of absence has expired."

On December 28, 2017 Avila sued P&L for disability discrimination, retaliation, failure to prevent discrimination and retaliation, failure to provide reasonable accommodations, failure to engage in a good faith interactive process, wrongful termination in violation of public policy, and declaratory relief.

B. *P&L's Motion to Compel Arbitration*

On August 27, 2018 P&L moved to compel arbitration. P&L argued that on November 9, 2011 Avila signed three agreements with Aaron Industries (the Agreements), agreeing to resolve employment disputes through binding arbitration. Although P&L was not a signatory to the Agreements, P&L sought to enforce them as Avila's successor employer through its acquisition of Aaron Industries. P&L maintained the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) applied to the Agreements because P&L is a Delaware limited liability company engaged in "the business of manufacturing private label and branded pharmaceuticals, and transporting and selling those products through various states." Further, the Agreements expressly stated they were subject to the FAA.

In support of its motion, P&L filed a declaration by its vice president of human resources, attaching the Agreements Avila

signed on November 9, 2011. Both the "Employment At-Will and Arbitration Agreement California" and the "Employee Acknowledgment and Agreement" contain the same arbitration provision: "Company[1] and Employee agree to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to Employee's employment, including but not limited to the termination of Employee's employment and Employee's compensation. . . . Both Employee and Company agree that any claim, dispute, and/or controversy that Employee may have against the Company . . . , or Company may have against Employee, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act ("FAA"), in conformity with the procedures of the California Arbitration Act . . . and all of the Act's other mandatory and permissive rights to discovery . . . . Included within the scope of this Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination, harassment and/or retaliation, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise."

Both agreements provide, "This binding arbitration agreement shall not be construed to allow or permit the consolidation or joinder of other claims or controversies involving any other employees, and will not proceed as a class action, collective action, private attorney general action or any similar

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1 Both agreements define the "Company" as Aaron Industries.

representative action. No arbitrator shall have the authority under this agreement to order such class or representative action."

Similarly, the "Employee Acknowledgment and Agreement California," which is printed in a small font, states in part, "I and the Company agree to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to my employment, including but not limited to the termination of my employment and my compensation." Unlike the other two agreements, this agreement allows the employee to opt-out of the waiver of "any right [he or she] may have to bring an action on a class, collective, private attorney general, representative or other similar basis" if the employee checks a box. Avila did not check the box.

All three Agreements provide, "In addition to other requirements imposed by law, the arbitrator selected shall be a retired California [s]uperior [c]ourt [j]udge, or an otherwise qualified individual to whom the parties mutually agree and shall be subject to disqualification on the same grounds as would apply to a judge of such court. All rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure [s]ection 631.8 shall apply and be observed. . . . Likewise, all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code [s]ection 47(b)."

C. *Avila's Opposition*

In opposition, Avila contended P&L did not meet its burden to establish the existence of a valid arbitration agreement because the Agreements were inadmissible hearsay, and it was impossible to determine which of the three Agreements was the operative agreement. Avila also argued the Agreements were void because they were procured by fraud in the execution. In addition, Avila asserted the Agreements were procedurally and substantively unconscionable. Finally, Avila contended the motion was untimely, and therefore P&L waived its right to compel arbitration.

In his supporting declaration, Avila stated that during his employment he was required to sign documents that he "did not understand and could not possibly try to understand."[2] He did not recall signing the Agreements containing the arbitration provisions. Avila stated, "On November 9, 2011, the date that [P&L] claims I signed the Agreements, I could not read, write, or understand English. No agent or representative of [P&L] translated the text of any of the Agreements to me or even explained what any of the Agreements said. [¶] I never received copies of the Agreements that [P&L] alleged I signed in English or in Spanish. [¶] No agent or representative of [P&L] reviewed or discussed the Agreements or any of the provisions contained therein with me. No agent or representative of [P&L] told me that the terms were negotiable, or that there was an opt-out procedure to the Agreements." Avila also stated, "At no point did any representative of [P&L] tell me what the arbitration process

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[2] Avila's Spanish declaration was translated into English by a certified Spanish interpreter. Avila signed and dated the Spanish declaration.

entailed, what rules governed the process, or what other procedures were involved. No employee, agent or representative of [P&L] told me that I could consult with a lawyer, or that I should consult with a lawyer."

D. *The Trial Court Ruling*

At the September 19, 2018 hearing, the trial court overruled Avila's evidentiary objections and denied P&L's motion to compel arbitration. The court found Avila "doesn't speak English," and therefore he did not understand what he was signing because the Agreements were in English. The court concluded there was no arbitration agreement because "there's no meeting of the minds." In its written order, the court found there was fraud in the execution because there was "no mutual assent." The court explained, "[Avila] *could not* know what he was signing since he did not speak English and the documents were not explained to him. Therefore, there is no mutual assent and the Agreement is unenforceable." The court did not reach whether the Agreements were unconscionable.[3]

P&L timely appealed.

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[3] At the outset of the hearing, the trial court stated as to the Agreements, "It's a plain vanilla arbitration agreement. I have no problem with it. It's not unconscionable, it's not bad, there's nothing wrong." However, the court did not specifically address procedural or substantive unconscionability. When Avila's attorney started to respond to the court's tentative ruling, the court cut him off and stated, "You're winning, you don't have to say anything."

DISCUSSION

A. *Arbitration Law and Standard of Review*

"As with the FAA . . . , California law establishes 'a presumption in favor of arbitrability.'" (*OTO, supra,* 8 Cal.5th at p. 125.) "An agreement to submit disputes to arbitration 'is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.'" (*OTO*, at p. 125; accord, *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 964.) "'"[S]tate law" . . . is applicable to determine which contracts are binding . . . and enforceable under' the FAA, "'*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'"" (*McGill*, at p. 964; accord, *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1079 ["[U]nder section 2 of the FAA, a state court may refuse to enforce an arbitration agreement based on 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'"].)

"Because the existence of the [arbitration] agreement is a statutory prerequisite to granting the petition,[4] the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement—either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see [Code Civ. Proc.,] § 1281.2, subds. (a), (b))—that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Rosenthal v.*

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4 Code of Civil Procedure section 1281.2 refers to the motion as a "petition of a party to an arbitration agreement." However, when a motion is filed in an existing lawsuit, it is commonly styled, as here, a "motion to compel arbitration."

Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394, 413 (*Rosenthal*); accord, *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).)

An order denying a motion to compel arbitration is reviewed for substantial evidence if based on findings of fact. (*Lopez v. Bartlett Care Center, LLC* (2019) 39 Cal.App.5th 311, 317; *Nieto v. Fresno Beverage Co., Inc.* (2019) 33 Cal.App.5th 274, 279.) Where the facts are undisputed, we review the denial of a motion to compel arbitration de novo. (*OTO, supra*, 8 Cal.5th at p. 126; *Pinnacle, supra*, 55 Cal.4th at p. 236.) Likewise, we independently review the order if the court's denial rests solely on a question of law. (*Lopez*, at p. 317; *Nieto*, at p. 279.)

B. *The Arbitration Agreement Is Not Void Based on Fraud in the Execution*

"[C]laims of fraud in the execution of the entire agreement are not arbitrable under either state or federal law. If the entire contract is void *ab initio* because of fraud, the parties have not agreed to arbitrate any controversy . . . ." (*Rosenthal, supra*, 14 Cal.4th at p. 416; accord, *Duick v. Toyota Motor Sales, U.S.A., Inc.* (2011) 198 Cal.App.4th 1316, 1321.) Where there is fraud in the execution, """the fraud goes to the inception or execution of the agreement, so that the promisor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all, mutual assent is lacking, and [the contract] is *void*. In such a case it may be disregarded without the necessity of rescission."""" (*Rosenthal*, at p. 415.)

Generally, "'"one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms, and cannot escape liability on the ground that he [or she] has not read it. If he [or she] cannot read, he [or she] should have it read or explained to him [or her]."'" (*Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 686 (*Ramos*).) Therefore, to negate a contract by showing fraud in the execution, the plaintiff must demonstrate that in signing the document, he or she acted in an objectively reasonable manner in failing to acquaint himself or herself with the contents of the written agreement. (*Rosenthal, supra*, 14 Cal.4th at p. 423; *Ramos*, at p. 688.) As the Supreme Court explained in *Rosenthal*, "It follows that one party's *unreasonable* reliance on the other's misrepresentations, resulting in a failure to read a written agreement before signing it, is an insufficient basis, under the doctrine of fraud in the execution, for permitting that party to avoid an arbitration agreement contained in a contract." (*Rosenthal*, at p. 423; accord, *Ramos*, at p. 687 ["[T]he fact that [plaintiff] signed a contract in a language he may not have completely understood would not bar enforcement of the arbitration agreement."]; *Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 160, 163 [rejecting plaintiff's contention the release she signed was invalid because she was literate in Greek but not English].)

In *Rosenthal*, multiple plaintiffs brought fraud and other claims in connection with investments they made. (*Rosenthal, supra*, 14 Cal.4th at pp. 402-403.) The Supreme Court found the arbitration agreement unenforceable as to two of the plaintiffs, Giovanna Greco, an 81-year-old Italian immigrant who spoke only "'a few words of English' and 'cannot read English at all,'" and her daughter Rosalba Kasbarian, a 45-year-old Italian

immigrant who was "able 'to speak and understand simple English,' but 'cannot read English very well at all,' and ha[d] difficulty reading 'complicated words or legal terms.'" (*Id.* at p. 427.) The Supreme Court held Greco and Kasbarian reasonably relied on the defendant's representative in not reading the arbitration agreement where they had a previous relationship with the defendant; they had a limited ability to understand English; Greco explained she could not understand what the representative was saying; the representative told them he would read the documents to them while Kasbarian translated for Greco; and when the representative read the documents, he did not mention the contract included an arbitration agreement or that the plaintiffs were giving up their legal rights. (*Id.* at pp. 427-428.) The Supreme Court concluded these facts, if found true by the trial court, would support a defense of fraud in the execution by depriving the plaintiffs "of a reasonable opportunity to learn the character and essential terms of the documents they signed." (*Id.* at p. 428.)

By contrast, two other plaintiffs, Raul Pupo and Felix Segarra, produced evidence of their "limited facility with English," but they did not tell the defendant's representative they could not read the contract; Pupo had no prior relationship with the defendant or its representative; and the representative did not purport to read the contract to them or orally explain its contents. (*Rosenthal, supra*, 14 Cal.4th at p. 431.) The court concluded, "Under these circumstances, Pupo and Segarra's failure to take measures to learn the contents of the document they signed is attributable to their own negligence, rather than to fraud on the part of [defendant] or its representatives." (*Ibid.*; cf. *Ramos, supra*, 242 Cal.App.4th at p. 687 [plaintiff proved fraud

in the execution of an arbitration agreement where the defendant purported to provide the plaintiff a Spanish translation of a contract, but the translation did not contain the arbitration agreement].)

Similar to Pupo and Segarra in *Rosenthal*, who presented "evidence of limited facility with English" (*Rosenthal, supra*, 14 Cal.4th at p. 431), Avila stated he "could not read, write, or understand English." Like Pupo and Segarra, Avila presented no evidence he told any P&L representative that he could not read the Agreements, or that any P&L representative orally explained the Agreements' contents to him. (*Ibid.*) Rather, Avila averred no P&L representative "translated the text of any of the Agreements to [him] or even explained what any of the Agreements said." Although the record shows P&L had translated two employment documents into Spanish for Avila in 2009, Avila had signed 23 other employment documents without translations.[5]

Under these circumstances, Avila's "failure to take measures to learn the contents" of the Agreements he signed "is attributable to [his] own negligence, rather than to fraud." (*Rosenthal, supra*, 14 Cal.4th at p. 431.) These facts are in contrast to those in *Rosenthal* (as to Greco and Kasbarian who successfully proved fraud in the execution) and *Ramos* in that the representatives of the defendants there had translated the contracts but concealed the existence of the arbitration

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[5] P&L submitted the documents to show Avila signed the Agreements. The two Spanish documents were Avila's job evaluation from March 2009 and a vacation request Avila filled out in December 2009.

agreement. (*Rosenthal*, at pp. 427-428; *Ramos, supra*, 242 Cal.App.4th at p. 687.)

The trial court therefore erred in denying P&L's petition to compel arbitration based on fraud in the execution. However, because the trial court did not reach whether the arbitration agreement was procedurally and substantively unconscionable, we remand for the court to determine whether Avila can prove unconscionability in light of *OTO, supra*, 8 Cal.5th at pages 125-138. (See *Subcontracting Concepts (CT), LLC v. De Melo* (2019) 34 Cal.App.5th 201, 206, 211 [arbitration contract was procedurally unconscionable where employer failed to explain provisions of arbitration agreement to native Portuguese-speaking employee]; *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 85, 90 [arbitration agreement was procedurally unconscionable where employer failed to translate key provision into Spanish for Spanish-speaking employee although employer translated other portions of agreement].) This is a fact-specific determination for the trial court to make in the first instance. (*OTO*, at p. 124; *Sonic-Calabasas A., Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1147 [remanding for trial court to consider the arbitration process in determining unconscionability]; see Civ. Code, § 1670.5, subd. (b) ["When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination."].)

DISPOSITION

The order is reversed. The matter is remanded for the trial court to determine whether the arbitration agreement is procedurally and substantively unconscionable. The parties are to bear their own costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.