Filed 5/8/18 Watts v. U.S. TelePacific Corp. CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

| | |
|---|---|
| CRAIG WATTS et al.,<br><br>Plaintiffs and Respondents,<br><br>v.<br><br>U.S. TELEPACIFIC CORP.,<br><br>Defendant and Appellant. | B277100<br><br>(Los Angeles County Super. Ct. Nos. BC482968, BC497288) |

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

Horvitz & Levy, David M. Axelrad, Felix Shafir; Gibson, Dunn & Crutcher, Christopher Chorba and Katherine V.A. Smith for Defendant and Appellant.

Law Offices of Kevin T. Barnes, Kevin T. Barnes, Gregg Lander; Kokozian Law Firm, Bruce Zareh Kokozian; Capstone Law, Glenn A. Danas, Robert Drexler, Bevin Allen Pike, Arlene M. Turinchak, and Jonathan Lee for Plaintiffs and Respondents.

---

Four years after plaintiffs and respondents Craig Watts (Watts) and Tolanda McKinney (McKinney) filed their wage-and-hour class action complaint against defendant and appellant U.S. TelePacific Corp. (TelePacific), TelePacific filed a motion to compel arbitration. The trial court denied TelePacific's motion on the ground that it waived its right to compel arbitration by waiting too long to file it. TelePacific appeals, contending that it could not have waived its right to compel arbitration as to the unnamed class members[1] because they were not parties to the lawsuit before class certification; therefore, it could not have brought its motion to compel arbitration until after a class was certified, making its motion timely.

We cannot adopt TelePacific's position. If it wanted to arbitrate this dispute, it should have moved to compel arbitration at the outset of this litigation. Accordingly, we affirm the trial court's order.

## FACTUAL AND PROCEDURAL BACKGROUND

*The parties and the pleadings*

TelePacific is a telecommunications company that engages in interstate commerce by providing modern telecommunications services to small and medium-sized businesses. It employs customer account managers (CAMs) to advise and counsel customers concerning the selection and purchase of such services throughout the United States.

---

[1] Although it disagrees with the trial court's order, TelePacific is not asking us to overturn the denial of its motion as to Watts and McKinney, the two named plaintiffs. Rather, its appeal only challenges the trial court's determination that TelePacific waived its right to compel arbitration as to the unnamed class members.

Plaintiffs were employed by TelePacific as CAMs in California. McKinney worked as a CAM in Rancho Cucamonga from approximately 2002 to 2011. Watts worked as a CAM in Los Angeles from approximately 2011 to 2012.

In April 2012, Watts filed a wage-and-hour class action against TelePacific in Los Angeles County, asserting that TelePacific misclassified CAMs in California as exempt employees, and alleging claims under California's Labor Code. In June 2012, McKinney filed a related wage-and-hour class action against TelePacific in another county, alleging similar claims. In 2012, McKinney's lawsuit was transferred to Los Angeles, and in 2013 consolidated with Watts's lawsuit.

In its answers to both complaints, TelePacific asserted that "Some or all of Plaintiff's claims are subject to binding arbitration."

*Plaintiffs' motion for class certification and discovery*

Plaintiffs moved for class certification in December 2014.

In connection with plaintiffs' motion for class certification, the parties participated in extensive discovery. For example, Watts propounded at least two requests for production of documents. In response to his second request for production of documents, TelePacific offered lengthy, almost boilerplate objections—one of its numerous objections was: "[TelePacific] further objects to the request to the extent it seeks information relating to individuals who have waived the right to pursue class claims, are subject to binding arbitration agreements with [TelePacific], and may not properly be considered part of the putative class." Its supplemental response to Watts's second request for production of documents and corrected second

supplemental response to Watts's second request for production of documents reiterated the objection.

TelePacific filed its opposition to plaintiffs' motion on February 11, 2015. It argued that the motion should be denied because "of the approximately 300 putative class members, over 200 of them have signed some form of express arbitration agreement, and all are covered by arbitration provisions in the . . . employee handbook." Because "the vast majority (if not all) of the members of the putative class are bound by arbitration obligations, [they] cannot be members of any class." Moreover, "both of the named Plaintiffs are bound by arbitration obligations that cover all their individual claims." Thus, they cannot proceed as class representatives.

*Trial court order*

At the first hearing on plaintiffs' motion, TelePacific argued that it had had no opportunity to raise the issue of arbitration with regard to every putative class member other than Watts and McKinney—after all, they were not parties to the lawsuit. Thus, there had been no waiver.

The trial court then queried: If Watts had a valid arbitration agreement with TelePacific, why did TelePacific wait and raise the issue of arbitration defensively, only in response to plaintiffs' motion for class certification? TelePacific's counsel replied that whether Watts has an arbitration agreement is a different issue from whether the others have valid arbitration agreements with TelePacific—because they had never been parties to the action, TelePacific never had "a formal chance" to make a motion with respect to them.

At the end of the hearing, the trial court determined that some of plaintiffs' claims were susceptible to class certification.

In so ruling, the trial court noted that TelePacific had "advised [it] that many of the putative class members . . . have arbitration clauses in their employment agreements. The [trial] court understands that no such agreements have yet been located for the named plaintiffs. No evidence on that subject has as yet been presented, and the [trial] court will not consider arbitration-related issues at this time."

In June 2015, the trial court issued its order on plaintiffs' motion for class certification, reiterating that it was not considering arbitration-related issues at this time.

*Class notice and opt-out*

Class notice was mailed out in December 2015 to the 398 potential class members, who had until January 25, 2016, to opt out by returning an exclusion form.

*TelePacific's motion to compel arbitration*

Following the return of the opt-out exclusion forms, the certified class consisted of 383 class members. Of these 383 members, 359 signed one or more documents requiring them to submit their employment-related disputes to binding arbitration. It appears that there were at least six different groups of class members who signed different sorts of arbitration agreements with TelePacific.

In February 2016, TelePacific moved to compel class members with arbitration agreements, including both the named plaintiffs and the unnamed class members, to arbitrate certain claims. It did not move to compel arbitration as to 24 of the 383 class members for whom it could not find a signed arbitration agreement or offer letter.

Plaintiffs opposed TelePacific's motion, arguing, inter alia, that by actively litigating this case for more than four years, TelePacific waived its purported right to compel arbitration.

At the initial hearing, the trial court indicated its concern as to TelePacific's delay in raising this issue. It stated: If Watts and McKinney were required to arbitrate their claims against TelePacific, then "that might have been an issue that went to their suitability to serve as named class representatives and therefore should have been addressed in the context of the class certification motion." Thus, the trial court wanted more time to review TelePacific's motion, along with the materials that had been submitted in connection with the class certification motion.

Before the matter was put over, counsel for Watts directed the trial court to *Morgan v. AT&T Wireless Servs.* (Sept. 13, 2013, B241242) 2013 Cal.App. Lexis 6537 [nonpub. opn.] (*Morgan*), an unpublished Court of Appeal decision with what the trial court characterized as instructive, albeit not precedential, analysis.

At the subsequent hearing, the trial court relied heavily upon *Bower v. Inter-Con Security Systems, Inc.* (2014) 232 Cal.App.4th 1035 (*Bower*) and noted that to prove waiver of a right to arbitration, a party must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with that right, and prejudice to the party opposing arbitration. It went on to find all elements present here: (1) TelePacific was aware of its right to compel arbitration from the outset—after all, TelePacific asserted arbitration as an affirmative defense. (2) The parties and the court have gone through three years of litigation. (3) Because of the delay, plaintiffs were unable to avail themselves of the "cost savings and other benefits associated with arbitration."

In so ruling, the trial court was bothered by the fact that TelePacific possessed copies of the arbitration agreements at all times.

Moreover, the trial court highlighted what it perceived to be the "fundamental flaw" in TelePacific's argument: If the class representatives (Watts and McKinney) had enforceable arbitration agreements with TelePacific, how could they be proper class representatives in court? For that reason, the issue of their qualification as class representatives should have been raised and adjudicated "a lot earlier" in this matter; TelePacific should not have waited until after the class was certified.

The parties went on to discuss *Sky Sports, Inc. v. Superior Court* (2011) 201 Cal.App.4th 1363 (*Sky Sports*); TelePacific argued that *Sky Sports* held "that any delay in bringing the motion to compel arbitration until a class [is] certified to include the other class members cannot constitute a waiver." As applied to the instant case, TelePacific did not have the ability to bring a motion to compel arbitration against the unnamed class members until they became parties to this litigation, which did not occur until the opt-out period expired. And, TelePacific brought its motion to compel arbitration as to these individuals 22 days later.

Plaintiffs' counsel argued that *Sky Sports* was distinguishable for a simple reason; in *Sky Sports*, the class representatives did not sign an arbitration agreement; in this case, Watts and McKinney both signed arbitration agreements. According to plaintiffs' counsel: "Once you have a party, here, the class representatives, who signed an arbitration agreement, you must move to compel that arbitration agreement or you waive the right to do so." In other words, "[i]f you have a class rep with a signature on an arbitration agreement, if you're going to act with

the intent to invoke your right to compel arbitration, you must do so. [¶] You can't wait to hope that maybe you're going to get class cert denied, maybe you will get an MSJ ruling along the way that will help you. You cannot do that. You must file your motion to compel arbitration, get the case to speedy resolution, if that's what you want to do. But if you don't want to do that, and you don't act in regards to doing that, you've waived your right."

While the trial court's decision did not hinge on *Morgan*, and it expressly stated that it was not citing it as precedent, it did find *Morgan* "instructive because it points out what *Sky Sports* does and does not stand for." The trial court stated: "The *Morgan* court said *Sky Sports* does not stand for the proposition that it is premature to bring a motion to compel arbitration as to the putative class members unless and until a class certification motion is filed. Instead the appellate court held in essence that the trial court could not compel anybody to arbitrate until it had somebody before it who had signed the arbitration agreement. [¶] . . . [¶] . . . [T]he [*Morgan*] court did not hold the putative class members had to join in the action before the pleading requirements would be met to file a motion to compel; rather, the class had to be defined as including signatories for the arbitration agreement because until then the class could possibly be defined to include only those employees who had not signed the arbitration agreement. So arbitration never would have become an issue. In contrast here from the outset all plaintiffs, named and potential, were signatories to the arbitration agreement and the class was always contemplated as including those who [were] subject to the arbitration agreement."

The trial court continued: "And it seems to me that what the *Morgan* case says is that, as long as you have some people

who are parties who are subject to the arbitration agreement, the —the motion to compel arbitration could have been made. And here, from the get-go, the theory was named plaintiffs were subject to this. And I think that that created an obligation—I tend to agree that this is a distinction that has to be drawn with respect to *Sky Sports*. I think that may reflect a proper understanding of *Sky Sports*. And I do not—and I reject the concept that *Sky Sports* stands for the proposition that you have to have class certification before you can bring a motion to compel."

Ultimately, the trial court found *Bower* "very much on point." Because (1) this case had been pending for four years, (2) the parties had "gone through very, very extensive proceedings leading up to class certification over a very extended period of time", and (3) Watts and McKinney are subject to the arbitration provision in their offer letters and they have been the named class representatives throughout the proceedings, the opportunity to present the issue of arbitration could have been presented and adjudicated earlier. Thus, the trial court found "waiver on all the facts" and denied TelePacific's motion.

*Appeal*

TelePacific's timely appeal ensued.

**DISCUSSION**

I. *Standard of review*

To the extent we are called upon to review issues of law, we do so de novo. (*Sky Sports*, *supra*, 201 Cal.App.4th at p. 1367.) We review the trial court's factual findings for substantial evidence. (*Bower*, *supra*, 232 Cal.App.4th at p. 1043.)

II. *The trial court's judgment is affirmed*[2]

Both the Federal Arbitration Act (FAA) and California law reflect "a strong policy favoring arbitration agreements." (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) "Although a court may deny a petition to compel arbitration on the ground of waiver [citation], waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*St. Agnes*, *supra*, at p. 1195.)

"There is a presumption against waiver" and the "party seeking to prove waiver of a right to arbitration must show '(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration.'" (*Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389–1390.)

Plaintiffs here proved that TelePacific waived its right to compel arbitration. TelePacific knew it had a right to compel arbitration—it knew that it had arbitration agreements with the majority of the class members; it alleged arbitration as an affirmative defense; it objected to plaintiffs' discovery requests on the grounds that the parties had agreed to arbitrate any disputes.

TelePacific engaged in acts inconsistent with that right—as set forth above, for over four years, it participated in discovery and litigation before seeking to compel arbitration.

---

[2] We reach this conclusion without considering or relying upon *Morgan*, *supra*, B241242. Plaintiffs violated California Rules of Court, rule 8.1115(a) by calling this unpublished decision to the trial court's attention, and we do not condone such litigation strategies.

And, as pointed out by the trial court, plaintiffs have been prejudiced by TelePacific's delay in seeking arbitration. Because of TelePacific's delay, plaintiffs were unable to avail themselves of the "cost savings and other benefits associated with arbitration."

TelePacific contends that at least as to the unnamed class members, no prejudice has been shown. The problem with this argument is that it presupposes that we can grant the relief requested on appeal by TelePacific, namely that we reverse the trial court's ruling denying arbitration as to the unnamed class members. But, TelePacific does not explain how we can grant that relief without prejudicing those unnamed class members. Without Watts and McKinney in the arbitration proceeding, who will represent the class? Who is the class lawyer? Stated otherwise, if we grant TelePacific's request for relief on appeal, aren't we undoing the trial court's class certification order, as we would necessarily be finding that Watts and McKinney are not adequate class representatives?

In light of these litigation issues, we conclude that at this stage of the proceedings, Watts and McKinney cannot be segregated from the remainder of the class; because Watts and McKinney suffered prejudice as a result of TelePacific's delay (i.e., by incurring costs), the entire class suffered prejudice. Even if the unnamed class members did not suffer the same prejudice that those two persons suffered, the unnamed class members will incur substantial prejudice if we were to find that TelePacific did not waive its right to seek arbitration against them.

In urging reversal TelePacific argues that it "was not authorized to file a motion to compel arbitration as to unnamed class members before class certification; therefore, as a matter of

law, TelePacific [could not] have waived its right to compel arbitration as to the unnamed class members by not moving to compel prior to class certification." We cannot agree. It is undisputed that the named plaintiffs (Watts and McKinney) had valid, binding arbitration agreements with TelePacific. Thus, from the onset of this litigation, TelePacific could have moved to compel arbitration. It chose not to do so, and it is now bound by that decision.

TelePacific cites *Sky Sports*, *supra*, 201 Cal.App.4th at pages 1368 to 1369 for the proposition that it was premature to bring a motion to compel arbitration against unnamed class members until the class has been certified. As set forth in *Sprunk v. Prisma LLC* (2017) 14 Cal.App.5th 785, 799–800 (*Sprunk*),[3] *Sky Sports* is readily distinguishable as that case did not involve "a situation where a named plaintiff in a putative class action had agreed to arbitrate. Because the named plaintiff[] in [that] case had not signed [an] arbitration agreement[], the court[] concluded that [the plaintiff] could not be compelled to arbitrate, even though the putative class included persons who had signed such agreements. [Citations.]" In other words, the *Sky Sports* court "had no reason to consider whether a defendant who decides for strategic reasons not to pursue arbitration against a named plaintiff who *did* sign an arbitration agreement could waive its right to arbitrate against the class." (*Sprunk*, *supra*, at p. 800.) In contrast, in this case, there was always someone involved who was subject to arbitration—Watts and McKinney. Under these circumstances, TelePacific had no

---

[3] We reject TelePacific's argument that *Sprunk* was wrongly decided.

reason to wait until after class certification to bring its motion to compel arbitration.

In urging reversal, TelePacific relies heavily upon language in *Sprunk* "that a motion to compel arbitration against unnamed class members would have been premature until a class was certified." (*Sprunk*, *supra*, 14 Cal.App.5th at p. 797.) After all, according to *Sprunk*, "unnamed class members would not technically have been bound by the trial court's rulings prior to certification." (*Ibid.*) Regardless of whether we agree, as pointed out by the *Sprunk* court, "this fact does not affect the waiver analysis." (*Ibid.*) Rather, "the critical issue is whether the trial court could consider [TelePacific's] delay in moving to compel arbitration against [Watts and McKinney] in determining whether [TelePacific] waived its right to arbitrate against the unnamed class members, who ultimately did become parties and for whom [Watts and McKinney] serve[] as the class representative[s]." (*Ibid.*)

Under the circumstances of this case, as in *Sprunk*, the trial court properly found a waiver. Watts and McKinney (like the putative class representative in *Sprunk*) were signatories to an arbitration agreement. Thus, TelePacific had the procedural mechanism available to compel arbitration. Had TelePacific forced Watts and McKinney into individual arbitration, it may have ended the judicial action. While a different named plaintiff could conceivably have filed a new action, most of the class members are subject to an arbitration provision, and it is unlikely that any other plaintiff would have attempted to litigate a class action in court. (See *Sprunk*, *supra*, 14 Cal.App.5th at p. 797.)

We reject TelePacific's contention that the finding of waiver violates the due process rights of both the unnamed class members and TelePacific. As for the unnamed class members, a motion to compel arbitration is simply a question of where their claims will be heard—in court or in arbitration. And, the class members always had the opportunity to opt out of any class proceeding. As for TelePacific, its due process rights were never at risk. From the onset of this litigation, it could have moved to compel arbitration. It chose not to do so, and the matter will now be heard in court, where TelePacific will be permitted to defend itself fully.

It follows that we reject TelePacific's concern that the trial court's ruling violates the rule against one-way intervention.[4] "A largely settled feature of state and federal procedure is that trial courts in class action proceedings should decide whether a class is proper and, if so, order class notice before ruling on the substantive merits of the action. [Citations.] The virtue of this sequence is that it promotes judicial efficiency, by postponing merits rulings until such time as all parties may be bound, and fairness, by ensuring that parties bear equally the benefits and burdens of favorable and unfavorable merits rulings. The rule stands as a barrier against the problem of 'one-way intervention,' whereby not-yet-bound absent plaintiffs may elect to stay in a class after favorable merits rulings but opt out after unfavorable ones." (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1074; see also *id*. at pp. 1078–1084.) Here, the rule against one-

---

[4] Plaintiffs assert that TelePacific never made this argument to the trial court; therefore, it has been forfeited on appeal. Plaintiffs are mistaken.

way intervention was not implicated because the trial court never ruled on any issue on the merits before certifying the class.

Because we agree with the trial court that TelePacific waived its right to compel arbitration, we need not address the question of whether the arbitration agreement is unconscionable.

**DISPOSITION**

The order is affirmed. Plaintiffs are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ