Filed 8/30/18 Sandoval v. Superior Court CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ABEL SANDOVAL et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; MEDWAY PLASTICS CORPORATION et al., Real Parties in Interest.	B282837 (Los Angeles County Super. Ct. No. BC513170)

ORIGINAL PROCEEDINGS in mandate. Fredrick Shaller, Judge. Petition Denied.

Law Offices of Maryann P. Gallagher and Maryann P. Gallagher for Plaintiffs and Petitioners.

No appearance for Respondent.

Payne & Fears, Daniel F. Fears, Laura F. Fleming and Philip K. Lem, for Defendants and Real Parties in Interest .

In the underlying arbitration proceeding, the arbitrator dismissed the claims asserted by Abel Sandoval and Jesus Nolasco, concluding that they failed to demand arbitration within the applicable limitations periods, as determined under the arbitration agreements and Code of Civil Procedure section 1281.12.[1] Sandoval and Nolasco noticed an appeal from the trial court's denial of their motion to vacate the dismissal, which is not an appealable order. We conclude that immediate review of the denial is appropriate and treat their appeal as a petition for writ of mandate, but deny the petition.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This is the second time Sandoval and Nolasco (the employees) have appeared before us regarding their claims against their former employer, Medway Plastics Corporation, and a former supervisor, Maria Rodriquez (collectively, Medway).

A. *Prior Proceedings*

On June 25, 2013, the employees filed a complaint for damages against Medway, asserting claims for discrimination and retaliation under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), as well as claims for wrongful termination in violation of public policy, intentional infliction of emotional distress, and breach of an implied contract. The complaint alleged that in "approximately" February 2012, Medway wrongfully terminated their employment due to their age, race, nationality, and limited ability to speak English, as well as their complaints regarding unlawful discriminatory practices.

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[1] All further statutory citations are to the Code of Civil Procedure, unless otherwise indicated.

Medway filed a motion for an order dismissing the complaint and compelling arbitration of the claims (§ 128l.1 et seq.). The motion relied on arbitration agreements that the employees executed as a condition of their employment. Under the agreements, the employees were obliged to submit all employment-related issues -- including claims for discrimination and retaliation, and tort claims -- to arbitration using the Judicial Arbitration and Mediation Services (JAMS). The trial court denied Medway's motion on the ground that the arbitration agreements were unenforceable and unconscionable.

In an unpublished opinion (*Sandoval v. Medway Plastics Corp.* (Dec. 17, 2014, B252412)), we reversed the denial of Medway's motion to compel arbitration, concluding that the sole unenforceable provision in the agreements was a severable clause relating to the shifting of arbitration fees. We ordered that clause severed, directed the trial court to enter an order compelling arbitration, and remanded the matter for further proceedings. Our remittitur issued on February 19, 2015.

B. *Underlying Arbitration*

On March 12, 2015, the trial court dismissed the action without prejudice and ordered the employees to submit the matter to binding arbitration, but retained jurisdiction to confirm, vacate, or modify any arbitration award. Over a year later, in a letter dated May 4, 2016, the employees' counsel told Medway that they intended to initiate an arbitration. On May 6, the employees submitted a demand for arbitration to JAMS. The matter was submitted to arbitration before retired Judge Luis Cardenas.

At the preliminary arbitration conference, Medway secured leave to file a motion to terminate the proceeding pursuant to rule 18 of the JAMS Employment Arbitration Rules (JAMS

rules).[2] Medway's motion contended the proceeding was time-barred under the employees' arbitration agreements, which provide: "I understand that I must make a written petition for arbitration to the Management of the Company within the time limits that apply to file a civil complaint in court or I waive my right to pursue any complaint."[3] The motion argued that the employees failed to submit a timely demand for arbitration, notwithstanding section 1281.12, which tolls "the applicable time limitations contained in the arbitration agreement" when a civil action is commenced in lieu of arbitration. Under that statute, those limitations periods are tolled "from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action that was commenced and initiated the tolling, whichever date occurs first."[4]

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[2] JAMS rule 18 provides: "The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, . . . provided other interested Parties have reasonable notice to respond to the motion."

[3] Because the employees executed Spanish versions of the arbitration agreement and Nolasco also executed an English version of the agreement, the record contains several English renderings of the provision described above. We set forth a version of the provision that the employees offered in opposing Medway's motion to terminate.

[4] Section 1281.12 states: "If an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based

On September 14, 2016, after receiving the parties' briefs and conducting a hearing, the arbitrator granted Medway's motion to terminate. In a detailed written ruling, the arbitrator concluded that the employees failed to demand arbitration within the time periods set forth in the arbitration agreements, as determined in light of section 1281.12. The arbitrator dismissed the arbitration and barred the employees "from further proceedings in the superior court" on their claims.

C. *Proceedings Before the Trial Court*

On December 22, 2016, the employees filed a motion under section 1286.2, seeking an order from the trial court vacating the arbitrator's dismissal of the arbitration proceeding. The employees contended that the arbitrator's award exceeded his powers and constituted an improper refusal to hear evidence (§ 1286.2, subd. (a)(4) & (5)). In the alternative, in an effort to expedite an appeal, the employees asked the trial court to confirm the decision of the arbitrator if the court declined to vacate the dismissal. Their motion also sought relief from the arbitrator's award under section 473, subdivision (b).

Following a hearing, in a minute order dated April 24, 2017, the trial court declined to vacate the award under sections 1286.2 and 473. The minute order is silent regarding appellants'

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upon that controversy, within that period of time, shall toll the applicable time limitations contained in the arbitration agreement with respect to that controversy, from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action that was commenced and initiated the tolling, whichever date occurs first."

request for an order confirming the award. The employees noticed their appeal from the April 24, 2017 ruling.

DISCUSSION

A. *Propriety of Treating Appeal as Petition For Writ of Mandate*

We lack jurisdiction to consider the employees' appeal, as the April 24, 2017 ruling is not appealable. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126-129.) Generally, neither an order denying a petition to vacate an arbitration award nor an order confirming an arbitration award is appealable; such orders are reviewable only from a judgment on an order confirming the award. (*Mid-Wilshire Associates v. O'Leary* (1992) 7 Cal.App.4th 1450, 1453-1454; *Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321, 326.) Because the arbitrator's dismissal is not appealable (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9-12 (*Moncharsh*)), the denial of the employees' request under section 473, subdivision (b), for relief from that dismissal also is not appealable (*Litvinuk v. Litvinuk* (1945) 27 Cal.2d 38, 43-44).

In response to our order to show cause why the appeal should not be dismissed, the employees requested that we treat the appeal as a petition for writ of mandate.[5] Generally, when we lack the jurisdiction to entertain an appeal, we may nonetheless deem the appeal to be a petition for writ of mandate, provided that there are "unusual circumstances." (*Olson v. Cory* (1983) 35 Cal.3d 390, 401 (*Olson*).) Such circumstances are presented here.

Under the statutes governing private arbitration, the denial of a motion to vacate the award ordinarily triggers the entry of an order confirming the award, followed by an appealable judgment

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[5] Medway contended the appeal should be dismissed for want of an appealable judgment or order.

on that order. (*Law Offices of David S. Karton v. Segreto* (2009) 176 Cal.App.4th 1, 9 (*Law Offices*).) As the arbitrator's dismissal effectively terminates the arbitration, Medway has little or no incentive to secure an appealable judgment confirming the award. Although the employees independently requested an order from the trial court confirming the award in order to facilitate an appeal, the court did not respond to their request. Under the circumstances, requiring the employees to return to the trial court to obtain an appealable judgment would result in """unnecessar[y] . . . and circuitous""" proceedings (*Olson*, *supra*, 35 Cal.3d at p. 401), as the essential facts are undisputed and the issues have been fully briefed. (See *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1098.) Accordingly, in the interest of justice and in order to avoid undue delay, we will treat the appeal as a petition for a writ of mandate.

B. *Governing Law*

The employees' challenges to the trial court's ruling rely on the California Arbitration Act (CAA; § 1280 et seq.), which "represents a comprehensive statutory scheme regulating private arbitration in this state." (*Moncharsh, supra,* 3 Cal.4th at p. 9.) "The statutes set forth procedures for the enforcement of agreements to arbitrate (. . . §§ 1281.2-1281.95), establish rules for the conduct of arbitration proceedings except as the parties otherwise agree (. . . §§ 1282-1284.2), describe the circumstances in which arbitrators' awards may be judicially vacated, corrected, confirmed, and enforced (. . . §§ 1285-1288.8), and specify where, when, and how court proceedings relating to arbitration matters shall occur (. . . §§ 1290-1294.2)." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 830.)

As our Supreme Court has explained, "it is the general rule that parties to a private arbitration impliedly agree that the

arbitrator's decision will be both binding and final." (*Moncharsh*, *supra*, 3 Cal.4th at p. 9.) To enforce the finality of arbitration, the CAA minimizes judicial intervention. (*Id.* at p. 10.) Once a petition to confirm an award is filed, the superior court has only four courses of conduct: to confirm the award, to correct and confirm it, to vacate it, or to dismiss the petition. (*Law Offices*, *supra*, 176 Cal.App.4th at p. 8.) The trial court is empowered to correct or vacate the award, or dismiss the petition, upon the grounds set out in the pertinent statutes; "[o]therwise courts may not interfere with arbitration awards." (*Santa Clara-San Benito etc. Elec. Contractors' Assn. v. Local Union No. 332* (1974) 40 Cal.App.3d 431, 437; see also *Moncharsh*, *supra*, at pp. 10-13.)

Before the trial court, the employees relied on two statutory grounds for vacating an award. Under the CAA, the trial court must vacate an award when it exceeds the arbitrator's powers and cannot be corrected without "affecting the merits of the decision upon the controversy submitted," or when "[t]he rights of the party were substantially prejudiced by . . . the refusal of the arbitrators to hear evidence material to the controversy" (§ 1286.2, subd. (a)(4) & (5)).

We subject the trial court's rulings and the underlying award to different standards of review. To the extent the trial court made findings of fact in confirming the award, we affirm the findings if they are supported by substantial evidence. (*Turner v. Cox* (1961) 196 Cal.App.2d 596, 603.) To the extent the trial court resolved questions of law on undisputed facts, we review the trial court's rulings de novo. (*Advanced Micro Devices, Inc. v. Intel Corp*. (1994) 9 Cal.4th 362, 376, fn. 9 (*Advanced Micro Devices*).)

We apply a highly deferential standard of review to the award itself, insofar as our inquiry encompasses the arbitrator's resolution of questions of law or fact. Because the finality of

arbitration awards is rooted in the parties' agreement to bypass the judicial system, ordinarily "'[t]he merits of the controversy between the parties are not subject to judicial review.'" (*Moncharsh, supra*, 3 Cal.4th at p. 11.)

Moreover, absent "narrow exceptions," an award "cannot be reviewed for errors of fact or law." (*Moncharsh, supra*, 3 Cal.4th at p. 11.) One such exception -- discussed further below (see pt. C., *post*) -- arises when employees subject to mandatory employment arbitration agreements are unable to obtain an arbitration hearing on the merits of their FEHA claims due to an arbitration award reflecting "clear legal error." (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 673-680 (*Pearson*).)

C. *Section 1281.12*

The key issues concern the arbitrator's application of section 1281.12. Under the statute, when an arbitration agreement specifies the time period for initiating the arbitration, the commencement of a civil action regarding a dispute potentially subject to arbitration tolls that period. (*Pearson*, *supra*, 48 Cal.4th at pp. 673-675.) Generally, the CAA "recognizes that a party to an arbitration agreement may elect to initiate a civil action, rather than an arbitration proceeding." (*Sargon Enterprises, Inc. v. Brown George Ross LLP* (2017) 15 Cal.App.5th 749, 767.) The function of section 1281.12 is to "protect[] the party's right to do so." (*Ibid.*; see *Pearson*, *supra*, 48 Cal.4th at pp. 673-674.)

Here, the employees asserted several claims, including claims under FEHA. Our Supreme Court has held that mandatory employment arbitration agreements may not operate to waive FEHA statutory rights implementing the public policy against discrimination. (*Armendariz v. Foundation Health*

Psychcare Services, Inc. (2000) 24 Cal.4th 83, 108 (*Armendariz*).) For that reason, any such agreement to arbitrate FEHA claims is potentially enforceable only when it imposes requirements on arbitration sufficient to preserve the unwaiveable FEHA rights. (*Id*. at pp. 102-103.)

An instructive application of section 1281.12 to arbitration proceedings involving FEHA claims is found in *Pearson*. There, an employee, in the course of his employment, signed an agreement requiring that any dispute be submitted to arbitration within one year from the date the dispute arose. (*Pearson*, *supra*, 48 Cal.4th at p. 671.) On January 31, 2006, he was terminated. (*Id*. at p. 670.) Three months later, in early April 2006, he filed an administrative complaint with the Department of Fair Employment and Housing (DFEH), alleging age discrimination. (*Id*. at p. 670.) On April 14, 2006, the DFEH issued a right-to-sue letter. (*Ibid*.)

On October 2, 2006, the employee filed a complaint against his employer, asserting a claim for age discrimination under FEHA, a claim for wrongful termination in violation of public policy, and a claim for breach of an implied-in-fact contract not to terminate him without good cause. (*Pearson*, *supra*, 48 Cal.4th at pp. 670.) On April 12, 2007, the trial court orally granted the employer's motion to compel arbitration. (*Id*. at p. 674.)

On June 13, 2007, the parties agreed on an arbitrator. (*Pearson*, *supra*, 48 Cal.4th at pp. 671.) In the arbitration proceeding, the employer filed a motion for summary judgment, contending the employee's claims were time-barred under the one-year period specified in the arbitration agreement. (*Id*. at p. 671.) The arbitrator granted summary judgment, reasoning that the employee failed to initiate arbitration within the one-year period, notwithstanding section 1281.12. (*Id*. at pp. 671-672.)

Our Supreme Court held that the award was subject to vacation because the arbitrator committed a "clear error of law" amounting to an act in excess of his powers. (*Pearson*, *supra*, 48 Cal.4th at p. 670.) The court explained that under section 1281.12, the employee unmistakably began the arbitration within the one-year period specified in the arbitration agreement, even if all reasonable assumptions favorable to the employer were entertained. (*Ibid*.) The court stated: "Leaving aside any tolling . . . that may have resulted from the filing of a complaint with the DFEH, approximately eight months had passed between the time of the termination on January 31, 2006, and October 2, 2006, when [the employee] filed a complaint in superior court. Choosing arguendo the earliest date [the employer] offers for when the trial court's order to arbitrate became final, April 12, 2007, then, by the terms of . . . section 1281.12, the tolling ended 30 days after that, on May 12, 2007. . . . Because there were approximately four months left on the one-year limitation period when the civil action was filed, even if there was no FEHA tolling, then [the employee] had four months from the May 12, 2007, date to initiate the arbitration. [The] initiation, which . . . was no later than June 13, 2007, was well within this period." (*Id*. at p. 675.)

The court further explained that the arbitrator's misapplication of section 1281.12 was sufficiently grave to constitute an act in excess of the arbitrator's powers: "[A]s a result of the arbitrator's clear legal error, [the employee's] claim was incorrectly determined to be time-barred. Indeed, the legal error misconstrued the procedural framework under which the parties agreed the arbitration was to be conducted, rather than misinterpreting the law governing the claim itself. It is difficult to imagine a more paradigmatic example of when 'granting finality to an arbitrator's decision would be inconsistent with the

protection of a party's statutory rights' [citation] than the present case, in which, as a result of allowing the procedural error to stand, and through no fault of the employee or his attorney, the employee will be unable to receive a hearing on the merits of his FEHA claims *in any forum*." (*Pearson*, *supra*, 48 Cal.4th at pp. 679-680, fn. omitted.)

D. *Analysis*

We agree with the trial court that the arbitrator, in concluding that the employees' claims were time-barred, "reached a fair determination of the issue based upon sound legal analysis." The arbitrator provided the following rationale for his ruling: "The superior court entered an order on March 12, 2015, mandating the parties go to arbitration. So at that time [the employees] had any remaining time under the statute of limitations that had not been used when they filed the civil case[,] plus an additional 30 days added on as required by [section]1281.12. [¶] Based on the causes of action filed by [the employees,] they had a mix of less than three months left on the FEHA claims, and less than eight months on the other claims. [¶] Since [the employees] did not file the [d]emand for [a]rbitration until approximately 14 months after the superior court order requiring arbitration[,] all the time limits had expired." As explained below, in view of *Pearson*, we discern no error in the arbitrator's rationale.

Because the arbitration agreements obliged the employees to submit a demand for arbitration to Medway "within the time limits which would apply to the filing of a civil complaint in court," any arbitration proceeding regarding their FEHA claims was subject to the limitations periods specific to FEHA. (See *Ellis v. U.S. Security Associates* (2014) 224 Cal.App.4th 1213, 1221 (*Ellis*).) Generally, "[p]rior to suing for violation of FEHA, an

employee must exhaust all administrative remedies by filing a timely and sufficient complaint with the [Department of Fair Employment and Housing (DFEH)]. [Citations.]" (*Id.* at p. 1221.) If the DFEH decides not to pursue the matter, it must issue a right-to-sue letter. (*Ibid.*) "The time limit for filing the administrative claim with the DFEH is one year from the date of the unlawful act . . . . [Citation.] [A]ny lawsuit must be filed within one year from the date of the right-to-sue letter. [Citation.]" (*Ibid.*)

In view of the one-year limitations period applicable to the filing of a FEHA lawsuit following the issuance of a right-to-sue letter, the employees did not demand arbitration of their FEHA claims in a timely manner. Their arbitration agreements obliged them to demand arbitration within one year of their right-to-sue letters, absent any tolling attributable to section 1281.12. Those letters were issued in August 2012, approximately 10 months before the employees commenced their legal action.[6] Under section 1281.12, the running of the limitations period was tolled from the commencement of the action until 30 days after it ended. Because the final order compelling arbitration was issued on March 12, 2015 -- when the trial court dismissed the action and ordered the employees to submit their claims to arbitration -- the limitations period began to run again no later than April 11, 2015. As approximately two months of the limitations period then remained, the employees' demand for arbitration through JAMS over one year later in May 2016 was untimely.[7]

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[6] Nolasco's right-to-sue letter is dated August 15, 2012, and Sandoval's right-to-sue letter is dated August 21, 2012.

[7] We recognize that before the arbitrator and the trial court, the employees asserted that Medway was reasonably identified as

The same is true of the employees' claims for wrongful termination in violation of public policy, intentional infliction of emotional distress, and breach of an implied contract. The first two claims were subject to a two-year limitations period (§ 335.1; *Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1382; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1450), as was the third (§ 339, subd. (1); *Blaustein v. Burton* (1970) 9 Cal.App.3d 161, 185-187). Because those claims were

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the party obliged to initiate an arbitration with JAMS. The crux of their contention was that although the arbitration agreements required them to submit a petition for arbitration *to Medway*, the agreements did not specify the party required to "initiate arbitration services." They argued that under the agreements, Medway was reasonably assigned that responsibility, and that Medway's petition to compel arbitration mooted their own obligation to submit a petition for arbitration to Medway. In rejecting the contention, the arbitrator stated: "[A]ll reasonable interpretation of the contract puts the burden on the person or entity seeking relief. [¶] The contract says, 'I must' file a claim. This puts the burden on the [employee] to move forward."

We see no error in that ruling. Ordinarily, the proponent of a claim is obliged to take the steps necessary for its resolution. (*Oberkotter v. Spreckels* (1923) 64 Cal.App. 470, 473 ["The established doctrine in this state is that it is the plaintiff upon whom rests the duty to use diligence at every stage of the proceeding to expedite his case to a final determination. It is true that the defendant may bring about a trial of the case, but he is under no legal duty to do so. His presence in the case is involuntary . . . ; he is put to a defense only, and can be charged with no neglect for failing to do more than meet the plaintiff step by step."].) Reasonably construed, the arbitration agreements required the employees to take *some* affirmative action to initiate arbitration of their claims against Medway, which they did not do until May 2016.

predicated on alleged misconduct culminating with the employees' termination in February 2012, the claims accrued no later than that event. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 490, 501 [claims for breach of implied employment contract not to terminate without good cause and wrongful termination in violation of public police accrue at time of dismissal]; *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 889 [claim for intentional infliction of emotional distress accrues "once the plaintiff suffers severe emotional distress as a result of outrageous conduct on the part of the defendant"].) As approximately 16 months of the two-year limitations periods elapsed before the employees commenced their legal action, only approximately eight months of the periods remained as of April 11, 2015, when the periods began to run again. Their May 2016 demand for arbitration of those claims was thus untimely.

E. *The Employees' Challenges to the Trial Court's Order*

The employees contend the trial court erred in declining to vacate the arbitrator's rulings, arguing (1) that section 1281.12 did not authorize the dismissal of their FEHA claims, and (2) that equitable tolling of the applicable limitations periods rendered their arbitration demand timely. As explained below, we reject their contentions.

1. *Arbitrator's Application of Section 1281.12*

The employees' principal contention is that the award was subject to vacation because section 1281.12 does not support the arbitrator's dismissal of their FEHA claims. They contend that section 1281.12 is merely a tolling statute, and that their FEHA claims are not subject to dismissal because they complied with the statutory requirements for filing a FEHA claim in court. As explained below, they have identified no basis for vacating the award.

The employees have failed to demonstrate that the arbitrator acted in excess of his powers, as they have not shown that he made *any* error, let alone a "clear error of law." (*Pearson*, *supra*, 48 Cal.4th at p. 670.) Because the parties agreed to arbitration using the services of JAMS, they authorized application of the JAMS rules, including JAMS rule 24(c), which empowered the arbitrator to render relief on the basis of principles of justice and equity. The arbitrator thus "enjoy[ed] the authority to fashion relief [he or she] consider[s] just and fair . . . , so long as the remedy may be rationally derived from the contract and the breach." (*Advanced Micro Devices*, *supra*, 9 Cal.4th at p. 383.)

The arbitrator's rationale for dismissing the FEHA claims reflects no abuse of that authority. In view of the broad scope of the arbitration agreements, the arbitrator was authorized to adjudicate Medway's defense based on the limitations period provision in the arbitration agreements. (See *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 23 ["Where . . . the parties have agreed to arbitrate any dispute arising out of their contract, the affirmative defense that the statute of limitations has run is for the arbitrator rather than the court to decide."].) Under that provision, the employees were required to demand arbitration of their FEHA claims within the time periods applicable to filing such claims in court. The arbitrator thus reasonably concluded -- correctly, in our view (see pt. C., *ante*) -- that the employees were subject to a contractual obligation to demand arbitration within the one-year period specified in FEHA regarding the filing of a lawsuit after the issuance of the right-to-sue letter.

Although the employees initiated their lawsuit within the one-year period specified in FEHA, they breached their

contractual obligation to demand arbitration within the one-year period. The arbitrator's rationale for dismissing the FEHA claims was founded on the employees' failure to comply with *that* contractual obligation, not on section 1281.12. Indeed, the arbitrator clearly afforded the employees the full benefit of any tolling to which they were entitled under section 1281.12. The arbitrator's rationale thus fell within his authority, as it appears to be legally and factually correct. Accordingly, the dismissal was not an act in excess of his powers.[8]

We also reject the employees' contention that the arbitrator improperly refused "to hear evidence material to the controversy" (§ 1286.2, subd. (a)(5)). As the trial court noted in declining to vacate the award, nothing in the record of the arbitration proceeding offered by the employees suggested that the arbitrator barred evidence relevant to Medway's motion to dismiss. Furthermore, the arbitrator's ruling on that motion does not itself constitute an improper refusal to hear evidence. (*Schlessinger v. Rosenfeld, Meyer & Sussman* (1995) 40 Cal.App.4th 1096, 1105 [arbitrator's obligation to hear evidence does not bar arbitrator from granting summary judgment].)

The employees maintain that the arbitration agreements themselves were unenforceable because they contained "multiple unconscionable clauses" and the employees were unaware of the

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[8] The employees suggest that the arbitrator, in determining whether the arbitration should be dismissed, was obliged to apply section 583.420, which specifies the time periods for prosecuting civil actions. However, the arbitrator reasonably applied section 1281.12, as it addressed the precise question regarding the timeliness of the arbitration demand raised in Medway's motion to dismiss.

arbitration provisions. However, as that contention merely resurrects their challenges to the agreements we rejected in Medway's appeal (*Sandoval v. Medway Plastics Corp.*, *supra*, B252412), it fails under the doctrine of the law of the case.[9]

In a related contention, the employees suggest that the dismissal of their FEHA claims contravenes the public policy underlying FEHA. We disagree. Our Supreme Court has held that an agreement to arbitrate FEHA claims is potentially enforceable if it imposes certain procedural requirements on arbitration sufficient to preserve the unwaivable FEHA rights. (*Armendariz*, *supra*, 24 Cal.4th at pp. 102-103.) In order to be lawful, "'(1) the arbitration agreement may not limit the damages normally available under the statute [citation]; (2) there must be discovery "sufficient to adequately arbitrate their statutory claim" [citation]; (3) there must be a written arbitration decision and judicial review "'sufficient to ensure the arbitrators comply with the requirements of the statute'" [citation]; and (4) the employer must "pay all types of costs that are unique to arbitration" [citation].'" (*Pearson*, *supra*, 48 Cal.4th at p. 677, quoting *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1076.) The employees' contractual obligation to demand arbitration within the time period specified for FEHA actions in court contravenes none of those procedural requirements, and they have not shown that the obligation otherwise offended public policy.

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[9] Generally, "the statement by an appellate court of a rule of law necessary to the decision of the case on appeal conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial on appeal in the same case," provided that the stated rule was "necessary to the decision of the case on appeal." (*Salaman v. Bolt* (1977) 74 Cal.App.3d 907, 917.)

Martinez v. Master Protection Corp. (2004) 118 Cal.App.4th 107 (*Martinez*) and *Ellis*, *supra*, 224 Cal.App.4th 1213, upon which the employees rely, are distinguishable. In *Martinez*, an employee executed a mandatory employment agreement requiring him to commence arbitration regarding claims relating to his employment within six months of the relevant misconduct, notwithstanding any applicable statutes of limitation. (*Martinez*, *supra*, 118 Cal.App.4th at pp. 111, 117.) After the employee initiated a FEHA action in court, the employer secured orders compelling arbitration and a judgment confirming the arbitration award. (*Id*. at pp. 111-112.) In reversing the judgment, the appellate court concluded that the six-month contractual limitations period was unenforceable because it was inconsistent with the longer FEHA limitation periods.

Ellis involved a similar contractual limitations period. There, an employee executed a mandatory employment agreement requiring her to file a lawsuit relating to her employment within six months of the relevant "employment action," notwithstanding any statutes of limitation. (*Ellis*, *supra*, 224 Cal.App.4th at p. 1219.) After suffering sexual harassment, the employee secured a right-to-sue letter in December 2010, and filed a FEHA court action in November 2011. (*Id*. at pp. 1217-1219.) Relying on the contractual limitations period, the employer successfully sought judgment on the pleadings. (*Id*. at p. 1219.) Reversing, the appellate court concluded that the six-month contractual limitation period was unenforceable because it thwarted the DFEH administrative enforcement process central to FEHA. (*Id*. at pp. 1225-1226.)

In contrast with *Martinez* and *Ellis*, the arbitration agreements here did not shorten the time periods specified in FEHA or thwart the DFEH administrative process. Rather, the

contractual provision upon which the arbitrator relied merely required the employees to demand arbitration -- rather than commence a lawsuit -- within one year of the issuance of a right-to-sue letter. Indeed, because that contractually-imposed time period was subject to tolling under section 1281.12, the arbitration agreements potentially gave the employees *more* than one year to demand arbitration after receiving right-to-sue letters. Accordingly, the contractual provision is not reasonably regarded as contrary to the public policy underlying FEHA.

2. *Equitable Tolling*

The employees contend their demand for arbitration was timely under the doctrine of equitable tolling. That doctrine is a judicially created rule applicable "'"[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one."'" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 100, quoting *Elkins v. Derby* (1974) 12 Cal.3d 410, 414.) The doctrine ordinarily requires the presence of three elements: "(1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to [the] defendant in gathering evidence to defend against the second claim; and, (3) good faith and reasonable conduct by the plaintiff in filing the second claim." (*Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 924.)

The employees have forfeited their contention, as the record does not show that they invoked the doctrine before the arbitrator or the trial court. (*In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 912.) Moreover, we would reject the contention were we to address it. Equitable tolling does not apply when "it is 'inconsistent with the text of the relevant statute.'" (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 371, quoting *United States v. Beggerly* (1998) 524 U.S. 38, 48.) Because section 1281.12 states the tolling rule specific to the employees' demand for

arbitration, it displaces the equitable tolling doctrine. In sum, the employees have not shown that the trial court erred in declining to vacate the arbitrator's award.

DISPOSITION

The employees' petition for writ of mandate is denied. Medway Plastics Corporation and Maria Rodriquez are awarded their costs as real parties in interest.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.