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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DIXIE L. JARA ,

Plaintiff and Appellant,

v.

JPMORGAN CHASE BANK, N.A. et al.,

Defendant and Respondent.

2d Civil No. B234089
(Super. Ct. No. CV110109)
(San Luis Obispo County)

JPMorgan Chase Bank, N.A. (JPMorgan Chase) appeals from an order denying its motion to compel arbitration of Dixie Jara's employment claims. We conclude, upon de novo review, that the arbitration agreement was both procedurally and substantively unconscionable and the trial court did not abuse its discretion when it refused to enforce the entire agreement rather than severing the unconscionable provisions. We affirm.

FACTUAL BACKGROUND

In February 2001, Washington Mutual Bank hired Dixie Jara as an assistant manager. She signed a two page document entitled "BINDING ARBITRATION AGREEMENT," in which she agreed to arbitrate all disputes related to her employment with Washington Mutual, or its successor.

JPMorgan Chase acquired Washington Mutual's assets in 2008. Jara became an employee of JPMorgan Chase. In December of 2010, JPMorgan Chase terminated Jara's employment.

Jara filed a complaint against JPMorgan and her supervisor, Scott Doi, for discrimination, harassment, and wrongful termination under California's Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.). She alleged that JPMorgan Chase discriminated against her in the terms and conditions of her employment because she is of Mexican and Filipino ancestry and is over 60 years old.

JPMorgan and Doi moved to compel arbitration. The court denied the motion based on its finding that the arbitration agreement was procedurally and substantively unconscionable. The court found, "The arbitration agreement here is one of adhesion. Further, there are serious limitations on the plaintiff's ability to conduct meaningful discovery on her discrimination claims. On the other hand, the employer has not expressly waived its rights to bring a civil action, and the agreement preserves the right to a civil action for temporary injunctive relief, a claim more likely pursued by an employer rather than an employee. Because these aspects of substantive unconscionability are present, the court will not enforce the agreement." The court declined to sever the unconscionable provisions because it found the agreement was permeated with unconscionability.

The arbitration agreement was signed only by Jara, and had no signature line for the employer. It included a statement that "I am waiving any right I may have to file a lawsuit or other civil action . . . related to my employment with Washington Mutual . . . ." It required that arbitration of all civil claims were covered, including claims under the FEHA, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the American't with Disabilities Act (ADA), Fair Labor Standards Act (FSLA), Immigration Reform and Control Act (IRCA). But it excluded claims for injunctive relief or "ERISA [Employee Retirement Income

Security Act] plan benefit issues and claims for unemployment and worker's compensation benefits."

The agreement limited discovery to one request for production and a maximum of two depositions. It provided that either party "may apply to the arbitrator for further discovery," and that such discovery "may, in the discretion of the arbitrator, be awarded upon a showing of sufficient cause."

The agreement provided, "Any filing fee will be paid by the party initiating arbitration." With respect to the arbitrator's fees, it provided, "During the time the arbitration proceedings are ongoing, Washington Mutual will advance any required administrative or arbitrator's fees." Any party requesting a stenographic record was required to pay the reporter's fees.

The agreement provided that arbitration would be conducted according to the "rules and requirements of the arbitration service being utilized," and that the arbitration service would be the AAA, absent contrary agreement. If the AAA were unable or unwilling to serve, the parties would submit the dispute to "a comparable arbitration service." No arbitration rules were attached or provided to Jara.

Jara declares that the agreement was "one document among many [she] was asked to sign," when she was hired and that "[i]t was not explained to me or discussed other than I was told that I had to sign it." She was not given a copy to keep. No one provided her with a copy of any rules governing arbitration, and she "had no idea what the AAA was."

About a month before she signed the arbitration agreement, Jara signed an employment application which contained a finely-printed paragraph that said, "*If I accept an offer of employment with Washington Mutual, I hereby agree to comply with all its policies and procedures, and I agree to resolve* employment disputes through Washington Mutual's Dispute Resolution Process, which includes binding arbitration. As a condition of accepting any offer of employment, I will sign a Binding Arbitration

Agreement. Upon request, Washington Mutual will provide me with a copy of the policy and the agreement before I sign the application/agreement."

DISCUSSION

Standard of Review

Courts may refuse to enforce unconscionable provisions in a contract. (Civ. Code, § 1670.5.) Unconscionability is a question of law and our review is de novo. (*Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 144. Where, as here, an arbitration agreement is governed by the Federal Arbitration Act, state courts may invalidate it based only upon principles of unconscionability that apply to contracts generally, and not based upon principles that apply to arbitration agreements alone. (*AT&T v. Concepcion* (2011) 563 U.S. __, __, 131 S.Ct. 1740, 1746.) California and federal law favor enforcement of valid arbitration agreements. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97, *Armendariz.*)

Civil Code section 1670.5, subdivision (a) permits a court to sever unconscionable portions of an arbitration agreement in order to make the remainder of the agreement enforceable. We review for abuse of discretion the trial court's decision whether to sever unconscionable provisions or to refuse to enforce the entire agreement. (*Armendariz, supra,* 24 Cal.4th at p. 122.) The latter course is permitted only when the agreement is "permeated" by unconscionability. (*Id.* at p. 124.)

Unconscionability

Unconscionability has both a procedural and a substantive element. (*Armendariz, supra,* 24 Cal.4th at p. 114.) The former focuses on oppression or surprise due to unequal bargaining power; the latter focuses on overly harsh or one-sided results. (*Ibid.*) Both procedural and substantive unconscionability must be present before a court may refuse to enforce an arbitration provision. (*Ibid.*) But they need not be present in the same degree. Generally, "a sliding scale approach is taken." (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 714.) The more substantively oppressive the terms, the less evidence of procedural unconscionability is required, and vice versa. (*Armendariz,* at

p. 114.) Here, the evidence of substantive unconscionability is great and there is sufficient evidence of procedural unconscionability to render the agreement unenforceable.

Substantive Unconscionability

Jara contends the arbitration provision was substantively unconscionable because it was not mutual, it excluded claims for injunctive relief favored by employers, limited discovery to one request for production and two depositions absent relief from the arbitrator on a finding of good cause, and imposed upon her the risk of costs unique to arbitration.

The absence of an employer's signature on an arbitration provision raises an issue of mutuality that is presently pending before the California Supreme Court. (*Wisdom v Accent Care, Inc.* (2012) 202 Cal.App.4th 591, review granted March 28, 2012, S200128.) The question under review in *Wisdom* is whether an arbitration clause in an employment application that provides, "I hereby agree to submit to binding arbitration all disputes and claims arising out of the submission of this application" (*id.* at p. 192), is unenforceable as substantively unconscionable for lack of mutuality, or whether the language creates a mutual agreement to arbitrate. In *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462.), division seven of this court decided that similar language created an implied mutual agreement to arbitrate all disputes, notwithstanding the absence of the employer's express agreement or signature. In *Armendariz,* by contrast, the Court held that courts are not authorized to reform non-mutual arbitration provisions, and may only cure the unconscionability if they can do so by severing or restricting an existing provision. "Because a court is unable to cure this unconscionability through severance or restriction and is not permitted to cure it through reformation and augmentation, it must void the entire agreement." (*Armendarez, supra,* 24 Cal.4th at p. 125.) We conclude under *Amrendariz* that the absence of any express agreement by JPMorgan Chase to be bound by the arbitration agreement rendered it non-mutual.

The agreement is also substantively unconscionable because it reserves court access for claims for injunctive relief, a remedy favored by employers. (*Trivedi v. Curexo* (2010) 189 Cal.App.4th 387, 397 [employer's reservation of access to court for injunctive relief was substantively unconscionable].) It also does not require the employer to bear the burden of costs that are unique to arbitration. When an employer imposes mandatory arbitration as a condition of employment, it must bear all costs that are unique to arbitration. (*Armendariz, supra*, 24 Cal.4th at p. 113.) Here, the agreement requires the "party initiating arbitration" to pay any filing fee, and only requires the employer to "advance any required administrative or arbitrator's fees."

The limitation of discovery also renders the agreement substantively unconscionable. Discovery is limited to "a maximum of two (2) depositions," absent discretionary relief from the arbitrator upon a showing of "sufficient cause." Adequate discovery is "indispensable" for the vindication of FEHA claims. (*Armendariz, supra*, 24 Cal.4th at p. 104.) On the other hand, "a limitation on discovery is one important component of the 'simplicity, informality, and expedition of arbitration.'" (*Id.* at p. 106, fn. 11, quoting *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 31.) Generally, "[t]he arbitrator and reviewing court must balance this desirable simplicity with the requirements of the FEHA in determining the appropriate discovery." (*Armendarez,* at p. 106, fn. 11.) In *Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 978, we found an arbitration agreement between a corporate attorney and his employer was not substantively unconscionable where discovery was limited to deposition of "one individual and any expert witness designated" (*ibid.*) absent relief from the arbitrator "upon a showing of need." But in *Dotson,* the agreement was in all other respects unobjectionable and no FEHA claims were involved. (*Id.* at p. 979.) In *Fitz v. NCR Corp., supra,* 118 Cal.App.4th at p. 702, an arbitration provision was substantively unconscionable because it limited discovery in a FEHA case to depositions of two individuals and any expert, and relief from those limits could only be granted if the arbitrator decided "*a fair hearing* [*was*] *impossible without additional discovery*." (*Id*. at

p. 709.) The discovery limits imposed upon Jara here, combined with other one-sided and harsh terms, constituted substantive unconscionability.

Procedural Unconscionability

Jara contends the agreement was procedurally unconscionable because it was among "a number of" new hire documents, was not called to her attention, and she was not given a copy of the arbitration rules. We conclude that the agreement is procedurally unconscionable because it was presented on a take it or leave it basis and did not include copies of the arbitration rules. This minimal showing of procedural unconscionability is sufficient because of the high degree of substantive unconscionability previously discussed.

Where, as here, the arbitration agreement is permeated with substantive unconscionability, a minimal showing of procedural unconscionability is sufficient to render the agreement unenforceable. A mandatory arbitration provision, drafted by the employer and presented to the employee on a take it or leave it basis, is a contract of adhesion, and the circumstances of its execution may render it procedurally unconscionable. (*Wherry v. Award, Inc*. (2011) 192 Cal.App.4th 1242.) Adhesion alone does not render an arbitration agreement unenforceable. (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 819.)

Failure to provide a copy of the arbitration rules to which the employee will be bound supports a finding of procedural unconscionability. (*O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402; *Fitz v. NCR Corp., supra,* 118 Cal.App.4th 702; *Trivedi v. Curexo Technology Corp., supra,* 189 Cal.App.4th 387.) Jara was not given a copy of the rules by which she would be bound if she signed it, rendering the agreement procedurally unconscionable

Severance

The arbitration agreement was permeated with unconscionability and the court did not abuse its discretion when it refused to compel arbitration. (*Armendariz,*

supra, 24 Cal.4th at p. 122.) The agreement lacked mutuality, had a one-sided remedial provision, and contained strict discovery limits and an unlawful costs provision.

DISPOSITION

The judgment is affirmed. Jara is entitled to her costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Charles S. Crandall, Judge

Superior Court County of San Luis Obispo

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