Filed 7/25/02 Adamany v. Superior Court CA2/4

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HENRY ADAMANY, JR., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; BENY ALAGEM et al., Real Parties in Interest.	No. B156220 (Super. Ct. No. BC252626)

ORIGINAL PROCEEDING in mandate. Richard C. Hubbell, Judge. Writ conditionally granted.

John H. Upton for Petitioner.

No appearance for Respondent.

Rosoff, Schiffres & Barta and H. Steven Schiffres for Real Parties in Interest.

Henry Adamany, Jr. challenges an order by the trial court compelling arbitration of his action against his former employer, AST Computers, LLC (AST) and Beny Alagem, alleged to be an owner of AST. We conclude that Adamany is estopped from denying the applicability of the arbitration clause because he has sued on the written contract which contained the clause, and that real parties in interest have ratified the contract by petitioning to compel arbitration under its provisions. We also conclude the punitive damages limitation in the arbitration clause is severable, but that the cost sharing provision is unenforceable. We therefore shall grant the relief sought unless real parties commit to meeting those expenses.

FACTUAL AND PROCEDURAL SUMMARY

According to the allegations of the first amended complaint, in early 2000, Adamany was a highly compensated executive and partner in the Orange County office of PricewaterhouseCoopers. He was approached at that time by a recruiter acting on behalf of Beny Alagem. Alagem represented that he wanted petitioner to join Vault Technologies, an existing company that was going to move to Orange County to accommodate Adamany. Alagem was personally financing Vault and was committed to making it a viable business. Adamany was told that he would be the chief executive officer of Vault and would have full management of strategy, marketing, sales, expenditure and personnel.

The complaint alleges that Adamany and Alagem orally agreed that Adamany would leave his current employment and join Vault. The terms were that Adamany would receive a base salary of $300,000, annual bonuses of up to $300,000 with $120,000 of that guaranteed, a hiring bonus of $50,000, and, upon termination without good cause, a severance benefit of $150,000 to be personally paid by Alagem. Adamany also was to have stock options.

In reliance on this oral agreement, Adamany resigned his position at PricewaterhouseCoopers. On June 19, 2000, Alagem sent him an e-mail agreeing to guarantee the severance package. A copy of this e-mail is attached and incorporated into the complaint as Exhibit A.

In late June 2000, Adamany received a written employment agreement from AST Computers, LLC (incorporated by reference and attached to the complaint as Exh. B). The agreement was not signed.

It contains an arbitration clause: "Any dispute or controversy arising under or in connection with this Agreement shall be settled exclusively by arbitration in Los Angeles, California, in accordance with the employment rules of the American Arbitration Association then in effect by an arbitrator selected by both parties within 10 days after either party has notified the other in writing that it desires a dispute between them to be settled by arbitration. . . . Each party shall pay its own expenses associated with such arbitration, including the expense of any arbitrator selected by such party and the Company will pay the expenses of the jointly selected arbitrator. The decision of the arbitrator shall be binding upon the parties and judgment in accordance with that decision may be entered in any court having jurisdiction thereover. Punitive damages shall not be awarded."

After resigning from his employment at PricewaterhouseCoopers, Adamany learned that Vault was not a separate entity. Alagem told him that he owned AST, that AST owned technology essential to the Vault venture, that Alagem intended to spin-off the AST technology into a company to be formed and called Vault, and that Adamany would be an employee of AST until Vault was formed. Adamany alleges that Alagem failed to disclose that AST was partially owned by a third party and that Alagem did not have authority to spin-off the AST technology to form Vault without the other owner's approval.

Adamany began his employment with AST in July 2000. He was not paid the promised signing bonus. He was told that, because of a provision relating to stock options, the written employment agreement could not be executed until Vault was formed. Adamany alleges that there was an implied in fact contract between the parties incorporating the terms contained in the written agreement. On October 16, 2000, real parties in interest terminated Adamany. He was owed the hiring bonus, monies due under the written agreement, and a severance benefit.

Adamany sued Alagem and AST in superior court. His first amended complaint, the charging pleading, alleges causes of action for fraud, negligent misrepresentation, willful failure to pay wages and breach of contract. Real parties in interest petitioned to compel arbitration. Their petition asserted: "This Petition is made upon the grounds that all the purported claims asserted by plaintiff in the First Amended Complaint filed herein are all premised upon a written 'Employment Agreement' attached hereto as Exhibit 1. Same provides for arbitration of the dispute which is the subject of this action." Like the written agreement attached to the first amended complaint, this copy of the written agreement was unsigned. Real parties also alleged that the claims asserted in the first amended complaint "'arise under or in connection with' [Adamany's] alleged employment" by real parties and thus fall within the arbitration clause of the agreement. Real parties also asserted that their right to compel arbitration had not been waived; rather that they had "consistently asserted that inasmuch as [Adamany] pleads claims for relief premised on said writing, then the exclusive arbitration provision therein controls, even if, as [real parties allege], said writing is ultimately held to be unenforceable."

In their petition to compel arbitration, real parties reserved all defenses, including the defense that the unsigned writing is not binding, is unenforceable, and does not memorialize the terms of Adamany's employment.

Adamany opposed the petition to compel arbitration, denying that the arbitration clause is controlling. He argued that the unsigned Agreement is enforceable, but that real parties had denied ever entering into the agreement. Adamany asserted: "[Real parties in interest] can not [*sic*] contend that it never entered into the Agreement containing the arbitration clause and simultaneously seek to enforce the arbitration clause." In addition, Adamany argued that the arbitration clause is not enforceable because it violates public policy by precluding him from seeking punitive damages, citing *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (Armendariz). In response, real parties argued that Adamany could not "cherry-pick" the provisions of the agreement by seeking relief based on the agreement but denying the enforceability of the arbitration clause.

The trial court granted the petition to compel arbitration. It found: "that an agreement to arbitrate the controversy exists." It also ruled that *Armendariz* does not apply. Adamany filed a petition for writ of mandate with this court. We issued an order to show cause, and a stay on March 8, 2002.

DISCUSSION

I

The primary issue in this proceeding is whether there was an enforceable agreement to arbitrate, since the employment agreement was not signed by either party.

Code of Civil Procedure section 1281 provides: "A *written* agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Emphasis added; all statutory references are to the Code of Civil Procedure.) Section 1280, subdivision (f) provides that a "'Written

agreement' shall be deemed to include a written agreement which has been extended or renewed by an oral or implied agreement."

"'"'On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy . . . , the court shall order the petitioner and the respondent to arbitrate the controversy *if it determines that an agreement to arbitrate the controversy exists* . . . ." . . . Thus, "[t]he right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract. [Citations.]" . . . There is no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate. [Citation.] It follows that when presented with a petition to compel arbitration, the trial court's first task is to determine whether the parties have in fact agreed to arbitrate the dispute. [¶] We apply general California contract law to determine whether the parties formed a valid agreement to arbitrate. [Citations.]'" (*Romo v. Y-3 Holdings, Inc.* (2001) 87 Cal.App.4th 1153, 1158, quoting *Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-89, italics added by *Marcus & Millichap*.)

Adamany and real parties take inconsistent positions on the enforceability of the contract and the arbitration clause. Adamany sues to enforce the unsigned written agreement, but denies the validity of the arbitration clause it contains. Real parties deny the existence of the agreement, but petition to enforce the arbitration clause. Neither side can have it both ways.

Under principles of judicial estoppel, once Adamany sued on the contract, he was estopped from maintaining, that as an unsigned writing, the arbitration clause it contains is unenforceable. (See *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1188-1191 [party's claim for attorney's fees based on breach of contract judicially estops that party from contending the provision does

not authorize an award of fees]; *Berman v. Renart Sportswear Corp.* (1963) 222 Cal.App.2d 385.)

Real parties are estopped from denying the existence of the agreement sued on because they petitioned to enforce the arbitration clause in the written agreement. (See *Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 870-871; c.f. *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348.)

We conclude that the parties agreed to arbitrate the claims between them. The next question is whether the language in the arbitration clause precluding an award of punitive damages renders the clause unenforceable.

II

Adamany also argues that the arbitration provision is unenforceable because it contravenes public policy, relying on *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th 83. He relies on two aspects of the arbitration clause for this argument: the prohibition on an award of punitive damages, and the sharing of costs of arbitration. In *Armendariz*, our Supreme Court held that an arbitration agreement may not limit *statutorily* imposed remedies, such as punitive damages under the Fair Employment and Housing Act (Gov. Code, § 12965). (*Id.* at pp. 103-104.) But the claim for punitive damages here is based on a common law cause of action for fraud. Although Adamany's lawsuit alleges a statutory cause of action for willful failure to pay wages under Labor Code section 200 et seq., he does not seek punitive damages for that claim. *Armendariz* therefore does not apply.

In a supplemental brief, Adamany argues that the arbitration provision is unenforceable under *Armendariz* because it requires him to share the costs of arbitration. The clause states: "Each party shall pay its own expenses associated with such arbitration, including the expense of any arbitrator selected by such party and the Company will pay the expenses of the jointly selected arbitrator." In

Armendariz, the Supreme Court held that an arbitration agreement may not require the employee to bear any type of expense that the employee would not be required to bear if he or she brought the action in court. (*Armendariz, supra,* 24 Cal.4th at pp. 110-111; see also *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 181-182.) We agree that the fee-sharing provision of the arbitration clause violates this principle and cannot be enforced.

The issue becomes whether this unenforceable aspect of the arbitration agreement may be severed, allowing arbitration. In *Armendariz,* the Supreme Court explained the standard for determining whether an unconscionable provision is severable: "Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Armendariz, supra*, 24 Cal.4th at p. 124.)

The language barring an award of punitive damages appears at the end of the arbitration clause and, absent parol or other evidence on the point (there is none), is severable because its purpose is collateral to the purposes of the contract as a whole. But the cost-sharing provision of the clause is not severable and hence not enforceable, unless real parties in interest agree to bear the costs of arbitration in accordance with the principle expressed in *Armendariz*, *supra*, 24 Cal.4th at pages 110-111. They should have the opportunity to do so.

DISPOSITION

The petition for writ of mandate is granted and the trial court is directed to vacate its order granting the petition to arbitrate and to issue a new and different order denying the petition to arbitrate, unless, within 30 days of the filing of this

opinion, real parties in interest file written confirmation with the trial court agreeing to bear the costs of the arbitration in accordance with *Armendariz, supra*, 24 Cal.4th at pages 110-111, including, in particular, payment of fees and costs of the arbitration. The parties are to bear their own costs in this writ proceeding.

NOT TO BE PUBLISHED.

EPSTEIN, J.

We concur:

VOGEL (C.S.), P.J.

HASTINGS, J.