Filed 1/3/12

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MELISSA WISDOM et al., Plaintiffs and Respondents, v. ACCENTCARE, INC. et al., Defendants and Appellants.	C065744 (Super. Ct. No. 34-2009-00063028CU OE GDS)

APPEAL from a judgment of the Superior Court of Sacramento County, Steven H. Rodda, Judge. Affirmed.

Stradling Yocca Carlson & Rauth, Robert J. Kane, Peter L. Wucetich, for Defendants and Appellants.

Spinelli, Donald, Nott; LaPlante, Spinelli, Donald & Nott, Domenic D. Spinelli, Amanda S. Uhrhammer, Monica M. Espejo, for Plaintiffs and Respondents.

In this case we decide that a clause in an application for employment with AccentCare, Inc. (AccentCare), requiring only the applicant agree that, if hired, all disputes that cannot be resolved informally will be submitted to binding arbitration is

both procedurally and substantively unenforceable as unconscionable.

A court can refuse to enforce an unconscionable provision in a contract. (Civ. Code, § 1670.5.) A provision is unenforceable if it is both procedurally and substantively unconscionable. A contract can be procedurally unconscionable if it is oppressive due to the unequal bargaining power of the parties. In this case, the preemployment arbitration agreement is procedurally unconscionable. "[F]ew employees are in a position to refuse a job because of an arbitration requirement." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 115.)

We shall conclude that in addition to the procedural unconscionability of the pre-employment agreement to give up the right to trial, the agreement at issue was procedurally unconscionable because its language implied there was no opportunity to negotiate, because the rules of any arbitration were not spelled out in the agreement or attached thereto, and because plaintiffs did not understand they were waiving their right to a trial, nor was that fact explained to them.

We shall further conclude that the agreement was substantively unconscionable because it lacked mutuality. The lack of mutuality is made apparent by contrast to a different application form, also employed by AccentCare, which provided that "in exchange for my agreement to arbitrate, AccentCare, Inc. also agrees to submit all claims and disputes it may have

with me to final and binding arbitration . . . ." "[I]n the context of an arbitration agreement imposed by the employer on the employee, such a one-sided term is unconscionable." (*Armendariz, supra*, 24 Cal.4th at p. 118.)

Because both substantive and procedural elements of unconscionability are present, we shall affirm the trial court ruling finding the arbitration agreement unenforceable.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs were employed by defendant AccentCare as on-call staffing coordinators. Defendant Tera Cummings (formerly Tera Landeros) was their immediate supervisor. Part of plaintiffs' duties included ensuring that all cases remained staffed during off hours. They were required to respond to an off-hour call within 20 minutes.

Plaintiffs filed a complaint for damages, injunctive, and declaratory relief, alleging they were not paid for all of the overtime and time they spent handling off-hour calls. They stated causes of action for breach of implied contract, violation of Labor Code sections relating to the failure to pay wages and provide an accurate wage statement, unfair business practices, unjust enrichment, and promissory estoppel.

Four of the six plaintiffs, Norma and Katrina Rodriguez, Batseba Escoto, and Jessica Bondi, signed acknowledgment forms when they applied for employment with AccentCare. The acknowledgment was the last page of an application form that AccentCare gave plaintiffs, along with several other forms, when

plaintiffs applied for a job. The last page of the form consisted of five initialed paragraphs and a signature at the bottom. The heading directed: "Acknowledge Your Understanding of the following Statements and Agreements by Placing Your Initials by Each Paragraph, then Sign and Date Below." The third of the five paragraphs was an arbitration agreement that stated as follows:

> "I hereby agree to submit to binding arbitration all disputes and claims arising out of the submission of this application. I further agree, in the event that I am hired by *AccentCare*, that all disputes that cannot be resolved by informal internal resolution which might arise out of my employment with *AccentCare*, whether during or after that employment, will be submitted to binding arbitration. I agree that such arbitration shall be conducted under the rules then in effect of the American Arbitration Association."

Plaintiffs did not negotiate the terms of the application form, nor were the provisions explained to them. They were not told that their signature on the form was optional, nor were they aware of the consequences of signing a binding arbitration agreement.

By contrast Jessica Bondi signed a different, two-page arbitration agreement as a part of a new hire packet. As is relevant, that agreement provided that "in exchange for my agreement to arbitrate, AccentCare, Inc. also agrees to submit

all claims and disputes it may have with me to final and binding arbitration . . . ."[1]

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[1] The agreement reads in full:

"By signing below I confirm my voluntary agreement to submit to final and binding arbitration any and all claims and disputes with AccentCare, Inc., including but not limited to those related in any way to my employment or the termination of my employment, ... I understand further that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against both AccentCare, Inc. and/or its employees, officers directors or agents, and that, by agreeing to use arbitration to resolve such claims or disputes, both AccentCare, Inc. and I agree to forego any right we each may have had to a jury trial on these claims or disputes. I acknowledge that I have been advised of my right to consult with an attorney concerning the legal effect of this Agreement.

. . . . . .

I further acknowledge that in exchange for my agreement to arbitrate, AccentCare, Inc. also agrees to submit all claims and disputes it may have with me to final and binding arbitration, and AccentCare, Inc. further agrees that if I submit a request for binding arbitration, my maximum out-of-pocket expense for the administrative costs of the AAA and the arbitrator's fee will be an amount, if any amount, I would have to pay as a filing fee for a complaint in Orange County Superior Court or other trial court which would have jurisdiction and where venue would be appropriate were a complaint filed in such court . . . ."

Although this agreement had a date and signature line for both the employee and AccentCare, only the employee (Bondi) signed the agreement.

In their reply brief, defendants argue this arbitration agreement was also enforceable. Defendants' opening brief does not argue the enforceability of this agreement. Accordingly, we need not address whether this agreement is enforceable. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

Two of the plaintiffs, Melissa Wisdom and Vanessa Rodriguez, did not sign any arbitration agreement.

Defendants AccentCare and Cummings brought a motion to compel arbitration of the claims asserted by the four plaintiffs who had signed an arbitration agreement, and to stay the proceedings asserted by all plaintiffs pending completion of the arbitration.

The trial court denied the motion. It found the agreements were procedurally and substantively unconscionable. The court found the agreements procedurally unconscionable because: (1) defendants did not inform plaintiffs that signing the agreement was optional, and the heading of the agreement indicated that signing was mandatory; (2) there was unequal bargaining power between the parties and no possibility to negotiate a meaningful choice by the job seeker; (3) the arbitration agreement was located in the middle of five uniform, single-spaced paragraphs, and was not distinguished in any manner; (4) defendants did not explain the meaning of the agreement to plaintiffs; and (5) plaintiffs did not know what binding arbitration meant.

The trial court found the agreements were substantively unconscionable due to lack of mutuality. As to the arbitration agreement in the acknowledgment, the court found that there was no language in the agreement indicating that AccentCare agreed to submit to arbitration. As to Bondi's later-signed agreement, the trial court found it did not need to address that agreement

because defendants had not mentioned it in their moving papers, and because it had not been signed by AccentCare.

DISCUSSION

Recognizing that there is no "meaningful" factual dispute and the key issue is whether the arbitration agreement was unconscionable, defendants argue the standard of review is de novo. Plaintiffs do not contend otherwise. Absent conflicting extrinsic evidence, the validity of an arbitration agreement is a question of law subject to de novo review. (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1468-1469.)

A court can refuse to enforce an unconscionable contract. (*Armendariz, supra,* 24 Cal.4th at p. 114; Civ. Code, § 1670.5.) Both a procedural and a substantive element of unconscionability must be present before a court may exercise its discretion to refuse to enforce an agreement. (*Ibid.*) Although both procedural and substantive elements must be present, they need not be present in the same degree. (*Ibid.*) "'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Ibid.*)

A. Procedural Unconscionability

An agreement is procedurally unconscionable if there was oppression or surprise due to unequal bargaining power. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.) Adhesive contracts are oppressive. A contract of adhesion is one "'"which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."' [Citation.]" (*Ibid.*) Surprise means the weaker party's reasonable expectations are disappointed. (*Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1406.)

As explained in *Armendariz, supra*, there is "little dispute" that an arbitration agreement "imposed on employees as a condition of employment" without the opportunity for negotiation is adhesive. (24 Cal.4th at p. 115.) "Moreover, in the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Ibid.*)

We agree with the trial court that there is abundant evidence that the arbitration agreement was procedurally unconscionable. The contract, being one of adhesion, was oppressive. It was given to plaintiffs upon their application for employment. This situation leads to inherent

unconscionability because of the unequal bargaining power of the parties and the nature of the relationship. There was no evidence that the plaintiffs in this case were highly sought-after skilled employees who individually negotiated the details of their employment relationship with AccentCare.

The agreement itself implies that there was no opportunity to negotiate its terms. The language simply directs the applicant to "acknowledge your understanding of the following statements and agreements[.]" The other statements the applicants were directed to acknowledge were: (1) that the statements in the application were true and nothing was withheld, (2) that AccentCare could investigate the applicant's references, (3) that AccentCare was a smoke-free and drug-free workplace, and (4) that nothing in the application created an employment contract, and that if hired, employment would be at will. These were all terms that an applicant for employment would not expect would be negotiable.

Although the agreement stated that arbitration would be conducted under the rules of the American Arbitration Association, the rules were not attached. In *Harper v. Ultimo, supra*, 113 Cal.App.4th at page 1406, the court held it was oppressive to reference the Better Business Bureau arbitration rules, but not attach the rules to the agreement. "The customer is forced to go to another source to find out the full import of what he or she is about to sign -- and must go to that effort *prior* to signing." (*Ibid.*) "Numerous cases have held that the

failure to provide a copy of the arbitration rules to which the employee would be bound, supported a finding of procedural unconscionability. [Citations.]" (*Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393.)

The element of surprise was also present. The arbitration agreement was one of several forms presented to plaintiffs upon their application for employment. No one called attention to the arbitration agreement, and no one explained that it would result in a waiver of the right to trial. Plaintiffs did not know what binding arbitration meant. Thus, the employees' reasonable expectation that they were entitled to a trial to determine their legal rights with respect to their employment was disappointed.

We are aware that Division 7 of the Second Appellate District examined a nearly identical arbitration agreement in *Roman, supra,* 172 Cal.App.4th at page 1470-1471, and held that the procedural unfairness was "limited[.]" *Roman* reasoned that there was little evidence of surprise since the arbitration provision was "contained on the last page of a seven-page employment application," and "was set forth in a separate, succinct (four-sentence) paragraph that Roman initialed, affirming she had seen it." (*Id.* at p. 1471.)

Here, however, even though plaintiffs undoubtedly saw the arbitration paragraph when they initialed it, their declarations state they did not know what "binding arbitration" meant, no one explained it to them, and they were unaware they were giving up

their right to trial. There was no evidence any of the plaintiffs were sophisticated in legal matters. This, combined with the non-negotiable, take-it-or-leave-it circumstances surrounding the application for employment, result in a strong showing of procedural unconscionability.

B. Substantive Unconscionability

The substantive element of unconscionability means that the agreement is overly harsh or one-sided. (*Armendariz, supra*, 24 Cal.4th at p. 114; *Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, 1246.) Plaintiffs claim the arbitration agreement was substantively unconscionable because it lacked mutuality of obligation.

In the context of an arbitration agreement imposed by an employer on an employee, a lack of mutuality renders a contract substantively unconscionable. (*Armendariz, supra*, 24 Cal.4th at p. 118.) "Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities.'" (*Id.* at p. 117.)

Plaintiffs rely on *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238. In that case, five orphaned siblings sued the producers and network of "Extreme Makeover: Home Edition" and others when the family that took the siblings in, and for whom

the television show built a house, forced the siblings to leave after the television show documenting the construction of the house was broadcast. (*Id.* at pp. 1241-1245.)

The siblings had signed an "Agreement and Release" containing 24 pages and 72 paragraphs. (140 Cal.App.4th at p. 1242.) Paragraph 69 of the agreement provided in pertinent part:

> "'I agree that any and all disputes or controversies arising under this Agreement or any of its terms, any effort by any party to enforce, interpret, construe, rescind, terminate or annul this Agreement, or any provision thereof, and any and all disputes or controversies relating to my appearance or participation in the Program, shall be resolved by binding arbitration in accordance with the following procedure . . . . All arbitration proceedings shall be conducted under the auspices of the American Arbitration Association. . . . I agree that the arbitrator's ruling, or arbitrators' ruling, as applicable, shall be final and binding and not subject to appeal or challenge. . . . The parties hereto agree that, notwithstanding the provisions of this paragraph, Producer shall have a right to injunctive or other equitable relief as provided for in California Code of Civil Procedure [section] 1281.8 or other relevant laws.'" (*Id.* at p. 1243.)

The court concluded that the agreement was not bilateral because the arbitration provision required only the siblings to submit their claims to arbitration. (*Id.* at p. 1253.) In making this determination, the court focused on the "I agree" language of the contract, stating that the "I" referred to the

siblings, and "[t]he only time the phrase 'the parties' is used is in the last sentence, where 'the parties' agree that, . . . the producer has the right to seek injunctive or other equitable relief in a court of law . . . ." (*Ibid.*) There is no similar "parties" language in the AccentCare agreement.

The court noted that the television defendants claimed the contract was bilateral because it covered "'all disputes or controversies relating to my appearance or participation in the Program,'" indicating that if all disputes were subject to arbitration, either side could move to compel arbitration. (*Higgins, supra,* 140 Cal.App.4th at pp. 1253-1254.) The court rejected this argument, stating: "they [the television defendants] miss the point: only one side [the siblings] agreed to that clause." [2] (*Id.* at p. 1254, fn. omitted.)

The same must be said of the arbitration agreement at issue here. The phrases, "I hereby agree[,]" "I further agree," and "I agree" indicate only one party is agreeing to submit all disputes to arbitration, and that party is the one whose signature appears at the bottom of the form.

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[2] The court found additional elements of substantive unconscionability in a provision barring only the siblings from seeking appellate review of the arbitrator's decision, and the provision requiring arbitration in accordance with the rules of the American Arbitration Association, which provided that arbitration costs would be borne equally by the parties. (*Higgins, supra,* 140 Cal.App.4th at p. 1254.)

The one-sidedness of this agreement is highlighted by the language of the one and a half-page "Arbitration Agreement" signed by Bondi (but unsigned by defendants) after she became employed. That agreement stated Bondi's understanding that "*both AccentCare, Inc. and I agree* to forego any right we each may have had to a jury trial on these claims or disputes[,] . . . . '*both AccentCare, Inc. and I* will have the right to conduct reasonable discovery in such Arbitration proceeding[,] . . . [and*] I and AccentCare, Inc. also agree* that all matters relating to the dispute or the events underlying it shall be confidential." (Italics added.) Finally, the agreement stated: "I further acknowledge that in exchange for my agreement to arbitrate, AccentCare, Inc. also agrees to submit all claims and disputes it may have with me to final and binding arbitration . . . ."

Clearly, defendants knew how to draft a bilateral agreement. The differences between the post-hire agreement and the pre-hire agreement also confirm that the pre-hire agreement at issue in this case was not bilateral.

Defendants rely on *Roman, supra*, which held that an agreement containing nearly identical language was bilateral. (172 Cal.App.4th at p. 1473.) But *Roman, supra*, did not explain its reasons for concluding that the agreement at issue in that case was bilateral. Instead, the court distinguished *Higgins, supra*, on the ground that the *procedural* unconscionability in *Higgins* had been "far greater[.]" (*Id.* at pp. 1472-1473.)

To the extent *Roman* implies that the agreement in *Higgins* was not substantively unconscionable due to its one-sidedness, it is wrong. *Higgins*, *supra*, discussed at some length the fact that the "I agree" language of the contract indicated that only the siblings had agreed to the arbitration clause, and stated only briefly that "[a]dditional elements of substantive unconscionability" were to be found in the provision barring only the siblings from seeking appellant review of some claims and the provision requiring arbitration in accordance with the rules of the American Arbitration Association. (*Higgins*, *supra*, 140 Cal.App.4th at p. 1254.)

Roman, *supra*, cited *Little v. Auto Stiegler, Inc., supra,* 29 Cal.4th at page 1070, as lending support to its conclusion that the "I agree" language in an arbitration clause is not substantively unconscionable. (172 Cal.App.4th at p. 1473.) However, the clause litigated in *Little v. Auto Stiegler, Inc.*, explicitly stated: "'I understand by agreeing to this binding arbitration provision, *both I and the Company give up our rights to trial by jury.*'" (Italics added.) There is no similar language in the agreement at issue here.[3]

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[3] *Roman* cites to *Little v. Auto Stiegler, Inc., supra,* 29 Cal.4th at page 1070 with a compare (cf) sign, suggesting that the words "I agree" were determinative of the mutuality issue in that case. (172 Cal.App.4th at p. 1472.) However, at the page cited (p. 1070), the agreement in *Little*, unlike this case, provided that "both I and the Company give up our rights to trial by jury."

In their reply brief, defendants point to language in *Roman, supra*, 172 Cal.App.4th at page 1473, indicating that if the court had found the arbitration provision ambiguous on the issue of mutuality, it would have enforced the agreement because of the public policy favoring arbitration and the requirement that contract provisions be interpreted in a manner that renders them legal rather than void. We do not find the language of the agreement before us ambiguous. There is no language in the agreement binding AccentCare to arbitrate its claims against its employees.[4]

The arbitration language in the acknowledgment signed by plaintiffs did not create mutual obligations. This, combined with the elements of procedural unconscionability present in the circumstances of the execution of the agreement compel the conclusion that the arbitration agreement was unenforceable.

DISPOSITION

The judgment (order) is affirmed. Costs are awarded to respondents.

BLEASE, Acting P. J.

We concur:

BUTZ, J.

MAURO, J.

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[4] Moreover, the application form contains a provision that, if hired, the terms of employment of the applicant may be changed by the employer with or without cause or notice, necessarily including an arbitration clause.