

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA DIVISION**

TENTATIVE RULINGS

EVENT DATE: 07/23/2020 EVENT TIME: 08:20:00 AM DEPT.: 20
JUDICIAL OFFICER: Matthew P. Guasco

CASE NUM: 56-2019-00537455-CU-WT-VTA
CASE TITLE: FERNANDEZ VS MILESTONE MANAGEMENT

CASE CATEGORY: Civil - Unlimited CASE TYPE: Wrongful Termination

EVENT TYPE: Motion to Compel - Arbitration & to Dismiss or in the Alternative Stay Proceedings by counsel for Def
CAUSAL DOCUMENT/DATE FILED: Motion to Compel, 01/22/2020

Notice Regarding Courtroom 20 Law & Motion Procedures: The law and motion calendar in Courtroom 20 before Judge Matthew P. Guasco starts promptly at 8:30 a.m. Ex parte applications will be heard at the same time as matters on the law and motion calendar. Parties appearing by Court Call must check in with the Judicial Assistant by 8:20 a.m. No notice of intent to appear is required. Parties wishing to submit on the tentative decision must so notify the Court by e-mail at Courtroom20@ventura.courts.ca.gov or by fax to Judge Guasco's secretary, Lori Jacques at (805) 477-5892. **Do not call in lieu of sending an e-mail or fax.** If a party submits on the tentative decision without appearing, but another party appears, the hearing will be conducted in the absence of the non-appearing party. Effective February 13, 2018, all cases assigned to Courtroom 20 are assigned for all purposes (including trial) to Judge Guasco.

COVID-19 NOTICE: Pursuant to the administrative orders of the Presiding Judge and the Civil Reopening Plan, effective June 10, 2020, and until further notice, all attorneys and self-represented parties in law and motion hearings must appear telephonically via Court Call; there shall be no personal appearances in the courtroom without the prior express approval of Judge Guasco. You may contact Court Call as follows: www.courtcall.com or call 888-882-6878.

The following is the Court's tentative decision concerning the motion of defendant, Milestone Management (CA) – Thousand, LLC, dba Sage Mountain Senior Living ("Milestone"), to compel binding contractual arbitration and to stay or dismiss the Complaint of plaintiff, Melissa Lorenzo Fernandez ("Fernandez"):

Evidentiary Objections

The Court OVERRULES each of Fernandez's objections 1-8 to the declaration of Melissa Spino.

The Court OVERRULES each of Milestone's unnumbered objections to the declaration of Fernandez.

Request for Judicial Notice

The Court GRANTS Milestone's request for judicial notice of the AAA Employment Arbitration Rules, which are expressly incorporated by reference in the arbitration agreement at issue in this action.

Fernandez's Surreply

The Court enters its ORDER striking the surreply filed by Fernandez without prior leave of the Court on February 11, 2020. Ordinarily, motion practice limits the parties to one round of moving, opposing, and reply papers. The Court's routine policy concerning motion practice is no different than this. Fernandez did not request, nor did the Court approve, the filing of the surreply. Accordingly, the Court strikes and will not consider it. This determination is rendered moot, in any event, because the Court finds no issue with regard to the presentation of a Spanish language and an English translation of the same declaration by Fernandez.

Ruling on Motion

For the following reasons, the Court GRANTS Milestone's motion to compel binding arbitration and to stay the action pending completion of the arbitration:

(1) "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such 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 . . ." (Code of Civ. Proc., § 1281.2.) The court is permitted to deny a petition to compel arbitration in the event that there is no binding agreement to arbitrate, the right to arbitrate has been waived by the party compelling arbitration, grounds exist to revoke the agreement to arbitrate, or a party subject to arbitration is a party in a pending action or proceeding arising out of the same events, occurrences or transactions as those which would be arbitrated. (Code of Civ. Proc., § 1281.2.)

(2) Milestone has met its initial burden of demonstrating an agreement to arbitrate and Fernandez's refusal to arbitrate. The arbitration agreement has been properly authenticated by the declaration of Melissa Spino, and it is fully executed.

(3) Additionally, Milestone has met its burden of demonstrating that the arbitration agreement is governed by the Federal Arbitration Act (9 U.S.C., §§ 2, et seq. ("FAA").) This is not a case in which the Court must resort to extrinsic evidence to determine whether the FAA applies; the arbitration agreement contains an express provision to that effect. Additionally, Ms. Spino's declaration provides sufficient foundation to permit the Court to conclude that Milestone engages in substantial interstate commerce. Accordingly, the Federal Arbitration Act applies and preempts any contrary California state law. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 405, 58 Cal.Rptr.2d 875, 925 P.2d 1061.) (*Accord, Henry Schein, Inc. v. Archer and White Sales, Inc.* (2019) 139 S.Ct. 524, 202 L.Ed.2d 480; *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742.)

(4) Fernandez argues that the arbitration agreement should not be enforced because it is unconscionable. It is settled that ". . . the doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243, 200 Cal.Rptr.3d 7, 367 P.3d 6.) Procedural and substantive unconscionability must both be present in order to justify an order denying a motion to compel arbitration pursuant to an express agreement. (*Ibid.*) "But they need not be present in the same degree." (*Ibid.*) "[T]he 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." (*Id.* 62 Cal.4th at p. 1244, 200 Cal.Rptr.3d 7, 367 P.3d 6.)

(5) "[A] finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided." (*Ibid.*, internal quotation marks and citations omitted.) "At one end of the spectrum are equal parties, in which there is no procedural unconscionability . . ." (*Ibid.*) "Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum." (*Ibid.*) "Ordinary contracts of adhesion, although they are indispensable facts of modern life that are generally enforced [citation], contain a degree of procedural unconscionability even without any notable surprises, and bear within them the clear danger of oppression and overreaching." (*Ibid.*, internal quotation marks and citations omitted.) Courts are required to ". . . be particularly attuned to this danger in the employment setting, where the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute." (*Ibid.*, internal quotation marks and citations omitted.)

(6) "The unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as overly harsh [citation], unduly oppressive [citation], so one-sided as to shock the conscience[citation], or unfairly one-sided [citation]." (*Ibid.*, internal quotation marks and citations omitted.) In other words, an arbitration agreement may be so substantively one-sided and unfair that its adhesive nature renders the agreement unenforceable. (*Id.*, 62 Cal.4th at pp. 1244-45, 200 Cal.Rptr.3d 7, 367 P.3d 6.) Any such unfairness would have to be substantially greater than "a simple old-fashioned bad bargain." (*Id.*, 62 Cal.4th at p. 1245, 200 Cal.Rptr.3d 7, 367 P.3d 6, internal quotation marks and citation omitted.) "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." (*Ibid.*)

(7) Here, the adhesive, take-it or leave-it nature of the arbitration agreement, like all such agreements which are

non-negotiated and unilaterally-imposed as a term and condition of employment, is to some extent procedurally unconscionable. It is not, however, an adhesive contract which bears any elements of "surprise or other sharp practices." (*Ibid.*) In fact, quite the contrary is true here; Milestone was up-front about the arbitration provision and its meaning and implications as part of the employment application and acceptance process.

(8) Fernandez argues that the arbitration agreement was procedurally unconscionable because it was presented to her in English, a language she does not read or understand. Accordingly, her argument is that she signed an arbitration agreement which she did not understand. It is a settled rule of contracts, however, that ". . . one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms, and cannot escape liability on the ground that he has not read it. If he cannot read, he should have it read or explained to him." (*Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 686, 195 Cal.Rptr.3d 34, citations and internal quotation marks omitted.) [i] (*Accord, Roldan v. Callahan & Blaine* (2013) 219 Cal.App.4th 87, 93, 161 Cal.Rptr.3d 493; *Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 21 Cal.Rptr.2d 245; *Fields v. Blue Shield of California* (1985) 163 Cal.App.3d 570, 578, 209 Cal.Rptr. 781.)

(9) The evidence is disputed about whether Fernandez understands, speaks, and reads English, as opposed to Spanish. Fernandez submits her declaration that she can only understand, speak and read Spanish, and that her interview with Milestone was entirely in Spanish. Fernandez declares that the arbitration agreement she signed was part of numerous papers in English she signed the date she was interviewed by Milestone. According to Fernandez, nobody at Milestone mentioned or explained the arbitration provision to her in Spanish. She had no idea she might be bound by the arbitration provision until the pending motion was filed, Fernandez declares.

(10) On the other hand, Milestone's business office manager at the Sage Mountain retirement community at issue here, Jade Alma, submitted a declaration in which she states that she personally interviewed and hired Fernandez. Alma declares that Fernandez was fluent in English, the interview did not occur in Spanish, all of the forms Fernandez read and signed, including the arbitration agreement, were in English, and Alma advised Fernandez up-front that she needed to be proficient in English to be hired. The application Fernandez filled out herself is entirely in English, including the sections in which Fernandez herself wrote information in English.

(11) Thus, the preponderance of the evidence is that Fernandez does, in fact, understand, read, and speak English, contrary to her declaration. Even if she did not, however, she is bound by the arbitration agreement she signed, whether she understood it or not. (*Ramos v. Westlake Services LLC, supra*, 242 Cal.App.4th at p. 686, 195 Cal.Rptr.3d 34.)

(12) On the sliding scale, therefore, the procedural unconscionability of the arbitration agreement receives minor weight in the unconscionability analysis.

(13) Additionally, the Court finds that the arbitration agreement is not substantively unconscionable. The Court has taken judicial notice of the AAA Employment Arbitration Rules, to which the arbitration agreement explicitly refers. Those rules provide the following:

(a) "The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration."

(b) "The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any party or arbitrator is absent, in default, or has waived the right to be present, however 'presence' should not be construed to mandate that the parties and arbitrators must be physically present in the same location."

(c) The arbitrator has full subpoena powers.

(d) The arbitrator has full decision making authority as the trier of fact.

(e) "The arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law."

(14) The arbitration agreement provides that Milestone bears the fees and costs of AAA arbitration, including those billed by the arbitrator. Thus, Fernandez is only responsible for the fees and expenses of her attorneys and experts.

(15) Thus, the arbitration agreement and AAA rules establish the substantive fairness of the arbitration process in this matter. Fernandez fails to meet her burden of proving that the arbitration agreement here is substantively unconscionable. The hearing process and remedies available in arbitration are mutual and conducive to a fair opportunity for the parties to present their claims and defenses. (See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

(16) Accordingly, the Court finds that the arbitration agreement here is valid and enforceable. The Court DENIES Fernandez's request to find the arbitration agreement void as unconscionable.

(17) The Court also finds that the arbitration agreement binds defendant, Christian Doe, who the Complaint alleges was acting in the course and scope of his employment as an agent and supervising or managing employee of Milestone. (*Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 613-14, 139 Cal.Rptr.3d 114.)

(18) For all of the above reasons, the Court GRANTS Milestone's motion to compel binding contractual arbitration of this action.

The Court enters its further ORDER that the action is STAYED pending completion of the arbitration. (Code of Civ. Proc., § 1281.4.)

The Court hereby schedules this matter for a status conference re arbitration and stay for **October 22, 2020, at 8:30** a.m. in Courtroom 20. The parties shall submit a joint status conference statement not later than seven (7) days before the hearing advising the Court of the then-existing status of the arbitration.

Counsel for Milestone shall serve and file a notice of ruling and proposed order consistent with the above and in conformity with the Code of Civil Procedure and the California Rules of Court. A copy of this tentative decision (if adopted by the Court as its final ruling) may be attached to any such proposed order in lieu of quoting the same verbatim in the body of the document. /n

[i] The *Ramos* court held that the arbitration agreement in that consumer automobile contract was unenforceable because it was undisputed the plaintiff in that case did not read or understand English, the arbitration agreement was in the English purchase contract, and the Spanish language translation of the contract omitted the arbitration provision. Accordingly, the arbitration agreement in that case was void ab initio as having been procured by fraud. The *Ramos* case is readily distinguishable from Fernandez's for the reasons stated in this ruling.