Filed 12/19/07 Aguilar v. BLH Construction CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

NEFTALI V. AGUILAR et al.

Plaintiffs and Respondents,

v.

BLH CONSTRUCTION COMPANY,

Defendant and Appellant.

2d Civil No. B198468
(Super. Ct. No. CIV 245721)
(Ventura County)

BLH Construction Company (BLH) appeals from an order denying its motion to compel arbitration. The court denied the motion finding that respondents, Neftali Aguilar and Daniel Garcia aka Danny Lopez (respondents), had not signed the arbitration agreement. On appeal, BLH asserts the trial court abused its discretion by not continuing the hearing to permit oral testimony and cross-examination of witnesses on the issue. We affirm.

Factual and Procedural History

Respondents were hired by BLH as construction workers on February 28, 2005. On the day they were hired, each was given an employee handbook and a form entitled "Receipt of Handbook and Acknowledgement of At-Will Employment" and another form entitled "Mutually Binding Arbitration Agreement." Each form had lines for the employee's signature and the date of signing.

On January 5, 2007, Aguilar and Garcia filed a wage and hour class action complaint against BLH. In response, BLH filed a petition to compel arbitration. Copies of the "Mutually Binding Arbitration Agreement" purportedly signed by respondents were attached to the petition.

Respondents opposed the petition on the ground, inter alia, that they had not signed the arbitration form and the signatures on the copies of the forms submitted by BLH were forged. BLH responded by submitting a declaration of the company's roofing division supervisor, Juan Prado, in which he stated that he gave respondents the employee handbook, Mutually Binding Arbitration Agreement and Receipt of Employee Handbook and Acknowledgement of Employee Handbook. He also stated that respondents "signed and dated the two signature pages contained within the Employee Handbook." BLH also submitted the declaration of the company's chief operations officer, Brian Holland, stating that respondents signed the arbitration agreement. BLH's attorney submitted a declaration stating that he received copies of the agreements from the custodian of records and that it was BLH's custom and practice to have each employee sign the arbitration agreement.

The court issued a tentative ruling denying the petition to compel arbitration on the ground that BLH did not present admissible evidence that Aguilar and Lopez had signed the arbitration agreement. The ruling states: "Plaintiffs declare that the signatures and dates on Exhibits 1 and 2 are not their handwriting and that they have never seen either agreement. Neither Prado's nor Holland's statements overcome plaintiffs' denials that it is their handwriting. [¶] . . . Attorney Fong does not have personal knowledge sufficient to lay a foundation to authenticate either Exhibits A or B. At best, he is relying on hearsay, which is not a proper foundation."

At the hearing on the motion, BLH argued that it should be allowed to conduct discovery and have an opportunity to present testimony and cross-examine witnesses to determine whether respondents authorized someone else to sign the

agreements. The court rejected the argument finding that the signatures on the arbitration agreements did not match the signatures of Aguilar's and Garcia's declarations.

In this appeal, BLH argues: "Because of The Sharply Conflicting Evidence, it Was Error Not to Hold An Evidentiary Hearing Before Ruling On the Petition."

Discussion

The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement. *(Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 586.) The disposition of this matter is governed by Code of Civil Procedure section 1290.2, a statute cited by neither party. Section 1290.2 states in relevant part: "A petition under this title shall be heard in a summary way in the manner and upon the notice provided by law for the making and hearing of motions . . . ." (See *Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 413, ["We . . . conclude that the summary procedure established by sections 1281.2 and 1290.2 does not violate the cited provisions of the California Constitution"].)

California Rules of Court, rule 3.1306 provides for the receipt of evidence at a motion hearing, as follows: "(a) Evidence received at a law and motion hearing must be by declaration or request for judicial notice without testimony or cross-examination, unless the court orders otherwise for good cause shown. [¶] (b). . . A party seeking permission to introduce oral evidence . . . must file, no later than three court days before the hearing, a written statement stating the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing. When the statement is filed less than five court days before the hearing, the filing party must serve a copy on the other parties in a manner to assure delivery to the other parties no later than two days before the hearing."

Code of Civil Procedure section 1290.2 and rule 3.1306 give the trial court discretion to permit oral testimony and cross examination. (See *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972, [petitions to compel arbitration are

resolved by a summary procedure that allows the parties to submit declarations and other documentary testimony and, at the trial court's discretion, to provide oral testimony].)

BLH's reliance on *Rosenthal v. Great Western Financial Securities Corp., supra*, 14 Cal.4th 394 and *Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754 is misplaced. BLH cites these cases for the proposition that where, as here, the parties' evidence is conflicting, an evidentiary hearing is required before the court rules on a motion to compel arbitration. This rule does not help BLH because, in this case, the trial court did hold an evidentiary hearing. Unlike the trial court in *Hotels Nevada* which based its decision to deny a motion to compel arbitration on the basis of the complaint's allegations, here the court considered the declarations filed by both parties before denying the motions.

BLH's assertion that these cases required the trial court to hear oral testimony also is without merit. In *Rosenthal*, the court said that where fraud is alleged, oral testimony may be required to weigh the credibility of witnesses. (*Rosenthal v. Great Western Fin. Securities Corp., supra*, 14 Cal.4th 394, 414.) However, *Rosenthal* also said: "There is simply no authority for the proposition that a trial court necessarily abuses it discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony." (*Ibid.*; see also *People v. Johnson* (2006) 38 Cal.4th 717, 730 [" 'Evidence received at a law and motion hearing *shall be by declaration, affidavit, or request for judicial notice without testimony or cross-examination* . . . .' "]) Here, the evidence presented by BLH in the Prado and Holland declarations did conflict with that presented by respondents as to the authenticity of the signatures on the agreements. However, BLH's evidence was weak -- neither Prado nor Holland stated they actually saw respondents sign the agreements -- compared with respondents' evidence that they did not sign the agreements, that Aguilar's name was misspelled on the agreement and that the signatures on their declarations bore no resemblance to the signatures on the agreements submitted by BLH. (See Evid. Code, § 1417; and see *People v. Rodriguez*

(2005) 133 Cal.App.4th 545, 554 [trial court sitting as trier of fact can compare signature with exemplar to determine whether signature was a forgery].)

BLH also relies on *Bolanos v. Khalatian* (1991) 231 Cal.App.3d 1586 to support its argument that it should be permitted to present evidence that respondents authorized an agent to sign the agreement on their behalf. *Bolanos* does not support BLH's argument. *Bolanos* involved an arbitration agreement that complied with the requirements of the Medical Injury Compensation Reform Act. "[T]he conclusion that a nonsigning third party was bound by the arbitration agreement rested in part on the consideration of the public policies that led to enactment of that legislation." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 789.)

BLH had an opportunity to present evidence at the arbitration hearing. It did not do so. It failed to present any credible documentary evidence, such as employment applications or driver's licenses, to show that the signatures appearing on arbitration agreements were those of Aguilar and Garcia. The court was not required to provide BLH with a second hearing or with an opportunity to present oral testimony.

The order is affirmed. Respondents shall recover costs.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Vincent O'Neill, Judge

Superior Court County of Ventura

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O'Rourke, Fong & Manoukian LLP, Roderick D. Fong, Marina Manoukian for Defendant and Appellant.

Nava & Gomez, Santos Gomez, Cesar H. Nava, Stanley J. Hodson for Plaintiffs and Respondents.