Filed 3/23/04 Whalen-Camacho v. GMRI CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHELLE WHALEN-CAMACHO et al.,	
Plaintiffs and Respondents,	G031367
v.	(Super. Ct. No. 02CC00038)
GMRI, INC.,	O P I N I O N
Defendant and Appellant.	

Appeal from an order of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Littler Mendelson, Garry G. Mathiason, Tony R. Skogen, Diane L. Kimberlin, and Dominic J. Messiba for Defendant and Appellant.

Langford & Langford, Michael S. Langford; Walsh & Walsh, Michael J. Walsh and Mark A. Walsh for Plaintiffs and Respondents.

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I. INTRODUCTION

This case illustrates how adroit lawyering at the trial level can save a win on a motion to compel arbitration when that victory is challenged on appeal. In a word, the remarks of the trial judge at oral argument (held September 30, 2002) indicated that he thought he had no discretion but to refuse to sever a

patently unconscionable provision of an arbitration agreement, and therefore had to throw out the entire agreement. If counsel had left matters there, we would have to reverse, to give the judge the opportunity to exercise his discretion on the subject. However, the actual order which counsel prepared (submitted October 11, 2002) and which the trial judge signed some 11 days later (on October 25, 2002) takes precedence over the trial judge's oral remarks, and that order shows that the judge *did* exercise discretion in choosing not to sever the offending clause. And given the fact that two weeks passed in the interim between submission of the order and its signing, and the trial judge struck a number of paragraphs from the proposed order, that is not an unreasonable supposition. The judge clearly read the language and thought about it. The inference is that he thought sufficiently enough that if he hadn't exercised his discretion by the oral argument, he certainly had by the time he signed the order. (See Evid. Code, § 664; *People v. Visciotti* (1992) 2 Cal.4th 1, 49 [presumption that judicial duty is regularly performed].)

Since the judge's exercise of discretion was, as we show now, a reasonable one, the order refusing to sever must be upheld.

II. FACTS

Michelle Whalen-Camacho and Miguel Perez sued their employer, Red Lobster restaurants, for not allowing them and other employees to have a ten minute break for every four hours of work performed or a thirty-minute meal break if working a five-hour shift or more. (See Lab. Code, §§ 510, 512.) The suit has been brought as a class action. Red Lobster countered with a motion to compel arbitration or, alternatively, for summary judgment based on the idea that Whalen-Camacho and Perez had agreed to arbitrate their claims and were refusing to do so. Both the motion to compel and the motion for summary judgment were denied.

Red Lobster has now appealed from the denial of the motion to compel arbitration.[1]

The arbitration agreement provides that "the claim or dispute shall be submitted to binding arbitration in accordance with the Employment Dispute Resolution Rules of the American Arbitration Association (AAA), except to the extent modified by these DRP [the arbitration agreement itself, known as the Dispute Resolution Procedure] or by applicable state or federal law."

A number of the agreement's clauses have been challenged by the plaintiffs in this litigation. The most important one is a fee sharing provision. Under the heading, "Arbitration Fees and Costs," the agreement states that the arbitrator's fees and expenses, the costs of the hearing facilities, and any costs owed to the American Arbitration Association "shall be shared equally" by both employer and employee, *except* that the employee "shall not be required to pay more than the equivalent of two weeks' salary in his/her current position, or the last position held with the Company." The employer picks up the rest. (After the litigation commenced, Red Lobster's counsel expressly offered to sever the two-weeks expense provision, in effect meaning that Red Lobster would pick up *all* the costs.)

A second problematic clause is the scope of *express* coverage of the arbitration agreement. Under the heading "What is Covered Under DRP" the agreement states: "The claims of Employees which may be submitted to DRP are claims for wages or other compensation due (except as herein limited); tort claims, claims of discrimination including but not limited to race, color, sex, religion, . . . age, claims for denial of benefits, claims for violation of any federal or state law or regulation or any claim arising under common law. However, the DRP is not

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[1] Technically, the defendant in the caption, Darden Restaurants, Inc., is the parent company of GMRI, Inc. dba Red Lobster. (The "GMR" stands for General Mills Restaurants.) Darden is a Florida corporation traded on the New York Stock Exchange. Respondents' motion to dismiss the appeal because "GMRI, Inc." is a "non-party" is frivolous, and hereby denied.

available to review performance evaluations, job elimination or layoff decisions, Company work rules, policies or pay rates, or increases and decreases in benefits except to the extent such matters relate to statutory or breach of contract claims." Conspicuously missing from the list are claims employers would typically make against employees, like breach of trade secrets, infringements of trade dress, breaches of covenants not to compete, and indemnity.

There are four other aspects of the arbitration agreement which have come under attack by the plaintiffs:

-- A one-year contractual statute of limitations clause: "Any controversy, claim or dispute subject to the DRP (which has not been resolved through the Open Door Policy) must be submitted in writing on a Darden Dispute Resolution Procedure Request Form to the restaurant's general manager (if the Employee works in a restaurant), facilitator or to the president of personnel, within one (1) year from the date the Employee first learns of his/her claim. Any claims not submitted to DRP during this one (1) year period shall be considered resolved and closed and the Employee may not thereafter pursue the claim through the DRP or seek relief from any federal, state or local governmental administrative agency or court, unless otherwise provided by law in which event, the one (1) year period shall be according extended."

-- A limitation on trial time: "The arbitration hearing shall last not longer than two days. Each party has one day to present his/her position. The arbitrator may for good cause, extend the hearing and adjust the timing of the presentations."

-- A discretionary fee provision for statutority-entitled fee claims: "However, if the Employee prevails on a statutory claim which entitled him/her to attorney's fees, the arbitrator may award reasonable attorney fees to the Employee in accordance with such statute."

-- A limitation on discovery via the incorporation of American Arbitration Association rules, which provide: "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."

Oral argument on the motion to compel was heard September 30, 2002. At the hearing the trial judge denied the motion to compel arbitration, in particular denying the Red Lobster's request to sever the two-week salary exposure provision. In doing so, however, he appeared to base his decision on the idea of an a priori preclusion of *any* severance *at all* based on the expensive nature of the two-week exposure provision. We quote his comments at length to demonstrate how one could get that impression:

"I am not as persuaded as you are, Mr. Skogen [Red Lobster's counsel], about this opportunity to blue pencil the illegal portion of the document. This is going to be perceived, I think, reasonably by anybody who has it in hand as being a rather daunting challenge. It's almost an in terrorum clause. [¶] Your argument, if carried to its ultimate conclusion, would permit the employer to put all sorts of onerous terms into an employment slash arbitration provision with the avowed intention of discouraging any claims. [¶] I am not suggesting that was Darden's intention here, but the intention of the drafter may not be so important as the result of such a document. [¶] And, of course, there is nothing in the record on this; but I think one can take notice of the fact that an expensive obligation of that nature would discourage a person from pursuing that arbitration . . . . [¶] I think the timing of that and the continued use of a document that's improper leads me to think that that is not so easily done; that the employer no so easily escapes its own impropriety by just responding to a lawsuit with this type of selective enforcement. And it's called blue penciling, it's called severance; but I think it's an improper use of a validly illegal document."

On October 11, 2002, eleven days after the oral argument, the plaintiffs submitted a proposed order on the motion to compel. It provided, among

other things: "Further, the Court finds that substantively unconscionable provisions pervade the DRP such that severing said terms would go beyond mere excision to rewriting the subject document, which is not the proper role for the Court."

On October 25, 2002, the trial judge signed the order. He struck out a number of other provisions (dealing with triable issues regarding unconscionability), but left the language dealing with severance, quoted just above, intact.

While the notice of appeal purports to appeal from the September 30, 2002 oral order denying the motion to compel, we must construe the appeal to be from the October 25, 2002 written order. Otherwise we would have the anomaly of an appeal from patently nonfinal "remarks" (not even a minute order) of the trial judge. The rule is that the trial court retains the right to reverse non-final orders. (See *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1274 ["A trial court is entitled to change its mind before judgment . . . ."]; *Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1231 ["trial courts have always had inherent jurisdiction to reconsider interim rulings until the ruling is finalized by entry of judgment"]; see also *Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1013 ["if the original order is an interim rather than a final ruling, it may be corrected at any time up to final judgment"]; *Greenberg v. Superior Court* (1982) 131 Cal.App.3d 441, 444-445 [court was well within its jurisdiction to change ruling on denial of motion to expunge lis pendens].)

III. DISCUSSION

A. *General Considerations Bearing on Severability*

The question of severing unconscionable clauses from arbitration agreements is, statutorily, a matter of trial court discretion. Civil Code section 1670.5 provides: "If the court as a matter of law finds the contract or any clause of

the contract to have been unconscionable at the time it was made the court *may* refuse to enforce the contract, or it *may* enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (Emphasis added.)

The factors by which a court should exercise this statutory discretion are discussed in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 121-127. Boiled to their essence, the inquiry is whether the unconscionability is central to the document or merely incidental to it. "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 illegality can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Id*. at p. 124.)

Along the way, *Armendariz* also teaches these things:

-- First, there is a presumption in favor of maintaining the contractual relationship if possible. The high court says, "But it [Civil Code section 1670.5] also appears to contemplate the latter course [refusing to enforce the entire agreement] only when an agreement is 'permeated' by unconscionability." (*Armendariz, supra*, 24 Cal.4th at p. 122.)

-- Second, however, "more than one unlawful provision" is a factor that weighs against severance, since "multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." (*Armendariz, supra*, 24 Cal.4th at p. 124.) Along those lines, a lack of mutuality can indicate permeation with illegality because "there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement." (*Id*. at pp. 124-125.)

-- Finally, *Armendariz* emphasizes the equitable nature of the severance analysis. Parties should not receive an "undeserved benefit" or "suffer undeserved detriment" because an entire agreement is voided. (*Armendariz*, *supra*, 24 Cal.4th at

p.123.) And by the same token preserving contractual relationships for their own sake is to be preferred "if to do so would not be condoning an illegal scheme." (*Id*. at p. 124.)

Perhaps the easiest cases for severance are those where there are unconscionable trial de novo clauses, i.e., where the overreaching party is allowed to reject the result of arbitration. In such cases, it would reward the overreaching party *not* to sever. (See e.g., *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 [either party could appeal any award of more than $50,000 to second arbitrator]; *Saika v. Gold* (1996) 49 Cal.App.4th 1074 [arbitration award could be rejected if it exceeded $25,000].)

On the other hand, the least likely candidates for severance are those cases where the unconscionable aspect of the arbitration is so "bound up" with the unconscionable part that separation is not readily possible. (E.g., *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 7 Cal.Rptr.3d 418, 426.)[2]

B. *This Record Shows the Trial Judge Exercised His Discretion*

This case is only difficult insofar as the tenor of the trial court remarks at oral argument suggest he was laboring under a "penalty" or "forfeiture" theory of severability -- the idea that if an employer includes a single unconscionable clause, the whole agreement should go. That idea, as should be clear from our discussion above, is obviously not the law. (See also *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 91 [because unconscionable cost provision was collateral to general purpose to resolve disputes in arbitration, "severance was available"].)

The closest thing that our high court has come to the trial court's forfeiture rationale is the idea that *bad faith* inclusion of unconscionable matter in an arbitration agreement will preclude enforcement of the entire agreement, on the ground that any other result will reward the bad faith of the employer -- the employer will have extracted a de facto deterrent effect by the inclusion, and will have lost nothing by the severance.

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[2] Emphasis on inextricable connections and various claims being "bound up" with one another is simply another way of stating the "permeation" standard set forth in *Armendariz*.

(See *Armendariz, supra*, 24 Cal.4th at pp. 124-125, fn. 13.) But here, no bad faith was found. The trial court specifically said there was "nothing in the record" to support the idea that it was "Darden's intention" to "put all sorts of onerous terms" into the agreement "with the avowed intention of discouraging any claims."

Rather, and in contrast with the emphasis in the *Armendariz* footnote on subjective bad faith, the trial judge's remarks at oral argument appeared to show that his decision was grounded in the *objective* effect of the agreement. He told Red Lobster's counsel, "the intention of the drafter may not be so important as the result of such a document." (Actually, the law is precisely the other way around: There is nothing in *Armendariz* which supports a penalty or forfeiture rationale when the drafter acts in good faith.)

And if the trial judge's remarks were all that existed, we would have to reverse. However, those remarks were made September 30, 2002. On October 11, 2002, plaintiffs submitted a proposed order on the motion to compel arbitration, and on October 25, 2002, two weeks after that, the trial judge signed an order which indicated he *had* done some thinking about the matter in the interim. He excised, for example, a whole block of language on the preceding page dealing with triable issues. But he left intact the language which said that "substantively unconscionable provisions pervade the DRP such that severing said terms would go beyond mere excision to rewriting the subject document, which is not the proper role for the Court."

And on that score, the decision may be readily upheld on the merits. The rule is that when oral remarks conflict with formal written orders, it is the formal written order that controls. (See *Yarrow v. State of California* (1960) 53 Cal.2d 427, 438 ["An order will not be deemed to be limited by an opinion or judicial reasoning unless the intention to limit is clearly expressed in the order."]; *Lopez v. Larson* (1979) 91 Cal.App.3d 383, 405 ["the general rule" is "that the oral statements or the opinion of the court may not be used to impeach its orders or judgment"]; *Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 494 [a "court is not bound by its statement of intended decision and may enter a wholly different judgment than that announced"].)

Here, the formal order has language indicating a finding of pervasiveness that transcends merely a one-bad-clause-and-you're-out theory. And, as we said, given the facts that the trial judge clearly read the order, and had plenty of time to reflect on any differences expressed by it and his original thinking at oral argument, it is to be concluded that he adopted a pervasiveness rationale -- which is the law under *Armendariz* -- in his final judgment on the matter.

C. *The Trial Judge's Order Was Reasonable*

So we now turn to the merits. Was the decision not to sever because of the pervasiveness of unconscionability and the need to do considerable re-writing a *reasonable* one?

Yes. First, there is no doubt that the fee sharing clause was unconscionable. Red Lobster makes no attempt to defend it and in fact had the good sense to jettison it, albeit after the litigation commenced.

But the scope of coverage clause is almost as bad because of a lack of mutuality. The clause expressly includes for arbitration the sorts of claims that employees are likely to bring in civil court (e.g., labor and civil rights claims), and impliedly *excludes* from arbitration the sorts of claims that employers are likely to bring in civil court (e.g., trade secret and trade dress claims), and, on top of that, excludes from arbitration the sorts of claims that employees themselves are likely to *want* to arbitrate (such as performance evaluations and layoff decisions).

Armendariz specifically noted that a lack of mutuality is a ready indicator of "permeation with illegality" because "there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement." (*Armendariz, supra*, 24 Cal.4th at pp. 124-125.) To *reverse* the order, as Red Lobster invites us to do, would mean *inserting into* the "What Is Covered" clause, language to this effect: "In fact, this arbitration covers every single claim which we might bring against you." We cannot say that Red Lobster would ever have consented to *that* sort of inclusiveness. (See *Harper, supra*, 113 Cal.App.4th at p. 1408 [noting that at the time defendant drafted

arbitration clause, he might never have agreed to the arbitration of the sort of claims that severance and a rule of mutuality would require].) Indeed, under the rule of expressio unius, all indications are that Red Lobster *didn't* want its trade secret and related claims arbitrated. (See *ibid*.)

This arbitration agreement may not say, as the ones in *Little* and *Saika* did, "heads I win tails you lose." But it does erect a one-way door: The door admits typical employee claims *into* arbitration; it keeps typical employer claims *out* of the arbitration.

That is two strikes under the *Armendariz* principle that "more than one unlawful provision" is a factor that weighs against severance. (*Armendariz, supra*, 24 Cal.4th at p. 124.)

The lack of mutuality is also reason by itself to uphold the trial court's ruling given that it necessarily does entail rewriting. (*Id*. at pp. 124-125.) We need only note that in addition, another challenged clause, this one involving the provision for fees to be discretionary where statutorily authorized, likewise entails some actual re-writing, if not by a trial judge then certainly by an arbitrator.

Throughout its briefs Red Lobster emphasizes the general catch-all provision that makes the American Arbitration Rules binding "except to the extent modified by . . . applicable state or federal law," as if that provision could otherwise magically transform unconscionable clauses into acceptable ones. For Red Lobster, the clause has a self-correcting, procrustean quality by which the arbitration agreement automatically passes muster.

But Red Lobster has not considered the practical effects of this clause. It makes arbitration into a floating crap game in which the rules are never quite known to the weaker party. Indeed, it would be hard enough for *us* to figure out *exactly* what the rules would be in light of the modification clause; pity the poor newly hired waiter. This floating modification is, in short, a virtual invitation to confusion.

Does the poor employee *know* from the clause that he or she *will* obtain statutorily-required attorney fees if he or she prevails? Or merely that, if the court decides that this clause must be rewritten to conform it to the law, that fees will be

awarded? Or is it a mere probability based on who he or she gets as an arbitrator and what the arbitrator had for breakfast that morning? We ask these questions merely to illustrate that the attempt to use an automatic modification clause to automatically rewrite arbitration agreements to make them conform to law *by itself* may operate to discourage claimants from receiving a fair arbitration. No wonder the trial judge used the word "daunting" to describe the severance process in this case. Clearly, his decision not to sever at least two clearly offending clauses or try to save the agreement was a reasonable one.[3]

IV. DISPOSITION

The order is affirmed. Respondents shall recover their costs on appeal.

SILLS, P.J.

WE CONCUR:

MOORE, J.

FYBEL, J.

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[3] Because of our disposition, it is unnecessary for us to wade into the problem, on which there is decided disagreement between the parties, as to whether the plaintiffs were ever actually given a copy of the arbitration agreement.