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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ERIC SHERF, Plaintiff and Respondent, v. RUSNAK/WESTLAKE et al., Defendants and Appellants.	2d Civil No. B237275 (Super. Ct. No. 56-2011-00390038) (Ventura County)

Respondent Eric Sherf purchased a BMW automobile from appellant Rusnak/Westlake pursuant to a retail installment sale contract (Contract).[1] Sherf filed a lawsuit alleging unlawful business practices relating to the purchase, and Rusnak moved to compel arbitration under an arbitration agreement in the Contract. The trial court denied the motion ruling that the arbitration agreement included an unenforceable class action waiver, and that Sherf's claim for injunctive relief was not subject to arbitration. Rusnak appeals the denial of its motion. Rusnak contends that the trial court erred because in *AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___ [131 S.Ct. 1740] (*Concepcion*), the United States Supreme Court held that the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) preempts state law prohibiting a consumer from waiving class action rights and injunctive relief rights in an arbitration agreement.

[1] Rusnak/Westlake assigned the Contract to BMW Financial Services NA, LLC. We refer to Rusnak/Westlake and BMW Financial Services collectively as "Rusnak."

We hold that *Concepcion* invalidates California authority prohibiting the waiver of class action rights in an arbitration agreement and that Sherf's waiver of the right to bring a class action is binding and enforceable. As to his claim regarding arbitration of injunctive relief, we conclude that Sherf has conceded the issue by failing to address it in his appellate brief.

In light of the above, we reverse and remand for further proceedings concerning whether the arbitration agreement is unconscionable under general principles of California law.

FACTS

On August 10, 2010, Sherf signed a Contract for the purchase of a BMW car. The Contract was a one-page printed form provided by Rusnak and had provisions on both sides of the page. In bold and capitalized letters on its front side, the Contract states that the buyer has read the arbitration agreement on the reverse side. The arbitration agreement provides in capital letters that either party "may choose" to arbitrate "any dispute" before a single arbitrator. If a dispute is arbitrated, "you will give up your right to participate as a class representative or class member on any class claim you may have against us including any right to class arbitration or any consolidation of individual arbitrations." The agreement provides that Rusnak will advance the buyer his/her filing fee, administration, service, arbitrator or hearing fee up to $2,500, but each party shall be responsible for its own attorney, expert or other fees. The arbitrator's award shall be final unless the award is $0 or against a party in excess of $100,000 or includes an award of injunctive relief. In such an event, that party may request a new arbitration before a three arbitrator panel. The agreement also provides that, if any part of the arbitration agreement "other than waivers of class action rights" is deemed unenforceable, the remainder of the agreement remains enforceable. If the waiver of class action rights is deemed unenforceable in a case in which class allegations have been made, the remainder of the agreement shall be unenforceable.

In January 2011, Sherf filed a complaint alleging that some BMW cars do not come with a spare tire but, instead, are equipped with tires that permit the car to be

driven safely for a period of time after a tire is punctured. One type of tire permits the car to be "run flat" with a puncture, and another type, called an "M Mobility System," comes with a repair kit allowing drivers to repair and reinflate a flat tire. Sherf's car was equipped with four M Mobility tires. There was no spare.

The complaint alleges that Rusnak improperly charged Sherf a statutory "tire fee" of $1.75 for a spare tire which was not provided or purchased.[2] The complaint also alleges that Rusnak improperly charged him $1,149 for a tire service contract which was applicable only to "run flat" tires and not to the M Mobility tires installed on his car.

The complaint includes four individual and class action causes of action pertaining solely to the new tire fee, and two individual causes of action covering the tire service fee. The class action causes of action include claims for violation of the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), and two other consumer protection statutes. The CLRA cause of action seeks injunctive relief as well as monetary damages. The individual causes of action concerning the tire service fee allege violation of the CLRA and Unlawful Business Practices Act. (Bus. & Prof. Code, § 17200 et seq.) The first cause of action for violation of the CLRA regarding the tire fee, and the fifth cause of action regarding the tire service contract seek injunctive relief.

In August 2011, Rusnak filed a motion to compel arbitration of all causes of action, strike the class action claims, and stay the proceeding pending completion of arbitration. After a hearing, the trial court denied the motion. The trial court ruled (1) the waiver of the right to bring a class action violated the CLRA and is unenforceable under *Fisher v. DCH Temecula Imports LLC* (2010) 187 Cal.App.4th 601, and (2) claims for injunctive relief are not arbitrable as set forth in *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066. The court acknowledged *Concepcion* but concluded that it did not invalidate the "facially neutral anti-waiver provisions" in the CLRA. The trial court did not consider Sherf's claim that the arbitration agreement is unconscionable. The trial

[2] To fund a recycling program, Public Resources Code section 42885 requires every person who buys a new tire to pay a $1.75 fee for each tire purchased, and directs the seller to collect the fee.

court also declined to order arbitration of claims other than for class and injunctive relief due to the commonality of issues and the substantial possibility of conflicting rulings.

DISCUSSION

Concepcion and the FAA

Rusnak contends that the trial court erred in denying its motion to compel arbitration because, under *Concepcion*, the class action waiver provision in the arbitration agreement is enforceable. Rusnak also contends that any injunctive relief claim is subject to arbitration under the arbitration agreement. We agree that the class action waiver is enforceable under *Concepcion*, and conclude that Sherf has conceded Rusnak's contention regarding injunctive relief.

On appeal from the denial of a motion to compel arbitration based solely on a decision of law, we review the arbitration agreement de novo to determine whether it is enforceable under applicable principles of law. (See, e.g., *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 707.) Here, we review the trial court's order de novo because its rulings regarding the waiver of class action claims and arbitrability of injunctive relief claims were based solely on questions of law.

Both state and federal law favor the arbitration of disputes. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195; *Concepcion, supra,* 131 S.Ct. at p. 1745.) Under California law, the court must enforce an arbitration agreement unless the right to compel arbitration has been waived, grounds exist for the revocation of the agreement, or a party to the arbitration is also a party to a pending court action where there is a possibility of conflicting rulings on a common issue of law or fact. (Code Civ. Proc., § 1281.2; see *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113–114.) Under the FAA, arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) Grounds for revocation include "'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" (*Concepcion*, at p. 1746.)

Sherf's class action and injunctive relief allegations are based on the CLRA and its interpretation by the California courts. The CLRA creates a nonexclusive

statutory remedy for unfair or deceptive acts or practices in connection with the sale of goods or services to consumers. (*Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 869.) Any consumer who is damaged by a deceptive practice set forth in the CLRA may "bring an action" to recover damages, injunctive relief, restitution, punitive damages, and any other relief the court deems proper. (Civ. Code, § 1780.) The CLRA permits class actions and injunctive relief and expressly declares that any waiver by a consumer of its provisions "is contrary to public policy and shall be unenforceable and void." (Civ. Code, § 1751, see also *id*. at § 1781, subd. (b).)

At the time of *Concepcion*, California authority limited the enforceability of class action waivers. In *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*), the plaintiff filed a class action alleging consumer credit card practices which were prohibited by a Delaware statute. After the bank successfully moved to compel arbitration, the plaintiff sought to compel class arbitration. The arbitration agreement expressly precluded class actions and class arbitration. (*Id*. at pp. 152–154.)

Our Supreme Court stated that "under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration." (*Discover Bank, supra*, 36 Cal.4th at p. 153.) Where the class action waiver is included in a "consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' [Citation.] Under these circumstances, such waivers are unconscionable under California law . . . ." (*Id.* at pp. 162–163.)

Discover Bank concluded the FAA did not preempt its interpretation of California law because "the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law

that does not specifically apply to arbitration agreements, but to contracts generally." (*Discover Bank, supra,* 36 Cal.4th at pp. 165–166.) "[T]he FAA does not federalize the law of unconscionability or related contract defenses except to the extent that it forbids the use of such defenses to discriminate against arbitration clauses." (*Id*. at p. 167.)

Fisher v. DCH Temecula Imports LLC, supra, 187 Cal.App.4th 601, a case cited by the trial court, relied in significant part on *Discover Bank*. *Fisher* involved an arbitration agreement which, like the Rusnak agreement, waived the "right to participate as a class representative or class member . . . including any right to class arbitration or any consolidation of individual arbitrations." (*Id*. at p. 607.) The agreement also provided that, if the class action waivers were deemed unenforceable, the entire arbitration agreement was unenforceable. (*Ibid*.) *Fisher* held that the arbitration agreement was unenforceable because class action rights could not be waived as set forth in the CLRA and *Discovery Bank*. (*Id.* at pp. 605, 614-618.)

In April 2011, the United States Supreme Court decided *Concepcion*. *Concepcion* addresses the issue of "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." (*Concepcion, supra,* 131 S.Ct. at p. 1744.) *Concepcion* involved a consumer class action alleging fraud in connection with a cellular telephone contract that included an arbitration agreement precluding class claims. (*Ibid.*) The defendant's motion to compel arbitration was denied in the lower federal courts on the authority of *Discovery Bank*. (*Id.* at p. 1745.)

Concepcion expressly holds that the FAA preempts and invalidates the rule set forth in *Discover Bank* that conditioned "the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." (*Concepcion, supra,* 131 S.Ct. at p. 1744.) The court concluded that to require classwide arbitration "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Id.* at p. 1748.)

The court stated that, not only is a state law which "prohibits outright the arbitration of a particular type of claim" inconsistent with the FAA, but also a defense

seemingly allowed by the FAA saving clause, such as unconscionability may run afoul of the FAA if it is "applied in a fashion that disfavors arbitration." (*Concepcion, supra,* 131 S.Ct. at p. 1747.) A court may not rely on the uniqueness of an agreement to arbitrate as a basis to deny enforcement. (*Ibid*.)

The Supreme Court emphasized that the FAA saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but *not* by defenses that apply only to arbitration or that *derive their meaning from* the fact that an agreement to arbitrate is at issue." (*Concepcion, supra,* 131 S.Ct. at p. 1746, italics added.) "[N]othing in [the saving clause] suggests an intent to preserve state-law rules that *stand as an obstacle* to the accomplishment of the FAA's objectives." (*Id.* at p. 1748, italics added.)

Concepcion illustrated this point with hypothetical examples of state law rules classifying arbitration agreements as unconscionable because they fail to abide by the rules of evidence, to provide for discovery, or guarantee a jury trial. (*Concepcion, supra,* 131 S.Ct. at p. 1747.) State courts might claim that such rules apply to "the general principle of unconscionability or public-policy disapproval of exculpatory agreements" to all contracts, but in practice the rule would have a disproportionate impact on arbitration agreements. (*Ibid.*) Arbitration agreements must be enforced under the FAA "notwithstanding any state substantive or procedural policies to the contrary." (*Id.* at p. 1749.)

Sherf asserts that the CLRA creates a statutory right to bring a class action and seek injunctive relief. Relying on *Fisher v. DCH Temecula Imports LLC, supra*, 187 Cal.App.4th 601, he argues that statutory rights may not be waived. We acknowledge that some cases give greater weight to the vindication of statutory rights in determining the enforceability of an arbitration agreement, but no special status is given statutorily-created rights in *Concepcion.*

Although not cited by Sherf or in *Concepcion*, our Supreme Court has relied on statutory rights to invalidate a class action waiver in the context of employee rights. In *Gentry v. Superior Court* (2007) 42 Cal.4th 443, the court concluded that a

class arbitration waiver in a case alleging violations of the Labor Code might "impermissibly interfere with employees' ability" to enforce his or her unwaivable statutory right to enforce overtime pay laws. (*Id*. at p. 463.) *Gentry* concludes that, when a court concludes that "a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws . . . , it must invalidate the class arbitration waiver." (*Ibid*.)

There has been disagreement in the courts whether *Gentry* survives *Concepcion* in the area of employee rights. One appellate court has stated in dictum *Gentry* remains good law after *Concepcion* because "'. . . *Discover Bank* is a case about unconscionability, [whereas] *Gentry* is concerned with the effect of a class action waiver on unwaivable rights *regardless of unconscionability*.'" (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 498.) Our Supreme Court has granted review in another case which concluded that *Concepcion* invalidated *Gentry* by making no distinction between statutory provisions and judicial decisions that serve as obstacles to enforcement of arbitration agreements. (*Iskanian v. CLS Transp. Los Angeles* (2012) 208 Cal.App.4th 949, review granted Sept. 19, 2012, S204032.)

We need not comment on the continuing viability of *Gentry* because the instant case does not deal with employment issues. We conclude, however, that *Concepcion* rejects the argument that class action waivers in consumer contracts can be invalidated in order to vindicate statutory rights even if the statutory right is desirable for other reasons. *Concepcion* expressly concludes that nothing in FAA "suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," and arbitration agreements must be enforced "notwithstanding any state substantive or procedural policies to the contrary." (*Concepcion, supra,* 131 S.Ct. at pp. 1748-1749.)

In addition to invalidating the class action waiver, the trial court denied Rusnak's motion to compel arbitration on the ground that claims for injunctive relief are

not arbitrable under the CLRA. Relying on *Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 673 F.3d 947, Rusnak contends the trial court's ruling on injunctive relief is contrary to *Concepcion* and, therefore, injunctive relief claims under the CLRA are arbitrable.

Sherf fails to challenge Rusnak's contention. His appellate brief presents extensive argument regarding the class action waiver and unconscionability, but no argument or citation of authority regarding arbitration of his claim for an injunction. "Although it is the appellant's task to show error, there is a corresponding obligation on the part of the respondent to aid the appellate court in sustaining the judgment. [Citation.]" (*California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 382, fn. 7.) Under these circumstances, we deem the issue to be conceded. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [appellant's failure to present argument]; *Mann v. Andrus* (1959) 169 Cal.App.2d 455, 458–459 [same].) Accordingly, we will reverse the trial court's order on both its class action waiver and injunctive relief determinations.

Unconscionability

In the trial court, the parties briefed the issue of whether the arbitration agreement was unconscionable under general principles of California law, but the trial court declined to make findings or a ruling on that issue. On appeal, Sherf requests that we rule on the issue and determine that the arbitration agreement is unconscionable. Rusnak argues that the case should be remanded to the trial court for that determination.

Although an arbitration agreement is reviewed de novo on appeal where arbitration was denied solely on questions of law, when the trial court's decision depends on the resolution of disputed facts, we review the decision under the substantial evidence test. (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 673, 685.) Here, there has been no determination of any factual issues which may be raised concerning conscionability, nor has the trial court otherwise ruled on the issue. Therefore, we will remand to the trial court for a determination of whether the arbitration agreement is unconscionable in light

of *Concepcion*'s directive that conscionability law may not be applied in a manner that disfavors, or stands as an obstacle to, arbitration.

DISPOSITION

The order of the trial court denying Rusnak's motion to compel arbitration is reversed, and the matter is remanded to the trial court for a determination of whether an arbitration agreement is unconscionable under general principles of California law. Costs on appeal are awarded to appellants.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

David Worley, Judge

Superior Court County of Ventura

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