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4/26/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KENNETH MEIER, an individual; NORTHWEST RECYCLER, INC., a Washington corporation and dba THE RECYCLER CORE CO., INC., a California corporation; and THE RECYCLER CORE CO., INC., a California corporation,

Respondents,

v.

KEVIN STEVENS, a married individual, and IRENE FAYE STEVENS, his spouse; NW SCRAP BUYERS, LLC, a Washington limited liability company; GARY LUSK, a married individual, and DEBORAH LUSK, his spouse; KYLE LUSK, a married individual, and JANE DOE LUSK, his spouse; ALL BRITE RECYCLING, LLC, a Washington limited liability company; MID VALLEY RECYCLING, INC., a Washington corporation; and NW METALS, LLC aka NW RECYCLING, LLC, a Washington limited liability company,

Appellants.

DIVISION ONE

No. 81624-1-I

UNPUBLISHED OPINION

DWYER, J. — Kevin Stevens appeals from an order denying his motion to compel arbitration in a dispute between Stevens and his former employer. Stevens sought to compel arbitration based on an arbitration agreement that the parties entered into in 2006. The trial court ruled both that the agreement had been rescinded by later agreements and that—if it had not been rescinded—

Stevens had waived his right to compel arbitration. We disagree. Because arbitration agreements cannot be unilaterally modified, the 2006 arbitration agreement remains binding. Additionally, Stevens' actions prior to noting his motion to compel arbitration did not waive his right to compel arbitration. Accordingly, we reverse.

I

The Recycling Core Co., Inc. (RCC) is a business that deals in rebuildable automotive cores, catalytic converters, and other types of scrap. Kevin Stevens began working for RCC in 1985, first in California and later in Washington. In 2006, Stevens and RCC executed an arbitration agreement, which provided that:

> [T]he Company and the undersigned Employee are waiving the right to a jury trial for most employment-related disputes.

The agreement was broad in scope, and applied to "all statutory, contractual and/or common law claims arising from employment with the Company." The arbitration agreement was contained within an employee handbook, but Stevens was required to execute the agreement, detach it from the handbook, and present it to RCC's human resources department. Stevens also signed a separate acknowledgement of receipt of the handbook.

In 2015 and 2016, RCC issued revised handbooks which did not contain any information about arbitration or any other method of dispute resolution. RCC omitted this information intentionally, because it wished to rescind the arbitration agreement. The 2015 and 2016 handbooks contained an integration clause, stating their intent to supersede all previously issued handbooks, and stating that

the handbook contained "the entire agreement between [Stevens] and the Company."

Stevens received the 2015 and 2016 handbooks by e-mail. Stevens was required to be familiar with the contents of the handbook because he was employed in a supervisory role and was required to enforce its provisions. For example, Stevens issued disciplinary letters to several employees for violating the various policies set forth in the handbook.

In February 2019, the chief executive officer of RCC, Kenneth Meier, became concerned that Stevens was stealing from RCC. RCC terminated Stevens. Upon Stevens' termination, RCC shut down all of its Washington operations and removed all equipment, inventory, and files from Stevens' office, including Stevens' copy of the 2006 arbitration agreement.

In January 2020, plaintiffs (collectively RCC) filed suit against Stevens, alleging breach of contract, tortious interference, conversion, negligent and fraudulent concealment, breach of fiduciary duty, and unjust enrichment. On the same day, RCC served Stevens with interrogatories and requests for production. In March 2020, Stevens filed his answer and counterclaims and responded to discovery requests. Stevens' answer did not mention arbitration.

Shortly thereafter, Stevens propounded discovery requests to RCC—one set of interrogatories and requests for production. In April, the parties met and conferred regarding discovery. At that meeting, arbitration was not discussed. In response to his discovery requests, RCC produced a copy of the arbitration

agreement to Stevens on May 4, 2020. On May 5, 2020, RCC filed a stipulated motion to amend the complaint, with Stevens' consent.

On June 2, 2020, Stevens filed an answer to the amended complaint and raised mandated arbitration as a defense. The next day, Stevens filed a motion to compel arbitration.

The trial court denied Stevens' motion to compel arbitration, concluding that (1) the 2015 and 2016 handbooks had replaced the 2006 handbook containing the arbitration agreement, thereby rescinding the arbitration agreement, and (2) if the arbitration agreement had not been rescinded, Stevens had waived the right to compel arbitration.

Stevens appeals.

II

Stevens contends that the trial court erred by concluding that an arbitration agreement that he entered into with RCC was rescinded. We agree.

We review de novo a trial court's decision to compel or deny arbitration. Burnett v. Pagliacci Pizza, Inc., 196 Wn.2d 38, 46, 470 P.3d 486 (2020). Arbitration is a matter of contract, and arbitration agreements stand on equal footing with other contracts. McKee v. AT&T Corp., 164 Wn.2d 372, 383, 191 P.3d 845 (2008). Accordingly, parties cannot be compelled to arbitrate unless they agreed to do so. Weiss v. Lonnquist, 153 Wn. App. 502, 510, 224 P.3d 787 (2009) (citing AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)). But when a court

determines that an enforceable agreement to arbitrate exists, it must order the parties to do so. RCW 7.04A.070(1).

Because arbitration agreements—like all contracts—must be formed by mutual assent, an employer cannot "'foist an arbitration agreement on an employee simply by including an arbitration clause in an employee handbook that is provided to the employee.'" Burnett, 196 Wn.2d at 53 (quoting Burnett v. Pagliacci Pizza, Inc., 9 Wn. App. 2d 192, 208, 442 P.3d 1267 (2019)). Accordingly, an arbitration provision that is included in an employee handbook is enforceable only when the employee is given explicit notice of the arbitration provision. Burnett, 196 Wn.2d at 50; see also Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 761 (9th Cir. 1997) (signed acknowledgment of receipt of handbook which contained arbitration provision did not constitute "knowing agreement to arbitrate").

Here, the issue is not whether an agreement to arbitrate may be formed merely by inclusion in an employee handbook but, rather, whether such an agreement may be rescinded by means of a revised handbook that includes no mention of arbitration. Because arbitration is a matter of contract, we must apply contract principles to resolve the question.

Rescission occurs when either mutual consent exists to rescind a contract or a demand made to rescind by one side is met with acquiescence by the other. Woodruff v. McClellan, 95 Wn.2d 394, 397, 622 P.2d 1268 (1980). When the same parties enter into a second contract that concerns the same subject matter but contains terms inconsistent from those in the first contract, the effect is

to rescind the earlier contract. In re Estate of Wimberly, 186 Wn. App. 475, 505, 349 P.3d 11 (2015).

The trial court relied on Gagliardi v. Denny's Rests., Inc., 117 Wn.2d 426, 815 P.2d 1362 (1991), for the proposition that employers may unilaterally amend or revoke policies in a handbook, so long as employees are given reasonable notice. The trial court concluded that, as Stevens had received the 2015 and 2016 editions of the handbook, which did not contain an arbitration agreement, and because of his supervisory role (requiring that Stevens be familiar with the contents of the handbook in order to discipline other employees) he had been given reasonable notice. However, as our Supreme Court has recently explained:

> Gagliardi does not support that notion. In Gaglidari, this court acknowledged that "[a]n employer may unilaterally amend or revoke policies and procedures established in an employee handbook." [117 Wn.2d] at 434. "However, an employer's unilateral change in policy will not be effective until employees receive reasonable notice of the change." Id. This court explained that this "reasonable notice rule" is warranted "because it is unfair to place the burden of discovering policy changes on the employee. While the employee is bound by unilateral acts of the employer, it is incumbent upon the employer to inform employees of its actions." Id. at 435. Gaglidari did not address arbitration, it concerned alteration of the at-will employment relationship based on the employer's policy of progressive discipline as stated in the employee handbook.

Burnett, 196 Wn.2d at 52.

Accordingly, although an employer may unilaterally modify conditions of employment relating to employee discipline so long as employees receive reasonable notice, an employer may not unilaterally alter an agreement to arbitrate. See Burnett, 196 Wn.2d at 52.

This is consistent with determinations concerning the enforceability of arbitration agreements in which one party expressly reserves the right to modify the agreement. Courts have generally held that such agreements are unenforceable because they are illusory promises. Burnett, 196 Wn.2d at 53 n.4. This suggests that employers do not retain the right to unilaterally revoke arbitration agreements because, if they did, those agreements would be unenforceable illusory promises. Given that valid arbitration agreements are enforceable, RCW 7.04A.060(1), that cannot be the case.

RCC contends that the issuance of the 2015 and 2016 handbooks, each of which contained an integration clause while not containing an arbitration agreement, superseded the 2006 arbitration agreement. However, given that the inclusion of an arbitration provision in an employee handbook, without explicit notice, does not establish knowing agreement—as would be required to form a contract—the mere omission of such a provision cannot establish the knowledge required to acquiesce to a demand to rescind an existing agreement to arbitrate or demonstrate the formation of a new contract with different terms regarding dispute resolution.

RCC avers that rescission of an arbitration agreement must be distinct from formation of such an agreement because "[r]evoking a mandatory arbitration agreement should be favored by public policy principles," as it is "reinstating the employees' broader rights to a public judicial forum and appeal." But federal and Washington law both express strong public policies favoring arbitration. Adler v. Fred Lind Manor, 153 Wn.2d 331, 341, 341 n.4, 103 P.3d 773 (2004)

(citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). Given this strong public policy preference for arbitration, RCC fails to establish that public policy interests militate in favor of a view that rescission of arbitration agreements may be accomplished unilaterally.

Because the 2006 arbitration provision was never effectively rescinded, the trial court erred by ruling that no arbitration obligation existed.

III

Stevens next contends that the trial court also erred by ruling that he waived his right to arbitrate the dispute. We agree.

We review de novo whether an agreement to arbitrate has been waived. Romney v. Franciscan Med. Grp., 199 Wn. App. 589, 602, 399 P.3d 1220 (2017) (citing Steele v. Lundgren, 85 Wn. App. 845, 850, 935 P.2d 671 (1997)). Waiver of a contractual right to arbitration is disfavored, and a party seeking to establish such a waiver has a "'heavy burden of proof.'" Steele, 85 Wn. App. at 852 (quoting Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 694 (9th Cir. 1986)). To establish waiver, on the part of its opponent, the party opposing arbitration must demonstrate that the opponent (1) had knowledge of the existing right to compel arbitration, (2) acted inconsistently with that right, and (3) those inconsistent acts prejudiced the party opposing arbitration. Romney, 199 Wn. App. at 601-02. Whether a party has waived its right by its conduct depends on the particular facts of the case and is not susceptible to bright line

rules. Romney, 199 Wn. App at 602 (quoting Canal Station N. Condo. Ass'n v. Ballard Leary Phase II, LP, 179 Wn. App. 289, 298, 322 P.3d 1229 (2013)).

Here, the record does not establish that Stevens, at the outset of the litigation, had knowledge of his right to arbitrate or the scope of that right. Although the law presumes that someone who signs a document knows and understands its contents, Kinsey v. Bradley, 53 Wn. App. 167, 171, 765 P.2d 1329 (1989), the fact that Stevens signed the 2006 agreement is not dispositive. It is undisputed that—upon his firing—RCC seized his business records. This left Stevens without a copy of the 2006 agreement. There is no indication in the record that Stevens then possessed the information necessary to determine whether the claims in the lawsuit all fell within the scope of the agreement. Stevens signed the document 14 years earlier and the evidence in the record suggests that Stevens did not have access to a copy of the agreement until it was provided to him in discovery. It was at this time that Stevens was chargeable with the knowledge necessary to assert or waive his right to arbitration.

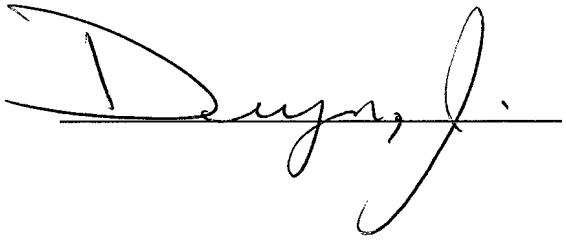
Nor did Stevens engage in acts inconsistent with the right to arbitrate. Engaging in discovery was necessary to inform himself of the scope of his right to arbitrate. Indeed, Stevens filed a motion to compel arbitration within a month of receiving a copy of the 2006 document. While we have held that "overly aggressive" discovery requests "aimed at getting information that the defendants could not get in an arbitration proceeding" can be inconsistent with an assertion of an intent to arbitrate, Steele, 85 Wn. App. at 854, Stevens' limited actions prior

to seeking arbitration, including his delay in asserting his right to arbitration and his participation in discovery, were reasonable under the circumstances and were not inconsistent with his assertion of his right to arbitrate within a month of obtaining a copy of the 2006 arbitration agreement.

RCC does not identify any case in which such a brief delay resulted in waiver. Compare Adler, 153 Wn.2d at 362 (right to arbitrate not waived when defendant filed motion to compel arbitration approximately three months after complaint filed in superior court), and Wiese v. Cach, LLC, 189 Wn. App. 466, 481, 358 P.3d 1213 (2015) (same), with Jeoung Lee v. Evergreen Hosp. Med. Ctr., 7 Wn. App. 2d 566, 584, 434 P.3d (2019) (nine month delay, while aware of right to arbitrate, waived right to compel arbitration), and Steele, 85 Wn. App. at 859 ("unnecessary" delay of ten months, along with "abusive" discovery tactics waived right to arbitrate).

Because Stevens did not, with full knowledge of his right to arbitrate, act inconsistently with an exercise of that right, no examination is necessary of the question of whether RCC will be prejudiced by arbitrating its claims. RCC contracted to do so. It never effectively modified that contractual obligation. Stevens did not waive his right under that contract. No more need be said.

Reversed and remanded.



WE CONCUR: