Filed 1/19/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROBERT GENTRY, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent. CIRCUIT CITY STORES, INC., Real Party in Interest.	B169805 (Super. Ct. No. BC280631) (Thomas L. Willhite, Jr., Judge)

ORIGINAL PROCEEDING. Petition for writ of mandate denied.

Righetti & Wynne, P.C., Matthew Righetti and John Glugoski, and Law Offices of Ellen Lake for Petitioner,

No appearance for Respondent.

Berry & Block, LLP, Rex Darrell Berry and Scott M. Plamondon, for Real Party in Interest.

This employment case concerns the enforceability of a pre-employment arbitration agreement containing a class action waiver. The Supreme Court has remanded the case for reconsideration in light of *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, in which that Court invalidated a class action waiver in what the Court referred to as a "consumer contract of adhesion" contained in a credit card mailer. We issued an order to show cause and invited supplemental briefing limited to the issue of whether the holding in *Discover Bank* invalidates a class action waiver in an employment case of this type. We hold that *Discover Bank* does not render the class action waiver in this case unenforceable. Accordingly, we deny the petition.

FACTS AND PROCEDURAL HISTORY

On August 29, 2002, Robert Gentry filed a class action lawsuit in superior court against Circuit City seeking damages for conversion as well as violations of the Labor Code and Business and Professions Code. Gentry alleged that Circuit City had "illegally misclassified" Gentry and other salaried customer service managers as "exempt managerial/executive employees" not entitled to overtime pay, when in fact, they were "'non-exempt' non-managerial employees" entitled to be compensated for hours worked in excess of 8 hours per day and 40 hours per week

During the time he was employed by Circuit City in 1995, Gentry received a packet that included an "Associate Issue Resolution Package" (AIRP) and a copy of Circuit City's "Dispute Resolution Rules and Procedures," pursuant to which employees are afforded various options (including arbitration) for resolving employment-related disputes. By electing arbitration, the employee agrees to "dismiss any civil action brought by him in contravention of the terms of the parties' agreement." The agreement to arbitrate also contains a class action waiver, which provides: "The Arbitrator shall not consolidate claims of different Associates into one proceeding, nor shall the Arbitrator have the power to hear arbitration as a class

action. . . ." The packet includes a form that gives the employee 30 days to opt out of the arbitration agreement. Gentry did not do so.[1]

At that time, there was a split of authority in California on the enforceability of class action waivers in consumer contracts. In *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, the court held that an arbitration provision in a credit card agreement that prohibited class actions was unfair and unconscionable, and thus unenforceable. In *Discover Bank v. Superior Court* (2003) 105 Cal.App.4th 326, the Court disagreed with *Szetela* and held that where there is a valid arbitration clause, governed by the Federal Arbitration Act (FAA), the trial court could not apply state substantive law to strike a class action waiver from the arbitration agreement.

The petition to compel arbitration was heard February 26, 2003. Respondent court took the matter under submission and, on February 28, 2003, issued an order granting the petition. The court acknowledged that the governing case law was "conflicting and in a state of flux," and elected to follow *Discover Bank*. The court did hold two provisions of the agreement (cost splitting and limitation of remedies provisions) substantively unconscionable based on federal case law. (*Morrison v. Circuit City Stores, Inc.* (6th Cir. 2003) 317 F.3d 646.) The court severed those provisions from the agreement, ordered Gentry to "arbitrate his claims on an individual basis and submit to the class action waiver," and stayed the superior court action.

On April 16, 2003, Gentry appealed the order on the theory that it was a final order regarding class certification. In fact, the order was one compelling arbitration

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[1] The arbitration agreement contains a choice-of-law provision which provides that the arbitrator "shall apply the substantive law of the State in which the Associate is, was or sought to be predominately employed." Because Gentry was employed in California, we evaluate the enforceability of the agreement under California substantive law.

and staying the superior court action, which is not appealable. (Code Civ. Proc., § 1294.) On July 11, 2003, we dismissed the appeal but noted that Gentry had an alternative remedy by way of a petition for writ of mandate.

Gentry filed this mandate petition on September 9, 2003. We initially denied the petition, noting that the issue of the enforceability of the class action waiver was before the Supreme Court. The Supreme Court granted Gentry's petition for review. On June 27, 2005, the court issued its decision in *Discover Bank*. Analyzing the case under general principles of unconscionability, the Court held that "at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, . . ." (*Discover Bank, supra*, 36 Cal.4th at p. 153.) The Court remanded this employment case for reconsideration in light of *Discover Bank*.

DISCUSSION

The issue in this case is a narrow one: whether the class action waiver in the Circuit City arbitration agreement is an unconscionable provision that renders the provision unenforceable. We conclude the provision is neither procedurally nor substantively unconscionable.

In *Discover Bank*, the Supreme Court analyzed the bank's class action waiver under principles of unconscionability applicable to contracts of adhesion. The term "contract of adhesion" "signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817, citing *Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694.) "A contract of adhesion is fully enforceable according to its terms [citations] unless certain other factors are present which, under established legal rules – legislative or judicial – operate to render it otherwise." (*Graham v. Scissor-Tail, Inc., supra*, 28 Cal.3d at pp. 819-820.) "Generally speaking, there are

two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. [Citations.] The second – a principle of equity applicable to all contracts generally – is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.' [Citations.]" (*Id.* at p. 820.)

The judicially created doctrine of "unconscionability" contains both procedural and substantive elements. "The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, 'which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" . . . Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided." (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.)

In the employment context, our Supreme Court has found pre-employment arbitration agreements to be adhesive where the agreement is made a condition of employment. (*Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 115-116; *Little, supra,* 29 Cal.4th at p. 1071.) However, the agreement at issue here does not have that adhesive element and therefore is not procedurally unconscionable. Signing the arbitration agreement was not made a condition of Gentry's employment; he was given 30 days to decide whether or not to opt out of the agreement, and chose not to do so.

The Ninth Circuit has twice held that because of the "opt-out" provision, the 1995 version of the Circuit City arbitration agreement was not procedurally unconscionable. (*Circuit City Stores v. Najd* (9th Cir. 2002) 294 F.3d 1104; *Circuit City Stores v. Ahmed* (9th Cir. 2002) 283 F.3d 1198, 1200.) In *Ahmed,* the Court noted that the agreement lacked the "necessary element of procedural unconscionability. Ahmed was not presented with a contract of adhesion because he was given the opportunity to opt-out of the Circuit City arbitration program by

mailing in a simple one-page form. Moreover, and apart from its non-adhesive nature, the arbitration agreement here also lacked any other indicia of procedural unconscionability. The terms of the arbitration agreement were clearly spelled out in written materials and a videotape presentation; Ahmed was encouraged to contact Circuit City representatives or to consult an attorney prior to deciding whether to participate in the program; and he was given 30 days to decide whether to participate in the program." (*Id.* at p. 1199.)[2]

Gentry nonetheless claims the agreement is procedurally unconscionable despite the opt-out provision because Circuit City attempted to "sucker unsophisticated employees into not opting out" by touting the advantages of arbitration. His claim is without merit. The "Associate Issue Resolution Handbook," written in straightforward language, does point out the advantages of electing arbitration (notably, that the procedure is cost effective and the employee's claim is resolved "in a matter of weeks or a few months rather than years"). However, it also notes the disadvantages (for example, the lack of a right to a jury trial and limited discovery). The employee is then free to decide whether or not the advantages of arbitration outweigh the disadvantages.

We further find that the class action waiver in this case is not substantively unconscionable. In *Discover Bank*, the Supreme Court found that the class action waiver in the bank's cardholder agreement was both procedurally and substantively unconscionable for a variety of reasons. The amendment was mailed to the cardholder in a "bill stuffer" that the average cardholder was unlikely to read. The

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[2] *Ingle v. Circuit City Stores, Inc.* (2003) 328 F.3d 1165, 1175-1176, also decided by the Ninth Circuit, is factually distinguishable. In *Ingle*, the court found an arbitration agreement that included a class action waiver to be procedurally unconscionable because the employee had only three days in which to decide whether or not to opt out of the arbitration agreement. The court held the three-day waiting period did not provide the plaintiff with a "meaningful opportunity" to opt out of the agreement. (*Id.* at p. 1172.)

cardholder had no opportunity to opt out of the amendment, other than to close his account. (*Discover Bank, supra,* 36 Cal.4th at p. 161.) These factors provided the element of procedural unconscionability. (*Ibid.*)

The court also found the class action waiver substantively unconscionable because it was "found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages," and it was "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 . . . ." In such a case, "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.' (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (*Id.* at pp. 162-163.)

The infirmities that plagued the *Discover Bank* class action waiver are not present here. The Circuit City agreement is not a "consumer contract of adhesion" that the cardholder had no opportunity to reject. Nor is this a case in which the "disputes between the contracting parties predictably involve small amounts of damages," or where "the party with the superior bargaining power has carried out a scheme to deliberately cheat large number of consumers out of individually small sums of money." (*Discover Bank, supra,* 36 Cal.4th at pp. 162-163.) The Supreme Court held in *Discover Bank* that under such circumstances, enforcing a class action 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.' (Civ. Code, § 1668.)" (*Ibid.)* Here, Gentry has alleged statutory violations that could result in substantial damages and penalties should he prevail on his individual claims. In fact, the Supreme Court acknowledged in *Discover Bank* that in some employment cases, large individual awards are commonplace. (*Discover Bank, supra,* 36 Cal.4th at

p. 168, see *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 32; 111 S.Ct. 1647, 114 L.Ed. 26.)

DISPOSITION

The petition for writ of mandate is denied. Costs of this proceeding are awarded to Circuit City.

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ARMSTRONG, J.

We concur:

TURNER, P.J.

KRIEGLER, J.