

**Judge Mosbarger – Law & Motion – Wednesday, March 15, 2023 @ 9:00 AM
TENTATIVE RULINGS**

1. 20CV01493 SHIPPEN, KALEN ET AL V. FAIRHURST, THOMAS J ET AL

EVENT: Plaintiffs Kalen Shippen and Madeleine Shippen’s Motion for Summary Adjudication on Whether Defendatn SPSP Partners Owes a Nondelegable Duty of Care

On the Court’s own motion this matter is continued to March 29, 2023 at 9:00 a.m.

2. 21CV02396 SHANE, KAREN V. LEVERENZ, CARL B ET AL

EVENT: Plaintiff’s Motion for Order Substituting Personal Representative for Deceased Defendants and Granting Leave to File Supplemental Complaint

Plaintiffs’ Motion for Order Substituting Personal Representative for Deceased Defendants and Granting Leave to File Supplemental Complaint, is unopposed and is granted in its entirety. Counsel shall submit a revised form of order in two weeks that includes a copy of the supplemental complaint as indicated on Pg. 2, Line 27, and the correct Judicial Officer on Pg. 2, Line 8.

3. 23CV00132 IN RE: PETERS, KIMBERLEY H

EVENT: Petition for Change of Name

If proper proof of publication is submitted at or before the hearing, the Petition will be granted.

4. 23CV00211 NOLL, TIMOTHY ET AL V. 1 SOURCE SOLUTIONS INC

EVENT: Defendant’s Petition to Compel Arbitration

Defendant’s Petition to Compel Arbitration is GRANTED in PART as set forth herein. Defendant’s Request for Attorney Fees and Costs is DENIED. Unlike *Acosta v. Kerrigan* (2007) 150 Cal.App.4th 1124, there is no independent provision in the subject contract that specifies fees and costs associated with the instant petition.

Defendant Did Not Waive Its Right to Arbitration

Defendant did not waive its right to arbitration under CCP §1281.5. The plain language of CCP §1281.5 clearly shows that enforcement of a mechanic’s lien is a pre-requisite to the application of this statute. The title of the Statute is “How right to arbitration preserved when filing action to enforce lien ...” [Emphasis Added] The first sentence of the statute provides “Any person who proceeds to record and enforce a claim of lien by commencement of action”[Emphasis Added]

This language leaves no doubt that section 1281.5 applies only when an action to enforce a lien has been filed. Plaintiff cites no authority for his contention that

Defendant has attempted to “enforce” its mechanic’s lien for purposes of section 1281.5. Plaintiff’s argument that because a mechanic’s lien was recorded, and is therefore a cloud on title, is unpersuasive. The statute clearly states it applies when a lien is recorded and enforced by commencement of action. If all that was necessary to trigger section 1281.5 was the recording of the lien, the language “and enforce a claim of lien by commencement of action” would not have been included in the statute.

Consequently, because defendant only recorded a mechanic’s lien, but did not sue to enforce it, there can be no waiver under CCP §1281.5.

Unconscionability

Under California law, “[i]f 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.” *Civil Code* §1670.5(a); *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114. Both procedural and substantive elements of unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability, although they need not be present in the same degree. “[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th at 114.

“The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power.” *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC* (2012) 55 Cal. 4th 223, 246 (citation omitted).

Here Plaintiff contends in a conclusory manner in the opposition, without citing any specific evidence, that this was an adhesion contract simply because it was a form contract and Plaintiff has no choice but to agree to its terms. The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396-397, 399-400. The burden then shifts to the resisting party to prove by a preponderance of the evidence a ground for denial. *Rosenthal v. Great Western Fin. Securities Corp.*, 14 Cal. 4th 394, 413.

The one-line notation in the opposition that Plaintiff has no choice but to agree to all of its terms is not itself evidence. Further, there is no other evidence indicating the arbitration provision is procedurally unconscionable.

As to substantive unconscionability, it requires a showing that the contract terms were so “overly harsh” and “unfairly one-sided,” as to ‘shock the conscience.’ *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012)

55 Cal.4th 223, 246. The substantive component looks to whether the contract allocates the risks of the bargain in an objectively unreasonable or unexpected manner. *A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 487, emphasis added.

Here the Court is persuaded that the prohibition on discovery is substantively unconscionable. Considering the nature of this case which includes allegations of failure to comply with worker's comp laws, discovery is a crucial component to Plaintiff's ability to prosecute the matter. It is very likely significant discovery efforts will be necessary to prove these allegations.

With this in mind, the Court finds the prohibition on discovery is a severable term from an otherwise valid agreement to arbitrate the dispute. As a result, the prohibition on discovery is severed from the arbitration agreement, and the motion to compel arbitration is GRANTED in all other respects.

Defendant shall prepare and submit a form of order consistent with this ruling within 10 days.