UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE RULING

Case Number: 02-00090 WJR (AJWx) **Docket Number:**

Title: Lozano v. AT&T Wireless

Date: Monday, August 18, 2003

Nature of Motion: Plaintiff's Motion to Vacate Order Compelling Arbitration and Staying Proceedings, Pursuant to the Ninth Circuit's Decision in Ting v. AT&T

HON. WILLIAM J. REA, JUDGE

Marva Dillard, Deputy Clerk

TENTATIVE RULING

The Court is inclined to vacate its Order Compelling Arbitration and Staying Proceedings, entered on June 10, 2002, thereby placing the matter back on the trial calendar of this Court. The Ninth Circuit decision in Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003), guides this Court's decision to find both procedural and substantive unconscionability; the arbitration agreement limitation on class actions is unenforceable.

DISCUSSION

I. Legal Standard

While Federal Rules of Civil Procedure 59 and 60 permit reconsideration of final judgments, California Central District Local Rule 7-18 allows motion for reconsideration "of the

decision on any motion." Cal. Cent. Dist. L.R. 7-18.[1]

The Court views the instant motion as a motion for reconsideration pursuant to Local Rule 7-18, because of the intervening order of the Ninth Circuit following Plaintiff Lozano's Petition for a Writ of Mandamus. While Plaintiff did not obtain leave to file a motion for reconsideration under Local Rule 7-18, the Court will consider the merits of the instant motion because of the importance of the issues to be decided.

Significantly, the Federal Arbitration Act ("FAA") applies to "a contract evidencing a transaction involving commerce . . . ." 9 U.S.C. § 2 (2002). Any arbitration agreement within the FAA's scope "shall be valid, irrevocable, and enforceable," id., and permits a party "aggrieved by the alleged . . . refusal of another to arbitrate" to file a petition in the district court for an order compelling arbitration. 9 U.S.C. § 4 (2002). The court, "upon being satisfied that the making of the agreement for arbitration . . . is not in issue . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." By the terms of the FAA, the district court shall direct the parties to proceed to arbitration with regard to issues which the relevant arbitration agreement covers, and thus there is no place for the exercise of discretion by the district court. Chiron Corp. v. Ortho Diagnostic Systems, Inc., 207 F.3d 1126, 1130 (9th Cir. 2000) (citation and quotation omitted). Additionally, a party to a lawsuit pending in federal court may request that the court stay the court proceedings pending the outcome of the arbitration proceedings. 9 U.S.C. § 3 (2002); Wagner v. Stratton Oakmont, Inc., 83 F.3d 1046, 1048 (9th Cir. 1996); Arriaga v. Cross Country Bank, 163 F.Supp.2d 1189, 1192 (S.D. Cal. 2001).

Thus, the court's role under the FAA is limited to determining: (1) whether the arbitration agreement is valid and enforceable and (2) whether the claims asserted are within the

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[1] L.R. 7-18 Motion for Reconsideration. A motion for reconsideration of the decision on any motion may be made on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. [].

purview of the arbitration agreement. Id.; Howard Elec. & Mech Co., Inc. v. Frank Brisco Co., Inc., 754 F.2d 847, 849 (9th Cir. 1985); Bischoff v. DirectTV, Inc., 180 F.Supp.2d 1097, 1102 (C.D. Cal. 2002).

Furthermore, the FAA evinces a "liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1985); Arriaga, 163 F.Supp.2d at 1191. Thus, a court must look at questions of arbitrability with the federal policy favoring arbitration in mind. Arriaga, 163 F.Supp.2d at 1191 (quoting Moses H. Cone Mem'l Hosp., 460 U.S. at 24).

II. Analysis

Plaintiff Lozano has moved the Court to vacate its June 10, 2002, Order Compelling arbitration and Staying Proceedings in light of the Ninth Circuit's recent decision in Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003). Specifically, this motion is before the Court following the Ninth Circuit Court of Appeal's order denying Plaintiff Lozano's Petition for Writ of Mandamus, which stated "[i]n light of the intervening authority of Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003), the petition for writ of mandamus is denied without prejudice to allow the district court to consider the applicability, if any, [], to this case."

The Court, reviews its prior decision of June 10, 2002, and in line with Ting v. AT&T, should find that the arbitration clause of the Cellular Service Agreement ("CSA") is both procedurally and substantively unconscionable. Therefore, the Court should vacate the prior compelled arbitration order and request comment of both Plaintiff Lozano and Defendant AT&T Wireless to restore the matter on this Court's trial calendar.

The Court should not find substantively unconscionable the limiting provision of punitive damages, nor should it find that the class arbitration waiver is preempted by the Federal Arbitration Act.

A. Unconscionability of the Arbitration Clause

Although federal policy favors arbitration agreements, federal courts should rely on state law when addressing issues of contract validity and enforceability. Bischoff, 180 F.Supp.2d at 1106 (citing Green Tree Fin. Corp.--Alabama v. Randolph, 531 U.S. 79, 81 (2000); Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 936-37 (9th Cir. 2001)) (citations omitted). Thus, contract defenses generally applicable under state law, including fraud,

duress, or unconscionability, may be asserted to invalidate arbitration agreements without contradicting Section 2 of the FAA. See 9 U.S.C. § 2 (2002). A court's unconscionability analysis on a motion to compel is limited to the arbitration clause in the agreement. Id. at 1107 (citing Gray v. Conseco, Inc., No. CV 00-322, 2000 WL 1480273 (C.D. Cal. Sept. 29, 2000) ("Gray I").

In determining the validity of an arbitration agreement, this Court "should apply ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). As Plaintiff entered a subscription for service in California, this Court should review the arbitration agreement under the contract law of California. Therefore, "[b]ecause unconscionability is a generally applicable defense to contracts, California courts may refuse to enforce an unconscionable arbitration agreement." Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1170 (9th Cir. 2003) (citation omitted).

"Under California law, for a contract term to be held unconscionable it must possess two elements: procedural unconscionability (meaning terms which are outside of the reasonable expectations of the parties) and substantive unconscionability (meaning terms that are overly harsh or one-sided). Arriaga, 163 F.Supp.2d at 1194 (citing Armendariz v. Foundation Health Psychare Servs., 24 Cal. 4th 83, 114 (2000)), rev'd on other grounds, Ingle, 328 F.3d at 1176.

The first step in the unconscionability analysis is to determine whether the contract is one of adhesion. Bischoff, 180 F.Supp.2d 1107 (citing Armendariz, 24 Cal.4th at 113). A contract of adhesion is 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." Bischoff, 180 F.Supp.2d at 1107; Neal v. State Farm Ins., Co., 188 Cal. App. 2d 690, 694 (1961). A contract of adhesion is unconscionable when both procedural and substantive unconscionability are present. Id. (citing Armendariz, 24 Cal.4th at 99). Procedural and substantive unconscionability need not be present in the same degree.. Ferguson v. Countrywide Credit Industries, Inc., 298 F.3d 778, 783 (9th Cir. 2002) (noting, for example, that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable") (citing Armendariz, 24 Cal.4th at 113).

1. Procedural Unconscionability

On June 10, 2002, this Court determined that the related arbitration clauses of the AT&T Wireless CSA are procedurally unconscionable. In so finding, the Court examined "the manner in which the contract was negotiated and the circumstances of the parties at that time." Kinney v. United Healthcare Servs., Inc., 70 Cal.App.4th 1322, 1329 (1999). In reviewing the arbitration agreement for oppression and adhesion in the relationship between Defendant AT&T Wireless and Plaintiff Lozano, the Court should find procedural unconscionability for the same reasons.

The "Welcome Guide" that accompanied delivery of Plaintiff's phone is a contract of adhesion. The contract is a form contract imposed by the party with superior bargaining power – Defendant AT&T Wireless. Additionally, Plaintiff was not free to negotiate the terms of the contract, but rather, could only (1) cancel the contract immediately if the terms and conditions were not agreeable; or (2) cancel the contract within 30 days of activation. "[A] finding of a contract of adhesion is essentially a finding of procedural unconscionability." Bischoff, 180 F.Supp.2d at 1107 (citing Flores v. Transamerica Home, Inc., 93 Cal. App.4th 846, 853 (2001)) (internal quotations omitted). Thus, the arbitration clause in the Welcome Guide is procedurally unconscionable.

At oral hearing on July 21, 2003, Defendant AT&T urged the Court to consider that procedural unconscionability is lacking because this particular plaintiff had the opportunity to reject the agreement with AT&T wireless and to seek out cellular services with another distributor. The Court, however, should find that procedural unconscionability still remains in this circumstance because it is a contract of adhesion, where there is no evidence that an ordinary consumer like Plaintiff Lozano could have obtained the same services elsewhere, without otherwise entering a similar arbitration agreement.

However, to find that an arbitration clause is unconscionable, the Court must also make a finding of substantive unconscionability.

2. Substantive Unconscionability

Plaintiff moves the Court to find that the limit on class action provision is substantively unconscionable under the relevant arbitration agreement with Defendant AT&T Wireless. The Court, however, should not find that the limitation on punitive damages is substantively unconscionable.

In order for a contract term to be substantively unconscionable, it must be found to be so one-sided as to "shock the conscience." Kinney, 70 Cal.App.4th at 1330; 24 Hour Fitness, Inc. v. Superior Court, 66 Cal. App. 4th 1199, 1212-1213 (1998). When the contract concerns an arbitration agreement, the unconscionability exists unless the arbitration agreement contains a "modicum of bilaterality." See Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal.4th 83, 87 (Cal. 2000). "[T]he doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." Id. Finally, the reviewing Court must evaluate the substance of the contract at the time it was made. See Ingle, 328 F.3d at 1165.

In Ting v. AT&T, the Ninth Circuit reviewed AT&T's Consumer Services Agreement ("CSA") to determine whether California law rendered the Legal Remedies Provision unenforceable. 319 F.3d at 1147-52. The Court continued on to find that various aspects of the CSA were substantively unconscionable. Id. at 1149-52. Specifically, the Ninth Circuit reviewed the enforceability of a class action provision based on the one-sidedness of the contract terms. Id. at 1150. The Court held that the class action provision presented in the CSA was patently one-sided for the following reason:

> It is not only difficult to imagine AT&T bringing a class action against its own customers, but AT&T fails to allege that it has ever or would ever do so. . . . However, because "bilaterality" is a requirement in all California arbitration agreements, (citation omitted), we affirm the district court's conclusion that the class-action ban violates California's unconscionability law.

Ting, 319 F.3d at 1150. Therefore, the analysis must focus on whether the contract is so one-sided, gauged by the fact that one party would never act under such a provision.

Here, Plaintiff Lozano analogizes his position against Defendant AT&T Wireless to the ruling of Ting, that the class action prohibition in the arbitration agreement is substantively unconscionable because there is no chance that Defendant would ever file a class action against its consumers. Because Ting ruled that such a provision is substantively unconscionable, this Court should find that the CSA Provision banning class actions to individuals like Plaintiff Lozano is manifestly one-sided and

unenforceable.[2]

The Ninth Circuit also ruled upon the unenforceability of a provision in the AT&T CSA that places limits on the ability of a plaintiff to obtain "the information needed to build a case of intentional misconduct or unlawful discrimination." Ting, 319 F.3d at 1152. Therefore, the Court ruled that the district court did not err in finding the confidentiality provision under the arbitration agreement unconscionable. From this ruling, Plaintiff Lozano requests that this Court find that the AT&T Wireless CSA provision that precludes recovery of punitive damages is substantively unconscionable. (Pl. Mot. to Vacate, at 11).

The Court should not find that the Ting case stands to hold that a limitation on damages recovery is substantively unconscionable, at least in the form that exists in the AT&T Wireless CSA. In the June 10, 2002 order, this Court held:

> [T]he Plaintiff cannot find support for the proposition that a damage limitation, in and of itself, is substantively unconscionable. See e.g. Powertel v. Bexley, 7443 So.2d 570, 575 (Fla. Dist. Ct. App. 1999) (holding limitation on damages among the factors that contribute to a finding of substantive

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[2] The Ninth Circuit in Ingle upheld the ruling in Ting v. AT&T, and supported rejecting this Court's earlier finding on the limiting provision concerning class actions:

> [O]ur holding is in tension with Lozano v. AT&T, 216 F. Supp. 2d 1071 (C.D. Cal. 2002). The court in Lozano held, inter alia, that an arbitration clause prohibiting class actions was not substantively unconscionable, so long as the clause allows the arbitrator to provide for declaratory and injunctive relief under state consumer statutes and authorizes statutory damages on an individual basis. Id. at 1076; see also Arriaga v. Cross Country Bank, 163 F. Supp. 2d 1189, 1195 (S.D. Cal. 2001) (rejecting plaintiff's argument that bar on class-wide arbitration was substantively unconscionable). We reject the reasoning in Lozano and Arriaga to the extent that it conflicts with our holding that an essentially unilateral bar on class-wide arbitration is substantively unconscionable.

Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1176 (9th Cir. 2003).

unconscionability). The Court agrees with Defendant's argument that the limitation on punitive damages applies "to the fullest extent allowed by law." (Haight Decl. Ex. A at 25, § 5.d). If the arbitrator appointed by the American Arbitration Association finds that the limit on punitive damages goes beyond the law, such a limitation will not take effect. Furthermore, the limitation on punitive damages in this case is not by itself sufficient to make the arbitration clause so one-sided as to shock the conscience. 24 Hour Fitness, Inc., 66 Cal. App. 4th at 1212-1213.

Lozano v. AT&T Wireless, 216 F.Supp.2d 1071, (C.D. Cal. 2002). This is different from Ting, where the Ninth Circuit focused on limitations based on confidentiality and secrecy. As AT&T Wireless concedes, "an arbitrator could make an award of punitive or exemplary damages if required by statute (such as the CLRA or the UCL)." (Def. Opp. Mot. to Vacate, at 23). Therefore, the Court should find that the relevant AT&T Wireless CSA provision is not substantively unconscionable because it does not read to preclude punitive damages, it merely provides that punitive damages apply only to the extent allowed by law.

B. No Preemption by the Federal Arbitration Act

The Court should briefly reject Defendants argument that the Federal Arbitration Act ("FAA") preempts the effect of California law that deems class arbitration waivers to be unconscionable.

Defendant proffers an argument based on the Supreme Court ruling in Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987), to assert FAA preemption because California law overrides the class action provision in a manner "inherently hostile" to arbitration agreements. The Court should note, however, that the Ninth Circuit specifically focused on the FAA preemption argument when ruling that class action limitations in arbitration agreements are unconscionable and unenforceable. See Ingle, 328 F.3d at 1171, n.3 (holding that because "the arbitration agreement at issue was unenforceable under generally applicable California contract law, it was fully consistent with federal law); Ting, 310 F.3d at 1152 (holding that "the Supreme Court's generalized statements on arbitration do not override the FAA's particular rule, which obtains here and which is well-settled: '[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.') (citation omitted).

Therefore, the Court should find that the FAA does not

preempt a finding pursuant to California law that the limitation on class actions is procedurally and substantively unconscionable.