Filed 6/27/24

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARIO BALDERRAMA, Plaintiff and Respondent, v. ECOLAB, INC., Defendant and Appellant.	D082043 (Super. Ct. No. 37-2022-00028433-CU-OE-CTL)

APPEAL from an order of the Superior Court of San Diego County, Kenneth J. Medel, Judge. Affirmed.

Jones Day, Lauren E. Dutkiewicz, Kelsey A. Israel-Trummel, and Matthew J. Silveira, for Defendant and Appellant.

Lebe Law, Jonathan M. Lebe, and Chancellor D. Nobles, for Plaintiff and Respondent.

Ecolab, Inc. appeals an order denying its motion to compel arbitration. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Ecolab employed Mario Balderrama from September 2006 until June 2021. Under the Private Attorneys General Act of 2004 (PAGA) (Lab.

Code, § 2698 et seq.), Balderrama filed a representative action in the San Diego Superior Court, alleging that Ecolab "engaged in a systematic pattern of wage and hour violations under the California Labor Code and IWC Wage Orders."

In response to the complaint, Ecolab filed a motion to compel arbitration, arguing that Balderrama refused to arbitrate his claims despite entering into an arbitration agreement with Ecolab. In support of its motion, Ecolab filed the declaration of Kari Zahn, a vice president of human resources. Zahn's declaration consisted of two substantive paragraphs, one of which stated in part:

> "Ecolab's records reflect that . . . Balderrama[ ] electronically entered into the Ecolab Mediation and Arbitration Agreement . . . on October 16, 2014. On the same date, Ecolab sent [Balderrama] a confirmation email acknowledging that he had entered into the Arbitration Agreement and providing a copy of the Arbitration Agreement for his records."

Attached to Zahn's declaration was an email purporting to be from someone in Ecolab's human relations department to Balderrama. Zahn represented the email evidenced that Balderrama had entered into a valid arbitration agreement, which also was included in the email. There was no signature (electronic or otherwise) on the arbitration agreement.

In opposition to the motion to compel arbitration, among other arguments, Balderrama noted that Ecolab had not "produce[d] any record of an arbitration agreement or provision that [was] actually signed or clearly assented to by [him]."

After considering the motion, opposition, and evidence submitted as well as entertaining oral argument, the court took the matter under

submission. The court subsequently issued a minute order denying the motion to compel arbitration. To this end, the court explained:

> "As noted, the purported agreement is a confirmation email allegedly sent to [Balderrama] with a copy of the agreement. Zahn's declaration generally claims personal knowledge, but insufficient foundation is laid to authenticate the document. Zahn simply claims to have reviewed [Ecolab's] records without indicating that she personally reviewed [Balderrama's] personnel records, that she is familiar with the onboarding or sign-on process, that she is familiar with the electronic records and records-keeping system, describe the manner in which the electronic process works, explain how [Balderrama's] assent or signature was obtained, or some statements which would establish that the evidence submitted is authentic and reliable. Zahn's declaration also states that [Balderrama] electronically entered into the arbitration agreement, but there is no electronic signature or initials showing anywhere on the document. As such, Zahn's declaration is insufficient to lay the proper foundation for the evidence. Thus, [Ecolab] fails to make a prima facie showing of the existence of a written arbitration agreement and to shift the burden of production to [Balderrama]."

In addition, the court observed that California Rules of Court, rule 3.1330[1] did not relieve Ecolab of the burden of proving the existence of an arbitration agreement.

Ecolab timely filed a notice of appeal.

---

1 California Rules of Court, rule 3.1330 states: "A petition to compel arbitration or to stay proceedings pursuant to Code of Civil Procedure sections 1281.2 and 1281.4 must state, in addition to other required allegations, the provisions of the written agreement and the paragraph that provides for arbitration. The provisions must be stated verbatim or a copy must be physically or electronically attached to the petition and incorporated by reference."

DISCUSSION

A. General Legal Principles

Generally, "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists . . . ." (Code Civ. Proc., § 1281.2.) "Thus, when presented with a motion to compel arbitration, the court's first task is to determine whether the parties have entered into an agreement to arbitrate their claims." (*Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 685.) "[T]he trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) "Courts 'apply general California contract law to determine whether the parties formed a valid agreement to arbitrate their dispute.' [Citation.] 'General contract law principles include that "[t]he basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contract[ ]." ' [Citation.] 'Contract law also requires the parties agree to the same thing in the same sense.' [Citation.]" (*Ramos*, at p. 685.)

"The burden of persuasion is always on the moving party to prove the existence of an arbitration agreement with the opposing party by a preponderance of the evidence" (*Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 164 (*Gamboa*)), but "the burden of production may shift in a three-step process" (*id.* at p. 165). "First, the moving party bears the burden of producing 'prima facie evidence of a written agreement to arbitrate the controversy.' " (*Ibid.*, quoting *Rosenthal v. Great Western Fin.*

Securities Corp. (1996) 14 Cal.4th 394, 413 (*Rosenthal*).) "If the moving party meets its initial prima facie burden and the opposing party does not dispute the existence of the arbitration agreement, then nothing more is required for the moving party to meet its burden of persuasion." (*Gamboa*, at p. 165.) "If the moving party meets its initial prima facie burden and the opposing party disputes the agreement, then in the second step, the opposing party bears the burden of producing evidence to challenge the authenticity of the agreement." (*Ibid*.) "If the opposing party meets its burden of producing evidence, then in the third step, the moving party must establish with admissible evidence a valid arbitration agreement between the parties." (*Ibid*.) "There is a strong public policy favoring contractual arbitration, but that policy does not extend to parties who have not agreed to arbitrate." (*Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 787.)

B. Standard of Review

" ' " 'There is no uniform standard of review for evaluating an order denying a motion to compel arbitration.' " ' [Citation.]" (*Gamboa*, *supra*, 72 Cal.App.5th at p. 166.)

"We review an order denying a petition to compel arbitration for abuse of discretion unless a pure question of law is presented. In that case, the order is reviewed de novo." (*Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal.App.4th 1047, 1056–1057 (*Espejo*).) "Where the trial court's ruling is based on a finding of fact, we review the decision for substantial evidence. [Citations.] Under this deferential standard, ' "[A]ll factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment." ' [Citations.]" (*Trinity v. Life Ins. Co. of North America* (2022) 78 Cal.App.5th 1111, 1121.)

"When . . . the court's order denying a motion to compel arbitration is based on the court's finding that petitioner failed to carry its burden of proof, the question for the reviewing court is whether that finding is erroneous as a matter of law. [Citations.] ' "Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.['] " ' [Citations.]" (*Fabian v. Renovate America, Inc.* (2019) 42 Cal.App.5th 1062, 1066–1067 (*Fabian*).) "For this reason, ' "[w]here . . . the judgment is against the party who has the burden of proof, it is almost impossible for him to prevail on appeal by arguing the evidence compels a judgment in his favor. That is because unless the trial court makes specific findings of fact in favor of the losing [party], we presume the trial court found the [party's] evidence lacks sufficient weight and credibility to carry the burden of proof. [Citations.] We have no power on appeal to judge the credibility of witnesses or to reweigh the evidence." ' [Citation.] ['The appellate court cannot substitute its factual determinations for those of the trial court; it must view all factual matters most favorably to the prevailing party and in support of the judgment. [Citation.] " 'All conflicts, therefore, must be resolved in favor of the respondent.' [Citation.]" [Citation.]' [Citation.]" (*Id.* at p. 1067.)

C. Analysis

Below, the trial court determined that Ecolab failed to "establish the existence of a valid arbitration agreement as a preliminary matter." The court specifically noted that Ecolab did not submit a signed arbitration agreement. Moreover, the court accorded little weight to Zahn's declaration, finding she did not lay sufficient foundation to indicate she possessed the

requisite personal knowledge to establish that Balderrama had signed the subject arbitration agreement.

On appeal, Ecolab maintains that the trial court erred in concluding that Ecolab did not demonstrate the existence of an arbitration agreement. Therefore, it argues that it met its initial burden under the three-step burden shifting process (see *Gamboa*, *supra*, 72 Cal.App.5th at p. 165), pointing out that it "recited the relevant terms of its arbitration agreement with Balderrama . . . [and] [n]othing more was required." In support of its position, Ecolab relies on *Condee v. Longwood Management Corporation* (2001) 88 Cal.App.4th 215 (*Condee*).

In *Condee*, the trial court denied a petition to compel arbitration on the ground that the agreement to arbitrate had not been authenticated properly even though the authenticity of the signatures had not been challenged and the parties had not challenged the existence or validity of the arbitration agreement. The appellate court determined that the burden of proof under Code of Civil Procedure section 1281.2 is met simply by alleging the existence of an arbitration agreement and either reciting the provisions of the agreement in the petition or attaching a copy of the agreement to the petition as required by California Rules of Court, rule 3.1330, formerly rule 371. (*Condee*, *supra*, 88 Cal.App.4th at pp. 218–219.) The court concluded that once the petitioner alleged the existence of an arbitration agreement, the burden shifts to the respondent to prove falsity of the agreement. (*Id.* at p. 219.)

In *Toal v. Tardif* (2009) 178 Cal.App.4th 1208, Division Three of the Fourth Appellate District Court, the same court that decided *Condee*, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, noted that "[t]o the extent *Condee* conflicts with *Rosenthal*, our Supreme Court's

decision is controlling." (*Toal*, at p. 1219, fn. 8.) It observed that "our Supreme Court has clearly stated that a court, before granting a petition to compel arbitration, *must* determine the factual issue of 'the existence or validity of the arbitration agreement.' (*Rosenthal*, *supra*, 14 Cal.4th at pp. 402, 413.) In this way, a court's role, though limited, is critical. 'There is indeed a strong policy in favor of enforcing agreements to arbitrate, but there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate and which no statute has made arbitrable.' [Citation.]" (*Toal*, at pp. 1219–1220.)

Thus, we do not read *Condee* to alter the trial court's threshold consideration when ruling on a motion to compel arbitration. As such, a trial court cannot grant a motion to compel arbitration absent a finding that a valid arbitration agreement exists. (*Rosenthal*, *supra*, 14 Cal.4th at pp. 402, 413.) Here, the trial court found that Ecolab did not prove a valid arbitration with Balderrama existed. And nothing in *Condee* causes us to question the trial court's finding in this regard.

Beyond arguing that the trial court held it to an improper standard of proving the existence of a valid arbitration agreement, Ecolab does not challenge or discuss the trial court's consideration of the evidence Ecolab submitted. Indeed, a case on which Ecolab relies in this appeal, *Espejo*, underscores the deficiency of the evidence Ecolab submitted in support of its motion to compel arbitration. In that case, the defendant (SCPMG) moved to compel arbitration and attached a printed copy of the electronically executed arbitration agreement that had a signature line with the typed name of the plaintiff, the date and time that the agreement was allegedly signed, and an IP address purportedly identifying the location where the document was signed. (*Espejo*, *supra*, 246 Cal.App.4th at p. 1052.) In addition, SCPMG

submitted a declaration of Julie Tellez, an SCPMG systems consultant, who explained that part of her job responsibilities was " 'maintaining and troubleshooting the online system for . . . physician employment contracts.' " (*Id.* at p. 1052, fn. 1.) Tellez further described that " '[s]ince 2006, the majority of Associate SCPMG physician employee contracts and agreements, including those of [the plaintiff], are executed online. The online process requires the physician to review and electronically sign his or her employment contract and all related agreements.' " Tellez also stated that on May 22, 2011, the plaintiff " 'electronically signed' " the copy of the arbitration agreement attached as an exhibit to defendants' petition. (*Id.* at p. 1052.) Additionally, SCPMG submitted a declaration from a project manager employed by SCPMG, whose duties included " 'reviewing physician employment agreements and advising' " regarding compensation policies. The declarant explained that to finalize his employment agreement, the plaintiff was required to digitally sign his employment agreement and the arbitration agreement (the declarant represented that the plaintiff did both). (*Ibid.*) Finally, SCMPG submitted a supplemental declaration from Tellez providing "additional details regarding the electronic review and signature process" wherein she explained how the documents supplied established that the plaintiff signed the arbitration agreement. Further, the supplemental declaration authenticated the arbitration agreement. (*Id.* at pp. 1053–1054.)

After the trial court denied the motion to compel arbitration, SCMPG appealed, raising the issue of whether the trial court erred in excluding the supplemental declaration that supplied further details about SCMPG's electronic review and signature process for employment agreements. (*Espejo*, *supra*, 246 Cal.App.4th at pp. 1053, 1056–1060.) The appellate court concluded that the trial court erred in striking the supplemental declaration

and determined that the declaration sufficiently authenticated the arbitration agreement. (*Id.* at pp. 1060–1063.) Also, in determining that SCMPG met its initial burden to show an agreement to arbitrate, the appellate court noted SCMPG attached a copy of the arbitration agreement purportedly bearing the plaintiff's signature. (*Id.* at p. 1060.)

The evidence Ecolab submitted in support of its motion to compel arbitration pales in comparison to the evidence before the court in *Espejo*. In addition to a declaration from Ecolab's attorney detailing her efforts to persuade Balderrama's counsel to agree to arbitration, Ecolab submitted the short declaration of Zahn, which can be generously described as perfunctory. Because it only consists of two substantive paragraphs, we include the lion's share of the declaration here:

> "1. I am currently employed by Ecolab Inc. . . . as a Vice President of Human Resources—Institutional Division. I have knowledge of the facts set out below based on my personal knowledge and/or my review of the business records and files of Ecolab. If called as a witness, I could and would competently testify to these same facts.
>
> "2. Ecolab's records reflect that Plaintiff in the above-captioned lawsuit, Mario Balderrama, electronically entered into the Ecolab Mediation and Arbitration Agreement . . . on October 16, 2014. On the same date, Ecolab sent [Balderrama] a confirmation email acknowledging that he had entered into the Arbitration Agreement and providing a copy of the Arbitration Agreement for his records. A true and correct copy of the October 16, 2014 email is attached hereto as Exhibit A."

Exhibit A consists of an email from " 'HR Communications' <HRCommunicationsNA@ecolab.com" to " 'Mario Balderrama' <mario.bladerrama@ecolab.com>" dated October 16, 2014 at 11:30 a.m. with the subject line: "Confirmation: Ecolab Association Resolution Resources

(EARR) and Mediation and Arbitration Agreement." The body of the email begins with the following prefatory statement:

> "Mario Balderrama[100/34967]
>
> > "This email serves as acknowledgment that you, as an Ecolab associate, and Ecolab, have entered into a mutually binding agreement as stated below. This agreement also is signed by Laurie Marsh, Executive Vice President, Human Resources, acting as the official representative of Ecolab."

The rest of Exhibit A purports to be the "Ecolab Mediation and Arbitration Agreement."

The trial court determined that the Zahn declaration failed to provide sufficient foundation to authenticate the arbitration agreement found in Exhibit A. More importantly, the court noted that Zahn did not indicate that she (1) personally reviewed Balderrama's personnel records, (2) was familiar with the onboarding or sign-on process, or (3) was familiar with the electronic records and record-keeping system. In addition, the court took issue with Zahn's failure to describe the way the electronic process worked, explain how [Balderrama's] assent or signature was obtained, or otherwise provide some statements that would establish the evidence submitted was authentic and reliable. Further, the court emphasized that there was no electronic signature anywhere on the purported arbitration agreement.

Ecolab offers no argument regarding why the trial court's findings are not supported by substantial evidence. We interpret this silence as a tacit admission that it has no valid argument challenging the trial court's conclusions. Moreover, we agree with the trial court that Ecolab's evidence submitted in support of its motion to compel arbitration falls woefully short of establishing the existence of a valid arbitration agreement.

Nonetheless, Ecolab makes the alternative argument that it was not required to submit a signed arbitration agreement in support of its motion, but instead, it could show the existence of an implied-in-fact arbitration agreement based on Balderrama's continued employment after being notified of Ecolab's arbitration process. In response, Balderrama argues that Ecolab waived any such implied-in-fact argument by failing to raise it below. Ecolab counters that it made such an argument during the hearing on its motion to compel arbitration. However, Ecolab does not point to where it made that assertion in its original motion to compel arbitration. Moreover, our review of the record shows that Ecolab made no such argument until the hearing on the motion and that argument was a minor component of the discussion of its prima facie burden of establishing the existence of the arbitration agreement.

As a general rule of motion practice, courts ordinarily do not consider new issues and evidence presented in reply papers because it deprives the opposing party of an opportunity to counter the argument. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537–1538.) For the same reason, as a matter of fairness, courts may decline to consider issues raised for the first time at oral argument. (*California Redevelopment Assn. v. Motosantos* (2013) 212 Cal.App.4th 1457, 1500.) Because the issue was not properly raised below, the trial court did not have an opportunity to consider evidence as to whether Ecolab established an implied-in-fact arbitration agreement. And as Ecolab did not adequately raise this issue in the trial court, it is precluded from raising the issue on appeal. (*Holden v. City of San Diego* (2019) 43 Cal.App.5th 404, 419.) As such, we will not consider it for the first time here as we deem this argument forfeited. (*In re N.R.* (2017) 15 Cal.App.5th 590, 598 [claim involving "issue of fact rather than a pure question of law," is forfeited by failure to raise it below].)

In summary, to prevail on appeal, Ecolab was required to establish that its evidence compelled a finding in its favor as a matter of law. (See *Fabian*, *supra*, 42 Cal.App.5th at p. 1070.) Zahn's declaration and the attached Exhibit A do not compel this finding. We thus conclude that the trial court did not err in denying Ecolab's motion to compel arbitration based on Ecolab's failure to prove, by a preponderance of the evidence, the existence of a valid arbitration agreement.[2]

DISPOSITION

The order is affirmed. Balderrama is entitled to his costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

DO, J.

BUCHANAN, J.

---

[2] Because we conclude the trial court did not err in denying Ecolab's motion to compel arbitration, we do not reach Ecolab's additional arguments regarding the arbitrability of Balderrama's PAGA claim.