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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/01/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARY KATHRYN HOOSAVA, an) No. 1 CA-CV 11-0390
individual,)
)
) DEPARTMENT C
Plaintiff/Appellant,)
)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
DESERT DENTISTRY, a partnership;)
THOMAS M. MATTERN, D.D.S., P.C.,)
a professional corporation;)
THOMAS M. MATTERN and SHARON)
MATTERN, husband and wife; JANET)
B. EUZARRAGA, D.D.S., P.C., a)
professional corporation; DENTAL)
PROPERTIES, INC., a corporation,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-003530

The Honorable J. Richard Gama, Judge

VACATED AND REMANDED

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By Dawn C. Valdivia
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Attorneys for Defendants/Appellees

S W A N N, Judge

¶1 An employee brought an action against her former employer alleging wrongful discharge. The employer moved to dismiss and compel arbitration, asserting that the employee's claim was subject to the arbitration clause in the employer's alternative dispute resolution policy.

¶2 In response to the motion, the employee attached a declaration asserting that she was never provided a copy of the policy. The employer, in turn, presented declarations to the effect that the employee had been provided a copy of the policy. On these documents, the trial court dismissed the employee's case with prejudice. Because the trial court resolved a disputed material fact based solely on declarations without conducting an evidentiary hearing, we vacate and remand.

FACTS AND PROCEDURAL HISTORY

¶3 Mary Hoosava delivered her notice of intent to resign from her position as a dental hygienist with Desert Dentistry on July 25, 2010. Her final day at work was August 9, 2010. Two days before delivering her notice, Hoosava had signed a new employment contract with Desert Dentistry that went into effect on August 1, 2010. She also signed an acknowledgement of receipt of a new alternative dispute resolution policy ("ADR policy"). Hoosava's prior written employment contract had been in effect since July 2006.

¶14 In early February 2011, Hoosava sued Desert Dentistry for wrongful termination. She alleged that Desert Dentistry had constructively discharged her by creating a hostile work environment and by reducing her hours, in retaliation for her expressions of concern regarding the use of uncertified dental assistants for certain dental procedures. On February 28, 2011, Desert Dentistry contacted Hoosava and asked her to move the dispute to arbitration under the ADR policy she acknowledged on July 23, 2010. Hoosava declined. On March 8, 2011, Desert Dentistry moved to dismiss the complaint and compel arbitration.

¶15 Hoosava argued that arbitration was not required because (1) she did not receive proper notice of the ADR policy, (2) she did not consent to arbitration, (3) there was no consideration for the new employment contract and (4) the policy was unconscionable. She specifically alleged that she never saw the ADR policy and "felt threatened and intimidated" to sign the acknowledgement of receipt of the ADR policy sight unseen. Hoosava attached her declaration to her response to Desert Dentistry's motion. In her declaration, she stated that she neither received nor reviewed the ADR policy before signing the acknowledgment form. She also declared that Desert Dentistry "never gave [her] a copy of the [ADR policy]" and that Desert Dentistry "refused to provide their policies" to employees.

¶16 Desert Dentistry replied to Hoosava's arguments and attached two declarations not included with the original motion -- one from office manager Jennifer Taylor, and the other from business manager Sharon Mattern. Taylor stated that she asked Hoosava to review the new ADR policy in August 2009, and that "Desert Dentistry maintains copies of the manuals and policies, including the ADR policy, at its facility and provides paid time for all employees to read them before agreeing to them. . . . [and] also let[s] employees take the policies home to review them and then reimburse[s] employees" for the time spent outside of work reviewing the policies. Taylor also stated that Hoosava "kept the policies in her personal office space for several weeks." Mattern's declaration reiterated that Hoosava was asked to review the policies in August 2009, and added that Mattern reminded Hoosava in June 2010 to sign and acknowledge the policies, and followed up on that reminder in July 2010 by telling Hoosava that "her continued employment was contingent upon her reviewing, signing, and returning her contract, the acknowledgments, and ADR policy."

¶17 The superior court held no evidentiary hearing on the motion to dismiss and compel arbitration, and declined to hold oral argument. Without elaboration, the court found the ADR policy enforceable, valid and not unconscionable, dismissed Hoosava's case with prejudice, and granted the motion to compel

arbitration. The court also awarded Desert Dentistry its attorney's fees and costs.

¶18 Hoosava timely appeals. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶19 Arizona's Employment Protection Act ("the Act") governs the severability of employment relationships and the effect of employment contracts on severability. A.R.S. § 23-1501. Section 23-1501(2) requires that when an employment contract is not signed by both employer and employee, it "must be set forth in the employment handbook or manual or any similar document *distributed to the employee*, if that document expresses the intent that it is a contract of employment, or this written contract must be set forth in a writing signed by the party to be charged." (Emphasis added.) Under the Act, therefore, the question whether Desert Dentistry actually distributed its arbitration policy to Hoosava is directly relevant to the question whether a binding arbitration agreement exists. The parties' declarations squarely conflict on this point.

¶10 A.R.S. § 12-1502(A) provides that when a party "denies the existence of [an] agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party." In *Ruesga v. Kindred Nursing Centers, L.L.C.*, 215 Ariz. 589, 161

P.3d 1253 (App. 2007), this court addressed the proper procedure for resolution of competing facts in the context of a motion to compel arbitration. We noted that "courts 'have repeatedly analogized a trial court's duty in ruling on a motion to compel arbitration to its duty in ruling on a motion for a summary judgment.'" *Id.* at 596, ¶ 23, 161 P.3d at 1260 (citations omitted). We therefore held that, in the context of motions to compel arbitration, "[p]roceeding 'summarily' means that the court initially determines whether material issues of fact are disputed and, *if such factual disputes exist, then conducts an 'expedited evidentiary hearing' to resolve the dispute.*" *Id.* at 596, ¶ 24, 161 P.3d at 1260 (citations omitted) (emphasis added).

¶11 Here, the court did not acknowledge the factual dispute, much less hold an evidentiary hearing.¹ Because the trial court resolved a disputed factual issue on declarations alone, without holding an evidentiary hearing to evaluate the credibility of the witnesses presenting conflicting facts, it

¹ We recognize that *Ruesga* placed the burden on the party claiming a dispute of fact to request an evidentiary hearing. Here, Hoosava requested oral argument in her response to the motion, but the court declined to hold argument. Further, there was no dispute of fact until Desert Dentistry first filed its own declarations -- in its reply. Desert Dentistry never requested any hearing. In these circumstances, we conclude that Hoosava did not waive her right to a hearing.

failed to provide Hoosava with due process. We therefore vacate and remand for the necessary evidentiary hearing.

ATTORNEY'S FEES

¶12 Both Hoosava and Desert Dentistry request attorney's fees on appeal under A.R.S. § 12-341.01. Because there has been no resolution on the merits, we decline to award attorney's fees, and remand for the superior court's determination of attorney's fees on appeal following resolution of the issues.

CONCLUSION

¶13 For the foregoing reasons, we vacate the order dismissing Hoosava's action and remand for proceedings consistent with this decision.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

MAURICE PORTLEY, Judge