Filed 3/24/08 Cairns v. Ventura Urgent Care Center Medical Corp. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

NIGEL CAIRNS, Plaintiff and Respondent, v. VENTURA URGENT CARE CENTER MEDICAL CORP. et al., Defendants and Appellants.	2d Civil No. B199116 (Super. Ct. No. 244510) (Ventura County)

Defendants Ventura Urgent Care Center Medical Corporation (VUCC) and Doctors Richard E. Wagner and Walter Thomas, appeal an order denying their petition to compel plaintiff Nigel Cairns to arbitrate his wrongful termination claim. The trial court found that the arbitration clause in Cairns's employment contract expired and was not enforceable. We affirm.

FACTS

Cairns worked for VUCC as a medical doctor. Wagner and Thomas were his supervisors. VUCC referred all patients who needed physical therapy to a single therapist at another facility. On November 16, 2005, Cairns notified VUCC that he would no longer refer any patients to that therapist because he believed VUCC, Wagner and Thomas were receiving illegal "kick backs" for the referrals. Two days later, VUCC fired Cairns.

Cairns sued VUCC, Wagner and Thomas. He alleged causes of action for retaliatory firing, termination of employment for whistle blowing, breach of implied and oral contracts not to terminate without good cause, breach of the implied covenant of good faith and fair dealing, unfair business practices (Bus. & Prof. Code, § 17200) and retaliation for his refusal to participate in illegal kick backs.

The defendants filed a petition to compel arbitration and attached a "Medical Services Employment Agreement" which Cairns and VUCC signed in 1998:

Point 2 of that agreement states, in relevant part, "The term of this Agreement shall be from 11/1/1998 through 11/1/2000, the first three months of which is a probationary period . . . ."

Point 15 states, "Any controversy o[r] claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration or in accordance with the Commercial Arbitration Rules of the American Arbitration Association and judgment upon the award rendered by the Arbitrator may be entered in any Court having jurisdiction thereof."

Point 17 states, "This agreement constitutes the entire agreement by and between the parties as to all issues except for compensation and fees in connection with In-Hospital services performed by Physician which shall be subject to a separate agreement . . . ."

Point 22 states, among other things, "It is specifically agreed and understood that nothing in this Agreement is intended or implied to be construed as requiring Physician to practice medicine exclusively under this Agreement."

Point 24 states, "No amendments, changes alterations, modifications, additions, or qualifications to the terms of this Agreement may be made or be binding unless they are in writing and are agreed to in writing by all parties."

VUCC also attached a contract it executed with Cairns in 2005 which stated Cairns "ha[s] agree[d] to a $5 [per hour] increase in compensation from $60-$65 [per hour] for [his] duties as Medical Director of the [VUCC]. This will be retroactively effective as of August 2004. This is in lieu of any Directors fee[] and/or incentive

package from past, present or future, unless mutually agreed upon from this date forward."

Cairns stated in his declaration: "[T]he Medical Services Employment Agreement terminated on November 1, 2000[.] I never entered into another written employment agreement with [VUCC]. [¶] I never entered into a written, oral or implied agreement to extend the duration of the arbitration clause contained within my agreement with [VUCC] entitled 'Medical Services Employment Agreement.'"

VUCC filed a reply which did not include a declaration. At the hearing on its petition, VUCC did not present any evidence. The trial court told VUCC's counsel that it had some concern "with regard to the foundation" upon which VUCC bases its request to compel arbitration. In denying the petition, the court found that the 1998 agreement "lapsed as of November 2, 2000, and therefore, this lapsed contract and its requirement to arbitrate disputes has no force or effect herein."

DISCUSSION

I. *The Enforceability of the Arbitration Clause*

VUCC contends the trial court erred by denying its petition to compel Cairns to arbitrate his wrongful termination claims. We disagree.

"'A proceeding to compel arbitration is in essence a suit in equity to compel specific performance of a contract. . . .' [Citation.]" (*Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 218 (*Condee*).) Where a defendant petitions to compel arbitration, the court decides if there is a written agreement to arbitrate the controversy, and whether the agreement is enforceable. (*Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*).) "[F]acts necessary for a determination of its enforceability are proven by affidavits and declarations." (*Condee*, *supra*, at p. 218.) "[A]n appellate court reviews the action of the lower court and not the reasons given for its action; and . . . there can be no prejudicial error from erroneous logic or reasoning if the decision itself is correct." (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 610.)

VUCC contends the trial court erred by ruling that the arbitration clause was not enforceable. We disagree. The court properly found that it had expired. The intent of the parties to a contract is determined from the ordinary meaning of the words they used. (*TIG Ins. Co. of Michigan v. Homestore, Inc.* (2006) 137 Cal.App.4th 749, 755.) Employers and employees may specify the duration of an employment contract. (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 58; *Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 677.) Arbitration provisions may not be expanded beyond the limits agreed to by the parties. (*Medical Staff of Doctors Medical Center in Modesto v. Kamil* (2005) 132 Cal.App.4th 679, 684.) "If contractual language is clear and explicit, it governs." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) Here the agreement containing the arbitration provision had a specific and unambiguous duration clause. It said, "The term of this Agreement shall be from 11/1/1998 through 11/1/2000."

VUCC suggests that the parties implicitly agreed to extend this contract beyond the termination date. But an implied contract cannot override the terms of an express agreement between the parties. (*Falkowski v. Imation Corp.* (2005) 132 Cal.App.4th 499, 518.)

VUCC correctly notes that arbitration provisions have been enforced after the expiration of the contracts containing them. In *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 545, the agreement contemplated that the parties' joint ownership of a technology would continue after the agreement's termination with each party having defined rights and responsibilities. Under these circumstances, the court allowed arbitration of the parties' dispute relating to those responsibilities even though the dispute occurred after the agreement had terminated. Here, no such facts were developed. VUCC presented no evidence on the issue of enforceability, reinstatement, or survival of the arbitration clause. (See *Condee, supra*, 88 Cal.App.4th at p. 218; *Rosenthal, supra*, 14 Cal.4th at pp. 413-414.)

VUCC's unverified petition to compel arbitration included no evidence other than the 1998 and 2005 agreements. VUCC argues that the trial court should have

found from these documents that the arbitration clause survived. But these agreements do not show an extension of the arbitration provision. Point 17 of the 1998 agreement states that subsequent contracts involving compensation are separate from the initial agreement. The 2005 contract is a subsequent compensation agreement. It has no arbitration provision and contains no language reinstating the lapsed arbitration clause. The two agreements do not involve the same job. The first was for an entry level physician with a probationary period. But the 2005 contract involved Cairns's duties as the "Medical Director" of the VUCC. Cairns said he continued to work for VUCC after November 1, 2000, but not under the first contract. A reasonable inference from his evidence is that the initial contract was replaced by other agreements or oral contracts as he advanced in the organization.

Point 24 of the 1998 agreement shows the parties intended that its duration provision could only be changed by a written modification agreement. VUCC has neither produced such a document nor does it claim one exists. There were five years between the end of the first agreement and Cairns's termination. The enforceability of the arbitration provision was a contested issue. VUCC had to present declarations to prove its position. (*Condee*, *supra*, 88 Cal.App.4th at p. 218.) But it did not file a declaration with its petition to establish facts about current enforceability. (*Ibid.*)

By contrast, Cairns's declaration shows that the agreement to arbitrate expired on November 1, 2000. He said there was never a written, oral or implied agreement to extend the duration of the arbitration clause. In its reply, VUCC submitted only a brief, but no declaration. Its failure to present evidence leads to the reasonable inferences that VUCC was unable to contradict Cairns and his statements were correct. (Evid. Code, §§ 412, 413; *Largey v. Intrastate Radiotelephone, Inc.* (1982) 136 Cal.App.3d 660, 672; *Westinghouse Credit Corp. v. Wolfer* (1970) 10 Cal.App.3d 63, 69 [adverse inference against party whose declaration did not address material issues]; *King v. Karpe* (1959) 170 Cal.App.2d 344, 348.)

At the hearing, VUCC presented no evidence. VUCC refers us to its argument in the trial court and claims that it showed that the arbitration clause survived.

But the argument of counsel is not admissible as evidence. (*Nobel Farms, Inc. v. Pasero* (2003) 106 Cal.App.4th 654, 658.) Here the only evidence on the enforceability of the arbitration agreement was Cairns's declaration. That established that the arbitration clause had expired and was unenforceable. The trial court properly denied the petition to compel arbitration.

The order is affirmed. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Frederick H. Bysshe, Jr., Judge

Superior Court County of Ventura

Lowthorp, Richards et al. and Glen J. Campbell for Defendants and Appellants.

Lavi & Ebrahimian, Joseph Lavi and Jordan D. Bello for Plaintiff and Respondent.