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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ROSALINA CLOPTON, Plaintiff and Respondent, v. LAUREN YASUDA RAINEY, DDS, INC., et al., Defendants and Appellants.	A155470 (Alameda County Super. Ct. No. HG18-908546)

INTRODUCTION

Defendant Lauren Yasuda Rainey appeals from an order denying her motion to compel arbitration. First Rainey claims the trial court erred in refusing to consider her declaration, first proffered during the hearing on her motion. Second, she claims that, even in the absence of that declaration, the other evidence she presented established the existence of an agreement to arbitrate. We affirm.

BACKGROUND

Plaintiff Rosalina Clopton, who once worked at Rainey's dental practice, claims she was wrongfully discharged because she requested paid time off to care for her terminally-ill husband. Although Clopton began the process of arbitration, she soon filed a civil complaint against Rainey, alleging discrimination, wage and hour, and wrongful termination claims.

In response, Rainey filed a motion to compel arbitration. The motion was supported by a declaration by her attorney to which copies of a number of documents

were attached, including a copy of an arbitration agreement bearing, in counsel's words, "what appears to be the signature of plaintiff."

Clopton filed opposition raising a number of issues, including that Rainey had failed to establish, through competent and admissible evidence, the existence of an agreement to arbitrate and that the purported agreement was, in any case, unconscionable. With respect to Rainey's supposed evidentiary showing, Clopton claimed Rainey had not authenticated the copy of the supposed arbitration agreement, had not established that Clopton had, in fact, signed it, and had not shown that Rainey and her company were parties to or had agreed to be bound by the agreement.

Rainey did not file a reply memorandum.

The trial court issued a tentative ruling denying Rainey's motion to compel arbitration, identifying the evidentiary problems raised in Clopton's opposition.

At the outset of the hearing on the motion, Rainey's counsel urged the trial court to hold off ruling, pending a "further deposition and further briefing limited to the arbitration agreement." Counsel asserted it was "clear that parole evidence is necessary to explain the terms in the agreement," and as proof of that, counsel announced he had, that morning, served Clopton's counsel with a declaration by Rainey "establishing the factual basis for each and every issue identified as an issue of concern by the court." Counsel then sought to present a copy of this declaration to the court. Pointing out it was now the "middle of a hearing" and it was "inappropriate" for the court to take "up as an issue" the proffered declaration, the court allowed counsel to file it, but made clear whether the court would consider the declaration was another matter. Counsel then proceeded to argue the new declaration demonstrated that whether Clopton had agreed to arbitrate was an evidentiary issue that required parole evidence obtained through a focused deposition.

Clopton, in turn, maintained Rainey's proffered declaration—prepared after the tentative ruling—was too little, too late and urged the court to adhere to its tentative.

After taking the matter under submission, the trial court issued a written ruling denying Rainey's motion to compel arbitration. The court refused to consider Rainey's

belatedly proffered declaration and ruled (1) Rainey did not prove by a preponderance of the evidence that an agreement to arbitrate existed and (2) no legal authority bound Clopton to arbitration simply because she initially made a demand to arbitrate.

DISCUSSION

Refusal to Consider Rainey's Declaration

Rainey first maintains the trial court erred in refusing to consider her declaration tendered at the hearing.

We review the court's evidentiary ruling for abuse of discretion, and under this deferential standard, will uphold its ruling unless it is beyond the bounds of reason. (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 881; see *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 414 (*Rosenthal*) [in ruling on petition to compel arbitration, it is within trial court's "discretion" to resolve issues arising from conflicting declarations without holding an evidentiary hearing, although in some cases "the better course" may be to hear oral testimony and allow the parties to conduct cross-examination].) A trial court's discretion is not unlimited, however. It must in all cases, be exercised "within the confines of the applicable legal principles."[1] (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

The Code of Civil Procedure clearly lays out the chronology for moving and opposing papers: "Unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 16 court days before the hearing . . . [a]ll papers opposing a motion so noticed shall be filed with the court and a copy served on each party at least nine court days, and *all reply papers at least five court days before the hearing*." (Code Civ. Proc., § 1005, subd. (b), italics added.) The California Rules of Court further make clear that the trial court has discretion to not consider a late-

[1] Rainey variously claims in her opening brief that the substantial evidence standard and the de novo standard of review applies. However, to the extent she complains the trial court erred in refusing to consider her declaration, she is challenging an evidentiary ruling that is reviewed for abuse of discretion.

filed paper. (Cal. Rules of Court, rule 3.1300(d); *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1146 (*Samaniego*) [court acted within its discretion in denying late reply declaration introduced on the date of the hearing with no plausible explanation for its tardiness]; *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 261–262 [court acted within its discretion in declining to consider late-filed opposition absent good cause].)

Here, Rainey had every opportunity to make a competent evidentiary showing in support of her petition to compel arbitration. She could have, and should have, made a proper showing in conjunction with the filing of her motion. (See *Rosenthal, supra*, 14 Cal.4th at p. 413 ["Because the existence of the agreement is a statutory prerequisite to granting the petition [to arbitrate], the petitioner bears the burden of proving its existence by a preponderance of the evidence."].)

Clopton's opposition, in turn, was timely filed 11 court days before the hearing. Rainey therefore had ample time to file a timely reply and to remedy the identified evidentiary shortcomings in support of her motion to compel (see *Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal.App.4th 1047, 1060–1062 (*Espejo*) [even if copy of arbitration bearing electronic signature is sufficient to meet "*initial* burden" in support of petition to compel, once opposing party challenges authenticity of signature, moving party has additional burden of establishing authenticity, which it can do through a supplemental declaration filed in conjunction with reply memorandum]), or, at the very least, to ask the trial court to conduct an evidentiary hearing on the existence of an agreement to arbitrate. (See *Rosenthal, supra*, 14 Cal.4th at p. 414 [court has discretion to hold evidentiary hearing on petition to compel arbitration]; compare *Ashburn v. AIG Financial Advisors, Inc.* (2015) 234 Cal.App.4th 79, 89 [plaintiffs submitted opposing declarations and in their opposition memorandum urged trial court to hold evidentiary hearing on the enforceability of the ostensible arbitration agreements].) Rainey, however, did not avail herself of this opportunity.

Instead, Rainey waited until *midway through the hearing, itself*, to introduce a new declaration addressing the evidentiary shortcomings in her initial showing. When the

trial court asked counsel why Rainey had not filed a reply memorandum, counsel provided no explanation, stating only that Rainey was legally entitled to reply orally at the hearing and "[n]o reply brief can do this issue justice." Counsel did not supply the court with any legal authority supporting such entitlement, nor has Rainey cited any such authority in her briefs on appeal. (See *Rosenthal, supra*, 14 Cal.4th at p. 414 [whether to hold evidentiary hearing in connection with a petition to compel arbitration is a matter committed to the trial court's discretion].)

Indeed, it is well-established in motion practice that "[g]ood cause must be shown to the satisfaction of the trial court before supplemental material may be filed after the statutory deadline. . . ." (*Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 624, disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6.) It is equally well-established that, as a matter of fundamental fairness, " 'the party opposing the motion . . . [have] notice and an opportunity to respond to the new material.' " (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 449, italics added.)

Accordingly, in an array of contexts, including in proceedings to compel arbitration, trial courts have acted within their discretion in declining to consider materials offered for the first time *at the hearing* on the motion. (E.g., *Samaniego, supra*, 205 Cal.App.4th at p. 1146 [trial court within its discretion in refusing to consider reply declarations submitted on hearing date of motion to compel arbitration and with no plausible explanation for their tardiness]; see *Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 320–322 [trial court within its discretion in refusing to consider evidence proffered on day of summary judgment hearing, noting failure to comply with statutory requirements and unfairness to defendants]; *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765–766 [trial court within its discretion in refusing to consider " 'surrebutal' " filed on day of summary judgment hearing and without good cause].)

Here, Rainey failed to comply with the statutory procedures governing motion practice and further failed to provide any explanation for her belated evidentiary showing, except to assert "I have an option of replying by writing or replying orally"—an

assertion that is not only unsupported by any statute, rule or case, but contrary to controlling statutes, rules and case law. Accordingly, the trial court did not abuse its discretion in refusing to consider her declaration.

Rainey maintains the trial court's citation to *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 (*Jay*) in support of its ruling was misplaced, and that *Jay*, in fact, demonstrates the "good cause" requirement the case acknowledges applies only to " 'entirely new evidence' " and not to evidence that is merely "supplemental" to that already before the court. *Jay*, however, is of no assistance to Rainey.

In *Jay*, the defendants in a malicious prosecution case made an unsuccessful special motion to strike under the "anti-SLAPP" statute. (*Jay, supra*, 218 Cal.App.4th at p. 1526.) Their moving papers were supported by some evidentiary materials. The opposition, in turn, was supported by "fairly voluminous evidence." In reply, the defendants submitted a number of additional declarations, to which the plaintiffs objected and which the trial court excluded. (*Id.* at pp. 1533–1534, 1536–1537.) On appeal, the defendants maintained they were not required to make any evidentiary showing as to the "second prong" of the anti-SLAPP analysis (meritless claims) unless and until the plaintiffs made some colorable showing on the merits in their opposition. (*Id.* at p. 1537.) The Court of Appeal disagreed, stating no case suggested that a party making a special motion to strike can, for the first time in a reply memorandum, introduce "entirely new evidence." (*Ibid.*)

The court distinguished cases that had allowed additional evidence in reply, as evidence "supplemental to evidence submitted in the moving papers." (*Jay, supra*, 218 Cal.App.4th at p. 1357.)

As the court explained: "The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions, which is not surprising, given that it is a common evidentiary motion. '[T]he inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case . . .' and if permitted, the other party should be given the opportunity to respond. [Citations.] The same rule has been noted in

other contexts as well. [Citation.] [¶] This rule is based on the same solid logic applied in the appellate courts, specifically, that '[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.' [Citations.] [¶] To the extent defendants argue they had the right to file any reply declarations at all, they are not wrong. Such declarations, however, should not have addressed the substantive issues in the first instance but only filled gaps in the evidence created by the limited partners' opposition. Defendants' decision to wait until the reply briefs to bring forth any evidence at all, when the limited partners would have no opportunity to respond, was simply unfair. Thus, while the trial court had discretion to admit the reply declarations, it was not an abuse of discretion to decline to do so." (*Jay, supra*, 218 Cal.App.4th at pp. 1537–1538, italics omitted.)

To begin with, we have serious doubt that Rainey's declaration can fairly be characterized as merely "supplemental" to the summary declaration of her counsel filed in conjunction with her motion to compel arbitration. In any event, even assuming Rainey's declaration can be so characterized, she did not timely submit this evidence in reply, even though she had every opportunity to do so. (See *Espejo, supra*, 246 Cal.App.4th at pp. 1060–1062.) Rather, in contrast to the chronology in *Jay*, Rainey did not even prepare this new declaration until after the trial court issued its tentative ruling denying her motion to compel, and she waited until the midst of the hearing on her motion before tendering the declaration to the court.

Furthermore, *Jay* does not purport to establish any requirement that trial courts must allow the filing of "supplemental" materials in reply, with or without a showing of good cause. The Court of Appeal simply concluded that the moving defendants were not entitled to wait until reply to make some showing that the plaintiffs' claims lacked merit and therefore the trial court did not abuse its discretion in refusing to consider the showing made in their reply papers. (*Jay, supra*, 218 Cal.App.4th at p. 1538.) Indeed, the "good cause" requirement acknowledged by the court in *Jay* and relied on by the trial

court here, applies to late-filed papers *generally* under California Rule of Court, rule 3.1300(d), not simply to new evidence.

Rainey next contends the fact the trial court issued a tentative ruling entitled her to present additional evidence at the hearing. According to Rainey, "once a tentative ruling has been provided, the issuing court should at least consider evidence that a challenging party submits for the judge's consideration" and that not doing so "undermines the legitimacy of the judicial process and is contrary to law." Rainey cites no authority that comes close to suggesting that a tentative ruling is an engraved invitation to present additional evidence at the follow-on hearing. Indeed, this assertion is directly contrary to the statutes and rules governing motion practice (discussed above), as well as the case law on the extent of a trial court's *discretion* to allow or disallow late-filed materials (also discussed above).

Finally, Rainey's insistence that the trial court blundered in refusing to consider her belated declaration disregards that at the hearing, she produced and used this declaration to demonstrate that "the parties strongly disagree about whether there is in fact an arbitration agreement" and to urge the court "to suspend any final determination of this motion pending" depositions focused on whether the parties had agreed to arbitrate. Counsel asserted it was "clear that parole evidence is necessary to explain the terms in the agreement." As we have discussed, these were points Rainey could have, and should have, made in a reply memorandum requesting that the court hold an evidentiary hearing or continue the hearing to allow discovery, followed by an evidentiary hearing. (See *Rosenthal, supra*, 14 Cal.4th at pp. 413–414 [explaining "summary" proceedings on petitions to compel arbitration]; *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412, 427–428 [focused discovery can be conducted in connection with petition to compel arbitration and remanding for such, followed by the "summary" procedure outlined in *Rosenthal*].) But Rainey did neither, and therefore should hardly have been surprised that the trial court rejected her much belated effort to head down an evidentiary course she had wholly ignored.

Sufficiency of the Evidence

While it is not entirely clear, Rainey also seems to be challenging the sufficiency of the evidence that was before the court to support the order denying arbitration. In this regard, Rainey points to e-mails from Clopton's attorney stating he will "be submitting our clients' claims through AAA" and inquiring about arbitrators, and a letter from Clopton's attorney entitled "Demand for Arbitration," identifying a proposed arbitrator, elaborating on the substance of Rainey's claims, and attaching a copy of an arbitration agreement identical to that attached to Rainey's motion to compel arbitration. Rainey maintains these communications from counsel constituted "admissions" by Clopton that she agreed to arbitrate, rendering immaterial any failure by Rainey to authenticate the supposed arbitration agreement and to establish that both parties, in fact, agreed to it.

We first observe that Rainey's challenge on appeal to the sufficiency of the evidence is at odds with the position she advocated in the trial court, i.e., that there were serious factual disputes and parole evidence was necessary to establish that the parties had entered into an agreement to arbitrate.

Further, the documents to which Rainey points are documents prepared by Clopton's attorney, and he timely submitted a declaration in opposition to the motion to compel arbitration averring that within two weeks of making the demand for arbitration, he contacted Rainey's attorney, stated he thought the arbitration agreement "was not well-written" and was in several respects "unconscionable," and also stated Clopton might pursue her claims in court. This plainly signaled to Rainey that Clopton was prepared to abandon arbitration and object to any motion to compel, underscoring that Rainey would have to establish, through competent and admissible evidence, an enforceable agreement to arbitrate.

In its order denying Rainey's motion, the trial court pointed out the declaration of her attorney submitted in support of the motion provided "no foundation for authenticating the [arbitration agreement] or authenticating [Clopton's] purported signature, or for declaring that this was in fact an arbitration agreement agreed upon by the parties." Each of these points is borne out by the record, and namely by the

minimalist declaration of Rainey's attorney. The court further pointed out the ostensible arbitration agreement did not name either Rainey or her business, but referred to " 'the Company' " without definition, plus it bore only one signature line and was ostensibly signed only by Clopton. The trial court therefore further found Rainey had not shown that she and her company "are parties to this purported Arbitration Agreement" and thus had not established "mutual assent." This finding is also supported by the record.

Finally, as for Rainey's assertion that Clopton "admitted" the existence of an arbitration agreement, it is now well-established that an attorney lacks apparent authority to bind his or her client to arbitrate. Accordingly, the trial court could not conclude, solely by virtue of communications from her attorney to Rainey's attorney, that Clopton "admitted" the existence of an agreement to arbitrate. (See *Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1213 ["signature of defendants' attorney on the arbitration stipulation, standing alone, did not constitute substantial evidence that defendants agreed to arbitrate the dispute"], italics omitted.)

DISPOSITION

The order denying arbitration is affirmed.

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Banke, J.

We concur:

_____
Humes, P.J.

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Margulies, J.