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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RANDY CROCKETT, Plaintiff and Respondent, v. JAMES D'AREZZO et al., Defendants and Appellants.	B260048 (Los Angeles County Super. Ct. No. BC551527)

APPEAL from an order of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Affirmed.

Crowder Law Center and Douglas A. Crowder for Defendants and Appellants.

Seki, Nishimura, & Watase, Andrew C. Pongracz and Kari C. Kadomatsu for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, James D'Arezzo, World Energy, LLC and Empire Gold, LLC, appeal from an order denying their motion to compel arbitration. Defendants do not challenge the trial court's refusal to enforce the arbitration agreement between plaintiff, Randy Crockett, and Empire Gold, LLC. Rather, defendants seek arbitration pursuant to the arbitration agreement between plaintiff and a co-defendant, American Mutual Mortgage. Defendants assert plaintiff's agency allegations are judicial admissions that entitle them to enforce the American Mutual Mortgage arbitration agreement as purported agents. We conclude defendants failed to meet their burden of proving they are entitled to enforce the arbitration agreement and affirm the order. In addition, we affirm the order based on the lack of an adequate record.

II. BACKGROUND

A. Unverified Complaint

On July 14, 2014, plaintiff filed an unverified complaint against defendants and co-defendants, Robert Weiss, John Fletcher, Catherine Tweed, Scott Saks, American Mutual Mortgage and International Fund Management. The unverified complaint alleges Mr. D'Arezzo, Ms. Tweed and Mr. Saks are high-ranking Scientologists who plaintiff considered trustworthy because of their prominence in the church. In May 2011, Ms. Tweed allegedly told plaintiff that Mr. Weiss and International Fund Management were entitled to extremely large commissions from a foreign bank. But Mr. Weiss and his company needed money to pay the fees demanded by the bank. Plaintiff agreed to loan $250,000 with the understanding that he would receive a significant success fee on top of the loan repayment. Plaintiff made the loan in reliance on Ms. Tweed's representations and promises which were later confirmed by Mr. D'Arezzo. Several weeks later, Ms. Tweed told plaintiff an additional $2 million was needed to obtain release of the money

from the bank. In July 2011, Ms. Tweed and Mr. D'Arezzo arranged for plaintiff to obtain a loan of $2.15 million. The loan was secured by plaintiff's real estate holdings and company stock. The loan was funded by a third party, Louis Cohen, and brokered by Mr. Saks and American Mutual Mortgage. Plaintiff never received any payment on his two loans.

Paragraph 12 of the unverified complaint states, "[Plaintiff] is informed and believes and thereon alleges that at all times herein mentioned, Defendant and each of them, including DOES 1 through 80, inclusive, were the agents, representatives and/or employees of each other and were at all times acting within the course and scope of said agency, representation and/or employment and pursuant to and with the knowledge, consent and/or ratification of each other Defendant." As will be noted, paragraph 12 is relied upon by defendants as a binding judicial admission pertinent to the right to compel arbitration. The unverified complaint alleges causes of action for: fraud; negligent misrepresentation; contract breach; implied covenant of good faith and fair dealing breach; violation of Business and Professions Code section 17200 et seq.; civil conspiracy; and fiduciary duty breach.

B. Defendants' Petitions to Compel Arbitration

On August 14, 2014, Mr. Saks and American Mutual Mortgage filed a petition to compel arbitration. In support of their petition, they relied on the arbitration agreement between plaintiff and American Mutual Mortgage. The July 14, 2011 arbitration agreement was signed by plaintiff and Mr. Saks, American Mutual Mortgage's president. The arbitration agreement contains the following provision: "BORROWER has or will obtain a mortgage loan (the 'Loan') made or arranged by American Mutual Mortgage. THE BROKER, THE BORROWER agrees that any and all disputes or controversies involving the Loan, including claims arising from the origination, documentation, disclosure, servicing, collection or any other aspect of the Loan transaction or the coverage or enforceability of this Agreement between THE BORROWER and THE

BROKER and/or the LENDER, identified by THE BROKER to THE BORROWER shall be subject to resolution exclusively [by binding arbitration under the terms of this Agreement. Such arbitration shall proceed in accordance with the rules of the American Arbitration Association, Los Angeles Section, Commercial Rules, then existent. In the event of any such arbitration, the parties thereto shall be entitled to conduct discovery as provided in Code of Civil Procedure sections 1283.05 and 1283.1, the provisions of the same being incorporated herein by this reference. This Agreement shall also be binding on the agents, successors and assigns of the parties to the loan]."

Separately, defendants moved to compel arbitration and stay proceedings on September 3, 2014. Defendants sought to enforce the arbitration provision in a July 9, 2011 agreement between plaintiff and Empire Gold, LLC. The agreement was signed by plaintiff and Mr. D'Arezzo. In addition, the defendants argued they were entitled to arbitrate the claims pursuant to the arbitration agreement between plaintiff and American Mutual Mortgage. Defendants asserted they could enforce the arbitration agreement as alleged agents of American Mutual Mortgage.

C. Trial Court Ruling

On September 30, 2014, the trial court held a hearing on both petitions to compel arbitration. The trial court ruled the arbitration agreement between plaintiff and American Mutual Mortgage was enforceable. In addition, the trial court found Mr. Saks could enforce the arbitration agreement because he acted as American Mutual Mortgage's agent. As to the arbitration agreement between plaintiff and Empire Gold, LLC, the trial court ruled, "The terms of this purported arbitration agreement are so lacking as to preclude enforcement by this Court." The trial court denied defendants' motion to compel arbitration. The trial court stayed the judicial proceedings as to American Mutual Mortgage and Mr. Saks. The trial court ordered the case to proceed as to the rest of defendants.

III. DISCUSSION

A. Standard of Review

On appeal from an order denying a petition to compel arbitration, we review de novo where the evidence is not in conflict. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236; *Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1468.) Likewise, we exercise our independent judgment as to questions of law. (*Duick v. Toyota Motor Sales, U.S.A., Inc.* (2011) 198 Cal.App.4th 1316, 1320; *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 12.) We review de novo the question of whether and to what extent a nonsignatory may enforce an arbitration agreement. (*DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1352 (*DMS Services*); *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 708 (*Molecular Analytical Systems*).) We review for substantial evidence where the trial court resolved disputed facts on the petition to compel arbitration. (*Peng v. First Republic Bank, supra,* 219 Cal.App.4th at p. 1468; *Brown v. Wells Fargo Bank, N.A,* (2008) 168 Cal.App.4th 938, 953.)

B. Enforcement of Arbitration Agreement by Nonsignatories

Because arbitration is a matter of contract, generally one must be a party to an arbitration agreement to invoke or be bound by its terms. (*DMS Services, supra,* 205 Cal.App.4th at p. 1352; *Molecular Analytical Systems, supra,* 186 Cal.App.4th at p. 706.) However, limited exceptions allow a nonsignatory to invoke the arbitration agreement. (*Jones v. Jacobson, supra,*195 Cal.App.4th at p. 18; *DMS Services, supra,* 205 Cal.App.4th at p. 1353; *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513.) One such exception is when a nonsignatory has an agency relationship with a party to the arbitration agreement. (*Jones v. Jacobson, supra,*195 Cal.App.4th at p. 18 [“‘Exceptions in which an arbitration agreement may be enforced by or against nonsignatories include

where a nonsignatory is a third party beneficiary of the agreement [citation] and when a nonsignatory and one of the parties to the agreement have a preexisting agency relationship that makes it equitable to impose the duty to arbitrate on either of them. [Citations.]' [Citation.]"]; *DMS Services, supra,* 205 Cal.App.4th at p. 1353.) A nonsignatory seeking arbitration bears the burden of proving it is an intended beneficiary or party to the arbitration agreement. (*Jones v. Jacobson, supra,*195 Cal.App.4th at p. 15; *City of Hope v. Bryan Cave, L.L.P.* (2002) 102 Cal.App.4th 1356, 1369-1370.)

Defendants are not signatories to the American Mutual Mortgage arbitration agreement. But defendants argue the fact they have no arbitration agreement with plaintiff is immaterial. Defendants contend they are entitled to enforce the American Mutual Mortgage arbitration agreement because of the agency allegations made by plaintiff in the complaint. As previously noted, paragraph 12 of the unverified complaint alleges, "[Plaintiff] is informed and believes and thereon alleges that at all times herein mentioned, Defendants and each of them, including DOES 1 through 80, inclusive, were the agents, representatives and/or employees of each other and were at all times acting within the course of and scope of said agency, representation and/or employment and pursuant to and with the knowledge, consent and/or ratification of each other Defendant."

In support of their argument, the defendants rely exclusively on *Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 614. In *Thomas*, the complaint alleged the defendants acted as an agent for each of the other defendant. (*Thomas v. Westlake, supra,* 204 Cal.App.4th at p. 614.) The Fourth Appellate District, Division One concluded plaintiff's allegations of an agency relationship among defendants constituted binding judicial admissions that allowed the nonsignatory parties to invoke the benefits of the arbitration agreement. (*Id.* at pp. 614-615.) The appellate court held the nonsignatory parties could enforce arbitration clauses contained in plaintiff's account agreements as alleged agents of the signatory defendant. (*Id.* at p. 618.)

But *Thomas* has been distinguished by a subsequent case, *Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446, 453 (*Barsegian*). In *Barsegian*, the Second Appellate District, Division One rejected the defendants' contention that they were

entitled to enforce the arbitration agreement based on the agency allegations in the complaint. (*Barsegian, supra,* 215 Cal.App.4th at p. 451.) Our Division One colleagues observed, "Complaints in actions against multiple defendants commonly include conclusory allegations that all of the defendants were each other's agents or employees and were acting within the scope of their agency or employment." (*Ibid*.) The *Barsegian* court reasoned not every factual allegation in a complaint constituted a judicial admission. (*Id.* at pp. 451-452.) Our colleagues in Division One explained: "[A] judicial admission is ordinarily *a factual allegation by one party that is admitted by the opposing party*. The factual allegation is removed from the issues in the litigation because the parties *agree* as to its truth. . . . [¶] A judicial admission is therefore conclusive both as to the admitting party *and as to that party's opponent.* [Citation.]" (*Id.* at p. 452.) The *Barsegian* court distinguished *Thomas* because there it was not clear whether all sides conceded as to the mutual agency of the defendants. (*Id.* at p. 453.) Like the defendants in *Barsegian*, defendants do not concede they are agents of American Mutual Mortgage. Defendants submitted no evidence they have a preexisting agency relationship with American Mutual Mortgage. Defendants merely rely on the boilerplate agency allegations in paragraph 12 of the unverified complaint. Defendants have failed to meet their burden of establishing they are parties under the arbitration agreement as agents of American Mutual Mortgage. (*Jones v. Jacobson, supra,*195 Cal.App.4th at p. 15; *City of Hope v. Bryan Cave, L.L.P., supra,* 102 Cal.App.4th at pp. 1369-1370.)

C. Inadequate Record

Defendants have not provided this court with a reporter's transcript, a settled statement, or an agreed statement of the September 30, 2014 hearing on the petitions to compel arbitration. On March 19, 2015, we requested the parties to brief whether defendants' failure to designate a reporter's transcript or suitable substitute warrants affirmance based on the inadequacy of the record. On April 14, 2015, defendants filed a brief arguing they provided an adequate record by including the following documents in

the appeal record: the complaint; the motions to compel arbitration; the arbitration agreements; and the trial court's final ruling. They reiterate this contention in their reply brief.

A judgment is presumed to be correct and appellant has a duty to provide the reviewing court with an adequate record to demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Jones v. Jacobson, supra,*195 Cal.App.4th at p. 12 ["We also must presume the court found every fact and drew every permissible inference necessary to support its judgment or order . . . ."]; *Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1224; *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 494; *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58.) In numerous situations, courts have refused to reach the merits of an appellant's claims because appellant failed to provide a reporter's transcript of a pertinent proceeding or a suitable substitute. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 273-274 [transfer order]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [attorney fee motion hearing]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 (lead opn. of Grodin, J.) [new trial motion hearing]; *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [hearing to determine whether counsel was waived and minor consented to informal adjudication]; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1672 [no record of judge's ruling on an instruction request]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447 [attorney fee award affirmed where trial transcript not provided]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [no reporter's transcript of surcharge hearing]; *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657 [nonsuit motion affirmed where reporter's transcript not provided]; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [monetary sanctions hearing]; *Hernandez v. City of Encinitas* (1994) 28 Cal.App.4th 1048, 1076-1077 [preliminary injunction hearing]; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532 [reporter's transcript fails to reflect content of special instructions]; *Buckhart v. San Francisco Residential Rent etc., Bd.* (1988) 197 Cal.App.3d 1032, 1036 [hearing on Code Civ. Proc., § 1094.5 petition]; *Sui v. Landi* (1985) 163 Cal.App.3d 383, 385 [order denying preliminary injunction dissolution

affirmed based on lack of reporter's transcript]; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 711-712 [demurrer hearing]; *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 71-73 [argument to jury not in reporter's transcript]; *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 462 [failure to secure reporter's transcript or settled statement as to offers of proof]; *Wetsel v. Garibaldi* (1958) 159 Cal.App.2d 4, 10 [no reporter's transcript of hearing confirming arbitration award].) We affirm the order denying the petition to compel arbitration based on defendants' failure to provide an adequate record.

IV. DISPOSITION

The order is affirmed. Plaintiff, Randy Crockett, shall recover his costs on appeal from defendants, James D'Arezzo, World Energy, LLC and Empire Gold, LLC.

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TURNER, P. J.

I concur:

KIRSCHNER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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MOSK, J., Concurring

I concur.

I concur that the order should be affirmed. I do not agree that there is an inadequate record, as the issues are matters of law and reviewed de novo.

MOSK, J.