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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

UNION PATRIOT CAPITAL MANAGEMENT II, LLC et al., Plaintiffs and Respondents, v. RICHARD RIONDA DEL CASTRO et al., Defendants and Appellants.	B293436 (Los Angeles County Super. Ct. No. BC687697)

APPEAL from an order of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed.

Abrams Coate and Charles M. Coate for Defendants and Appellants.

Daniels, Fine, Israel, Schonbuch & Lebovits and Maureen M. Michail for Plaintiffs and Respondents.

I. INTRODUCTION

Defendants Richard and Patricia Rionda del Castro, Hannibal Classics, Inc. (Hannibal), a California corporation, and USS Indianapolis Production, Inc. (USS Indianapolis Prod.), a Nevada corporation, appeal from an order denying in part their motion to compel arbitration and stay proceedings.[1] Plaintiffs Union Patriot Capital Management, LLC (Union Patriot I) and Union Patriot Capital Management II, LLC (Union Patriot II), Delaware limited liability companies, and I Am Wrath Production, Inc. (Wrath), a California corporation, sued defendants for various causes of action arising from a series of agreements to finance and distribute two films.

Defendants moved to compel arbitration for all causes of action, citing an arbitration clause in an agreement concerning one of the two films. The trial court denied their motion in part. We affirm.

II. BACKGROUND

A. *Agreements*

This case involves the purported breach of agreements to finance and distribute two different film projects: *I Am Wrath* and *USS Indianapolis: Men of Courage* (*USS Indianapolis*). Various related parties entered into four agreements that governed the parties' rights and obligations.

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[1] Because they share the same last name, we will refer to Richard and Patricia by their first names. Richard and Patricia are the owners of Hannibal and USS Indianapolis Prod.

1. I Am Wrath SAA

On February 27, 2015, Union Patriot I, Wrath, and Hannibal entered into an agreement entitled "Sales Agency Agreement" (SAA). In that agreement, Wrath and Union Patriot I were identified as the "owners" of the film *I Am Wrath,* and they granted Hannibal the exclusive right to distribute the film, in exchange for certain considerations. The SAA contained an arbitration clause at paragraph 28: "Any controversy or claim arising out of, or relating to, this Agreement, the breach thereof, or the validity of this arbitration provision, shall be settled by binding arbitration in Los Angeles, California before one neutral arbitrator in accordance with the IFTA Rules of International Arbitration [(IFTA Rules)], and the judgment upon any award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Nothing contained herein shall prevent any party from (i) seeking and obtaining equitable relief against a third party not a party to this agreement, including but not limited to, prohibitory or mandatory injunctions, specific performance, or extraordinary writs, nor (ii) joining a third party."[2]

2. USS Indianapolis Agreements

On June 19, 2015, Union Patriot II entered into three agreements with various parties concerning the film *USS*

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[2] "IFTA" is an abbreviation for "Independent Film & Television Alliance," which provides services such as arbitration. (Selz et al., Entertainment Law 3d: Legal Concepts and Business Practices (2018) § 1:123.)

Indianapolis. In an agreement entitled "Financing Agreement," Union Patriot II agreed to provide funding to USS Indianapolis Prod. for the production of the film *USS Indianapolis*, in exchange for certain rights. In the "Sales Agent Interparty Agreement," Union Patriot II, Hannibal, and USS Indianapolis Prod. detailed their respective agreed-upon distribution rights to the film.[3] Finally, in an agreement entitled "Continuing Guaranty," Richard guaranteed that he would pay any amounts owed by USS Indianapolis Prod. pursuant to the Financing Agreement. The Continuing Guaranty included a document entitled "Spousal Consent," which was signed by Patricia.

Of the three *USS Indianapolis* agreements, only the Sales Agent Interparty Agreement contained an arbitration clause, which provided: "In the event any dispute arises between Borrower [USS Indianapolis Prod.], Guarantor and/or Sales Agent [Hannibal], on the one hand, and Financier [Union Patriot II] or the Approving Party [a designee of Union Patriot II], on the other hand, as to whether Mandatory Delivery has been effected in accordance with the requirements of Paragraph 13 hereof, each of said parties hereby agrees to submit such dispute to binding arbitration . . . ." The parties agree that the arbitration clause in the Sales Agent Interparty Agreement is not applicable to the claims here because the parties raised no dispute regarding mandatory delivery.

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[3] Out of the Box Investment, Inc. was also a party to the Sales Agent Interparty Agreement, but is not a party to the underlying action.

B. *Complaint, Demurrer, and First Amended Complaint*

On December 21, 2017, plaintiffs filed a complaint against defendants for 12 causes of actions. The complaint attached the parties' four agreements as exhibits.

On March 9, 2018, defendants demurred to the first through tenth causes of action. On May 1, 2018, the trial court sustained in part the demurrer.

On May 18, 2018, plaintiffs filed their first amended complaint, the operative pleading. The first amended complaint did not attach as exhibits any of the agreements. In the first through fifth causes of action, Union Patriot II sued various defendants for fraud, breach of the Financing Agreement, conversion, interference with the Sales Agent Interparty Agreement, and breach of the Continuing Guaranty, contending that defendants had made false representations regarding their ability to secure payments from distributors for *USS Indianapolis* and had stolen the proceeds of undisclosed distribution sales.

In the sixth through tenth causes of action, plaintiffs Union Patriot I and Wrath alleged that defendants had engaged in fraud and conversion, interfered with a contract, and conspired to and did breach their fiduciary duty to plaintiffs, in connection with the film *I Am Wrath*. Plaintiffs contended that defendants had fraudulently induced plaintiffs to engage Hannibal as a sales agent for the film, based on overstated distribution sales projections, and had stolen the proceeds of undisclosed sales of distribution rights.

All three plaintiffs alleged the eleventh cause of action, imposition of a constructive trust, and the twelfth cause of action,

an accounting, against all defendants. Plaintiffs requested as relief compensatory and punitive damages, imposition of a constructive trust, an accounting, prejudgment interest, reasonable attorney fees, and costs.

D. *Motion to Compel Arbitration*

On June 18, 2018, defendants moved to compel arbitration of the entire action pursuant to the Federal Arbitration Act (FAA) and the California Arbitration Act (CAA).[4] Defendants argued that based on the SAA's arbitration clause, each cause of action in the first amended complaint was subject to mandatory arbitration pursuant to the IFTA Rules. Defendants also moved for the entire action to be stayed pending completion of arbitration.

Plaintiffs opposed the motion and argued that the causes of action related to *USS Indianapolis* (in other words, the first through fifth causes of actions and part of the eleventh and twelfth causes of action) were not subject to any arbitration agreement. Plaintiffs contended that the SAA's arbitration clause applied only to obligations related to *I Am Wrath*. Plaintiffs further asserted defendants Richard, Patricia, and USS Indianapolis lacked standing to enforce the SAA's arbitration clause because they were not signatories to that agreement.

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[4] Defendants also cited the Federal International Arbitration Act and the California International Arbitration Act. Defendants fail to make any argument in support of these statutes on appeal. Accordingly, we deem any issue concerning those statutes waived. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 ["'We are not bound to develop appellants' arguments for them'"].)

Finally, plaintiffs argued that defendants by their litigation conduct had waived any right to enforce the arbitration clause.

E. *Ruling*

On September 19, 2018, the trial court heard argument on the motion to compel arbitration and issued its decision. The trial court granted in part and denied in part defendants' motion. The court found that the SAA's arbitration clause "does not govern any aspect of the dispute related to *USS Indianapolis*" (italics added), and denied the motion to compel as to the first through fifth causes of action and the portions of the eleventh and twelfth causes of action that related to *USS Indianapolis*. The court granted the motion to compel arbitration as to the sixth through tenth causes of action, and those portions of the eleventh and twelfth causes of action pertaining to *I Am Wrath*. The trial court also found defendants had not waived their arbitration rights.[5]

III. DISCUSSION

As a preliminary matter, the FAA applies to the SAA, which is a contract involving interstate commerce. (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350-1351 ["Section 2 of the FAA, declaring the enforceability of arbitration agreements, 'create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement

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[5] The trial court stayed the first through fifth causes of action.

within the coverage of the Act.' [Citation.] The FAA governs agreements in contracts involving interstate commerce"].)

Defendants argue that pursuant to the SAA's arbitration clause, the arbitrator, rather than the court, should have decided the issue of arbitrability, that is, whether the parties agreed to arbitrate a dispute. We disagree. Before deciding whether an arbitration clause delegates the arbitrability issue to an arbitrator, a court must first "determine[] whether a valid arbitration agreement exists." (*Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 586 U.S. __ [139 S.Ct. 524, 530] (*Henry Schein*), citing 9 U.S.C. § 2.) In other words, the threshold question is whether the parties have agreed to arbitrate. *(Long v. Provide Commerce, Inc.* (2016) 245 Cal.App.4th 855, 861; *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396.) "To presume arbitrability without first establishing, independently, consent to arbitration is to place the proverbial cart before the horse." (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 252.)

As with all contracts, when there is no conflicting extrinsic evidence, we apply a de novo review to the interpretation of the contract. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866; *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1202.) Our de novo review of the SAA demonstrates that Union Patriot II, which is not a party to that agreement, did not agree to arbitrate its claims. (*Benaroya v. Willis* (2018) 23 Cal.App.5th 462, 468 ["(T)he (arbitration) agreement cannot bind nonsignatories, absent a judicial determination that the nonsignatory falls within the limited class of third parties who can be compelled to arbitrate"]; *Henry Schein, supra*, 139 S.Ct. at p. 529 [under the FAA, "arbitration is a matter of contract, and courts must enforce arbitration

contracts according to their terms"].) Thus, on its face, the SAA's arbitration clause does not apply to any of the causes of action asserted by Union Patriot II, that is, the first through fifth causes of action and those portions of the eleventh and twelfth causes of action that seek a constructive trust and accounting for the distribution proceeds of *USS Indianapolis*. Defendants made no effort to argue either below or on appeal that Union Patriot II, as a nonsignatory, is bound by the arbitration clause. Defendants have thus waived and forfeited any argument that Union Patriot II should be compelled to arbitration pursuant to the SAA's arbitration clause. (*G & W Warren's Inc. v. Dabney* (2017) 11 Cal.App.5th 565, 570, fn. 2; *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 451-452.) Accordingly, the trial court did not err by denying the motion to compel arbitration in part as to the causes of action concerning *USS Indianapolis*.[6]

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[6] On appeal, plaintiffs re-assert their argument that defendants waived their right to arbitrate all of their causes of actions. We reject this argument on two grounds. First, "'[a]s a general matter, "'a respondent who has not appealed from the judgment [or order] may not urge error on appeal.'"'" (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 665.) Second, orders granting motions to compel arbitration are not appealable. (*Young v. RemX, Inc.* (2016) 2 Cal.App.5th 630, 634.)

IV. DISPOSITION

The order is affirmed. Plaintiffs are entitled to recover their costs on appeal.

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KIM. J.

We concur:

BAKER, Acting P. J.

MOOR, J.