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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

FRIDA DILONELL, Plaintiff and Appellant, v. SUZANNE CHANDLER, Defendant and Respondent.	B282634 (Los Angeles County Super. Ct. No. BS164453)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. Elizabeth Allen White, Judge. Affirmed in part and reversed in part.

Law Office of Judith K. Williams and Judith K. Williams for Plaintiff and Appellant.

Plotkin Marutani & Kaufman, Jay J. Plotkin and Nancy O. Marutani for Defendant and Respondent.

This case arises out of communications surrounding a potential sale of real estate. Frida Dilonell (appellant) was the prospective buyer, and Suzanne Chandler (respondent) the seller. As part of her complaint appellant filed a petition to compel arbitration based on a purported contract between the parties. The trial court denied the petition on the ground that no agreement to arbitrate existed between the parties, and entered a judgment of dismissal. Appellant then filed a motion to vacate the judgment pursuant to Code of Civil Procedure section 663, which was denied. Appellant appeals from the judgment and the trial court's subsequent award of attorney fees in favor of respondent.

We affirm the judgment, but reverse the attorney fee award due to respondent's refusal to engage in mediation prior to the commencement of the litigation.

FACTUAL BACKGROUND

The property which is the subject of this action is located at 703 Walnut Street, Inglewood, California (property). It consists of five separate, tenant-occupied bungalows, within walking distance of the site of the Los Angeles Rams stadium presently under construction.

Respondent, a 66 year-old woman, is 50 percent owner of the property. The property was purchased over 50 years ago by respondent's grandmother. Respondent received her portion of the property through a quitclaim deed signed and delivered to respondent by her mother. The other 50 percent was owned by now deceased Alice Jackson. Respondent never bought or sold real estate prior to the events described here. She had no education or training in matters related to the purchase or sale of real estate. Respondent has not been employed for the past 18 years, other than caring for her elderly parents.

In July 2013, respondent signed an agreement with MGConnection Premier Real Estate Services for the management of the property. Gail Anderson (Anderson) acted as agent for MGConnection.

After respondent's mother died in March 2016, Anderson discussed with respondent the possibility of selling the property. Respondent was reluctant to sell, but Anderson told her that if she did not sell, it was likely that Jackson would file a partition action against her and force the sale. When asked by respondent, who had not visited the property in 20 years, how much Anderson thought the property was worth, Anderson said $800,000. Respondent was aware of the new Rams football stadium being constructed nearby. When asked, Anderson told respondent the property was not near the new stadium. Respondent agreed that Anderson could attempt to find a buyer for the property.

Anderson received a number of offers on the property, but they were all below $800,000. On May 12, 2016, Anderson called respondent to arrange to send respondent an offer for the property. Since respondent did not have a fax machine they agreed the fax would be sent to the Fed Ex office in Woodland Hills.

Before respondent had a chance to read it, Anderson called and told respondent to disregard the fax. Anderson had received another offer, for more money, from another person. Respondent asked Anderson to send her the second offer so that she could review it. Anderson told her there was not enough time to do that, and that they would lose the offer if it was not accepted. Anderson told respondent she would just sign respondent's name to the offer. Respondent reluctantly agreed. Respondent stated that she "felt pressured because Ms. Anderson was telling me what to do and what to say and telling me the urgency of my acting before the offer was lost."

Anderson directed respondent to send a voice mail authorizing Anderson to sign respondent's name. Anderson told respondent exactly what to say in the voice mail. Respondent sent the voice mail on May 14, 2016, despite the fact that she had not yet received any paperwork regarding the sale. Respondent believed that she was only authorizing Anderson to start a process which would include respondent's opportunity to review the agreement and further discuss it with Anderson before final agreement.

In the same telephone conversation, Anderson informed respondent that the sale price remained $800,000 but the sale was an "as is" sale. Anderson did not inform respondent of any other terms or conditions of the offer. She never mentioned the arbitration provision contained in paragraph 31 of the purchase agreement. If asked, respondent would have informed Anderson that she did not have the means to pay for an arbitration and would want any disputes heard by a court. Nevertheless, Anderson initialed paragraph 31 on behalf of respondent. Respondent later learned that Anderson signed her name to other documents required in the transaction, although Anderson had never submitted the papers to respondent.

On May 20, 2016, respondent assumed the deal had not gone through since she had received no paperwork. She called Anderson, who told her the deal had gone through. Respondent recalled stating, "what do you mean the deal went through, I never saw the papers." Respondent expressed her objection to the sale but Anderson stated that escrow had opened and respondent could not now get out of the deal.

Respondent never gave Anderson signed, written authorization to sign respondent's name to real estate documents related to the property. Respondent informed Anderson that she objected to the deal, and also told appellant's broker that she did

not sign the agreement and was canceling the transaction. On May 27, 2016, respondent wrote to Anderson telling her that respondent was canceling the transaction and terminating Anderson as property manager.

PROCEDURAL HISTORY

On August 16, 2016, after respondent refused to sell, appellant filed a petition to compel arbitration as part of her complaint. No hearing date was specified. On November 30, 2016, respondent filed an opposition to the motion, attaching respondent's declaration and the declaration of her attorney, Jay Plotkin. On January 30, 2017, appellant filed a notice of motion and petition to compel arbitration, setting a hearing date of February 23, 2017. On February 7, 2017, respondent opposed the motion, attaching declarations of respondent and her attorney as well as documentary and testimonial evidence. In her opposition, respondent argued that there was no agreement between the parties because the statute of frauds (Civ. Code, §§ 1624, 1091) required the agreement to be signed. Although Anderson signed respondent's name to the agreement, the equal dignities rule (Civ. Code, § 2309) required Anderson's authority to do so be in a writing signed by respondent, which respondent had never provided.

In reply, appellant argued that the oral message left by respondent on Anderson's answering machine constituted a signed writing under the Uniform Electronic Transaction Act (UETA) (Civ. Code, § 1633.1 et seq.) Alternatively, appellant argued that Anderson's signing/initialing on behalf of respondent was a ministerial act which did not involve the exercise of discretion and was thus permitted by the doctrine of amanuensis.

The hearing was held on February 23, 2017,[1] at which time the court provided the parties with a tentative decision. After hearing argument, the court adopted its tentative as the final order. The trial court found that respondent did not enter into the purchase agreement, which includes the arbitration provision, "because [respondent] did not give Anderson signed, written authority to sell the property on [respondent's] behalf." Thus, no written agreement to arbitrate existed between the parties. The petition to compel arbitration was denied.

On March 1, 2017, the court signed a judgment of dismissal, and notice of entry of judgment was mailed. On March 6, 2017, respondent filed a memorandum of costs in the amount of $3,275.11.

On March 8, 2017, appellant filed objections to the statement of decision and judgment. Appellant objected to the trial court's entry of judgment prior to the time allowed under Code of Civil Procedure section 634 and California Rules of Court, rule 3.1590(g). Further, appellant objected on the ground that the trial court failed to resolve the issue of whether the voice recording was an electronic record under the UETA. Finally, appellant argued that the statement of decision did not address the question of whether the doctrine of amanuensis was applicable.

On March 9, 2017, respondent filed a motion for attorney fees and a reply to appellant's objections.

On March 16, 2017, appellant filed a notice of intention and motion to set aside and vacate judgment and enter different

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[1] Though no reporter's transcript of the hearing was provided, we are able to resolve the appeal without a reporter's transcript. A transcript is not required in this appeal. (Cal. Rules of Court, rules 8.120(b), 8.130(a)(4).)

judgment (motion to vacate) pursuant to Code of Civil Procedure section 663.

On March 23, 2017, appellant filed a notice of motion and motion to tax costs.

On March 23, 2017, the trial court overruled appellant's objections to the statement of decision and judgment. On the same date, respondent's opposition to appellant's motion to vacate was filed.

Appellant's motion to vacate was heard on April 25, 2017. Again, the court provided the parties with a tentative ruling. After hearing oral arguments, the tentative ruling became the court's final order. The court found that appellant failed to provide evidence that appellant and respondent agreed to conduct the transaction by electronic means. Thus, the UETA was inapplicable. Further, the court found that the doctrine of amanuensis was inapplicable because Anderson "obviously had an interest in the purchase agreement because she would have obtained a commission from the sale as listing agent." Further, the court found that Anderson pressured respondent into accepting appellant's offer. Based on this evidence the court found that Anderson was not signing respondent's name merely as a mechanical act, but had made the decision to accept the offer and directed respondent to authorize her to sign respondent's name. Under the circumstances, the court found the doctrine of amanuensis to be inapplicable.

On May 5, 2017, the trial court granted respondent's motion for attorney fees in the reduced amount of $26,400.

On May 17, 2017 appellant filed her notice of appeal from the order denying her motion to vacate.

On May 25, 2017, a signed order awarding respondent attorney fees was filed.[2]

DISCUSSION

I. Timeliness of appeal

We first address respondent's argument that appellant's appeal from the judgment is untimely and should be dismissed. "The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal. [Citation.]" (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.)

The judgment denying appellant's petition to compel arbitration was entered on February 23, 2017, and was immediately appealable. On March 1, 2017, the court signed a judgment of dismissal, and notice of entry of judgment was mailed. Ordinarily, an aggrieved party has 60 days from service of notice of entry of judgment to appeal. (Cal. Rules Court, rule 8.104.) Thus, appellant's May 17, 2017 notice of appeal was untimely unless the time to appeal was extended.

The filing of a valid motion to vacate the judgment extends the time to appeal. (Cal. Rules Court, rule 8.108(c).) Under these circumstances, the time to appeal from the judgment is extended to the earliest of: (1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; (2) 90 days after the first notice of intention to move -- or motion -- is filed; or (3) 180 days after entry of judgment. (Cal.

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[2] Although appellant's notice of appeal was filed eight days prior to entry of the signed order regarding attorney fees, and may have been premature as to the attorney fee ruling, we will treat the premature notice as timely. (*Eckhart v. Genuine Parts Distributors* (1997) 53 Cal.App.4th 1340, 1344.)

Rules Court, rule 8.108(c).) Thus, if appellant's motion to vacate was a valid motion, her appeal is timely under rule 8.108(c).

Respondent argues that appellant' s motion to vacate was not valid in that appellant's motion to vacate merely repeated her objections to the statement of decision. Respondent asserts that this does not comport with the grounds for a valid motion to vacate, which must set forth an "[i]ncorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts." (Code Civ. Proc., § 663.)

Appellant's motion to vacate was made pursuant to Code of Civil Procedure section 663 on the grounds that the legal basis for the decision is not consistent with, nor supported by, the facts. The motion then points out that the statement of decision did not address the issues of whether (1) the digital voice recording was an electronic record pursuant to the UETA; and (2) the doctrine of amanuensis applied. However, in the body of the motion, appellant argues that the undisputed facts support a conclusion that the UETA, and the doctrine of amanuensis, apply. The motion concludes:

> "By finding that Respondent did not enter into the Property Purchase Agreement because she did not give Anderson authority in writing, and by not applying the terms of the [UETA] and the [amanuensis] rule to the undisputed facts of this case, the legal basis for the Court's judgment is incorrect and the statement of decision should be amended and corrected."

Thus, appellant' s motion raises a purportedly incorrect legal basis for the decision. Further, the Advisory Committee Comment following California Rules of Court, rule 8.108, specifically provides that "the word 'valid' means only that the motion . . . complies with all procedural requirements; it does not mean that the motion . . . must also be substantively

meritorious." (Advisory Com. com., Thomson Reuters Cal. Rules of Court (2018 Rev. Ed.) foll. rule 8.108, p. 502.) Because appellant's motion to vacate complied with all procedural requirements, and set forth purportedly incorrect legal basis for the trial court's decision, we find it was a valid motion for the purposes of extending the time to appeal the judgment.

Pursuant to California Rules Court, rule 8.108(c), appellant's appeal is timely, thus we have jurisdiction to consider the merits.

II. Standards of review

A party who petitions the trial court to compel arbitration bears the burden of establishing the existence of a valid agreement to arbitrate. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 356.) The trial court's factual determination as to whether an agreement to arbitrate exists is reviewed for substantial evidence. (*Id.* at p. 357.) However, if the court's denial rests on a decision of law, then the de novo standard applies. (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1406.)

III. UETA

The California UETA generally provides that "[i]f a law requires a record to be in writing, an electronic record satisfies the law." (Civ. Code, § 1633.7, subd. (c).) It further provides that "[i]f a law requires a signature, an electronic signature satisfies the law." (§ 1633.7, subd. (d).) An electronic signature is defined as "an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record." (§ 1633.2, subd. (h).)

However, the UETA has a several limitations. Significantly, it applies "only to a transaction between parties each of which has agreed to conduct the transaction by electronic

means." (Civ. Code, § 1633.5, subd. (b).)[3] This requires a "separate" agreement, "the primary purpose of which is to authorize a transaction to be conducted by electronic means." This separate agreement authorizing the transaction to be conducted by electronic means "may not be contained in a standard form contract that is not an electronic record." (§ 1633.5, subd. (b).)

The trial court properly determined that the purported agreement between appellant and respondent did not meet these requirements. The trial court focused on the provision specifying that the UETA "applies only to a transaction between parties each of which has agreed to conduct the transaction by electronic means." (Civ. Code, § 1633.5, subd. (b).) Because appellant and respondent were the parties to the real property sales agreement that contained the arbitration provision, appellant and respondent would have had to have agreed to conduct the real estate transaction by electronic means. Appellant did not provide any evidence that she and respondent agreed to conduct the real estate transaction by electronic means. Thus, appellant failed to prove that the UETA applies. (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 987, 989 [holding that trial court's determination that printed name on email was an enforceable electronic signature was "manifestly erroneous" where parties did not meet requirements of UETA, including requirement that parties agree to conduct transactions by electronic means].)

Appellant argues that respondent and Anderson, not respondent and appellant, were parties to the "transaction" to

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[3] A "transaction" is defined as "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs." (Civ. Code, § 1633.2, subd. (o).)

which the UETA applies. Appellant contends that respondent and Anderson agreed to, and did, conduct an electronic transaction using the voice mail as authorization for Anderson to sign respondent's name. This argument is not persuasive. In order for the real estate purchase agreement to be valid, appellant and respondent would have to separately agree that respondent would give her consent to the contract by electronic means. Appellant offers no evidence that appellant and respondent entered such an agreement. Thus, the UETA did not apply.

Further, the UETA specifies that an electronic signature must be "executed or adopted by a person with the intent to sign the electronic record." (Civ. Code, § 1633.2, subd. (h).) The evidence in the record does not suggest that respondent intended to sign a final agreement to sell the property. The evidence is unclear as to whether respondent even received the written offer from appellant. Respondent felt pressured to leave the voice mail for Anderson, due to Anderson's representation that there was no time for her to fax the offer or it would be lost. Further, respondent believed that her voice message to Anderson merely started a process which would include respondent's opportunity to review the agreement and discuss it with Anderson before a final agreement was reached. Thus, the evidence supports a finding that respondent's voice mail to Anderson did not constitute an intentional "electronic signature" on the purported real property sale contract between appellant and respondent.

In sum, because there was no agreement between appellant and respondent to conduct the transaction by electronic means, and because respondent lacked intent to sign her name to the real property sale agreement, the UETA does not apply. Because the UETA does not apply, neither the purported contract, nor the arbitration provision, are enforceable.

IV. Doctrine of amanuensis

The doctrine of amanuensis provides that "where the signing of a grantor's name is done with the grantor's express authority, the person signing the grantor's name is not deemed an agent but is instead regarded as a mere instrument or amanuensis of the grantor." (*Estate of Stephens* (2002) 28 Cal.4th 665, 670-671 (*Stephens*).) Under these circumstances, "that signature is deemed to be that of the grantor. [Citation.]" (*Ibid.*) In *Stephens*, the high court applied the doctrine of amanuensis to validate a grant deed where a man had instructed his daughter to execute, notarize, and record the deed. The court stated that the doctrine applied where "an agent, acting with merely mechanical and no discretionary authority," signs the principal's name. (*Id.* at p. 675.)

However, the *Stephens* court emphasized that "if the amanuensis will directly benefit from the transfer of title, the validity of the transfer must be examined under a heightened level of judicial scrutiny." (*Stephens, supra,* 28 Cal.4th at p. 677.) The burden of proof shifts to the advocate of application of the doctrine "'to show that the transaction was free from fraud and undue influence, and in all particulars fair.' [Citation.]" (*Ibid.*) Because unscrupulous parties could attempt to use the amanuensis rule to sidestep the protections contained in the law, "the signing of a grantor's name by an interested amanuensis must be presumed invalid." (*Id.* at pp. 677-678.) The daughter in *Stephens* successfully rebutted that presumption by overwhelming evidence.

Here, the presumption of invalidity existed. The purported amanuensis, Anderson, was an interested party who stood to gain financially from the real estate transaction. The documents before the trial court included a commission agreement, which provided Anderson a broker's commission of five percent. Thus,

appellant, who seeks to enforce the sale agreement, bore the burden of showing that Anderson's signing of respondent's name was a mechanical act and that the transaction was free from fraud, undue influence, and was fair in all particulars. (*Stephens, supra,* 28 Cal.4th at p. 677.)

Substantial evidence supports the trial court's determination that appellant failed to overcome the presumption of invalidity. The trial court found that Anderson pressured respondent into accepting the offer, at the risk of losing the offer, before respondent even had a chance to review it. Respondent's declaration supports this factual determination. The trial court found that, based on this evidence, it was Anderson who made the decision to accept the offer and directed respondent to authorize her to sign respondent's name. Under these circumstances, the doctrine of amanuensis does not apply.

Furthermore, there was evidence before the trial court that respondent was unaware that the contract contained an arbitration provision. Respondent provided evidence that she did not have the opportunity to review the agreement. Anderson never mentioned to her that it contained an arbitration clause, nor did Anderson explain what an arbitration was or what rights respondent was giving up in agreeing to arbitration. Respondent asserted that had she been aware of it, she would not have agreed to an arbitration provision. Substantial evidence supports the trial court's determination that respondent did not authorize Anderson to agree to arbitration.

The evidence supports the trial court's determination that Anderson coerced respondent into authorizing her signature on the purchase agreement. Under the circumstances, the doctrine of amanuensis does not apply to validate either the agreement or the arbitration provision contained therein.

V. Attorney fee award

A. Standard of review and applicable law

The question of a party's entitlement to attorney fees is a legal issue subject to de novo review. (*Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1016.) The amount of attorney fees is reviewed for abuse of discretion. (*Id.* at p. 1017.) An order awarding attorney fees is presumed correct, and all findings, express or implied, are reviewed under the substantial evidence standard. (*Ibid.*)

Civil Code section 1717 allows for attorney fees on a contract when the contract is held to be unenforceable.[4] (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870 (*Hsu*) [holding that a party is entitled to attorney fees under Civil Code section 1717 even when the party prevails on the ground that the contract is inapplicable, invalid, unenforceable, or nonexistent, if the other party would have been entitled to attorney fees had it prevailed].)

The purported contract at issue in this matter contained an attorney fee clause, which provided:

> "'In any action, proceeding or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorneys fees and costs from the non-prevailing Buyer or Seller except as provided in Paragraph 31A.'"

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[4] Civil Code section 1717 provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

Citing *Hsu*, respondent sought $28,880 in attorney fees. The trial court granted respondent's motion for attorney fees in the reduced amount of $26,400.

Appellant challenges the attorney fee award on two grounds: first, that respondent was not entitled to attorney fees because respondent refused to mediate this dispute; and second, that the award was excessive. We find that the language of the contract supports appellant's first argument. Thus, we reverse the attorney fee award, and do not reach the issue of whether the award was excessive.

B. Mediation requirement

Appellant argues that respondent was not entitled to attorney fees because respondent refused to mediate this dispute. The sales agreement contained the following provision:

> "31. DISPUTE RESOLUTION:
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> "A. MEDIATION: The Parties agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action . . . . The Parties also agree to mediate any disputes or claims with Broker(s) . . . . If, for any dispute or claim to which this paragraph applies, any Party (i) commences an action without first attempting to resolve the matter through mediation, or (ii) before commencement of an action, refuses to mediate after a request has been made, then that Party shall not be entitled to recover attorney fees, even if they would otherwise be available to that Party in any such action. THIS MEDIATION PROVISION APPLIES WHETHER OR NOT THE ARBITRATION PROVISION IS INITIALED."

Appellant made a demand for arbitration on August 15, 2016 at 11:30 a.m., giving respondent until the close of business

to respond. Within two hours, respondent's then counsel responded that there was nothing to mediate as there was no enforceable contract. Appellant filed this lawsuit the next day.

The trial court determined that, pursuant to the language of the standard real estate purchase contract, a defendant need not mediate in order to be entitled to attorney fees. The trial court relied on *Van Slyke v. Gibson* (2007) 146 Cal.App.4th 1296, 1299 (*Van Slyke*). The contractual term at issue in *Van Slyke* was similar to the one at issue here, providing that if "'any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees.'" (*Id.* at pp. 1298-1299.) The trial court in this matter quoted the following language from *Van Slyke* in concluding that a defendant need not mediate in order to be entitled to attorney fees:

> "The parties' real estate purchase agreement provides that in any action between the buyer and seller, the prevailing party is entitled to recover attorney fees, unless that party brought the action without first attempting to mediate the dispute. [Citation.] 'Seeking mediation is a condition precedent to the recovery of attorney fees *by the party who initiates the action*.' [Citation.]"

(*Van Slyke, supra*, 146 Cal.App.4th at p. 1299.)

We disagree with the trial court's determination that, based on the contract at issue here, only a plaintiff must agree to mediation prior to litigation. The contract at issue provides not only that a party commencing the litigation must first attempt mediation in order to recover attorney fees, but that any party who "refuses to mediate after a request has been made" shall not recover attorney fees. In this case, appellant made a request that

respondent mediate. Respondent replied within two hours, rejecting appellant's request. Respondent's refusal to mediate bars her from recovering contractual attorney fees under the plain language of the contract. (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1520 (*Frei*) [holding that a party refusing a request to mediate a dispute that ripens into litigation may not recover attorney fees at the conclusion of the litigation, even if that party is the prevailing party].)[5]

Van Slyke distinguishable. There, the defendant sellers were awarded attorney fees in an action for breach of contract and specific performance brought by the plaintiff buyer. There was no evidence that the plaintiff buyer had sought mediation

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[5] We reject respondent's argument that appellant did not provide a reasonable time for respondent to respond to appellant's request for mediation. Respondent is correct that *Frei, supra,* 124 Cal.App.4th at page 1516, suggests that a reasonable time for performance on a mediation demand must be permitted. However, this is not a case where, like *Frei*, respondent did not directly respond to appellant's demand. Here respondent responded, within two hours. Thus, there is no issue as to whether appellant waited a reasonable time before commencing the lawsuit. Respondent had already declined to participate in mediation. Further, we reject respondent's argument that because respondent advised within three weeks that respondent would, in fact, submit to mediation, respondent is entitled to attorney fees. The contractual language is specific. It provides that any party refusing to mediate *before commencement of an action* may not recover attorney fees. At the time appellant filed this litigation, respondent had already declined to mediate. Therefore, respondent is not entitled to attorney fees in this case, despite her later change of mind.

prior to filing suit.[6] Thus, in that action, defendant sellers had neither commenced the action, nor had they refused to mediate after a request had been made. *Van Slyke* does not suggest that a defendant, such as respondent, who has refused to mediate is entitled to attorney fees.[7]

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[6] Prior to filing their cross-complaint, the defendant sellers had requested mediation, which the plaintiff buyer refused. (*Van Slyke, supra,* 146 Cal.App.4th at pp. 1298-1299.) The defendant sellers later dismissed the plaintiff buyer from their cross complaint. They sought attorney fees only in defending the action brought by the plaintiff buyer.

[7] We also note that the *Van Slyke* court cited *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, 1100 (*Johnson*), for the proposition that "'Seeking mediation is a condition precedent to the recovery of attorney fees *by the party who initiates the action*.' [Citation.]" (*Van Slyke, supra*, 146 Cal.App.4th at p. 1299.) The contractual language in the residential purchase agreement at issue in *Johnson*, a 2000 case, provided only that "If any party commences an action based on a dispute or claim to which the paragraph applies, without first attempting to resolve the matter through mediation, then that party shall not be entitled to recover attorney's fees." (*Johnson, supra,* 84 Cal.App.4th at p. 1100.) The *Frei* court, writing in 2004, noted that the standard residential form purchase agreement in California had been amended: "The standard form residential purchase agreement used in California has a recently added clause providing that a prevailing party in litigation or arbitration who *refused* a request to mediate made before the commencement of such proceedings is barred from recovering attorney fees." (*Frei, supra,* 124 Cal.App.4th at p. 1508.) *Frei* was "the first published case in which this provision [was] applied." (*Ibid.*) Although *Van Slyke* was a later case, published in 2007, it did not mention the *Frei* opinion nor the change in the standard contractual language.

Thus, the contract at issue in *Johnson* differed significantly from the contract before us because it did not provide that any

Frei is on point. There, the contractual language was similar to the language at issue here, providing that if "'any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney's fees.'" (*Frei, supra*, 124 Cal.App.4th at p. 1509.) The seller defendants prevailed in an action for specific performance brought by the plaintiff buyers. However, the evidence showed that the seller defendants had refused the buyer's request to mediate. (*Id.* at p. 1513.) The *Frei* court concluded that the language of the contract "means what it says -- a party refusing a request to mediate a dispute that ripens into litigation may not recover attorney fees at the conclusion of the litigation, even if that party is the prevailing party." (*Id.* at p. 1520.)

Other courts have affirmed the enforceability of contractual language mandating mediation prior to litigation. In *Leamon v. Krajkiewcz* (2003) 107 Cal.App.4th 424, 432-433, the court established that a contractual condition precedent requiring mediation prior to an award of attorney fees is enforceable even where, as here, a litigant prevails by establishing the contract is invalid. *Lange v. Schilling* (2008) 163 Cal.App.4th 1412 further reiterated that the standard California residential purchase agreement "means what it says: plaintiff's failure to seek mediation precludes an award of attorney fees." (*Id.* at p. 1414.)

The contract in this matter prohibits an award of attorney fees to any party who refuses to mediate before the litigation is commenced. Respondent refused to mediate before this action

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party refusing to mediate after a request has been made cannot recovery attorney fees. In other words, while the contractual language in *Johnson* was limited to cover only a party commencing litigation, the contractual language in this matter is not so limited.

was filed. Therefore, the award of attorney fees must be reversed.

DISPOSITION

The judgment is affirmed. The order granting attorney fees is reversed. Each side will bear its own cost on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST