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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| YONG HWAN KIM et al.,<br><br>Plaintiffs and Respondents,<br><br>v.<br><br>JOON KIM et al.,<br><br>Defendants and Appellants,<br><br>CHRISTINE KIM et al.,<br><br>Defendants and Respondents. | B283786<br><br>(Los Angeles County Super. Ct. No. BC593197) |

APPEAL from an order of the Superior Court of Los Angeles County, Michelle Williams, Judge. Affirmed.

Ervin Cohen & Jessup, Russell M. Selmont and Jason L. Haas for Defendants and Appellants.

Thompson Coburn, Helen B. Kim, Jeffrey N. Brown and Kacey R. Riccomini for Plaintiffs and Respondents.

Park & Lim, S. Young Lim, Dennis McPhillips and Jessie Y. Kim for Defendants and Respondents.

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Defendants JK-0618, Inc., Joon Kim, Elaine Oh, Jisun Oh, and Sookryul Choi appeal from the trial court's denial of their petition to compel plaintiffs Young Hwan Kim and Haeng Cha Kim to arbitrate their claims against defendants, all of which arose from plaintiffs' 2015 purchase of a residence from defendant JK-0618, Inc. Defendants contend the trial court erred in finding there were two applicable statutory exceptions to the parties' arbitration agreement. We affirm the trial court's order denying the petition.

**FACTUAL AND PROCEDURAL BACKGROUND**

On May 28, 2015, plaintiffs Young Hwan Kim and Haeng Cha Kim (Buyers) entered into an agreement to purchase a residence on Fremont Place in Los Angeles (the Property) from defendant JK-0618, Inc. The parties used a standard form created by the California Association of Realtors and entitled "California Residential Purchase Agreement" (Form Agreement).

The Form Agreement showed the total purchase price for the Property as $6.8 million. Buyers also entered into a one-page "Agreement" dated May 28, 2015, which stated in its entirety: "Buyer[s] agree to pay $1,500,000.00 to seller[s] at close of escrow." Both agreements were signed and initialed by defendant Joon Kim on behalf of JK-0618, Inc.; Buyers have alleged that Joon Kim is the sole shareholder, director and officer

of JK-0618, Inc., and its alter ego (hereafter, Joon Kim and JK-0618, Inc., are referred to collectively as Sellers).

Buyers and Sellers both used defendant Bee Investments, Inc., as the agent for the transaction; defendant Christine Kim signed the Form Agreement on behalf of Bee Investments, Inc. (hereafter Bee Investments, Inc. and Christine Kim are referred to collectively as Brokers). In paragraph 3 of the Form Agreement, a box was checked confirming that Bee Investments, Inc., was the agent for both the Buyers and Sellers.

Escrow closed on June 22, 2015. Buyers paid an additional $1.5 million outside of escrow via checks to defendants Joon Kim, Elaine Oh, Jisun Oh and Sookryul Choi (hereafter Choi and the Ohs are referred to collectively as the Individual Defendants). The record provides no information about the relationship of the Individual Defendants to the transaction or the reason for the payments to them.

On September 1, 2015, Buyers filed a lawsuit against Brokers, alleging causes of action for breach of fiduciary duty and negligence. Buyers alleged that Christine Kim told them the property was in perfect condition and was worth $8.3 million. Kim also stated that the seller had recently put $2 million in renovations into the property. Buyers agreed to purchase the property in reliance on these representations. Buyers alleged that upon taking possession of the property, they discovered that the property was in poor condition and had a number of material defects. Buyers further alleged that the cost to place the property in perfect condition was $700,000 and the fair market value of the property was $6 million. Buyers also alleged that they "are non-English speakers and their primary language is Korean and [they] interacted solely in Korean with [Christine Kim].

[Christine Kim] failed to provide [Buyers] with a copy of the purchase contract translated into Korean . . . ."[1]

On December 15, 2016, Buyers filed a first amended complaint adding Sellers and the Individual Defendants as defendants. The amended complaint maintained the cause of action for breach of fiduciary duty against Brokers and added causes of action for fraudulent concealment and misrepresentation and negligent misrepresentation against Brokers and Sellers; breach of contract against Sellers; and rescission as to all defendants.

On February 27, 2017, before any newly added defendant had responded to the complaint, Buyers filed a second amended complaint with more detailed factual allegations but no new causes of action. On March 9, 2017, counsel for the Sellers and Individual Defendants spoke with counsel for Buyers and demanded that Buyers agree to arbitrate their claims against Sellers and Individual Defendants. Buyers' counsel rejected this demand.

Relying on the arbitration provision of the Form Agreement, Sellers and Individual Defendants moved to compel arbitration of the Buyers' claims against them pursuant to Code

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[1] The complaint contains numerous other allegations of wrongdoing by Christine Kim. For example, Buyers alleged Kim told Buyers they could not tell anyone they were in escrow on the property and could not have anyone view the property. Kim did not advise Buyers to obtain a physical inspection of the home, did not provide buyers with an agency visual inspection of the property or a transfer disclosure statement from seller, and did not disclose any material defects with the property. Buyers also alleged Kim told them she was not receiving a commission from the seller and asked Buyers to pay her a commission of $50,000.

of Civil Procedure[2] section 1281.2. The arbitration provision, found in paragraph 22.B. of the Form Agreement, provides: "The Parties agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration. The Parties also agree to arbitrate any disputes or claims with Broker(s), who, in writing, agree to such arbitration prior to, or within a reasonable time after, the dispute or claim is presented to the Broker." The Form Agreement expressly provides that "Real Estate Brokers are not parties to the Agreement between Buyer and Seller." Paragraph 22.C.(3) further provides: "BROKERS: Brokers shall not be obligated nor compelled to mediate or arbitrate unless they agree to do so in writing. Any Broker(s) participating in mediation or arbitration shall not be deemed a party to this Agreement."

In addition to seeking an order compelling arbitration, Sellers and the Individual Defendants sought dismissal of the complaint as to Sellers and Individual Defendants or a stay of the trial proceedings as to Sellers and Individual Defendants pending arbitration. In the alternative, Sellers and Individual Defendants sought a stay of arbitration until Buyers' claims against Brokers were resolved in the court action.

Buyers and Brokers opposed the petition to compel. Both asserted that Brokers were "third parties" within the meaning of section 1281.2, subdivision (c) and that the exception to arbitration for pending litigation involving third parties applied. Buyers also argued that the arbitration provision in the Form

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[2] Further undesignated statutory references are to the Code of Civil Procedure.

Agreement was void for fraud in the execution pursuant to section 1281.2, subdivision (b).

At the conclusion of the hearing on Sellers' petition, the trial court found that two of the exceptions in section 1281.2 were present in this case and denied the petition. The trial court stated: "[T]he court finds that the Broker[s] are third parties to the agreement, cannot compel arbitration." The court also found that "there's a high likelihood of inconsistent rulings in this matter to split it between arbitration between the [Buyers] and the Individual Defendants who act as brokers." The court also found that "that the arbitration agreement is void for fraud in the execution and lack of initial consent. The [Buyers] didn't speak English. And all of the negotiations were conducted solely in Korean."

The court's minute order for the hearing states: "The [broker] defendants did not choose to arbitrate, and they cannot be compelled to do so. [¶] The court also notes that there is a possibility of inconsistent outcomes if the non-parties to the arbitration are severed." The minute order does not refer to the court's fraud finding. Sellers did not request a statement of decision.

## DISCUSSION

Sellers contend that the trial court erred in finding that Brokers were third parties, and that even if the Brokers were third parties, the trial court abused its discretion by failing to consider if there was a workable alternative to simply denying arbitration. Sellers also contend that the trial court abused its discretion in denying Sellers' request for an evidentiary hearing on the Buyers' ability to understand English and erred in finding that there was fraud in the execution of the arbitration provision

of the Form Agreement due in part to the Buyers' lack of English skills. We find no error in the trial court's determination that that Brokers are third parties and no abuse of discretion in the court's decision to deny arbitration. As Sellers acknowledge, in order to prevail on appeal they would have to establish that both of the grounds offered by the trial court for denying arbitration involved legal error or an abuse of discretion. Accordingly we need not and do not consider Sellers' claims concerning the fraud.

**1. Standard of Review**

The standard of review for the denial of a petition or motion to compel arbitration depends on the basis for the trial court's ruling. " 'If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's decision rests solely on a decision of law, then a de novo standard of review is employed.' " (*Bunker Hill Park Ltd. v. U.S. Bank National Assn.* (2014) 231 Cal.App.4th 1315, 1324.)

**2. Brokers Are Third Parties Under Section 1281.2, Subd. (c)**

Sellers' first claim on appeal is that the trial court erred in "finding [that] a waiver of the Brokers' right to compel arbitration turned the Brokers into 'third parties' for the purposes of California Code of Civil Procedure §1281.2(c)." We note that nothing in the trial court's oral or written statements indicate the trial court was relying on a waiver theory to find that Brokers were third parties. Although a waiver finding would be reasonable under the facts of this case, the trial court focused on the Brokers' election of their right, specified in the Form Agreement, not to arbitrate. There are no factual disputes about the language of the Form Agreement, and the issue of whether

Brokers are "third parties" is resolved by the application of statutory and decisional law to that language. Accordingly, we review the issue de novo. (See *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 684.)

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement. [¶] (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. . . ." (§ 1281.2.)

" 'Section 1281.2(c) addresses the peculiar situation that arises when a controversy also affects claims by or against other parties not bound by the arbitration agreement.' " (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393 (*Cronus*).) In light of the clear language of paragraph 22, set forth above, there can be no serious argument that Brokers are "bound" by the arbitration provision of the Form Agreement. Sellers themselves acknowledge on appeal that "the arbitration clause in the standard [Form] Agreement specifically provides for brokers to have a choice of whether to arbitrate claims against them, while binding buyers and sellers to arbitration."

Sellers contend that the term "third party" has a special meaning under section 1281.2, subdivision (c), which is broader

than the discussion in *Cronus* suggests. Sellers assert that a third party is one who is not "bound" by an arbitration agreement and is not entitled to enforce the arbitration agreement. Sellers believe that this is a disjunctive test: they maintain that even though Brokers are not bound by the arbitration provision, Brokers do not qualify as third parties because they are entitled to enforce the provision both by its terms and under common law principles as the agents of Sellers and Buyers.

Sellers rely on *Thomas v. Westlake* (2012) 204 Cal.App.4th 605 (*Thomas*), *Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399 (*Laswell*) and *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511 (*RN Solution*) for their claimed meaning. Their reliance is misplaced.

There is broad language in all three cases referring to parties who are entitled to enforce an arbitration agreement. The Court of Appeal in *Thomas* stated: "As used in section 1281.2, subdivision (c), the term 'third party' means a party to the action that is not bound by or entitled to enforce the arbitration agreement." (*Thomas, supra,* 204 Cal.App.4th at p. 612.) The Courts of Appeal in *Laswell* and *RN Solution* made similar statements. (*Laswell*, *supra*, 189 Cal.App.4th at p. 1405 [third party exception "does not apply when all defendants, including a nonsignatory to the arbitration agreement, have the right to enforce the arbitration provision against a signatory plaintiff"]; *RN Solution, supra,* 165 Cal.App.4th at p. 1520 [" 'Because [the individual defendants] may enforce arbitration of the claims against them, they are not "third part[ies]" within the meaning of section 1281.2, subdivision (c).' "].)

Sellers have taken this broad and general language out of context. The opinions as a whole do not support a disjunctive test

to evaluate whether a party qualifies as a third party. In each of the three cited cases, the Court of Appeal found that the nonsignatory parties were both bound by *and* entitled to enforce the arbitration agreement. In both *Laswell* and *RN Solution*, the Court of Appeal so held. (*Laswell, supra,* 189 Cal.App.4th at p. 1407 [nonsignatory defendants who moved to compel arbitration "equally are bound by the agreement and thus entitled to enforce it" against signatory plaintiff]; *RN Solution, supra,* 165 Cal.App.4th at p. 1520 [nonsignatory plaintiff "bound by the arbitration agreement" and nonsignatory defendant who moved to compel "is also bound by the arbitration agreement and entitled to enforce it"].) In *Thomas*, the Court of Appeal held that the nonsignatory defendants were entitled to enforce the agreement and indicated that they would also be bound by the agreement. (*Thomas, supra,* 204 Cal.App.4th at p. 618.)[3]

More importantly, in all three cases, the nonsignatory defendant's entitlement to enforce arose solely from the defendant's relationship with a signatory party. (*Thomas, supra,* 204 Cal.App.4th at p. 614 [nonsignatory defendants were alleged to be agents of signatory defendant]; *Laswell, supra*, 189 Cal.App.4th at p. 1407 [all defendants were related entities]; *RN Solution, supra,* 165 Cal.App.4th at p. 1520 [nonsignatory defendant was agent of signatory defendant].) The underlying contractual arbitration agreements did not bestow any rights on

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[3] It is the general rule that a party who has the ability to enforce an arbitration agreement under common law principles can also be compelled to arbitrate. (See *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1285 ["A nonsignatory who is the agent of a signatory can even be *compelled* to arbitrate claims against his will."]; see *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 72-76.)

the nonsignatories. Thus, the Courts of Appeal in *Thomas*, *Laswell* and *RN Solution* had no occasion to consider the effect of a nonsignatory's contractual rights on the party's status as a third party.

Perhaps recognizing this deficiency, Sellers also rely on *Nguyen v. Tran* (2007) 157 Cal.App.4th 1032 (*Nguyen*) and *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759 (*Westra*) to support their argument that Brokers are not third parties. The facts in *Nguyen* and *Westra* are superficially similar to the facts of this case: *Nguyen* and *Westra* involve real estate transactions where an arbitration agreement between the seller and purchaser discusses the nonsignatory brokers' role in arbitration. The cases are nevertheless not helpful because the Courts of Appeal in those cases had no occasion to consider whether the nonsignatory brokers were third parties.

The court in *Westra* concluded that a real estate broker who did not sign an arbitration provision in a real estate purchase agreement was bound by the agreement under agency principles and so could enforce the arbitration agreement. (*Westra, supra*, 129 Cal.App.4th at p. 766.) That unsigned arbitration provision would have required the broker to arbitrate (*id.* at p. 762), and so the *Westra* court had no occasion to consider the effect of a contractually provided option to arbitrate on third party status under section 1281.2, subdivision (c).

The court in *Nguyen* also had no occasion to consider the third party provisions of section 1281.2, subdivision (c). The arbitration agreement in *Nguyen* did provide the nonsignatory brokers with the option of whether to arbitrate (*Nguyen, supra*, 157 Cal.App.4th at p. 1035), but certain "cooperating"

nonsignatory brokers chose to demand arbitration of the claims by signatory parties (*id.* at p. 1038). Thus, the cooperating parties' third party status was not an issue. The cooperating brokers attempted to compel other, unwilling brokers to arbitrate as well, but the court found no basis for the cooperating brokers to do so. (*Id.* at pp. 1038-1039.)[4] The court remanded the matter for consideration of the unwilling brokers' claim that they were third parties under section 1281.2, subdivision (c), noting it had had "no occasion to consider [the claim] and offer[ed] no opinion on whether [the provision] applie[d]." (*Nguyen*, at p. 1039.)

Fundamentally, arbitration is consensual in nature and depends on a contract among the parties. (*Nguyen, supra,* 157 Cal.App.4th at p. 1036.) " 'Public policy favors arbitration as an expedient and economical method of resolving disputes, thus relieving crowded civil courts. However, arbitration assumes that the parties have elected to use it as an alternative to the judicial process.' " (*Ibid.*) " 'Even the strong public policy in favor

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[4] The Court of Appeal in *Nguyen* did state that the cooperating broker could have been compelled to arbitrate the claims under agency principles, but this statement is dicta since the broker chose to arbitrate. (*Nguyen, supra*, 157 Cal.App.4th at p. 1037.) The court also stated that the buyers might be able to compel unwilling brokers to arbitrate under agency principles. (*Id.* at p. 1039.) This statement too is dicta, because no buyer was attempting to force the brokers to arbitrate. Since no buyer was attempting to compel arbitration, the court had no occasion to consider whether a buyer would be estopped or otherwise barred from compelling arbitration under agency principles by the buyer's contractual agreement not to compel arbitration. Absent such consideration, the *Nguyen* court's discussion of general agency principles is not helpful.

of arbitration does not extend to those who are not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement.' " (*Ibid.*)

Treating a nonsignatory party who has been given an express contractual right not to arbitrate as a "third party" is consistent with the contractual nature of arbitration. Moreover, such recognition provides the trial court with the ability to balance the contractual rights of *all* involved parties. That is consistent with the purpose of section 1281.2, subdivision (c), which our Supreme Court has characterized as "an evenhanded law," which provides trial courts with several options to deal with " 'the peculiar situation that arises when a controversy also affects claims by or against other parties not bound by the arbitration agreement.' " (*Cronus, supra,* 35 Cal.4th at p. 393.) Accordingly, the trial court did not err in finding the Brokers were third parties under section 1281.2, subdivision (c).

**3. The Trial Court Did Not Abuse Its Discretion by Denying Arbitration and Permitting Litigation to Proceed**

Sellers contend that assuming Brokers are "third parties" whose presence gives rise to the possibility of conflicting resolutions of the connected issues in the case, the trial court abused its discretion by failing to discuss or "apparent[ly]" consider the best alternative for resolving the possibility of conflicting rulings. Sellers assert the trial court simply "reflexively" denied the petition to compel.

Here, section 1291 permitted Sellers to request a statement of decision explaining the factual and legal basis of its order denying Sellers' petition. (See *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842.) Sellers did not make such

a request. "Because a statement of decision was available but not requested, we apply the doctrine of implied findings and presume the court made all factual findings necessary to support its order—to the extent substantial evidence supports such findings." (*Ibid*.)

A "finding that there is a possibility of inconsistent rulings on common questions does not conclude the analysis under section 1281.2, subdivision (c). As mentioned, the statute gives the court several options, including denying the petition for arbitration, staying the arbitration pending disposition of nonarbitrable claims in the court, or staying the litigation pending completion of the arbitration. (See *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1114–1115.) What the trial court chooses to do in this situation is a matter of its discretion, guided largely by the extent to which the possibility of inconsistent rulings may be avoided." (*Metis Development LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 692–693.)

The trial court's decision should also be informed by other relevant factors such as the strong public policy favoring arbitration and judicial economy, including consideration of which outcome would expedite the proceeding. (*Doan v. State Farm General Ins. Co.* (2011) 195 Cal.App.4th 1082, 1100–1101; see *Cronus, supra*, 35 Cal.4th at p. 393 [court has "discretion not to enforce the arbitration agreement . . . in order to avoid . . . duplication of effort"].)

Here, there is substantial evidence to support the trial court's express and implied findings that (1) permitting both arbitration and litigation created the possibility of conflicting outcomes that could not be alleviated by a stay of one proceeding;

(2) judicial economy favored a single proceeding; and (3) the benefits of arbitration would be unlikely to be realized under the facts of this case.

The trial court expressly found that there was a possibility of inconsistent outcomes if the litigation and arbitration proceeded separately. Substantial evidence supports this finding.

The allegations of the Buyer's complaint contain causes of action for both negligent and fraudulent misrepresentation against Brokers and Sellers. As Buyers explained in the trial court and on appeal, a jury could find that Brokers negligently repeated Seller's misrepresentations about the property while an arbitrator could find that Sellers did not make such misrepresentations. Similarly, a jury could find that Brokers worked with Sellers to fraudulently misrepresent the value of the property, but an arbitrator could find that Sellers had no such involvement. (See *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 972 ["allegations of the parties' pleadings may constitute substantial evidence" that there is a possibility of conflicting rulings within the meaning of § 1281.2, subd. (c); party need not make any showing about viability of claims and issues that create the possibility of conflicting rulings]; see also *Lindemann v. Hume* (2012) 204 Cal.App.4th 556, 567.)

There is substantial evidence to support an implied finding that the possibility of conflicting resolutions would not be significantly reduced by staying one of the proceedings. Sellers acknowledge that "[a]llowing different tracks for parties involved in the same real estate transaction . . . inescapably creates the possibility of conflicting rulings." They argue that if one of the

proceedings were stayed, collateral estoppel could reduce the possibility of conflicting rulings.

Collateral estoppel requires that the party against whom preclusion is sought must have been the same party as in the former proceeding. (See *Gikas v. Zolin* (1993) 6 Cal.4th 841, 848.) Brokers would not be parties to an arbitration proceeding and so an arbitration finding that Sellers did not make misrepresentations would not prevent the Brokers not from arguing in subsequent litigation that Sellers did make misrepresentations. Sellers would not be a party to the litigation and so a jury finding that Sellers made misrepresentations would not prevent the Sellers from denying the misrepresentations in a subsequent arbitration with Buyers.

Substantial evidence also supports an implied finding that denying arbitration would promote judicial economy. Buyers' attorney submitted a declaration in the trial court showing the extensive nature of the discovery already undertaken in the matter. Sellers acknowledge that by the time of the hearing on the petition to compel, Buyers and Brokers had engaged in "extensive discovery and filed multiple discovery motions" in the court proceedings. This discovery included extensive requests for admissions propounded by Buyers and Brokers; the parties' admissions cannot be used against them in any other proceeding. (§ 2033.410, subd. (b).) Discovery in this case also included numerous interrogatories and there are similar limitations on the use of interrogatory answers. (See § 2030.410 [answers to interrogatories may be used at "the trial or other hearing in the action"].) Thus, duplication of effort was a certainty if both litigation and arbitration proceeded.

In addition, substantial evidence supports an implied finding that the public policy in favor of arbitration did not outweigh the other factors and require ordering (and potentially staying) arbitration. "'Public policy favors arbitration as an expedient and economical method of resolving disputes, thus relieving crowded civil courts.' " (*Nguyen, supra,* 157 Cal.App.4th at p. 1036.)

Under the facts of this case, the usual benefits of arbitration would be unlikely to be realized. Given the discovery conducted and the time elapsed in the litigation, arbitration would result in duplication of effort by the parties, not economy. Two proceedings conducted serially would be less expedient than one combined proceeding. A stay would likely not eliminate the need for litigation between Buyers and Brokers, and so the court system would receive little relief from an arbitration between Sellers and Buyers.

**DISPOSITION**

The trial court's order denying Sellers' motion to compel arbitration is affirmed. Sellers are to bear costs on appeal.

ROGAN, J.*

WE CONCUR:

RUBIN, Acting P. J. GRIMES, J.

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