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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ALLEN NOOR et al., Plaintiffs and Respondents, v. ANDREW KATZ et al., Defendants and Appellants.	B275176 (Los Angeles County Super. Ct. No. LC103904)

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

Stanley L. Friedman for Defendants and Appellants.

AAA-Law and Ashkan A. Ashour for Plaintiffs and Respondents.

Defendants and appellants Andrew Katz (Katz) and Purser Labs, LLC, doing business as Purser Partners (Purser), and Smoking Gun Media challenge a trial court order denying their motion to compel arbitration of a complaint filed against them by plaintiffs and respondents Allen Noor, Michael Noor, and Boytone Corporation (Boytone).

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 23, 2016, plaintiffs filed the instant lawsuit against defendants,[1] alleging claims for breach of contract, common counts, fraud (intentional misrepresentation, negligent misrepresentation, and concealment), breach of fiduciary duty, and restitution. According to the complaint, plaintiffs paid defendants to build and develop a Web site, develop and design a picture logo, provide consulting services, and create video content. Attached to the complaint is a copy of the July 13, 2015, invoice for services. As is relevant to the parties' claims on appeal, the invoice notes that it is an "estimate."

On April 12, 2016, defendants answered and filed a cross-complaint. Attached to the cross-complaint is the copy of an alleged September 10, 2015, written agreement between Boytone and Purser. Allen Noor executed the agreement on behalf of Boytone, and Katz executed the agreement on behalf of Purser. That agreement contains the following language: "Any disputes in excess of $3,500 arising out of this Agreement shall be submitted to binding arbitration before the Joint Ethics

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[1] Plaintiffs also named Heather Stewart (Stewart) as a defendant. On May 31, 2016, plaintiffs dismissed her without prejudice.

Committee or a mutually agreed upon Arbitrator pursuant to the rules of the American Arbitration Association. The Arbitrator's award shall be final, and the judgment may be entered in any court having jurisdiction thereof."

On the same date, defendants filed a motion to compel arbitration. They argued that the dispute resolution provision set forth in the September 10, 2015, agreement mandated arbitration of this lawsuit.

Plaintiffs opposed the motion on the grounds that each cause of action in their complaint either arose from the July 13, 2015, invoice or from misrepresentations made on or about July 13, 2015. Moreover, not all parties to the lawsuit signed the September 10, 2015, agreement and thus could not be ordered to arbitration.

After entertaining oral argument, the trial court denied defendants' motion to compel arbitration, finding that defendants failed to show "that the subject arbitration clause relate[d] to the contract that [p]laintiffs [said was] the basis for their contract and other claims." The trial court also rejected defendants' suggestion that the second contract was a novation.

Defendants' timely appeal ensued.

DISCUSSION

I. *Appealability and Standard of Review*

An order denying a petition to compel arbitration is an appealable order. (*Fireman's Fund Ins. Companies v. Younesi* (1996) 48 Cal.App.4th 451, 456–457; Code Civ. Proc., § 1294, subd. (a).)

"There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] 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 denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]" (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

II. *The Trial Court's Order is Affirmed*

Code of Civil Procedure section 1281.2 provides, in relevant part: "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." In other words, there must be a valid agreement to arbitrate a dispute before the parties can be ordered to arbitration. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 356.) Moreover, "[i]n determining whether an enforceable arbitration agreement exists, the initial burden is on the party petitioning to compel arbitration." (*Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1230.)

Here, defendants did not meet their burden. As the trial court determined, based upon the evidence and argument before it, defendants did not establish that plaintiffs' claims arose out of the September 10, 2015, agreement. Likewise, on appeal, defendants have not shown that this was error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 ["'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and an error must be affirmatively shown'"].)

In urging reversal, defendants argue that the July 13, 2015, document is merely an estimate, not an agreement between

the parties. Rather, the parties' agreement actually is the September 10, 2015, document, a copy of which is attached to the cross-complaint. Other than defendants' bald argument, defendants offer no evidence, such as a declaration regarding the negotiation process and/or the parties' intent, or legal authority in support of their contention.

In a brief footnote, defendants renew their claim that the September 10, 2015, contract could be considered a novation of the July 13, 2015, invoice. "A novation is a substitution, by agreement, of a new obligation for an existing one, with intent to extinguish the latter. [Citations.] A novation is subject to the general rules governing contracts [citation] and requires an intent to discharge the old contract, a mutual assent, and a consideration. [Citation.] The question whether these elements are present is one of fact for determination by the trial judge." (*Klepper v. Hoover* (1971) 21 Cal.App.3d 460, 463.) Defendants' argument fails for the simple reason that they neglect to offer any evidence of the parties' intent.

All remaining arguments, including those relating to the alleged unconscionability of the arbitration agreement, are moot. And, in light of our conclusion that the trial court rightly denied defendants' motion to compel arbitration because defendants failed to meet their burden, there is no reason to remand the matter for reconsideration of changed circumstances, namely the dismissal of Stewart from the action.

DISPOSITION

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

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J. *
GOODMAN

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