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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ALAIN SIDNEY DRAY, Plaintiff and Respondent, v. HAIM REVAH, Defendant and Appellant.	B281702 (Los Angeles County Super. Ct. No. BC621088)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed.

Novian & Novian, Farhad Novian, Aaron J. Weissman for Defendant and Appellant.

Law Offices of Mark Shipow, Mark S. Shipow for Plaintiff and Respondent.

INTRODUCTION

Defendant Haim Revah appeals from the trial court's denial of his motion to compel arbitration of a contractual loan dispute. Revah and plaintiff Alain Dray entered into a loan agreement that contained an arbitration provision. They subsequently signed a promissory note regarding the same loan; that document contained no reference to arbitration. Dray sued for breach of the promissory note and Revah moved to compel arbitration. The trial court denied arbitration, finding that the terms of the later agreement superseded the original contract. We agree with the trial court's conclusion and affirm.

FACTUAL AND PROCEDURAL HISTORY

A. *Complaint*

Dray filed his complaint against Revah in May 2016, alleging causes of action for breach of contract, money lent, account stated, and unjust enrichment. Dray alleged that he agreed to loan Revah $2 million pursuant to a loan agreement dated June 13, 2010. However, Revah failed to repay the loan or make any interest payments under the schedule set forth in the agreement.

The complaint further alleged that "[w]ith Defendant having failed to perform any payment obligations under the Note, on August 28, 2013, the parties executed a Secured Promissory Note . . . to supersede and replace the Loan Agreement." Under the promissory note, Revah promised to pay $2.2 million to Dray by June 30, 2014. Based on that commitment, Dray "did not begin collection proceedings on the Loan Agreement." When Revah failed to make any payments under the promissory note, Dray filed the instant lawsuit. All four causes of action are based

on Revah's alleged failure to pay pursuant to the promissory note.

B. *Agreements*

Dray attached copies of the loan agreement and the promissory note as exhibits to his complaint. The loan agreement, a two-page document originally written in Hebrew, also included an English translation.[1] The loan agreement contained the following terms: Dray agreed to loan $2 million to Revah "for a three year period at a 10 percent rate of interest per year." Revah agreed to pay the interest on the loan "semiannually" starting six months from the date the agreement was signed. The loan would "renew automatically every year up to three years," with a right of cancellation triggered at Dray's request at least one month prior to the renewal term. After three years, or earlier if cancelled by Dray, Revah "shall repay the Loan Principal within two weeks."

The loan agreement also contained the following dispute resolution clause: "In the event of differences of opinion between the parties with respect to the loan and any question concerning this contract, the Parties shall consult Rabbi Yoshiyahu Pinto (May he live a good long life, Amen) who shall decide on the dispute between the Parties." The parties signed the loan agreement on June 13, 2010 in Israel. Revah also signed a second line stating that he "personally guarantee[s] the loan and the undertakings connected to the loan."

The promissory note is a four page document written in English, dated August 28, 2013. Under this note Revah, as "the Borrower," "hereby promises to pay" Dray $2.2 million, "or such

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[1] Revah attached the same agreement and translation to his motion to compel arbitration and attested to their accuracy.

lesser amount as shall then equal the outstanding principal and any accrued but unpaid interest thereon." This lump-sum payment was due "on the earlier to occur of" either June 30, 2014 or "when declared due and payable" by Dray following an event of default as defined in the note. The promissory note set forth the annual interest rate as "the lesser of (1) .28% or (ii) the maximum rate permitted by applicable law; provided, however that such annual rate shall increase to the lesser of (i) ten percent (10.0%) or (ii) the maximum rate permitted by applicable law during the occurrence and continuance of any Event of Default." The promissory note also included several pages of terms and conditions, including conditions for default, an agreement regarding a security interest by Revah, designation of California state law as the governing law, and a provision that if "suit is brought for collection of this Note, Borrower will pay all reasonable expenses." There was no dispute resolution provision or mention of arbitration in the promissory note.

C. *Petition to Compel Arbitration*

Revah moved to compel arbitration in November 2016, based on the dispute resolution provision in the loan agreement. In his accompanying declaration, Revah stated he was introduced to Dray in 2010 "by our mutual friend," Rabbi Pinto. The motion did not discuss or attach the promissory note.

Dray opposed the motion to compel, arguing that the terms of the promissory note superseded those in the loan agreement. He also noted that Revah had not asserted the arbitration provision in his answer, amended answer, or case management statement; instead, Revah only raised the issue in November 2016, three months after his initial answer, in response to discovery served by Dray. As such, Dray argued Revah had

waived any right to arbitration. Alternatively, Dray asserted that Rabbi Pinto was no longer qualified to arbitrate the dispute because he had been "convicted of bribery" in Israel and had a "personal relationship" with Revah that inhibited his impartiality. Dray filed a declaration in support of his opposition, stating that he had his attorney draft the promissory note after Revah failed to make any payments on the loan by the original due date in June 2013, with the understanding that the promissory note "would replace the original loan document." Dray also filed a declaration from Dror Varsano, an Israeli attorney, purporting to relate additional information regarding Rabbi Pinto and Israeli law. Dray's attorney also filed a declaration and attached, among other things, a copy of the complaint, loan agreement, and promissory note.

The court heard argument on the motion to compel arbitration on March 8, 2017. Revah's counsel orally objected to and moved to strike the entirety of Dray's declaration, based on Dray's acknowledgment of his limited understanding of English and use of an interpreter; Revah similarly moved to strike Varsano's declaration as irrelevant. Turning to the substance of the motion, he argued that the arbitration provision from the loan agreement should apply because "there is no inconsistency" between the two agreements and no integration or merger clause in the promissory note.

The court found that "the applicable agreement that forms the basis of the complaint is the Secured Promissory Note agreement." The court further found that the terms of the promissory note superseded the loan agreement, citing *Frangipani v. Boecker* (1998) 64 Cal.App.4th 860, 863 (*Frangipani*). Thus, because the promissory note did not contain

an arbitration provision, "no valid arbitration agreement exists, and the motion must be denied." In addition, the court found that compelling arbitration under the terms of the agreement would be unconscionable, based on Rabbi Pinto's criminal conviction and "preexisting personal relationship" with Revah. The court did not rule on the record on Revah's evidentiary objections or on Dray's argument that the right to arbitration had been waived.

Revah timely appealed pursuant to Code of Civil Procedure section 1294, subdivision (a).[2]

DISCUSSION

A. *Governing Principles*

We review an order denying a petition to compel arbitration for abuse of discretion unless a pure question of law is presented. In that case, the order is reviewed de novo. (*Gorlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1505; *California Parking Services, Inc. v. Soboba Band of Luiseño Indians* (2011) 197 Cal.App.4th 814, 817.) Where, as here, "there is no 'factual dispute as to the language of the agreement' [citation] or 'conflicting extrinsic evidence' regarding the terms of the contract [citation], our standard of review of a trial court order granting or denying a motion to compel arbitration under section 1281.2 is de novo." (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1061–1062; see also *People v. International Fidelity Ins. Co.* (2010) 185 Cal.App.4th 1391, 1395 [interpretation of a written contract, where the evidence is not in dispute, is reviewed de novo].)

Public policy favors contractual arbitration as a means of resolving disputes. (*Mercury Ins. Group v. Superior Court* (1998)

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[2] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

19 Cal.4th 332, 342.) But that policy "'"does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration."'" (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.) "'The right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract. [Citations.] There is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate. [Citation.]' [Citation.]" (*Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 347 (*Hotels Nevada*).)

Section 1281.2 provides that "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 . . . [g]rounds exist for the revocation of the agreement." On a petition to compel arbitration, the petitioner bears the burden of proving the existence of an agreement to arbitrate "by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement . . . that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) "'Whether the parties formed a valid agreement to arbitrate is determined under general California contract law. [Citations.]'" (*Hotels Nevada, supra*, 203

Cal.App.4th at p. 348; see also *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 971-973.)

B. *Analysis*[3]

Revah argues that the trial court erred in finding the terms of the promissory note superseded the loan agreement. He contends the trial court's reliance on *Frangipani, supra*, 64 Cal.App.4th 860 was misplaced because the dispute resolution clause from the loan agreement was not inconsistent with the terms of the promissory note, and therefore the parties remain bound by that portion of the original agreement. We are not persuaded.

In *Frangipani, supra*, 64 Cal.App.4th at p. 863, the parties entered into an agreement providing that the defendant "assumed" certain loans as part of a property purchase. A few days later, they signed escrow instructions providing that defendant would purchase the property "subject to" the loans.

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[3] On appeal, Dray revives his argument that Revah waived the right to arbitration by failing to assert it for several months at the beginning of this case. The trial court did not make a finding as to waiver and we decline to do so in the first instance, particularly since Revah raised the issue of arbitration near the outset of discovery and Dray has made no showing of prejudice. (See *Spear v. California State Automobile Assn.* (1992) 2 Cal.4th 1035, 1043 ["[A] party who does not demand arbitration within a reasonable time is deemed to have waived the right to arbitration. . . . '[W]hat constitutes a reasonable time is a question of fact. . .' Among the facts a court may consider is any prejudice the opposing party suffered because of the delay."] (citations omitted); *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 949 [affirming finding of waiver where defendant sought arbitration after plaintiff had completed discovery and designated trial experts].)

(*Ibid.*) The court stated that "[w]here there is an inconsistency between two agreements both of which are executed by all of the parties, the later contract supersedes the former. Thus, '. . . the terms of the escrow instructions control to the extent that they are inconsistent with the prior contract.' [Citation.]" (*Ibid.*) The court therefore concluded that the defendant "purchased the parcel 'subject to' existing loans." (*Id.* at p. 864.)

Here, Revah asserts that the dispute resolution provision in the loan agreement is not inconsistent with the promissory note, because the latter document does not contain any contradictory reference to arbitration. This argument ignores the fact that practically *every* provision of the two agreements differs, apart from the identity of the lending and borrowing parties and the fact that no new loan was provided. These inconsistent provisions include the amount to be repaid; the timing of repayment; the term of the loan; the applicable interest rate(s); and terms regarding default, security interest, governing law, payment of expenses, and waiver. Based on the language of the agreements, we agree with the trial court's conclusion that the terms of the loan agreement were entirely inconsistent with, and therefore superseded by, the promissory note. Because the promissory note undisputedly contained no arbitration provision, Revah has not met his burden to establish the existence of an arbitration agreement covering the causes of action in Dray's complaint.

In essence, Revah suggests that the arbitration provision is the only portion of the loan agreement that should be included as part of the parties' current agreement, as it is not directly inconsistent with the promissory note. He cites no authority for this proposition, but argues that *Frangipani* is distinguishable

because the contracts at issue in that case contained directly contradictory terms. While Revah is correct that the contracts in *Frangipani* involved a single inconsistency, he offers no basis to limit the holding to such a circumstance. We see no reason why the same interpretation would not apply here, where almost all of the terms are inconsistent with each other. Moreover, while the contracts in *Frangipani* were made within a few days of each other regarding a single transaction, the agreements here were made three years apart and the promissory note reflected the changed circumstances following Revah's failure to pay under the loan agreement. This further supports the conclusion that the terms of the promissory note govern the parties' agreement. Revah's piecemeal attempt to import only the arbitration provision conflicts with the well-settled rule of contract interpretation that we view the language of a contract "'in light of the instrument as a whole' [citations]." (*City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 71.)

Moreover, our analysis does not change based on the fact that the promissory note did not contain a merger or integration clause. The *presence* of a merger or integration clause in an agreement can be evidence of the parties' intent that the contract represents their complete and final agreement. (See, e.g., *Marani v. Jackson* (1986) 183 Cal.App.3d 695, 702 [""When the parties to a written contract have agreed to it as an 'integration'-a complete and final embodiment of the terms of an agreement-parol evidence cannot be used to add to or vary its terms. [Citations.]"' [Citation.]"].) Conversely, Revah argues that the *absence* of such terms from the promissory note compels a finding that the parties intended to retain the arbitration clause from the loan agreement as part of their contract. We disagree, and note

that Revah fails to point to any evidence demonstrating such intent. Indeed, the promissory note did not contain any language expressly incorporating the arbitration provision, or any other portions of the loan agreement, into the contract.

We also reject Revah's suggestion that there was no admissible evidence on which the trial court could find that the promissory note superseded the loan agreement. He argues that the court relied on the allegations in the complaint and the declarations of Dray and Varsano, to which he objected. We disagree. While the trial court indicated it had reviewed these materials, the record suggests that the court based its ruling on the language of the two contracts, rather than any extrinsic evidence regarding the parties' intent. In any event, our review of the language of the loan agreement and the promissory note—each of which was admitted without objection as evidence on the motion to compel arbitration—is consistent with the trial court's determination. Because we reach this conclusion based on the language of the agreements, no consideration of extrinsic evidence is necessary. (See, e.g., *WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1709–1710.) As such, we need not reach Revah's arguments regarding his evidentiary objections to the declarations submitted by Dray in opposition to the motion to compel arbitration.

Finally, Revah challenges the trial court's findings in the alternative regarding the fitness of Rabbi Pinto to serve as the arbitrator. This argument is moot in light of our conclusions herein.

DISPOSITION

The judgment is affirmed. Dray is awarded his costs on appeal.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.