Filed 2/23/12 Peak Sports Products USA V. Kwok CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PEAK SPORTS PRODUCTS USA, INC., Plaintiff and Respondent, v. GINO KWOK et al., Defendants and Appellants.	B232841 (Los Angeles County Super. Ct. No. BC449788)

APPEAL from an order of the Superior Court of Los Angeles County. Rolf M. Treu, Judge. Reversed and remanded with directions.

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John D. Younesi and Jan A. Yoss for Defendants and Appellants.

Arias Ozzello & Gignac, Mike Arias and Arnold C. Wang, for Plaintiff and Respondent.

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Gino Kwok and Karen Su appeal from the order denying their petition to compel arbitration in this action against them by Peak Sports Products USA, Inc. (Peak Sports). Because we conclude that the action should proceed in arbitration, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Kwok's Demand for Arbitration Against Peak Sports*

On October 22, 2010, Kwok filed a demand for arbitration before JAMS against Peak Sports, its China-based parent company and two of its officers, Yang Grant Zhou and Jia Su. According to the complaint attached to the demand, the chief executive officer of Peak Sports's parent company approached Kwok, an attorney, in October 2009 "for the purpose of obtaining information from Kwok about the [National Basketball Association (NBA)], the possibility of [the parent company] operating business in the United States and obtaining market information from Kwok." In March 2010, Zhou and Jia Su met with Kwok, asked him to help establish a United States office for the parent company and assigned him a number of tasks requiring immediate attention. Kwok began the work and helped establish Peak Sports, including finding office space, planning a launch party and opening bank accounts. Interested in Kwok's NBA contacts, Peak Sports offered Kwok $60,000 a year, plus shares of stock in the parent company and "the right to buy into" Peak Sports's business operations. "In reliance on Zhou and [Jia] Su's representations concerning the direction of the company and that Kwok [would] be treated as a founder and an equal with them, Kwok accepted the offer."

The complaint also alleged that "Kwok's employment agreement was eventually reduced to writing in late June 2010." Kwok, as general manager and chief legal officer, was responsible for "assisting in the running of the company, focusing on player contracts and product development and marketing. He was overseeing certain legal issues, such as compliance with employment laws, securing proper trademarks and confidentiality agreements. Kwok was charged with drafting or reviewing all contracts. Kwok was called upon to locate needed professionals in the business such as shoe and clothing designers. He attended many NBA events and helped to build the Peak brand. Kwok also participated in mergers and acquisitions, special events and basketball

events." According to the complaint, Kwok's employment agreement contained an arbitration provision providing that the parties would submit any dispute regarding the agreement to arbitration before JAMS.

The complaint further alleged that, when Kwok brought to Zhou's and Jia Su's attention issues regarding Peak Sports's suspended trademark application, miscalculation of or failure to account for royalties and other problems in certain endorsement contracts, denial of a contractual payment to the Laker Girls following an appearance they had made on the company's behalf, violations of wage and hour laws and further employment issues, Zhou and Su were not responsive and made comments about Kwok's age of more than 40 years old. On August 24, 2010, Su asked Kwok to change his position from general manager to general counsel and work part time as an hourly employee. Kwok viewed Su's request as an attempt to force him to resign. "When Kwok refused the demotion, he was terminated." As Kwok left Peak Sports's offices, "[h]e was forcibly detained by one of the Peak [Sports] employees who blocked his car and would not allow him to leave unless he provided her with a laptop computer he had been using even though it belonged to Kwok under his employment agreement." Peak Sports did not pay all amounts due to him under his employment agreement.

Based on these allegations, and after receiving a right-to-sue letter from the Department of Fair Employment and Housing, Kwok asserted causes of action for wrongful termination, violation of Labor Code section 1102.5, assault and battery, age discrimination, breach of contract, defamation, fraud and intentional infliction of emotional distress. He sought compensatory and punitive damages, attorney fees, costs and prejudgment interest.

2. *Peak Sports's Complaint in the Trial Court Against Kwok and Su*

Less than one month after Kwok submitted his demand for arbitration, on November 19, 2010, Peak Sports filed the instant action against Kwok and Su, who are husband and wife. According to Peak Sports's complaint, Kwok represented to officials from the parent company on or about September 21, 2009 that he was interested in bringing the company to the United States, as he had connections with an American shoe

company that was attracted to the Chinese market. On October 14, 2009, Zhou contacted Kwok and set up a meeting with him on October 24, 2009 for Kwok to present plans for him to assist entry into the United States market. Around March 8, 2010, Kwok began to assist in the establishment of Peak Sports, and the company sought legal advice from him. Later that month, about March 31, 2010, Peak Sports, based on Kwok's instruction, opened an account at the bank where Su, Kwok's wife, was an employee. Beginning about April 1, 2010, Kwok, although he had not been hired as a Peak Sports employee or as general counsel, started representing to members of the business community, including vendors and potential clients of Peak Sports, that he was the company's general counsel.

Peak Sports's complaint also alleged that, between June 9 and June 21, 2010, Kwok had drafted an agreement between himself and Peak Sports to give him the title of general counsel. Kwok presented a draft agreement to Jia Su, as a document setting forth his compensation, knowing that Jia Su had limited English skills. The agreement was signed by Jia Su and Kwok. After execution of the agreement, Kwok provided incorrect legal advice, mishandled contracts and negotiations and failed to comply with company policy. He and his wife also wrongfully obtained Peak Sports's property, including footwear and sports apparel, and obtained a benefit by redistributing the property to others.

The complaint further alleged that, about August 18, 2010, Peak Sports officers met with Kwok to express their displeasure with his performance. On August 26, 2010, Peak Sports paid Kwok for all services rendered. Around this time, Kwok presented Peak Sports with an agreement, under which he maintains that he is entitled to various other payment and continued benefits. According to the complaint, the agreement is different from that entered into between Kwok and Peak Sports and contains multiple provisions favorable to Kwok to which the company never assented. Kwok "has expressed that if he is not paid more money by [Peak Sports] that he hopes that his statements and actions will cause the termination of any and all business relationships that [the company] has, or ever hopes to have, with the National Basketball Association . . . and its professional basketball players."

In causes of action against both Kwok and Su for breach of fiduciary duty and conversion and against Kwok alone for declaratory relief, negligence, legal malpractice and fraud, Peak Sports sought compensatory and punitive damages, as well as a determination that it did not enter into an employment agreement with Kwok or that the agreement produced by Kwok is false and unenforceable.

3. *Kwok and Su's Petition to Compel Arbitration and Peak Sports's Opposition*

On February 8, 2011, Kwok and Su filed a petition to compel arbitration pursuant to Code of Civil Procedure section 1281.2. According to the petition, instead of responding to Kwok's demand for arbitration or challenging it, Peak Sports filed the instant action against Kwok and Su as an attempt to avoid arbitration. Kwok and Su asserted that all causes of action in Peak Sports's complaint were covered by the arbitration provision in Kwok's employment agreement, which was signed on June 21, 2010 and effective as of April 2, 2010 and provided, "This agreement shall be construed under and governed by the laws of the State of California, without reference to conflicts of law principles. Company agrees that the exclusive venue for any dispute regarding this agreement shall be arbitration via JAMS located in Los Angeles, CA. Company submits to such venue." Kwok maintained that the causes of action alleged against Su arise out of the same set of facts as the claims against him and relate to his employment agreement and thus are subject to arbitration as well.

Kwok and Su attached as an exhibit to the petition a copy of Kwok's employment agreement, including the arbitration provision. In Kwok's declaration in support of the petition, he asserted that the agreement provided that each party should consult independent legal counsel and that he had discussed the issue of having outside counsel review the agreement with both Jia Su and Zhou, who both then examined, reviewed and analyzed the contract. In addition, Jia Su informed Kwok that he had forwarded and discussed the agreement with a representative from the parent company. The agreement was negotiated extensively before it was signed in June 2010, and Kwok's communication with Jia Su and Zhou was "almost entirely" in English. Kwok represented that Jia Su had signed other employment agreements for the company, and

did considerable business on behalf of the company with the NBA and its players, particularly regarding shoe-endorsement contracts.

Peak Sports opposed the petition to compel arbitration, contending that its complaint alleged actions by Kwok before execution of any employment agreement and, even if an agreement covered Kwok's conduct, the arbitration provision was not sufficiently specific to include allegations of legal malpractice. In addition, Peak Sports argued that its declaratory relief cause of action involved issues regarding the enforceability of the purported employment agreement, which should be decided by the trial court and were outside the scope of arbitration. Jia Su submitted a declaration in support of Peak Sports's opposition, saying that, although his primary means of communication is through his native language of Mandarin, not English, Kwok "was solely responsible for the drafting of an employment agreement" and Kwok never suggested that he should have outside counsel review the agreement.

4. *The Trial Court's Ruling*

The trial court denied the petition to compel arbitration. According to the court, "The complaint is divided into three portions. ¶¶14 through 18 detail acts taken by Kwok prior to 4/02/10. ¶¶19 through 24 allege acts taken between 4/02/10 and 6/21/10. ¶s 29 through 37 include acts taken after 6/21/10. For example, ¶29 alleges 'Kwok provided incorrect legal advice after Jia Su signed the document presented by Kwok.' See also ¶¶31 through 37, detailing additional acts of alleged malpractice that occurred after the parties signed the agreement. [¶] [Kwok and Su] fail to establish that the allegations arising prior to 4/02/10 are subject to arbitration. [They] also fail to cite any authority with respect to what happens when a document is signed on one date but contains an 'effective date' that is earlier. [Kwok and Su] therefore fail to meet their initial burden to show that claims arising prior to the date the agreement was signed, 6/21/10, are subject to the arbitration provision. . . . [¶] Thus, [they] fail[] to establish that 2/3 of the alleged acts of malpractice are subject to the arbitration agreement. [They] also fail[] to cite any authority suggesting that the Court should compel arbitration of part of the claims when the other part of the claims is not subject to the arbitration agreement.

The motion to compel arbitration is therefore denied. [¶] [Peak Sports] also contends the agreement is not sufficiently specific to require arbitration of claims for malpractice. The Court declines to decide this issue, as it is not necessary to do so."

Kwon and Su filed a timely notice of appeal. (Code Civ. Proc., § 1294, subd. (a) [order denying petition to compel arbitration is appealable].)

DISCUSSION

Kwok and Su contend that the trial court erred by denying their petition to compel arbitration on the ground that the claims in Peak Sports's complaint are not arbitrable because some of the allegations refer to conduct before June 21, 2010—the date Kwok's employment agreement containing the arbitration provision was executed. We agree.

"A trial court is required to order a dispute to arbitration when the party seeking to compel arbitration proves the existence of a valid arbitration agreement covering the dispute. [Citation.] Under Code of Civil Procedure section 1281.2, '[o]n 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' the case falls into one of three limited exceptions. (Italics added.) Similarly, Code of Civil Procedure section 1281 provides, '[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.' These '"statutes evidence a strong public policy in favor of arbitration[], which policy has frequently been approved and enforced by the courts."' [Citations.]" (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1404-1405; see also *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1282 (*Rowe*) ["A strong public policy favors the arbitration of disputes, and doubts should be resolved in favor of deferring to arbitration proceedings"].) "In general, '[t]here 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.]' [Citation.]" (*Laswell*, at p. 1406.)

Peak Sports contends, and the trial court agreed, that the matter was not subject to arbitration because only the allegations against Kwok that occurred after the employment agreement was signed on June 21, 2010, and not the allegations of conduct that took place before that time, could be covered by the arbitration provision. We disagree. The majority of the allegations in Peak Sport's complaint relate to conduct after June 21, 2010. Moreover, although the agreement was executed on June 21, 2010, it was effective as of April 2, 2010, providing that "[t]his agreement is effective beginning April 2, 2010[,]" and thereby covering all alleged acts after that date. The only allegations against Kwok regarding conduct before April 2, 2010 involve his statements to Peak Sports about his qualifications, his recommendation to the company to open an account at the bank where his wife worked and his purported representations to individuals in the business community that he was Peak Sports's general counsel when, according to the company, it had not officially hired him as general counsel but had "accepted Kwok's proposal" that it "follow his legal counsel and advice with regards to all aspects related to [Peak Sports] establishing a business office in Los Angeles, California." Given that the nature of the alleged conduct before April 2, 2010 relates to Kwok's role in Peak Sports and his employment with the company, it falls within the arbitration provision covering "any dispute regarding [Kwok's] [employment] agreement[.]" (See *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686-687 ["arbitration should be upheld 'unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covered the asserted dispute"; burden falls on "party opposing arbitration to demonstrate that an arbitration clause *cannot* be interpreted to require arbitration of the dispute"].)

Relying on *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501 (*Lawrence*), Peak Sports argues that in any case its legal malpractice cause of action against Kwok cannot be covered by the arbitration provision because it does not expressly provide that it encompasses legal malpractice. Peak Sports's reliance on

Lawrence is misplaced. In *Lawrence*, the appellate court held that the client's agreement to arbitrate a dispute "'regarding fees, costs or any other aspect of our attorney-client relationship'" when read in the context of the contract "devoted almost exclusively to financial matters" did not demonstrate a waiver of the right to a jury trial on legal malpractice claims. (*Id*. at pp. 1504-1506.) Here, in contrast, Kwok's employment agreement is not "devoted almost exclusively to financial matters." (*Id*. at p. 1506.) Rather, it lists his qualifications in relation to the company's needs and details the work that he will perform for Peak Sports, including responsibility for "trademarks . . ., mergers and acquisitions, special events, basketball events, human resources, negotiating sponsorship contracts, negotiating player endorsement contracts, negotiating coaching contracts, and any significant contractual transaction." As a result, the circumstances in this case are distinguishable from those in *Lawrence*, and the arbitration provision covering "any dispute regarding [Kwok's] [employment] agreement" encompasses the legal malpractice cause of action. (See *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1106-1107, 1112-1113 [*Lawrence* distinguishable and legal malpractice claims arbitrable based on provision covering disputes other than attorney fees related to the contract or attorney's professional services]; see also *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1315-1316 [under liberal interpretation of arbitration provisions, causes of action with their roots in the relationship between the parties created by the contract are arbitrable].)

Nor does the fact that Peak Sports sued Su, Kwok's wife, for breach of fiduciary duty and conversion render the complaint or any of its causes of action nonarbitrable. Su, a nonsignatory to Kwok's employment agreement, may compel arbitration because the breach of fiduciary duty and conversion causes of action, relating to Kwok's and her alleged possession of Peak Sports's property and benefit from redistributing it, are based on and intertwined with Kwok's employment agreement, containing the arbitration provision, and his duties specified in that agreement. (*Rowe*, *supra*, 153 Cal.App.4th at p. 1287 [nonsignatory may compel arbitration for "[c]laims that rely upon, make reference to, or are intertwined with claims under the subject contract"].) In addition,

because the allegations against Su involve conduct related to Kwok's employment duties, she, as a nonsignatory sued based on her actions as the agent of a signatory, may compel arbitration. (*Berman v. Dean Witter & Co., Inc.* (1975) 44 Cal.App.3d 999, 1004 [nonsignatory entitled to benefit of arbitration provision for breach of fiduciary duty and negligence causes of action based on his actions as the agent for the signatory].)[1]

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[1] Peak Sports also asserts that, because it pleaded a declaratory relief cause of action in which it seeks a determination that it "did not enter an agreement with Kwok and/or that Kwok's alleged agreement is false and unenforceable[,]" the matter is not arbitrable. We disagree. In support of their petition to compel arbitration, Kwok and Su produced Kwok's employment agreement containing the arbitration provision. The agreement provided, "Each party understands that they have the right to legal counsel and each has exercised such right or have voluntarily waived such right." In his declaration, Kwok stated that he had discussed the issue of consulting independent legal counsel with Jia Su and Zhou and that "[t]hey both [had] examined, reviewed and analyzed the contract." In addition, Jia Su informed Kwok "that he had personally forwarded and discussed" the agreement with an officer of the parent company. In opposition to the petition, Jia Su declared that Kwok did not suggest to him that he should have the agreement reviewed by outside counsel. He, however, did not mention the express term in the agreement referring to each party's right to legal counsel, nor did he suggest that the agreement had not been examined independently. In addition, Peak Sports did not deny the existence of an employment agreement with Kwok or produce a different agreement to show that the one presented by Kwok was false. Peak Sports also failed to present any evidence that any different agreement did not contain an arbitration provision. The declaratory relief cause of action thus is not an impediment to arbitration. (*Owens v. Intertec Design, Inc.* (1995) 38 Cal.App.4th 72, 75 [party may not dispute existence of arbitration agreement without presenting "evidence, by declaration or otherwise, in support of the 'facts' underlying his arguments in opposition to the petition"]; *Strauch v. Eyring* (1994) 30 Cal.App.4th 181, 183 ["petition to compel arbitration may not be denied on the ground of fraud alleged in an unverified pleading, but only upon evidentiary support by an affidavit or declaration under penalty of perjury submitted in opposition to the petition"], disapproved on other grounds in *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 407.) Peak Sports may raise issues regarding its declaratory relief cause of action with the arbitrator if it so chooses.

DISPOSITION

The order denying the petition to compel arbitration is reversed and the matter is remanded with directions for the trial court to enter a new order granting the petition. Kwok and Su are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.