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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

KT CONNECT, INC., Plaintiff and Respondent, v. T-MOBILE USA, INC., Defendant and Appellant.	B284142 (Los Angeles County Super. Ct. No. BC624429)

APPEAL from an order of the Superior Court of Los Angeles County, Rita Miller, Judge. Reversed and remanded.

Alston & Bird, Stephanie A. Jones; Corr Cronin Michelson Baumgardner Fogg & Moore, Michael A. Moore, for Defendant and Appellant.

No appearance by Plaintiff and Respondent.

Appellant T-Mobile USA, Inc. (T-Mobile) appeals the order denying its motion to compel arbitration in this breach of contract action brought by respondent, KT Connect, Inc. (KT Connect).[1] (Code Civ. Proc., § 1294, subd. (a).) T-Mobile advances several claims of error. We conclude the trial court erroneously failed to address T-Mobile's contention that KT Connect was bound to arbitrate its claims based on the doctrine of equitable estoppel, and applied the wrong standard for reviewing T-Mobile's alter ego argument. We further conclude that the record does not support the trial court's finding that T-Mobile waived its right to compel arbitration. Accordingly, we reverse.

FACTUAL AND PROCEDURAL SUMMARY

T-Mobile offers a program in which it enters into contractual arrangements with qualified dealers to sell its goods and services. Authorized dealers, in turn, contract with subdealers who sell T-Mobile products.

In 2010, T-Mobile entered into a dealer agreement with Pager Partmart, Inc., doing business as Cell Gate USA (Pager Partmart). The parties refer to this agreement as the Master Dealer Agreement (MDA). The MDA authorized Pager Partmart to appoint subdealers "to promote, market, and sell the wireless service and equipment only upon the Company's [T-Mobile] prior written approval of the Sub-Dealer and each Sub-Dealer location . . . ." Pertinent here, the MDA requires the parties to arbitrate any claims or controversies arising out of or relating to the

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[1] KT Connect did not file a respondent's brief, and did not respond to this court's default notice.

agreement. The arbitration is to be conducted in the State of Washington.

Kevin Bae is the president and owner of two pertinent entities, KT Connect and Klean Accents, Inc. (Klean Accents). In June 2015, Klean Accents entered into a subdealer agreement with Pager Partmart, which authorized it to promote, market and sell T-Mobile's prepaid wireless services and equipment. The subdealer agreement bound Klean Accents to "adhere to the terms and conditions of Company's Dealer Agreement." The agreement was signed by Mr. Bae and the CEO of Pager Partmart, but the portion for T-Mobile's approval was left blank.

In June 2016, KT Connect filed a complaint for breach of contract and unjust enrichment naming as defendants T-Mobile and Pager Partmart. According to the complaint, KT Connect and Pager Partmart entered into an oral agreement on or about January 27, 2015, by which KT Connect would resell prepaid T-Mobile SIM cards provided by Pager Partmart.[2] The contract purportedly was memorialized by e-mail. It allegedly provided that KT Connect would receive a 97.25 percent commission for activation of its T-Mobile SIM cards. Pager Partmart paid this commission during the March through June 2015 period, but the commission was reduced to 7.25 percent beginning in July 2015. The next month, after the original commission percentage was not paid, KT Connect ceased selling the SIM cards.

T-Mobile entered a general denial of each allegation in the complaint and asserted seven affirmative defenses. About one year after filing its answer, T-Mobile moved to compel arbitration. It argued that KT Connect and its alter egos, including Klean Accents, had agreed that any claims related to

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[2] A SIM card is a removable memory card.

their role as T-Mobile subdealers were subject to binding arbitration. Alternatively, T-Mobile argued KT Connect is equitably estopped from contesting arbitration because it admitted in discovery responses that it is a third party beneficiary of the MDA, which requires arbitration.

The motion to compel was accompanied by a declaration from Carlos Herrador, a contracts and sales manager for T-Mobile's Dealer Program. According to Mr. Herrador, all subdealers had to be approved by T-Mobile. As part of the approval process, subdealers fill out an application. T-Mobile then reviews applications for compliance with company guidelines. T-Mobile will not approve a subdealer until it has received an executed copy of the subdealer agreement. T-Mobile does not retain copies of its subdealer agreements due to the volume of documentation involved; instead, it issues codes specific to each subdealer. Mr. Herrador's review of T-Mobile's records revealed that: "KT Connect, Inc. was originally known by the name 'Phone to Korea,' and was approved as a sub-dealer and issued sub-dealer codes on or around April 23, 2012. On June 4, 2014, Phone to Korea requested that its name in T-Mobile's sytem be changed to KT Connect."[3]

KT Connect opposed T-Mobile's motion to compel on three grounds: first, that it was not bound by the MDA or any subdealer agreement because it was not a signatory to either contract; second, that it would be unconscionable to enforce the arbitration clause in the MDA against a non-signatory; and third, that T-Mobile waived its right to compel arbitration by waiting approximately one year to bring the motion. Attached to the

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[3] The record does not reveal whether Mr. Bae is connected to Phone to Korea.

opposition was a declaration from Mr. Bae stating, in pertinent part, that "[o]nce payments stopped, Cell Gate told [me] that I needed to start a new company to continue doing business with Cell Gate and T-Mobile, so this time Cell Gate provided a written sub-dealer agreement for the different company, Klean Accents, . . ."

After a hearing, the court issued a written order denying the motion to compel arbitration. The court concluded: "[it] is not inclined to find the argument that an agreement with a different corporation signed after[4] the transactions in dispute occurred would be retroactive and require arbitration of the disputes. [¶] There is no evidence that plaintiff and Klean Accents are alter egos." Alternatively, the court found T-Mobile waived the right to compel arbitration by filing an untimely motion after substantially participating in litigation proceedings. The statement of decision did not address T-Mobile's equitable estoppel argument.

DISCUSSION

Generally, pre-dispute arbitration agreements are "valid, enforceable and irrevocable." (Code Civ. Proc., § 1281.) Code of Civil Procedure section 1281.2 requires that, with certain exceptions, the trial court order arbitration of a controversy if it determines that a valid arbitration agreement exists.

"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.

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[4] The subdealer agreement was executed on June 11, 2015; the purported breach of contract started in July 2015.

[Citation.] Arbitration is consensual in nature." (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244.) "Whether an arbitration agreement is binding on a third party (e.g., a nonsignatory) is a question of law subject to de novo review. [Citation.]" (*Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 680.)

I

KT Connect was not a signatory to any arbitration agreement with T-Mobile. Generally, only signatories to any arbitration agreement may enforce it. (*JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1236.) There are several exceptions to this general rule, including the doctrines of equitable estoppel and alter ego. (See *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513.)

Under the doctrine of equitable estoppel, a defendant may invoke an arbitration clause to compel arbitration when the plaintiff's causes of action are "'"intimately founded in and intertwined" with the underlying contract obligations.' [Citations.]" (*JSM Tuscany, LLC v. Superior Court*, *supra*, 193 Cal.App.4th at p. 1237.) The rationale is that a plaintiff who relies on a contract as a basis for its claims is precluded from repudiating the arbitration clause in that contract. (*Ibid.*) "The doctrine thus prevents a party from playing fast and loose with its commitment to arbitrate, honoring it when advantageous and circumventing it to gain undue advantage. [Citation.]" (*Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1714.)

T-Mobile argues, as it did below, that KT Connect expressly claimed to be a third party beneficiary of the MDA, and is thus estopped from repudiating the arbitration clause contained in

that agreement. This stems from a February 3, 2017 email clarification of KT Connect's interrogatory responses. Specifically, T-Mobile requested that KT Connect identify the basis for any contractual obligations between the parties. KT Connect's counsel responded, "our client holds T-Mobile on the fact that Pager [Partmart] was the agent for T-Mobile, whether that is a direct or indirect liability is a legal matter, and the fact that T-Mobile's contract with Pager, *makes KT Connect a third party beneficiary*." (Emphasis added.) KT Connect, as the principal, is bound by the statements of its attorney-agent. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403.)

Additionally, Mr. Herrador's declaration asserted that Phone to Korea was approved as a sub-dealer in 2012, and subsequently requested its name be changed to KT Connect. KT Connect's opposition did not challenge or otherwise contradict Mr. Herrador's assertion.

Based on this evidence, T-Mobile made a prima facie case of a nexus between KT Connect's causes of action and the MDA containing the arbitration provision. At the hearing on the motion to compel arbitration, T-Mobile highlighted the fact that the court's tentative ruling did not address its equitable estoppel argument. T-Mobile reiterated that "the law is clear that a party can't simultaneously benefit from the agreement and avoid the burdens of the agreement. Plaintiffs don't dispute that in any of their papers."

The court responded as follows: "I'm not swayed. And I'm sorry, I am in trial. I wish I had been able to spend more time looking at the estoppel case law. [¶] It's federal case law, and it's not binding on us in California. But if the California courts have approved it, as you say they have, I probably should have looked

at it a little more carefully, but I'm still not persuaded." Following the hearing, the court adopted its tentative ruling as its final order. The ruling does not address the equitable estoppel issue.

We conclude the court had a duty to consider T-Mobile's equitable estoppel argument.

T-Mobile asks that we decide in the first instance that the doctrine of equitable estoppel bound KT Connect to arbitrate its claims. We decline to do so. "Whether the facts establish an equitable estoppel is a question for the trial court to decide in the first instance, unless the facts can support only one reasonable conclusion. [Citation.]" (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 759.) The facts can support more than one reasonable conclusion, as each party presented evidence concerning the relationship among the various entities. Accordingly, we remand the matter to the trial court to decide this issue in the first instance.[5]

II

T-Mobile claims KT Connect is bound to arbitrate because it is an alter ego of Klean Accents, which entered into a subdealer agreement with Pager Partmart that incorporates "the Dealer Agreement." Citing *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523 (*Sonora*), the trial court found the two entities were not alter egos because "there is no evidence plaintiff is trying to perpetrate a fraud, circumvent a statute or some

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[5] On remand, the trial court "is free to employ whatever procedure it deems necessary and legally appropriate in making the required findings," including a bench trial. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 756.)

other inequitable *purpose* in forming Klean Accents." (Emphasis added.) This is not the correct standard.

A court may compel a party to arbitrate a dispute even though that party did not enter into a written agreement containing an arbitration clause, if the party sought to be compelled is the alter ego of the party clearly subject to arbitration. (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1284–1285.) Since the alter ego determination is primarily a question of fact, the conclusion of the trial court's finding will not be disturbed if it is supported by substantial evidence. (*Alexander v. Abbey of the Chimes* (1980) 104 Cal.App.3d 39, 47.) If there is no conflict in the relevant evidence, we review the issue de novo. (*Sonora*, *supra*, 83 Cal.App.4th at p. 535.)

"There is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case. There are, nevertheless, two general requirements: '(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an *inequitable result* will follow.' [Citation.]" (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300, emphasis added.)

Sonora noted that the alter ego doctrine applies only "when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other *wrongful or inequitable purpose*. . . ." (*Sonora*, *supra*, 83 Cal.App.4th at p. 538, emphasis added, citing *Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 892; accord, *Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 993–994.) This language is dicta, not precedent. (*Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1005–1006.)

Moreover, *Sonora* and the cases it cites expressly acknowledge that the standard for alter ego is whether honoring the corporate form will yield "an inequitable *result*." The distinction between these two standards is significant because finding an inequitable *result* is a less exacting standard than finding an inequitable *purpose*.

The balance of case law on this issue concludes the alter ego doctrine may be invoked when adherence to the fiction of the separate existence of the corporate entities would promote injustice or bring about inequitable *results*. (*Automotriz del Golfo de California S. A. de C. V. v. Resnick* (1957) 47 Cal.2d 792, 796; *Mesler v. Bragg Management Co*., *supra*, 39 Cal.3d at p. 300; *Riddle v. Leuschner* (1959) 51 Cal.2d 574, 580; *Stark v. Coker* (1942) 20 Cal.2d 839, 846; *Watson v. Commonwealth Ins. Co. of N.Y.* (1936) 8 Cal.2d 61, 67; *Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1074; *Webber v. Inland Empire Investments* (1999) 74 Cal.App.4th 884, 899; *Associated Vendors, Inc. v. Oakland Meat Co*. (1962) 210 Cal.App.2d 825, 837; *Claremont Press Publishing Co. v. Barksdale* (1960) 187 Cal.App.2d 813, 817; *Engineering Etc. Corp. v. Longridge Inv. Co*. (1957) 153 Cal.App.2d 404, 416; *D.N. & E. Walter & Co. v. Zuckerman* (1931) 214 Cal. 418, 420; *Minifie v. Rowley* (1921) 187 Cal. 481, 488.) Notably, five of these cases are Supreme Court precedent. Courts exercising inferior jurisdiction are bound by the decisions of the Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We conclude that in requiring an inequitable purpose as opposed to an inequitable result, the trial court applied the wrong standard with respect to the alter ego issue.

Remand is warranted because the prerequisites under which the corporate entity may be disregarded ordinarily is a question of fact that "'is particularly within the province of the trial court. [Citations.] This is because the determination of whether a corporation is an alter ego of an individual is ordinarily a question of fact.' [Citation.]" (*Misik v. D'Arco*, *supra*, 197 Cal.App.4th at pp. 1071–1072.) On remand, the court shall determine whether (1) there was such a unity of interest and ownership between KT Connect and Klean Accents that separate personalities of the two entities did not exist, and (2) an inequitable result will follow unless KT Connect is bound to the arbitration agreement agreed to by Klean Accents. (See e.g., *Highland Springs Conference & Training Center v. City of Banning* (2016) 244 Cal.App.4th 267, 289 [setting parameters for remand to determine whether plaintiffs proved alter ego claim].)

III

The trial court alternatively found that T-Mobile waived the right to arbitration by filing its motion to compel some 11 months after answering the complaint, and after substantial participation in the litigation proceedings. Were we to agree, the aforementioned errors would be moot, but we do not reach that conclusion.

Under Code of Civil Procedure section 1281.2, the trial court may deny a motion to compel arbitration if it finds the moving party has waived the right to arbitrate. (Code Civ. Proc., § 1281.2, subd. (a).) There is no single test for such waiver. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) "'In determining waiver, a court [may] consider "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery

has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party.'" [Citations.]" (*Id.* at p. 1196.) Prejudice is a critical factor in waiver determinations. (*Id.* at p. 1203.)

The burden of proof is on the party seeking to establish waiver. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195.) Any doubt regarding a waiver allegation should be resolved in favor of arbitration. (*Ibid.*) A determination by a trial court that the right to compel arbitration has been waived ordinarily involves a question of fact, which is binding on the appellate court if supported by substantial evidence. (*Id.* at p. 1196.)

KT Connect's sole argument below regarding prejudice was that "it has discovery outstanding, and has not received responses, while providing discovery to defendants T-Mobile and Pager Partmart, as well as the fact that trial is set for October 10, 2017." The trial court found T-Mobile waived the right to arbitrate because:

"The litigation proceedings were substantially invoked. The dates initially set for mediation and trial have passed, were continued based on the inability to timely complete discovery and the new dates are rapidly approaching. Substantial discovery has been conducted. The parties are well into trial preparation.

Although plaintiff did not serve discovery until May 2017, the discovery was served well before the discovery cut-off. Defendant had ample time to set a date for its motion for summary judgment, and was not required to wait until the completion of discovery to reserve a date.

"Defendant has always been aware its policy was not to do business with subdealers until the subdealer signed a written agreement. Defendant did not inform the court it intended to seek to compel arbitration. It made this last minute motion despite not having an agreement signed by this plaintiff. The dealer who would have been the other party to the subdealer agreement, [Pager Partmart], is also a defendant in this action. Neither defendant has a copy of a written subdealer agreement with this plaintiff signed prior to the transactions at issue in this action. As defendant brought this motion without a signed agreement, the motion could have been brought earlier.

"Defendant is seeking to blame plaintiff for any delays in the case, stating plaintiff failed to timely produce documents in response to discovery requests. The court notes that no motions to compel further discovery or compliance with agreement to produce documents have been filed."

The court's waiver determination is not supported by substantial evidence. T-Mobile's actions were consistent with the right to arbitrate, as KT Connect acknowledged at the hearing that T-Mobile "kept saying to me there is an arbitration provision." T-Mobile moved to compel arbitration less than two months after obtaining a copy of the 2015 subdealer agreement, which formed the basis for its equitable estoppel and alter ego

arguments.[6] T-Mobile reiterated in several emails to KT Connect that it intended to compel arbitration. T-Mobile's motion to compel filed in June 2017—while close to the October 2017 trial date—was not on "the eve of trial." (See *St. Agnes*, *supra*, 31 Cal.4th at p. 1204.) T-Mobile did not file a counterclaim. Further, discovery was ongoing and Mr. Bae had not yet been deposed. There is no evidence that T-Mobile used the judicial discovery process in order to gain information that could not have been secured in arbitration. (*Ibid.*)

Turning to the last factor, "prejudice can be established when the party seeking arbitration used judicial discovery procedures not available in arbitration to obtain discovery of the opposing party's strategies, evidence, theories, or defenses. [Citations.]" (*Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1196, italics omitted.) Here, KT Connect was not forced to reveal its strategies, evidence, theories, defenses or case plan, which would weigh in favor of waiver. Nor did KT Connect allege, let alone prove, that the timing of T-Mobile's motion "substantially impaired" its ability to take advantage of the benefits and efficiencies of arbitration. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1204.)

The concept of waiver has equitable roots. (Schwing, 2 Cal. Affirmative Def. (2d ed. 2017) § 47:1.) By all accounts, T-Mobile repeatedly insisted upon the existence of a binding arbitration

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[6] According to emails attached as exhibits to T-Mobile's ex parte application to set a hearing on its motion to compel arbitration, KT Connect never produced the 2015 subdealer agreement in discovery, despite repeated demands to do so. Instead, T-Mobile obtained a copy of the subdealer agreement from Pager Partmart.

agreement, but the proof of the agreement was not established until it obtained a copy of the 2015 subdealer agreement from Pager Partmart, and KT Connect's counsel admitted it was a third party beneficiary of the MDA. Any delay in bringing the motion to compel was attributable to KT Connect's lack of cooperation during discovery. Nor did T-Mobile's delay undermine the public policy of an efficient and relatively inexpensive means to dispute resolution. We conclude the trial court's waiver finding is not supported by substantial evidence.

DISPOSITION

The order denying T-Mobile's motion to compel arbitration is reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion. T-Mobile is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.