Filed 6/15/17 Random Holdings v. M3House CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RANDOM HOLDINGS, LLC, et al. Plaintiffs and Respondents, v. M3HOUSE, LLC, et al., Defendants and Appellants.	B263488 (Los Angeles County Super. Ct. No. BC545228)

APPEAL from an order of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Reversed.

James A. Shalvoy for Defendants and Appellants.

Law Offices of Bryan Mashian; Mashian Law Group, Bryan Mashian and Laura K. Stanton for Plaintiffs and Respondents.

Appellants and defendants M3House, LLC dba mnmMOD Building Solutions, LLC (mnmMOD); Minarc, Inc.; Tryggvi Thorsteinsson; and Erla Dogg Ingjaldsdottir (collectively, defendants) appeal from an order denying their motion to compel plaintiffs and respondents Random Holdings, LLC, and Mario Romano (collectively, plaintiffs) into arbitration. Because we conclude that the defendants' motion to compel arbitration should have been granted, we reverse the order.

BACKGROUND

Minarc provides design services, including ones for prefabricated houses. Thorsteinsson and Ingjaldsdottir are Minarc's principals and shareholders. mnmMOD provides building materials, including the prefabricated panels Minarc uses in its buildings.

Romano is a general contractor, and he develops modern homes. In 2012, he hired structural engineers Carl Howe and C.W. Howe Partners, Inc. (the Howe defendants)[1] to help Romano plan a home in Venice. Because Romano was interested in prefabricated homes, Howe referred him to mnmMOD and Minarc. Unbeknownst to Romano, Howe was "actively working" with Thorsteinsson and Ingjaldsdottir to expand Minarc's and mnmMOD's sales, and Howe was considering investing in the companies.

Romano met Thorsteinsson and Ingjaldstdottir, who, Romano was told, was an architect. To build their prefabricated homes, Thorsteinsson and Ingjaldstdottir used mnmMOD's panel system. They, along with Howe, assured Romano, that

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[1] The Howe defendants are not parties to this appeal.

mnmMOD's "revolutionary building system" allowed homes to be built faster and cheaper than traditional construction methods.

In July 2012, Romano entered into a design agreement with Minarc for it to "[p]repare [p]lans and [s]pecifications for a 4000 square foot panelized mnmMOD house" in Los Angeles. The Minarc agreement contained this arbitration clause: "All claims, disputes, and other matters or questions arising out of, or relating to, this agreement or the breach thereof, will be determined by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association in Los Angeles, California." Romano then entered into a supply and purchase agreement with mnmMOD for it to supply the panels. The mnmMOD agreement did not have an arbitration clause.

Construction began on Romano's home. But when the mnmMOD panels arrived they were defective and unusable. Romano then learned that Thorsteinsson and Ingjaldstdottir were not architects and had not developed the panel technology. The Howe defendants knew about the other defendants' lack of qualifications but, because of their financial interest in Minarc and mnmMOD, the Howe defendants "rubberstamped" the project. Romano stopped construction and abandoned the mnmMOD system.

Random also wanted to build a home in Santa Monica. The Howe defendants were Random's project engineer. After reading about Minarc in a magazine, Random contacted Thorsteinsson, who said a home could be built in six-to-nine months, instead of the traditional two years, using the prefabricated panels. In December 2011, Minarc agreed to "[p]repare [p]lans and [s]pecifications for a 4000 to 4500 square foot prefabricated mnm-MOD house" for Random in Santa Monica. That agreement

contained the same arbitration clause as was in Romano's agreement. A supply agreement with mnmMOD was prepared but never signed, although Random made a downpayment on the panels. The Howe defendants failed to tell Random that the City of Santa Monica would not approve the home, because the City required on-site construction, but the prefabricated panels were built off-site. After Random learned that the prefabricated panels were "snake oil," that they were made of foam containing a suspected carcinogen and that the insulation method Minarc promoted was not recommended by experts, Random demanded a refund, which defendants failed to give.

Based on these allegations, Random and Romano, in May 2014, filed a complaint for breach of contract and for intentional and negligent misrepresentation against Minarc, mnmMOD, Thorsteinsson, Ingjaldsdottir and the Howe defendants. The complaint alleged that Thorsteinsson and Ingjaldsdottir were owners and agents of mnmMOD and Minarc, that mnmMod and Minarc were alter egos of Thorsteinsson and Ingjaldsdottir, and that mnmMOD and Minarc were alter egos of each other.

Defendants—but not the Howe defendants— moved to compel arbitration under the arbitration clauses in the Minarc agreements. After that motion was filed, plaintiffs, to avoid a "two-front war," dismissed Minarc, the signatory defendant, without prejudice. Plaintiffs then opposed arbitration on the ground that the remaining defendants (mnmMOD, Thorsteinsson and Ingjaldsdottir), had no agreement to arbitrate with them. Alternatively, plaintiffs argued that even if Minarc remained in the case, arbitration still would not be proper because the arbitration clause covered only contract claims, whereas the case fundamentally sounded in tort.

Before the motion was heard, plaintiffs filed a first amended complaint that still named Minarc as a defendant, although it had been dismissed without prejudice.[2] Plaintiffs then clarified they were not reasserting the previously-dismissed claims against Minarc.

On March 20, 2015, the trial court denied the motion to compel arbitration.[3]

DISCUSSION

Although mnmMOD, Thorsteinsson and Ingjaldsdottir aren't parties to the arbitration agreement, they contend they may compel arbitration. Plaintiffs respond that the "third party" exception in Code of Civil Procedure section 1281.2, subdivision (c),[4] applies, and therefore the motion was properly denied. We agree with mnmMOD, Thorsteinsson and Ingjaldsdottir.

California has a strong public policy favoring arbitration. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9; *Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1405 (*Laswell*).) Doubts as to the scope of an agreement to arbitrate must be resolved in favor of arbitration. (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1282.) Section 1281.2 thus provides that on "petition of a party to an arbitration agreement alleging the

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[2] The first amended complaint added a cause of action for intentional misrepresentation against the Howe defendants and amplified the allegations against them.

[3] Although Minarc was dismissed from the action without prejudice, Minarc purports to appeal from the order denying arbitration. Minarc is not a party to this appeal because it was dismissed from the action without prejudice.

[4] All further undesignated statutory references are to the Code of Civil Procedure.

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." (Italics added.) Generally, only signatories to an arbitration agreement can be bound by or invoke it. (*Rowe*, at p. 1284; *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.) However, there are exceptions under which a nonsignatory to an arbitration agreement can invoke an arbitration clause. (*Westra*, at p. 765.) Those exceptions include agency, veil-piercing or alter ego, estoppels, and third-party beneficiary. (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513; *Westra*, at pp. 763-767 [applying agency exception].)

Some exceptions apply here. mnmMOD, for example, is a third-party beneficiary of the Minarc agreement. (See generally *Valley Casework, Inc. v. Comfort Construction, Inc.* (1999) 76 Cal.App.4th 1013, 1021 ["a person who can show he is a third party beneficiary of an arbitration agreement may be entitled to enforce that agreement"].) " 'The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [Citation.] If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract.' " (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1232; see also Civ. Code, § 1559.) Here, the stated object of the Minarc agreements was to prepare plans and specifications for a "panelized mnmMOD house" (Romano/Minarc agreement) and for a "prefabricated mnm-MOD house" (Random/Minarc agreement).

The Minarc agreements designate mnmMOD as the supplier of the prefabricated panels with which the houses would be built. Minarc thus was designing, not just any prefabricated house, but a *mnmMOD* prefabricated house. mnmMOD benefited from the Minarc agreements.

Alternatively, under the estoppel exception, a nonsignatory defendant may "invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claim when the causes of action against the nonsignatory are 'intimately founded in and intertwined' with the underlying contract obligations." (*Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 271; see also *Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 213-214.) The claims must be based on the same facts and inherently inseparable from the arbitrable claims against signatory defendants. (*Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1713.) Where the signatory raises allegations of substantially interdependent and concerted misconduct by the nonsignatory and the signatory to the contract and the behavior is related to the contract containing the arbitration clause, estoppel is warranted. (*Goldman*, at pp. 224, 228.) Here, plaintiffs' claims are based on alleged misrepresentations defendants made about defendants' ability to provide prefabricated homes in a short timeframe, the viability of the panels, Minarc's status as an architectural firm, and Thorsteinsson's and Ingjaldsdottir's status as architects. Defendants engaged in the alleged conduct jointly and concertedly to induce plaintiffs to build prefabricated homes using Minarc's designs *and* mnmMOD's panels. Defendants' conduct is thus intimately founded in and intertwined with the underlying arbitration agreement.

Finally, agency and alter ego exceptions also apply. Parties sued as agents or alter egos of a signatory may enforce an arbitration agreement. (*Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406, 418; *Rowe v. Exline*, *supra*, 153 Cal.App.4th at p. 1285 ["Indeed, while an agent is one who acts on behalf of a corporation, an alter ego is one who, effectively, *is* the corporation."]; *Berman v. Dean Witter & Co., Inc.* (1975) 44 Cal.App.3d 999, 1003.) According to plaintiffs' own allegations Thorsteinsson and Ingjaldsdottir are the "principal owners" of mnmMOD and of Minarc, mnmMOD and Minarc are Thorsteinsson's and Ingjaldsdottir's alter egos, and mnmMOD and Minarc are alter egos of each other. Plaintiffs' claims and allegations against defendants are so thoroughly intertwined that plaintiffs have referred to them collectively as the "Minarc Defendants" throughout the trial and appellate proceedings. Therefore, mnmMOD, Thorsteinsson and Ingjaldsdottir, despite being nonsignatories to the arbitration agreement, could compel arbitration. That plaintiffs dismissed without prejudice Minarc—the signatory defendant—does not alter this conclusion. Where, as here, plaintiffs allege that the nonsignatory defendants are alter egos of the signatory defendant, plaintiffs may not avoid arbitration by dismissing the signatory defendant.

Nor is plaintiffs' assertion that their complaint "fundamentally" sounds in tort, not contract, a ground to deny arbitration. The arbitration agreements provide that "[a]ll claims, disputes, and other matters or questions arising out of, or relating to, this agreement" are subject to arbitration. That phrase is broad enough to encompass tort and contractual liabilities. (*Rice v. Downs* (2016) 248 Cal.App.4th 175, 186; *Berman v. Dean Witter & Co., Inc.*, *supra*, 44 Cal.App.3d at p. 1003; see *Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell* (1999) 76 Cal.App.4th 227, 230 [describing similar

arbitration clause as "very broad"].) Plaintiffs' intentional and negligent misrepresentation causes of action are predicated on allegations that defendants misrepresented their status as award-winning architects; Minarc represented that it designed, patented and trademarked the panels when in fact another company had done so; the paneling system would save time and costs; and the panels were tested and met certain codes and standards. Plaintiffs thus essentially allege that defendants' misrepresentations induced them to enter into the agreements. (See, e.g., *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1316 [where plaintiffs' complaint predicated on claim vital information withheld in communications leading to the agreement, arbitration of tort claims proper]; *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 715-716.) Plaintiffs' causes of actions arise out of or relate to the Minarc arbitration agreements.

Because the nonsignatory defendants could compel arbitration under one or more of these grounds, to the extent the trial court based its decision on defendants' nonsignatory status, the court erred in denying the petition. The issue therefore becomes whether there is another reason precluding arbitration. Plaintiffs assert there is: the Howe defendants are "third parties" per section 1281.2, subdivision (c). We first note that this exception wasn't addressed in plaintiffs' written opposition to the motion to compel arbitration. The trial court's minute order perfunctorily denies the motion without explanation. The proceedings were unreported. And there is no settled or agreed statement. It is therefore unclear whether the trial court considered section 1281.2, subdivision (c), or on what ground the court denied the motion. But, because the threshold issue raised by that exception is subject to de novo review, we address it.

(*Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 680; *Rowe v. Exline*, *supra*, 153 Cal.App.4th at p. 1283.)[5]

The exception to arbitration in section 1281.2, subdivision (c), applies when (1) a "party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party," (2) the third party action arises out of the same transaction or series of related transactions, and (3) there is a possibility of conflicting rulings on a common issue of law or fact.[6] (§ 1281.2, subd. (c); see also *Acquire II, Ltd. v. Colton Real Estate*

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[5] "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.] By contrast, the ultimate determination whether to stay or deny arbitration based on the possibility of conflicting rulings on common questions of law or fact is reviewed for an abuse of discretion. [Citation.] 'The court's discretion under section 1281.2, subdivision (c) does not come into play until it is ascertained that the subdivision applies, which requires the threshold determination of whether there are nonarbitrable claims against at least one of the parties to the litigation (e.g., a nonsignatory).' [Citations.]" (*Daniels v. Sunrise Senior Living, Inc.*, *supra*, 212 Cal.App.4th at p. 680.)

[6] "If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding." (§ 1281.2, subd. (c).)

Group (2013) 213 Cal.App.4th 959, 967.) Section 1281.2, subdivision (c), thus "authorizes the court to refuse to enforce a contractual arbitration provision if arbitration threatens to produce a result that may conflict with the outcome of related litigation not subject to arbitration." (*Mount Diablo Medical Center v. Health Net of California, Inc.* (2002) 101 Cal.App.4th 711, 717; see also *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.*, *supra*, 186 Cal.App.4th at pp. 704-705.) The "third party" section 1281.2, subdivision (c) refers to is one not bound by the arbitration agreement. (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393 [" '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' "]; *Laswell*, *supra*, 189 Cal.App.4th at pp. 1405, 1407; *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1519.) "The exception thus 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." (*Laswell*, at p. 1405.)

The threshold determination is whether there are nonarbitrable claims against a nonsignatory, here, the Howe defendants.[7] (*Laswell*, *supra*, 189 Cal.App.4th at pp. 1405-1406.) Stated otherwise, are the Howe defendants third parties to the arbitration agreement such that they are not bound by it? As we explained, however, nonsignatories can be bound by an arbitration agreement; for example, a nonsignatory sued as an agent of a signatory may enforce an arbitration agreement. (*Rowe v. Exline*, *supra*, 153 Cal.App.4th at p. 1284; *Dryer v.*

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[7] The Howe defendants had their own contracts with Romano and Random, and those contracts did not have arbitration clauses.

Los Angeles Rams, supra, 40 Cal.3d at p. 418.) Also, "a signatory plaintiff who sues on a written contract containing an arbitration clause may be estopped from denying arbitration if he sues nonsignatories as related or affiliated persons with the signatory entity." (*Rowe*, at p. 1287.)

Here, according to the first amended complaint, Carl Howe introduced Romano to Thorsteinsson and Ingjaldsdottir. But Howe wasn't a "gratuitous messenger; instead, he was a middle man soliciting Romano on behalf of" defendants. Howe was "essentially working as a consultant and sales agent to expand and develop" Minarc's and mnmMOD's sales and businesses, and he "bill[ed] time" to them. To induce Romano to enter into the agreements with Minarc and mnmMOD, the Howe defendants falsely represented that defendants had " 'designed' a patented, trademarked pre-fab paneling system." Using that prefabricated design would be two-to-three times faster than building with traditional framing and would save labor costs. The Howe defendants also created the "false impression" that the defendants were architects. Plaintiffs ignore these allegations, although they are essentially the same ones alleged against Minarc, mnmMOD, Thorsteinsson and Ingjaldsdottir. Based on plaintiffs' own allegations, no defendant is a third party to the arbitration agreement within the meaning of section 1281.2, subdivision (c).

Therefore, to the extent the trial court's denial of the motion to compel arbitration was based on that exception, the court was incorrect. Instead, the motion to compel arbitration should have been granted. That being said, we do not decide whether the Howe defendants can either compel arbitration or be compelled into arbitration, because that issue is not before us. We hold merely that Romano and Random cannot rely on the third party exception in section 1281.2, subdivision (c), as a

shield against mnmMOD's, Thorsteinsson's and Ingjaldsdottir's motion to compel arbitration.

DISPOSITION

The order denying the motion to compel arbitration is reversed. Appellants and defendants may recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, Acting P. J.

We concur:

LAVIN, J.

JOHNSON (MICHAEL), J.*

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