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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

DAVID K. BRANDON, Cross-complainant and Respondent, v. MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES, INC. et al., Cross-defendants and Appellants.	B276540 (Los Angeles County Super. Ct. No. BC512372)

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

Scheper Kim & Harris, Katherine B. Farkas and Amos A. Lowder for Cross-defendants and Appellants.

Sandler and Rosen and Charles L. Birke for Cross-complaint and Respondent.

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After David K. Brandon purchased an apartment building in Texas from No Mas Tomas, LLC, he defaulted on a promissory note securing a portion of the purchase price. Consequently, he was sued by the principal of No Mas Tomas, Thomas Mitchell. Mr. Brandon cross-complained against the real estate broker and salesperson, cross-defendants Marcus & Millichap Real Estate Investment Services, Inc., and Jeffrey Mark Miller, who represented both Mr. Brandon and No Mas Tomas in the transaction.

Cross-defendants petitioned to compel Mr. Brandon to arbitrate his claims pursuant to the arbitration clause in the purchase agreement between Mr. Brandon and No Mas Tomas. Mr. Brandon opposed arbitration on several grounds. The trial court denied the petition on the basis that cross-defendants were not parties to the purchase agreement between Brandon and No Mas Tomas, despite well-settled law establishing the right of the parties' agent to enforce an arbitration agreement. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2013, Mr. Brandon was sued by Mr. Mitchell for breach of contract, alleging that Mr. Brandon defaulted on a promissory note in connection with his purchase of an apartment complex in Texas. Mr. Brandon and No Mas Tomas had executed an addendum to the purchase agreement, which provided for seller financing of a portion of the purchase price. The addendum provided that it would be "kept outside of escrow, but shall be part of the transaction."

In June 2014, Mr. Brandon filed a cross-complaint for indemnity and damages against Marcus & Millichap and Mr. Miller, the brokerage and agent representing both Mr. Brandon and No Mas Tomas in the transaction. Mr. Brandon alleged that cross-defendants had prepared the seller financing addendum, and

kept it out of escrow to avoid recording of a note and deed of trust, thereby eliminating the protections of the anti-deficiency statute in the event Mr. Brandon defaulted on the note.

On September 12, 2014, cross-defendants demurred to the cross-complaint. The court set the hearing on the demurrer *more than one year later*, on October 20, 2015. Instead of opposing the demurrer, Mr. Brandon filed an amended cross-complaint on May 28, 2015, *more than eight months after the demurrer was filed*, alleging additional causes of action.

Cross-defendants demurred to the first amended complaint, and the hearing on the second demurrer was set for December 18, 2015, *almost seven months after Mr. Brandon filed his first amended cross-complaint*. After taking the matter under submission, the trial court overruled the demurrer.

On January 4, 2016, Mr. Brandon moved for leave to file a second amended cross-complaint, adding an additional cause of action based on cross-defendants' drafting of the addendum to the purchase agreement.

On January 7, 2016, cross-defendants filed a petition to compel arbitration of Mr. Brandon's claims against them. Cross-defendants invoked the arbitration clause in the purchase agreement between Mr. Brandon and No Mas Tomas, which identified cross-defendants Marcus & Millichap and Mr. Miller as the "agents" of both the buyer and seller.

The arbitration agreement provides that "[a]ny controversy or claim arising out, of or relating to this Agreement, or the breach thereof, shall be settled by final binding arbitration administered before a single arbitrator by the American Arbitration Association (AAA) under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitration shall be governed by

the AAA's expedited procedures. The parties also agree that the AAA's Optional Rules for Emergency Measures of Protection shall apply to the proceedings. The AAA's fees and charges shall be paid equally by the parties as they become due, provided that the prevailing party shall be awarded its costs and expenses associated with any dispute concerning this Agreement, including reasonable attorneys' fees from the non-prevailing party. If either party fails to pay its share of the AAA's fees or expenses as they become due, and such failure is not cured within five (5) days of receiving written notice therefore from the other party or the AAA, such party shall be deemed to have defaulted and the arbitrator shall enter final judgment in favor of the non-defaulting party."

The signature page of the purchase agreement provides: "Buyer and seller hereby acknowledge that agent has advised the parties to consult with their respective legal counsel concerning the legal effect and validity of the agreement prior to its execution." The agreement further provides: "No representation is made by agent as to the legal, financial, tax or other effects or the validity of any provision of this agreement, as a real estate broker, agent is qualified to give advice on real estate matters only. If you desire legal, financial, tax or other professional advice, consult your attorney, accountant, tax or other professional advisor."

Cross-defendants asserted in their petition that Mr. Brandon's claims arose out of, or were related to the purchase agreement, and because of the agency relationship between the signatories and the moving parties, cross-defendants could enforce the agreement to arbitrate.

Mr. Brandon did not dispute that the claims were subject to the arbitration agreement. Nor did he dispute that the purchase agreement provided cross-defendants the right to enforce the arbitration clause.

Instead, Mr. Brandon opposed the petition on the grounds that cross-defendants obtained his consent to the arbitration agreement by fraud. Mr. Brandon submitted a declaration in which he described his almost 30 years of investing in residential income producing properties, most of which he had bought and sold with cross-defendant Marcus & Millichap as his broker. Mr. Brandon admitted he had read the arbitration clause before he signed the purchase agreement. But he said cross-defendants did not explain it to him. Mr. Brandon argued that cross-defendants had a fiduciary duty to advise him they could enforce the arbitration agreement. He also argued the agreement was unconscionable, and cross-defendants waived their right to arbitration by filing demurrers in the trial court after his lawyer rejected cross-defendants' demand to arbitrate.

The trial court denied the petition, stating as the only ground for denial that Marcus & Millichap was not a signatory party to the purchase agreement.

DISCUSSION

Code of Civil Procedure section 1281.2 requires a trial court to grant a petition to compel arbitration "if [the court] determines that an agreement to arbitrate the controversy exists." (*Ibid.*) The party seeking to compel arbitration has the initial burden to plead and prove the existence of a valid arbitration agreement that applies to the dispute by a preponderance of the evidence. Once that burden is satisfied, the party opposing arbitration must prove by a preponderance of the evidence any defense to the agreement's enforcement. (*Ibid.*; see also *Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 59.) "Petitions to compel arbitration are resolved by a summary procedure that allows the parties to submit declarations and other documentary testimony and, at the trial court's discretion, to provide oral testimony."

(*Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 586.) On appeal from the denial of a petition to compel arbitration, we apply the de novo standard of review if the trial court's ruling rests on a decision of law, and the facts are undisputed. (*Avery*, at p. 60.)[1]

1. Agreement to Arbitrate

Generally, one must be a party to an arbitration agreement to be bound by it. (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.) However, "[t]here are exceptions to the general rule that a nonsignatory to an agreement cannot be compelled to arbitrate and cannot invoke an agreement to arbitrate, without being a party to the arbitration agreement. [Citation.] A nonsignatory to an agreement to arbitrate may be required to arbitrate, and may invoke arbitration against a party, if a preexisting confidential relationship, such as an agency relationship between the nonsignatory and one of the parties to the arbitration agreement, makes it equitable to impose the duty to arbitrate upon the nonsignatory." (*Id.* at pp. 763-765, and cases cited therein; *Norcal Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 72-76, and

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[1] The purchase agreement provides it "shall be construed under and governed by the laws of the State of Texas . . . ." Cross-defendants argue that the choice of law provision in the agreement requires that we apply Texas law, which they say is in accord with California law. Both parties for the most part relied on California law in support of their positions. Mr. Brandon contends that California law applies, not Texas law. Since the parties rely on California law, and have not developed any arguments resting on Texas law, we rest our opinion on California authority. (See, e.g., *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.)

cases cited therein ["The common thread of all the above cases is the existence of an agency or similar relationship between the nonsignatory and one of the parties to the arbitration agreement."].)

Mr. Brandon does not dispute that cross-defendants were the agents of the signatories to the arbitration agreement. To the contrary, in his first amended cross-complaint, he specifically alleged that cross-defendants were his agents. As a matter of law, it is well established that the relationship between a broker and its client is that of principal and agent. (See, e.g., *Rhode v. Bartholomew* (1949) 94 Cal.App.2d 272, 278.) The purchase agreement acknowledged that an agency relationship existed between the signatories and cross-defendants, and it is plain that the dispute arose from cross-defendants' representation of Mr. Brandon related to the purchase agreement. Mr. Brandon concedes these points on appeal. We find the trial court erred in concluding cross-defendants could not enforce the agreement to arbitrate on the ground they were not signatories to the agreement.

2. Defenses to Arbitration

The trial court did not resolve Mr. Brandon's grounds for opposing arbitration. We first address whether remand is necessary to allow the trial court to rule on Mr. Brandon's defenses, or whether we may decide them on appeal. Mr. Brandon contends that remand is not necessary, and that we may reach the merits of his defenses. Cross-defendants agree that we may decide the merits of Mr. Brandon's defenses as long as they do not turn on disputed facts.

The trial court must resolve factual disputes in deciding a petition to compel arbitration, but if a party opposing arbitration provides no evidentiary support for his defenses, we may decide them on appeal as a matter of law. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973-986 [finding remand

necessary for some defenses, as there was some evidence supporting them, but rejecting unconscionability defense as a matter of law, even though the trial court had not considered it].) We agree with the parties that we may decide the merits of Mr. Brandon's defenses as there are no disputed facts.

a. Fraud

A party opposing arbitration may raise fraud as a defense. (*Rosenthal v. Great Western Fin. Securities Corp.* (2006) 14 Cal.4th 394, 415 (*Rosenthal*).) "California law distinguishes between fraud in the 'execution' or 'inception' of a contract and fraud in the 'inducement' of a contract. In brief, in the former case ' "the fraud goes to the inception or execution of the agreement, so that the promisor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all, mutual assent is lacking, and [the contract] is *void*. In such a case it may be disregarded without the necessity of rescission." ' Fraud in the inducement, by contrast, occurs when ' "the promisor knows what he is signing but his consent is *induced* by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is *voidable*. In order to escape from its obligations the aggrieved party must *rescind* . . . ." ' " (*Ibid.*, citation omitted.)

In the trial court, and on appeal, Mr. Brandon asserted both fraud in the inducement and fraud in the execution of the arbitration agreement. Mr. Brandon's own testimony forecloses any finding of fraud in the execution because he never testified he was deceived as to the nature of the purchase agreement, or that he did not know what he was signing or did not intend to enter any contract at all. Quite the contrary, Mr. Brandon testified that he read and understood the purchase agreement he signed had an

arbitration clause, and that cross-defendants were his agents and the buyer's agents.

Mr. Brandon's fraud defense rests entirely on his claim that cross-defendants owed him a duty to explain that he would be bound to arbitrate claims against them, and that they would seek to enforce the arbitration agreement in the event of a dispute even though they were not signatories to the purchase agreement. While it is generally true that an agent and principal have a fiduciary relationship (*Twomey v. Mitchum, Jones & Templeton, Inc.* (1968) 262 Cal.App.2d 690, 709), it does not follow that cross-defendants had a fiduciary duty to explain the legal effect of the arbitration agreement to Mr. Brandon.

The scope of a fiduciary's obligations often depends on the facts of the case, including the relative sophistication of the parties. (*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 961 (*Brown*).) In *Brown*, the court reversed the trial court's order on a motion to compel arbitration and remanded with instructions to make a finding whether there was fraud in the execution of a brokerage account agreement that contained an arbitration clause. (*Id.* at p. 945.) An elderly couple with substantial assets entered into the brokerage account agreement with a Wells Fargo financial consultant at the urging of their Wells Fargo "relationship manager." At the time, the husband was 93 years old, in failing health and legally blind, and his wife was 81. The relationship manager, a Wells Fargo vice president, had basically taken over the financial affairs of this vulnerable couple, making biweekly visits to their home office to manage their financial paperwork, and introducing them to an estate attorney, an accountant, and the Wells Fargo financial consultant who set up the brokerage account. (*Id.* at pp. 945-947.)

The relationship manager and financial consultant went to the office of the elderly couple and presented them with numerous Wells Fargo forms to sign, knowing that the couple were unable to read the fine print. The husband was so frail, he could not sign his name where indicated. The financial consultant knew the husband was unable to read the documents and had been told of his limitations during the meeting. Nonetheless, the financial consultant did not offer to read or explain anything to the couple, or ask if they had any questions. The couple believed that, by signing the agreements, they were only agreeing to open brokerage accounts. They signed the documents almost immediately after they received them, having no idea the documents included an arbitration agreement. (*Brown*, *supra*, 168 Cal.App.4th at pp. 947-949.)

On these facts, the *Brown* court found Wells Fargo had induced the vulnerable couple to repose trust and confidence in Wells Fargo such that Wells Fargo might have a fiduciary duty to disclose the arbitration clause to them in a manner they could understand. The court remanded for further proceedings to determine if there was fraud in the execution of the brokerage account agreement which contained the arbitration agreement. (*Brown*, *supra*, 168 Cal.App.4th at pp. 961-962.)

This case is not remotely similar to the facts in *Brown*. As we have already observed, Mr. Brandon's own testimony forecloses any finding of fraud in the execution of the purchase agreement and the arbitration clause. (*Rosenthal*, *supra*, 14 Cal.4th at p. 425 ["Because the facts described above do not establish these plaintiffs lacked a reasonable opportunity to learn the character of the documents they signed, they do not prove fraud sufficient to make the contracts wholly void."].)

We also find Mr. Brandon has not demonstrated fraud in the inducement. To oppose arbitration on the ground of fraud in the inducement, Mr. Brandon would have to seek rescission of the purchase agreement, which he has never done. (*Rosenthal*, *supra*, 14 Cal.4th at p. 415 [in order to escape contractual obligations on the ground of fraud in the inducement, the aggrieved party must rescind].)

Moreover, Mr. Brandon is a sophisticated real estate investor. He testified in his declaration that he had almost 30 years experience as a residential real estate investor. These are his California residential income-producing investments: He first bought a duplex in 1987 and added two units to the building. He next purchased a four-unit property in the mid-1990's. He sold the first property and bought another four-unit property in 1999. He bought a seven-unit property in 2003 and later sold it. In 2004, he bought a six-unit property and also an eight-unit property, both of which he later sold. In 2005, he bought an 11-unit property which he still owns. He first invested out of state in 2006, when he bought and sold a 120-unit apartment complex in Texas. He bought the 76-unit complex in Houston that gave rise to this litigation in 2009 and lost that to foreclosure. In addition to his real estate ventures, Mr. Brandon has been a member of the Beverly Hills Police Department for over 30 years and currently serves as Traffic Supervisor. In sum, Mr. Brandon is neither vulnerable, feeble, nor a pushover likely to be misled by those with whom he transacts business.

Mr. Brandon actually read the arbitration clause but states he did not understand it would apply to disputes with cross-defendants. He also states he had a longtime trusting relationship with cross-defendants and "it did not cross my mind that I would ever get into a legal dispute with M&M." As a matter of law, these

facts are insufficient to establish cross-defendants owed a duty to explain the arbitration agreement to Mr. Brandon.

In *Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal.App.4th 866 (*Desert Outdoor Advertising*), the court held a lawyer did not have a fiduciary duty to explain an arbitration clause in a fee agreement to clients who were sophisticated businesspersons. (*Id*. at pp. 873-874.) As in this case, the fee agreement advised the clients of their right to seek independent legal advice and encouraged them to do so. (*Id*. at p. 869, 871.) *Unlike* this case, the clients in *Desert Outdoor Advertising* testified they did not read the fee agreement and were unaware it contained an arbitration clause. (*Id*. at p. 873.) The court reasoned the arbitration provision was readily discernible and clear, there was no claim the lawyer tried to conceal it or misrepresented it, the clients acted unreasonably in failing to read it, and the lawyer had no fiduciary duty to explain it. (*Id*. at pp. 874-875; see also *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP* (2013) 219 Cal.App.4th 1299, 1308-1309 [finding that counsel had no obligation to explain arbitration agreement to sophisticated client].)

Similarly, the court in *Rosenthal*, *supra*, 14 Cal.4th at page 425, found the fiduciary obligations of a securities broker did not extend to orally alerting the customer to the existence of an arbitration clause or explaining its meaning and effect.

Mr. Brandon is a sophisticated businessperson who actually read the purchase agreement and the arbitration clause, which was discernible and clear. He does not claim cross-defendants tried to conceal the arbitration clause or that they misrepresented it. Like the courts in *Desert Outdoor Advertising* and *Rosenthal*, we find the circumstances here do not establish a fiduciary duty to explain the arbitration clause to Mr. Brandon. Since that is the only premise of

his fraud defense to enforcement of the arbitration clause, we reject it.[2]

b. Unconscionability

Unconscionability consists of two elements: procedural unconscionability and substantive unconscionability. (*Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1532-1533; see also *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.) Both must be present for a court to exercise its discretion to refuse to enforce a contract under the doctrine of unconscionability. (*Stirlen*, at p. 1533.)

Procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. The relevant factors are oppression and surprise. Oppression arises from unequal bargaining power between the parties, and the absence of any meaningful choice of the weaker party. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 656.) It generally takes the form of a contract of adhesion, a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694; see also *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.) "Where an adhesive contract is oppressive, surprise need not be shown." (*Abramson*, *supra*, at p. 656.)

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[2] Mr. Brandon asks us to take judicial notice of the California Association of Realtors form purchase agreement, which informs the buyer and seller that nonsignatory brokers may compel arbitration. This form, which was not used in this transaction, is irrelevant, and we decline to judicially notice it.

The only procedural unconscionability Mr. Brandon asserts is that the contract was on a Marcus & Millichap form and that Mr. Brandon was not provided with a copy of the AAA rules referenced in the arbitration agreement. These facts are insufficient as a matter of law to demonstrate the contract was procedurally unconscionable. Although the contract is a Marcus & Millichap form, it had many blanks that the parties filled in, and it is replete with interlineations and cross-outs. Mr. Brandon never contended he could not bargain for desired terms, or to remove undesirable terms, or that there was any unequal bargaining power. (See, e.g., *Trend Homes, Inc. v. Superior Court* (2005) 131 Cal.App.4th 950, 957-958.) He never contended the failure to provide him with the AAA rules caused him any surprise. (See *Lane v. Francis Capital Mgmt. LLC* (2014) 224 Cal.App.4th 676, 690.) As such, he failed to demonstrate procedural unconscionability, and therefore, we need not address substantive unconscionability.

c. Waiver

Lastly, Mr. Brandon contends cross-defendants waived their right to compel arbitration by filing two demurrers. He contends he was prejudiced because he incurred legal fees to oppose the demurrers and in seeking leave to file a second amended complaint. He also contends the demurrers delayed litigation of the Mitchell complaint. We are not persuaded.

"A party to an arbitration agreement may by conduct waive its right to compel arbitration. There is no single test for the type of conduct which may waive arbitration rights, but *the conduct must have caused prejudice* to the opposing party." (*Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1194.) "[W]hile there is no 'single test' in establishing waiver, the relevant factors include whether the party seeking arbitration (1) has 'previously taken steps

inconsistent with an intent to invoke arbitration,' (2) 'has unreasonably delayed' in seeking arbitration, (3) or has acted in 'bad faith' or with 'wilful[l] misconduct.' " (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 605-606 ["We have stressed the significance of the presence or absence of prejudice. Waiver does not occur by mere participation in litigation; there must be 'judicial *litigation* of the merits of arbitrable issues'. . . ."].)

It is well settled that filing demurrers, alone, does not demonstrate waiver of the right to compel arbitration. (*Groom v. Health Net*, *supra*, 82 Cal.App.4th at p. 1195 [court's sustaining demurrer to two causes of action that were arbitrable is not litigation of the merits because the causes of action were merely alternative legal theories based on the same underlying facts, which had not been litigated].) Moreover, incurring litigation costs does not demonstrate prejudice. (*Id*. at p. 1197 [the mere expense of responding to preliminary court motions, by itself, does not constitute the prejudice that bars a belated petition to compel arbitration].)

Mr. Brandon must show that his ability to participate in and achieve the benefits of arbitration were somehow impaired. For example, waiver has been found when extensive discovery has been conducted. (*Groom v. Health Net*, *supra*, 82 Cal.App.4th at p. 1197; see *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 212-215.) No discovery was conducted here. Nevertheless, Mr. Brandon contends the two demurrers delayed the prosecution of the Mitchell complaint, which was ultimately resolved in his favor. However, what is evident from the record is that trial court calendar congestion, which led to extraordinary delays in hearing the two demurrers, and Mr. Brandon's own delay in filing his first amended complaint, and seeking leave to file his second amended complaint, are what caused the delays preceding cross-defendants'

petition to compel arbitration. On this record, we find no waiver by cross-defendants of their right to petition to compel arbitration.

DISPOSITION

The order is reversed, and the trial court is directed to enter a new order granting appellants' petition to compel arbitration. Appellants are awarded their costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.