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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

DARIEN EPHRAM, INC., Plaintiff and Respondent, v. MAHROKH YASHAR et al., Defendants and Appellants.	B279827 (Los Angeles County Super. Ct. No. BC630850)

APPEAL from an order of the Superior Court of Los Angeles County. Elizabeth R. Feffer, Judge. Affirmed.

Novian & Novian, LLP, Farid Novian and Jonathan A. Schuab for Defendants and Appellants.

Law Offices of Nico N. Tabibi, Nico N. Tabibi for Plaintiff and Respondent.

Plaintiff and respondent Darien Ephram, DDS, Inc. (Ephram) filed a complaint against defendants and appellants Mahrokh Yashar, Yashar DDS, Kamran Azizi, DMD, and Orion DMD, LLC (collectively, Defendants) asserting numerous claims related to the purchase of a dental practice. Defendants challenge on appeal the trial court's denial of their motion to compel arbitration of Ephram's claims. We affirm the trial court order.

FACTUAL AND PROCEDURAL BACKGROUND

Complaint

According to Ephram's complaint, in August 2015, Ephram and Yashar DDS (Yashar)[1] executed a purchase and sale agreement (Purchase Agreement), whereby Ephram purchased a dental practice from Yashar. The agreement included the purchase of all tangible and intangible properties of the practice, including furniture and equipment, dental instruments, and patient records. At the time of the purchase, Yashar operated the dental practice out of a building leased from Orion DMD, LLC (Orion)[2] pursuant to a lease agreement (Lease Agreement). In connection with the purchase of the practice, Ephram, Yashar, and Orion executed an assumption and assignment of the Lease Agreement (Lease Assignment). Per the terms of the Lease Assignment, Ephram agreed to make all payments and perform all terms, covenants, and conditions of the Lease Agreement.

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[1] Our further references to Yashar include the dental corporation as well as its president, defendant and appellant Mahrokh Yashar.

[2] Our further references to Orion include the company as well as its president, defendant and appellant Kamran Azizi, DMD.

In the course of negotiating the purchase, Ephram visited the practice on two occasions. During a July 13, 2015 visit, Yashar represented to Ephram that the plumbing and dental chairs were in working order, there had been no break-ins on the premises, and co-pays were being collected from patients. During a July 30, 2015 visit, Yashar and Orion represented there had been no security issues attributable to a faulty gate in the parking lot.

A few weeks after purchasing the practice, Ephram discovered numerous and substantial preexisting issues with the dental chairs and building's plumbing, and a pest infestation believed to have been caused by the faulty plumbing. In addition, Ephram learned that Yashar had not collected co-pays from patients, and the practice had previously been burglarized. Ephram further discovered a prior owner of the practice was operating a competing dental practice three blocks away.

Based on the above allegations, Ephram asserted causes of action against Yashar for breaches of terms and warranties contained in the Purchase Agreement. As to both Yashar and Orion, Ephram asserted causes of action for fraud, conspiracy to defraud, negligent misrepresentation, breach of implied covenants of good faith and fair dealing contained in the Purchase Agreement and Lease Assignment, and rescission of the Purchase Agreement and Lease Assignment.

Petition to Compel Arbitration

On October 18, 2016, Defendants filed a motion to compel arbitration of Ephram's claims based on an arbitration agreement contained in an addendum to the Lease Agreement (Arbitration Agreement). Paragraph A of the Arbitration Agreement states that, "[e]xcept as provided in Paragraph B

below, the Parties agree to resolve any and all claims, disputes or disagreements arising under this Lease . . . by and through arbitration . . . and irrevocably waive any and all rights to the contrary." Paragraph B excludes from arbitration "[a]ll claims by either party which (a) seek anything other than enforcement or determination of rights under this Lease, or (b) are primarily founded upon matters of fraud, willful misconduct, bad faith or any other allegations of tortious action, and seek the award of punitive or exemplary damages."

In moving to compel arbitration, Defendants argued Ephram's causes of action "arise out of, relate to, or, at minimum, reference the Lease [Agreement]." Defendants detailed numerous references throughout the complaint to faulty plumbing and a pest infestation, which they generally asserted related to breaches of duties arising from the Lease Agreement. In addition, Defendants argued that Ephram's causes of action for fraud, conspiracy to defraud, and negligent misrepresentation, "though facially falling within the arbitration agreement's Paragraph B exceptions, have no bearing on the arbitrability of the dispute" because Ephram was "barred from bringing tort-based claims relating to the Lease [Agreement] based upon the numerous exculpatory clauses and limitations of liability set forth in the Lease [Agreement], which disallow such claims." Defendants urged the court to consider such claims as contractual rather than tortious.

In opposition, Ephram asserted it had not received a copy of the Arbitration Agreement prior to executing the Lease Assignment. It additionally objected on hearsay grounds to Defendants' inclusion of the Lease Agreement in their petition.

In their reply brief, Defendants asserted Ephram received the addendum containing the Arbitration Agreement, and even if he had not, it was referenced twice in the Lease Agreement. Defendants additionally set forth various legal theories upon which Ephram could be compelled to arbitrate its claims, even if it had not received the Arbitration Agreement.

The trial court denied Defendants' motion to compel arbitration. The court stated that the parties did not offer extrinsic evidence regarding the terms of the Arbitration Agreement and, therefore, "the determination of whether the claims fall within the proposed Arbitration Agreement is a question of law." The court noted that, although Defendants argued Ephram's claims fall within the broad arbitration provision in Paragraph A, they failed to address the "extremely broad" limitation found in Paragraph B. Based on its review of the complaint, the court determined that Ephram's claims fall within Paragraph B's limitation because each claim seeks "much more than 'enforcement or determination of rights under [the Lease Agreement]." For example, the court noted that because the Purchase Agreement "was not in existence when the subject Lease [Agreement] was entered into, it is clear that the claims based upon breaches of the 2015 [Purchase Agreement] fall outside the terms of the 2013 Lease [Agreement].
Further, . . . the main issue is the [Purchase Agreement], relating to the dental practice, and not the Lease [Agreement] itself. . . . Plaintiff's claims only tangentially involve the Lease [Agreement] and, therefore, are expressly not within the terms of the arbitration agreement, which applies to claims which only seek 'enforcement or determination of rights under this Lease [Agreement].' " The court concluded that the "limitation on which

claims are subject to arbitration in Paragraph [B] ensures that the Arbitration Agreement asserted by Defendants cannot be interpreted to include the claims at issue in this action."

Defendants timely appealed.

DISCUSSION

I. The Trial Court Did Not Err in Relying on Allegations Rather than Evidence

Defendants contend the trial court erred in relying solely on allegations in Ephram's complaint to deny their motion to compel arbitration. We disagree.

Private arbitration involves a matter of agreement between the parties and is governed by contract law. (*In re Tobacco Cases I* (2004) 124 Cal.App.4th 1095, 1104.) When a party alleges a written agreement to arbitrate a controversy exists and another party to the agreement refuses to arbitrate the 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 . . . ." (Code Civ. Proc., § 1281.2.) A trial court has no power to order parties to arbitrate a dispute they did not agree to arbitrate. (*Ibid.*; *Bouton v. USAA Casualty Ins. Co.* (2008) 43 Cal.4th 1190, 1202.) Although a strong policy exists in favor of enforcing agreements to arbitrate, no policy exists to compel persons to accept arbitration of controversies that they have not agreed to arbitrate. (*Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 481; see also *Bouton v. USAA Casualty Ins. Co., supra*, 43 Cal.4th at p. 1199.) Thus, in a case such as the present, whether an arbitrable controversy exists depends on the terms of the parties' agreement.

"The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) "Once the existence of a valid arbitration clause has been established, '[t]he burden is on "the party opposing arbitration to demonstrate that an arbitration clause *cannot* be interpreted to require arbitration of the dispute." ' [Citation.] In other words, 'an order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' [Citation.]" (*Titolo v. Cano* (2007) 157 Cal.App.4th 310, 316–317.) "If the party opposing the petition raises a defense to enforcement—either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation [citation]—that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense. [Citation.]" (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*).)

Defendants do not directly challenge the trial court's interpretation of the Arbitration Agreement. Nor do they contest—with one exception that we discuss in the next section—the court's determination that Ephram's claims, as pleaded, fall within Paragraph B's limitations on arbitration. Instead, Defendants argue the court erred in relying on allegations in Ephram's complaint, rather than examining evidence, prior to denying their motion to compel arbitration. Specifically, they assert that because they met their initial burden of proving the existence of the Arbitration Agreement, the burden shifted to Ephram to show, *by a preponderance of the evidence*, that its

claims do not fall within the scope of the Arbitration Agreement. Defendants contend that, because the trial court failed to look beyond the allegations in Ephram's complaint, its order was not supported by "substantial evidence" and constituted an "abuse of discretion." They additionally maintain the trial court's ruling evidences a "hostility" to arbitration which violates the policy that favors it.

We reject Defendants' arguments because they are premised on fundamental misunderstandings of the trial court's order and the difference between legal and factual determinations. Contrary to Defendants' suggestions, there was no reason for the trial court to consider evidence prior to denying their motion. No party raised any factual arguments regarding the interpretation or scope of the Arbitration Agreement, and the trial court's refusal to compel arbitration was in no way founded upon a factual defense.[3] Nor have Defendants identified any other contested factual determinations upon which the trial court relied in denying their motion.[4] Instead, the court's order was premised entirely on its *legal* determination that Ephram's claims do not fall within the scope of the Arbitration Agreement.

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[3] Although Ephram asserted it did not receive a copy of the Arbitration Agreement—a potential factual defense to its enforcement—the court's order was not premised on that defense.

[4] As supposed examples of the trial court's "factual findings," Defendants point to statements the court made at oral argument indicating that the case did not involve claims that the "office space doesn't have what it was promised to have or there are defects in the building or the air conditioning doesn't work." These were not factual findings. Rather, the court was simply commenting on the scope of Ephram's claims based on its review and interpretation of allegations in the complaint.

(See *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71 [" '[w]hether an arbitration agreement applies to a controversy is a question of law' "].) Given the trial court's decision was purely legal and not based on any contested facts, there was no reason for the court to consider evidence.

Defendants' suggestion that the court could not rely on allegations in Ephram's complaint is similarly without merit. To determine whether Ephram's claims fall within the scope of the Arbitration Agreement, the court had to determine what those claims are. The court could only make such a determination by looking to the allegations in Ephram's complaint. Indeed, in " 'determining whether an arbitration agreement applies to a specific dispute, the court may examine only the agreement itself and the complaint filed by the party refusing arbitration . . . .' [Citation.]" (*Rice v. Downs* (2016) 248 Cal.App.4th 175, 185.) Moreover, there was no need to look beyond the allegations because "[i]n deciding an application to compel [arbitration] . . . the superior court does not decide whether the plaintiff's causes of action have merit." (*Rosenthal, supra,* 14 Cal.4th at p. 412.)

The cases Defendants rely on to support their arguments are inapposite. Defendants cite numerous cases standing for the proposition that a trial court may not rely on allegations in a complaint to resolve contested questions of fact related to a defense to the enforcement of an arbitration agreement. (See, e.g., *Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754; *Owens v. Intertec Design, Inc.* (1995) 38 Cal.App.4th 72; *Strauch v. Eyring* (1994) 30 Cal.App.4th 181; see also *Rosenthal, supra*, 14 Cal.4th 394.) Those cases have no application to the present controversy because here, the trial

court denied Defendants' motion based on legal, rather than factual, determinations. There were no contested factual issues to decide and no reasons for the trial court to examine evidence.

II. Defendants' Remaining Arguments Lack Merit

Defendants raise a number of other issues with the trial court's order, many of which are made in passing and without significant argument or citation to relevant authority. As these arguments are not fully developed, not designated by separate argument headings, and not presented with sufficient analysis of the issues, they are subject to forfeiture. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074.) Nevertheless, we briefly address them and find each meritless.

First, Defendants contend the trial court failed to consider two of their evidentiary objections to Ephram's declarations. Attached to their reply brief, Defendants asserted six objections to declarations Ephram submitted in support of its opposition to the motion to compel arbitration. Specifically, Defendants objected to three statements in Darien Ephram's declaration, one statement in Kurt Skarin's declaration, and two statements in Nico Tabibi's declaration. In its order, the trial court did not expressly address Defendants' two Tabibi objections. Instead, the court made the following rulings: "Defendants' Objections Nos. 1–3 are OVERRULED as to the declaration of Ephram. Objection No. 1 to the declaration of Skarin is OVERRULED. *Objections Nos. 2–3 to the declaration of Skarin are SUSTAINED*." (Italics added.) Defendants assert the trial court's failure to address their Tabibi objections was error.

Based on our review of the record, it is clear the above italicized portion of the court's order was intended to refer to the Tabibi objections rather than two nonexistent Skarin objections. As such, and contrary to Defendants' argument, the trial court properly considered and ruled on each of Defendants' evidentiary objections. Regardless, even if the trial court erroneously failed to consider the Tabibi objections, such error would not warrant reversal because Defendants fail to demonstrate prejudice. (See *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694 [party asserting errors in evidentiary rulings must show prejudice]; Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) The objectionable statements in the Tabibi declaration did not concern the interpretation or scope of the Arbitration Agreement or Ephram's claims.[5] Accordingly, regardless of whether the court considered such statements, it would have denied Defendants' motion based on its determination that Ephram's claims fall outside the scope of the Arbitration Agreement.

Defendants next assert the trial court erroneously overlooked their argument related to Paragraph B. In its order, the trial court noted that Defendants failed to address Paragraph B's "express limitation" that precludes from arbitration claims seeking "anything other than enforcement or determination of rights under [the Lease Agreement]." Defendants maintain this statement was factually inaccurate because, in their motion to compel arbitration, they briefly argued that Ephram's fraud,

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[5] In one statement, Tabibi urged the court to consider the importance of his attempts to meet and confer with defense counsel. In the other statement, Tabibi expressed an opinion that Defendants' lack of a declaration regarding the authenticity of the Arbitration Agreement attached to their motion suggested the attachment was not authentic.

conspiracy to defraud, and negligent misrepresentation claims should be construed as contractual claims, which "do not fall within the exception of Paragraph B . . . ."

We find no reversible error. Although Defendants' motion briefly referred to Paragraph B, it did so in conclusory fashion and without reference to the relevant language relied on by the trial court. Regardless, to the extent the trial court erred in failing to acknowledge Defendants' brief reference to Paragraph B, Defendants have not shown such error was prejudicial. (See Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) Defendants fail to explain how construing Ephram's tort claims as sounding in contract would alter the trial court's determination that the claims fall outside Paragraph B's exception to arbitration for claims seeking "anything other than enforcement or determination of rights under [the Lease Agreement]." As such, any error was harmless.

Defendants further argue that Ephram's claim for "rescission of the Lease" does not fall within Paragraph B's exception to arbitration because claims for rescission of contracts are suits in equity seeking determination of contractual rights. They additionally argue that "claims for rescission of a contract with an arbitration provision must themselves be arbitrated."

Defendants' arguments are based on the erroneous premise that Ephram seeks rescission of the Lease *Agreement*. It does not. Rather, Ephram seeks rescission of the Lease *Assignment*. Although resolution of that claim may impact the parties' rights under the Lease Agreement, it nevertheless seeks something "other than enforcement or determination of rights under [the Lease Agreement]"—mainly, rescission of the Lease Assignment.

As such, the claim falls within Paragraph B's broad limitation on arbitration, as interpreted by the trial court.[6]

Finally, Defendants argue that an arbitrator, rather than the court, should have interpreted the Arbitration Agreement and determined whether Ephram's claims fall within its scope. "The issue of who should decide arbitrability turns on what the parties agreed in their contract." (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 551.) Defendants suggest that because the parties agreed to arbitrate disputes arising under the Lease Agreement, they also agreed to arbitrate disputes related to the scope of the Arbitration Agreement contained in the Lease Agreement. Defendants provide no authority or significant analysis in support of their argument.

We decline to consider whether the parties agreed that an arbitrator, rather than the court, should determine the scope of the Arbitration Agreement. To the extent the trial court erred in this regard, such error was invited by Defendants. An error is invited when a party purposefully induces the commission of error. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) The doctrine of invited error bars review on appeal based on the principle of estoppel and is intended to prevent a party from leading a trial court to make a particular ruling, and then profiting from the ruling in the appellate court. (*Ibid.*)

In their motion to compel arbitration, Defendants specifically argued that Ephram's "claims fall within the Arbitration Agreement." In so arguing, Defendants implicitly sought an order from the court finding the same, which required

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[6] We construe Defendants' failure to directly contest the trial court's interpretation of the Arbitration Agreement as an implicit acknowledgment that its interpretation is correct.

that the court interpret the Arbitration Agreement. Defendants cannot argue that the court erred in doing precisely what they asked of it simply because they disagree with the court's ultimate conclusion.

DISPOSITION

The order is affirmed. Respondent is awarded costs on appeal.

BIGELOW, P.J.

We concur:

GRIMES, J.

HALL, J. *

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