Filed 5/29/14 Kretzmar v. Triad Global Asset Management CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ALLAN KRETZMAR, Plaintiff and Appellant, v. TRIAD GLOBAL ASSET MANAGEMENT, INC., et al., Defendants and Appellants.	B245300 (Los Angeles County Super. Ct. No. BC450654)

APPEAL from orders of the Superior Court of Los Angeles County. Joanne B. O'Donnell, Judge. Affirmed.

Allan Kretzmar, in pro. per., for Plaintiff and Appellant.

Joshua R. Furman Law Corp. and Joshua R. Furman for Defendants and Appellants.

Allan Kretzmar (Kretzmar) appeals from an order of the trial court granting a motion for relief from default and default judgment filed by defendants Triad Global Asset Management, Inc. (Triad) and Eugene Cheng (Cheng) (collectively "defendants").

Triad and Cheng cross-appeal from an order denying their motion to compel arbitration.

We find no error and affirm the orders of the trial court.

FACTUAL BACKGROUND[1]

In March 2008, Kretzmar entrusted defendants with $20,000 of his money for the purpose of investment. The overall investment objective was "'Preservation of Capital,' defined as seeking maintenance of the principal value of the investments with a very low risk of loss of said funds." Kretzmar and defendants entered into written agreements regarding the transaction.

Defendants opened a variety of accounts for Kretzmar, including two IRA accounts created for the same tax year. Cheng assured Kretzmar that he would implement a strategy that would ensure that preservation of capital was the primary objective. Under this objective, the goal is to maintain the principal value of the investments and demonstrate a very low risk of loss of principal value. As of March 31, 2008, the consolidated summary of accounts was $20,196.59.

When Kretzmar called Cheng and inquired as to how his investments were doing, Cheng represented that Kretzmar's investments had realized an increase and that he would place stop-losses on any and all trades. However, instead of keeping his promise, defendants placed Kretzmar's funds in risky, speculative, and wholly inappropriate investments that did not conform to Kretzmar's investment objectives. As a result, Kretzmar was damaged in the amount of $7,824.08 plus consequential damages.

On November 18, 2009, Kretzmar's attorney Wilfred I. Aka sent a letter to defendants demanding that the capital lost be returned to Kretzmar. The letter was

---

[1] The facts are taken from the allegations set forth in Kretzmar's complaint and the pleadings before the trial court.

captioned as a pre-law suit demand for settlement and sought $7,118.27 to be paid to Kretzmar within 30 days of defendants' receipt of the letter.

PROCEDURAL HISTORY

Kretzmar filed his civil case against defendants on December 6, 2010. He alleged causes of action for breach of contract, breach of implied covenant of good faith, negligent misrepresentation, breach of fiduciary duty, and professional malpractice. Kretzmar served the complaint on Triad and Cheng at Triad's business address on record with the Secretary of State: 2999 Overland Avenue, Suite 207B, Los Angeles, California 90064 (Overland address). Cheng was listed with the Secretary of State as Triad's agent for service of process.

Defendants never responded to the complaint. On June 10, 2011, Kretzmar obtained a default judgment against them. The writ of execution of money judgment was filed on February 16, 2012. The trial court granted the default judgment in the amount of $8,099.08 plus $275 in costs.

On July 12, 2012, Kretzmar sought to enforce the judgment. On July 18, 2012, Cheng's bank sent a "Notice of Levy Under Writ of Execution" to Cheng's family, notifying Cheng that it was required by law to charge the amount levied against his accounts.

Defendants filed a motion for relief from default judgment and for leave to defend the action on August 30, 2012. Defendants argued that the proof of service was probably fraudulent, as it claimed that defendants were personally served at a location they had moved out of seven months before. Defendants further argued that they first received notice of the litigation when a letter arrived from their bank informing them that the funds in their bank accounts had been levied. Defendants asked that the default be vacated as fraudulently obtained, or at least obtained without the opportunity for defendants to defend the action. Defendants attached the declaration of Cheng, who attested to the fact that his lease for the Overland office space had expired on May 31, 2010, and was not renewed. Cheng further declared that he was not present at the

Overland address on December 17, 2010, and was not served with the summons and complaint on that day, either on behalf of himself or on behalf of Triad.

The trial court heard the motion for relief from default on September 24, 2012. Kretzmar appeared without his attorney and was informed he could not appear in pro. per. as he was represented by counsel and no substitution of attorney had been filed. The court announced its tentative decision to grant defendants' motion for relief from judgment and set a hearing for October 30, 2012, on the court's order to show cause as to why the funds levied from Cheng's account should not be returned.

At the October hearing the court found that Kretzmar had filed a substitution of attorney and was representing himself. The court further found its tentative order to be the order of the court and ordered Kretzmar to give a check to defense counsel forthwith. In open court, Kretzmar personally delivered a check to defense counsel which was accepted.

On October 9, 2012, defendants filed a motion to compel arbitration. The motion was heard on November 6, 2012. After taking the matter under submission, the trial court issued an order denying the motion to compel arbitration. The court noted that Kretzmar's opposition was untimely filed and was not considered. However, the court noted that neither Triad nor Cheng were mentioned anywhere in the alleged arbitration agreement. Under its plain language, the arbitration agreement was between Kretzmar and an entity named Commonwealth Financial. The court acknowledged that Cheng declared that at the time Kretzmar opened his account, Cheng was exclusively associated with Commonwealth Financial Network. However, the court found that Cheng failed to provide any evidence that the allegations of the complaint describe actions that Cheng took while he worked for Commonwealth. In addition, the trial court found that the arbitration agreement "merely states that Commonwealth and [Kretzmar] agree to arbitrate any disputes between them; it does not mention disputes between Commonwealth or [Kretzmar] and any agent of the other. Further, defendant fails to show how Cheng's past association with Commonwealth might bind [Kretzmar] to

arbitrate matters against Triad." The court held that defendants failed to prove the existence of an arbitration agreement between Kretzmar and defendants.

Kretzmar filed a notice of appeal from the order vacating the default and default judgment on November 19, 2012.

Defendants filed a notice of appeal from the trial court's order denying the motion to compel arbitration on November 26, 2012.

DISCUSSION

I. Kretzmar's appeal from order granting relief from default

We first address the sole issue raised in Kretzmar's direct appeal: whether the trial court erred in granting defendants' motion for relief from default.

A. Standard of review

"'A motion to vacate a default and set aside [a] judgment . . . "is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse . . . the exercise of that discretion will not be disturbed on appeal."' [Citations.] The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. [Citation.]" (*Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1318-1319.)

B. The trial court did not abuse its discretion in granting relief under Code of Civil Procedure section 473.5

1. The parties' arguments in the trial court

In their motion for relief from default judgment and leave to defend the action, defendants argued that the alleged service took place at a location where defendants were not, and could not at that time, be found. Service of process allegedly took place at the Overland address. The service was allegedly completed by Chris Stevens, who was not a registered California process server. Defendants argued that the attestation of Chris Stevens set forth the impossible as facts. In Cheng's declaration the following facts were included: Triad's lease at the Overland address expired on May 31, 2010, and was not renewed. Several days before May 31, 2010, Triad and Cheng vacated the premises and could not have been found there at any time since then. Cheng attested that under no circumstances was he personally present at that location to receive service of process

seven months later, on December 17, 2010, when Chris Stevens allegedly performed the service of process. Cheng declared that he was not served on December 17, 2010, and had never been served in the action.

Defendants also argued that there was extrinsic fraud on the court, because the proofs of service filed by Kretzmar were fraudulent. As set forth in the declaration of Cheng, it was impossible that service was effected on either defendant at the Overland address as reflected on the proofs of service.

In his opposition to the motion Kretzmar denied defendants' allegations of fraud. He argued that defendants had not provided any proof that they had vacated the premises in May 2010. He also argued that defendants' filings with the State of California, Department of Corporations identified the Overland address as their place of business and listed Cheng as their agent for service of process. Kretzmar argued it was defendants' duty to update records with the State, and that no mail was ever returned from that address as undeliverable. Kretzmar maintained that by failing to update their records with the state, defendants deliberately evaded service.

2. Application of the law

Code of Civil Procedure, section 473.5, subdivision (a), provides:

> "When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered."

Code of Civil Procedure section 473.5, subdivision (c), provides:

> "Upon a finding by the court that the motion was made within the period permitted by subdivision (a) and that his or her lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect, it may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action."

Thus, "[d]iscretionary relief based upon a lack of actual notice under [Code of Civil Procedure] section 473.5 empowers a court to grant relief from a default judgment where a valid service of summons has not resulted in actual notice to a party in time to defend the action. [Citations.] A party seeking relief under section 473.5 must provide an affidavit showing under oath that his or her lack of actual notice in time to defend was not caused by inexcusable neglect or avoidance of service. [Citations.]" (*Anastos v. Lee, supra,* 118 Cal.App.4th at p. 1319.)

The trial court must make the factual determination as to whether the defendants' lack of actual notice was caused by avoidance of service or inexcusable neglect. Here, the trial court implicitly found, based on Cheng's declaration, that the defendants' lack of actual notice was not caused by avoidance or inexcusable neglect. Under the circumstances, we do not revisit the trial court's factual findings. (See *Lynch v. Spilman* (1967) 67 Cal.2d 251, 259 ["'When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed'"].) This rule is applicable to orders made on motions for relief from default. (*Ibid.*)

The trial court found that Cheng's declaration was credible and stated valid reasons for relief from default. Thus, "for the reasons stated in the moving papers," it granted relief from default. No abuse of discretion occurred, and we do not disturb the trial court's factual finding that defendants' default was not caused by avoidance or inexcusable neglect.

C. Kretzmar's arguments do not change the result

Kretzmar devotes much of his brief to the argument that defendants are lying and deceiving the court. Kretzmar accuses the defendants of "evasions and game playing." Kretzmar's belief that the defendants are lying is not a sound basis for reversal of the trial court's order. "'"Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge

or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]"'" (*People v. Mayberry* (1975) 15 Cal.3d 143, 150.) The trial court found defendants' declaration to be credible and granted relief from default for the reasons set forth therein. On appeal, we do not reweigh the evidence. (*People v. Culver* (1973) 10 Cal.3d 542, 548.) The trial court's determination of credibility will not be disturbed on appeal, and we will not address Kretzmar's accusations of deceitfulness or conflicting evidence further.

Kretzmar also continues to emphasize the defendants' failure to update its records with the state. Kretzmar argues that defendants "deliberately chose to ignore the laws in the State of California that if a company is doing business in the State, they have to accept service." Kretzmar points to Business and Professions Code section 17538.5, which makes it unlawful to do business in the State of California without the designation of the complete street address from which the business is being done, and the appropriate designation of the agent of service of process. Kretzmar claims it was not until May 2, 2011, that defendants updated their address with the state, and again argues that no mail was ever returned as undeliverable.

While we agree that defendants should have updated their business address with the state promptly, Kretzmar cites no law suggesting that their failure to do so precludes relief from default. Under the circumstances, the trial court did not exceed the bounds of reason by determining that defendants' failure to promptly update its records was not deliberate avoidance or inexcusable neglect. In fact, the trial court could have concluded that Kreztmar should have done more to ensure that the defendants were properly served.

Finally, Kretzmar argues that defendants' motion for relief from default was not timely. Kretzmar objects to the defendants' claim that the running of the statute of limitations should begin on the date of the levy, arguing that the defendants had actual knowledge long before that date, and that time limit should begin on the date of the entry of the default judgment. Kretzmar makes reference to the rules requiring that a notice of appeal be filed within 180 days (Cal. Rules of Court, rule 8.104(a)(3)), and claims that 180 days after entry of the judgment, "the statutory prohibitions regarding Appeal take

effect." Again, Kretzmar cites no law supporting his position that the time restrictions regarding appeal are relevant to the timeliness of defendants' motion for relief from default.

The relevant statute, Code of Civil Procedure section 473.5, subdivision (a), requires that the motion for relief be filed "within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered."

The record shows that defendants' motion for relief from default was filed on August 30, 2012. This is less than two years after the default judgment was entered on June 10, 2011. It was also less than six weeks after the defendants first became aware of the litigation, when Cheng received notice from his bank on July 18, 2012.

Defendants' motion was brought within the time period set forth in the statute, and the trial court did not err in determining that it was brought within a reasonable time after defendants became aware of the litigation.

In sum, Kretzmar has failed to show an abuse of discretion in the trial court's order granting the defendants' motion for relief from default. Therefore, the order must be affirmed.[2]

II. Defendants' appeal from order denying petition to compel arbitration

After obtaining relief from default, defendants filed a motion to compel arbitration. The trial court denied the motion, finding that the defendants failed to prove

---

[2] In his reply brief, Kretzmar complains that the trial court refused to allow him to present any evidence to refute the defendants' motion for relief from default at the time of the hearing. Kretzmar appeared at the hearing without his attorney. The trial court stated, "I have to consider you to be not here right now because I haven't seen a substitution of counsel, there's been no motion to be relieved." Kretzmar presents no legal support for his argument that the trial court's decision was incorrect. Therefore we may consider this argument forfeited on appeal. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].)

the existence of an arbitration agreement between the parties. In their appeal, defendants challenge this ruling.

A. Applicable law and standard of review

Pursuant to Code of Civil Procedure section 1281.2, when a party files a petition alleging the existence of an agreement to arbitrate the controversy before the court, the court must order the matter to arbitration "if it determines that an agreement to arbitrate the controversy exists." "On appeal, we review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law. [Citations.] Although public policy favors arbitration in general, we will not infer that the right to a jury trial has been waived absent a clear agreement to submit the dispute to arbitration. [Citation.]" (*Kleveland v. Chicago Title Ins. Co.* (2006) 141 Cal.App.4th 761, 764.)

B. The arbitration agreement presented to the court

In their motion to compel arbitration, defendants argued that the court should compel arbitration because Kretzmar's claims are covered by a "broadly worded mandatory arbitration provision contained in the broker customer agreements from which the instant dispute arises."

In his declaration filed in support of the motion, Cheng attested to the following: he is a broker, and he runs his business through Triad. At the time that Kretzmar opened his account, Cheng was exclusively associated with Commonwealth Financial Network (Commonwealth). Every client he took on was required to complete Commonwealth forms and agree to the Commonwealth customer agreements. Attached as exhibit A to Cheng's declaration were "the Commonwealth customer agreements as executed by Mr. Kretzmar."

The document containing Kretzmar's signature has the name "Commonwealth Financial Network" at the top and is captioned "Account Form." Cheng's name is listed under "Representative Name." Above the signature line, the agreement states: "This agreement contains additional terms set forth on the attached pages, including a customer agreement and an arbitration disclosure and agreement."

A few pages later there is an "Arbitration Disclosure and Agreement" which contains the following language:

> "In consideration of opening one or more accounts with Commonwealth Equity Services, LLP, doing business as Commonwealth Financial Network (Commonwealth), I (we) hereby agree that any disagreement between Commonwealth and me (us) shall be settled by arbitration, in accordance with the current rules of the Financial Industry Regulatory Authority (FINRA), and the governing laws of the Commonwealth of Massachusetts.
>
> "I (we) am (are) aware and consent to the following conditions of this Arbitration Agreement:
>
> "(I) All parties to this Agreement are giving up the right to sue one another in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which the claim is filed.
>
> "[¶] . . . [¶]
>
> "I (We) understand that either Commonwealth or I (we) may initiate an arbitration by serving or mailing a written notice to the other party by certified mail, return receipt requested. . . .
>
> "[¶] . . . [¶]
>
> "I (We) understand that this Agreement to arbitrate is enforceable only to the extent mandated by law, and that should such mandatory right of arbitration be eliminated, I (we) shall have no further rights under this Agreement to compel arbitration.
>
> "I (We) understand that this Agreement to arbitrate means that Commonwealth can compel the transfer of any and all claims I (we) made or make or am (are) preparing or hoping to prepare for court, arising from the account relationship with Commonwealth, to arbitration. If any court claim is compelled to arbitration, all claims made in court can be arbitrated in such arbitration if Commonwealth or I (we) so request.
>
> "[¶] . . . [¶]
>
> "This Arbitration Disclosure and Agreement is deemed to be delivered to the account holder(s) at the time the Commonwealth Account Form is signed by the consenting account holder(s). Account holder(s) may

obtain a copy of this Arbitration Disclosure and Agreement by submitting a written request to Commonwealth at:

> "Commonwealth Financial Network
> "29 Sawyer Road
> "Waltham, MA 02453-3483
> "Attn: Legal Department"

Nowhere in the agreement is there a reference to Triad, or a suggestion that it applies to Cheng in his role as agent or owner of Triad.

Kretzmar argues that he never signed the arbitration agreement and that it was never presented to him at any time before the commencement of this litigation. [3]

C. No valid agreement to arbitrate the controversy exists between the parties

Because the existence of a valid agreement to arbitrate the controversy is a statutory prerequisite to the granting of a motion to compel arbitration, "the petitioner bears the burden of proving its existence by a preponderance of the evidence." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) We find that defendants have failed to prove the existence of a valid agreement to arbitrate this controversy.

Defendants contend that the agreement between Kretzmar and Commonwealth is sufficient to show the existence of an arbitration agreement between Kretzmar and the defendants, Triad and Cheng. It is not.

"'[T]he existence of a valid agreement to arbitrate is determined by reference to state law principles regarding the formation, revocation and enforceability of contracts generally. [Citations.]' [Citation.]" (*Bolter v. Superior Court* (2001) 87 Cal.App.4th 900, 906.) The guiding principle here is that a contract cannot be enforced by a nonparty. (*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 294; *Berclain America Latina v. Baan*

---

3 Kretzmar also made this argument to the trial court in his opposition to defendants' petition to compel arbitration, however, Kretzmar's opposition was filed late and was not considered by the trial court. Defendants argue that Kretzmar's argument is therefore forfeited on appeal. We need not address the forfeiture argument, as set forth below, we find that the arbitration agreement, on its face, does not apply to the current controversy.

Co. (1999) 74 Cal.App.4th 401, 405 ["It is elementary that a party asserting a claim must have standing to do so. In asserting a claim based upon a contract, this generally requires the party to be a signatory to the contract, or to be an intended third party beneficiary"].) "'"'A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him . . . .'" [Citations.]' [Citation.]" (*California Emergency Physicians Medical Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, 1138 (*Emergency Physicians*).)

Neither Triad, nor Cheng in his role as owner of Triad, is a party or an intended beneficiary of the contract containing the agreement to arbitrate.[4] Therefore they may not seek to enforce the arbitration agreement contained therein. While there is a strong public policy favoring arbitration, there is "an accompanying foundational precept that claims should be arbitrated only to the extent the parties have agreed. [Citation.]" (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 780; see also *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 245 ["Even the strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement"].)

Defendants argue that because Kretzmar has made a claim for breach of contract, and attached the first two pages of the Commonwealth contract to the complaint, he cannot argue that the arbitration provisions of that contract do not apply. In support of this argument, defendants cite *Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell* (1999) 76 Cal.App.4th 227. The case involved a complaint for dissolution of a partnership agreement which contained an arbitration provision. In finding the arbitration

---

[4] "'A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that third party and such intent appears on the terms of the contract. [Citation.]'" (*Emergency Physicians, supra,* 111 Cal.App.4th at p. 1137.)

provision applicable to the controversy, the court stated: "The controversy as alleged would not have arisen at all but for the partnership agreement." (*Id.* at p. 230.)

Defendants have not shown that this is the case here. Because Kretzmar has not named Commonwealth in his complaint, and the agreement between Kretzmar and Commonwealth does not contemplate any third party beneficiaries to the contract, it cannot be said that the controversy would not have arisen at all but for that agreement.

Defendants argue that both Kretzmar and Cheng, *in his capacity as a financial advisor for Triad*, signed the agreement containing the arbitration provision. This is a misstatement of the record. Nowhere in the referenced document is Triad mentioned, nor does Cheng hold himself out as anything other than a representative of Commonwealth. While Kretzmar attached several agreements to his complaint, he did not attach any written contract between himself and Triad, or between himself and Cheng as a representative of Triad. Defendants are not absolved of their burden of proving the valid existence of an arbitration agreement by virtue of the fact that Kretzmar has attached extraneous documents to his complaint.[5]

Defendants also claim that the trial court erred in failing to make a finding that Triad was related to or affiliated with Commonwealth. Defendants point to law stating that "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. [Citations.]" (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1287 (*Rowe*).)

In *Rowe*, a former corporate officer of a corporation sued the corporation and two officers of the corporation for breach of contract. The claim was based on a contract which the former officer entered into with the corporation. The contract contained an arbitration clause. The two individuals, although not signatories to the contract, were alleged to be alter egos of the corporation which was a signatory to the agreement. Under

---

[5] Kretzmar attached several other alleged agreements to his complaint as well which appear to have existed between Kretzmar and an entity called National Financial Services LLC or "NFS."

those circumstances, the trial court held that the individual defendants could enforce the arbitration agreement. The court noted that "Alter ego theory posits that the individual defendants are inseparable from the corporation and in legal effect are the corporation. [Citation.]" (*Rowe, supra*, 153 Cal.App.4th at p. 1284.) The court further decided that the plaintiff was estopped from repudiating the arbitration clause because the relevant causes of action relied upon and presumed the existence of the contract containing the arbitration provision. (*Id.* at p. 1286.)

Neither circumstance exists here. Kretzmar has not sued Cheng or Triad as alter egos of Commonwealth. Nor can Kretzmar's action for breach of contract against Cheng, as owner and alter ego of Triad, and Triad, be founded on a contract between Kretzmar and Commonwealth.

Defendants also cite language in *Turtle Ridge Media Group, Inc. v. Pacific Bell Directory* (2006) 140 Cal.App.4th 828 (*Turtle Ridge*). In *Turtle Ridge*, a subcontractor of a delivery company sued SBC Smart Yellow Pages (SBC) for fraud and deceit and unlawful conduct, among other things. SBC petitioned to compel arbitration based on an arbitration clause found in its contract with the delivery company. The subcontractor opposed the petition, claiming that it had no direct contractual relationship with SBC and that SBC could not enforce the arbitration provision against it. The Court of Appeal disagreed, finding that "[i]ts claims against SBC arose from its business dealings with SBC and [the delivery company], which the contract and subcontract governed; outside of those contracts, [the subcontractor] had no business relationship with SBC." (*Id.* at p. 833.) In addition, the contract containing the arbitration clause "was expressly incorporated by reference in the subcontract" between the delivery company and the subcontractor. (*Id.* at p. 834.)

Defendants here have not provided any documentary evidence of a contractual relationship between Triad and Commonwealth. Triad is not mentioned in the Commonwealth service agreements, Commonwealth account statements, account-opening acknowledgements, or journal requests attached to the complaint. The only document which references both Triad and Commonwealth is Cheng's business card,

which names Cheng as president of Triad and notes in small writing, "Securities and advisory services offered through Commonwealth Financial Network, Member NASD/SIPC, a registered investment advisor." This reference on Cheng's business card is insufficient to suggest the kind of contractual relationship that existed between the companies in *Turtle Ridge*. Without evidence of a specific business relationship between Commonwealth and Triad, there is no basis for an assumption that Commonwealth intended to be legally intertwined with any business performed by Triad. Nor is there any basis for a finding that the parties to the Commonwealth arbitration agreement intended to incorporate Triad.

Defendants have not met their burden of proving the existence of a valid agreement to arbitrate the disputes in question between Kretzmar and Triad.

III. Kretzmar's motion for sanctions

Kretzmar has made a motion for sanctions against defendants for revealing information about alleged settlement negotiations that took place after this appeal was filed. Kretzmar argues that defendants' revelation of alleged settlement discussions was contrary to public policy and professional ethics, and was also false.

California Rule of Court, rule 8.244(a)(1), requires a party who has settled a case on appeal to "immediately serve and file a notice of settlement in the Court of Appeal." Defendants cited this rule when filing their "Notice of Settlement" with this court. Kretzmar provides no legal authority suggesting that sanctions are appropriate when such a notice is filed in error, as it appears to have been. Further, Kretzmar has not been injured by defendants' apparently mistaken filing. While Kretzmar argues that defendants were seeking to take advantage of him by getting him to sign dismissal papers, Kretzmar does not suggest that he actually signed any such papers.

Imposition of sanctions should be used sparingly to deter only the most egregious conduct. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650-651.) Defendants' premature filing of the Notice of Settlement does not constitute the type of conduct for which sanctions are appropriate. Therefore, we deny Kretzmar's motion.

DISPOSITION

The orders are affirmed. Each party shall bear its own costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.*
FERNS

---

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