Filed 1/17/17 Shaolian v. Jourabchi CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MENASHE SHAOLIAN, Plaintiff and Respondent, v. SEPEHR JOURABCHI, Defendant and Appellant.	B268999 (Los Angeles County Super. Ct. No. BC575678

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

Novian & Novian, Farid Novian and Shanna Javaheri for Defendant and Appellant.

Tuchman & Associates, Aviv L. Tuchman and Michael C. Dicecca for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Sepehr Jourabchi, appeals from a December 11, 2015 order denying his petition to compel arbitration and to the stay action. Defendant argues the specific performance and declaratory relief claims of plaintiff, Menashe Shaolian, are subject to arbitration. We disagree. We conclude the dispute is excluded from the scope of the arbitration agreement. We affirm the order denying defendant's petition to compel arbitration and stay the action.

II. BACKGROUND

A. Complaint

On March 17, 2015, plaintiff filed a complaint for specific performance and declaratory relief. The complaint alleges plaintiff and defendant formed 785 S. Stanford Associates, LLC (the corporation) to invest, develop and manage real property. The parties are the sole members of the corporation with each owning a 50 percent interest in the company. The parties entered into an operating agreement. On May 10, 2011, the corporation acquired real property located at 785 South Stanford Avenue, Los Angeles (the property). The corporation had a note obligation of approximately $560,000 with Bank of America that was secured by a recorded deed of trust on the property.

On June 11, 2013, the corporation, through the parties, entered into a listing agreement to sell the property. Defendant allegedly breached his fiduciary duties by interfering with several viable purchase offers for the property. On January 14, 2015, defendant submitted an offer to purchase the property for $1.7 million. On January 18, 2015, defendant submitted an offer notice pursuant to the operating agreement. Defendant offered to purchase plaintiff's 50 percent interest in the corporation for a

total of $850,000 subject to a specified credit. According to the complaint, defendant's offer notice was made pursuant to section 4.11 of the operating agreement.

On January 20, 2015, plaintiff responded to the offer notice by electing to buy defendant's 50 percent interest in the corporation. Plaintiff agreed to the purchase price, free and clear of all liens and encumbrances, with the sale to be completed within 60 days. Upon receipt of plaintiff's purchase election letter, defendant allegedly refused to sell his interest as required by the operating agreement.

The complaint alleges plaintiff is entitled to specific performance under section 4.11D of the operating agreement. Plaintiff also requests declaratory relief to determine the rights and duties of the parties under the operating agreement's sell-buy provisions. The complaint seeks a judicial determination and declaration that: defendant improperly thwarted a competitive bidding process for sale of the property to acquire the parcel and unfairly benefit from the undervalued rent; defendant triggered the sell-buy provisions of section 4.11 of the operating agreement; plaintiff exercised his right under section 4.11 of the operating agreement; this would permit the purchase of defendant's 50 percent interest free and clear of liens for the same amount offered by him; defendant refused to do things necessary to convey his interest as required by the operating agreement; and plaintiff is entitled to a decree of specific performance to purchase defendant's interest at the agreed-upon amount free of all liens.

B. Defendant's Petition to Compel Arbitration

On September 23, 2015, defendant filed a petition to compel arbitration and stay the action pursuant to Code of Civil Procedure[1] sections 1281.2 and 1281.4. Defendant argued plaintiff is required to submit his claims to arbitration under section 13.10 the operating agreement. Defendant acknowledged section 4.11 of the operating agreement allows a party to bring a court action for specific performance to enforce the buy-sell provision. But defendant contended the parties dispute whether the buy-sell provisions of section 4.11 have been triggered. According to defendant, section 13.10 requires the arbitrator to interpret the provisions of the operating agreement, including section 4.11.

Defendant submitted the operation agreement in support of his petition. The buy-sell agreement provision in section 4.11A of the operating agreement states: "Notwithstanding anything to the contrary contained in this Agreement, if for any reason any Member determines that he does not wish or cannot continue the business of the Company, either Member, at his option, shall be entitled to initiate the buy-sell procedure as provided in and subject to the limitations of this paragraph as follows: [¶] A. The Member initiating the buy-sell procedure (the 'Offeror') may serve upon the other Member (the 'Offeree') a Notice (the 'Offering Notice') which shall constitute an offer by the Offeror (a) to sell his aggregate interest in the Company and (b) to purchase the Offeree's aggregate interest in the company. The Offering Notice shall state the Offeror's proposed purchase price with respect to the offer to sell and the offer to purchase, each of which offers

[1] Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

shall be calculated by multiplying a stated price per percentage interest owned by the Member. The selling and the purchase price shall be the same."

Section 4.11B of the operating agreement provides: "Within fifteen (15) days after delivery of the aforesaid offer, the Offeree may accept either offer by a written acceptance delivered to the Offeror, unconditionally stating that the Offeree accepts the offer to buy or sell, as the case may be. Failure of the Offeree to accept one of the offers within fifteen (15) days after delivery of the aforesaid offers shall be deemed an acceptance of the Offeror's offer to sell. Offers shall be irrevocable during such fifteen (15) day period. Once such an offer has been delivered by an [*sic*] Member, the other Member may not, during its pendency, initiate a procedure under this Paragraph. In addition, there shall be no action taken by any Member during the pendency of such offers which would, either alone or in conjunction with actions by the other Member, [] Transfer any of their Interests under this Agreement. The initiation of the Buy-Sell Procedure as provided in Paragraph 4.11 shall stay any Transfer by any Member under any other Paragraphs of this Agreement."

Section 4.11C of the operating agreement states: "Acceptance of an offer pursuant to this Paragraph shall constitute a binding agreement between the Offeror and Offeree to buy and sell at a closing (the 'Closing') to be held at the Company's principal place of business, within sixty (60) days after the date of such acceptance, or on the next succeeding business day, if that day is a Saturday, Sunday or legal holiday. At the Closing, the Selling Member shall assign and deliver his interest to the Buying Member or his assignees free and clear of all liens, encumbrances and claims of third parties, in exchange

for payment of the full purchase price. Prior to the Closing, the Buying Member shall obtain discharges of continuing liabilities and guarantees of the Selling Member related to the Company, or in lieu of such discharges, shall provide to the Selling Member indemnification and hold harmless agreements with respect to such continuing liabilities and guarantees of the Selling Member."

Under section 4.11D, the parties may bring an action for specific performance to enforce a purchase or sale pursuant to the buy-sell agreement provisions. Section 4.11D provides: "The Members agree to execute, acknowledge and deliver all documents necessary or appropriate to effect a transfer of the Interest in question. If any Member fails to execute, acknowledge or deliver any such document, that Member hereby irrevocably appoints the Buying Member as his attorney-in-fact, coupled with an interest, for the sole purpose of executing, acknowledging and delivering same on its behalf pursuant to this Paragraph. Notwithstanding the foregoing power of attorney, and in addition to any rights which the Members have hereunder, a Member desiring to enforce a purchase or sale pursuant to this Paragraph shall have the right to apply to a court of competent jurisdiction for specific performance hereof, and the defendant Member shall not plead as a defense that an adequate remedy at law exist."

The operating agreement also contains an arbitration provision in section 13.10 which provides: "Except as otherwise provided in this Agreement, any controversy or dispute arising out of this Agreement, the interpretation of any of the provisions hereof, or the action or inaction of any Member or Manager hereunder shall be submitted to arbitration in Los Angeles, California. The parties shall be entitled to full discovery in the

Arbitration proceeding. Any award or decision obtained from any such arbitration proceeding shall be final and binding on the parties, and judgment upon any award thus obtained may be entered into any court having jurisdiction thereof. No action at law or in equity based upon any claim arising out of or related to this Agreement shall be instituted in any court by any Member except (a) an action to compel arbitration pursuant to this Section 13.10 or (b) an action to enforce an award obtained in an arbitration proceeding in accordance with this Section 13.10."

In his written opposition, plaintiff argued the dispute was not subject to arbitration. Plaintiff contended the parties expressly agreed an action could be filed in court to enforce specific performance of a buy-sell agreement under section 4.11D. Plaintiff argued section 4.11D is an exception to the arbitration provision in section 13.10. In addition, plaintiff argued defendant waived his right to arbitrate the dispute. Defendant answered the complaint without asserting an affirmative defense of arbitration. Further, defendant requested a jury trial, agreed to a trial date and posted jury fees. In addition, defendant delayed more than four months before filing his petition to compel arbitration.

In reply, defendant asserted plaintiff's claims fell within the parameters of the arbitration agreement. Defendant argued: the dispute was not excluded from arbitration pursuant to section 4.11 of the operating agreement; section 4.11 was inapplicable because there was no valid offering notice; the January 18, 2015 letter did not constitute a valid offering notice because it contained an offer to purchase but did not include an offer to sell as required by section 4.11; he did not waive his right to compel arbitration; and the delay in bringing the motion was not

unreasonable and did not prejudice plaintiff. Defendant argued that the January 18, 2015 letter was irrelevant. But defendant never argued the January 18, 2015 letter was not part of the evidentiary record before the trial court.

Defendant cited extensively to the January 18, 2015 letter in his December 4, 2015 reply papers. But the January 18, 2015 letter is not attached as an exhibit to plaintiff's opposition to defendant's petition to compel arbitration. Rather, the letter is attached to the declaration of defense counsel filed in response to plaintiff's separate sanctions motion filed on October 16, 2015. The January 18, 2015 letter, which is signed by defendant, is addressed to plaintiff. The letter states in part: "This letter will act as an offer notice for purposes of the operating agreement of 785 S. Stanford Associates, LLC (the 'LLC'). I hereby offer (on behalf of myself and my potential assignee) to purchase your entire 50% membership interest in the LLC for the proposed aggregate purchase price of $850,000.00 (which has been determined by multiplying $17000.00 for each of your percentage interests); the amount actually paid on the closing of the purchase and sale of the interests will be subject to a credit in favor of the buyer in the amount of 50% of the balance of outstanding principal and interest as of the closing date of the loan that is secured by the LLC's property at 785 S. Stanford Street, Los Angeles. The provisions of the operating agreement will control regarding your response to this offer notice, the closing time frame, and all other matters. [¶] Please advise me as to your intent with regard to the foregoing proposal."

C. The Trial Court's Rulings

On December 11, 2015, a hearing was held on defendant's petition to compel arbitration and the parties' competing sanctions motions. The petition to compel arbitration was granted and the sanctions motions were denied. The trial court rule section 4.11D of the operating agreement was an exception to the arbitration provision set forth in section 13.10. The trial court ruled plaintiff's action for specific performance, which was permitted under section 4.11D, fell outside the scope of the arbitration agreement. The trial court added, "Whether or not Plaintiff is entitled to such specific performance is a question to be decided on the merits, not a threshold question as to the arbitrability of such dispute."

III. DISCUSSION

A. The January 18, 2015 Letter Is Part of the Record

Plaintiff argues defendant may not rely on the January 18, 2015 letter because it was not submitted in connection with the petition to compel arbitration. Plaintiff requests we strike or disregard defendant's citations and arguments based on the letter. We decline to do so.

The January 18, 2015 letter was submitted by defendant in opposition to plaintiff's sanctions motion. The sanctions motion was heard in conjunction with the petition to compel arbitration. Defendant's reply to plaintiff's written opposition to the petition to compel arbitration discusses the January 18, 2015 letter at some length. Defendant never objected to consideration of the January 18, 2015 letter because his written reply relies on it. However, the letter is relevant evidence that was before the trial court when the petition to compel arbitration was denied.

According to the complaint, the January 18, 2015 letter is the offering notice. The buy-sell provisions under section 4.11 of the operating agreement are triggered when one member sends an offering notice to the other member. Plaintiff's claims for specific performance and declaratory relief are based on enforcement of the buy-sell provisions in section 4.11. Thus, the January 18, 2015 letter is pertinent evidence concerning the applicability of section 4.11. And as noted, the letter was before the trial court when it denied defendant's petition to compel arbitration. The January 18, 2015 letter was attached to a declaration in opposition to plaintiff's motion for sanctions that was filed on November 30, 2015. Both the petition to compel arbitration and the parties' motions for sanctions were heard and ruled upon by the trial court on December 11, 2015. Accordingly, we may consider the January 18, 2015 letter because it is part of the record before the trial court. (*Haworth v. Superior Court* (201) 50 Cal.4th 372, 379 fn. 2; *Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.)

B. The Dispute Is Not Subject to Arbitration

Sections 1281 and 1281.2 reflect a strong public policy in favor of arbitration. (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 25; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) Given this strong public policy, any doubts concerning whether plaintiff's claims come within the arbitration provision should be resolved in favor of arbitration. (*Lindermann v. Hume* (2012) 204 Cal.App.4th 556, 568; *EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1320-1321.) However, arbitration is a matter of contract. (*Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1440; *Linderman v. Hume,* supra, 204 Cal.App.4th at p. 569.) Thus, a

party cannot be required to accept arbitration of any dispute which she or he has not agreed to arbitrate. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle)*; *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.)

General principles of contract law determine whether the parties have entered into a binding arbitration agreement. (*Pinnacle, supra*, 55 Cal.4th at p. 236; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 173; *Hotels Nevada, LLC v. Bridge Banc, LLC* (2005) 130 Cal.App.4th 1431, 1435 [ordinary rules of contract interpretation apply to arbitration agreement].) Our Supreme Court has explained: "'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id*., § 1639.) The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" (*id*., § 1644), controls judicial interpretation. (*Id*., § 1638.)' [Citations.] A [contract] provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. [Citation.] But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract." [Citation.]'" (*TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27; accord, *EFund Capital Partners v. Pless, supra*, 150 Cal.App.4th at p. 1321.) Where there is no factual dispute as to the language of the agreement or conflicting extrinsic evidence regarding its terms, we review de novo the trial court's order.

(*Rice v. Downs* (2016) 248 Cal.App.4th 175, 185; *Bono v. David* (2007) 147 Cal.App.4th at p. 1061.) We are not bound by the trial court's construction or interpretation of the arbitration agreement. (*Rice v. Downs, supra*, 248 Cal.App.4th at p. 185; *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 684.)

Defendant challenges the order denying the petition to compel arbitration. He argues the trial court abused its discretion by failing to make a factual determination as to whether the January 18, 2015 letter constitutes an offering notice. Defendant also contends the trial court erred by not requiring plaintiff to satisfy his burden of proving the validity of the offering notice under section 4.11 of the operating agreement. Defendant's arguments do not warrant reversal.

Section 13.10 states in part, "*Except as otherwise provided in this Agreement*, any controversy or dispute arising out of this Agreement, the interpretation of any of the provisions hereof, or the action or inaction of any Member or Manager hereunder shall be submitted to arbitration in Los Angeles, California. . . ." (Italics added.) The arbitration agreement in section 13.10 rules out from arbitration any controversy or dispute excluded under other provisions of the operating agreement. Section 4.11D falls within the scope of the "[e]xcept as otherwise provided" language in section 13.10. As noted, section 4.11D states in part, "Notwithstanding the foregoing power of attorney, and in addition to any rights which the Members have hereunder, a Member desiring to enforce a purchase or sale pursuant to this Paragraph shall have the right to apply to a court of competent jurisdiction for specific performance hereof, and the defendant Member shall not plead as a defense that an adequate remedy at

law exist." Section 4.11D allows a member to enforce the buy-sell agreement in court by bringing an action for specific performance.

The dispute between the parties arises from the buy-sell agreement provisions in section 4.11 of the operating agreement. According to the complaint, defendant submitted an offering notice to plaintiff on January 18, 2015. On January 20, 2015, plaintiff responded to the offering notice by electing to buy defendant's 50 percent interest. Plaintiff agreed to the purchase price, free and clear of all liens and encumbrances, with the sale to be completed within 60 days. Upon receipt of plaintiff's purchase election letter, defendant allegedly refused to sell his interest as required by the operating agreement.

Defendant admits section 4.11D is an exception to the arbitration provision in section 13.10 of the operating agreement. But defendant argues the January 18, 2015 letter is a not a valid offering notice under section 4.11. He asserts section 4.11 of the operating agreement is triggered only if the offering notice contains both an offer to purchase and a offer to sell a member's interest in the corporation. Defendant contends the January 18, 2015 letter did not trigger the buy-sell provisions in section 4.11 because it only made an offer to purchase.

However, any issue concerning the validity of the offering notice is irrelevant to the issue of whether the parties must arbitrate their dispute. As noted, section 13.10 states in part, "Except as otherwise provided in this Agreement, any controversy or dispute arising out of this Agreement, the interpretation of any of the provisions hereof, or the action or inaction of any Member or Manager hereunder shall be submitted to arbitration in Los Angeles, California. . . ." The

"any controversy or dispute" language is broad in scope. (*EFund Capital Partners v. Pless*, *supra*, 150 Cal.App.4th at pp. 1322-1326; see *Rice v. Downs* (2016) 247 Cal.App.4th 1213, 1225-1226.) Apart from the specific performance context, "any controversy or dispute" about the whether an effective offering notice has been made is subject to arbitration.

Further, defendant argues to the extent there is any ambiguity regarding a provision of the operating agreement, the arbitrator is to interpret the contract language. Defendant asserts a court action for specific performance is permitted only if an arbitrator rules the January 18, 2015 letter constitutes a valid offering notice under section 4.11. However, section 13.10 of the operating agreement provides in part, "Except as otherwise provided in this Agreement, any controversy or dispute arising out of this Agreement, the interpretation of any of the provisions hereof, or the action or inaction of any Member or Manager hereunder shall be submitted to arbitration in Los Angeles, California." Section 4.11 of the operating agreement is an exception to the arbitration provision set forth in section 13.10. Nothing in section 4.11 requires the parties to arbitrate the threshold issue of the validity of the offering notice before bringing an action for specific performance in court.

Finally, the parties have briefed the issue of arbitration waiver. Plaintiff argues defendant waived his right to arbitrate the claims. Having concluded the dispute is not subject to arbitration, we decline to discuss arbitration waiver.

IV. DISPOSITION

The order denying the petition to compel arbitration and stay the action is affirmed. Plaintiff, Menashe Shaolian, shall recover his costs on appeal from defendant, Sepehr Jourabchi.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

KRIEGLER, J.

BAKER, J.