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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

SCOTT WEIL et al., Plaintiffs and Respondents, v. SOUTH BROCKTON PARTNERS, L.P., Defendant and Appellant.	B271123 (Los Angeles County Super. Ct. No. BC506464)

APPEAL from a judgment of the Superior Court of Los Angeles County. Deirdre Hill, Judge. Conditionally reversed and remanded with directions.

Burgee & Abramoff, John G. Burgee for Defendant and Appellant.

Hartounian Law Firm, Alex Hartounian for Plaintiffs and Respondents.

Defendant South Brockton Partners, L.P. (SBP) appeals from a January 19, 2016 judgment following the trial court's denial of SBP's motion to vacate an arbitration award making it jointly and severally liable with codefendants Hollywood Realty, Inc. (HRI), and Blue Jay Group (BJG) to Scott Weil and John Kline (Respondents), and granting Respondents' motion to confirm that award. We conditionally reverse the judgment.

PROCEDURAL AND FACTUAL BACKGROUND

SBP owned a 45-unit apartment building in Hollywood, California (the Property). SBP retained first HRI, and later BJG, to manage the Property. Respondents, who resided in an apartment at the Property, were hired in June 2010 by HRI as resident property managers. They continued as resident property managers when property management companies changed from HRI to BJG in June 2012. The terms of their continued employment included agreeing to arbitrate any employment-related disputes. Respondents first became aware of the existence of HRI and BJG in June 2012 when the property managers changed and they were given the employee manual for HRI and contracts for their services with BJG.

Respondents filed their initial unverified complaint against SBP in April 2013, alleging multiple violations of the Labor Code. In August 2013, Respondents filed their first amended complaint (FAC), adding HRI and BJG as defendants.[1] Respondents alleged they each worked more than full time for all defendants in exchange only for the provision of "an apartment unit to Plaintiffs on a rent-free basis," and were never paid any wages. Respondents

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[1] Respondents' initial complaint alleged 13 causes of action against SBP, for wage and hour violations, failures to provide meal and rest breaks, unfair competition, accounting and unjust enrichment. The FAC contained no material differences other than those adding HRI and BJG as defendants.

also alleged they were not provided meal and rest breaks to which they were statutorily entitled. They sought payment of their unpaid wages at the legal minimum wage, statutory liquidated damages, waiting time penalties, meal and rest period wages, statutory penalties, restitution, interest, attorney fees, costs and expenses, and punitive damages.

HRI and BJG (but not SBP) each filed a petition to compel arbitration and to stay the pending civil action.[2] Respondents filed oppositions, as well as declarations in support thereof.[3] HRI and BJG filed a joint reply brief. Following argument on the petitions, on January 10, 2014, the trial court adopted a lengthy tentative ruling in full, granting the petitions and ordering that Respondents "must arbitrate their dispute against HRI and BJG."

The trial court held three conferences to monitor the status of the arbitration, on June 5 and September 12, 2014, and on March 2, 2015. At the third such conference, the court was advised that the arbitration, which was then scheduled to commence in the following week, would not proceed "due to defendant's [*sic*] failure to pay." The court ordered that HRI and BJG pay the arbitrator's fees and schedule the arbitration within 20 days.[4]

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[2] On September 20, 2013, SBP demurred to the FAC. The trial court sustained demurrers to certain causes of action and overruled demurrers as to other claims. Rather than order that the complaint be amended or that SBP answer, the court stayed further action in the trial court pending the outcome of the arbitration. The ruling on the demurrers is not an issue on appeal. (Code Civ. Proc., § 1281.4.)

[3] Opposition to BJG's petition to compel arbitration is not in the record on appeal, although there is a reference to an opposition being filed.

[4] The court also ordered that each of HRI and BJG pay sanctions of $250, apparently for failing to earlier pay the full amount of the arbitrator's estimated fee as the court had ordered on January 10, 2014.

The proceedings on that date were not reported. The minute order for that date contains the following with respect to the order that SBP participate in the arbitration: "The court finds that the issues regarding Defendant [SBP] are intertwined and arbitrable as well." In addition, the Joint Settled Statement on Appeal contains the following with respect to events and rulings which the court made on March 2, 2015: "Counsel for Defendants advised the Court that the arbitration was scheduled to proceed one week later[,] on March 9, 2015. [¶] Counsel for Plaintiffs asked the Court to clarify whether Defendant [SBP] was to be included in the arbitration. [¶] The Court asked whether [SBP] was represented by the same counsel as the other Defendants in this action. [¶] Defendants' counsel replied that he was counsel for all of the Defendants. [¶] The Court held that Plaintiffs' claims against Defendant [SBP] were sufficiently intertwined with those against defendants [HRI] and [BJG] and, thus, [were] subject to arbitration. The Court then clarified that its January 10, 2014 order compelling this matter to arbitration was binding on defendant [SBP]. [¶] The Court stated that it was amending its January 10, 2014 order compelling arbitration to include [SBP] and that [SBP] was ordered to participate in the arbitration. [¶] Counsel for Defendants objected to the Court's amendment of its prior order" and to "the lack of any noticed hearing and the fact that [SBP] could not fairly be included in the arbitration which was scheduled one week away."[5]

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[5] Three days after the March 2 hearing and issuance of the order that SBP participate in the forthcoming arbitration, SBP filed a separate "Objection to Ruling at Status Conference" in which it stated there was no evidence it had a contractual agreement with Respondents, that SBP had not petitioned for arbitration, the court's original January 10, 2014 order compelling arbitration did not include SBP, and the order that SBP arbitrate was issued without opportunity for notice and briefing, violating SBP's due process rights. There is no indication in the record that SBP asked that the

Arbitration of the matter commenced on March 9, 2015, at which time SBP filed objections similar to those described above. The arbitrator's award issued March 18, 2015, awarding Respondents $36,800 in ordinary wages and $20,700 overtime wages, plus $2,700 in penalties for nonpayment of wages. SBP was found jointly and severally liable with HRI and BJG. On May 11, 2015, the arbitrator supplemented his initial award, awarding Respondents $63,154 in attorney fees, and $2,432.12 in costs.

Respondents filed a petition to confirm the award; only SBP filed a petition to vacate it. Both petitions were heard on November 4, 2015. The minute order for that date states that the trial court rejected SBP's contention it had not been a proper party to the arbitration and confirmed the award, also denying SBP's motion to vacate the award. (These proceedings were also not reported.) Neither HRI nor BJG had filed either a petition to vacate the award or any opposition to the confirmation of the award.

Judgment was entered jointly and severally against all defendants, including SBP, in the total amount of $135,332.58, on January 19, 2016. SBP filed a timely notice of appeal.

CONTENTIONS

SBP contends the trial court's ruling in March 2015, adding SBP as a party to the arbitration, was a denial of SBP's "rights to due process"; the trial court did not have the authority to reconsider its prior arbitration order,

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trial court address the concerns set out in that document. The mere filing of a document without a motion or request for ex parte relief is not sufficient to bring the filing to the attention of the trial court (see Code Civ. Proc., § 1003 [application for a court order is made by motion]); for this reason, we do not consider this filing.

and there was no substantive basis to include SBP in the arbitration as it had not signed an agreement to arbitrate.

DISCUSSION

The Trial Court's Sua Sponte Reconsideration of Its Order to Arbitrate Should Have Included an Opportunity for Additional Briefing and Argument.

At the hearing which the trial court held on March 2, 2015, to monitor the status of the arbitration, the court sua sponte reconsidered its earlier ruling, and in the manner described, *ante*, added SBP as a party to the arbitration scheduled to be held the following week and ordered that it participate in that arbitration. The stated basis for this ruling was the trial court's determination that "the issues regarding [SBP] are intertwined and arbitrable as well."[6]

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[6] There are multiple bases upon which a nonsignatory may be ordered to arbitrate with parties who did sign an agreement to arbitrate. As our colleagues in Division Five stated in *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504: "There are circumstances in which nonsignatories to an agreement containing an arbitration clause can be compelled to arbitrate under that agreement. As one authority has stated, there are six theories by which a nonsignatory may be bound to arbitrate: '(a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing or alter ego; (e) estoppel; and (f) third-party beneficiary' (2 Oehmke, Commercial Arbitration (3d ed. 2006 update) § 41.57 at pp. 41–195; see *Dryer v. L.A. Rams* (1985) 40 Cal.3d 406, 418 [agency]; *Goldman v. KPMG LLP* (2009) 173 Cal.App.4th 209 [recognizing but denying equitable estoppel]; *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511 [agency and third party beneficiary]; *Rowe v. Exline* [(2007)] 153 Cal.App.4th [1276,] 1284–1285 [alter ego and equitable estoppel]; *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262 [equitable estoppel]; *Wolschlager v. Fidelity National Title Ins. Co.* (2003) 111 Cal.App.4th 784, 790–791 [incorporation of arbitration clause]; *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705 [equitable estoppel]; *Magness Petroleum Co. v. Warren Resources of Cal., Inc.* (2002) 103 Cal.App.4th 901,

Whether an arbitration agreement is binding on a nonsignatory is a question of law subject to de novo review. (*Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 680; *Suh v. Superior Court, supra,* 181 Cal.App.4th at p. 1512.)

SBP, however, presents a predicate issue for our resolution: Whether the procedure by which it was ordered to participate in the arbitration deprived it of due process. The trial court announced at the March 2 hearing that it was sua sponte reconsidering its prior order to arbitrate (issued 15 months earlier) notwithstanding SBP's objection to doing so. Without giving the parties the opportunity for briefing and additional factual presentation on the issue, the trial court ordered SBP to participate in the forthcoming arbitration. We therefore discuss the authority of the trial court to reconsider prior orders on its own motion and the steps to be taken in doing so.

In *Le Francois v. Goel* (2005) 35 Cal.4th 1094 (*Le Francois*), our Supreme Court clarified the relationship between the statutory motion to reconsider set out in Code of Civil Procedure section 1008 and "the court's authority to act on its own motion to correct is own errors," holding, inter alia, that a court may sua sponte reconsider its prior orders. (*Id.* at pp. 1104-1105.)

909–910 ["limited circumstances" of "waiver, estoppel or an oral agreement reflected in written court or other record"]; *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 81–82 [person who accepts benefits under agreement containing arbitration clause bound by the clause]; *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* [(1996)] 47 Cal.App.4th [237,] 242 [third party beneficiary]; *Marsch v. Williams* (1994) 23 Cal.App.4th 250, 255 [agreement to arbitrate may be in a "collateral document which is incorporated by reference"]; *Harris v. Superior Court* (1986) 188 Cal.App.3d 475 [third party beneficiary]; *Berman v. Dean Witter & Co., Inc.* (1975) 44 Cal.App.3d 999 [agency]; *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1971) 20 Cal.App.3d 668, 671–672 [part of agreement].)" (*Id.* at p. 1513.)

Respondents rely on *Le Francois* to demonstrate that SBP erred in contending the trial court did not have the authority to reconsider its prior ruling and add SBP as a party to the earlier-ordered arbitration. While Respondents are correct with respect to the authority of the court to do so, there is a second aspect of our Supreme Court's decision in *Le Francois* that also applies on this appeal.

Thus, in addition to confirming the trial court's authority to reconsider a prior ruling on its own initiative, our Supreme Court noted the potential for adverse impact on the procedural rights of the parties from a sua sponte reconsideration—particularly when the result materially changes the ruling so reviewed. To address this issue of due process, the court stated: "To be fair to the parties, if the court is seriously concerned that one of its prior interim rulings might have been erroneous, and thus that it might want to reconsider that ruling on its own motion . . . it should inform the parties of this concern, solicit briefing, and hold a hearing." (See *Abassi v. Welke* [(2004)] 118 Cal.App.4th at [1353,] 1360 ['The trial court invited Welke to file a second summary judgment motion indicating it wanted to reassess its prior ruling . . . . The parties had an opportunity to brief the issue, and a hearing was held.']; *Schachter v. Citigroup, Inc.* [(2005)] 126 Cal.App.4th [726,] 739.) Then, and only then, would a party be expected to respond to another party's suggestion that the court should reconsider a previous ruling. This procedure provides a reasonable balance between the conflicting goals of limiting repetitive litigation and permitting a court to correct its own erroneous interim orders." (*Le Francois, supra,* 35 Cal.4th at pp. 1108-1109.) The court in *Le Francois* thus determined that the proper disposition in that case was to reverse the judgment and return the matter to the trial court "for the court and the parties to follow the proper procedure." (*Id.* at p. 1109, fn. 6.)

The court reached this disposition having addressed the view expressed by Justice Kennard in her concurring and dissenting opinion. In her view, "[a] legally correct ruling [is not to] be reversed on appeal merely because the trial court erred in its reasoning (*People v. Smithey* (1999) 20 Cal.4th 936, 972; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19), and a trial court's judgment may not be set aside for procedural error unless the error has resulted in a miscarriage of justice (Cal. Const., art. VI, § 13). Because no miscarriage of justice has been demonstrated here, I would affirm." (*Le Francois*, *supra*, 35 Cal.4th at pp. 1109–1110.)

In discussing the application of the harmless error standard to the case before it, the *Le Francois* majority concluded that because the respondents in that case had "made no such harmless error argument, and thus [appellants] have had no chance to argue against it [, and the court did] not know what would have occurred if [the trial court] had done so . . . we think it best to remand the matter for the court and the parties to follow proper procedure." (*Le Francois*, 35 Cal.4th at p. 1009, fn. 6.)

In the present case, as in *Le Francois*, the parties have not had the opportunity to address in any meaningful way whether the trial court's change in ruling constituted harmless error. Instead, Respondents argue that "[w]here there is no genuine issue of material fact, an appellate court should affirm the judgment of the trial court if it is correct on any theory of law applicable to the case," citing, inter alia, *Estate of Beard* (1999) 71 Cal.App.4th 753, 776-777.[7] The difficulty with this argument is that, as our

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[7] Respondents also argue that we should review the trial court's ruling for abuse of discretion, relying on *Robbins v. Los Angeles Unified School District* (1992) 3 Cal.App.4th 313, but concede that the standard of review applied in *Robbins* may not apply here, i.e., "Respondents urge this Court to adopt an abuse of discretion standard . . . ." However, that case is inapposite

Supreme Court noted in *Le Francois*, we do not know what the trial court would have done if the parties had briefed and then argued the issue reconsidered: the order that SBP participate in the arbitration. It is reasonable to assume that additional evidence, including evidence of the several-years-long relationship between Respondents and SBP would have been adduced in preparing for that hearing and the parties would have argued how that evidence supported, or detracted from, a ruling on the merits under one of the several theories noted in footnote 6, *ante*. We need not speculate, nor should we, based on our Supreme Court's similar observation in *Le Francois*. (35 Cal.4th at p. 1110.)

Instead, as our Supreme Court did in *Le Francois*, we return the matter to the trial court so that it may allow the parties an appropriate amount of time to brief and then argue with respect to the trial court's reconsideration of its prior ruling. (*Le Francois*, *supra*, 35 Cal.4th at pp. 1109, fn. 6; cf. *Hotels Nevada v. L.A. Pacific Center, Inc*. (2006) 144 Cal.App.4th 754, 762 [where there are two sharply conflicting factual accounts, "'the better course would normally be for the trial court to hear oral testimony and allow the parties the opportunity for cross examination'"].)

We recognize SBP filed objections in the arbitration proceeding and then participated to an unknown degree in the arbitration,[8] and that the arbitrator issued an award making SBP jointly and severally liable for the monetary award issued. Following those proceedings, the trial court granted

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as it addressed an interim (nonappealable) order made under Code of Civil Procedure section 1008; it also predated *Le Francois* by six years and does not consider the due process issue addressed in *Le Francois*. (Cf. *Robbins*, at p. 318.)

[8] There is no reporter's transcript or documentation regarding the arbitration other than the award of the arbitrator.

Respondents' motion to confirm the award and denied SBP's motion to set aside the award.

Because the potential error in ordering SBP to participate in the arbitration affects only the single issue of its joint and several liability for the award that was not otherwise challenged, we conditionally reverse the judgment with the directions set out below. (See *Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 776 [limited retrial of single issue ordered]; *Interstate Group Administrators, Inc. v. Cravens, Dargan Co*. (1985) 174 Cal.App.3d 700, 709–710; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 890, pp. 950–951.)

In order that appropriate proceedings be conducted in connection with the trial court's sua sponte reconsideration as described, *ante*, we conditionally reverse both the order confirming the award and the order vacating the award. The trial court is ordered to allow the parties to brief and present evidence to support their respective positions on (1) whether SBP was a proper party to the subject arbitration, and (2) whether SBP was given adequate time to prepare for the arbitration proceeding that occurred, and then hear the matter on notice. If the trial court determines SBP was a proper party to arbitration but was not given ample time to prepare for the arbitration, it shall grant the motion to vacate the award as to SBP only and order Respondents and SBP to a later arbitration.[9]

DISPOSITION

The trial court is ordered to allow the parties to brief and present evidence to support their respective positions on (1) whether SBP was a proper party to the subject arbitration, and (2) whether SBP was given

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[9] This disposition makes unnecessary our consideration of other issues raised by the parties.

adequate time to prepare for the arbitration proceeding that occurred, and then hear the matter on notice. If the trial court determines SBP was a proper party to arbitration but was not given ample time to prepare for the arbitration, it shall grant the motion to vacate the award as to SBP only and order Respondents and SBP to a later arbitration.

The parties shall each bear their own costs on appeal pursuant to California Rules of Court, rule 8.278(a)(5).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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