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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

TIMOTHY J. MULLAHEY, as Trustee, etc., Plaintiff and Respondent, v. GERALD A. FELDMAN, as Trustee, etc., et al., Defendants and Appellants.	B278653 (Los Angeles County Super. Ct. No. BC515544)

APPEAL from an order of the Superior Court of Los Angeles County. Stephanie M. Bowick, Judge. Affirmed.

Legis Law and S. David Kozich and Richard A. McFarlane for Defendants and Appellants.

Hallstrom, Klein & Ward and David T. Ward, for Plaintiff and Respondent.

Defendants and appellants Gerald A. Feldman, Jr., individually and as trustee, and Cynthia Ann Feldman as trustee of the Gerald Feldman, Jr. and Cynthia Feldman Joint Living Trust (collectively, Feldman) appeal from an order granting the motion by plaintiff and respondent Timothy J. Mullahey, individually and as trustee of the Tim Mullahey Trust (Mullahey) to enforce a settlement agreement under Code of Civil Procedure section 664.6.[1] We affirm the trial court court's order.

BACKGROUND

Feldman and Mullahey own 49 percent and 51 percent, respectively, of the shares of Central Ford Automotive, Inc. (Central Ford), a California corporation and the operator of a Ford Motor Company automobile dealership in South Gate, California. A dispute arose between the parties regarding a loan Mullahey allegedly made to Feldman in connection with their initial purchase of the dealership assets, and Mullahey commenced this action against Feldman to recover the loan proceeds and other damages. Feldman in turn filed a cross-complaint against Mullahey.

In January 2016, the parties participated in a mediation at which they reached a global settlement. The terms of the settlement were memorialized in an agreement signed by the parties and their respective counsel on January 12, 2016 (mediation agreement). The mediation agreement states that Feldman will purchase Mullahey's 51 percent interest in Central Ford for $3.5 million; that Mullahey will be released from his personal guarantees on all dealership obligations; and that if Feldman fails to consummate the purchase of Mullahey's 51 percent interest by March 14, 2016, the parties agree to

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[1] All further statutory references are to the Code of Civil Procedure, unless stated otherwise.

participate in a binding mediation with JAMS, to commence on or before April 14, 2016.[2]

On February 5, 2016, Feldman, through his counsel, sent Mullahey a letter of intent for Mullahey's signature. The letter of intent stated that Feldman and a third party named Silvestre Gonzales, or their assignees, intended to purchase Mullahey's 51 percent interest in Central Ford, that the parties wished to close the transaction by April 1, 2016, but that the parties understood that some contingencies, including Ford's approval of the transaction, might delay the anticipated closing date.

Mullahey, through his counsel, responded on February 10, 2017, stating that he was unwilling to contract with Gonzales or any other third party, but that "Mr. Feldman may make any agreement he chooses with any third party, and prepare any third party agreement that he believes advantageous." Mullahey further stated that the proposed letter of intent was unacceptable because it unilaterally changed the deadline for Feldman's performance under the mediation agreement. Finally, Mullahey asked Feldman to notify him when Feldman intended to contact Ford Motor Company about the purchase transaction.

Feldman responded in a February 12, 2016 letter from his counsel stating that Feldman alone did not have the financial

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[2] The mediation agreement, Mullahey's motion to enforce the mediation agreement, the memorandum of points and authorities in support of the motion, and declarations filed by Mullahey and his attorney, David Ward, were filed under seal pursuant to a trial court order dated June 28, 2016; however, Mullahey's publicly filed, unredacted appellate brief quotes extensively from or recites the substance of those documents. In light of that public disclosure, this court, on its own motion, after giving notice to the parties and the opportunity to respond, ordered the sealed documents to be unsealed pursuant to California Rules of Court, rule 8.46(e)(3).

resources necessary to make the purchase, that it was unlikely Feldman would be able to secure financing to do so within the limited time frame contemplated by the mediation agreement, and that Mullahey was at all times aware of these facts. Feldman further stated that he believed Gonzales would back out of the deal unless Mullahey signed the letter of intent. Feldman proposed two options -- (1) enter into a new settlement agreement that would allow both Feldman and a third party purchaser or investor to purchase Mullahey's shares; or (2) return to mediation. A proposed settlement agreement was attached to Feldman's letter. As to contacting Ford Motor Company, Feldman asked Mullahey to notify Patrick Sheehan at Ford's regional office that Feldman would be contacting him about the purchase transaction.

On February 17, 2016, Mullahey responded by email through his counsel. Mullahey pointed out that because only Feldman could provide Ford Motor Company with the necessary information about his means of purchasing Central Ford, his financial resources, and his plans for managing and operating the dealership, Feldman, and not Mullahey, was the appropriate person to initiate contact with Ford.

Feldman responded by email the following day stating that he understood that Ford would communicate only with Mullahey, the majority owner of Central Ford, about ownership changes in Central Ford. He agreed, however to contact Ford. He asked Mullahey to tell Ford to expect a communication from him on that subject. Feldman further stated that the purchase transaction could not go forward unless Gonzales purchased Mullahey's 51 percent interest in Central Ford, and that Ford would require at least 90 days to approve the transaction.

On February 22, 2016, Mullahey sent Feldman an email stating that Mullahey had received no inquiries from Ford Motor

Company and asking Feldman to confirm that he had initiated contact with Ford. Later that same day, Mullahey rejected Feldman's proposed settlement agreement as inconsistent with the terms of the parties' mediation agreement.

On March 2, 2016, Feldman emailed Mullahey, advising him that Feldman had contacted Patrick Sheehan, Ford's Western Region Market Representation Manager, about the proposed purchase transaction. Sheehan informed Feldman that he could respond only to Mullahey, the dealer of record. Mullahey responded by email on March 4, 2016, stating that he had called Patrick Sheehan, who was not available, and that Mullahey had left him a message. Mullahey subsequently spoke with Sheehan, notifying him of the purchase transaction and asking Sheehan to accommodate Feldman in any way possible regarding the transaction. Mullahey informed Sheehan that the purchase transaction was set to close by March 14, 2016, but Sheehan responded that Ford's approval process would likely take between 30 to 60 days.

In early March, the parties discussed a possible alternate purchase proposal that would include an earnest money deposit and some showing that Feldman had the financial resources to obtain for Mullahey the releases the parties had agreed to in the mediation agreement. On March 10, 2016, Feldman's counsel sent proposed modifications to the mediation agreement that would allow Gonzales to be a co-purchaser of Mullahey's interest in Central Ford and that extended the deadline for the purchase transaction. Mullahey rejected the proposed modifications, noting that they included no earnest money provision, no disclosure of financial resources to obtain releases in favor of Mullahey, and no additional consideration for the requested changes. Mullahey then filed the instant motion to enforce the mediation agreement, which Feldman opposed.

Following a hearing at which the parties presented argument, the trial court granted the motion to enforce the mediation agreement. This appeal followed.

DISCUSSION

I. Applicable law and standard of review

Code of Civil Procedure section 664.6 states: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

A trial court's factual findings on a motion pursuant to section 664.6 "'are subject to limited appellate review and will not be disturbed if supported by substantial evidence.' [Citation.]" (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1360.) Legal determinations are reviewed de novo. (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 984 (*J.B.B. Investment*); *Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 Cal.App.4th 724, 734 (*Bowers*).)

II. Valid and enforcement settlement agreement

When ruling on a motion to enforce a settlement under section 664.6, a trial court must determine whether the parties entered into a valid and binding settlement of the case. (*Corkland v. Boscoe* (1984) 156 Cal.App.3d 989, 994.) Feldman challenges the trial court's determination that a valid and binding settlement existed on the following grounds: (1) the mediation agreement itself was inadmissible; (2) the term "binding mediation" as used in the mediation agreement is inherently uncertain; (3) there was no meeting of the minds on the material terms necessary to create an enforceable contract;

and (4) Mullahey breached the mediation agreement and/or the covenant of good faith and fair dealing before seeking to enforce the agreement.

A. Admissibility of mediation agreement

Documents prepared for the purpose of or pursuant to a mediation are generally inadmissible. Evidence Code section 1119, subdivision (b) states that "[n]o writing, as defined in Section 250,[3] that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given." (Evid. Code, § 1119, subd. (b).) A settlement agreement reached during mediation and signed by the parties is exempt from this general rule, however, if "[t]he agreement provides that it is enforceable or binding or words to that effect." (Evid. Code, § 1123, subd. (b).) To come within the exemption, "a settlement agreement must include a statement that it is 'enforceable' or 'binding,' or a declaration in other terms with the same meaning." (*Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 199-200.)

The mediation agreement at issue here expressly states that it is binding and enforceable. It states in relevant part: "The Parties agree to be bound by the terms set forth herein, and agree that the terms shall be further reduced to writing in a more

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[3] Evidence Code section 250 defines a "writing" as "handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." (Evid. Code § 250.)

comprehensive and complete settlement agreement to be executed at a later date, but such further agreements shall not detract from or impair the enforceability of this Agreement." The mediation agreement is therefore admissible for purposes of its enforcement. (Evid. Code § 1123, subd. (b); *Fair v. Bakhtiari, supra,* 40 Cal.4th at pp. 197-200.)

Feldman claims that a separate nondisclosure agreement signed by the parties precludes admission of the mediation agreement and its terms. He does not indicate where in the record the executed nondisclosure agreement may be found,[4] nor does he cite any other evidence in the record to support that claim. We therefore disregard it. (Cal. Rules of Court, rule 8.204(a)(1)(C), 8.204(a)(2)(C); *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29 [factual statements in appellate brief must be supported with citations to the record and must be confined to matters in the record on appeal].)

B. Certainty of terms

The term "binding mediation" as used in the mediation agreement is sufficiently certain to be enforced. Feldman's argument to the contrary has been previously rejected by *Bowers*, in which the court held that similar binding mediation provisions in a settlement agreement "were not too uncertain to be enforceable." (*Bowers, supra*, 206 Cal.App.4th at p. 728.)

The court in *Bowers* applied the following standard for determining whether a contract is certain enough to be enforced: """"The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy."" [Citation.] If, by contrast a supposed "contract" does not provide a basis for determining what

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[4] The record contains unsigned drafts of a nondisclosure agreement and a confidentiality agreement. There is no evidence in the record that either agreement was signed by the parties.

obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract.' [Citation.] 'Whether a contract is certain enough to be enforced is a question of law for the court.' [Citation.]" (*Bowers, supra,* 206 Cal.App.4th at p. 734.) Applying this standard to the mediation agreement at issue, the *Bowers* court observed that the parties had "elaborated on what they meant by the alternative dispute resolution method they chose," agreeing to a full-day of mediation, at the end of which, if mediation was unsuccessful, the mediator would award the plaintiffs an amount equal to either their last demand or the defendant's last offer. These provisions, the court concluded, were "sufficiently certain to be specifically enforceable." (*Bowers, supra,* 206 Cal.App.4th at p. 736.)

The court in *Bowers* distinguished *Lindsay v. Lewandowski* (2006) 139 Cal.App.4th 1618, 1624 (*Lindsay*), on which Feldman relies as support for his position in this case. *Lindsay* involved a mediation that resulted in a stipulation for settlement of litigation. One provision of the stipulation called for "'binding arbitration'" of one party's claims. In this provision, the word "'arbitration'" was typed in directly above the word "'mediation,'" through which a line had been drawn. (*Id.* at p. 1620.) A second provision required "binding mediation" if two other parties could not agree on the terms for payment of a sum of money. (*Ibid.*) The court in *Lindsay* concluded that these discrepancies prevented the court from ascertaining what the parties meant when they used the term "binding mediation."

Unlike *Lindsay,* the mediation agreement in this case contains no discrepancy in terms. Moreover, it specifies the dispute resolution procedures to be followed in even greater detail than the agreement enforced in *Bowers*. The mediation agreement states that the mediation shall be with JAMS; that

each side will pay half of the mediation fees; that the mediation will be conducted by three mediators, one presiding mediator and two additional mediators, with each of the parties selecting one of the two additional mediators. The agreement further states that the parties may make an opening statement, present briefs and exhibits, and provide any other arguments or evidence requested by the mediators. Finally, the agreement states that no punitive damages will be recoverable by Feldman in the mediation. It is sufficiently certain to be specifically enforceable. (*Bowers, supra,* 206 Cal.App.4th at p. 736.)

C. Mutual consent

Mutual consent is an essential element of an enforceable contract. (*Bowers, supra,* 206 Cal.App.4th at pp. 732-733.) "'"The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe."' [Citation.]" (*Id.* at p. 733.) A trial court's determination of this factual issue is subject to limited review and will not be disturbed if supported by substantial evidence. (*J.B.B. Investment, supra,* 232 Cal.App.4th at p. 984.)

Feldman argues that mutual consent on a final settlement was lacking because the mediation agreement itself states that its terms were to be finalized at a later date. That argument is contradicted by the plain language of the mediation agreement, which states that it is enforceable and that the parties agree to be bound by its terms: "The Parties agree to be bound by the terms set forth herein, and agree that the terms shall be further reduced to writing in a more comprehensive and complete settlement agreement to be executed at a later date, but such further agreements shall not detract from or impair the enforceability of this Agreement." The parties' stated intent to enter into a more formal agreement at a later date does not

preclude enforcement of the mediation agreement. "When parties intend that an agreement be binding, the fact that a more formal agreement must be prepared and executed does not alter the validity of the agreement. [Citations.]" (*Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 48.) That Feldman proposed modifications and alternative terms after the parties signed the mediation agreement, and Mullahey rejected the proposed modifications, is not evidence that mutual consent was lacking at the time the agreement was executed.[5]

Weddington Productions, Inc. v. Flick (1998) 60 Cal.App.4th 793 (*Weddington*), on which Feldman relies as support for his argument that mutual consent was lacking, is distinguishable. The parties in that case signed a one-page settlement memorandum at the end of a mediation. The memorandum contained a clause stating that the parties would formalize a licensing agreement governing the shared use of a "library" of recorded sounds used in motion picture and television sound editing. (*Id.* at p. 799.) The record showed that the licensing agreement was of central material importance to both parties; however, during subsequent attempts to formalize that agreement, it became evident that there had been no meeting of

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[5] As support for their respective positions, both parties cite in their appellate briefs communications and writings (e.g., drafts of the settlement agreement) made or prepared during the course of the mediation. Neither party established that any of this evidence was admissible under Evidence Code section 1119 or any other applicable statutory provision. There is accordingly no admissible evidence to support Feldman's contention that the parties agreed to "an outside financial partner" to enable Feldman to purchase Mullahey's shares, or that Mullahey's refusal to agree to a third party participant resulted in an absence of mutual consent at the time the settlement agreement was executed.

the minds as to the scope of the licensing agreement, the obligations of the parties thereunder, whether the agreement could be terminated, and if so, under what circumstances. (*Id.* at pp. 800-802.) When the parties were unable to agree upon the terms of the undrafted license agreement, they returned to mediation, and the mediator, together with the respondent, formulated a 14-page license agreement and an expanded 14-page settlement agreement. Both agreements contained new terms to which the appellant had never agreed. (*Id.* at pp. 806-807.) The respondent then filed a motion to enforce the unsigned documents that had been generated by the mediator, which the superior court granted. The Court of Appeal reversed, concluding there was no substantial evidence that the parties had reached agreement as to the license terms. (*Id.* at p. 818.) There was no writing signed by the parties setting forth the terms of the licensing agreement; rather, the material terms sought to be enforced had not been agreed to by the parties but were created by the mediator. (*Ibid.*)

Here, unlike *Weddington*, the parties signed a written agreement that set forth the material terms of their settlement and unequivocally states their intent to be bound by those terms. Feldman has not identified any document in this action that can persuasively be characterized as the equivalent of the licensing agreement in *Weddington*.

D. Mullahey's alleged breaches

Feldman contends the mediation agreement is not enforceable because Mullahey materially breached the agreement by (a) refusing to sign the letter of intent with Gonzales for the purchase of Mullahey's shares in Central Ford; (b) refusing to initiate contact with Ford to obtain Ford's review and approval of the purchase; (c) refusing to prepare further written agreements contemplated by the mediation agreement; and (d) refusing to

confer and cooperate with Gonzales's counsel or to extend the deadline for Feldman's performance. Feldman further contends Mullahey's alleged breaches made it impossible for Feldman to perform his obligations under the mediation agreement, and therefore excused him from such performance. Substantial evidence supports the trial court's determination that Mullahey did not breach the mediation agreement.

1. Purchase of shares

The mediation agreement plainly states that Feldman will purchase Mullahey's interest in Central Ford within 60 days from the parties' execution of the agreement. The letter of intent Feldman claims Mullahey was obliged to sign modified these terms to state that "Feldman . . . will, with the assistance of a third party individual or entity, purchase . . . Mullahey's 51% interest" and eliminated the 60-day deadline for performance. The letter of intent would have required Mullahey to contract with Gonzales, a third party who was not a party to the mediation agreement. Substantial evidence does not support Feldman's claim that Mullahey's refusal to sign the letter of intent constituted a breach of the mediation agreement.

Feldman provides no evidence that Mullahey interfered with Feldman's efforts to obtain the financial resources necessary to purchase Mullahey's interest in Central Ford. The evidence in the record is to the contrary. After declining to sign the Gonzales letter of intent, Mullahey confirmed that "Feldman may make any agreement he chooses with any third party, and prepare any third party agreement that he believes advantageous."

2. Contact with Ford

The record does not support Feldman's claim that Mullahey breached the mediation agreement by refusing to initiate contact with Ford Motor Company. The evidence shows that on February

9, 2016, Mullahey advised Feldman to contact Ford and to let Mullahey know how he could provide assistance in this regard.

On February 17, 2016, in response to Feldman's request that Mullahey contact Ford about the proposed purchase, Mullahey pointed out that only Feldman could provide Ford with information regarding his means of payment, his financial resources, and his planned management and operation of the dealership. On February 22, 2016, and again on February 24, 2016, Mullahey urged Feldman to contact Ford.

When Feldman finally contacted Ford in early March 2016, and was told that Ford would only respond to Mullahey, the dealer of record, about the proposed purchase transaction, Mullahey contacted a Ford manager, notified him of the purchase transaction, and asked him to accommodate Feldman in any way possible.

Substantial evidence supports the finding that Mullahey did not breach the mediation agreement with regard to notice to Ford.

3. Further agreements

The record shows that on January 21, 2016, Mullahey's counsel sent to Feldman a draft confidentiality agreement, a draft nondisclosure agreement, and a draft agreement for settlement and mutual release, as contemplated by the terms of the mediation agreement. Feldman proposed changes to the draft documents that were contrary to the terms of the mediation agreement, and final documents were never executed. Substantial evidence supports the finding that Mullahey did not breach the mediation agreement by not finalizing the further agreements contemplated by the parties' mediation agreement.

4. Refusal to cooperate

Feldman cites no evidence in the record to support his claim that Mullahey breached the mediation agreement by

refusing to confer with Gonzales's counsel. There is substantial evidence to support a finding that Mullahey's refusal to extend the deadline for Feldman's performance under the mediation agreement did not constitute a breach of that agreement.

5. Covenant of good faith and fair dealing

Feldman contends Mullahey's alleged breaches of the mediation agreement also constituted a breach of the covenant of good faith and fair dealing. Because substantial evidence supports the finding that Mullahey did not breach the mediation agreement, Feldman's claim for breach of the covenant of good faith and fair dealing fails for similar reasons.

DISPOSITION

The order enforcing the mediation agreement is affirmed. Mullahey shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST