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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

LADT, LLC, et al., Plaintiffs and Respondents, v. GREENBERG TRAURIG, LLP, Defendant and Appellant.	B246649 (Los Angeles County Super. Ct. No. BC475543)

APPEAL from an order of the Superior Court of Los Angeles County, Abraham Khan, Judge. Affirmed.

Gaims, Weil, West & Epstein, Gaims Weil West, Alan Jay Weil, Barry G. West and Jesse J. Contreras for Defendant and Appellant.

Leonard, Dicker & Schreiber, Steven A. Schuman and Kevin S. Dicker for Plaintiffs and Respondents.

This is a legal malpractice action. The defendant law firm moved to compel arbitration. The basis of its motion was a letter signed by some of the plaintiffs acknowledging and waiving potential conflicts of interest and providing that the plaintiffs agreed "to submit to final arbitration . . . any dispute arising out of or in relation to this Conflict Disclosure and Waiver Agreement as the exclusive, binding and final method of dispute resolution regarding any claim of or arising from any such asserted conflict of interest."

The plaintiffs sued the law firm for causes of action arising out of allegedly negligent drafting of a real estate purchase agreement and related documents. Their complaint did not mention or rely on any theory that the law firm's conduct had resulted from any conflict of interest and did not suggest the claims arose from or related to the Conflict Disclosure and Waiver Agreement.

When the law firm sent the plaintiffs an interrogatory asking if they contended that the law firm "had an unwaived conflict of interest in its representation" in connection with the real estate purchase agreement, the plaintiffs answered, "Yes." The law firm moved to compel arbitration, and the plaintiffs provided an amended response to the interrogatory, saying in essence that, even though such a conflict existed, they were not pursuing any claim based on any conflict of interest. The plaintiffs then opposed the motion to compel arbitration, arguing that they were not asserting any claim arising out of or in relation to the Conflict Disclosure and Waiver Agreement or any conflict of interest.

The trial court denied the motion to compel, and the law firm appealed. We affirm because the arbitration provision applied only to claims arising from or relating to the Conflict Disclosure and Waiver Agreement or arising from any asserted conflict of interest. The plaintiffs chose not to pursue any such claim, as was their right.

BACKGROUND

The plaintiffs are an individual, Barry Shy, and certain entities affiliated with him named LADT, LLC; LABAR, LLC; and LA ABC, LLC. We refer to these as the "Shy parties" when possible. The defendant is a law firm, Greenberg Traurig, LLC

(Greenberg). In the late 1990's, Shy and LABAR, LLC entered into complex real estate transactions with a third party, Andrew Meieran, and entities affiliated with him. We refer to these parties as the "Meieran parties." The Shy and Meieran parties formed LADT, LLC to hold their interests in a building they had acquired called the "Higgins Building."

On December 5, 2003, Greenberg sent a letter titled, "Engagement Agreement," to Shy and Meieran, stating, "This letter will constitute our agreement concerning the engagement of GREENBERG TRAURIG, LLP . . . to perform legal services for you, LABAR, LLC and ALBION," one of the Meieran parties. The immediate task at hand was for Greenberg to advise the parties "in connection with a deferred payment sale" of a building called the "Higgins Building" along with a second building. The Engagement Agreement also provided that Greenberg would provide "other legal services if and when requested by Clients and agreed to by [Greenberg]." The letter contained provisions concerning the scope of the engagement, fees for services performed, insurance, disbursements and charges, manner of billing and payment, advance retainers, attorney-client privilege, termination of services and the like. A flat fee of $200,000 was to be paid for the legal services to be rendered in connection with the deferred payment sale of the two buildings. The agreement provided that any fee dispute would be submitted to mandatory, binding arbitration conducted according to the rules of the State Bar of California. The agreement did not contain any other provision concerning arbitration. Shy signed on behalf of himself and LABAR, LLC, and Meieran signed on behalf of one of his entities. These signatures appear to have been affixed in December 2003. Thereafter, Greenberg provided legal services pursuant to the Engagement Agreement.

By August 2004 the Shy parties and the Meieran parties had decided to unravel their relationship. The Meieran parties agreed to sell their interest in LADT, LLC and the Higgins Building to a new Shy entity, LA ABC, LLC, which would become the new owner of the Higgins Building. Greenberg sent two letters dated August 20, 2004, concerning the parties' relationship with Greenberg, which would be drafting the

purchase agreement, deeds of trust, and other documents needed to effectuate the sale of Meieran's interests to LA ABC, LLC.

One of the August 20, 2004 letters is an acknowledgment of certain matters. We call this the "Acknowledgment Letter" to distinguish it from the other letter of the same date. The Acknowledgment Letter was directed to Shy and Meieran as individuals and stated in pertinent part that the firm had previously represented each individual in income tax planning and related matters, and that Shy and Meieran had now asked Greenberg to draft documents by which the Meieran entities would sell their interests in LADT, LLC and the Higgins Building for certain consideration to LA ABC, LLC. The letter asserted that Greenberg was not representing them, but rather was serving both sides merely as a scrivener. It advised them to consult independent counsel and asked them to acknowledge they had reviewed and understood the statements in the letter. Shy and Meieran signed the Acknowledgment Letter on an unspecified date. There was no signature block for Greenberg to sign as acknowledging or agreeing to anything.

Greenberg sent a second letter dated August 20, 2004, to Shy and Meieran, this time apparently in their capacities as members of LADT, LLC, LA ABC, LLC, and one of the Meieran entities. It was headed "Re: LADT, LLC Conflicts Disclosure and Waiver Agreement." The letter stated that Greenberg had represented and continued to represent Shy and Meieran in certain matters. It said that each of them had asked the firm to prepare a purchase agreement and related documents in connection with the sale by a Meieran entity of the Meieran entity's interest in LADT, LLC to LA ABC, LLC. The letter set forth various provisions of the California Rules of Professional Conduct concerning conflicts of interest and requested written confirmation of the parties' understanding and consent.

The last page was titled, "CONSENT AND WAIVER OF RIGHTS." It provided in pertinent part that the parties consented to the representation and waived potential conflicts of interest. The last paragraph contained an arbitration provision stating: "The undersigned also agree to submit to final arbitration before a retired judge from JAMS any dispute arising out of or in relation to this Conflict Disclosure and Waiver Agreement

as the exclusive, binding and final method of dispute resolution regarding any claim of or arising from any such asserted conflict of interest." Shy signed on behalf of himself, LADT, LLC and LA ABC, LLC on December 14, 2004, and the Meieran entity signed three days later. We refer to this letter as the "Conflict Waiver and Arbitration Letter" to distinguish it from the other letter dated August 20, 2004.

The Shy parties' brief indicates the purchase agreement whereby the Meieran entity sold the Meieran interests in the Higgins Building and the deeds of trust prepared in connection with the sale were also dated August 20, 2004.

The Shy parties filed their original complaint on December 19, 2011. The operative first amended complaint followed on April 10, 2012. It contains causes of action for breach of contract, breach of fiduciary duty, negligent misrepresentation and negligence. As Greenberg concedes, the first amended complaint "does not allege a conflict of interest." Nor does it suggest that any claim arose from or is related to the Conflict Waiver and Arbitration Letter.

Rather, the essence of all causes of action stated in the first amended complaint is that Greenberg drafted the purchase agreement and deeds of trust and documents implementing the sale of the Meieran parties' interests in the Higgins Building to LA ABC, LLC in a sloppy, ambiguous, inconsistent, incomprehensible manner that led to costly litigation and multimillion-dollar judgments against some of the plaintiffs. Among other defects in the documents, a mutually agreed $4 million offset provision favoring the Shy parties was omitted. The terms of the purchase agreement concerning due dates, interest rates and penalty clauses were different from the terms of the promissory notes that were supposed to refer to the identical due dates, interest rates and penalty clauses, which errors resulted in a judgment against the Shy parties of $1 million. In addition, Greenberg mistakenly prepared a contingent *deed* instead of the contingent *assignment* called for in the purchase agreement and failed to obtain essential signatures on the contingent assignment. When it discovered its mistake, Greenberg failed to disclose it to plaintiffs in a timely manner to the detriment of plaintiffs.

The first cause of action for breach of contract alleges Greenberg breached its agreement with Shy and LA BAR, LLC to perform its professional services in a competent manner. The second cause of action for breach of fiduciary duty, brought by all the Shy parties, alleges Greenberg "failed to communicate truthfully and completely with Plaintiffs." However, it does not state that this failure to communicate truthfully or completely arose from or related to any conflict of interest. The allegation that Greenberg "failed to communicate truthfully and completely" is incorporated by reference into the negligence and negligent misrepresentation causes of action.

On May 7, 2012, Greenberg served special interrogatories on the plaintiffs. One of the interrogatories asked whether the plaintiff contended that Greenberg had an "unwaived conflict of interest in its representation" of the Meieran parties and the plaintiff. The plaintiffs answered, "Yes," explaining that Greenberg's concurrent representation of both sides in effectuating the sale of the Meieran parties' interest in the Higgins Building to LA ABC, LLC "created a situation where [Greenberg] could not adequately counsel either side" and the waiver letter of August 20, 2004, was "woefully deficient" and that the conflict was "unwaivable."

After receiving this answer, Greenberg sent an e-mail to plaintiffs' counsel, stating that it appeared "for the first time that plaintiffs' claims against [Greenberg] arise out of or otherwise relate to the" Conflict Waiver and Arbitration Letter. Greenberg stated that it was demanding arbitration due to this state of affairs.

On or about October 9, 2012, the plaintiffs amended their answer to the interrogatory as follows: "As stated in [plaintiff's] original response to this interrogatory, [plaintiff] believes that [Greenberg] possessed an unwaived conflict of interest in its representation of both [plaintiff] , on the one hand, and [the Meieran parties], on the other, in connection with the [Conflict Waiver and Arbitration Letter]. However, Plaintiffs do not make a claim in this action, nor do they seek damages relating to or arising out of [Greenberg's] conflict. As a result, the answer is 'no' [plaintiff] makes no such contention [that there was an unwaived conflict of interest]." In other words,

plaintiffs said they believed a conflict had existed but they were not pursuing a cause of action based on the conflict.

None of the facts set forth above is disputed.

The trial court denied the ensuing motion to compel arbitration. The record does not disclose the trial court's reasoning.

At oral argument before this court, counsel for the Shy parties represented that the Shy parties would not pursue or mention claims arising from any conflict of interest in the trial court.

DISCUSSION

I. Applicable standard of review, burden of proof and interpretation of arbitration agreements

The parties disagree as to the appropriate standard of review. "'Whether an arbitration agreement applies to a controversy is a question of law to which the appellate court applies its independent judgment where no conflicting extrinsic evidence in aid of interpretation was introduced in the trial court.' [Citation.]" (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.) There was no conflicting extrinsic evidence in aid of interpretation presented to the trial court. Therefore, we apply our independent judgment.

The parties also disagree upon which side bore the burden of proof. We need not address the issue because we conclude the Shy parties have established that the trial court did not err in denying the motion to compel arbitration.

"In determining the scope of an arbitration clause, '[t]he court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made [citation].' [Citation.]" (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.)

II. The Shy parties' claims fall outside the scope of the arbitration provision

We look first to the usual and ordinary meaning of the words of the arbitration provision to determine the parties' intentions. The arbitration provision contained in the Conflict Waiver and Arbitration Letter could not be clearer either in its manifested intent

or in its choice of words. "The undersigned also agree to submit to final arbitration . . . any dispute *arising out of or in relation to this [Conflict Waiver and Arbitration Letter]* as the exclusive, binding and final method of dispute resolution *regarding any claim of or arising from any such conflict of interest.*" (Italics added.) Claims arising out of or in relation to the Conflict Waiver and Arbitration Letter regarding any claim of or arising from a conflict of interest were to be arbitrated. Others were not.

Neither plaintiffs' claim that Greenberg breached its agreement to provide its professional services in a competent manner nor their claims that Greenberg performed its services negligently and in breach of its duties to the plaintiffs arise from or relate to the Conflict Waiver and Arbitration Letter. The letter apparently was created in or about August 20, 2004, long after most of Greenberg's work on the documents had been completed in preparation for the August 20, 2004 transaction date. The letter was not executed until December 2004. Thus, plaintiffs' claims arose from breaches that occurred before they signed the Conflict Waiver and Arbitration Letter. These preexisting claims could not have arisen from the Conflict Waiver and Arbitration Letter.

Nor do plaintiffs' claims arise from any alleged conflict of interest. The operative complaint simply alleges that Greenberg's work fell below the applicable standard of care. Such a breach is not dependent upon the presence of any conflict of interest. Law firms are perfectly capable of making mistakes in the absence of conflicts of interest. Moreover, plaintiffs have specifically denied Greenberg's allegation that they are seeking relief based on any conflict of interest.

Our conclusion is the same when we consider "the circumstances under which the agreement was made," as we are directed to do in *Victoria v. Superior Court*, *supra*, 40 Cal.3d at page 744. Most or all of Greenberg's work had to have been completed before the August 20, 2004 transaction date. The parties had an Engagement Letter in place that covered that work. The Engagement Letter did not provide for arbitration except for a County Bar arbitration triggered only by a fee dispute.

However, the relationship of the Shy and Meieran parties had evolved into a singularly adverse position, as one sold its property to the other. It would have been

natural for Greenberg to become concerned at this time about unwaived conflicts of interest. The Acknowledgment Letter obviously was intended to protect Greenberg from any unwaived conflicts of interest as to Shy and Meieran individually. Similarly, the Conflict Waiver and Arbitration Letter sought to protect Greenberg from any unwaived conflicts as to the Shy and Meieran entities. Conflict of interest was the topic of concern in August 2004.

It would have been natural for Greenberg to wish to add further protection as to the particular issue of concern that existed in August 2004. The addition of a provision that disputes concerning conflicts of interest would be arbitrated would have been calculated to address the issue of concern. Indeed, that is what the plain language of the arbitration provision says.

By contrast, there is no evidence in the record to show that the topic of concern in August 2004 extended beyond conflict of interest to breach of contract or tort claims.

Greenberg's conduct also indicates that Greenberg recognized the arbitration provision applied only to conflict of interest claims. It did not move to compel arbitration until the Shy parties answered an interrogatory asserting a conflict of interest existed. Greenberg made a point of saying it had not moved to compel arbitration earlier because this was the "first time" it understood plaintiffs' claims "[arose] out of or otherwise relate to the" Conflict Waiver and Arbitration Letter. This appears to be an admission by Greenberg that the arbitration provision was not intended to apply to actions that did not arise from a conflict of interest.

The circumstances taken together with the parties' language indicate the intent of the parties was to provide for arbitration only of matters that related to or arose from the Conflict Waiver and Arbitration Letter or from conflicts of interest. Consequently, the arbitration provision is inapplicable to the instant litigation.

Greenberg has constructed an argument that the Acknowledgment Letter was really a new engagement letter. Greenberg argues that, because the Acknowledgment Letter was written at the same time as the Conflict Waiver and Arbitration Letter and concerned the same subject matter, the two letters must be read as a single contract. This

allows Greenberg to argue that, because the arbitration provision is thus imported into the Acknowledgment letter, and the Acknowledgment Letter contains a description of the work to be performed, the arbitration provision applies to any litigation arising from the work described in the Acknowledgment Letter, including this litigation.

This argument is inconsistent with the circumstances that existed at the relevant time. There was no need to replace the December 5, 2003 Engagement Letter. It specifically applied to work to be done in the future and contained all the customary terms needed in an engagement letter. The August 20, 2004 letters do not say they are replacing the December 2003 Engagement Letter, do not contain the customary terms concerning fees and the like needed in an engagement letter, and do not say they are engagement letters. Rather, they are what they say they are: Acknowledgments and waivers concerning potential conflicts of interest.

Greenberg's argument does not alter our conclusion that the circumstances under which the letters were sent indicate the arbitration provision was not intended to apply to the type of claims the Shy parties have chosen to pursue.

III. Greenberg's other arguments are not persuasive

Greenberg's next argument boils down to the claim that, once the Shy parties responded "Yes" when asked if they "contend that [Greenberg] had an unwaived conflict of interest," they could not decline to seek relief based on the theory of conflict of interest. This flies in the face of the bedrock principle that a plaintiff can select the legal theories on which it wishes to proceed.[1] Just because the Shy parties could have pursued

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[1] A plaintiff may plead "alternative counts to support alternative legal theories. [Citation.]" (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 402, p. 543.) As our Supreme Court once put it, plaintiffs are permitted to plead their negligence claims "in separate counts, as occurring in as many ways as they believed their evidence would show . . . ." (*Froeming v. Stockton Elec. R. Co.* (1915) 171 Cal. 401, 404.) The election of remedies doctrine is inapplicable when the remedies sought are consistent with each other. (E.g., 3 Witkin, *supra*, Actions, § 179, pp. 259–260.) Indeed, the doctrine of election of remedies has become disfavored even when the available remedies are inconsistent. (3 Witkin, *supra*, Actions, § 180, p. 260.)

a conflict of interest theory in their action, they were not forced by their interrogatory answer to pursue it.

Similarly, Greenberg's contention is incompatible with the principle that a plaintiff can dismiss a cause of action contained in a complaint at any time before the commencement of trial. (Code Civ. Proc., § 581, subd. (c).) With some exceptions inapplicable here, neither the defendant nor the court can prevent such a dismissal. (E.g., Code Civ. Proc., § 581, subd. (k) [class actions].) The right is considered "absolute." (*O'Dell v. Freightliner Corp.* (1992) 10 Cal.App.4th 645, 659.) Thus, even if the interrogatory answer had indicated the Shy parties were pursuing a conflict of interest theory, they were permitted to reverse course. Again, the interrogatory answer did not compel them to pursue that theory.

Greenberg's argument also ignores the rule that the complaint establishes the parameters of the litigation. (*Fuentes v. Tucker* (1947) 31 Cal.2d 1, 4.) The complaint here does not allege any conflict of interest, and the plaintiffs' initial response to the interrogatory did not change that.

In addition, the Shy parties' initial response to the interrogatory was not necessarily incompatible with their choice to forgo a cause of action based on conflict of interest. They were asked if they contended Greenberg had a conflict of interest. Arguably, they were not asked if they were pursuing a cause of action based on conflict of interest. This put the Shy parties in something of a box. If they answered "no" under oath, they could have been seen as untruthfully asserting there was no conflict of interest, even though they believed there was, but had chosen not to pursue it.

Finally, Greenberg's attempt to handcuff the Shy parties to the position they took in their first answer to the interrogatory about unwaived conflicts of interest is based on a misreading of the authorities on which Greenberg bases its argument. Greenberg relies on Code of Civil Procedure sections 2030.310, subdivision (a), and 2030.410 for the proposition that prior answers to discovery can be used against their author at trial. This is so but is of no import. It simply means Greenberg can ask witnesses for the Shy parties at trial if they said in their original responses that there was an unwaived conflict

of interest. It does not mean the Shy parties are forced in this litigation to pursue the theory that Greenberg had a conflict of interest that caused damage to the Shy parties.

Greenberg also claims that the allegation in the plaintiffs' tort causes of action that Greenberg "failed to communicate truthfully and completely with Plaintiffs" necessarily imports into the first amended complaint a contention that Greenberg had a conflict of interest. It does not. Any failure to communicate truthfully and completely could have been due to mistake, ineptitude or other reasons not related to any conflict of interest.

Greenberg contends that the plaintiffs will not be able to present their case without arguing there were conflicts of interest. Greenberg's alleged errors in connection with the purchase agreement of August 20, 2004, the deeds of trust and contingent assignment stand on their own and do not need to be supported on a scaffold of conflict of interest.

Moreover, Greenberg's concern that the Shy parties may somehow be allowed to change course and pursue damage claims based on conflict of interest during trial is misplaced. As the Shy parties observe, pretrial procedures such as motions in limine are sufficient to protect against such an eventuality, particularly in light of the Shy parties' representations to this court at oral argument that they would not pursue or mention claims arising from any conflict of interest in the trial court.

Contrary to Greenberg's claim, this is not a case where there merely are some doubts about the scope of an arbitration provision and where those doubts should be resolved in favor of arbitration. The arbitration provision on which Greenberg relies is inapplicable. It applies only to claims arising from or relating to the Conflict Waiver and Arbitration Letter or arising from any asserted conflict of interest, and the plaintiffs chose not to pursue any such claim, as was their right.

The trial court did not err in denying the motion to compel arbitration.

Because we resolve the issues based on the foregoing, we need not address the parties' other arguments.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

MILLER, J.*

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.

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