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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE ex rel. ILWU-PMA WELFARE PLAN et al., Plaintiffs and Respondents, v. DAVID EDWARD RIVERA, D.C. et al., Defendants and Appellants.	B295940 (Los Angeles County Super. Ct. No. BC711668)

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

Fenton Law Group, Henry R. Fenton and Summer A. Main for Defendants and Appellants.

Seyfarth Shaw, Donald Ward Kallstrom, S. Bradley Perkins, Ryan McCoy; Leonard Carder, Emily Maglio and Nicole E. Teixeira for Plaintiffs and Respondents.

David Rivera, D.C. and David Rivera Chiropractic, Inc (defendants) appeal from the trial court's denial of their Petition to Compel Arbitration. Plaintiff is the International Longshore and Warehouse Union and Pacific Maritime Association (ILWU-PMA) Welfare Plan (ILWU Plan or Plan). Plaintiff has asserted claims against defendants, including a claim asserted by the ILWU Plan on behalf of the State of California under Insurance Code section 1871.1 et seq., the Insurance Frauds Prevention Act (IFPA). Defendants relied on an arbitration provision in the Participating Practitioner Agreement (Agreement) between defendants and non-party Chiropractic Health Plan of California (CHPC). ILWU Plan is not a signatory to that agreement. Defendants contend the Agreement "envelopes" all of ILWU Plan's claims, and the trial court erred in rejecting defendants' contentions that (1) the doctrine of equitable estoppel applied to ILWU Plan's claims; (2) ILWU Plan was a third-party beneficiary of the Agreement; (3) Civil Code section 1589 required arbitration; (4) CHPC was the agent of ILWU Plan; and (5) claims under the IFPA are arbitrable.

ILWU Plan does not seek to enforce any terms or obligations in the Agreement, and its causes of action are not founded on and do not rely on the Agreement; the causes of action would be viable even if the Agreement did not exist. Thus, the trial court correctly found there was no basis to apply equitable estoppel. The Agreement contains a provision demonstrating that the signatory parties did not intend for any non-signatories to be beneficiaries of the Agreement, and there is no evidence ILWU Plan benefits from the Agreement. The trial court correctly found ILWU Plan was not a third-party beneficiary. Civil Code section 1589 generally applies to assignments of

contracts, and has no application here. Defendants have forfeited the last two claims by failing to provide adequate legal and record citations. We affirm the trial court's order denying arbitration. In our discretion, we deny respondent's request to dismiss the appeal and to strike appellants' brief for failure to include a statement of appealability.

BACKGROUND

David Rivera, D.C. (Rivera) is a licensed chiropractor and, coincidentally or not, a registered longshoreman. David Rivera Chiropractic, Inc. is an entity incorporated by Rivera. Rivera and his corporation entered into the subject Agreement with CHPC in 2016. This Agreement describes CHPC as "a duly licensed organization which provides administrative services including management tools for the provision of Covered Services to Members . . . of [ILWU Plan] by Participating Practitioners." ILWU Plan is not a signatory to this Agreement, and does not refer to the Agreement in its Complaint.

On appeal, defendants describe the CHPC as ILWU Plan's chosen management company. The only evidence of such a relationship proffered in the trial court was Rivera's declaration to that effect; the trial court sustained ILWU Plan's objection to that portion of the declaration. In Opposition to the Petition to Compel Arbitration, ILWU Plan submitted the declaration of an executive director, John Barton, that ILWU Plan "engaged [CHPC] to provide a network of chiropractors in California" for servicing Plan participants. The Barton declaration also stated that the ILWU Coastwise Claims Office "handles the daily operations of welfare claims administration."

In their Opening Brief on appeal, defendants contend that when Rivera provides chiropractic services to an ILWU Plan member, he "submits the bill to CHPC, who in turn process[] the claims. (AA 084, ¶10.)" Defendants also contend, without adequate citation to the record, that the direct supervision of the participating chiropractors for quality and the monitoring of their billing are "delegated in the Agreement to the CHPC."[1]

The evidence in the record, however, contradicts these contentions. In paragraph 10 of his declaration Rivera himself states: "When I submit claims for reimbursement from the ILWU-PMA Welfare Plan, I submit them to ILWU Coastwise Claims in San Francisco." ILWU Plan, as well, through the Barton declaration, states that Coastwise "is responsible for receiving and adjudicating claims for services from health care providers in accordance with the Plan's terms. [Coastwise's] primary functions include receiving, processing, adjudicating and, if appropriate, paying claims for services from providers and issuing Explanation of Benefits forms."

The Agreement does provide a sanctions procedure for practitioners who violate the requirements of CHPC's quality assurance program; a failure to submit "clean claims" (including fraudulent bills) appears to be such a violation. The most severe

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[1] ILWU Plan is not a signatory to the Agreement, and it does not seem possible for ILWU Plan to have delegated anything by way of the Agreement. Defendants do not quote any specific language in the Agreement which imposes such duties on CHPC. They cite to a block of 16 pages in the record which correspond to the Agreement and a "Code of Conduct." This is not adequate. There is no evidence of a separate agreement between ILWU Plan and CHPC to delegate any duties or responsibilities.

sanction is termination from the CHPC network of practitioners. It appears the Agreement contemplates that CHPC will learn of alleged violations from a variety of outside sources, including ILWU Plan and the California Board of Chiropractic Examiners. Further, the Agreement requires practitioners themselves to "notify CHPC/CSI of any and all disputes between Participating Practitioner and Participating Payor, Member(s) and/or Member Group(s) so that CHPC/CSI may act to resolve such disputes." (¶ 5.06.) However, the decision to sanction is "in the sole discretion" of CHPC. (¶ 5.09)

In June 2018, ILWU Plan filed a Complaint against defendants, asserting causes of action for violations of IFPA and the California's Unfair Competition law (Bus. & Prof. Code, § 17200 et seq.) (UCL) and fraud. The state elected not to prosecute the IFPA claim itself, and ILWU Plan was permitted to prosecute the cause of action on behalf of the People. All three of ILWU Plan's causes of action allege defendants engaged in fraudulent billing practices. The UCL cause of action also alleges Rivera violated his statutory duty to supervise unlicensed massage therapists.

Defendants moved to compel arbitration. The Agreement between defendants and CHPC contains the following arbitration provision: "If the parties to this Agreement are unable to settle a grievance according to policies and procedures created by CHPC/CSI to resolve Quality issues, any dispute disagreement or controversy arising out of or in relation to this Agreement shall be settled by arbitration." (¶7.02.) Defendants contended this provision "encompasses" all the causes of action. They acknowledged ILWU Plan is not a signatory to the Agreement, but asserted ILWU Plan could be compelled to arbitrate under

the doctrine of equitable estoppel and as a third-party beneficiary of the Agreement. The trial court disagreed and denied the motion. This appeal followed.

DISCUSSION

"Both the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and the California Arbitration Act (Code Civ. Proc., § 1280 et seq.) favor enforcement of valid arbitration agreements. (*Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24–25 [74 L.Ed.2d 765, 103 S.Ct. 927] ['the [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . .']; *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 25–26 [58 Cal.Rptr.3d 434, 157 P.3d 1029] [strong public policy in favor of arbitration].) 'The fundamental policy underlying both acts "is to ensure that arbitration agreements will be enforced in accordance with their terms." ' (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 59 [159 Cal.Rptr.3d 444], italics omitted.)" (*UFCW & Employers Benefit rust v. Sutter Health* (2015) 241 Cal.App.4th 909, 918–919, fn. omitted (*UFCW*).)

"The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration." (*Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990; accord, *Matthau v. Superior Court* (2007) 151 Cal.App.4th 593, 598.)

When a party brings a motion to compel arbitration, the trial court may resolve the motion "in summary proceedings, in which '[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the

evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation.]' [Citation.] 'We will uphold the trial court's resolution of disputed facts if supported by substantial evidence. [Citation.] Where, however, there is no disputed extrinsic evidence considered by the trial court, we will review its arbitrability decision de novo.' [Citations.]" (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 683.)

A. ILWU Plan's Complaint Is Not Based on the Subject Agreement and So the Doctrine of Equitable Estoppel Does Not Apply.

The trial court found "the Plan's complaint is based on fraudulent claims for reimbursement. The complaint does not arise out of the terms of the [Agreement] or any breach of those terms."

Defendants contend the Agreement requires them to submit "clean claims" to ILWU Plan, and the definition of clean claims means the claims must be truthful. Thus, defendants claim ILWU Plan's "causes of actions are the *exact* obligations found in the Agreement." Even assuming for the sake of argument that this is true, this is not a sufficient ground to invoke equitable estoppel. ILWU Plan's claims are not based on defendants' breach of its promise to CHPC to submit clean claims as defined in the Agreement.

1. The Law of Equitable Estoppel

The purpose of the doctrine of equitable estoppel is "to prevent a party from using the terms or obligations of an agreement as the basis for his claims . . . while at the same time refusing to arbitrate . . . under another clause of the same agreement." (*Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 221 (*Goldman*).) Thus, "[w]hen a plaintiff brings a claim which *relies on contract terms* against a defendant, the plaintiff may be equitably estopped from repudiating the arbitration clause contained in that agreement." (*JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1239 (*JSM Tuscany*).)

"[M]erely 'mak[ing] reference to' an agreement with an arbitration clause is not enough." (*Goldman*, *supra*, 173 Cal.App.4th at p. 218.) Even if the allegations of a complaint " ' "touch matters" relating to' " such an agreement, that is not sufficient under state or federal law to support application of the equitable estoppel doctrine to a non-signatory plaintiff. (*Jensen v. U-Haul Co. of California* (2017) 18 Cal.App.5th 295, 306 (*Jensen*).) "Equitable estoppel applies 'when the signatory to a written agreement containing an arbitration clause "must rely on the terms of the written agreement in asserting [its] claims" against the nonsignatory.' " (*Goldman*, at p. 218.) Where plaintiff's claims "are 'fully viable without reference to the terms' of the . . . agreement," the basis for equitable estoppel is " 'completely absent.' " (*Jensen*, at p. 306.)

Typically, equitable estoppel applies when a signatory plaintiff sues a nonsignatory defendant. At least one court has held that there is "no reason why this doctrine should not be equally applicable to a nonsignatory plaintiff. When that

plaintiff is suing on a contract—on the basis that, even though the plaintiff was not a party to the contract, the plaintiff is nonetheless entitled to recover for its breach, the plaintiff should be equitably estopped from repudiating the contract's arbitration clause." (*JSM Tuscany*, *supra,* 193 Cal.App.4th at pp. 1239–1240.) "In *any* case applying equitable estoppel to compel arbitration despite the lack of an agreement to arbitrate, a nonsignatory may [be ordered to] arbitration only when the claims . . . are founded in and inextricably bound up with *the obligations imposed by the agreement containing the arbitration clause."* (*Goldman, supra,* 173 Cal.App.4th at p. 219.)

" 'Because equitable estoppel applies only if [the] plaintiff's claims . . . are dependent upon, or inextricably bound up with, the obligations imposed by the contract . . . , we examine the facts alleged in the complaints.' [Citation.]" (*JSM Tuscany*, *supra,* 193 Cal.App.4th at p. 1239.)

2. ILWU Plan's Complaint Is Based on Statutory Violations and Rivera's False Statements Made under Penalty of Perjury.

Here, the Complaint clearly alleges Rivera filed claims forms containing information he certified under penalty of perjury was true and correct when he "knew [the information] was untrue, false, fraudulent, and/or misleading." The Complaint alleges defendants "systematically and continuously engaged in false, fraudulent, and/or misleading billing practices including up-coding, billing for services that did not occur, and/or billing for chiropractic services purportedly performed by Rivera that were actually performed by other individuals." The Complaint alleges "up-coding" is "assigning a CPT code to an event that has inappropriately been set at a level of complexity

and corresponding reimbursement higher than the actual service provided." In other words, up-coding is a form of lying using medical terminology.

These allegedly false claims are the basis of the statutory and fraud causes of action, which do not refer to and are in no way dependent on terms in the Agreement between defendants and CHPC. Rather, they depend on Rivera's false statements under penalty of perjury on a form "customarily used by health care providers and insurers for making and evaluating health care claims for compensation." Rivera would be liable even if no Agreement existed between himself and CHPC.[2]

Fraudulent billing allegations are also part of ILWU Plan's unfair competition cause of action, but the Complaint additionally alleges "Rivera's intentional failure to meet his supervisory obligations as a licensed chiropractor with respect to unlicensed individuals employed by Defendants" also constituted

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[2] Defendants claim ILWU Plan "*requires* that any chiropractor who renders service to its health plan members be under contract with" CHPC. As defendants acknowledge, there is no evidence of such a requirement. The trial court sustained ILWU Plan's objection to Dr. Rivera's statement to that effect. Even assuming for the sake of argument that Rivera could not submit claims to ILWU Plan unless he signed the Agreement, this argument "confuses the concept of 'claims founded in and intertwined with the agreement containing the arbitration clause' with but–for causation." (*DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1356–1357.) But for the Agreement, Rivera could not submit claims forms to ILWU Plan; however ILWU Plan's claims against Rivera are founded on his false statements in those forms, not on any breach of the Agreement.

unfair competition. It further alleges "[u]nder the California Code of Regulations, Title 16, sections 302 and 312, 'unlicensed individuals' are prohibited from performing a chiropractic adjustment, but permitted" to perform other activities, including physical therapy treatments, under the supervision of a licensed doctor. According to the allegations of the Complaint, it was factually "impossible for Rivera to meet his regulatory supervisory obligations [concerning the 12 massage therapists he employed] and therefore the unsupervised physical therapy treatments conducted by unlicensed individuals and billed to the Plan amount to illegal practice of chiropractic care. Such illegal practices, in turn, amounted to unfair competition in violation of California law."

Again, Rivera would be liable even if no Agreement existed between himself and CHPC.

3. The Agreement's Procedure for Resolving Disputes Between CHPC and Defendants Does Not Provide a Basis for Asserting Equitable Estoppel against ILWU Plan.

Defendants' reliance on the clean billing and grievance/sanction procedures of the Agreement as a basis to compel arbitration is misplaced. The Agreement governs the relationship between defendants and CHPC, specifically defendants' inclusion in CHPC's network of providers. Clean billing is a requirement for inclusion in the CHPC network of providers. The grievance procedure set forth in the Agreement is designed to govern defendants' relationship with CPHC; its highest sanction is termination of the Agreement, with the result

that the practitioner is expelled from the CHPC network.[3] Contrary to defendants' claims, ILWU Plan has no responsibility for or authority over this grievance process. Further, ILWU Plan is not seeking to have Rivera warned, suspended or terminated from the CHPC, the sole remedies specified in the Agreement for quality violations.

In sum, ILWU Plan is not seeking to enforce the Agreement in this matter. Indeed, the Complaint does not even refer to the Agreement or its obligations. The Plan is seeking to enforce the Unfair Competition Act and IFPA, and is also seeking relief for common law fraud. (See *UFCW*, *supra,* 241 Cal.App.4th at p. 929 [doctrine of equitable estoppel does not apply when plaintiff is seeking to enforce UCL and Cartwright Act and is not seeking to enforce or otherwise take advantage of any portion of the contract].) ILWU Plan's causes of action would be viable even if the Agreement did not exist. (*Jensen, supra,* 18 Cal.App.5th at p. 306 [when claims are "fully viable" without reference to the terms of the agreement, the basis for equitable estoppel is " 'completely absent.' "].) The trial court correctly found there was no basis to apply equitable estoppel.

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[3] Unsurprisingly, the grievance procedure provides no mechanism for the recovery of funds paid in response to fraudulent claims by a practitioner, since CHPC has no contractual responsibility to routinely review claims or make payments for services.

B. Defendants Have Not Shown ILWU Plan To Be a Third Party Beneficiary of the Agreement.

The court found that ILWU Plan is not a third party beneficiary because the Agreement expressly provides the " 'obligations of each party to this Agreement shall inure solely to the benefit of the other party.' "

In its Petition to Compel Arbitration, defendants relied on the law of equitable estoppel, contending that ILWU Plan was a third-party beneficiary because (1) it relied on terms of the Agreement to assert entitlement to recover for its breach; and (2) it accepted the benefits of the Agreement. In opposition, ILWU Plan correctly noted these arguments represent a misunderstanding of the law, and pointed out the Agreement contained an express no third-party beneficiaries provision in Paragraph 7.14.[4] In reply defendants did not address the law or Paragraph 7.14. The trial court found Paragraph 7.14 takes precedence over defendants' assertion that ILWU Plan is a third-party beneficiary. On appeal, defendants repeat the same inapplicable law and the same incomplete factual arguments.

Our Supreme Court has recently summarized the law concerning third-party beneficiary status: a "court . . . carefully examine[s] the express provisions of the contract at issue, as well as all of the relevant circumstances under which the contract was agreed to, in order to determine not only (1) whether the third

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[4] Paragraph 7.14 reads: "Third Party Beneficiaries – The obligations of each party to this Agreement shall inure solely to the benefit of the other party. Except as otherwise provided in this Agreement, no other person or entity shall have the right to enforce any provision of this Agreement."

party would in fact benefit from the contract, but also (2) whether a motivating purpose of the contracting parties was to provide a benefit to the third party, and (3) whether permitting a third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties. All three elements must be satisfied to permit the third party action to go forward." (*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 830 (*Goonewardene*).)

Even a scenario where ILWU Plan in some way benefits from the Agreement would not be sufficient under case law. (*Goonewardene*, *supra*, 6 Cal.5th at pp. 830, 835.) Defendants did not argue or show that CHPC's "motivating purpose" in entering into the Agreement was to provide benefits to ILWU Plan. Further, ILWU Plan offered evidence, in the form of Paragraph 7.14, that treating the Plan as a third party beneficiary would not be "consistent with the objectives of the contract and the reasonable expectations of the contracting parties." (*Id*. at p. 830.). Defendants have failed to show that all three required elements were present to establish a third party beneficiary relationship. The trial court did not err in finding no such relationship.

C. Civil Code Section 1589 Does Not Apply to the Agreement.

Defendants also argue Civil Code section 1589 requires ILWU Plan to arbitrate, because it accepted the benefits of the Agreement. Legally and factually they are mistaken.

Civil Code section 1589 provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." Civil Code section 1589

" 'has generally been held to apply only where the person accepting the benefit was a party to the original transaction.' " (*Recorded Picture Company* [*Productions*] *Ltd. v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350, 362.) Thus, the section usually applies to an assignee of an agreement who knowingly accepts the benefits of the agreement. (See, e.g. *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 788–790 [defendant was "an assignee of the Release Agreement and had knowledge of its terms, making application of Civil Code section 1589 appropriate."].) ILWU Plan was not a party to the original transaction and there was no assignment in this case.

Further, even if Civil Code section 1589 could apply to non-parties, ILWU Plan did not accept any benefits from the Agreement between Rivera and CHPC. Generally, in the health care context, it is the doctor, not the health plan, who benefits from becoming part of an entity like CHPC. (See *Harris v. Superior Court* (1986) 188 Cal.App.3d 475, 479 [doctor obtained patients through enrollments in health plan, and his "acceptance of this benefit necessarily entailed acceptance" of the arbitration provision of the plan agreement]; *UFCW*, *supra*, 241 Cal.App.4th at p. 931 [UBET, an employee benefits plan, did not "accept the benefits" of the agreement between network vendor Blue Shield and health care provider group Sutter; it was Sutter who received the benefit of "an increased client base in exchange for" authorizing Blue Shield to provide access for self-funded payors like UBET].) Defendants have not shown that their situation is different than the norm.

D. Defendants Have Forfeited Their Claim That CHPC Is ILWU Plan's Agent.

Defendants also contend the trial court should have granted the petition to compel arbitration because "[ILWU Plan's] agent was the signatory on the Participating Practitioner Agreement." They do not develop this bare assertion of agency, which appears to be premised on the mistaken belief that CHPC is the management company for ILWU Plan and ILWU Plan has delegated the "duty" of monitoring billing to CHPC.

ILWU Plan points out that the "entirely conclusory sentence" quoted above "comprises the entirety of [Defendants'] argument that CHPC is [the Plan's] agents – this argument does not appear anywhere else in the OAB." Defendants do not respond to this contention in their reply brief, and do not offer any facts or law to support their original conclusion that CHPC is the Plan's agent. They simply repeat their unsupported conclusory statements that CHPC is the management company for the Plan and the Plan has delegated the "duty" of monitoring billing to CHPC.

"In order to demonstrate error, an appellant must supply the reviewing court with some cogent argument supported by legal analysis and citation to the record." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 286–287.) We may and do "disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt." (*Id*. at p. 287.) "We are not bound to develop appellants' arguments for them." (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.)

E. We Decline to Address Defendants' Argument that the Qui Tam Cause of Action Is Arbitrability.

As an alternative ground for denying the motion to compel arbitration, the trial court stated: "The Court further finds that even if the arbitration agreement that Defendants seek to enforce did exist between [ILWU Plan] and Defendants, the agreement does not cover the disputes at issue in this matter, which include causes of action brought on behalf of the state which cannot be compelled to arbitration."

We need not and do not address this issue because we hold the trial court correctly found that no valid arbitration agreement existed between ILWU Plan and defendants.

DISPOSITION

The trial court's order denying arbitration is affirmed. Respondent is awarded costs on appeal.

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STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.