Filed 11/13/18 Cutting v. Pimentel CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WARREN D. and WINIFRED H. CUTTING, as Trustees, etc., et al., Plaintiffs and Respondents, v. CAROLEE PIMENTEL, as Successor Trustee, etc., Defendant and Appellant.	B279574 (Los Angeles County Super. Ct. No. BC625185)

APPEAL from an order of the Superior Court of Los Angeles County, Marc R. Marmaro, Judge. Affirmed.

Sullivan Law, Gene M. Kaufmann and J. D. Sullivan for Defendant and Appellant.

Greenberg, Whitcombe, Takeuchi, Gibson & Grayver, John D. Whitcombe, Samantha F. Lamberg and Michael J. Weinberger for Plaintiffs and Respondents.

Defendant and appellant Carolee Pimentel, as Successor Trustee of the Axline Trust (Pimentel) appeals from an order denying her petition to compel arbitration. Because we agree with the trial court that Pimentel waived the right to compel arbitration against plaintiffs and respondents,[1] we affirm the order.

BACKGROUND

The parties own interests in commercial real property. For the purposes of either managing or holding the property, the parties formed the James Cook, LLC (the LLC).[2] The LLC's operating agreement contained an arbitration clause.[3] When the

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[1] Plaintiffs and respondents are Warren D. and Winifred H. Cutting, as Trustees of the Cutting Family Trust; Linda A. Horrell and Lori Brooks, as Trustees of the 2004 Horrell Family Revocable Trust; and Michael Rookus, Debra Shelburne, and Karen Wilmans, as Trustees of the James D. Rookus Family Trust (collectively the Trust).

[2] The LLC and James Cook Partnership were also named defendants, but they are not parties to this appeal.

[3] "Any action to enforce or interpret this Agreement or to resolve disputes between the Members or by or against any Member shall be settled by arbitration in accordance with the rules of the American Arbitration Association or by such other arbitration provider as may be agreed upon by the parties. Arbitration shall be the exclusive dispute resolution process in the State of California, but arbitration shall be a nonexclusive process elsewhere. Any party may commence arbitration by sending a written demand for arbitration to the other parties. Such demand shall set forth the nature of the matter to be resolved by arbitration. . . . The substantive law of the State of

parties could not agree to sell the property, the Trust filed a partition action on June 27, 2016. The Trust served Pimentel on July 5, 2016, and she answered the complaint on August 10, 2016 but did not assert an affirmative defense based on the arbitration clause. Her case management statement similarly did not raise an arbitration defense.

The matter therefore proceeded on a fast track for trial. That is, the trial court, at the October 6, 2016 case management conference, set dates for the final status conference (November 14, 2016) and for trial (November 21, 2016). After the case management conference, Pimentel participated in discovery. And, in preparation for trial, the parties met and conferred and filed their joint witness and exhibit lists on November 7, 2016.

Notwithstanding having engaged in preparations for trial, Pimentel filed her petition to compel arbitration on November 9, 2016. The Trust opposed the petition, pointing out that Pimentel failed to raise arbitration in her pleadings and other papers but instead participated in discovery and prepared for the upcoming trial.

Agreeing that Pimentel, "by her conduct in this case" had waived the right to compel arbitration, the trial court denied the petition. The court noted that Pimentel failed to raise arbitration

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California shall be applied by the arbitrator to the resolution of the dispute. The parties shall share equally all initial costs of arbitration. The prevailing party shall be entitled to reimbursement of attorney fees, costs, and expenses incurred in connection with the arbitration. All decisions of the arbitrator shall be final, binding, and conclusive on all parties. Judgment may be entered upon any such decision in accordance with applicable law in any court having jurisdiction thereof."

in her answer, responded to discovery without raising arbitration, represented in her case management statement and at the conference that the matter could proceed to a short-cause trial, and prepared for trial. Also weighing in favor of waiver was that Pimentel had "consistently agreed to bring the matter to trial on a relatively expedited timeframe," with the result that by the time Pimentel raised arbitration, "the parties were well into" trial preparation. Moreover, Pimentel's delay in seeking arbitration prejudiced the Trust because two trustees—Winifred and Warren Cutting—were 88 years old, which is why they had sought the earliest trial date. Also, delay risked fractionalization of interests in the property.

This appeal followed the trial court's denial of the petition.

DISCUSSION

The sole issue is whether Pimentel waived her right to arbitration.[4] As we now explain, she did.

An agreement to arbitrate is generally enforceable, but a "petition to compel arbitration will be denied when the right [to arbitrate] has been waived by the proponent's failure to properly and timely assert it." (*Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557 (*Guess?*); Code Civ. Proc., §§ 1281, 1281.2, subd. (a).) Public policy strongly favors arbitration agreements "and requires . . . judicial scrutiny of waiver claims." (*St. Agnes*

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[4] The parties disputed whether the LLC's operating agreement, which contains the arbitration clause, governs the dispute. The trial court found it did. Because we conclude arbitration was waived, we need not reach plaintiffs' alternative contention the operating agreement containing the arbitration provision does not control this dispute.

Medical Center v. PacifiCare of California (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) "In light of the policy in favor of arbitration, 'waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof.' " (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 375 (*Iskanian*).) "Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] 'When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.' " (*St. Agnes*, at p. 1196; *Bower v. Inter-Con Security Systems, Inc.* (2014) 232 Cal.App.4th 1035, 1043.)

Waiver of arbitration can occur in a variety of contexts. (*Iskanian*, *supra*, 59 Cal.4th at pp. 374–375.) They include where a party takes steps inconsistent with an intent to invoke arbitration, the petitioning party has unreasonably delayed seeking arbitration, and where the party has acted in bad faith or with willful misconduct. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.) " 'In determining waiver, a court can consider "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in

arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party." ' " (*Ibid.*)

Here, substantial evidence establishes all of these factors except the fourth, because Pimentel did not file a counterclaim.

As to the first, second, and fifth factors, the evidence shows that Pimentel's actions were substantially inconsistent with the right to arbitrate. She did not assert the arbitration agreement as an affirmative defense in her answer, although an agreement to arbitrate is an affirmative defense to claims in a lawsuit.[5] (*Oregel v. PacPizza, LLC* (2015) 237 Cal.App.4th 342, 355 (*Oregel*); *Guess?*, *supra*, 79 Cal.App.4th at pp. 557–558.) Pimentel confirmed in her discovery responses she was not asserting any affirmative defenses to partition by sale. She similarly did not raise arbitration in her case management statement. Instead, she asked for a nonjury trial, indicated the matter would be ready for trial within 12 months, said trial would be a short-cause matter of two hours, and did not check the box for binding private arbitration or otherwise indicate arbitration might be an issue. And, when counsel for Pimentel appeared at the October 6, 2016 case management conference, counsel did not advise the trial court of any intent to compel arbitration. The court therefore set trial for November 21, 2016 based on counsels' representation this short-cause matter would be ready for trial by then.

Pimentel further behaved inconsistently with seeking arbitration and invoked the machinery of litigation by participating in discovery. (See, e.g., *Oregel*, *supra*, 237

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[5] Pimentel admits she "mistakenly failed" to assert that affirmative defense.

Cal.App.4th at p. 356 [actively participating in discovery is inconsistent with right to arbitrate].) She responded to form interrogatories and to requests for admission. In addition to engaging in discovery, Pimentel and the Trust prepared for trial by meeting and conferring on November 4, 2016 and preparing joint witness and exhibit lists.

The third factor relevant to waiver—whether arbitration was requested close to trial or delayed for a long period—is also present. Pimentel did not seek arbitration until *after* the trial date had been set. She petitioned for arbitration on November 9, 2016, just two weeks before the November 21, 2016 trial. By November 9, 2016, the parties had already incurred the time and expense of preparing for trial.

Pimentel, however, argues that November 9, 2016 is not the relevant date; the relevant date is October 20, 2016, when Pimentel personally (although represented by counsel) sent a letter to plaintiffs demanding arbitration. Even if we agreed the letter was sufficient to raise arbitration, we still would not agree Pimentel acted within a reasonable amount of time. An arbitration demand must not be unreasonably delayed and must be made within a reasonable time. (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992.) Pimentel sent the letter just one month before trial. Moreover, by October 20, 2016, Pimentel had attended the case management conference at which the final status conference and trial dates were set. Even after sending the letter, she participated in discovery and prepared for trial before finally filing her petition to compel arbitration on November 9, 2016. The letter notwithstanding, Pimentel continued to behave inconsistently with a desire to seek arbitration.

Pimentel also characterizes the delay as de minimis. She calculates the delay as just 71 days from when she filed her answer to when she personally sent her letter to plaintiffs demanding arbitration. But the passage of time, although *a* factor in determining waiver, is not the only one. To be sure, 71 days would not be an inordinate amount of time in many cases. But context is key. The delay here occurred in the context of a simple partition action involving little discovery and estimated to be a short-cause, nonjury trial. Therefore, while 71 days might not be long in the context of a matter not expected to be tried for years, it is a long time when the matter is scheduled—*with all parties' consent*—to go to trial within six months of the complaint being filed. (See, e.g., *Guess?*, *supra*, 79 Cal.App.4th at p. 557 [waiver found where defendant failed to explain three-month delay in demanding arbitration].)

Substantial evidence also supports the final factor, prejudice. "Prejudice will be found where the 'petitioning party's conduct has substantially undermined [the] important public policy [of arbitration as a speedy and relatively inexpensive means of dispute resolution] or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration.' " (*Oregel*, *supra*, 237 Cal.App.4th at p. 360.) Here, the court based its finding of prejudice on the Cuttings' advanced age, which led to risk of further fractionalization of the property in the event of delay. The record supports this finding. Warren and Winifred Cutting were both 88 years old in 2016. Also, the property was divided between the trusts: Axline Trust (1/2), Cutting Trust (1/6), Horrell Trust (1/6) and Rookus Trust (1/6). Therefore, a trustee's death could result in further fractionalization of property interests.

Pimentel responds that "trusts are often amended, so as to mitigate the risk of fractionalized interests" and therefore concerns property interests might become further fractionalized if a trustee dies are "exaggerated." However, Pimentel's attempt to minimize the prejudice to plaintiffs is unsupported. The record shows only that the trusts own the property. The record does not show how the property is held in the trusts, whether and how the trusts have been "amended," in what manner the property will be distributed or show how a trustee's death *won't* result in further fractionalization of interests in the property.

Because substantial evidence supports four of the five factors relevant to waiver, we conclude Pimentel waived any right to compel arbitration.

DISPOSITION

The order is affirmed. Plaintiffs and respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J. GOODMAN, 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.