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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

SHENIAN LAW FIRM, Plaintiff and Appellant, v. JONATAN LOPEZ et al., Defendants and Respondents.	B232089 (Los Angeles County Super. Ct. No. BC448003)

APPEAL from an order of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed.

Shenian Law Firm and Datev Shenian for Plaintiff and Appellant.

Fuchs & Associates, John R. Fuchs and Gail S. Gilfillan for Defendants and Respondents.

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Appellant Shenian Law Firm appeals from an order denying its petition to compel arbitration. The court found appellant had waived its right to contractual arbitration. We affirm.

FACTS AND PROCEDURE

On October 22, 2010, appellant filed a lawsuit against respondents Jonatan Lopez, Noemi Farias, and Alfonso Lopez alleging that respondents retained appellant to perform legal services and owed appellant attorney fees. Appellant caused a notice of pendency of action (lis pendens) to be recorded on October 28, 2010.

On January 5, 2011, respondents demurred to the complaint. Five days later, respondents filed a motion to expunge the lis pendens.

On February 10, 2011, appellant filed a petition to compel arbitration. Among other things, appellant attached a letter to respondent's counsel dated January 27, 2011, indicating that it was demanding arbitration of "any defenses and counter-claims, the motion to expunge lis pendens, the filed demurrer, and all discovery matters."

On March 22, 2011, the court denied appellant's petition to compel arbitration, overruled respondents' demurrer, and granted respondents' motion to expunge lis pendens. The trial court found appellant waived the right to arbitration by unreasonably delaying in seeking to compel arbitration. On April 7, 2011, the court issued an order expunging the lis pendens.

DISCUSSION

The sole issue on appeal is whether appellant waived its contractual right to arbitration.[1] We conclude it did.

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[1] We need not discuss appellant's challenge to the court's evidentiary rulings because we do not rely on any "evidence" appellant challenges. Because we find appellant's petition to compel arbitration was not timely, we need not consider appellant's argument that respondent suffered no prejudice.

We have considered respondents' argument that appellant's opening brief should be stricken, but conclude it lacks merit.

St. Agnes Medical Center v. PacifiCare of California (2003) 31 Cal.4th 1187 (*St. Agnes*) sets forth criteria for evaluating a waiver of a contractual arbitration provision and is the cornerstone of appellant's claim that the court erred in finding waiver. In *St. Agnes*, the California Supreme Court emphasized the strong public policy favoring arbitration and made clear that "merely participating in litigation, by itself, does not result in a waiver [of a contractual right to arbitrate] . . . ." (*Id*. at p. 1203.) Appellant emphasizes the high court's additional holding that to find waiver a court must find prejudice, which does not result solely from the payment of legal expenses. (*Ibid*.)

Appellant's heavy reliance on *St. Agnes* is misplaced because *St. Agnes* did not involve the determination of waiver in the context of a statute codifying special rules. Such statutes apply in disputes (1) involving a suit supporting the recording of lis pendens, (2) seeking to foreclose on a mechanic's lien, and (3) including an application for provisional remedies. (See Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2011) ¶¶ 5:193, 5.195, 5.200, pp. 5-145, 5-147.) As applicable here, Code of Civil Procedure section 1298.5[2] provides: "Any party to an action who proceeds to record a notice of pending action . . . shall not thereby waive any right of arbitration which that person may have pursuant to a written agreement to arbitrate, nor any right to petition the court to compel arbitration . . . , if, in filing an action to record that notice, the party *at the same time* presents to the court an application that the action be stayed pending the arbitration of any dispute which is claimed to be arbitrable and which is relevant to the action." (Italics added.)

Appellant argues this court should follow *Simms v. NPCK Enterprises, Inc*. (2003) 109 Cal.App.4th 233, in which the court considered a similar statute. Section 1281.8, states that a party does not waive the right to arbitrate by filing an application for a provisional remedy if "at the same time" the party presents an application for a stay.[3]

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[2] All statutory citations are to the Code of Civil Procedure.

[3] Section 1281.8, subdivision (d) provides in pertinent part: "An application for a provisional remedy under subdivision (b) shall not operate to waive any right of

Simms blurred the distinction between the statutory waiver and the application of the more general criteria, holding that compliance with the statute was only one factor to consider in analyzing waiver. (*Simms,* at p. 240.) *Simms* stated: "absent an explicit statutory command to find waiver, the failure to include a request for a stay with an application for provisional relief, is a fact to consider in determining waiver, but it is not dispositive." (*Ibid*.) As appellant argues, under *Simms,* appellant's failure to timely seek a stay was not dispositive, but instead was only one factor.

The rules of statutory interpretation provide that the court's "'first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.'" (*Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1997) 60 Cal.App.4th 13, 17.)

Statutory language that a particular act does not waive the right to arbitration "if, at the same time" an application for a stay is filed, expresses a contingency. Specifically, the term "if" indicates that one act is contingent on the other. The right to arbitration is not waived contingent on the timely filing of an application for a stay. Finding that the

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arbitration which the applicant may have pursuant to a written agreement to arbitrate, if, at the same time as the application for a provisional remedy is presented, the applicant also presents to the court an application that all other proceedings in the action be stayed pending the arbitration of any issue, question, or dispute which is claimed to be arbitrable under the agreement and which is relevant to the action pursuant to which the provisional remedy is sought."

application for a stay is optional renders the following statutory language surplusage: "the party at the same time presents to the court an application that the action be stayed pending the arbitration of any dispute which is claimed to be arbitrable and which is relevant to the action." (§ 1298.5.) "We must avoid any statutory construction which renders a portion of the statutory language meaningless." (*Weston Reid, LLC v. American Ins. Group, Inc.* (2009) 174 Cal.App.4th 940, 951.)

Cases applying the former statute governing suits to foreclose mechanics liens interpreted the phrase "at the same time" to require the party filing suit to immediately or within a reasonable time apply for a stay. For example, in *R. Baker Inc. v. Motel 6, Inc.* (1986) 180 Cal.App.3d 928, 930 (*Baker*), the court considered the meaning of former section 1281.5 containing the "at the same time" language.[4] The *Baker* court held that under this statute, the party seeking arbitration was required "to request a stay at the time it filed its action, not afterwards." (*Id*. at p. 931; see also *Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1054.) Applying similar reasoning, in *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1227 (*Kaneko*), the court held that an application for a stay was required to be filed "within a reasonable time" allowing time only to ensure the party filing the action to enforce a mechanics lien had an opportunity to serve the defendant with the summons and complaint prior to filing an application for a stay.[5] (*Ibid*.)

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[4] Former section 1281.5 provided: "Any person, who proceeds to record and enforce a claim of lien by commencement of an action [to foreclose on a mechanics lien] shall not thereby waive any right of arbitration which such person may have pursuant to a written agreement to arbitrate, if, in filing an action to enforce such claim of lien, the claimant *at the same time* presents to the court an application that such action be stayed pending the arbitration of any issue, question, or dispute which is claimed to be arbitrable under such agreement and which is relevant to the action to enforce the claim of lien." (*Baker*, *supra*, 180 Cal.App.3d at p. 930, italics added.)

[5] After *Kaneko* was decided, section 1281.5 was amended to "provide[] concrete guidance implementing the 'reasonable time' requirement" and allowing 30 days. (Cal. Law Revision Com. com., 19A West's Ann. Code Civ. Proc. (2007 ed.) foll. § 1281.5, p. 459 [com. to 2003 Amendment].) The Legislature also clarified that the failure to file

Based on the language of section 1298.5, *Baker*, and *Kaneko*, we conclude that to preserve its right to arbitrate appellant was required to file an application for a stay when it filed its suit supporting a lis pendens.[6] Even if the phrase "at the same time" is construed to mean a reasonable time, it cannot be construed to encompass a four month period. We reject appellant's argument that *St. Agnes* compels a different result as that case did not involve the application of the relevant statute. Because appellant waited several months after filing its lawsuit and recordings its lis pendens to seek a stay, it forfeited its right to arbitrate the dispute. The trial court properly denied appellant's motion to compel arbitration.

DISPOSITION

The order denying appellant's petition to compel arbitration is affirmed. Respondents shall have their costs on appeal.

FLIER, J.

I concur:

GRIMES, J.

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an application for a stay within 30 days constituted a waiver of the right to arbitrate. (§ 1281.5, subd. (c); see also Sen. Com. on Judiciary, Analysis of Sen. Bill No. 113 (2003-2004 Reg. Sess.) as amended Apr. 30, 2003, p. 3 [suggesting legislation should clarify that failure to comply with statute results in waiver as held by then existing case law].)

6 Appellant states without citation to legal authority that section 1298.5 is not applicable to him because the statute refers to section 409, which has been repealed. Assuming this issue is preserved, appellant's argument lacks merit because section 405.20 replaced section 409. "The only change of substance effected by this section [405.20] is the deletion of the former requirement that the lis pendens document contain a statement of the 'object' of the action. This requirement served little purpose; the 'object' (purpose) of the action can best be determined by review of the pleading supporting the lis pendens. This section continues the requirements of former CCP 409(a) that the lis pendens document contain the names of the parties and a description of the property affected." (See Code Comment, 14A West's Ann. Code Civ. Proc. (2004 ed.) foll. § 405.20, p. 321.)

BIGELOW, P. J., Dissenting:

I respectfully dissent.

The determination of whether arbitration has been waived is a question of fact, which is binding on the appellate court only if supported by substantial evidence. (*Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 983.) Those facts must be considered in light of the strong policy favoring arbitration, and waiver will not be lightly inferred. Indeed, the party claiming waiver has a heavy burden of proof. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) Applying these principles, I would find that the trial court erred in denying the motion to compel arbitration.

First, I do not share in the majority's interpretation that Code of Civil Procedure section 1298.5 (hereafter, § 1298.5) compels a conclusion that appellant waived contractual arbitration. Section 1298.5 provides: "Any party to an action who proceeds to record a notice of pending action . . . shall not thereby waive any right of arbitration . . . if, in filing an action to record that notice, the party *at the same time* presents to the court an application that the action be stayed pending the arbitration . . . ." (Italics added.) The majority interprets section 1298.5 to mean that if a party files an action to record a lis pendens, the party must at the same time present an application to the trial court for a stay pending arbitration, or the party loses any and all right to arbitration. I disagree. In my view, section 1298.5 protects a party who desires to record a lis pendens, while also retaining the right to arbitrate a claim. The statute clarifies that a party's right to arbitrate a dispute is protected, notwithstanding that the party files a lis pendens, if at the same time the party seeks a stay pending the arbitration. The converse, in my view, is not contemplated by the statute. That is, I do not believe a party's failure to file an application for a stay pending arbitration at the same time a lis pendens is filed forfeits the right to arbitrate a claim. This was the same result reached by *Simms v. NPCK Enterprises, Inc.* (2003) 109 Cal.App.4th 233, 240, under strikingly similar circumstances.

I interpret section 1298.5 to mean that a party's failure to file an application for a stay, at the same time a court action is filed, leaves the issue of whether the party waived contractual arbitration an open question, subject to the criteria set forth in *St. Agnes, supra,* 31 Cal.4th 1187. I do not believe that the public policy favoring arbitration (*id*. at pp. 1203-1204) should be undermined by an interpretation of section 1298.5 that cuts against the grain of that public policy, particularly where the statutory language does not plainly command such a result.

Second, I would find no waiver under the principles of the California Supreme Court case in *St. Agnes*. There, our high court taught us that merely participating in litigation does not result in a waiver of arbitration; instead the presence or absence of prejudice from the litigation is " 'the determinative issue . . . .' " (*St. Agnes, supra,* at p. 1203.) The opinion then noted: "courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration [Citations]; where a party unduly delayed and waited until the eve of trial to seek arbitration [Citation]; or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence. [Citation.]" (*Id*. at p. 1204.)

The record in this case does not show that the parties litigated the merits of the respondent's claims, or that any discovery took place. There is no evidence that the appellant gained any information about respondent's case that would be unavailable in arbitration. There is no showing of any lost evidence. Instead, the record reflects the parties were attempting to settle their dispute immediately after the case was filed in late October. Only about seven weeks passed between the filing of the lis pendens on November 5, and appellant informing respondents on December 28, 2010 that they would seek arbitration of their claims if settlement negotiations failed. After respondents indicated by letter that they were not interested in arbitration, appellant filed a formal motion to compel arbitration on February 10, 2011. No discovery was undertaken; no motions had been resolved. Really, nothing happened regarding the case until the motion to compel arbitration was denied. Further, appellant did not take actions inconsistent

with the right to arbitrate. Instead, the parties were attempting to settle the case and appellant informed respondents that if the settlement negotiations failed, appellant would seek arbitration. Even adding to these facts that there was a three-month delay between filing the lis pendens and filing a formal motion to compel arbitration, given the circumstances, I do not find substantial evidence that appellant met his "heavy burden" of demonstrating a waiver of the right to arbitration.

BIGELOW, P. J.