Filed 1/12/17 Racza v. J.K. Residential Services CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

NELLY R. RACZA et al., Plaintiffs and Respondents, v. J.K. RESIDENTIAL SERVICES, INC., Defendant and Appellant.	B261079, B262807 (Los Angeles County Super. Ct. No. BC520168)
ELBA M. MAYORGA-RODRIGUEZ, Plaintiff and Respondent, v. J.K. RESIDENTIAL SERVICES, INC., Defendant and Appellant.	(Los Angeles County Super. Ct. No. BC525641)

VILMA R. MOREIRA et al., Plaintiffs and Respondents, v. J.K. RESIDENTIAL SERVICES, INC., Defendant and Appellant.	(Los Angeles County Super. Ct. No. BC540388)

APPEAL from orders of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Affirmed.

Law Office of Joseph P. Wohrle, Joseph P. Wohrle; Law Office of Jeffrey Korn and Jeffrey Korn for Defendant and Appellant.

Law Offices of Gregory W. Smith, Gregory W. Smith; Koron & Podolsky, Boris Koron; Benedon & Serlin, Douglas G. Benedon and Judith E. Posner for Plaintiffs and Respondents.

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In this consolidated appeal from several orders denying 15 motions to compel arbitration, defendant J.K. Residential Services, Inc. (JK), challenges the trial court's finding that it waived its contractual right to arbitrate. For purposes of this appeal, we assume that the 15 plaintiffs identified in JK's motions to compel signed a contract including an arbitration

provision (even though the trial court found only certain plaintiffs signed a valid arbitration agreement).

After review, we find the trial court's conclusion that JK waived its contractual right to arbitrate with respect to all 15 plaintiffs was supported by substantial evidence. Not only did JK twice demand a jury trial, but it engaged in litigation, required plaintiffs to answer over a thousand interrogatories, and prevented plaintiffs from taking advantage of the efficiencies of arbitration. Defendant's "actions substantially impair[ed] the plaintiff[s'] ability to take advantage of the benefits and cost savings afforded by arbitration." (*Bower v. Inter-Con Security Systems, Inc.* (2014) 232 Cal.App.4th 1035, 1041 (*Bower*).) We affirm the trial court's orders.

BACKGROUND

This appeal involves three related cases. On September 3, 2013, 14 employees[1] or former employees of JK sued JK alleging wage and hour violations as well as violation of Business and Professions Code section 17200. On October 21, 2013, JK answered the complaint.

On October 29, 2013, Elba M. Mayorga-Rodriguez filed a related complaint against JK. On December 30, 2013, JK answered the related complaint. JK asserted as an affirmative defense that Mayorga-Rodriguez agreed to arbitration.

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[1] JK did not move to compel the arbitration of all 17 plaintiffs named in the three related cases. Plaintiffs identified in the first complaint were Sonia A. Bolanos, Gildardo Carrillo, Eddy R. Castillo, Manuel A. Dimas, Hye K. Kim, Digna Z. Lopez, Juana Monge, Diosdado D. Racza, Nelly R. Racza, Ricardo Rava, Wotzbeli V. Rivera, Juana E. Romero, Adolfo M. Urzua, and Virgilio V. Zamora.

Nevertheless, JK demanded a trial by jury. Specifically, JK's answer provided: "Defendant, J.K. RESIDENTIAL SERVICES, INC., hereby demands trial by jury in the herein action."

On March 25, 2014, Vilma R. Moreira and Edgar R. Moreira Castro filed a related complaint, also alleging wage and hour violations against JK. In its answer, JK again demanded a jury trial after identifying the existence of an arbitration agreement as an affirmative defense. Specifically, JK's answer provided: "Defendant, J.K. RESIDENTIAL SERVICES, INC., hereby demands trial by jury in the herein action."

Trial was set for January 14, 2015.

1. Motions to Compel Arbitration

Beginning October 6, 2014, and extending through January 15, 2015, JK filed 15 separate motions to compel arbitration. The first was filed approximately one year after JK had initially requested arbitration.

JK's motions to compel indicated that Bolanos, Carrillo, Rivera, and Urzua signed an acknowledgment with Strategic Outsourcing, Inc., requiring arbitration. The link if any between Strategic Outsourcing, Inc., and JK is unclear. According to JK, Castillo, Dimas, Kim, Lopez, Monge, Moreira, Moreira Castro, Diosdado Racza, Nelly Racza, and Zamora signed a "Dispute Resolution Agreement," including a "Mutual Promise to Resolve Claims by Binding Arbitration." This agreement permitted the arbitrator to allow discovery that the arbitrator considered necessary.

Plaintiffs opposed the 15 motions to compel arbitration. Among other defenses, they argued that JK waived the right to arbitrate by engaging in litigation. Counsel for plaintiffs averred that, in October 2013, defense counsel requested certain plaintiffs

stipulate to binding arbitration. Plaintiffs did not stipulate and defendants did not seek to compel arbitration. "Instead, Defendant actively engaged in the discovery process." Discovery included defendant propounding thousands of interrogatories, and plaintiffs responded to all of the interrogatories. Counsel averred that the parties have engaged in "numerous meet and confer efforts" and have exchanged hundreds of e-mails. Further, counsel averred that plaintiffs' counsel has expended hundreds of hours litigating. Counsel also averred that the plaintiffs have incurred a substantial amount of attorney fees in the litigation.

In contrast, defense counsel averred that very little discovery had taken place.

2. Trial Court Denies All 15 Motions to Compel Arbitration

In similar orders, the trial court denied each of JK's motions to compel arbitration. The trial court found that, in October 2013, JK's counsel requested certain plaintiffs stipulate to binding arbitration. The trial court further found that despite requesting arbitration, counsel did not seek to compel arbitration for over a year. Instead, JK engaged in discovery, producing more than 3,000 pages of documents and propounding thousands of interrogatories, all of which were answered by plaintiffs. Additionally, the parties met and conferred numerous times related to discovery issues and exchanged hundreds of e-mails. The court found that notwithstanding the January 2015 trial date, defense counsel delayed in sending written correspondence requesting arbitration until at least September 8, 2014.

On October 31, 2014, in its first challenged order, the court denied several of JK's motions to compel arbitration. The court concluded: "Defendant waived its contractual right to arbitrate

these claim[s] by unduly delaying this motion and waiting until the eve of trial (trial date 1/14/2015) to seek arbitration after engaging in extensive pretrial discovery over the 12-plus months that this action has been at-issue." The court further found that "[e]ngaging in the pre-trial discovery process without making a motion to compel arbitration over a period of a year is conduct inconsistent with an intent to invoke arbitration and an unreasonable delay." That same day the trial court continued the trial date.

In its second order, on November 5, 2014, the court denied several of JK's motions to compel. The court found that JK waived its contractual right to arbitrate by delaying until the eve of trial to file a motion. The court further found that JK engaged in extensive pretrial discovery in the year period in which the case had been at issue.

The court relied on the same reasons in its subsequent orders. The court stated that the action was filed September 3, 2013. "[M]oving party waited over 14 months to make a formal written request for the Plaintiff to submit the matter to binding arbitration and did not file the motion to compel until 01/15/2015, over 16 months after the action was filed. [¶] Between the date of the filing of the action and the filing of the instant motion[,] the parties were engaged in significant discovery, trial was set in this matter for July 2015 . . . , and as a result there would be significant prejudicial delay in ordering the matter into binding arbitration at this time." The court further found that "[i]t is impermissible to wait until the eve of trial to demand arbitration."

As noted, the court concluded that no valid arbitration agreement had been shown as to some of the plaintiffs.

These consolidated appeals followed.

DISCUSSION

1. Standard of Review

" '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." ' " (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 375 (*Iskanian*).) "Reversal is not justified simply because the trial court could have potentially reached a different conclusion on the question of waiver. '[R]ather, we may reverse the trial court's waiver finding only if the record establishes a lack of waiver *as a matter of law*.' " (*Bower, supra*, 232 Cal.App.4th at p. 1043.)

JK's argument that this court should apply a de novo standard of review ignores the fact that the evidence in this case was disputed. JK simply ignores the disputed evidence and summarizes the evidence in the light most favorable to it rather than in the light most favorable to the trial court's orders. For example, based on plaintiffs' counsel's declaration, the court found that the parties engaged in "extensive pretrial discovery," a finding defendant ignores.[2] The court also found that JK initially

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[2] Counsel for plaintiffs' declaration (which was relied upon by the trial court) indicated that in October 2013 defense counsel requested certain plaintiffs stipulate to binding arbitration. Plaintiffs did not stipulate and defendants did not seek to compel arbitration. "Instead, Defendant actively engaged in the discovery process." Discovery included defendant propounding thousands of interrogatories, which plaintiffs responded to. The

requested arbitration in October 2013, another fact JK ignores when discussing the relevant timeline. As we shall explain, once the proper standard of review is applied, the trial court's orders denying JK's motions to compel are amply supported.

2. Substantial Evidence Supported the Finding That JK Waived Its Right to Arbitration

JK's overarching argument is that the trial court erred in concluding it waived its right to arbitrate. We first summarize the relevant legal principles, and then apply those principles to this case.

a. Legal Principles

A contractual right to arbitrate may be waived in limited circumstances. "Although participating in the litigation of an arbitrable claim does not by itself waive a party's right to later seek to arbitrate the matter, at some point continued litigation of the dispute justifies a finding of waiver." (*Bower, supra*, 232 Cal.App.4th at p. 1042.)

Our Supreme Court recently explained principles relevant to waiver of a contractual arbitration provision: " '. . . California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the "bad faith" or "willful misconduct" of a party may constitute a waiver and thus justify a refusal to

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parties have engaged in "numerous meet and confer efforts" and have exchanged hundreds of e-mails. Plaintiffs' counsel has expended hundreds of hours.

compel arbitration. [Citation.]' [Citation.] The fact that the party petitioning for arbitration has participated in litigation, short of a determination on the merits, does not by itself constitute a waiver." (*Iskanian, supra,* 59 Cal.4th 348, 374-375.)

Our high court reaffirmed the factors relevant to determining whether a party has waived a contractual right to arbitrate: " ' " '(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.' " ' " (*Iskanian, supra,* 59 Cal.4th at p. 375.)

Further, "[i]n 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, supra,* 59 Cal.4th at p. 375.) That public policy is founded on the rationale that arbitration is a " ' " '*speedy and relatively inexpensive means of dispute resolution.*' " ' " (*Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1450.)

" 'Because of the strong policy favoring arbitration, prejudice typically is found only when the petitioning party has unreasonably delayed seeking arbitration or substantially impaired an opponent's ability to use the benefits and efficiencies

of arbitration. [Citations.] Prejudice is not found where the party opposing arbitration shows only that it incurred court costs and legal expenses in responding to an opponent's pleadings and motions. [Citation.] Prejudice sufficient for waiver will be found where instead of seeking to compel arbitration, a party proceeds with extensive discovery that is unavailable in arbitration proceedings.' " (*Bower, supra*, 232 Cal.App.4th at p. 1042.)

"[A] petitioning party's conduct in stretching out the litigation process itself may cause prejudice by depriving the other party of the advantages of arbitration as an 'expedient, efficient and cost-effective method to resolve disputes.' [Citation.] Arbitration loses much, if not all, of its value if undue time and money is lost in the litigation process preceding a last-minute petition to compel." (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 948.) However, a delay in seeking arbitration absent prejudice is insufficient to show waiver. (*Khalatian v. Prime Time Shuttle, Inc.* (2015) 237 Cal.App.4th 651, 663.)

b. Analysis

The trial court's finding that JK's actions were inconsistent with the right to arbitrate and that plaintiffs were prejudiced are supported by substantial evidence.

i. JK Unreasonably Delayed in Petitioning to Compel Arbitration and Petitioned Only After Twice Requesting a Jury Trial

Several reasons support the trial court's orders that JK waived its right to arbitrate. First, there was evidence that JK acted inconsistently with an intent to arbitrate. JK twice demanded trial by jury. JK's demands for a jury trial occurred with a concurrent acknowledgment of the arbitration agreements, suggesting an intent to proceed by way of trial.

That intent was further supported by JK's litigation conduct and lengthy delay in moving to compel arbitration. JK's first motions to compel were filed only three months before trial. This delay in seeking to compel arbitration is greater than that found sufficient in other cases to support a finding of waiver. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 446; *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 993-994.) JK " 'had the responsibility to "timely seek relief either to compel arbitration or dispose of the lawsuit, before the parties and the court have wasted valuable resources on ordinary litigation." ' " (*Lewis v. Fletcher Jones Motor Cars, Inc., supra*, at p. 446.) The trial court's conclusion that JK unreasonably delayed in seeking to compel arbitration was amply supported.

Additionally, in the extended interim between JK's initial request to arbitrate and JK's motions to compel, JK actively participated in the discovery process propounding more than a thousand interrogatories in addition to demands for production and causing plaintiffs to waste valuable resources on litigation. This conduct supported the conclusion that JK substantially invoked the litigation machinery. (*Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558 [fully participating in the discovery process inconsistent with an intent to arbitrate].) JK's contrary argument fails to consider the evidence relied on by the trial court and supported by defense counsel's declaration.

ii. Substantial Evidence Supported the Conclusion That Plaintiffs Were Prejudiced

Prejudice occurs when a party's delay in compelling arbitration affected, misled, or prejudiced the other party. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.) We must defer to the trial court's findings

when—as here—they are supported by the evidence. (*Adolph v. Coastal Auto Sales, Inc., supra*, 184 Cal.App.4th at p. 1450.)

JK misled plaintiffs by demanding a jury trial and by waiting a year after demanding arbitration to move to compel arbitration. The majority of the plaintiffs spent over a year preparing their case. Moreover, because the delay in moving to compel arbitration was unjustified, the plaintiffs' undisputed "expenditure of time and money *are* relevant to the prejudice analysis." (*Oregel v. PacPizza, LLC* (2015) 237 Cal.App.4th 342, 361; see *Sobremonte v. Superior Court, supra*, 61 Cal.App.4th at p. 996; *Guess?, Inc. v. Superior Court, supra*, 79 Cal.App.4th at p. 558.) JK's lengthy delay in seeking arbitration denied plaintiffs the benefit of the efficiency and cost effectiveness of arbitration. (*St. Agnes Medical Center v. Pacificare of California, supra*, 31 Cal.4th at p. 1204 [prejudice occurs where the petitioning party's conduct has "substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration"]; see *Bower, supra*, 232 Cal.App.4th at p. 1046 [finding prejudice where party opposing arbitration was denied "ability to obtain the cost savings and other benefits associated with arbitration"]; *Sobremonte v. Superior Court, supra*, at pp. 993-994 [party seeking arbitration "had the responsibility to 'timely seek relief either to compel arbitration or dispose of the lawsuit, before the parties and the court have wasted valuable resources on ordinary litigation' "].)

iii. JK's Arguments Apply an Incorrect Standard of Review and Lack Merit

As previously explained, JK relies on the wrong standard of review and ignores the evidence supporting the trial court's order. Instead JK summarizes the evidence in the light most

favorable to it and summarizes its counsel's argument which is not evidence. For example, citing the reporter's transcript, JK states that any delay was "attributable solely to waiting to ensure that all plaintiffs were identified before beginning arbitration proceedings." The record citation is to argument by counsel that counsel was "simply communicating with our client to determine what was going on with the additional plaintiffs." Counsel's argument is not evidence.[3] (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1173.) In any event, even assuming JK had presented evidence, the trial court was not required to find that evidence credible. Thus, the only reason JK offers to seek delay does not support a reasonable justification for delaying its motions to compel arbitration. (See *Lewis v. Fletcher Jones Motor Cars, Inc., supra*, 205 Cal.App.4th at p. 448.)

Following the same faulty logic, JK argues that, because its delay was solely to make sure all plaintiffs were identified, this case is like *Khalatian v. Prime Time Shuttle, Inc., supra*, 237 Cal.App.4th 651 in which this court found that the trial court's factual findings were not supported by the record. (*Id.* at p. 662.) As noted, JK's premise was apparently discredited by the trial court. In addition, in *Khalatian*, the trial court's findings that a party delayed in moving to compel arbitration were not supported by the record and in this case they were. There was evidence that during the time JK delayed in seeking to compel arbitration it propounded thousands of interrogatories, causing plaintiffs'

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[3] In its reply brief, JK also relies on its counsel's argument, claiming incorrectly that such argument is more persuasive than plaintiff's counsel's declaration. The argument is not persuasive because the trial court credited plaintiffs' counsel's declaration, adopting portions of it in the court's order.

counsel to meet and confer repeatedly, a process not required by any arbitration agreement. Moreover, here, in contrast to *Khalatian*, JK twice demanded a jury trial misleading plaintiffs into believing that the case would be litigated.

JK relies on the continued trial date to argue that the motions were filed "well in advance of the trial date." The problem with this argument is that at the time the majority of motions were filed the trial was three months away. The fact that trial subsequently was continued does not undermine the argument that plaintiffs based their trial strategy on JK's request for a jury trial and participated in discovery in reliance on that request. JK did not object to a trial date on the ground that plaintiffs were required to arbitrate their claims. Instead it waited until shortly before trial to seek to compel arbitration.

In sum, JK fails to show the trial court erred in denying JK's 15 motions to compel arbitration.[4] The trial court's findings were supported by substantial evidence.

DISPOSITION

The trial court's orders denying JK's 15 motions to compel arbitration are affirmed. Respondents are entitled to costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J. GRIMES, J.

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[4] Because we conclude JK waived its right to arbitrate we need not consider the parties' arguments concerning other defenses raised in connection with JK's 15 motions to compel arbitration.