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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ELEVEE CUSTOM CLOTHING INC. et al., Plaintiffs and Respondents, v. BUCHALTER NEMER, Defendant and Appellant.	B247278 (Los Angeles County Super. Ct. No. LC098704)

APPEAL from a judgment of the Superior Court of Los Angeles County. James A. Kaddo, Judge. Reversed with directions.

Jeffer Mangels Butler & Mitchell, Robert E. Mangels, Andrew I. Shadoff for Defendant and Appellant.

Nunziato Buckley Weber, Tom A. Nunziato, Illece Buckley-Weber for Plaintiffs and Respondents.

Buchalter Nemer (Buchalter) appeals from the denial of its petition to compel arbitration of a professional negligence claim brought by Elevee Custom Clothing Inc., Michael O'Brien, and Rebecca Frazier (collectively respondents). The trial court found no arbitration agreement existed between the parties because the signature on the purported agreement was forged. Because there may be basis to find that a valid arbitration agreement existed under the doctrine of ostensible agency irrespective of the forgery, we reverse and direct the trial court to hold an evidentiary hearing.

Statement of Facts

Buchalter, a legal corporation, provided legal services to Elevee and its shareholders on various matters from 2004 to 2012. On October 18, 2012, Elevee, O'Brien, and Frazier sued Buchalter, alleging Buchalter committed professional negligence in the course of its legal representation of Elevee. O'Brien and Frazier are husband and wife, and officers, directors, and majority shareholders of Elevee.

In lieu of answering the complaint, Buchalter filed a motion to compel arbitration, alleging it provided legal services pursuant to a written engagement letter between the parties that contained a mandatory arbitration provision. In support of its motion, Buchalter produced the letter, purportedly signed by O'Brien on behalf of Elevee. The letter confirmed Elevee had retained Buchalter for the formation of a limited liability company, as well as for other general legal matters, and required a $2,500 retainer prior to representation. The letter contained an arbitration provision, stating in pertinent part: "If any dispute arises out of or relating to this agreement, our relationship, or the services performed (including but not limited to disputes regarding attorney's fees or cost [sic] and claims of negligence, breach of contract or fiduciary duty, fraud or any claim based upon a statute), such dispute shall be resolved by submission to binding arbitration in Los Angeles County, California, before a retired judge or justice."

Buchalter represented that the letter had been kept in a correspondence file associated with Elevee, and appeared to have been folded twice as if once inserted into an envelope. On top of the letter was written, "Original to Yolanda 10-8-04," referring to an executive assistant at Buchalter who was responsible for filing and maintaining

engagement letters. Buchalter's records indicated it had received the engagement letter from Elevee on October 8, 2004.

Respondents opposed the motion, arguing O'Brien's signature on the engagement letter was a forgery. O'Brien declared, "I did not sign or authorize anyone to sign a retainer agreement with Buchalter. The signature on the purported retainer agreement proffered to the Court by Buchalter is not my signature." To support his claim, O'Brien submitted three documents from 2004 bearing his signature: a motor vehicle lease agreement, a deed of trust, and an assignment and assumption agreement. O'Brien also provided a signed court document from January 2012 to show consistency. He also declared he would not have signed a document with a retainer agreement, and neither he nor anyone at Elevee paid a retainer to Buchalter. Frazier declared she did not sign O'Brien's name on the retainer agreement, she knew of no instance where O'Brien authorized anyone to sign his name on behalf of Elevee, and no one at Elevee "*has* the authority to sign Michael O'Brien's name on behalf of Elevee." (Italics added.) Frazier declared Elevee never paid a $2,500 retainer to Buchalter, but did pay Buchalter $500 for the creation of a limited liability company. O'Brien and Frazier both noted the letter purportedly signed by O'Brien was not signed by anyone from Buchalter.

In reply, Buchalter offered its employees' declarations that on August 19, 2004, Buchalter drafted an engagement letter for the representation of Elevee. Nadav Ravid, the attorney in charge of the Elevee matter, signed a draft of the letter. On August 20, 2004, Buchalter opened a client file for Elevee according to its standard procedures. Buchalter emailed the engagement letter as an attachment to O'Brien on October 4, 2004. On October 5, 2004, Elevee wrote a check to Buchalter for $500 for an "LLC Agreement," which Buchalter deposited on October 8, 2004.

A hearing on the motion to compel arbitration was held on January 24, 2013. The trial court tentatively stated Buchalter had not met its burden to prove the existence of an agreement to arbitrate, citing O'Brien's and Frazier's declarations that they did not sign the engagement letter and observing several examples of O'Brien's signature that were "not even close" to the signature on the letter. Buchalter argued its evidence showed

respondents' claims of forgery were unbelievable. Respondents countered that discrepancies surrounding the engagement letter supported their contention that the letter was not signed by O'Brien. The court then took the matter under submission.

On January 30, 2013, the trial court denied Buchalter's motion to compel arbitration, finding Buchalter had not met its burden to show the existence of an arbitration agreement because "[t]he signature on Buchalter's document is irregular, and no plaintiff . . . stated they signed or authorized the signing of the purported retainer agreement." Buchalter timely appealed. Pursuant to our request, the parties submitted supplemental letter briefs addressing whether respondents were bound to the engagement letter under an ostensible agency theory.

Discussion

1. Standard of Review

To the extent the trial court's decision on arbitrability is based upon resolution of disputed facts, we review the decision for substantial evidence. (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.) "If the facts are undisputed, on appeal we independently review the case to determine whether a valid arbitration agreement exists." (*Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 586.)

2. Enforcement of Arbitration Agreements

When a party to an arbitration agreement refuses to submit to arbitration, the other party may petition the court to compel arbitration. (Code of Civ. Proc., § 1281.2.) "'A proceeding to compel arbitration is in essence a suit in equity to compel specific performance of a contract. [Citation.]'" (*Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 218.)

The statutory provisions set forth in Code of Civil Procedure sections 1281.2 and 1290.2 governing contractual arbitration "'create a summary proceeding for resolving' petitions or motions to compel arbitration." (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 705.) "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.]" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) The court "must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable." (*Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 413.) The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, and the party opposing the petition bears the burden of proving any defense to enforcement by a preponderance of evidence. (*Engalla v. Permanente Medical Group, Inc.*, *supra*, 15 Cal.4th at p. 972.)

3. Ostensible Agency

A party may be bound to an arbitration agreement with a third party through an act of its agent. (*Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1128.) "An agent is one who represents another, called the principal, in dealings with third persons." (Civ. Code, § 2295.)[1] "An agent has such authority as the principal, actually or ostensibly, confers upon him." (§ 2315.) Ostensible authority "is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (§ 2317.) An ostensible agent "binds the principal where the principal has intentionally or negligently allowed [a third party] to believe the agent has authority," and the third party reasonably relied on such authority. (*C.A.R. Transportation Brokerage Co. v. Darden Restaurants, Inc.* (2000) 213 F.3d 474, 479 [applying California law].)

Whether an agent has ostensible authority to bind the principal may be implied from the circumstances and proven by circumstantial evidence. (*Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 748; *C.A.R. Transportation Brokerage Co., Inc. v. Darden Restaurants, Inc.*, *supra*, 213 F.3d at pp. 480-481.) "[A]lthough the existence of an agency relationship is usually a question of fact, it 'becomes a question of law when the facts can be viewed in only one way.'" (*J.L.*

[1] All further statutory references are to the Civil Code.

v. Children's Institute, Inc. (2009) 177 Cal.App.4th 388, 403 [citing *Metropolitan Life Ins. Co. v. State Board of Equalization* (1982) 32 Cal.3d 649, 658].)

4. Existence of an Arbitration Agreement Between Buchalter and Elevee

Buchalter argues the undisputed facts surrounding its possession of the signed engagement letter show respondents received, signed, and returned the engagement letter, which established the existence of a valid arbitration agreement through ostensible agency. In support of its motion to compel, Buchalter produced a copy of the engagement letter purportedly signed by O'Brien, and provided evidence that Buchalter created and processed an engagement letter received from Elevee pursuant to its standard procedures for client representation. On August 19, 2004, Buchalter drafted an engagement letter for the representation of Elevee in forming a limited liability company. Nadav Ravid, the attorney in charge of the Elevee matter, signed a draft of the letter. Buchalter emailed the engagement letter as an attachment to O'Brien on October 4, 2004. The very next day, Elevee wrote a check to Buchalter for $500 for an "LLC Agreement," and three days later on October 8, Buchalter deposited it. Buchalter subsequently provided legal services pursuant to the engagement letter for eight years.

Buchalter produced the signed engagement letter from a correspondence file associated with Elevee. The letter appeared to have been folded twice as if inserted into an envelope, and on top of the letter was written, "Original to Yolanda 10-8-04," referring to an executive assistant responsible for receiving and filing engagement letters. Buchalter's records also indicated it had received an engagement letter from Elevee. These undisputed facts suggest someone at Elevee signed the engagement letter and returned it to Buchalter along with a $500 check for an "LLC Agreement" on October 8, 2004, only four days after Buchalter had emailed the engagement letter to O'Brien.

In response, O'Brien declared the signature on the engagement letter was not his signature, and provided four signature exemplars, which the trial court determined were "not even close" to the signature on the engagement letter. O'Brien also declared he did not authorize anyone to sign the engagement letter on his behalf, and Frazier declared she did not sign the engagement letter and no one at Elevee "has the authority to sign" on

behalf of O'Brien. Notably, however, neither O'Brien nor Frazier denied they received and read the engagement letter, or denied that someone at Elevee signed the letter on behalf of O'Brien and mailed it to Buchalter. At best, their declarations established that they failed to prevent someone at Elevee from obtaining the engagement letter from O'Brien's email, signing it with O'Brien's signature, and returning it and a check for $500 (admittedly not the requested $2,500) to Buchalter.

These facts, without more, may support a finding that whoever signed the engagement letter on behalf of O'Brien had ostensible authority to bind Elevee to the retainer agreement. Because the issue was not raised in the trial court, however, there may be additional facts unbeknownst to us that are pertinent to the determination of whether an ostensible agency existed. We therefore remand the case to the trial court to make a factual determination as to whether a valid arbitration agreement existed between Buchalter and Elevee under the principles of ostensible agency.

Given our holding above, we need not address Buchalter's argument that the trial court abused its discretion in failing to hold an evidentiary hearing.

Disposition

The order denying Buchalter's motion to compel arbitration is reversed, and the case is remanded for further proceedings in accordance with the views expressed herein. Buchalter is to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J. MILLER, J.*

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