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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GLENN JOHNSON, Plaintiff and Appellant, v. TRISCENIC PRODUCTIONS, Defendant and Respondent.	B261412 (Los Angeles County Super. Ct. No. PS016445)

APPEAL from and order of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Affirmed.

James W. Maddox for Plaintiff and Appellant.

Law Office of Priscilla Slocum and Priscilla Slocum; Early Maslach & Hartsuyker, John A. Peterson and James Grafton Randall for Defendant and Respondent.

I. INTRODUCTION

Plaintiff, Glenn Johnson, appeals from an order denying his motion to compel arbitration. Plaintiff sued defendant, Triscenic Productions, for injuries suffered at work in *1998*. The parties agreed to arbitrate the matter pursuant to an agreement with a specific arbitration deadline. The agreement provided for extension of the deadline by written agreement signed by all parties. The parties subsequently agreed to multiple extensions of time for arbitration to occur with a specific deadline. According to plaintiff, the last extension agreement was entered into on August 31, 2006. The alleged extension to August 31, 2006, was confirmed in a letter signed by plaintiff's counsel. This extension purported to remove a set deadline and provided the parties would schedule a mutually satisfactory hearing date. Defendant's counsel purportedly confirmed this extension in a letter dated October 6, 2006. The October 6, 2006 letter was signed by defendant's counsel.

On April 9, 2014, plaintiff requested defendant cooperate in picking an arbitrator. Defendant refused, contending that no arbitration agreement was in effect. Defendant asserted it offered an extension until December 31, 2008, but arbitration did not occur. Plaintiff moved to compel arbitration under the arbitration agreement. The trial court denied plaintiff's motion on the grounds that the arbitration agreement had expired. We affirm the judgment.

II. BACKGROUND

A. Plaintiff's Complaint

Plaintiff filed his complaint against defendant on October 19, 1999. Plaintiff sued defendant for negligence for injuries which occurred on October 21, 1998. Plaintiff alleges he was working on a film lot in Burbank, California for Warner Brothers.

Defendant is a company based in Los Angeles County, California. Defendant loaded and delivered set walls via trucks to lots owned by Warner Brothers. Plaintiff was to unload these set walls. Plaintiff alleges defendant negligently loaded these trucks such that when he began unloading the set walls, they fell on him. Plaintiff requests as relief general damages, lost current and future earnings and employment benefits, medical care expenses both past and future, and costs of suit.

B. The Arbitration Agreement and Extensions

On June 2, 2000, the parties agreed to submit the matter to binding arbitration pursuant to the California Arbitration Act. The arbitration agreement, entitled "AGREEMENT RE SUBMISSION TO BINDING ARBITRATION," provided in pertinent part: "At all times, the parties shall act in good faith in selecting an arbitrator, the dates for the arbitration hearing and all other matters regarding the resolution of this action by binding arbitration. . . . [¶] Unless extended by written agreement signed by all parties, the arbitration shall be completed no later than eight (8) months from the date of the execution of this agreement." The parties subsequently agreed to multiple extensions. Each extension was a written agreement signed by all parties.

On May 17, 2005, the parties agreed to arbitration before Retired Judge Irwin Nebron who was affiliated with Alternative Resolution Centers. On August 16, 2005, the parties signed a modification of their earlier arbitration agreement. The August 16, 2005 modification is entitled, "FURTHER AGREEMENT RE SUBMISSION TO BINDING ARBITRATION." This modification, similar to the original agreement, provided, "Unless extended by written agreement signed by all Parties, the arbitration shall be completed by December 1, 2005." The parties again extended the arbitration deadline by written agreements signed by all parties on November 14, 2005, and February 3, 2006. Under the February 3, 2006 extension agreement, the parties agreed to extend the deadline to complete arbitration to October 1, 2006.

C. Plaintiff's Settlement Demand Letter and Defendant's Response

On August 31, 2006, plaintiff's attorney, James Maddox, sent defendant's attorney at the time, Nancy Garber, a settlement demand letter. Mr. Maddox stated in his letter: "My office will provide your client a reasonable time to evaluate my client's demand. While discovery has been undertaken in the case, there is still outstanding discovery due to your office and to my office, as well as additional discovery prior to any arbitration. It is my understanding that if the parties are not able to informally resolve this, then the parties will participate in a mediation. Pending our informal settlement process and a mediation, it is my understanding that we have agreed not to press for formal discovery from each other. In the event that the parties are not able to settle this case by informal resolution or by mediation, then the parties will schedule a mutually satisfactory arbitration hearing date. If this is not your understanding, please advise me. In the meantime, if there is any further records that you may need, please do not hesitate to contact me."

On September 25, 2006, John Tasker sent a letter to Mr. Maddox. Mr. Tasker's September 25, 2006 letter stated he would be appearing as defense counsel. On October 6, 2006, Mr. Tasker stated in a letter to Mr. Maddox: "As we discussed, we agree that the Arbitration of this matter will be extended so that we can complete discovery related to your client's most recent work comp. [sic] injury. You indicated that you were going to send us records related to this new injury, and we most likely will need to take a second session of your client's deposition." Plaintiff was injured in an unrelated incident on September 28, 2005. On November 8, 2006, Mr. Maddox provided Mr. Tasker a list of healthcare providers treating plaintiff for this unrelated injury. No further communication occurred between them until April 17, 2008.

D. Defendant's New Proposed Arbitration Deadline

In a letter dated April 17, 2008, defendant's newest attorney, John Peterson, notified Mr. Maddox that there was no effective stipulation to submit the matter to arbitration. Mr. Peterson stated his position was that the case should be closed for lack of prosecution. On May 14, 2008, Mr. Maddox responded that Mr. Tasker had wanted additional time to investigate an unrelated injury to plaintiff. Mr. Maddox asserted Mr. Tasker had previously confirmed in a written agreement to extend arbitration in order to allow time for investigation.

In a letter dated June 9, 2008, Mr. Peterson wrote Mr. Maddox. Mr. Peterson related his April 17, 2008 position remained the same. However, Mr. Peterson further stated, "I am willing to proceed with the arbitration of this case, as long as the matter is concluded, in its entirety, by December 31, 2008." As will be noted, Mr. Peterson's June 9, 2008 letter is of material consequence to the outcome of this appeal. Mr. Peterson suggested setting an arbitration date before Judge Nebron before the end of the year. Mr. Peterson also requested setting a deposition of plaintiff and production of documents. Plaintiff's deposition was taken on July 10, 2008.

In a letter dated September 3, 2008, Mr. Peterson wrote Mr. Maddox. Mr. Peterson stated: "We need to obtain [p]laintiff's medical records from MAX MR Imaging, Inc. Enclosed is an [a]uthorization form that we request your client sign and return to our office. We agree to provide you with copies of all the records we receive." On September 12, 2008, Mr. Maddox wrote Mr. Peterson: "Mr. Johnson has signed his deposition transcript. . . . [¶] I have sent to my client the requested authorization form for release of records for MAX MR Imaging." Mr. Maddox also inquired as to when defendant would provide responses to plaintiff's special interrogatories and document production requests. Mr. Maddox and Mr. Peterson did not correspond further until approximately September 6, 2013.

E. Motion to Compel Arbitration

In a letter dated September 6, 2013, Mr. Maddox sent Mr. Peterson a letter with a new settlement demand. Mr. Maddox sent a follow-up letter on January 16, 2014. On February 26, 2014, Mr. Maddox sent a letter indicating that he was withdrawing the settlement offer. Mr. Maddox also requested the matter proceed to arbitration. Mr. Maddox sent a follow-up letter on April 9, 2014. On April 24, 2014, Mr. Peterson responded to Mr. Maddox by advising that there was no agreement to extend arbitration beyond December 31, 2008. Mr. Peterson wrote that defendant would not agree to any arbitration proceeding at this time and would oppose a petition to compel such.

On September 9, 2014, plaintiff filed his petition to compel arbitration. Plaintiff relied on the original agreement executed on June 6, 2000. Plaintiff asserted that defendant had agreed to an open-ended arbitration deadline pursuant to the August 31 and October 6, 2006 letters. According to Mr. Maddox, "I reiterated that the parties were going to agree to a mutually satisfactory date for the arbitration after exploring mediation/settlement and after additional discovery, including discovery that his office had never provided." Defendant relied on Mr. Peterson's June 9, 2008 letter which states in part, as noted, "I am willing to proceed with the arbitration of this case, as long as the matter is concluded, in its entirety, by December 31, 2008." However, according to defendant, Mr. Maddox never responded Mr. Peterson's June 9, 2008 letter. Defendant also asserted plaintiff engaged in dilatory behavior.

On December 8, 2014, the hearing was held on plaintiff's petition to compel arbitration. The trial court denied the plaintiff's petition to compel arbitration. The trial court found the parties never extended the arbitration completion date beyond December 31, 2008. The trial court ruled, "Moving party presents no evidence that the parties agreed to an open-ended arbitration completion date." The trial court concluded the arbitration agreement between the parties had expired.

III. DISCUSSION

A. Standard of Review

Code of Civil Procedure section 1281.2 states, "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists . . . ." (See *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 406.) We uphold the resolution of disputed facts if supported by substantial evidence. (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 683 (*Lane*); *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1277 (*Nyulassy*).) Where there is no disputed extrinsic evidence to consider, we review the trial court's arbitrability decision de novo. (*Lane, supra*, 224 Cal.App.4th at p. 683; *Nyulassy, supra,* 120 Cal.App.4th at p. 1277.)

B. Last Extension of Arbitration Deadline

Plaintiff asserts he never agreed to extend the arbitration deadline to December 31, 2008. Plaintiff's principal argument is that the August 31, 2006 letter extended the arbitration deadline for the parties to schedule a mutually satisfactory date. Plaintiff asserts that Mr. Tasker's October 6, 2006 letter confirmed this agreement.

Arbitration is a matter of agreement between the parties and governed by contract law. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 8; *Baide v. Bank of America* (1998) 67 Cal.App.4th 779, 787.) A party cannot be forced to arbitrate in the absence of an agreement to do so. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 259 (*Pinnacle*); *Frederick v. First Union Securities, Inc.* (2002) 100 Cal.App.4th 694,

697; *Arista Films, Inc. v. Gilford Securities, Inc.* (1996) 43 Cal.App.4th 495, 501.) Our Supreme Court has held: "Under statutory rules of contract interpretation, the mutual intention of the parties at the time contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless used by the parties in a technical sense or a special meaning is given to them by usage' (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.) Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. [Citations.]" (*AIU Insurance Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822; accord, *Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.)

The arbitration agreement at issue contains provisions expressly providing for extension of the arbitration deadline. (See *Busch v. Globe Industries* (1962) 200 Cal.App.2d 315, 320 ["A written contract may expressly provide for modification."]; accord, *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1210.) Here, the arbitration agreement permits an extension of the arbitration deadline "by written agreement" which must be "signed by all" of the parties. We conduct de novo review as to the meaning of the term "written agreement." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866; *Badie v. Bank of America, supra,* 67 Cal.App.4th at p. 799.) Applying a layperson's understanding and relevant contract law, we construe "written agreement" to mean a written contract. (See Civil Code, § 1549 ["A contract is an agreement to do or not do a certain thing."]; see *Agosta v. Astor* (2004) 120 Cal.App.4th 596, 604.) The parties do not dispute this construction. An essential element of any contract is consent or mutual assent of the parties. (Civ. Code, §§ 1549-1550, subd. (2), 1565, subd. (2); *Lopez v. Charles Schwab & Co., Inc.* (2004) 118 Cal.App.4th 1224, 1230.)

The Court of Appeal as held: "The manifestation of mutual consent is generally achieved through the process of offer and acceptance. [Citation.] Mutual consent necessary to the formation of a contract 'is determined under an objective standard

applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings. [Citation.]' [Citations.]" (*Deleon v. Verizon Wireless, LLC* (2012) 207 Cal.App.4th 800, 813; accord, *Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 309.) "Where the existence of a contract is at issue and the evidence is conflicting or admits of more than one inference, it is for the trier of fact to determine whether the contract actually existed. But if the material facts are certain or undisputed, the existence of a contract is a question for the court to decide." (*Bustamante v. Intuit, Inc.* (2005) 141 Cal.App.4th 199, 208; accord, *HM DG, Inc. v. Amini* (2013) 219 Cal.App.4th 1100, 1109.) Plaintiff contends the August 31 and October 6, 2006 letters constituted an agreement to extend the arbitration deadline for the parties to schedule a mutually satisfactory hearing date. Because the existence of the letters is undisputed, we review de novo whether a contract existed.

Mr. Maddox's August 31, 2006 letter states: plaintiff would provide defendant a reasonable time to consider the settlement demand; if an informal settlement was not achieved, the parties would pursue mediation; no formal discovery would occur while informal settlement and mediation were pending; and if the parties could not informally reach a settlement, they would "schedule a mutually satisfactory arbitration" date. Mr. Tasker's October 6, 2006 letter purported to agree to extend the arbitration deadline so that defendant could complete discovery concerning plaintiff's unrelated 2005 injury. Plaintiff argues that Mr. Tasker confirmed in writing the agreement offered in Mr. Maddox's August 31, 2006 letter. However, based on these letters, Mr. Tasker did not accept plaintiff's offer.

Civil Code section 1585 provides in pertinent part: "An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. *A qualified acceptance is a new proposal*." (Emphasis added.) Here, Mr. Tasker added a term in the October 6, 2006 letter that was not in plaintiff's original offer—additional discovery regarding plaintiff's 2005 injury. Our Supreme Court held: "It is elementary

that an acceptance is required to be identical with the offer, and must be unconditional and not add any new terms thereto. If the terms of the offer are changed or added to by the acceptance, there is no meeting of the minds and no contract." (*Robbins v. Pacific Eastern Corp.* (1937) 8 Cal.2d 241, 276; *Landberg v. Landberg* (1972) 24 Cal.App.3d 742, 752; see 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 185, p. 219 ["[A qualified acceptance] is a counteroffer that constitutes a *rejection* of the original offer, with the result that the original offer cannot thereafter be accepted by the offeree."].)

Mr. Tasker's October 6, 2006 letter was a qualified acceptance. It thus was a counteroffer that rejected plaintiff's August 31, 2006 offer and not an acceptance by Mr. Tasker. There is no evidence that plaintiff accepted Mr. Tasker's October 6, 2006 counteroffer. Mr. Maddox's May 14, 2008 letter indicated he discussed these terms with Mr. Tasker. This did not demonstrate plaintiff accepted the counteroffer given the explicit language of the arbitration agreement that extensions can only be accomplished by written agreement signed by all parties.

The last extension for completion of arbitration agreed upon in writing by the parties was until October 1, 2006. Because the parties did not agree to an extension beyond October 1, 2006, there is no binding arbitration agreement between the parties. The expectations of the parties based on the written terms was to complete arbitration by the deadline provided. The trial court did not err by finding the arbitration agreement had expired. (See *Beatty Safway Scaffold, Inc. v. Skrable* (1960) 180 Cal.App.2d 650, 654 ["It is the general rule that when a contract specifies the period of its duration, it terminates on the expiration of such period."]; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 924, p. 1022 ["A contract may also be discharged by expiration of the term of the agreement."].) There is no public policy favoring arbitration of disputes that the parties have not agreed to arbitrate. (*Lopez v. Charles Schwab & Co., Inc., supra,* 118 Cal.App.4th at p. 1229; *Badie v. Bank of America, supra,* 67 Cal.App.4th at p. 788.) The trial court correctly denied plaintiff's motion to compel arbitration. (Code Civ.

Proc., § 1281.2; *Pinnacle, supra,* 55 Cal.4th at p. 259.) We need not address the parties' additional arguments.

IV. DISPOSITION

The order denying the motion to compel arbitration is affirmed. Defendant, Triscenic Productions, may recover its appeal costs from plaintiff, Glenn Johnson.

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TURNER, P. J.

I concur:

BAKER, J.

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MOSK, J., Concurring

I concur.

I would affirm the judgment on the ground that plaintiff unreasonably delayed in seeking arbitration. (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211.) The required prejudice occurs because of an unreasonable delay in seeking arbitration—here 14 years. (See *Hoover v. American Income Life Ins.* (2012) 206 Cal.App.4th 1193, 1205.)

MOSK, J.