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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

OLD UNITED CASUALTY COMPANY, Plaintiff and Respondent, v. TYRONE G. BYRD, Defendant and Appellant.	B266484 (Los Angeles County Super. Ct. No. NC059507)

APPEAL from orders and a judgment of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Affirmed in part, reversed in part and remanded.

Tyrone G. Byrd, in pro. per., for Defendant and Appellant.

Michaelis, Montanari & Johnson, James I. Michaelis and Wesley S. Wenig for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Tyrone G. Byrd appeals from several orders and a judgment. Plaintiff Old United Casualty Company, doing business as Vantage Casualty Company, issued two marine insurance policies to defendant. Plaintiff filed a complaint and amended complaint seeking, inter alia, rescission of the insurance contracts for defendant's failure to comply with the insurance contract terms and for filing a false claim for theft. Defendant cross-complained, alleging bad faith breach of the implied covenant of good faith and fair dealing (implied covenant breach).

Plaintiff subsequently moved for summary adjudication of the rescission cause of action and defendant's cross-complaint for the implied covenant breach. Defendant demurred to the complaint and filed a number of motions, including a motion to dismiss, a motion to quash service, and a motion to compel arbitration. The trial court overruled the demurrer and denied all of defendant's motions. The trial court granted rescission of the insurance contracts and summary adjudication in favor of plaintiff on the cross-complaint. Prior to entry of judgment, defendant appealed the denial of the motion to compel arbitration.

We affirm in part and conclude that the trial court did not err when it denied defendant's motions to dismiss, quash service, and compel arbitration. We conclude, however, that the trial court acted without jurisdiction when it entered judgment in favor of plaintiff after defendant had filed his notice of appeal from the denial of the motion to compel arbitration. We therefore reverse the judgment as void. The other orders for which

defendant seeks appellate review are not reviewable by this appeal.

II. BACKGROUND

A. *Pleadings*

Plaintiff issued two marine insurance policies to defendant for two separate vessels and a trailer. Both insurance policies contained an arbitration provision.

On May 12, 2014, plaintiff filed a complaint against defendant alleging causes of action for: rescission of one of the insurance contracts, implied covenant breach, breach of contract, misrepresentation and fraud, and declaratory relief. Plaintiff claimed, among other things, that defendant had filed a false claim for theft of a vessel and trailer that had been lawfully repossessed by a bank that held a mortgage on them. Plaintiff further contended that defendant had failed to cooperate with its investigation of the theft claim.

Plaintiff submitted a proof of service of the summons and complaint, stating that defendant had been served by substituted service on May 22, 2014, at his place of business. On July 2, 2014, Ernest J. Franceschi, Jr. of the Franceschi Law Corporation filed an answer to the complaint on behalf of defendant. Also on July 2, 2014, Franceschi, on behalf of defendant, filed a cross-complaint against plaintiff for implied

covenant breach relating to the insurance contracts.[1] On October 27, 2014, plaintiff filed its answer to the cross-complaint.

On March 24, 2015, plaintiff filed its first amended complaint, alleging the same five causes of action as its original complaint. The amended complaint also sought rescission of a second insurance policy and alleged defendant had failed to cooperate with the investigation of a water damage claim he had submitted for a second vessel.

Both insurance policies had the same substantive terms, including an arbitration provision, which provided: "By accepting this Policy, you agree on your own behalf, and on the behalf of all other persons qualifying as an 'insured' under this Policy, to arbitrate all disputes between you and us. You agree that the words 'dispute' and 'disputes' are given the broadest possible meaning and include, without limitation: [¶] a.) all claims arising from or relating to the information you gave us before this Policy was issued, the issuance of this Policy, the coverage provided by the Policy, or the interpretation of this Policy; [¶] b.) all claims that you or we have breached or otherwise failed to perform any provision of this Policy; [¶] c.) all federal or state law claims arising from or relating to this Policy including, without limitation, claims based upon any insurance statute or regulation; and [¶] d.) all common law claims based upon contract, negligence, fraud or other intentional torts including, without limitation, claims that we may have acted in bad faith or with vexatious intent in

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[1] Plaintiff moved to strike portions of the cross-complaint that sought punitive damages. This motion was granted and is not on appeal.

defense or settlement of a suit or a claim covered by this Policy."

B. *Plaintiff's Motion for Summary Adjudication*

On May 5, 2015, plaintiff filed a motion for summary adjudication as to its first cause of action for rescission and defendant's cross-complaint.

C. *Counsel Franceschi Relieved*

On May 6, 2015, Franceschi filed an ex parte application to be relieved as defendant's counsel due to an irreconcilable conflict of interest between him and defendant. On May 14, 2015, Franceschi was relieved as defendant's counsel.

D. *Defendant's Motion to Dismiss, Quash Service, and Compel Arbitration*

On May 14, 2015, defendant, proceeding in propria persona, filed a motion for an order compelling arbitration.[2] That same day, defendant also filed a motion to quash service of process. On May 19, 2015, defendant demurred to the first amended complaint on the grounds that there was an applicable arbitration provision and because plaintiff failed to allege facts supporting a cause of action for rescission. Defendant also moved to strike portions of

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[2] It is undisputed that the parties' causes of action would be within the scope of the arbitration provision at issue here.

plaintiff's first amended complaint on the same grounds as the demurrer.

On June 15, 2015, defendant moved to dismiss the action for alleged fraud upon the court. Defendant argued plaintiff's counsel had submitted or made false statements and defendant's former counsel was not authorized to practice law.

On June 15, 2015, plaintiff moved to compel defendant's appearance at a deposition, and for sanctions for defendant's prior non-appearance at another deposition. On July 7, 2015, the trial court granted plaintiff's motion and sanctioned defendant in the amount of $2,846.72.

E. *Denial of Defendant's Motions and Grant of Summary Adjudication*

On July 21, 2015, the trial court held a hearing on defendant's motion to quash service, motion to dismiss, motion to strike, demurrer, motion to compel arbitration, and plaintiff's motion for summary adjudication. The trial court denied all of defendant's motions and overruled the demurrer. Regarding defendant's motion to compel arbitration, the trial court found defendant had waived any right to enforce the arbitration provision because he actively litigated both his defense and cross-complaint. The trial court found defendant delayed until plaintiff had moved for summary adjudication before filing his motion to compel arbitration. The trial court granted plaintiff's summary adjudication motion.

On July 29, 2015, plaintiff requested and received dismissal without prejudice of its second through fifth causes of action in the first amended complaint.

On August 20, 2015, the trial court issued a statement of reasons for its summary adjudication determination. The trial court also found judgment should be entered in favor of plaintiff because plaintiff had dismissed all of its remaining causes of action.

F. *First Notice of Appeal, Judgment and Second Notice of Appeal*

On August 20, 2015, defendant filed a notice of appeal from the order denying his motion to compel arbitration. According to the case summary, defendant filed the notice of appeal after the trial court issued the August 20, 2015 statement of decision. On September 9, 2015, the trial court issued its judgment of rescission and dismissal. Defendant filed a notice of appeal from the judgment on September 18, 2015.

III. DISCUSSION

A. *Effect of August 20, 2015 Notice of Appeal on Judgment*

Defendant contends that the filing of his August 20, 2015 notice of appeal automatically stayed proceedings and the trial court's September 9, 2015 judgment of rescission in favor of plaintiff therefore is void. We agree.

An order denying a motion to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).) Plaintiff,

however, contends that defendant did not perfect his appeal until he paid the filing fee on November 13, 2015. The timely filing of a notice of appeal generally perfects the appeal, and vests jurisdiction in the court of appeal. (See *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864; *Kroger Co. v. Workers' Comp. Appeals Bd.* (2012) 210 Cal.App.4th 952, 959; *Andrisani v. Saugus Colony Limited* (1992) 8 Cal.App.4th 517, 523.) Moreover, the filing of the notice of appeal does not require the payment of a filing fee or receipt of a fee waiver. (See Cal. Rules of Court, rule 8.100(b)(3) ["The clerk must file the notice of appeal even if the appellant does not present the filing fee, the deposit, or an application for, or order granting, a waiver of fees and costs"].) Accordingly, defendant perfected the appeal on August 20, 2015.

Pursuant to Code of Civil Procedure section 916, subdivision (a), "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." "'[W]hether a matter is "embraced" in or "affected" by a judgment [or order] within the meaning of [section 916] depends on whether postjudgment [or postorder] proceedings on the matter would have any effect on the "effectiveness" of the appeal.' [Citation.] 'If so, the proceedings are stayed; if not, the proceedings are permitted.' [Citation.]" (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189 (*Varian*).)

"[A] proceeding affects the effectiveness of the appeal if the very purpose of the appeal is to avoid the need for that proceeding. In that situation, the proceeding itself is inherently

inconsistent with a possible outcome on appeal and must therefore be stayed under section 916, subdivision (a). Thus, an appeal from the denial of a motion to compel arbitration automatically stays all further trial court proceedings on the merits." (*Varian, supra*, 35 Cal.4th at p. 190; *Prudential-Bache Securities, Inc. v. Superior Court* (1988) 201 Cal.App.3d 924, 925.) "This is true even if the subsequent proceedings cure any purported defect in the judgment or order appealed from." (*Varian, supra*, 35 Cal.4th at p. 197.)

Here, the defendant's filing of the August 20, 2015 notice of appeal divested the trial court of jurisdiction to consider any further proceedings on the merits. Indeed, if this court were to find the motion to compel arbitration should have been granted, then the dispute between the parties would not be resolved by litigation. Because the trial court lacked subject matter jurisdiction to enter judgment, the judgment is void as a matter of law. (*Varian, supra*, 35 Cal.4th at p. 198.) We therefore will reverse the judgment.[3]

B. *Other Preliminary Matters*

On appeal, defendant moved to strike plaintiff's respondent's brief on the grounds that plaintiff failed to file a fictitious business name statement under Business and

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[3] Although we conclude that the trial court lacked subject matter jurisdiction to enter the judgment, this does not affect the trial court's rulings on the motions that were made prior to the filing of defendant's notice of appeal. The trial court is not required to conduct any further hearings on these motions.

Professions Code section 17918. Defendant did not raise this argument before the trial court and thus forfeited or waived it. (*Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (1995) 34 Cal.App.4th 1204, 1214-1215.) The motion is denied.

In addition to the order denying his motion to compel arbitration, defendant seeks appellate review of the following orders: granting plaintiff's motion for summary adjudication; granting discovery sanctions against him; overruling his demurrer; denying his motion to strike; denying his motion to quash service of the complaint; and denying his motion to dismiss. We can review an intermediate ruling or order "which involves the merits or necessarily affects the order or judgment appealed from, or which substantially affects the rights of a party." (Code Civ. Proc., § 1294.2.)

The orders that fall within section 1294.2 are the motion to quash service of the complaint and the motion to dismiss. For the motion to quash, if service was erroneous, then none of the subsequent litigation should have occurred as the trial court would have had no personal jurisdiction over defendant. For the motion to dismiss, defendant argues a violation of constitutional rights under the Fourteenth Amendment to the United States Constitution based on alleged fraud upon the court by his former counsel for alleged unauthorized practice of law. Fraud upon the court by the unlicensed practice of law may affect the integrity of the litigation. (*See Russell v. Dopp* (1995) 36 Cal.App.4th 765, 777-778.) We will discuss those orders below.

For the remaining orders that do not fall within Code of Civil Procedure section 1294.2 (the demurrer, summary adjudication, discovery sanctions, and motion to strike), California is governed by the "one final judgment" rule which permits this court to review only those judgments that terminate the trial court proceedings by completely disposing of the matter in controversy. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697.) These trial court orders, however, are intermediate orders that are reviewable on appeal generally from a final judgment in the action. (See Code Civ. Proc., §§ 904.1, subd. (b) ["[s]anction orders or judgments of [$5,000] or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or . . . upon petition for an extraordinary writ"], 906 ["Upon an appeal pursuant to Section 904.1 . . . , the reviewing court may review . . . any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party"]; *Jennings v. Marralle* (1994) 8 Cal.4th 121, 128 [an order "granting summary adjudication of certain claims is . . . generally reviewable on appeal from the final judgment of the action"]; (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 182 [no appeal may be taken from order overruling a demurrer, but reviewable from final judgment]; *Warden v. Brown* (1960) 185 Cal.App.2d 626, 629 [no direct appeal from order denying motion to strike].) Here, because we will vacate the final judgment, the trial court's orders as to the demurrer, summary adjudication, discovery sanction, and motion to strike are not reviewable by this appeal.

C. *Due Process*

Defendant contends on appeal that the trial court violated his due process rights when it denied several of his motions, including the motions to quash service, to dismiss, and to compel arbitration. Because the facts regarding his due process argument are undisputed, we review the constitutional challenge de novo. (*State of Ohio v. Barron* (1997) 52 Cal.App.4th 62, 67.) Due process requires a person to be provided the opportunity to be heard at a meaningful time in a meaningful manner before deprivation of a protected interest. (*Los Angeles Police Protective League v. City of Los Angeles* (2002) 102 Cal.App.4th 85, 91-92.)

We reject defendant's argument. At the July 21, 2015 hearing, the trial court asked defendant what he had to say regarding the court's tentative rulings. Defendant does not dispute that he received the tentative rulings. The record reflects that defendant used that opportunity to be heard by making several arguments. Defendant further asserts that each motion should have been called for a hearing individually. However, defendant cites no authority in support of this argument. To the extent defendant suggests the hearing was not meaningful because of his self-representation, we disagree. "A party proceeding in propria persona 'is to be treated like any other party and is entitled to the same, but no greater, consideration than other litigants and attorneys.' [Citation.] Indeed, '"the in propria persona litigant is held to the same restrictive rules of procedure as an attorney."' [Citation.]" (*First American Title Co.*

v. Mirzaian (2003) 108 Cal.App.4th 956, 958, fn. 1.) Accordingly, we find no due process violation as to the July 21, 2015 hearing.

D. *Motion to Dismiss for Fraud*

Defendant next contends that the trial court erred in denying his motion to dismiss for fraud based on the unauthorized practice of law. Generally, an unlicensed person cannot appear in court for another person, and a resulting judgment is a nullity. (*Russell v. Dopp, supra*, 36 Cal.App.4th at pp. 777-778; see Bus. & Prof. Code, § 6125 ["No person shall practice law in California unless the person is an active member of the State Bar"].) The facts at issue for his motion to dismiss are undisputed. We review questions of law, such as the interpretation of a statute, or application of law to undisputed facts, de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.) Defendant argues that Franceschi Law Corporation was his attorney of record and was not authorized to practice law at the time it represented defendant because it was suspended by the California Franchise Tax Board from November 1, 2013 to May 4, 2015.

The practice of law is generally understood as "'"the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure."' [Citation.]" (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128.) Franceschi was practicing law while representing defendant. There is no dispute that Franceschi was a member of the State Bar in good standing when he provided legal services to defendant. Any deficiencies in Franceschi Law

Corporation's certification to practice law do not void Franceschi's legal representation of defendant, including the filings that Franceschi made on defendant's behalf. Thus, even assuming Franceschi Law Corporation was not authorized to practice law from July 2, 2014 (filing of answer) through May 14, 2015 (withdrawal as attorney of record), Franceschi was, and was also the attorney of record for defendant. Because Franceschi was authorized to practice law and represent defendant, there is no ground for the motion to dismiss to be granted for unauthorized practice of law.[4]

To the extent defendant argues plaintiff's attorneys engaged in fraud upon the court, those arguments are disregarded. Defendant failed to make actual argument in his briefs, and instead incorporated them by reference to the record, in violation of rule 8.204(a)(1)(B) of the California Rules of Court. (*Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1162.)

E. *Motion to Quash Service*

A motion to quash service is for the purpose of, inter alia, challenging personal jurisdiction over the defendant by reason of failure to properly serve him or her with the summons and

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[4] Defendant asserted the legal grounds for his motion to dismiss were based on the Penal Code's sections governing perjury, and Illinois and federal law. We note these are not grounds to dismiss under California law. (Cf. Code Civ. Proc., §§ 583.250, subd. (a) [dismissal for failure to timely serve summons], 583.360, subd. (a) [dismissal for failure to timely bring action to trial], and 418.10, subd. (a)(2) [dismissal for inconvenient forum].)

complaint. (Code Civ. Proc., § 418.10, subd. (a).) Because the relevant facts are undisputed, we review the trial court's ruling de novo. (*Ghirardo v. Antonioli, supra*, 8 Cal.4th at p. 799.) Defendant asserts that the motion to quash service should have been granted because any general appearance by his former counsel was void due to his counsel being unauthorized to represent him. We addressed and rejected this argument above. Filing an answer is a general appearance that forfeits any objection regarding improper service. (*Fireman's Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1145.) As discussed, because Franceschi, who was representing defendant at the time, filed an answer on behalf of defendant, any errors in service are forfeited.

Moreover, the record indicates defendant was served by substituted service. (Code Civ. Proc., § 415.20.) On appeal, defendant fails to argue and thus waives any error regarding the substituted service. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) Accordingly, the trial court had personal jurisdiction over defendant regardless of who was representing him.

Additionally, the time to file a motion to quash service is "on or before the last day of his or her time to plead or within any further time that the court may for good cause allow." (Code. Civ. Proc., § 418.10, subd. (a).) The time to file a responsive pleading after being served with a summons is 30 days after service. (Code Civ. Proc., § 412.20, subd. (a)(3).) Because defendant does not dispute he was served on May 22, 2014, the time to plead had well passed by the time defendant filed his motion to quash service on May 14, 2015. Defendant does not demonstrate any good cause for his failure to file the motion to quash service for

nearly a year after being served with the summons. Thus, defendant's motion to quash service was untimely.

F. *Motion to Compel Arbitration*

Finally, defendant contends that the trial court's denial of his motion to compel arbitration must be reversed because it erred in finding that defendant had waived his right to compel arbitration. "'Arbitration is not a matter of absolute right'" and it can be waived. (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 991). "'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.'" [Citations.]" (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187. 1196 (*St. Agnes*).)

The law favors arbitration, and the party claiming the other party waived the right to arbitrate "bears a heavy burden of proof." (*St. Agnes, supra*, 31 Cal.4th at p. 1195.) Under California law, questions of waiver are determined by the trial court. (*Hong v. CJ CGV America Holdings, Inc.* (2013) 222

Cal.App.4th 240, 243.) "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.' [Citation.]" (*St. Agnes, supra*, 31 Cal.4th at p. 1196.)

Here, the essential facts are not disputed. On July 2, 2014, defendant filed his answer and a cross-complaint. He did not seek a stay of the proceedings after filing his cross-complaint. On September 25, 2014, defendant filed his case management statement. On September 25, 2014, defendant opposed plaintiff's motion to strike portions of the cross-complaint. On March 24, 2015, plaintiff filed its first amended complaint. On May 5, 2015, plaintiff filed its motion for summary adjudication. Only then did defendant file a motion to compel arbitration.

"When an arbitration agreement does not specify the time within which arbitration must be demanded, a reasonable time is allowed; a party who does not demand arbitration within a reasonable time is deemed to have waived the right to arbitration." (*Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035, 1043.) What constitutes a reasonable time to demand arbitration is a question of fact, including any prejudice suffered by the opposing party because of the delay. (*Ibid*.)

Defendant argued the motion to compel arbitration should be granted, citing an arbitration demand letter that he purportedly sent to plaintiff's representative Russell Hodge on June 10, 2014. The letter had no proof of service. Hodge denied seeing defendant's letter demanding arbitration until defendant

filed his motion to compel arbitration. The trial court did not rule on the matter.

Defendant's argument is unavailing. Even if we accepted as true that defendant sent and plaintiff received the June 10, 2014 letter demanding arbitration, defendant still delayed in seeking to compel arbitration in the trial court. The arbitration provision of both policies provided, "Either party may send the other party written notice of the intent to arbitrate a dispute. The parties may agree to a single arbitrator, whose fee shall be paid 50 [percent] by you and 50 [percent] by us. If the parties fail to agree on a single arbitrator within 30 days after the arbitration notice, each party shall then select their own arbitrator within 30 days thereafter, and the two arbitrators shall select a third neutral arbitrator." Thus, after 30 days had elapsed from when defendant purportedly sent the June 10, 2014 letter, and plaintiff had yet to respond, it would be reasonable to conclude defendant was on notice that plaintiff was not willing to participate in arbitration. At that time, defendant could have filed a motion to compel arbitration. Instead, defendant waited until nearly a year after being served with the summons to move to compel arbitration. Given the timing of the filing (after plaintiff had moved for summary adjudication), such delay is inconsistent with the right to arbitrate.

Defendant also argues that the arbitration provision survives the termination of the insurance policies and thus cannot be waived unilaterally. A motion to compel arbitration is essentially a motion for specific performance under a contract. (*Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1795.) "[C]ontractual arbitration is in no sense a 'trial of a cause before a judicial tribunal,' nor is it a usurpation or ouster of

the judicial power vested in the trial court of this state by our Constitution. [Citation.] As a result, there is nothing to prevent one of the parties to a contractual arbitration provision from resorting initially to an action at law. [Citations.] The other party, if determined to pursue arbitration, must then take action to compel arbitration. [Citation.]" (*Ibid.*; accord, *Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 44; see *Spence v. Omnibus Industries* (1975) 44 Cal.App.3d 970, 975 ["But lacking a request for arbitration, the courts stand ready, willing, and able to decide controversies between the parties even though a provision for arbitration exists"].) "'A right to compel arbitration is not . . . self-executing. If a party wishes to compel arbitration, he must take active and decided steps to secure that right, and is required to go to the court where the [other party]'s action [at law] lies.' [Citation.] Consequently, the party seeking to enforce the contractual arbitration clause must file the section 1281.2 petition in the action at law (or raise it as an affirmative defense in the answer) or else the right to contractual arbitration is waived. [Citations.]" (*Brock v. Kaiser Foundation Hospitals*, *supra*, 10 Cal.App.4th at p. 1795; accord, *Dial 800 v. Fesbinder*, *supra*, 118 Cal.App.4th at pp. 44-45.)

Defendant's litigation conduct also supports a finding of waiver. Merely answering a complaint is not per se a waiver of the right to demand arbitration. (See *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 782.) But, here, defendant's additional conduct of filing a cross-complaint while not seeking a stay of the proceedings, filing the motion to compel arbitration within days after plaintiff moved for summary adjudication, and failing to assert arbitration in any court filings until nearly a year after being served with the summons, supports the trial

court's finding that defendant had waived his right to arbitrate. (See, e.g., *St. Agnes, supra*, 31 Cal.4th at p. 1196 [defendant filing a counterclaim without asking for a stay of proceeding is a factor in assessing waiver of arbitration right].) We find no error.

IV. DISPOSITION

The orders denying the motion to quash, the motion to dismiss, and the motion to compel arbitration are affirmed. The judgment is reversed as void. The case is remanded for further proceedings consistent with this opinion. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, 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.