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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PAUL T. WILKES,

Plaintiff and Appellant,

v.

METAL FLOWERS MEDIA
LLC, et al.,

Defendants and Respondents.

B270311

(Los Angeles County
Super. Ct. No. BS150521)

APPEAL from an order of the Superior Court of Los Angeles County. Elizabeth R. Feffer, Judge. Affirmed.

John D. Heath for Plaintiff and Appellant.

H. March Rupp for Defendants and Respondents.

* * * * *

Plaintiff Paul T. Wilkes appeals the trial court's order denying his petition to compel defendants Metal Flowers Media, LLC, Tim Warren, Alevil Rincones, and Allen Vainshtein to arbitrate plaintiff's claims arising from his participation in a television show, "Bar Rescue."¹ The petition alleges that Metal Flowers is the casting company that "pitches potential bars for filming" to Bar Rescue's producer, Bongo, LLC. Defendants Warren and Rincones are executive and story producers for the show, and defendant Vainshtein is Bongo's attorney. To participate in the show, plaintiff signed an Appearance Release with Bongo, which contained an arbitration clause. Following plaintiff's demand to arbitrate his claims arising from the show, JAMS ordered Bongo to participate in arbitration. However, because defendants are not signatories to the agreement, JAMS would not order them to participate absent their consent or a court order.

In support of his petition to compel arbitration, plaintiff contends that defendants are agents of Bongo, and are bound by the arbitration agreement. He also contends defendants are third party beneficiaries of the arbitration agreement, and that they should be estopped from refusing to arbitrate the dispute, as they have sought to benefit under the agreement. Finding no merit in any of these contentions, we affirm.

¹ Plaintiff also sought to compel Jon Taffer, the show's host and executive producer, to participate in arbitration. Because Taffer agreed to arbitrate the claims against him, and was ordered to participate in arbitration by the trial court, he is not a party to this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

According to the unverified petition, in September 2012, plaintiff emailed Metal Flowers seeking to have his Las Vegas bar, the Sand Dollar, featured on Bar Rescue.² In November 2012, nonparty Greg Croteau, a casting agent for Metal Flowers, emailed plaintiff a number of documents to be executed in order to “move forward in the Bar Rescue process,” including an “Appearance Release Form.” (The unauthenticated email is appended to the petition to compel arbitration as an exhibit.) The email instructed plaintiff to sign and return the documents to Metal Flowers, and to direct any questions to Metal Flowers’ casting agent. The Appearance Release Form (also appended as an exhibit to the petition) was a contract between plaintiff and Bongo, identified in the contract as the “producer” of the show.

Paragraph 13 of the agreement contained an arbitration clause, providing that “[t]he parties agree that if any controversy or claim arising out of or relating to this Agreement cannot be settled through direct discussions . . . or mediation, the parties agree that the . . . claim, including the scope or applicability of this agreement to arbitrate, shall then be resolved by final and binding confidential arbitration administered by JAMS. . . . The parties agree that the remedy for any claim brought pursuant to this agreement shall be limited to actual damages, and in no event shall any party be entitled to recover punitive or exemplary damages or to rescind this agreement or to seek injunctive or any other equitable relief. Notwithstanding the foregoing, I recognize

² Unless otherwise indicated, the vast majority of the facts discussed here are derived solely from the unverified petition to compel arbitration.

that given the unique nature of the program and the commercial realities of the entertainment industry, which rely upon confidentiality and intellectual property rights, any actual or anticipated breach of my confidentiality obligations pursuant to this agreement, or any infringement of producer's or network's^{3]} intellectual property rights, would cause producer and network irreparable injury and damage that cannot be reasonably or adequately compensated by money and, therefore, I agree that producer and network shall be entitled to seek and obtain injunctive and other equitable relief from a court of competent jurisdiction for any such breach or infringement."

Although the agreement's opening paragraph identified Bongo as the "producer," paragraph 15 of the agreement provided: "[a]s used herein, 'Producer' shall include Producer, its licensees, successors and assigns, . . . and each of their respective officers, directors, shareholders, employees, agents, representatives, successors, licensees and assigns."

An episode of Bar Rescue, featuring plaintiff, was produced between February 8 and 16, 2013. During and after filming, defendants "engaged in a number of unlawful acts, causing part of the controversy [plaintiff] seeks to arbitrate."

On April 2, 2014, plaintiff sent Bongo, Taffer, and defendants a demand to arbitrate his "fraud-related claims."⁴ As

³ The contract defines "network" as MTV networks.

⁴ On April 7, 2014, plaintiff filed a separate action in the Los Angeles County Superior Court against Bongo, Taffer, and Taffer's wife for "battery-related torts and severe emotional distress" arising from Taffer's alleged assault on plaintiff during the filming of the show.

an addendum to his demand for arbitration, plaintiff included an unverified complaint for damages. The complaint (which is appended to the petition to compel arbitration) included additional facts about the parties' dispute.

Plaintiff is a perinatologist with a thriving medical practice, and co-owner of the Sand Dollar bar. The bar was operating at a loss, so plaintiff contacted defendant Metal Flowers about being featured on Bar Rescue, a reality show focused on turning failing bars around. Metal Flowers was the casting company for the show.

Over the course of the audition process, plaintiff was encouraged to engage in "outrageous behavior" to increase his chances of being cast for the show. Producers Warren and Rincones encouraged plaintiff to make inappropriate sexual remarks while filming alleged "audition" tapes for the show. They falsely promised plaintiff that the footage would only be seen by the show's host to determine whether the Sand Dollar would be selected for the show, when they really intended to use the footage in the final episode of Bar Rescue. Plaintiff was assured that the show would represent him as a "good doctor" when in fact the show's producers intended to portray him as a "dirty doctor."

After a trailer promoting the show was released, depicting plaintiff as a "dirty doctor," plaintiff sought assurances that his reputation would be restored in the final episode. Rincones directed plaintiff to contact Vainshtein, representing that he was "our lawyer." Vainshtein assured plaintiff that the complete episode would "fix" his reputation. In fact, the final cut included the "outrageous" footage, causing significant damage to plaintiff's reputation and medical practice.

The complaint included general allegations that defendants were acting as agents of Bongo when they engaged in their wrongdoing.

On May 14, 2014, Bongo and defendants, represented by the same counsel, objected to arbitration of plaintiff's claims on the basis that defendants were not signatories to the arbitration agreement, and that plaintiff had already filed a superior court action to address his claims. (See fn. 4, *ante*.) Defendants further argued that "the claims [plaintiff] has filed in Superior Court are subject to an anti-SLAPP motion. . . . The adjudication of that motion will conclusively resolve any claims [plaintiff] might pursue in arbitration because all of those claims are barred by a release [plaintiff] signed prior to appearing on the television program at issue in this matter."

Nevertheless, JAMS ordered Bongo to submit to arbitration, but concluded that a court order or consent were required to compel the nonsignatory defendants to participate in arbitration.

In the memorandum supporting his petition to compel arbitration, plaintiff argued that defendants should be compelled to participate in arbitration because they were all agents of Bongo, and that the arbitration agreement, by its own terms, applied to agents of Bongo. Plaintiff also argued that defendants were third party beneficiaries under the agreement. Lastly, plaintiff argued that defendants should be equitably estopped from avoiding arbitration because they had argued, in their letter objecting to arbitration, that they were protected by the release language contained in the arbitration agreement.

On October 1, 2014, defendants moved to stay arbitration, under Code of Civil Procedure section 1281.2, subdivision (c), on

the basis that plaintiff had asserted claims arising from the same transaction in the superior court, and there was a risk of conflicting rulings. Defendants contended that the defendants in the superior court action had filed a special motion to strike plaintiff's complaint on the basis that the complained of conduct arose from protected activity, and that plaintiff could not prevail on his claims because they were barred by releases contained in various agreements signed by the plaintiff concerning the filming.⁵ Defendants acknowledged that the trial court had denied the SLAPP motion, finding that the conduct did not arise from protected activity. However, the defendants in the superior court action had appealed that ruling. Defendants argued that if the matter was ordered to arbitration, they intended to rely on the releases as a defense to plaintiff's claims. However, there was the possibility of conflicting rulings, because the appellate court could rule that the releases barred the claims, or that they applied only to the contracting parties, and the arbitrator could reach a contrary conclusion. Therefore, defendants urged that the court should stay any arbitration pending the appellate court's ruling on the appeal.

Contemporaneous with their motion to stay, defendants also filed an opposition to the petition. The opposition argued

⁵ Appended to the motion to stay were copies of the agreements signed by plaintiff containing the release language, including the Appearance Release containing the arbitration clause, and two Location and Cooperation agreements between Bongo and plaintiff, one of which was signed by defendant Vainshtein as VP of Business and Legal Affairs for Eyeworks USA, which owns Bongo.

that plaintiff had failed to demonstrate that defendants had an agency relationship with Bongo. Defendants also argued they were not third party beneficiaries under the agreement, and that equitable estoppel did not apply because defendants had not attempted to enforce the subject agreement.

The trial court granted defendants' request for a stay, and plaintiff appealed that ruling to this court. During the pendency of plaintiff's appeal, Division Five of this court affirmed the trial court's denial of the anti-SLAPP motion in plaintiff's battery case, and therefore, plaintiff's motion to compel arbitration was calendared. We therefore dismissed the appeal as moot.

Following remittitur, plaintiff and defendants filed supplemental briefing with the trial court, making nearly identical arguments as their previous filings.

The trial court denied the petition to compel arbitration, finding that none of the defendants were parties to the arbitration agreement, and that there was insufficient evidence that defendants were agents or employees of Bongo. The court also concluded that defendants were not third party beneficiaries of Bongo, as they were not seeking to benefit from the agreement containing the arbitration clause, and because the arbitration clause limited its application to the "parties" to the agreement. Lastly, the court concluded that equitable estoppel did not apply because defendants had not asserted any rights under the agreement.

Plaintiff filed a timely notice of appeal.

DISCUSSION

Code of Civil Procedure section 1281.2 requires a trial court to grant a petition to compel arbitration "if [the court] determines that an agreement to arbitrate the controversy exists." (*Ibid.*)

The party seeking to compel arbitration has the burden to plead and prove the existence of a valid arbitration agreement that applies to the dispute by a preponderance of the evidence. Once that burden is satisfied, the party opposing arbitration must prove by a preponderance of the evidence any defense to the agreement's enforcement. (*Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 413; see also *Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 59 (*Avery*).) "Petitions to compel arbitration are resolved by a summary procedure that allows the parties to submit declarations and other documentary testimony and, at the trial court's discretion, to provide oral testimony." (*Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 586.) However, allegations in an unverified petition are not evidence. (*Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754, 761-762.)

On appeal from the denial of a petition to compel arbitration, we apply either the substantial evidence or de novo standard of review. If the trial court's ruling turns on disputed facts, then our review is for substantial evidence. If the ruling rests on a decision of law, we apply the de novo standard. (*Avery, supra*, 218 Cal.App.4th at p. 60.) Here, the trial court's ruling did not turn on disputed facts; the trial court determined that plaintiff had failed to carry his initial burden of proof to establish that an agreement to arbitrate existed between plaintiff and the nonsignatory defendants. Therefore, our review is de novo.

Generally, one must be a party to an arbitration agreement to be bound by it. (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763.) However, "[t]here are exceptions to the general rule that a

nonsignatory to an agreement cannot be compelled to arbitrate and cannot invoke an agreement to arbitrate, without being a party to the arbitration agreement. [Citation.] A nonsignatory to an agreement to arbitrate may be required to arbitrate, and may invoke arbitration against a party, if a preexisting confidential relationship, such as an agency relationship between the nonsignatory and one of the parties to the arbitration agreement, makes it equitable to impose the duty to arbitrate upon the nonsignatory.” (*Id.* at p. 765.) Generally, the existence of an agency relationship is a question of fact. (*Seneris v. Haas* (1955) 45 Cal.2d 811, 831.)

Additionally, third party beneficiaries of an agreement to arbitrate may be compelled to participate in arbitration. (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 242; see also *Harris v. Superior Court* (1986) 188 Cal.App.3d 475, 478 [where a nonsignatory party would have a right to enforce an arbitration agreement, that party should be bound by the arbitration agreement as a beneficiary of that agreement].) Moreover, a party may be equitably estopped from avoiding arbitration if he has sought to benefit from the contract containing the arbitration clause. (*Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 269.)

Plaintiff argues defendants are agents of Bongo, and would be entitled to enforce the arbitration agreement, so they should be bound by it. Specifically, he contends the Appearance Release broadly defines “producer” as including Bongo’s agents, and therefore the arbitration agreement is clearly intended to bind, and benefit, nonsignatory agents of Bongo. Assuming without deciding that the arbitration agreement is broad enough to apply to Bongo’s agents, here, plaintiff failed to meet his burden of

demonstrating that defendants were in fact agents of Bongo. Plaintiff relies almost exclusively on the unverified allegations of his petition to establish agency. However, these allegations are not evidence. (*Hotels Nevada v. L.A. Pacific Center, Inc.*, *supra*, 144 Cal.App.4th at pp. 761-762; see also *Sheard v. Superior Court* (1974) 40 Cal.App.3d 207, 212.)

The only evidence of agency submitted by plaintiff in support of the petition is the unauthenticated email from Greg Croteau, which was ostensibly sent on behalf of Metal Flowers, forwarding a casting application, Cooperation and Location Agreement, and two Appearance Release forms to plaintiff, as well as a casting poster for Bar Rescue, directing applicants to contact Metal Flowers.⁶ This evidence falls short of establishing any agency relationship between Bongo and defendants. (*Gipson v. Davis Realty Co.* (1963) 215 Cal.App.2d 190, 206 [“Agency is the relation that results from the act of one person, called the principal, who authorizes another, called the agent, to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal”].)

Plaintiff also failed to establish that defendants are third party beneficiaries under the agreement, or that they should be estopped from denying they are bound by it. In support of these theories, plaintiff contends that defendants are agents and representatives of Bongo, and therefore could compel plaintiff to arbitrate his claims against them. He also contends that estoppel

⁶ Although there is some evidence in the record that defendant Vainshtein signed a contract on behalf of Bongo, this evidence was not submitted in support of the petition to compel arbitration.

should apply because defendants' motion to stay the arbitration sought to benefit from the release language in the same contract which contained the arbitration clause. These arguments fail because, as discussed *ante*, the evidence does not establish any agency relationship, and because plaintiff has misconstrued the arguments made in the stay motion. In moving for a stay of arbitration, defendants did not contend that the releases applied to them. Instead, they stated that they intended to rely on them as a defense *in the event they were ordered to arbitration*. Clearly, if the court determined that the arbitration agreement applied to defendants, they would be entitled to seek benefits under that agreement. Asserting this *possibility* does not compel an estoppel.

DISPOSITION

The order is affirmed. Defendants are awarded their costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.