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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

JAMES CIRILE, Plaintiff and Respondent, v. PETERSEN-DEAN, INC., Defendant and Appellant.	B278075 (Los Angeles County Super. Ct. No. BC619835)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

George K. Milionis, Neha Sareen and Kenneth B. Tsang for Defendant and Appellant.

Law Office of David Valdez Jr. and David Valdez Jr. for Plaintiff and Respondent.

Petersen-Dean appeals from the denial of its petition to compel arbitration in its dispute with James Cirile. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Cirile and Petersen-Dean entered into a contract for the installation of a solar power system at Cirile's home. A dispute arose between Cirile and Petersen-Dean, and Cirile filed this lawsuit.[1] Petersen-Dean petitioned to compel arbitration.

I. Relevant Documents

The Home Improvement Quotation and Contract, dated May 28, 2014, was signed by Cirile and his wife, Tanya Klein, on June 1, 2014, and by a Petersen-Dean representative on June 20, 2014. The six-page contract did not include an arbitration clause. The contract did include this language: "To access your warranty: Please call Contractor at 1-800-564-0362 24 hours a day. Or you can log on to www.needaroof.com and go to the warranty service link and fill out a 'request for service' form. Please refer to your actual warranty document for terms and conditions."

In December 2014, after the system had been installed and approved by the local utility for operation, Petersen-Dean sent Cirile and Klein an owner's manual and various documents. One page of the owner's manual was the "Residential Set It and Forget It 10 Year Roofing & Solar System Limited Warranty," which contained this provision: "ANY DISPUTE ARISING OUT OF OR RELATING TO THE CONSTRUCTION, PERFORMANCE OR NON-PERFORMANCE OF ANY ASPECT

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[1] The complaint was not included in the record on appeal.

OF THIS WARRANTY OR THE WORK PERFORMED BY US, INCLUDING WITHOUT LIMITATION ANY CLASS ACTION OR ANY CLAIM ARISING FROM OUR INSTALLATION OF THE ROOF AND SOLAR SYSTEM COVERED BY THIS WARRANTY, SHALL BE RESOLVED BY BINDING ARBITRATION CONDUCTED IN ACCORDANCE WITH THE CODE OF PROCEDURE AND FEE SCHEDULE OF THE NATIONAL ARBITRATION FORUM. (A COPY OF THE CODE OF PROCEDURE AND THE FEE SCHEDULE CAN BE OBTAINED AT WWW.ADRFORUM.COM.) JUDGMENT UPON THE AWARD RENDERED BY ANY SUCH ARBITRATOR IS FINAL AND NON-APPEALABLE, AND MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF. THIS ARBITRATION OF DISPUTES PROVISION, AND ALL ARBITRATION PROCEEDINGS, HEARINGS, AWARDS, AND ORDERS ARE TO BE GOVERNED BY THE FEDERAL ARBITRATION ACT, 9 U.S.C. §§ 1-16."

II. Petition to Compel Arbitration

In its petition to compel arbitration, Petersen-Dean did not disclose to the court that the arbitration provision was not set forth in the contract the parties signed in June 2014 but was contained in the owner's manual provided after the system had been installed. Instead, Petersen-Dean referred to the "Home Improvement Quotation and Contract with the underlying Residential Set It and Forget It 10 Year Roofing & Solar System Limited Warranty (collectively, 'the Agreement'), executed by Plaintiff and [Petersen-Dean] in June, 2014." Petersen-Dean then argued that "the Agreement between the parties contains an arbitration provision," and that Cirile's claims were subject to

that provision because they concerned the performance of the solar system. Petersen-Dean supported its petition with the declaration of Petersen-Dean's general counsel, who attached the contract and several different warranties as a single exhibit described as the agreement between the parties. Petersen-Dean did not provide any evidence beyond these documents to support its petition; the remainder of the general counsel's declaration concerned his estimation of the legal team's time spent on the petition and reasonable hourly rates.

III. Opposition to the Petition to Compel Arbitration

In response to Petersen-Dean's petition, Cirile argued that the June 2014 contract and the December 2014 owner's manual were distinct documents. The contract, he argued, included no arbitration clause and neither referenced nor incorporated an arbitration provision. The word "arbitration" appeared in the contract only once, in a provision that also referred to actions: "18. Limitations of Actions. No action or arbitration arising from or related to the contract or the performance thereof shall be commenced by either party against the other more than two years after the completion or cessation of work under this contract."

Cirile contended that the owner's manual was not a part of the contract and was not separately negotiated or discussed. He observed that the warranty appeared not to have been created until after the contract was signed, as it bore the marginal note, "Ver. 080714." Cirile pointed out that Petersen-Dean had not submitted evidence that he consented to the arbitration clause or a modification of the contract. He denied negotiating or assenting to the clause and stated that he had neither known of

its existence nor received consideration for a change in contract terms.

In declarations supporting the opposition to the petition to compel arbitration, Cirile and Klein declared that they signed the contract on June 1, 2014, and that the contract did not specifically require arbitration or a waiver of the right to resolve disputes through litigation. They stated that the Petersen-Dean agent who negotiated the contract never mentioned arbitration to them before or after the contract was signed. Cirile and Klein declared they had never seen or received the owner's manual until December 8, 2014, when Petersen-Dean sent it as an attachment to an email notifying them that the Department of Water and Power had granted permission to operate the system. None of the information, provisions, or terms in the manual were reviewed, discussed, or negotiated. They were unaware of the arbitration provision in the warranty until after filing the lawsuit, and had never had the opportunity to accept or reject it. They declared that they had not signed any document with Petersen-Dean that contained an arbitration clause, and that none of the documents they received from Petersen-Dean prior to the owner's manual included an arbitration provision. Cirile and Klein had never met the Petersen-Dean general counsel.

In its reply brief in support of the petition to compel arbitration, Petersen-Dean argued that the reference to the warranty in the contract—the language about calling or going online to make a warranty service request—incorporated the warranty by reference and was thus agreed to by Cirile and Klein when they signed the contract in June 2014.

The court denied the petition to compel arbitration on the ground that Petersen-Dean had failed to provide sufficient

evidence that the parties had agreed to arbitration. In support of its decision the court cited multiple facts: The arbitration agreement in the warranty was not called to the attention of Cirile in the written contract; nothing in the contract indicated that the parties were agreeing to arbitrate any disputes or that the warranty included an agreement to arbitrate; and the contract referred to lawsuits in two locations. The court concluded that the language in the "Additional Terms & Conditions" section mentioning a warranty "does not reference an agreement to arbitrate"; it "addresses [a] future request for warranty services, not an agreement to arbitrate at the time of contract formation." The court noted that Cirile had declared that nothing was mentioned to him about arbitration before the contract was signed, and no contrary evidence was presented by Petersen-Dean.

Petersen-Dean appeals.

DISCUSSION

The threshold question presented by every petition to compel arbitration is whether an agreement to arbitrate exists. (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*. (1985) 473 U.S. 614, 626.) While arbitration is favored in the law, "'the policy favoring arbitration cannot displace the necessity for a voluntary *agreement* to arbitrate.' [Citations.]" (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 739.) "Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived." (*Wolschlager v. Fidelity National Title Ins. Co*. (2003) 111 Cal.App.4th 784, 789.)

In determining whether an agreement to arbitration exists, "courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 236.) "The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.)

An order denying a petition to compel arbitration is an appealable order. (Code Civ. Proc., § 1294, subd. (a).) "When 'the language of an arbitration provision is not in dispute, the trial court's decision as to arbitrability is subject to de novo review.' [Citation.] Thus, in cases where 'no conflicting extrinsic evidence is introduced to aid the interpretation of an agreement to arbitrate, the Court of Appeal reviews de novo a trial court's ruling on a petition to compel arbitration.' [Citation.]" (*Molecular Analytical Systems* v. *Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 707.) Here, the evidence is not in dispute, and we review the trial court's decision de novo.

The central question here is whether the mention of the warranty in the contract incorporated the warranty, with its arbitration clause, into the contract. "[A]n agreement need not expressly provide for arbitration, but may do so in a secondary document which is incorporated by reference . . . ." (*Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 639 (*Chan*).) ""'For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the

attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.'" [Citations.] [¶] The contract need not recite that it 'incorporates' another document, so long as it 'guide[s] the reader to the incorporated document.' [Citations.]" (*Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 54.) "While federal law requires us to construe ambiguities *within the arbitration clause* in favor of arbitration, that does not prevent us from construing ambiguities *in the incorporating document* . . . against the drafter." (*Chan*, at p. 644.)

Petersen-Dean argues that the text mentioning the warranty was printed in bold and italicized type and the contract's reference to the warranty was therefore clear and unequivocal. However, the reference did not clearly and unequivocally draw Cirile's attention to the Residential Set It and Forget It 10 Year Roofing & Solar System Limited Warranty. When the parties intended to incorporate documents into the contract, they did so expressly and directly: Immediately above the signature block of the contract is language that reads, "List of Documents to be incorporated into the Contract:" Below that line are checked boxes listing the two addenda that are incorporated by reference. No warranty is listed among the documents incorporated by reference into this contract. The contract's amorphous warranty language offered no information that would permit a reader to identify the applicable warranty,[2] and also it did not guide the reader to the warranty as a source of terms

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[2] In its motion to compel arbitration, Petersen-Dean presented three separate warranties it claimed to be part of the parties' agreement.

incorporated into the contract. The contractual language about the warranty concerned a future request for service to the unit under the warranty. Neither the language of that provision nor its context offered any indication to the reader of an intent to incorporate the terms of the warranty into the contract. We conclude that as a matter of law the contract failed to clearly and unequivocally refer to the Residential Set It and Forget It 10 Year Roofing & Solar System Limited Warranty. The trial court properly denied Petersen-Dean's petition to compel arbitration.

Petersen-Dean contends that the standard of review is de novo because no factual disputes exist and the issue on appeal is the legal effect of the contract and the warranty, but it also argues that there was sufficient evidence that the parties agreed to arbitration. To any extent that this appeal involves a question of the sufficiency of the evidence, whether there was sufficient evidence to permit a court to find an agreement to arbitrate is not the relevant inquiry. "'[W]here the issue on appeal turns on a failure of proof . . . , the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." [Citation.]' [Citation.] The appellate court cannot substitute its factual determinations for those of the trial court; it must view all factual matters most favorably to the prevailing party and in support of the judgment. [Citation.] "'All conflicts, therefore, must be resolved in favor of the respondent." [Citation.]' [Citation.]" (*Dreyer's Grand Ice Cream, Inc., v. County of Kern* (2013) 218 Cal.App.4th 828, 838.)

Petersen-Dean has not demonstrated that the evidence compelled a finding as a matter of law that the parties entered into an agreement to arbitrate future disputes.

Petersen-Dean faults the trial court for failing to discuss decisions of the California Supreme Court that supported the enforceability of the arbitration provision in the warranty. Neither of the two cases that Petersen-Dean mentions in this argument, *Sanchez v. Valencia Holding Co.* (2015) 61 Cal.4th 899 and *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, is applicable here. *Sanchez* concerned unconscionability, and *Rosenthal* involved a contention that arbitration agreements were void for fraud in their execution. The court here did not find the arbitration provision was unenforceable or fraudulently obtained; it ruled that Petersen-Dean had failed to prove the parties agreed to arbitrate at all.

Finally, Petersen-Dean argues that the arbitration clause in the warranty covered Cirile's claims regardless of whether the warranty is incorporated into the contract because Cirile "raised warranty issues" in his complaint. Petersen-Dean, however, did not include the complaint in the record on appeal, preventing us from evaluating its contention. Failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

DISPOSITION

The judgment is affirmed. Respondent shall recover his costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

BENSINGER, 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.