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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

HERTZEL ILLULIAN et al., Plaintiffs and Respondents, v. ZE'EV RAV-NOY et al., Defendants and Appellants.	B269495 (Los Angeles County Super. Ct. No. SC123117)

APPEAL from an order of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Law Offices of Edward A. Hoffman, Edward A. Hoffman; Tepper & Takvoryan, Temper & Associates, Foster Tepper and Walter Whitman Moore for Defendants and Appellants.

Goodkin & Lynch, Daniel L. Goodkin, Michael A. Shakouri, and Allison J. Law for Plaintiffs and Respondents.

Appellant Ze'ev Rav-Noy and his co-appellants[1] challenge the trial court's order denying their petition to compel arbitration of a business dispute with respondents Hertzel Illulian and the Jewish Educational Movement. Appellants argue that the trial court erred in finding that they had waived arbitration by withdrawing from the prior arbitration proceedings. As we shall explain, the trial court did not err in denying the petition. Both parties demonstrated their intent to abandon the arbitration process. Accordingly, we affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

A. The Dispute and the Arbitration Before the Rabbinic Court

In the mid-2000s, appellants and respondents together formed companies to purchase and then resell two commercial buildings in Los Angeles. After the properties sold, a dispute arose concerning the division of the sale proceeds.

Respondents sought to resolve the dispute under Jewish law through arbitration before the Rabbinical Council of California—a rabbinic court.[2] Appellants initially refused to participate in arbitration before the bais din and instead filed a lawsuit against respondents. In November 2009, however, the parties agreed to

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[1] In addition to Rav-Noy, the appellants and defendants include Rav-Noy as Trustee of the Ze'ev Rav-Noy and Varda Rav-Noy 1995 Revocable Trust; Varda Rav-Noy, Individually and as Trustee of the Ze'ev Rav-Noy and Varda Rav-Noy 1995 Revocable Trust; Geulah Investments, LLC; and 9033 Wilshire, LLC.

[2] A rabbinic court known as a "bais din" or "beth din" is a Jewish forum for the resolution of disputes usually conducted before three rabbis. Secular commentators refer to a bais din proceeding that addresses business disputes as one before an arbitration panel. (See *Dial 800 v. Fesbinder (*2004) 118 Cal.App.4th 32, 46-47.)

arbitrate the matter before the Bais Din of the Machon L'Hora'ah in Monsey, New York (the Bais Din) and appellants dismissed their civil action without prejudice. The arbitration proceedings took place over several days in April 2010 and encompassed all of the parties' claims and disputes related to the sale of the properties. During the proceedings the parties submitted briefs and evidence and the Bais Din took the matter under submission. The panel, however, never issued a decision.

Over the next several years, the parties contacted the Bais Din several times inquiring about the status of the case, but no decision was forthcoming. In late October 2013, one of the Bais Din panelists, Rabbi Rosenberg wrote to appellants explaining that, although the Bais Din had convened in New York after the hearings to deliberate, "[a]t the conclusion of that meeting we were quite far from reaching a decision" and that "[s]ince that meeting the panel didn't meet again to discuss the merits of the case. [¶] We believe that although over three years have passed since the hearings, there is a good chance that we will be able to reconstruct the case from the transcripts and our notes, and be able to render a decision." The letter also indicated that the Bais Din would permit the parties to submit written arguments to address new matters or clarify positions and would also allow the parties a chance to respond to any new submissions.

In November 2013, appellants' counsel wrote a letter to the Bais Din objecting to reopening the proceedings to allow the presentation of new evidence or arguments. Counsel stated that he would advise his client not to agree to have the case reconstructed—"I understand the implications of your letter to be that I should advise my client to take a *chance* that his case will be reconstructed after 3.5 years of being tossed aside . . . if I am being requested to advise my client to take a chance that the hearing can be adequately reconstructed, where sharp contradictions existed in

the testimony, and where credibility is largely at issue, my answer must be a categorical 'No.' "

Appellants' counsel also expressed his clients' distrust of the Bais Din and its process, and he proposed two ways for the Bais Din to "finish the matter." Counsel first suggested that the Bais Din release the parties to pursue their conflict in a different venue, including a civil court. In the alternative, counsel urged the Bais Din to end the proceedings without rendering a decision and asked it to "stop[] pursuing my client." Counsel asserted that if the Bais Din concluded the proceedings without deciding the case, his client "would be foregoing very substantial counterclaims. However, knowing that he will not have to pay the prices for other people's mistakes is good enough for him."

According to respondents in mid-2014, the Bais Din informed them that it had not reached a decision on the matter and granted respondents "permission" to go to civil court to resolve the dispute.

B. The Civil Action and Appellants' Petition to Compel Arbitration

In mid-September 2014, respondents filed a civil action against appellants asserting various causes of action to resolve the dispute that had been before the Bais Din. Appellants filed a demurrer and motion to strike the complaint.[3] Shortly before the hearing, respondents filed an amended complaint and served discovery requests on appellants. Appellants demurred to the

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[3] Appellants also filed a Case Management Conference (CMC) Statement in which, among other things, they failed to assert that they had an agreement to arbitrate their dispute, that they had already participated in a private arbitration or whether they were willing to participate in such an arbitration even though the CMC Statement form expressly sought disclosure of such information.

amended complaint, filed a motion to disqualify respondents' counsel and a motion to stay the proceedings pending arbitration.

The trial court denied the motions, observing, with regard to the motion to stay: "There is no pending arbitration. . . [T]here is nothing pending. There is nothing for me to stay." Appellants' attorney argued, however, that the parties were waiting for the arbitration award from the Bais Din. The trial court responded that, if an award existed, counsel could file a petition to confirm it. Appellants' attorney suggested that perhaps what he should do is file a motion to compel arbitration. The trial court left that matter up to counsel, but declined to stay the proceedings.

In November 2015, appellants filed a petition to compel arbitration pursuant to the parties' 2009 agreement to arbitrate before the Bais Din. Respondents opposed the petition arguing that the arbitration had already occurred, that the Bais Din had refused to render a decision on the merits and had released the parties to resolve their dispute in civil court.

The trial court denied appellants' petition, concluding that appellants had effectively withdrawn from the arbitration which waived any right to further arbitration.

Appellants timely appealed.

DISCUSSION

On February 5, 2016, after appellants filed their notice of appeal, the Bais Din sent a letter to respondents' counsel stating that as of June 2014 it had officially closed the arbitration case. Before this court, appellants contend that the Bais Din's closure of the case was a decision on the merits and therefore the court should be directed to dismiss case. We disagree with the appellants' interpretation of the Bais Din's decision. Rabbi Rosenberg's 2013 letter to appellants' counsel reveals that the Bais Din panel believed that it could not reach a decision without reconstructing

the record and even wanted to reopen the proceedings for new evidence and argument. But the arbitration record was not reconstructed nor did the panel ever reached any decision on the merits. The panel simply terminated the proceedings. Consequently, the case closure cannot be fairly interpreted as any determination of the merits of the parties' dispute.

Appellants further argue that they did not waive their right to arbitration, and thus, the trial court erred in denying their petition to compel arbitration. They assert their counsel's November 2013 letter did not manifest the intent to waive arbitration, and point out that they did not take any other action to indicate they intended to abandon the arbitration. We disagree.

"Arbitration is not a matter of absolute right." (*Bodine v. United Aircraft Corp.* (1975) 52 Cal.App.3d 940, 945.) Code of Civil Procedure section 1281.2 provides that "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a 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, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner . . . ." (Code Civ. Proc., § 1281.2; see *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315 [although the statute speaks in terms of "waiver," the term is used "as a shorthand statement for the conclusion that a contractual right to arbitration has been lost"].)

No single test delineates the conduct that constitutes waiver or abandonment of arbitration. California courts have found a waiver and abandonment of the right to arbitration in a variety of contexts, ranging from situations in which the party seeking arbitration has previously taken steps inconsistent with the intent to invoke arbitration to instances in which the petitioning party

has unreasonably delayed in undertaking the procedure. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195-1196; *Gloster v. Sonic Automotive, Inc.* (2014) 226 Cal.App.4th 438, 447-448.) Abandonment may result from actions and conduct or omissions indicating an intention to forego the arbitration process. (6 C.J.S. Arbitration, § 86.) And parties to an arbitration agreement may by their actions, expressly or implicitly abandon the arbitration agreement. (See *Goossen v. Adair* (1960) 185 Cal.App.2d 810, 817; *Magness Petroleum Co. v. Warren Resources of Cal., Inc.* (2002) 103 Cal.App.4th 901, 910-911, fn. 7.)

Whether a party to an arbitration agreement has waived or abandoned the right to arbitrate is a question of fact, and a trial court's determination on that matter will not be disturbed on appeal if supported by substantial evidence. (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 991.) As with any appeal, we presume the trial court's decision is correct, and it is the burden of appellants to show reversible error. (*Ibid.*)

In our view, sufficient evidence supported the trial court's conclusion that appellants withdrew from the arbitration and effectively abandoned the 2009 arbitration agreement. When in the fall of 2013 the Bais Din informed appellants that it could not decide the merits in the pending arbitration without reconstructing and reopening the case, appellants' counsel indicated that he would advise his clients to not participate any further in the arbitration. And appellants' counsel urged the Bais Din to either release the parties to pursue their claims in another forum such as a civil court or close the arbitration case without issuing a decision and thus allow appellants to walk away from the arbitration. Whatever their counsel recommended to appellants, they never participated in any "reconstructed" arbitration proceedings before the Bais Din, and neither protested the Bais Din's action in closing the case or

demanded a new arbitration before the same or different arbitrators. This evidence supports the trial court's finding that appellants intended to abandon the pending arbitration proceedings. In addition, appellants failed to respond to the questions in the CMC Statement which specifically directed them to indicate whether they had an agreement to privately arbitrate the dispute or would be willing to participate in private arbitration. Their failure to affirm the 2009 agreement or express a willingness to arbitrate is additional evidence that appellants intended to forsake arbitration under the agreement. Further, respondents manifested their intent to forego any arbitration by filing this lawsuit.

The separate actions of the parties, when viewed together indicate separate but mutual decisions to abandon arbitration. In view of all of the foregoing, we conclude that the trial court did not err in denying the petition to compel arbitration.[4]

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[4] In reaching this conclusion we reject appellants' argument that the trial court erred because it did not explicitly find that respondents were prejudiced. The prejudice is apparent; the parties had agreed to a certain panel and that panel was no longer available. Nor is there any evidence that any other panel was available to take the case. Under those circumstances, respondents would be prejudiced if they could not proceed in court.

DISPOSITION

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

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.