Filed 8/5/15 Price v. Akhoian Enterprises, Inc. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SUSAN PRICE, Plaintiff and Respondent, v. AKHOIAN ENTERPRISES, INC., et al., Defendants and Appellants.	B259384 (Los Angeles County Super. Ct. No. BC517715)

APPEAL from an order of the Superior Court of Los Angeles County. Maureen Duffy-Lewis, Judge. Affirmed.

Pollak, Vida & Fisher, Michael M. Pollak and Anna L. Birenbaum, for Defendants and Appellants.

Gary Rand & Suzanne E. Rand-Lewis Professional Law Corporations and Suzanne E. Rand-Lewis for Plaintiff and Respondent.

Akhoian Enterprises, Inc. doing business as Mr. Rooter, and TAAC, Inc., doing business as Mr. Rooter Plumbing (collectively "appellants") appeal from an order denying their petition to compel arbitration. Burrell Price and Susan Price (respondents)[1] sued appellants over events stemming from a toilet and bathtub overflow at their residence.[2] Appellants' motion to compel arbitration was denied by the trial court under Code of Civil Procedure section 1281.2, subdivision (c).[3] We affirm.

CONTENTIONS

Appellants contend that the trial court erred by denying their petition to compel arbitration pursuant to section 1281.2, subdivision (c). Appellants argue that there is no possibility of conflicting rulings under section 1281.2, subdivision (c) and that substantial evidence does not support the trial court's factual finding that the insurance defendants hired appellants. Further, appellants argue that the trial court abused its discretion in denying the petition to compel arbitration outright instead of ordering a stay of the claims subject to the arbitration agreement.

FACTUAL BACKGROUND

In 2007, respondents purchased a homeowners' insurance policy with Travelers. First Line served as the insurance broker for the sale.

In September 2012, respondents sustained a loss when a toilet and bathtub overflowed in their home, damaging their family room, hallway and living room. Respondents immediately contacted Travelers. The individual who took respondents' call advised respondents that he would be their claim agent; that he would process the

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[1] Burrell Price died during the pendency of this action. The parties have since stipulated to substitute Susan Price for Burrell Price.

[2] Respondents' complaint also named as defendants Travelers Property Casualty Insurance Company (Travelers) and First Line Insurance Services, Inc. (First Line). These defendants are not parties to this appeal. We shall collectively refer to these defendants as "the insurance defendants."

[3] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

claim; that respondents should get someone out to do whatever was necessary to stop the water intrusion and damage to the premises; that respondents should thereafter submit the bills to Travelers, and that Travelers would pay the bills. The individual with whom respondents spoke never mentioned any limit on coverage.

Respondents contacted appellants to perform emergency repairs to the premises. Appellants advised respondents that extensive work needed to be done or their home would be ruined. Appellants advised respondents that in order to repair the sewage pipes they would have to open walls in respondents' bathroom; remove the floors in the family room, bathroom and hallway; and jackhammer the concrete in the garage at the end of respondents' driveway to get to the breaks. Appellants represented to respondents that the cost of the work would be $15,455 and that this work had to be done or respondents' home would be ruined. Respondents agreed that the work take place, believing that Travelers would reimburse them. Respondents allege that appellants' representations to respondents were untrue and that respondents' home would have been fine with less extensive repairs in limited areas.

Respondents' contract with appellants contains an arbitration provision. It states:

> "Any controversy or claim arising out of or related to this contract, or breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. . . .
>
> "NOTICE: *BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE BUSINESS AND PROFESSIONS

CODE OR OTHER APPLICABLE LAWS. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY."

Burrell Price initialed directly below a statement that said:

"WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION TO NEUTRAL ARBITRATION." I (WE) AGREE TO ARBITRATION."

On September 18, 2012, Travelers sent an email to respondents. Attached to the email was a letter acknowledging receipt of their claim and stating that Travelers had determined the value of the claim to be $17,642.29. The letter informed respondents that "it is the insured's right and responsibility to choose and work with an independent vendor for repair or replacement services." This language furthered respondents' belief that the work being done to repair and replace respondents' damages would be covered by Travelers. Within a day or so after receiving the letter, respondents received a check for $17,642.29 made payable to respondents and their mortgage holder. At no time did Travelers inform respondents that there was a limit on their policy. As the work continued, respondents submitted additional bills to Travelers.

On January 2, 2013, respondents received a notice of nonrenewal of their policy dated December 31, 2012, from Travelers. Respondents called the insurance company and were informed that the coverage was not being renewed because of the water damage claim and that no further payments would be made to respondents on the claim. Respondents were informed that they had already been overpaid on their claim as there was a $5,000 sewage backup limit on their policy.

Respondents depleted their savings and maxed out their credit cards. Respondents alleged that they never would have proceeded with the repairs had they been informed that there was a limitation on their insurance coverage.

PROCEDURAL HISTORY

On August 8, 2013, respondents brought this action against appellants and the insurance defendants. Respondents alleged 12 causes of action: (1) breach of contract against the insurance defendants; (2) breach of contract against appellants; (3) breach of the implied covenant of good faith and fair dealing against the insurance defendants; (4) breach of the covenant of good faith and fair dealing against appellants; (5) breach of fiduciary duty against the insurance defendants and appellants; (6) fraud--failure to disclose against appellants; (7) fraud--negligent misrepresentation against appellants; (8) fraud--negligent misrepresentation against the insurance defendants; (9) intentional infliction of emotional distress against appellants and the insurance defendants; (10) negligence against appellants and the insurance defendants; (11) violation of the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.) against First Line and appellants; and (12) violation of Business & Professions Code sections 17200, 17500 and 7159.5, subdivision (a)(5) against the insurance defendants and appellants.

On October 24, 2013, appellants filed their petition to compel arbitration pursuant to sections 1281 and 1281.2. Appellants attached a copy of the contract dated September 12, 2012; a contract change order dated September 13, 2012, signed by Susan Price; and a contract change order dated September 24, 2012, signed by Burrell Price. The petition was originally set for hearing on April 28, 2014. Susan Price filed an opposition to appellants' petition on April 15, 2014.[4] She argued: (1) that she was not a party to any arbitration agreement; (2) that the arbitration agreement was unconscionable; (3) that predispute jury waivers are unenforceable; and (4) that the presence of other parties to the litigation precludes an order compelling arbitration. On the last point, Susan Price argued that all claims arose from the water damage to respondents' home, and that there is a

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[4] Burrell Price died on September 9, 2013, thus the action was stayed as to him at the time that Susan Price filed her opposition to appellants' motion to compel arbitration.

distinct possibility of conflicting rulings on common issues of law if the court were to order respondents' claims against appellants to arbitration. [5]

On April 22, 2014, appellants filed a reply. They argued that respondents admitted all the allegations in the petition to compel arbitration by failing to file their response to the petition within 15 days of service of the petition, and that this procedural defect mandated that the petition be granted. Further, appellants argued that respondents' opposition presented no grounds upon which the petition could be denied. In particular, appellants argued that respondents should be required to arbitrate their controversy with appellants alone because the issues involved in the arbitration would be different from those involving the insurance defendants.

The petition was set for hearing on May 1, 2014. The hearing was continued several times, and concluded on September 30, 2014. The trial court announced its ruling from the bench. The court noted its finding that the signature on the contract was that of Burrell Price and that Susan Price was bound by his signature. The court agreed that there was procedural unconscionability as to the arbitration agreement, but found no substantive unconscionability. However, the court stated that it was persuaded by respondents' argument that appellants' petition should be denied based on the fact that there are other parties to the litigation. The court stated:

> "And I found this to be the most compelling argument by [respondent], that since Mr. Rooter was hired by the insurance carrier. There's a cross-over of the arguments, and I evaluated them. It would seem that a factual decision made by an arbitrator would then have an impact on the ruling with regard to the insurer. It would have an impact on a third party that was likely an unanticipated consequence and/or at least not appropriate from this court's view. Other parties involved compelling them to arbitrate, other parties involved not subject to arbitration and whose position may be impacted by the arbitrator's position certainly would have

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[5] In her opposition to the motion to compel arbitration Susan Price argued that she never signed the document containing the arbitration provision, and that the signature on the document was not her husband's. The trial court ordered an evidentiary hearing on the issue of the disputed signature. Following the hearing, the trial court found that the signature and initials on the arbitration agreement were Burrell Price's.

had a right to a jury trial in this regard or a court trial of some regard. So, the motion to compel arbitration is denied."

On October 3, 2014, counsel for respondents served notice of the ruling. On October 6, 2014, appellants filed their notice of appeal from the ruling.[6]

DISCUSSION

I. Relevant law

Section 1281.2 provides, in pertinent part:

"On 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:

"[¶] . . . [¶]

"(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. . . .

"[¶] . . . [¶]

"If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the

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[6] Appellants ask us to consider documents filed in connection with an application to stay the trial court proceedings pending the conclusion of this appeal. Because those filings were not before the trial court at the time it rendered its decision on the petition to compel arbitration, we do not consider them. (*Roden v. AmerisourceBergen Corp.* (2010) 186 Cal.App.4th 620, 630 ["We do not consider matters that were not before the trial court"].)

arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

In sum, section 1281.2, subdivision (c) "authorizes the court to refuse to enforce a contractual arbitration provision if arbitration threatens to produce a result that may conflict with the outcome of related litigation not subject to the arbitration." (*Mount Diablo Medical Center v. Health Net of California, Inc.* (2002) 101 Cal.App.4th 711, 717.) While there is a strong public policy favoring contractual arbitration, that policy """"does not extend to those who are not parties to an arbitration agreement. . . .""" [Citation.]" (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 704. (*Molecular*).) Thus, contractual arbitration "'may have to yield if there is an issue of law or fact common to the arbitration and a pending action or proceeding with a third party and there is a possibility of conflicting rulings thereon.' [Citation.]" (*Id*. at pp. 704-705.)

The trial court in this matter determined that section 1281.2, subdivision (c) was applicable because respondents' claims against the insurance defendants arose out of the same transaction and there is a possibility of conflicting rulings on common issues. Having made that determination, the trial court exercised its discretion to deny the motion to compel arbitration, as permitted by the statute.

II. Standards of review

The parties disagree as to the appropriate standard of review for the trial court's decision under section 1281.2, subdivision (c). Appellants argue that the application of section 1281.2, subdivision (c) to undisputed facts is a question of law subject to de novo review. Respondents, on the other hand, argue that the appropriate standard of review is substantial evidence.

In support of their position that the de novo standard of review applies, appellants cite *Molecular, supra*, 186 Cal.App.4th at pages 707-708. In *Molecular*, the question was whether a nonparty to the arbitration agreement (Bio-Rad) could compel the signatory plaintiff to arbitrate its claims. Ultimately, the court determined that the

plaintiff was equitably estopped from refusing to arbitrate with Bio-Rad because the plaintiff had relied upon the terms of the agreement containing the arbitration clause to bring its claims against Bio-Rad. (*Id.* at pp. 714-718.)

In discussing the appropriate standard of review for the question before it, the *Molecular* court indicated that no conflicting evidence regarding arbitrability was presented. Instead, "'[w]hether and to what extent [nonsignatories] can also enforce the arbitration clause is a question of law, which we review de novo.' [Citation.]" (*Molecular, supra,* 186 Cal.App.4th at p. 708.) In addition, the parties did not dispute the facts "'but rather whether those facts constitute sufficient legal basis for equitable estoppel.' [Citation.]" (*Id.* at p. 708.) The court ultimately determined that section 1281.2, subdivision (c) was entirely inapplicable because Bio-Rad, the nonsignatory, had a right to enforce the arbitration agreement. "In such cases, the nonsignatory is not a 'third party' within the meaning of section 1281.2(c). [Citation.]" (*Molecular,* at p. 717.)

The matter before us does not involve the questions of law at issue in *Molecular*. Instead, the parties agree that the insurance defendants are third parties within the meaning of section 1281.2, subdivision (c). However, they dispute the question of whether the causes of action arise out of the same transactions and whether there is a possibility of conflicting rulings. Thus, the question before us is whether the second two requirements of section 1281.2, subdivision (c) are met. In challenging the trial court's finding on these two points, appellants highlight a factual issue: whether the insurance defendants hired appellants.

The following discussion from *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 972 (*Acquire*) is instructive:

> "The trial court's decision whether section 1281.2(c) applies . . . is reviewed under either the substantial evidence standard or the de novo standard. If the court based its decision on a legal determination, then we adopt the de novo standard. [Citations.] If the court based its decision on a factual determination, then we adopt the substantial evidence standard of review. [Citation.] Whether there are conflicting issues arising out of related transactions is a factual determination subject to review under the substantial evidence standard. [Citation.]"

The allegations of the parties' pleadings may constitute substantial evidence sufficient to support a trial court's finding that section 1281.2, subdivision (c) applies. (*Acquire, supra*, 213 Cal.App.4th at p. 972.) Once it has been determined that section 1281.2, subdivision (c) applies, "'the trial court's discretionary decision as to whether to stay or deny arbitration is subject to review for abuse.' [Citations.]" (*Id.* at p. 971.)

In this matter, the trial court's findings that: (1) the third party action arises out of the same transaction or series of related transactions; and (2) there is a possibility of conflicting rulings on common issues of law or fact are in dispute. We find that the question of whether the claims against the appellants and the claims against the insurance defendants arise out of the same transaction or series of transactions is a factual question which must be reviewed under the substantial evidence standard. The question of whether the potential for conflicting issues exists is also a factual question. Thus, the primary issues before us must be reviewed under the substantial evidence standard. (*Acquire, supra*, 213 Cal.App.4th at p. 972.)

III. Appellants' failure to request a statement of decision

Respondents point out that appellants were entitled to request a statement of decision pursuant to section 1291, and failed to do so.[7] Respondents argue that appellants' failure to request a statement of decision waives any objection based on the trial court's failure to make all required findings. In support of their position, respondents cite *Acquire, supra*, 213 Cal.App.4th at page 970:

> "A party's failure to request a statement of decision when one is available has two consequences. First, the party waives any objection to the trial court's failure to make all findings necessary to support its decision. Second, the appellate court applies the doctrine of implied findings and presumes the trial court made all necessary findings supported by substantial evidence. [Citations.] This doctrine 'is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are

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[7] Section 1291 provides: "A statement of decision shall be made by the court, if requested pursuant to Section 632, whenever an order or judgment, except a special order after final judgment, is made that is appealable under this title."

indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.' [Citation.]"

Appellants do not dispute that they failed to request a statement of decision. In response to appellants' waiver argument, appellants argue that there is no dispute in the evidence in this case, therefore the doctrine of implied findings does not apply. We disagree. As set forth above, the question of whether there are potentially conflicting issues arising out of related transactions is a factual question in the province of the trial court. (*Acquire, supra*, 213 Cal.App.4th at p. 972.) In the absence of a statement of decision, we apply the doctrine of implied findings and presume that the trial court made all necessary findings supported by substantial evidence. (*Id.* at p. 970.)

IV. The trial court's statement regarding the insurance company hiring appellants

Appellants contend that the trial court relied on a single fact in making its finding that all elements of the third party litigation exception existed. Specifically, the trial court stated on the record: "[S]ince Mr. Rooter was hired by the insurance carrier[] [t]here's a cross-over of the arguments, and I evaluated them. It would seem that a factual decision made by an arbitrator would then have an impact on the ruling with regard to the insurer."

Appellants explain that according to the complaint, Travelers told respondents to hire services to fix the water intrusion at their home. Travelers told respondents that Travelers would reimburse respondents. Thus, appellants contend, the trial court erred in concluding that the insurance defendants hired appellants. Appellants argue that the trial court's own factual basis for finding a potential conflict was based on an erroneous statement of fact.

We reject this argument. The trial court made no formal findings of fact, and is not bound by informal comments made on the record. (See, e.g., *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 646 ["'[A] court is not bound by its statement of intended decision and may enter a wholly different judgment than that announced'"].) In addition, it is not clear from the court's limited statement from the bench whether a finding that

"Mr. Rooter was hired by the insurance carrier" was essential to the trial court's decision that the potential for conflicting results existed. The trial court noted that the relationship between appellant and the insurance defendants caused a "cross-over" of arguments, which the court then evaluated. There is no indication of which specific arguments the trial court focused on in its evaluation. From this evaluation, the trial court made its determination that "a factual decision made by an arbitrator would then have an impact on the ruling with regard to the insurer." Without a statement of decision, there is no record of the court's evaluation of the arguments or the potentially conflicting factual findings. Therefore, we must apply the doctrine of implied findings and presume the trial court made all necessary findings supported by substantial evidence. (*Acquire, supra*, 213 Cal.App.4th at p. 970.)

V. The record supports the trial court's decision

Pursuant to the rule set forth in *Acquire*, we may presume that the trial court made all necessary findings supported by substantial evidence. However, we note that the record supports the trial court's decision.

A. The insurance defendants were involved in the same transaction as appellants

All of the allegations in the complaint arise from the damage to respondents' home when their bathtub and toilet overflowed on September 12, 2012. Respondents immediately contacted Travelers. Travelers directed them to hire someone to "do whatever was necessary to stop the water intrusion and damage to the premises." In reliance on this representation from Travelers, and on behalf of Travelers, respondents contacted appellants to come out and assess and repair the damage.

Under the facts pled, we have no trouble affirming the trial court's decision that respondents' claims against appellants arise out of the same transaction or series of related transactions within the meaning of section 1281.2, subdivision (c).

B. There is a possibility of conflicting rulings on common issues of law or fact

The trial court noted that there was a possibility of conflicting rulings as to factual issues if the parties were not all joined in the same action. This decision is supported by

the record. Different triers of fact could come to different conclusions about which party is liable for respondents' financial losses. If a trier of fact were to decide that appellants improperly advised respondents that certain work needed to be done which did not need to be done; or overcharged respondents for the work that was done, then appellants would likely be found liable for the damages. However, if the trier of fact determined that all of the work was legitimate and necessary, the liability may fall to the insurance defendants. In addition, any determination regarding a cap or limit on the insurance defendants' liability would affect the apportionment of damages between the parties.

If the trier of fact is the same for all defendants, these possible conflicting rulings concerning fault and apportionment of damages would not occur.

VI. The cases cited by appellants support the result

Appellants argue that just because a plaintiff has multiple causes of action against multiple defendants arising from the same loss, that is not enough to deprive a contracting party of the agreed-upon right to arbitrate a dispute. In support of this argument, appellants cite three cases. As discussed below, all three cases support the trial court's decision in this case.

Whaley v. Sony Computer Entertainment America, Inc. (2004) 121 Cal.App.4th 479 involved disputes over employment contracts. Two former employees of Sony had agreements with Sony which required arbitration of any claims arising out of or relating to the agreements. (*Id.* at p. 483.) However, two other former employees, who had not signed arbitration agreements and were involved in a different lawsuit with Sony, raised the same factual issue in their cross-complaint against Sony. (*Id.* at pp. 482-483.) The former employees argued that the trial court should consolidate the matters and deny arbitration based on section 1281.2, subdivision (c). The trial court agreed. (*Whaley, supra*, at p. 483.) The Court of Appeal affirmed the trial court's decision, finding that the trial court "did not misapply the law in denying the motion to compel arbitration pursuant to section 1281.2, subdivision (c)." (*Whaley*, at p. 488.)

Birl v. Heritage Care, LLC (2009) 172 Cal.App.4th 1313, involved claims of elder abuse, willful misconduct, negligence, breach of statutory duties, wrongful death, and

related causes of action brought by an individual's survivors against the individual's health care plan and three residential nursing facilities, including Heritage. (*Id.* at pp. 1316-1317.) Heritage filed a petition to compel arbitration as to some of the causes of action. The trial court denied the motion in part under its authority pursuant to section 1281.2, subdivision (c). (*Birl*, at pp. 1317-1318.) The Court of Appeal affirmed on this ground, finding that the trial court did not misapply the law or abuse its broad discretion in denying the motion to compel arbitration. (*Id.* at p. 1322.)

Finally, in *Valencia v. Smyth* (2010) 185 Cal.App.4th 153, purchasers of real estate brought claims against their real estate agent, the vendor, the vendor's broker, the vendor's broker's wife, the title company, and the trust deed company for fraud, conversion, breach of fiduciary duty, negligence, declaratory and injunctive relief, and unfair business practices, among other things. (*Id.* at p. 158.) The vendor's broker and his wife filed a petition to compel arbitration based on an arbitration provision found in the residential purchase agreement. (*Id.* at p. 159.) The trial court denied the motion, in part under section 1281.2, subdivision (c). Again, the Court of Appeal affirmed, finding the trial court's reasoning persuasive as to the common questions on the theories of liability asserted against the various defendants. (*Valencia*, *supra*, at p. 180.)

VII. The trial court did not abuse its discretion by denying the entire petition

Having determined that section 1281.2, subdivision (c) was applicable, the trial court had four choices: (1) to refuse to enforce the arbitration agreement and order intervention or joinder of all parties in a single action; (2) order intervention or joinder as to all or certain issues; (3) order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) stay arbitration pending the outcome of the court action or special proceeding. The trial court had broad discretion in determining how to proceed. (*RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1521, fn. 15 [broad discretion is afforded by the last paragraph of section 1281.2, subdivision (c), when there is a third party involved in the litigation].) Here, the trial

court used its broad discretion to refuse to enforce the arbitration agreement. This exercise of discretion is specifically permitted under the statute.

Appellants argue that the trial court abused its discretion in failing choose a different option available under section 1281.2, subdivision (c). Specifically, appellants argue that the trial court should have stayed either the litigation or the arbitration with appellants if it had concerns about the potential for inconsistent findings.

We disagree. The trial court's decision not to enforce the arbitration agreement in this matter was authorized by law and did not exceed the bounds of reason. That the court "might reasonably have chosen some other means to avoid a conflicting ruling on a common issue of law or fact" is "immaterial." (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 351.) "The reasonableness of an approach that was not selected does not entail the unreasonableness of the one that was." (*Ibid.*) The court's decision was a rational exercise of its discretion under section 1281.2, subdivision (c).

VIII. Timeliness of respondents' opposition

Appellants argue that respondents failed to timely oppose their petition, therefore all allegations in the petition should have been deemed admitted. Appellants cite section 1290, which provides that "[t]he allegations of a petition are deemed to be admitted by a respondent duly served therewith unless a response is duly served and filed."

Section 1290.6 provides:

> "A response shall be served and filed within 10 days after service of the petition except that if the petition is served in the manner provided in paragraph (2) of subdivision (b) of Section 1290.4, the response shall be served and filed within 30 days after service of the petition. The time provided in this section for serving and filing a response may be extended by an agreement in writing between the parties to the court proceeding or, for good cause, by order of the court."

Appellants argue that instead of filing the petition within the time frame set forth in section 1290.6, respondents waited six months to file an opposition to the memorandum of points and authorities in support of the petition. Appellants argue that

because the response was untimely, all allegations in the petition were admitted and the trial court should not have considered respondents' affirmative defenses.

This issue was recently considered in *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836 (*Ruiz*). In *Ruiz*, an employee filed suit against his employer for various causes of action including failure to pay overtime, failure to provide meal and rest breaks, and related causes of action. After its petition to compel arbitration was denied, the employer appealed. The employer argued, among other things, that because Ruiz's opposition was untimely served and filed under sections 1290 and 1290.6, it should have been disregarded. The Court of Appeal disagreed, stating:

> "Courts have long acknowledged that the trial court may consider untimely filed and served response papers, when no prejudice to the petitioner is shown, without an order extending the 10-day time period of section 1290.6. (See, e.g., *MJM, Inc. v. Tootoo* (1985) 173 Cal.App.3d 598, 603 ['In the absence of any showing of prejudice to appellant, the trial court was well within its prerogative to evaluate credibility and consider the responses as timely under section 1290.6']; *Atlas Plastering, Inc. v. Superior Court* (1977) 72 Cal.App.3d 63, 68 ['The responses . . . were both served and filed beyond the 10-day period required by Code of Civil Procedure section 1290.6, and no extensions of time were granted or stipulations entered. However, there is no indication that the respondent court here did not treat the responses as timely.']; *Travelers Indemnity Co. v. Bell* (1963) 213 Cal.App.2d 541, 544-545 ['We first dispose of respondents' contention that in the superior court appellant's response or answer to its petition for order vacating award was not filed within the statutory time (Code Civ. Proc.[,] § 1290.6) and should be disregarded . . . .' '[T]here is nothing in the record to indicate that the lower court did not, nevertheless, treat it as timely filed . . . [and] no prejudice has resulted herein to respondent . . . .'].)"

(*Ruiz, supra*, 232 Cal.App.4th at p. 847.)

Similarly, here, there is no indication that the trial court did not treat respondents' opposition as timely. Appellants raised this issue below; therefore we must assume that the trial court considered the argument and, in its discretion, decided to consider respondents' response. As set forth above, the trial court had the authority to do so in the absence of prejudice to the appellants. No error occurred.

DISPOSITION

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

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT