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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

ISABELL CERNEKA et al., Plaintiffs and Respondents, v. RUSSELL NO. 8 SANTA MONICA, LLC, et al., Defendants and Appellants.	B276676 (Los Angeles County Super. Ct. No. BC616624)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Reversed and remanded with directions.

Buchalter Nemer, Jason E. Goldstein, Anne Marie Ellis, Efrat M. Cogan for Defendants and Appellants.

The Scali Law Firm, Christian J. Scali; Legal Foundation of Los Angeles, Denise L. McGranahan for Plaintiffs and Respondents.

Western Center on Law and Poverty, Madeline S. Howard for amici curiae Western Center on Law and Poverty, Legal Aid Society of Orange County, Legal Aid Association of California, Inner City Law Center, California Rural Legal Assistance, Inc., The Public Interest Law Project, Public Law Center, Legal Aid of Marin, Community Legal Services in East Palo Alto, Central California Legal Services, Inc., Oakland Centro Legal de la Raza, on behalf of Plaintiffs and Respondents.

Appellant Russell No. 8 Santa Monica, LLC, owns an apartment building located at 1605 Ocean Front Walk, adjacent to the beach, in Santa Monica, California. Isabell Cerneka and eight other plaintiffs had been tenants in that building for many years. In response to plaintiffs' complaint alleging multiple causes of action relating to their tenancies and the new leases they allege they were forced to sign in 2014 containing arbitration clauses, appellants filed a motion to compel arbitration of those claims. The trial court denied the motion, finding the arbitration agreements "are completely unenforceable under California law." We reverse, with directions to allow for additional fact-finding as we describe, *post*.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On April 12, 2016, Isabell Cerneka and eight other plaintiffs[1] (respondents), all of whom had been tenants in the Ocean Front Walk apartment building owned by Russell No. 8 Santa Monica, LLC (Russell) for many years (some for over 20 years), filed their Complaint for Injunctive Relief, Declaratory Relief and Damages against appellants Russell and its members Martin Mink, Florette Mink, and Terry Mink, and against property manager Roberta Rakes (collectively, appellants), alleging 13 causes of action, including claims for tort, contract, unfair business practices and local ordinance violations.[2] Among the reasons they filed suit was their contention

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[1] The plaintiffs and respondents are: Isabell Cerneka, Dennis Doherty, Jere Hawkins, Christopher McGrath, Louis Mifsud, Erik Pena, Lennox Varnedoe (aka Lenny Hoopes), Susan Weinberg and Stephen Weinberg.

[2] The 13 causes of action alleged were for: declaratory relief, failure to provide temporary relocation, failure to provide permanent relocation, tenant harassment in violation of the Santa Monica City Code, Tenant Harassment in violation of the Civil Code, Termination of Tenancies Without Just Cause, Contractual Breach of Warranty of Habitability, Tortious Breach of Warranty of Habitability, Negligence, Unfair Business Practices, Intentional Infliction

appellants were not responding as required by Santa Monica City Charter provisions to their homelessness following a fire in December 2015 that rendered the apartment building uninhabitable.[3]

On June 2, 2016, appellants filed their Motion to Compel Arbitration Pursuant to Code of Civil Procedure section 1281.2.[4] In that motion, appellants alleged respondents had, in December 2014, each signed a rental agreement (the 2014 Rental Agreements) containing valid and binding arbitration provisions which assigned to an arbitrator all matters related to every aspect of the rental relationship between the parties, including a provision specifying that the arbitrator would decide gateway issues such as whether the parties have a valid arbitration agreement.[5] Appellants also

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of Emotional Distress, Fraud and Illegal Lock-Out. The tenancies of all of the respondents had been terminated by appellants acting through Rakes for reasons which respondents allege were illegal and unfair.

[3] Respondents' complaint contains several paragraphs detailing their allegations of improper treatment by appellants. Those allegations would be presented either to an arbitrator or a court, but do not need to be described in detail to resolve this appeal.

[4] Appellants had also filed a motion under Code of Civil Procedure section 425.16 (an "anti-SLAPP motion"), which respondents contend makes untimely the later-filed Motion to Compel Arbitration. However, the record on appeal does not contain either the anti-SLAPP motion or any citation to authority to support respondents' contention. We therefore do not consider it. (E.g., *Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125 [contention fails for lack of an adequate record].)

[5] Appellants also pointed out that the only lease plaintiff Susan Weinberg signed was dated 1977 and contained no arbitration clause. In addition, there was no evidence that her son, Stephen Weinberg, who resided with his mother, had signed any lease. Our disposition of this appeal moots the need for us to address now whether some, but not all, parties would be ordered to arbitrate. Nor need we address application of the discretionary terms of Code of Civil Procedure section 1281.2, subdivision (c), by which a

alleged no grounds existed to revoke the arbitration provisions, and sought orders compelling all plaintiffs to arbitrate all causes of action and staying the action pending completion of the arbitration.

The only facts which appellants provided in support of their motion were contained in a brief declaration signed by Rakes in which she authenticated the seven identical "Residential Rental Agreements" signed by plaintiffs in December 2014 (collectively, the 2014 Rental Agreements). In addition, Rakes stated she "handed this rental agreement to [name of tenant] [and] was present when [he/she] initialed and signed the rental agreement on [date] 2014." Prior to the hearing of the motion to compel arbitration, appellants also submitted a declaration authenticating an enlargement of provisions of the 1977 lease signed by Susan Weinberg to establish that her lease had no arbitration clause.

On July 13, 2016, each of the tenant-plaintiffs filed a declaration in opposition to the motion to compel arbitration in which that tenant set out facts relating to his or her tenancy, including the existence of a rental agreement with appellants that pre-dated the 2014 Rental Agreements, and the circumstances under which his or her 2014 Rental Agreement was presented for signature by Rakes. In their declarations, some plaintiffs recalled in earlier years signing written leases (which they no longer had in their possession) and some stated their prior agreements were oral. All had been long-term tenants, some for 25 years. There was no evidence of any

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trial court determines whether it is appropriate to stay arbitration when non-arbitrable claims are pending against non-signers of an agreement to arbitrate signed by other parties. (See *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393; cf. *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1519-1521.)

prior agreement to arbitrate any aspect of the rental arrangement between the landlord and any tenant.

The record also contains copies of each tenant's application for waiver of court fees (including financial eligibility information) and an accompanying order granting each tenant a fee waiver.

Common to these declarations was that no tenant read the new lease before signing it; some declared they were rushed into signing "on the spot"; none was told the new lease contained arbitration provisions (although each initialed those provisions among others); one declared the tenants trusted Rakes, implying that this tenant and others signed because of the trusted relationship; and two (Doherty and Cerneka) made reference to the fear they could be "kicked out" of their apartments at any time, implying they signed based on this fear.

Respondents also submitted evidence in the form of documents prepared by Santa Monica City officials, including a report on the fire at the subject apartment building on December 12, 2015, attributing it to an undetermined cause; and a copy of an order from the Santa Monica Building Officer directing that Russell relocate all tenants and that Russell pay each tenant specified "per diem relocation benefits." The final item of evidence provided by the tenants was a set of Santa Monica City Administrative Citations issued to Russell for its failure to pay the relocation benefits that had been ordered.

Appellants submitted no declarations to refute any of the facts contained in the tenants' declarations.

The parties argued the matter on July 28, 2016. Appellants focused on the legal claims in their earlier-filed memoranda of points and authorities that the tenants had agreed in the 2014 Rental Agreements to have all issues

determined according to federal law, viz., the Federal Arbitration Act (9 U.S.C. §§ 1-16 [FAA]); the business of renting apartments implicated the interstate commerce clause of the United States Constitution; and that two California statutes (Civ. Code, §§ 1942.1, 1953) could not be applied to invalidate application of the FAA to the matters at issue in this action. Based on these contentions, appellants argued the court must grant their motion to compel arbitration of all claims.

In opposition to these contentions, respondents' counsel argued that the 2014 Rental Agreements and their arbitration clauses had been executed under duress, and included specific examples of individual tenants indicating what Rakes had said or done at the time of signing of each of the seven 2014 Rental Agreements. Respondents' counsel stated at argument in the trial court, "But that's the reason we have rules about unconscionability. Because people feel compelled to sign whatever their landlord puts in front of them." Respondents made a similar argument in their brief on appeal, arguing that the circumstances surrounding the signing of each of the seven leases were such that "no agreement was actually entered into" and "[t]he tenants did not consent to enter into new leases, much less ones requiring them to give up valuable rights," viz., the protections of Civil Code section 1953 (which include the right to trial by jury).

DISCUSSION

As we now explain, we return this matter to the trial court for an evidentiary hearing and for clarification of the contentions of the parties, so that if then necessary we will be able to properly apply the law applicable to the issues then extant. At present, we have unresolvable questions about the contentions of the parties that preclude proper analysis of the issues.

In *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, the United States Supreme Court summarized the rules applicable to determining whether the court or the arbitrator decides certain arbitration-related issues: "*Prima Paint* [*v. Flood & Conklin Mfg. Co*. (1967) 388 U.S. 395] and *Southland* [*v. Keating* (1984) 465 U.S. 1] answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts." (*Id*. at pp. 445-446; accord, *Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 414-415.)

It is unclear in the present case, however, whether respondents' challenge is to the arbitration clause only, or to the entirety of the 2014 Rental Agreements. If the former, resolution of the issues may be for the court; if the latter (or both) resolution is for the arbitrator unless the party challenging the entirety of the agreement alleges that the agreement is "wholly void." (*Buckeye Check Cashing, Inc. v Cardegna*, *supra*, 546 U.S. at pp. 444-446; *Rosenthal*, *supra*, 14 Cal.4th at pp. 416-417; see *Araiza v Younkin* (2010) 188 Cal.App.4th 1120, 1126 [duress may render an agreement void].) Neither the briefs of the parties nor the trial court's written ruling denying the motion to compel arbitration provides any clarity on this point.

Nor does it appear that the trial court made any factual determinations with respect to the declarations proffered by respondents as our state Supreme Court has long determined to be an important aspect of the court trial on the equitable issue presented in a petition (or motion) to compel arbitration. (*Rosenthal v. Great Western Fin. Securities Corp*., *supra*, 14

Cal.4th 394, *passim* [case remanded for proper evidentiary hearing]; *Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951.)[6]

For these reasons, we reverse the judgment and return the matter to the trial court so that the parties can more clearly explicate their legal and factual positions and so that the trial court may thereafter fully consider the facts and the legal issues then presented. (*Rosenthal, supra v. Great Western Fin. Securities Corp*., *supra*, 14 Cal.4th 394.*)*

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court, which is to order the parties to proffer any additional evidence and to provide additional briefing clarifying their legal contentions, followed by a court trial on the issues then presented.

The parties shall bear their own costs on appeal.

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GOODMAN, J.*

We concur:

CHAVEZ, Acting P.J. HOFFSTADT, J.

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[6] Also absent from the ruling is any discussion of the basis upon which the trial court rejected appellants' argument that the activity of renting apartments to tenants implicated interstate commerce; nor did the trial court expressly address the parties' arguments concerning the choice of law clause in the 2014 Rental Agreements, which purported to require application of "federal common law" to the interpretation of the contracts. (See *First Options of Chicago, Inc. v. Kapla*n (1995) 514 U.S. 938, 944 [state law governs contract formation issue]; *Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 972, citing *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 709, fn. 11.)

* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.