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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

BARRY K. ROTHMAN,

Plaintiff and Respondent,

v.

PARSA ZADEH,

Defendant and Appellant.

B269738

(Los Angeles County
Super. Ct. No. BC588961)

APPEAL from an order of the Superior Court of
Los Angeles County. Deirdre Hill, Judge. Affirmed.

Neufeld Marks and Paul S. Marks for Defendant and
Appellant.

Law Offices of Barry K. Rothman, Barry K. Rothman and
Alan E. Walcher for Plaintiff and Respondent.

Defendant and appellant Parsa Zadeh (Zadeh) appeals from the trial court's order denying his petition to compel arbitration of claims asserted in this action by plaintiff and respondent Barry K. Rothman (Rothman) and denying, without prejudice, his petition to compel arbitration of a purported dispute with Aza Yalanska (Yalanska). We affirm the trial court's order.

BACKGROUND

Rothman is a lawyer and Zadeh is a dentist. Yalanska is a former patient of Zadeh's. In June 2014, Zadeh and Yalanska agreed to a dental services treatment plan for a total cost of \$59,000. Rothman agreed to pay for the treatment.

On June 24, 2014, Rothman and Zadeh entered into an agreement in which Rothman agreed to pay Zadeh \$59,000 for Yalanska's treatment. Rothman paid Zadeh \$56,800 in cash before Zadeh commenced any of the work specified in the treatment plan.

On June 27, 2014, Zadeh and Yalanska entered into a written Physician-Patient Arbitration Agreement in which they agreed to arbitrate any dispute concerning medical services rendered and any claims arising out of the treatment or service provided by Zadeh.¹

¹ Articles 1 and 2 of the arbitration agreement provide: "Article 1: **Agreement to Arbitrate:** It is understood that any dispute as to medical practice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional rights to have any such dispute decided in a court of law before a jury, and instead are accepting use of the arbitration."

Zadeh thereafter commenced but did not complete Yalanska's treatment plan because Yalanska chose to see a different dentist. The parties then began negotiating over a refund of the unused portion of the money Rothman had paid to Zadeh.

When those negotiations failed, Rothman filed an arbitration demand on Yalanska's behalf. On April 10, 2015, Rothman filed a lawsuit on Yalanska's behalf for conversion, breach of contract, fraud, and unjust enrichment. On May 21, 2015, Zadeh moved to compel arbitration of Yalanska's lawsuit.

On July 13, 2015, Rothman, on behalf of Yalanska, dismissed without prejudice Yalanska's complaint against Zadeh. He also dismissed Yalanska's arbitration demand. He then commenced the instant action on his own behalf against Zadeh for conversion, breach of contract, fraud, and unjust enrichment. In the complaint, Rothman alleged that in June 2014, he and Zadeh entered into an oral contract pursuant to which Rothman agreed to obtain financing for the treatment plan and to deposit the sum of \$58,600 with Zadeh to be applied to services performed under the treatment plan. Rothman further alleged that Zadeh breached the oral contract by failing to return the unused funds once Yalanska terminated the treatment.

Zadeh filed a combined motion to compel arbitration against Rothman and petition to compel arbitration against Yalanska. He argued that Rothman had no standing to sue, that

“Article 2: All Claims Must Be Arbitrated: It is the intention of the parties that this agreement bind all parties whose claims may arise out of or relate to the treatment or service provided by the physician including any spouse or heirs of the patient and any children, whether born or unborn, at the time of the occurrence giving rise to any claim. In the case of any pregnant mother, the term ‘patient’ herein shall mean both the mother and the mother’s expected child or children.”

Yalanska was an indispensable party to this action, and that the arbitration agreement signed by Yalanska covered the dispute.

Rothman filed an opposition to the combined motion and petition to compel arbitration, arguing that no agreement to arbitrate existed between him and Zadeh, that his agreement with Zadeh to pay for Yalanska's treatment plan gave him standing to sue, and that the petition to arbitrate against Yalanska, a nonparty, was improper. Rothman's opposition was supported by Yalanska's declaration, in which she denied having any claim against Zadeh or any claim or interest in any refund of the \$56,800 paid by Rothman to Zadeh.

Zadeh's combined motion and petition to compel arbitration was heard on November 18, 2015. The trial court denied the motion to compel arbitration of the dispute with Rothman. The court dismissed the petition to compel arbitration against Yalanska "without prejudice to counsel for Defendant filing . . . a petition to compel arbitration against the third party in a separate action." The trial court further stated that in the event a subsequent petition to compel arbitration against Yalanska is filed, "Counsel may wish to relate or consolidate the cases moving forward; should the matters thereafter be consolidated the court would then reevaluate the demand for arbitration."

This appeal followed.

DISCUSSION

I. Standard of review

An "order denying a petition to compel arbitration, like any other judgment or order of a lower court, is presumed to be correct, and all intendments and presumptions are indulged to support the order on matters as to which the record is silent. [Citation.]" (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 88.)

Before a party may be compelled to arbitrate a claim, the petitioning party has the burden of proving both the existence of a valid arbitration agreement and the existence of an arbitrable controversy that is covered by the agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972; *Graphic Arts Internat. Union v. Oakland Nat. Engraving Co.* (1986) 185 Cal.App.3d 775, 780.)

When the trial court's decision as to arbitrability is based on the resolution of disputed facts, we review the decision for substantial evidence. (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 652-653.) Whether an arbitration agreement is binding as against a nonsignatory is a question of law subject to de novo review. (*McArthur v. McArthur* (2014) 224 Cal.App.4th 651, 656.)

II. Appealability of order denying petition to arbitrate against Yalanska

The order denying the petition to arbitrate against Yalanska is not an appealable final order because it expressly allows Zadeh to refile a petition to compel her to arbitration. The trial court denied the petition “without prejudice to counsel for [Zadeh] filing . . . a petition to compel arbitration against [Yalanska] in a separate action.” An order denying a petition to compel arbitration that does not foreclose the petitioner from making a subsequent demand for arbitration does not put a definitive end to the proceeding and is not a final appealable order. (*Fleur du Lac Estates Assn. v. Mansouri* (2012) 205 Cal.App.4th 249, 256-257 (*Fleur du Lac*).)

In *Fleur du Lac*, the court held that an order denying a petition to compel arbitration was not final and appealable because the denial was based on the petitioner's failure to adequately plead and prove that it had demanded arbitration under the parties' agreement and that the respondent had

refused to arbitrate, and not because the dispute was not subject to arbitration under the agreement. (*Fleur du Lac, supra*, 205 Cal.App.4th at p. 257.) The order “did not foreclose the [petitioner] from making a proper demand for arbitration under the [agreement] . . . or from obtaining an order from the trial court . . . compelling arbitration pursuant to that subsequent demand in the event [the respondent] refused.” (*Ibid.*, fn. omitted.)

The court in *Fleur du Lac* distinguished *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796 (*Otay River*), a case on which Zadeh relies as support for his appeal: “In *Otay River*, the party seeking arbitration argued that the claims at issue there arose under a contract that required binding arbitration, but the trial court ‘denied the petition to compel arbitration because the claims [actually] arose out of [a different agreement] which allowed for litigation of the disputes.’ [Citation.] On those facts, the appellate court properly determined that the order denying arbitration was ‘final and appealable even though more litigation [was] contemplated in a separate action’ [citation] because no further issues remained to be resolved *in the proceeding to compel arbitration*.” (*Fleur du Lac, supra*, 205 Cal.App.4th at p. 256.)

The trial court here did not deny Zadeh’s petition to arbitrate against Yalanska because his purported dispute with her was not subject to arbitration under their agreement, or because they had entered into another separate agreement that allowed litigation of disputes. *Otay River* is thus inapposite. The trial court’s order expressly states that denial of Zadeh’s petition to arbitrate against Yalanska is “without prejudice to . . . filing of a petition to compel arbitration . . . in a separate action.” By its terms, the order denying the petition to compel arbitration against Yalanska does not put a definitive end to the arbitration

proceeding against her and for that reason is not a final appealable order. (*Fleur du Lac, supra*, 205 Cal.App.4th at p. 257.)

III. Whether Rothman can be compelled to arbitrate

The parties do not dispute that an arbitration agreement exists between Zadeh and Yalanska. The question is whether that agreement may be enforced against Rothman, a nonsignatory.

As a general rule, a nonsignatory is not bound by an arbitration agreement. (See *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763; *Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990; *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 245 (*County of Contra Costa*).) There are certain limited exceptions in which an arbitration agreement can be enforced against a nonsignatory under traditional principles of contract and agency law. (See *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 268 (*Boucher*); see also *County of Contra Costa, supra*, at pp. 242-243.)

Under one exception, a nonsignatory may be required to arbitrate a claim because a benefit was conferred on the nonsignatory as a result of the contract, making the nonsignatory a third party beneficiary of the arbitration agreement. (*County of Contra Costa, supra*, 47 Cal.App.4th at p. 242.) A second exception exists when a nonsignatory and one of the parties to the arbitration agreement have a preexisting agency relationship. (*Ibid.*) A third exception arises under the doctrine of equitable estoppel. (See *Boucher, supra*, 127 Cal.App.4th at p. 268.)

Zadeh advances no argument or analysis as to whether any of the foregoing exceptions apply to bind Rothman, a nonsignatory to the arbitration agreement, and his motion to compel arbitration articulates no facts that would support such

application. There is nothing in the record to show that any benefit was conferred on Rothman as a result of the agreement between Zadeh and Yalanska, that Rothman and Yalanska had an agency relationship that predated the arbitration agreement, or that Rothman should be equitably estopped from denying the existence of an agreement to arbitrate with Zadeh.

The trial court did not err by denying the motion to compel arbitration of Rothman's claims.

DISPOSITION

The order denying the motion to compel arbitration against Rothman is affirmed. Rothman is awarded his costs on appeal.

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_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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