Filed 12/27/19 Garelick v. Bernards CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DAVID GARELICK et al., Plaintiffs and Respondents, v. RON BERNARDS et al., Defendants and Appellants; PERLITE PLASTERING CO., INC., Cross-complainant and Respondent.	B288358 (Los Angeles County Super. Ct. No. PC057678)

APPEAL from an order of the Superior Court of Los Angeles County, Stephen P. Pfahler, Judge. Affirmed.

Raisin & Kavcioglu, Armenak Kavcioglu and Aren Kavcioglu for Defendants and Appellants Ron Bernards, B&D Development, Inc. and Bernards Bros., Inc.

Schimmel & Parks, Alan I. Schimmel, Michael W. Parks and Arya Rhodes for Plaintiffs and Respondents David Garelick and Debra Garelick.

Berger ♦ Harrison and Daniel A. Harrison for Cross-complainant and Respondent Perlite Plastering Co., Inc.

Defendants Ron Bernards (Bernards), B&D Development, Inc. (B&D), and Bernards Bros., Inc. (BBI) were all allegedly involved in constructing a custom personal residence for plaintiffs David and Debra Garelick. Plaintiffs sued Bernards, B&D, and BBI (collectively, the Bernards Defendants) and three sub-contractors based on alleged defects in the construction.

The Bernards Defendants petitioned to compel arbitration based on an arbitration clause in the construction management services agreement for the project. The trial court denied the petition on two separate grounds. The court found the Bernards Defendants waived their right to arbitration, and in any event some of the defendants were not parties to the agreement to arbitrate, creating a risk of conflicting rulings if arbitration was compelled as to only some defendants. (See Code Civ. Proc., § 1281.2, subd. (c) [often referred to as the "third-party litigation exception"].)[1] Although we conclude the Bernards Defendants did not waive their right to arbitrate, the trial court did not abuse its discretion in refusing to compel arbitration based on the third-party litigation exception in section 1281.2, subdivision (c). We therefore affirm.

---

[1] All future unspecified statutory references are to the Code of Civil Procedure.

FACTUAL BACKGROUND

A. The Contract and Construction Project

On June 15, 2006, the Garelicks entered into a construction management services agreement (the Agreement) with B&D to build a two-story personal residence in Valencia. The Garelicks signed the Agreement, as did Bernards on behalf of B&D. The Agreement identified Bernards as the vice president of BBI, "a licensed general building contractor and [v]ice [p]resident of [B&D]." Bernards was to perform the duties and responsibilities of B&D under the Agreement. The Agreement further contemplated that Bernards would draft contracts with contractors, subcontractors, and other persons performing the construction work, and submit those agreements to the Garelicks for final approval.

Section 1.2 of the Agreement states that the terms of the Agreement prevail over any conflicting provision in the "Construction Documents," a term defined in Section 1.1 to include any contracts with contractors or subcontractors for the project. Article 10 addresses mediation and arbitration. Section 10.1 provides: "Claims or disputes between the parties hereto arising out of or relating to this Agreement or a breach thereof shall be submitted to mediation in accordance with the laws of the state of California before a mediator selected by both parties." Section 10.2 provides: "If [the] claims or disputes described above are not resolved through mediation, the parties agree that the claims or disputes shall be decided by binding arbitration in accordance with the laws of the state of California, unless the parties mutually agree otherwise. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be

entered upon it in accordance with applicable law in any court having jurisdiction thereof."

The Garelicks entered into a written subcontract with an entity called R.A.M. Precast for work on the construction project; that subcontract agreement contained an arbitration clause. Also engaged to perform construction work on the residence were defendants Perlite Plastering Co., Inc. (Perlite) and Beto's Tile. The record contains no contracts or subcontracts with these entities.

The construction of the residence was substantially completed by October 2007.

B. Pre-litigation Communications

Sometime in 2015, the Garelicks allegedly discovered latent defects in the residence. On January 6, 2017, the Garelicks' attorney, Alan I. Schimmel, sent notice to the Bernards Defendants pursuant to Civil Code sections 896 and 910, notifying them that the residence was "suffering from construction defects including but not limited to balcony deck failures, waterproofing failures, metal penetration failures, and stucco failures." Schimmel offered to discuss mediation under Article 10 of the Agreement prior to litigation, and requested tolling of any applicable statute of limitations.

Schimmel and Bernards attended a site inspection on February 4, 2017. After the inspection concluded, Schimmel states the Bernards Defendants "failed to agree to tolling the statute of limitations, failed to put other parties on notice, failed to tender [the Garelicks' claims] to their insurance carriers, failed to repair or provide any good faith [*sic*], and failed to agree to . . . arbitration" pursuant to the Agreement. Schimmel contacted

Bernards several times requesting mediation, but Bernards failed to cooperate.

C. The Litigation

After two months of unsuccessful attempts to secure the cooperation of the Bernards Defendants, the Garelicks filed this action on April 7, 2017 against the Bernards Defendants, R.A.M. Precast, Perlite, and Beto's Tile. The complaint seeks damages, including the cost of repairs and restoration of the property, and declaratory relief regarding the parties' duties and obligations for the construction project. The Garelicks further allege that Bernards, B&D, and BBI are alter egos of one another.

On May 26, 2017, counsel for BBI wrote to Schimmel asserting BBI had no involvement in the construction project.[2] BBI's counsel demanded the Garelicks dismiss BBI from the lawsuit, and indicated BBI would file a petition to compel arbitration if it was not dismissed. BBI's letter did not suggest any willingness to mediate prior to arbitration.

On June 22, 2017, BBI filed a petition to compel arbitration and to stay the action against it pending arbitration. On July 17, 2017, Bernards and B&D also filed a motion to compel arbitration and stay the action. In the supporting declaration, the attorney for Bernards and B&D stated: "The arbitration provision [in the Agreement] requires that the parties mediate first. I am in the process of meeting and conferring with opposing counsel to arrange for a mediation. I expect that process will be concluded before the hearing date on this motion."

---

[2] BBI was represented below by a law firm separate from the one representing Bernards and B&D.

Perlite filed a cross-complaint for equitable indemnity, contribution, and declaratory relief on November 3, 2017. The cross-complaint named Roes 1-50 as defendants; it did not assert claims against any of the parties already named in the litigation. Shortly thereafter, Perlite opposed the motions to compel arbitration. Perlite asserted improper service of the motion to compel arbitration, and that it was not a party to any agreement to arbitrate.

The Garelicks opposed the Bernards Defendants' motions to compel arbitration as well. The Garelicks asserted that the Bernards Defendants repeatedly refused mediation, which was a condition precedent to arbitration under the Agreement, and therefore had waived their right to compel arbitration. The Garelicks also asserted bad faith, providing a copy of the letter from BBI's counsel asserting they had no involvement in the building of the residence, along with numerous construction invoices addressed to BBI indicating BBI was in fact involved with the construction project.

The Garelicks additionally argued BBI and Perlite were not parties to the Agreement or its arbitration provision, and therefore the third party litigation exception in section 1281.2, subdivision (c) applied.[3] Section 1281.2, subdivision (c) states, in pertinent part, that "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

---

[3] The Garelicks' argument did not address Beto's Tile, and they eventually dismissed that defendant as well as R.A.M. Precast after the court ruled on the petitions to compel arbitration.

determines that [¶] . . . [¶] . . . [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. . . ." The Garelicks argued there was a possibility of conflicting rulings as between an arbitration proceeding with Bernards and B&D, and a court proceeding involving BBI and Perlite, and therefore the court should refuse to order any party to arbitrate.

D. The Trial Court's Ruling

Following argument, the trial court denied the motions to compel arbitration and stay the proceedings. The trial court noted that "[a]lthough a written agreement to arbitrate an existing or future dispute is generally enforceable, a petition to compel arbitration will be denied when the right has been waived by the petitioners' failure to properly and timely assert it. ([§§] 1281, 1281.2[, subd.](a).) This may happen in a variety of contexts, including where the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with willful misconduct. ([*Guess?, Inc. v. Superior Court*] (2000) 79 Cal.App.4th 553, 557.)"

The trial court found that the arbitration provision in the Agreement "states all disputes must be resolved through mediation and that '[i]f claims or disputes described above are not resolved through mediation, the parties agree that the claims or disputes shall be decided by binding arbitration . . . .' " The Garelicks "claim that [the Bernards Defendants] refused to mediate. [The Bernards Defendants have not] denied this. Such refusal indicates that [these parties] have previously taken steps

inconsistent with an intent to invoke arbitration. Had [these parties] actually wanted to invoke arbitration, [they] necessarily would have attempted to mediate before seeking to compel arbitration. Further, [BBI's] previous position, claiming it was not involved in the [construction p]roject, suggests [BBI] acted in bad faith."

The court also found the third-party litigation exception in section 1281.2, subdivision (c), applicable. The court found it undisputed that the Garelicks filed their complaint "against [defendants] that did not sign the contract with the arbitration provision at issue—i.e., [defendants] Perlite, [BBI], and Beto's Tile. As a result there is a high chance that inconsistent results could occur because [defendants] could have markedly different degrees of culpability. Indeed, [defendant] Perlite makes clear it was not part of the contract."

The Bernards Defendants filed a timely appeal. We have jurisdiction pursuant to section 1294, subdivision (a).

DISCUSSION

A. Standard of Review

There is no uniform standard of review for evaluating an order denying a petition to compel arbitration. (*Lopez v. Bartlett Care Center, LLC* (2019) 39 Cal.App.5th 311, 317.) If the court's order is based on a decision of fact, then we adopt a substantial evidence standard of review. (*Ibid.*) Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. (*Ibid.*)

B. The Bernards Defendants Did Not Waive Their Right To Arbitrate

1. *Applicable Law*

A petition to compel arbitration may be denied where "[t]he right to compel arbitration has been waived by the petitioner." (§ 1281.2, subd. (a).) " 'California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the "bad faith" or "willful misconduct" of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citation.]' [Citation.]" (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 374-375.) "In light of the policy in favor of arbitration, 'waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof.' [Citation.] 'Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. . . . [Citation.]" (*Id.* at p. 375.)

2. *Analysis*

The Bernards Defendants contest the trial court's finding of waiver on two grounds. First, they claim that participation in mediation was not a condition precedent to arbitration. Second, to the extent mediation was a condition precedent, they argue there is insufficient evidence they refused to participate in mediation.

(a) *Mediation Was a Condition Precedent*

We reject the Bernards Defendants' claim that mediation was not a condition precedent to arbitration. "The ordinary rules of contract interpretation apply to arbitration agreements. [Citation.] 'The court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made (Civ. Code, §§ 1636, 1644, 1647).' [Citation.] 'The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.' (Civ. Code, § 1641.) ' "A court must view the language in light of the instrument as a whole and not use a 'disjointed, single-paragraph, strict construction approach' [citation]." ' [Citation.] An interpretation that leaves part of a contract as surplusage is to be avoided. [Citation.]" (*Rice v. Downs* (2016) 248 Cal.App.4th 175, 185-186.)

Section 10.1 of the Agreement provides that "[c]laims or disputes between the parties . . . shall be submitted to mediation . . . ." "[T]he term 'shall' has long been considered mandatory under California's contract interpretation rules. [Citation.]" (*Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 634.) Section 10.2 provides that "[i]f [the] claims or disputes described above are not resolved through mediation, the parties agree that the claims or disputes shall be decided by binding arbitration . . . ." Interpreting this language to permit arbitration without first submitting claims to mediation would render section 10.1, as well as the language in section 10.2 that arbitration applies if a dispute is not resolved through mediation, superfluous or meaningless. Such an interpretation is to be avoided. (*In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667,

688; *Rice v. Downs*, *supra*, 248 Cal.App.4th at p. 186.) We further note our interpretation is consistent with that taken by Bernards and B&D before the trial court, where they recognized that "[t]he arbitration provision requires that the parties mediate first."

(b) *There Is Not Substantial Evidence of Waiver*

Turning to the issue of waiver, substantial evidence does not support the trial court's finding that the Bernards Defendants waived the right to arbitrate. The following factors generally apply when considering the issue of waiver: " ' "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [such as taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party." ' [Citation.]" (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196; see also *Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389-1390 ["A party seeking to prove waiver of a right to arbitration must show ' "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration" ' "].)

Here, the only actions the Bernards Defendants took that were arguably inconsistent with the right to arbitrate were not agreeing to mediate before a lawsuit was filed, and not having completed a mediation before filing their motion to compel arbitration. None of the Bernards Defendants substantially invoked any litigation machinery or took advantage of judicial procedures not available in arbitration. They did not file a counterclaim. They sought to arbitrate soon after the complaint was filed—including working to schedule a mediation before their motion to compel arbitration was heard.[4] Furthermore, the Garelicks submitted no evidence the alleged delay in mediation affected, misled or prejudiced them. While the Garelicks claim BBI acted in bad faith in denying involvement in the project, BBI coupled its denial of liability with an insistence on arbitration if the Garelicks intended to pursue their claims against BBI. In light of the heavy burden of proof necessary to infer a waiver, the record here is insufficient to find the Bernards Defendants waived their right to arbitration. (*Iskanian v. CLS Transportation Los Angeles, LLC*, *supra*, 59 Cal.4th at p. 375.)

C. The Trial Court Did Not Abuse Its Discretion in Holding the Third-party Litigation Exception Applied

"[T]he proper interpretation and application of section 1281.2, subdivision (c), is a legal question reviewed de novo. [Citations.] If the statute is properly invoked, then we review under the abuse of discretion standard the trial court's decision to

---

[4] The Bernards Defendants represent that a mediation ultimately did take place, albeit after the motion to compel arbitration was heard.

refuse to compel arbitration under section 1281.2, subdivision (c). [Citation.]" (*Birl v. Heritage Care, LLC* (2009) 172 Cal.App.4th 1313, 1318.) To establish an abuse of discretion, a party "must show that none of the other parties to the action are 'third parties' to a pending court action arising out of 'the same transaction or series of related transactions' in which there is 'a possibility of conflicting rulings on a common issue of law or fact.' (§ 1281.2, subd. (c).)" (*Id*. at p. 1319.)

The trial court found the Garelicks filed their complaint against defendants that did not sign the Agreement with the arbitration provision at issue—namely BBI, Perlite, and Beto's Tile.[5] The Bernards Defendants assert that BBI had the right to compel arbitration, because "a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are 'intimately founded in and intertwined' with the underlying contract obligations. [Citations.]" (*Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 271-272.) This principle may come into play where, as here, there are alter ego allegations. (*Id*. at p. 268.)

Even if we assume BBI had a right to compel arbitration because the Garelicks' claims against it were based in and intertwined with the Agreement, there was no basis to compel Perlite or Beto's Tile to arbitrate. Perlite and Beto's Tile were nonsignatories to the Agreement, and Perlite resisted arbitration.

---

[5] Although Beto's Tile was later dismissed, an appeal reviews the correctness of an order as of the time of its rendition. (*Dore v. County of Ventura* (1994) 23 Cal.App.4th 320, 323, fn. 2.) We therefore include Beto's Tile in the third-party litigation exception analysis along with Perlite, who remains a party.

The Bernards Defendants do not suggest equitable estoppel applies to these defendants.[6] Nor do the Bernards Defendants cite to any agreement to arbitrate signed by Perlite or Beto's Tile. Instead, the Bernards Defendants assert that section 1.2 of the Agreement provides that the Agreement's terms prevail over any conflicting provisions in contracts relating to the project, and therefore the Garelicks had the "burden to put the written contract with Perlite into evidence to demonstrate that the written contract with Perlite did not require arbitration." Because neither the Garelicks nor Perlite produced any such agreement, the Bernards Defendants argue there is no competent evidence demonstrating the claims against Perlite are not subject to arbitration.

We reject this attempted burden shifting. "[A] court should be wary of imposing a contractual obligation to arbitrate on a non-contracting party." (*Smith/Enron Cogeneration v. Smith Cogeneration* (2d Cir. 1999) 198 F.3d 88, 97.) As Perlite points out, a petition to compel arbitration must be supported by evidence of a written agreement to arbitrate. (*Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 413; *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 399-400; Cal. Rules of Court, rule 3.1330.) The Agreement did not require Perlite and Beto's Tile to arbitrate. Perlite and Beto's Tile did not sign the Agreement, and there is no evidence they were aware of its

---

[6] Nor could they. "[A]n intertwining claims analysis applies only when a nonsignatory seeks to compel a signatory to arbitrate, not when a signatory seeks to compel a nonsignatory to arbitrate. '[I]t matters whether the party resisting arbitration is a signatory or not.' " (*Inception Mining, Inc. v. Danzig, Ltd*. (D.Utah 2018) 312 F.Supp.3d 1271, 1281, italics and fn. omitted.)

terms. Moreover, the arbitration clause in the Agreement provides for arbitration "between the parties hereto" and neither Perlite nor Beto's Tile was a party to the Agreement.

To the extent the alleged agreement to arbitrate was contained in the actual contracts with Beto's Tile and Perlite, the Bernards Defendants were able to provide evidence of those terms, but failed to do so. The Agreement provided that, as part of its construction management services, B&D "shall draft the contracts" with entities like Perlite and Beto's Tile, and "submit such contracts to the [Garelicks] for final approval." Despite this access to, and understanding of, the terms of the contracts with Beto's Tile and Perlite, the Bernards Defendants submitted no evidence those contracts included an alleged agreement to arbitrate. Accordingly, the Bernards Defendants failed to show that the claims against Perlite and Beto's Tile were subject to arbitration. (*Lacayo v. Catalina Restaurant Group, Inc*. (2019) 38 Cal.App.5th 244, 257 [the party seeking to compel arbitration has the burden of proving the existence of a valid agreement to arbitrate].)

Based on the evidence before the trial court at the time it made its ruling, both Perlite and Beto's Tile were third parties to a pending court action arising out of the same transaction at issue in the arbitration agreement, and there was a possibility of conflicting rulings on common issues of liability and damages if there were parallel arbitration and court proceedings. (§ 1281.2, subd. (c).) Because Perlite and Beto's Tile were third parties, the trial court did not abuse its discretion in finding that the third-party litigation exception applied, and denying the petition to compel arbitration. (*Birl v. Heritage Care, LLC*, *supra*, 172 Cal.App.4th at pp. 1318-1319.)

DISPOSITION

The order is affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

---

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