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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ABEER SADDUQ, Plaintiff and Respondent, v. MAHFOUZ M. MICHAEL et al., Defendants and Appellants.	B292225 (Los Angeles County Super. Ct. No. BC699525)

APPEAL from an order of the Superior Court of Los Angeles County, Michelle Williams Court, Judge. Affirmed.

Goshgarian & Associates, Mark Goshgarian and Merak Eskigian for Defendants and Appellants.

Law Offices of Scott R. Ames, Scott R. Ames and Erin M. Kelly for Plaintiff and Respondent.

Appellants Mahfouz M. Michael (Michael) and Mahfouz M. Michael, M.D., Inc., dba Clinica Medica San Miguel (MMMI) employed Abeer Sadduq (Sadduq). After they terminated her employment, she initiated arbitration pursuant to the agreement they had all signed. Appellants failed to pay the fee required for the arbitration and failed to respond to inquiries about payment. Only after Sadduq filed a lawsuit against them and a third related entity, Clinica Medica San Miguel I.P.A. Medical Group (CMSM), did appellants move to compel arbitration and pay the fee. The trial court denied the motion. We affirm the trial court's order.

BACKGROUND AND PROCEDURAL SUMMARY

On July 12, 2017, Abeer Sadduq agreed to be the chief operating officer of Clinica Medica San Miguel. She entered into an employment agreement with "Mahfouz M. Michael MD., Inc., dba Clinica Medica San Miguel." The agreement was signed by Michael Mahfouz as president of Clinica Medica San Miguel. The agreement provided that either party may, in its sole discretion, terminate the agreement without cause by giving the other party at least 12 months prior written notice. The agreement also contained an arbitration provision that "[a]ny dispute or controversy arising under, out of or in connection with, or in relation to this Agreement, or any amendment hereof, or the breach hereof shall be determined and settled by final and binding arbitration in Los Angeles County, California in accordance with the Commercial Rules of Arbitration ('Rules') of the Judicial Arbitration and Mediation Services ('JAMS') before one arbitrator applying the laws of the State."

According to the complaint, on November 7, 2017, appellants and their counsel, Charles Smith, informed Sadduq they no longer required her services and wanted "to terminate her employment without cause and wanted to come to an agreement to avoid paying her contractual wages for the twelve-month notice period." (Complaint, ¶ 1.) The parties were unable to reach a termination agreement.

Sadduq alleges she then "filed a Demand for Arbitration [(Demand)] with JAMS on January 8, 2018." The Demand named Michael and MMMI as respondents. Sadduq alleges she "paid her portion of the arbitration fee in the amount of $400.00. [¶] . . . JAMS made several attempts to procure payment from Defendants for its share of the filing fee in the amount of $800.00, but Defendants failed to pay and failed to respond to JAMS' efforts." (Complaint, ¶¶ 18, 19.) The JAMS invoice was sent to attorney Smith, with the notation that he was representing Mahfouz Michael and Mahfouz M. Michael, MD Inc., dba Clinica Medica San Miguel.

On February 6, 2018, Sadduq's counsel advised Smith by email that if Michael and MMMI did not pay the arbitration fee by February 9, 2018, Sadduq would take the position they had waived their right to arbitration and would file a lawsuit. (Complaint, ¶ 20.) Sadduq received no response to the email and appellants did not pay their portion of the fee. "JAMS refused to process the case for arbitration because of Defendants' refusal to pay." (Complaint, ¶ 21.)

On March 26, 2018, Sadduq filed this lawsuit. She named Michael, MMMI, and CMSM as defendants; she described Michael as an individual and MMMI and CMSM as corporations operating "as a single, integrated enterprise with regard to

Plaintiff's employment. Alternatively, Plaintiff is informed, believes, and thereon alleges that MMMI and CMSM were her joint employers." She also alleged "each of the Defendants . . . was the agent . . . of each of the remaining Defendants . . . ." (Complaint, ¶¶ 7, 9.)

On May 18, 2018, appellants moved to compel arbitration. Appellants acknowledged but did not address Sadduq's claim that they had waived their right to arbitrate. They simply maintained arbitration was required by the written employment agreement. In their reply papers, appellants argued 1) they did not materially breach the agreement because they paid the arbitration fee on May 8, 2018; 2) they never expressly refused to arbitrate; 3) CMSM never waived its right to arbitrate because it was not named as a respondent in the Demand for Arbitration; 4) CMSM had the right to compel arbitration on behalf of MMMI and Michael because CMSM was alleged to be their agent.

The trial court found Michael and MMMI breached the arbitration agreement by not paying their arbitration fee until five months after Sadduq filed her Demand for Arbitration (and three months after she filed her lawsuit), and by their counsel's failure to respond to Sadduq's counsel or to JAMS. In so concluding, the court relied on *Brown v. Dillard's, Inc.* (9th Cir. 2005) 430 F.3d 1004 (*Brown*).[1] The basic facts in *Brown* mirror

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[1] The Ninth Circuit considered both California law and the Federal Arbitration Act (FAA) in *Brown*. (*Brown*, *supra*, 430 F.3d. at p. 1010.) "When it applies, the FAA preempts any state law rule that ' "stand[s] as an obstacle to the accomplishment of the FAA's objectives." ' [Citations.]" (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 238.) In this case, the arbitration agreement does not provide that arbitration is governed by the FAA. Appellants did not claim in

those at issue here: Brown filed a notice of intent to arbitrate her wrongful termination claim against Dillard's and she paid her fee. Dillard's did not pay its fee or respond to Brown or the arbitration association for 2 months. Dillard's then informed Brown that her claim had no merit and it expressly refused to arbitrate. The Ninth Circuit held that "Dillard's breached its agreement with Brown by refusing to participate in the arbitration proceedings Brown initiated. Having breached the agreement, Dillard's cannot now enforce it." (*Id.* at p. 1010.)[2]

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the trial court and do not claim on appeal that the FAA nevertheless applies because the "contract evidences a transaction involving commerce." (9 U.S.C. § 2.) The party seeking to apply the FAA "bears the burden to present evidence establishing a contract with the arbitration provision affects one of . . . three categories of activity" related to or involving interstate commerce. (*Carbajal,* at p. 238; see *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 687.) The failure to present such evidence "renders the FAA inapplicable." (*Carbajal,* at p. 238; *Lane,* at p. 688.) Accordingly, we do not consider federal law.

[2] The Ninth Circuit noted an arbitrator cannot compel a party to pay its fee and cannot proceed without the fee. (*Brown*, *supra*, 430 F.3d at p. 1013.) The court then declined to adopt a "perverse incentive scheme" where employers could refuse to arbitrate employees' claims "in the hope that the frustrated employees would simply abandon them. The tactic would be costless to employers if they were allowed to compel arbitration whenever a frustrated but persistent employee eventually initiated litigation." (*Id.* at p. 1012.)

In addition to finding a breach of contract, the trial court here also found that Michael and MMMI had waived their right to arbitrate and that Sadduq had been prejudiced by the waiver. The court found CMSM was alleged to be an agent of MMMI and Michael, but CMSM had "provided no authority that, as an agent of the other defendants, it can enforce an agreement those defendants, the principals on the contract, breached. The court declines to invoke equity to permit [CMSM] to enforce the agreement. [¶] Even if the court were to find that [CMSM] could enforce the arbitration provision, the court would be inclined to stay the arbitration pending resolution of the claims against the other defendants [pursuant to] Code of Civil Procedure section 1281.2(c)."

DISCUSSION

1. **Appellants Have Forfeited Their Claims That The Demand for Arbitration on MMMI and Michael Was Improperly Served.**

Appellants contend the trial court erred in relying on *Brown,* because the *Brown* arbitration was "***properly*** initiated" by the plaintiff.[3] Here, on the contrary, they claim they were never properly served with the Demand so there can be no waiver

[3] The Ninth Circuit used the phrase "properly initiated arbitration proceedings" several times in its opinion without any discussion of its meaning or requirements in the breach of contract context. (*Brown, supra*, 430 F.3d at pp. 1006, 1011, 1012.)

or breach of the agreement.[4] They claim the record shows the Demand was served only on their attorney Charles Smith. We reject their claims as forfeited.

At a minimum, resolution of these claims requires a factual determination whether appellants agreed Smith could accept service of the Demand on their behalf. Appellants did not raise these claims in the trial court. Consequently, they are forfeited. (See, e.g., *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381.)

We additionally note appellants have cited no legal authority to support their claim that a waiver finding can only be made if a party fails to act after it is properly served with a formal demand for arbitration.[5] "Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration." (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195.)

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[4] Appellants state their breach claim in their Statement of Facts and Procedural Background section. This is not the appropriate location for legal argument and does not comply with the California Rules of Court. (See Cal. Rules of Court, rule 8.204(a)(1)(B); *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830, fn. 4.) We nevertheless exercise our discretion and consider the claim.

[5] The *Brown* court rejected Dillard's argument that the case should be analyzed under the waiver doctrine. The court briefly noted it "would have no difficulty" finding waiver, but believed it was more accurate to describe Dillard's behavior as a breach of contract. (*Brown, supra*, 430 F.3d at p. 1012.)

2. **The Complaint Does Not Revive Michael's and MMMI's Right to Compel Arbitration.**

Appellants contend the complaint is "vastly different" than the original demand for arbitration and "[t]his difference entitles MMMI (and [Michael]) to compel arbitration regardless of any finding that those [appellants] previously waived its right to arbitrate the original demand." Appellants did not raise this claim in the trial court. On appeal, appellants cite no legal authority whatsoever to support this claim, and do not develop any legal argument to support granting such relief to a party who previously waived its right to arbitration. "In order to demonstrate error, an appellant must supply the reviewing court with some cogent argument supported by legal analysis and citation to the record." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 286–287.) We may and do "disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusion he wants us to adopt." (*Id*. at p. 287.)

Even if the claim were not legally forfeited, we would find it factually unsupported. The record on appeal does not show a complaint "vastly" different than the Demand. The primary factual difference between the Demand and the complaint is that CMSM, a non-signatory to the arbitration agreement, is named as a defendant in only the complaint. It is alleged CMSM is an entity related to Michael and MMMI — the three are alleged agents of each other and are Sadduq's joint employers. Michael and MMMI do not dispute that CMSM is a related entity, and have not shown how the addition of such a related entity creates a "vast" difference between the Demand and complaint.

The remaining differences between the Demand and complaint are minor at best. Appellants contend the complaint alleges they are agents of each other, but the Demand does not. Instead the Demand alleges both were Sadduq's employer; both terminated her contract without cause; both failed to pay her wages; and both were jointly and severally liable. The differences are technically true but not meaningful.

Similarly, Michael contends the complaint alleges he was a person acting on behalf of an employer within the meaning of Labor Code section 558.1 and so liable for Labor Code section 203 penalties, while the Demand does not. The Demand, however, also seeks to hold Michael liable for violation of Labor Code section 203; it just did not specifically refer to Labor Code section 558.1. Again, the difference is technically true, but not significant.

Appellants claim the complaint alleges "Defendants hired Plaintiff as their Chief Operating Officer pursuant to the terms of the written employment agreement." The Demand alleges Sadduq "was employed by Respondents as Chief Operating Officer pursuant to a written employment contract." The only difference between the two pleadings is the addition to the complaint of CMSM as a defendant; as we have noted, appellants provide no authority or argument in support of the notion that that the addition of CMSM to the complaint is a "vast" difference.

Appellants argue the complaint seeks recovery of damages not sought in the Demand. The Demand sought damages for unpaid wages, the value of benefits, waiting time penalties pursuant to "Labor Code section 203, past and future wage loss, emotional distress damages, punitive damages, and statutory attorneys' fees and costs under Labor Code sections 218.5 and

218.6." The complaint seeks "special damages, including but not limited to, the full amount of Plaintiff's unpaid contractual wages" plus statutory penalties pursuant to Labor Code section 203, interest and "such other and further relief as the court may deem just and proper." We see no meaningful difference.

Finally, appellants argue the complaint alleges causes of action not raised in the Demand. This argument also fails. The Demand seeks recovery for "breach of employment contract, failure to pay wages, waiting time penalties [pursuant to Labor Code section 203], and wrongful termination in violation of public policy." The complaint seeks recovery for breach of contract and a violation of Labor Code section 203.

3. **CMSM Has Not Shown It Has a Right to Arbitrate.**

The complaint alleges CMSM, a non-signatory, is an agent of MMMI, which is a signatory to the arbitration agreement. They contend a non-signatory entity which is an agent of a signatory party can have the right to compel arbitration. (See *Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 614.) Appellants, however, do not address the trial court's finding that CMSM, as an agent of the signatory party, cannot enforce an agreement the signatory party has already breached. At most, appellants simply assert that "as alleged agents of a signatory defendant each defendant has the independent right to enforce the arbitration provision . . . . The Court cannot deny an agent this right. *Thomas*, Id." (*Sic*.)

The case upon which appellants rely holds that an agent's right to compel arbitration is dependent on its relationship with the signatory party. (*Thomas v. Westlake, supra,* 204 Cal.App.4th at p. 614 [One exception to the general rule that a nonsignatory cannot invoke an arbitration agreement "provides

that when a plaintiff alleges a defendant acted as an agent of a party to an arbitration agreement, the defendant may enforce the agreement even though the defendant is not a party thereto."].) As a general rule, however, "a third party whose rights under a contract derive from those of a party to the contract cannot assert rights greater than those of the contracting party." (*Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830, 840.) "For example, an agent ordinarily has no contract rights greater than those of the principal, because in seeking to assert rights under the principal's contract, the agent 'is subject to the same defenses by the other party thereto.' " (*Ibid*.) While there are exceptions to this general rule, appellants have not identified any exception. Thus, we affirm the trial court's ruling that CMSM did not have an independent right to enforce the arbitration agreement. (See *City of Santa Maria v. Adam, supra*, 211 Cal.App.4th at pp. 286–287.)

4. **The Trial Court Properly Indicated a Stay of The Arbitration Proceedings Would Be Warranted.**

The trial court also ruled that if CMSM had a right to enforce the arbitration provision, the court would stay the arbitration, pursuant to Code of Civil Procedure section 1281.2(c),[6] pending resolution of the claims against Michael and MMMI. Appellants contend that section 1281.2(c) only applies when there are parties not bound by or entitled to enforce arbitration. Appellants' position is section 1281.2(c) is inapplicable because each of them is bound by and has the right to enforce the arbitration agreement.

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[6] Further undesignated statutory references are to the Code of Civil Procedure.

As our Supreme Court has explained, " 'Section 1281.2(c) addresses the peculiar situation that arises when a controversy also affects claims by or against other parties not bound by the arbitration agreement.' " (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393.) Section 1281.2(c) is "an evenhanded law that allows the trial court to stay arbitration proceedings while the concurrent lawsuit proceeds *or* stay the lawsuit while arbitration proceeds to avoid conflicting rulings on common issues of fact and law amongst interrelated parties." (*Cronus,* at p. 393.)

As we have just discussed, Michael and MMMI are not entitled to enforce the arbitration agreement. Stated differently, Sadduq is no longer bound by the arbitration agreement with respect to MMMI and Michael. Thus, section 1281.2(c) does apply. (See *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1283 [whether there are parties not bound by or entitled to enforce the arbitration agreement, such that section 1281.2(c) applies, is a question of law reviewed de novo].)

Moreover, to justify moving forward simultaneously on the arbitration against CMSM and the lawsuit against Michael and MMMI, there would have to be no possibility of conflicting rulings on commons issues of fact and law. Yet appellants make no such argument. Thus, they have in no way shown that the trial court abused its discretion in staying the arbitration. (*Rowe v. Exline, supra*, 153 Cal.App.4th at p. 1283 ["court's decision as to how to proceed in a situation governed by section 1281.2, subdivision (c), is reviewed for an abuse of discretion."].)

DISPOSITION

The trial court's order is affirmed. Appellants are to pay Sadduq's costs on appeal.

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STRATTON, J.

We concur:

GRIMES, Acting P. J.

WILEY, J.