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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

MAIA PAWOOSKAR, as Guardian ad litem, etc., Plaintiff and Respondent, v. BLUE CROSS OF CALIFORNIA, et al., Defendants and Appellants.	B277690 (Los Angeles County Super. Ct. No. BC586827)

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

Foley & Lardner, Tami S. Smason, Kimberly A. Klinsport, Melissa Y. Lerner and Kathryn A. Shoemaker for Defendants and Appellants.

Engstrom, Lipscomb & Lack, Walter J. Lack and Michael P. Lewis for Plaintiff and Respondent.

INTRODUCTION

Blue Cross of California, doing business as Anthem Blue Cross, and Anthem Blue Cross Life and Health Insurance Company (collectively, "Blue Cross") appeal from the trial court's order denying Blue Cross's motion to compel arbitration. Blue Cross contends the trial court erred in finding Blue Cross waived its right to arbitrate. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Lawsuit Begins*

On July 2, 2015 Som Pawooskar, through his guardian ad litem Maia Pawooskar, filed this case against Blue Cross, Anthem UM Services, Inc., and Anthem, Inc., alleging that on two occasions—first in 2012 and again in 2014—they wrongfully denied health insurance coverage for his medical treatment. Pawooskar asserted causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and violation of Business and Professions Code section 17200 (section 17200).

Pawooskar served Blue Cross with the complaint on August 6, 2015. Three weeks later Blue Cross contacted Pawooskar to begin discussing the possibility of amending the complaint to avoid or minimize the need for pretrial motions. Blue Cross maintained, among other things, that a previous class action settlement barred Pawooskar's causes of action to the extent they rested on any alleged denial of coverage occurring before September 2013. In these discussions, Blue Cross said nothing about arbitration.

On October 13, 2015 Pawooskar filed a first amended complaint. The first amended complaint dismissed Anthem UM Services, Inc. and Anthem, Inc., added causes of action for "tortious bad faith" and negligence, and limited recovery based on the 2012 denial of coverage to the two new causes of action.

On October 14, 2015 Blue Cross filed a case management statement requesting a five-day court trial, stating Blue Cross anticipated moving to bifurcate the court trial and try the section 17200 cause of action first, and noting Blue Cross would file "a demurrer/motion to strike portions of the amended complaint" and "a motion for summary judgment if appropriate."[1] The case management statement also set forth a discovery schedule for Blue Cross to serve requests for production of documents, interrogatories, and third-party deposition subpoenas, for Blue Cross to conduct a medical examination of Pawooskar, and for Pawooskar to take depositions, all of which Blue Cross proposed to complete by October 2016. Blue Cross said nothing about arbitration in its case management statement. To the contrary, in a column under the words "The party or parties completing this form are willing to participate in the following [Alternative Dispute Resolution] processes (*check all that apply*)," Blue Cross checked only the box for "Mediation," leaving unchecked the box for "Binding private arbitration."

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[1] Blue Cross also filed a peremptory challenge to the assigned judge pursuant to Code of Civil Procedure section 170.6, which the court accepted.

On November 13, 2015 Blue Cross demurred to the first amended complaint, asking the court to dismiss Pawooskar's causes of action for tortious bad faith and negligence, principally on the ground they were barred by the class action settlement. Blue Cross set the hearing on the demurrer for March 14, 2016. In its demurrer, Blue Cross said nothing about arbitration.

B. *The Parties Conduct Discovery*

On December 28, 2015 Blue Cross served Pawooskar with 27 requests for production of documents and 21 special interrogatories. Pawooskar responded in early February 2016, producing 1,440 pages of responsive documents and identifying specific facts and documents he contended supported his claims. At the same time, Blue Cross responded to a request for production of documents served by Pawooskar. At the end of February 2016 the parties met and conferred about their respective discovery responses and agreed to extend the deadlines for filing motions to compel further responses. Meanwhile, in January 2016 the parties began trying to reschedule three depositions Pawooskar had initially noticed for February 2016. Because of scheduling conflicts, and to accommodate issues relating to ongoing discovery, the parties agreed to postpone the depositions until June or July 2016. While engaging in all of this discovery activity, Blue Cross said nothing about arbitration.

On March 4, 2016 Pawooskar served Blue Cross with a second set of requests for production of documents and sets of special and form interrogatories. The deadline for Blue Cross to respond was April 8, 2016.

On March 11, 2016 the parties executed and filed a stipulation for a protective order that allowed them to designate as "confidential" certain documents and information produced during discovery. The stipulated protective order provided that material designated as confidential by the producing party "shall not be used by any person . . . for any purpose other than conducting this Proceeding, *Som Pawooskar v. Blue Cross of California dba Anthem Blue Cross, et al.*, Case No. BC586827, which is pending in the Superior Court for the State of California, County of Los Angeles, and in no event shall such information be used for any business, competitive, personal, private, public or other purpose." The parties further stipulated that the protective order would not "affect the use or admissibility of any Confidential Information at trial in this proceeding" and that the court would determine the admissibility of any such evidence. The parties also proposed a procedure for the court to rule on any disputes over "the propriety of a Confidential Information designation." Finally, the parties agreed that the protective order would "remain in effect and continue to be binding, unless expressly modified, superseded, or terminated by consent of all parties or by Order of the Court," and they included a provision stating the court "expressly retains jurisdiction over this action for enforcement of the provisions of this Order following the final resolution of this litigation." The trial court signed the proposed protective order the same day. Blue Cross still said nothing about arbitration.

C. *The Trial Court Overrules the Demurrer to the First Amended Complaint and Sets the Matter for Trial*

On March 14, 2016 the trial court held a hearing on Blue Cross's demurrer to the first amended complaint and, according to the parties, overruled it.[2] The court also held a case management conference at which it considered both parties' case management statements. Blue Cross had filed a second case management statement in February 2016 that again estimated a five-day trial, stated Blue Cross intended to move to bifurcate the trial of the cause of action for violation of section 17200, and indicated Blue Cross was willing to participate in mediation, but not binding private arbitration. The court asked whether the parties had discussed alternative dispute resolution, noted both parties indicated they were amenable to mediation, and encouraged the parties to pursue that route. The court then set the case for a five-day jury trial to begin October 24, 2016. Blue Cross consented to the trial date, but again said nothing about arbitration.

D. *The Trial Court Denies Blue Cross's Motion To Compel Arbitration*

On March 24, 2016 Blue Cross—after having asked the court to dismiss some of Pawooskar's causes of action on demurrer, invoked the court's jurisdiction to approve the protective order, and requested a five-day court trial—filed a motion to compel arbitration of Pawooskar's complaint and to stay the action pending arbitration. For the first time, Blue

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[2] There is no order in the record overruling the demurrer.

Cross cited the arbitration provision in the insurance policy Pawooskar alleged Blue Cross had breached. The parties attended a mediation, but did not settle the case. On September 7, 2016 the trial court denied the motion, ruling Blue Cross had waived its right to compel arbitration. Blue Cross timely appealed.[3]

DISCUSSION

A. *Applicable Law and Standard of Review*

A trial court may deny a petition to compel arbitration because the moving party has waived the right to arbitrate. (Code Civ. Proc., § 1281.2, subd. (a); *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) "In the arbitration context, waiver does not require relinquishment of a known right, but arises from a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right to arbitration." (*Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389; see *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 944 ["[a]lthough the statute speaks in terms of 'waiver,' the term is used '"as a shorthand statement for the conclusion that a contractual right to arbitration has been lost,"'" and "[i]n this context, waiver is more like a forfeiture arising from the nonperformance of a required act"].) But because state law, like the Federal Arbitration Act, reflects a strong policy favoring arbitration agreements, "waivers are not to

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[3] An order denying a petition to compel arbitration is appealable. (See Code Civ. Proc., § 1294, subd. (a); *Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th 408, 415.)

be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*St. Agnes*, at p. 1195; accord, *Sprunk v. Prisma LLC* (2017) 14 Cal.App.5th 785, 795 (*Sprunk*).)

Although "'no single test delineates the nature of the conduct that will constitute a waiver of arbitration,' [the California] Supreme Court [in *St. Agnes*] has identified various factors that are 'relevant and properly considered in assessing waiver claims.' [Citation.] Those factors . . . are: ""(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 [e.g., 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."""" (*Sprunk*, *supra*, 14 Cal.App.5th at pp. 795-796; see *St. Agnes*, *supra*, 31 Cal.4th at pp. 1195-1196.)

"The question of waiver is generally a question of fact, and the trial court's finding of waiver is binding on us if it is supported by substantial evidence. [Citation.] 'We infer all necessary findings supported by substantial evidence [citations] and "construe any reasonable inference in the manner most favorable to the judgment, resolving all ambiguities to support an affirmance."' [Citation.] Reversal is not justified simply because the trial court could have potentially reached a different

conclusion on the question of waiver. '[R]ather, we may reverse the trial court's waiver finding only if the record establishes a lack of waiver *as a matter of law*.' [Citation.] When the relevant facts are undisputed and only one inference may reasonably be drawn from the facts, the waiver issue may be reviewed de novo." (*Bower v. Inter-Con Security Systems, Inc.* (2014) 232 Cal.App.4th 1035, 1043; see *Sprunk*, *supra*, 14 Cal.App.5th at p. 794 ["[a] trial court's finding of waiver is . . . reviewed under the substantial evidence standard unless "'the facts are undisputed and only one inference may reasonably be drawn,'" in which case "'the reviewing court is not bound by the trial court's ruling'"'].)

B. *Substantial Evidence Supported the Trial Court's Finding Blue Cross Waived Its Right To Arbitrate*

Blue Cross argues that, because the relevant facts are not in dispute and the only reasonable inference from those facts is that Blue Cross did not waive its right to arbitrate, we should review the trial court's ruling de novo. It is true that the parties do not dispute the underlying facts, at least those concerning the substance and timing of the procedural events in this action, and that not every relevant consideration weighs in favor of finding waiver. But considered "holistically," as Blue Cross urges us to do, the evidence regarding the *St. Agnes* factors supports a reasonable inference of waiver. Therefore, we review the trial court's finding for substantial evidence. (See *Sprunk*, *supra*, 14 Cal.App.5th at p. 794; *Bower v. Inter-Con Security Systems, Inc.*, *supra*, 232 Cal.App.4th at p. 1043.)

Substantial evidence supports the trial court's finding that Blue Cross waived its right to arbitrate. Concerning the first *St. Agnes* factor, Blue Cross argues its actions were not inconsistent

with the right to arbitrate because they were "consistent with the goal of efficient dispute resolution." In particular, Blue Cross suggests it worked expeditiously to "clarify the scope of [Pawooskar's] claims" by sharing documents and legal analysis with him and by filing a demurrer to the first amended complaint. Blue Cross argues that moving to compel arbitration only 10 days after the trial court "definitively clarified" Pawooskar's claims by ruling on the demurrer is not inconsistent with the right to arbitrate. Blue Cross also cites case law suggesting the filing of a demurrer is not, without more, necessarily inconsistent with the right to arbitrate. (See *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1191 [defendants' "participation in litigation by way of demurrers did not, in the absence of prejudice to [the plaintiff], waive [their] right to enforce the arbitration agreement between the parties"].)

But there was more: Blue Cross took many actions that were inconsistent with the right to arbitrate. For example, Blue Cross indicated in two case management statements, filed more than four months apart, that it wanted a court trial and was not willing to participate in arbitration. Then, when the court discussed alternative dispute resolution with the parties at the case management conference, Blue Cross still did not raise the issue of arbitration. Indeed, despite evidently knowing of the relevant arbitration provision from the outset of the litigation,[4] Blue Cross said nothing about arbitration for almost eight

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[4] In a declaration supporting the motion to compel arbitration, counsel for Blue Cross stated that, when she first contacted counsel for Pawooskar in August 2016, she offered to provide him a copy of the policy on which Pawooskar had sued.

months after Pawooskar served Blue Cross with the complaint. (See *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1451 [conduct inconsistent with an intent to arbitrate included waiting six months from the filing of the complaint before petitioning to compel arbitration, filing two demurrers, accepting and objecting to discovery requests, engaging in efforts to schedule discovery, and omitting to mark or assert its request for arbitration in its case management statement].) Negotiating, filing, and asking the court to sign a protective order limiting use of certain documents to the action in superior court was also inconsistent with an intent to arbitrate. By stipulating to the protective order, Blue Cross asked the court to resolve disputes over confidentiality designation, gave the court continuing jurisdiction to enforce the provisions of the order, and obtained a court order that is still in effect. Even Blue Cross's purported use of the litigation process to "clarify the scope of [Pawooskar's] claims" was inconsistent with the right to arbitrate because, "'[s]imply put,'" the "'"courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration."'" (*Id.* at p. 1452.)

Regarding whether "the litigation machinery ha[d] been substantially invoked" (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196), Blue Cross argues it did not do so because "[t]he only matter of substance" the trial court considered before Blue Cross filed its motion to compel arbitration was the demurrer to the first amended complaint, the ruling on the demurrer was not a "decision on the merits of the case," and the parties' participation in discovery was "minimal." The trial court's ruling on the demurrer, however, did reach the merits of the case: The court's

ruling rejected Blue Cross's contention that a previous class action settlement barred Pawooskar's causes of action for tortious bad faith and negligence. (See *Pulli v. Pony Internat., LLC* (2012) 206 Cal.App.4th 1507, 1515 ["'judicial litigation of the merits of arbitrable issues . . . waives a party's right to arbitration'"].) Moreover, the parties' discovery efforts were substantially more than "minimal": Both parties served and responded to requests for production of documents, and Pawooskar provided almost 1,500 pages of responsive documents (and subsequently served a second set of requests for production); Blue Cross propounded 21 special interrogatories, to which Pawooskar responded; the parties engaged in meet and confer efforts to resolve discovery issues and stipulated to extend deadlines for filing motions to compel further responses; the parties noticed and rescheduled depositions; and the parties negotiated, executed, and asked the court to approve a protective order. There is no question "the litigation machinery [was] substantially invoked." (*St. Agnes*, at p. 1196.)

With respect to whether Blue Cross "requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay" (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196), Blue Cross notes trial was still seven months away when it moved to compel arbitration. Courts, however, have emphasized that "'"a demand for arbitration must not be unreasonably delayed . . . [and a] party who does not demand arbitration within a reasonable time is deemed to have waived the right to arbitration."'" (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 445; accord, *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992; see *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 376 ["[a]

factor relevant to the waiver inquiry is whether . . . a delay [in asserting the right to arbitration] was 'unreasonable'"]; *Sprunk*, *supra*, 14 Cal.App.5th at p. 796 ["[i]n the context of an arbitration right, waiver can result from ""[unreasonable delay] in undertaking the procedure"""].)

Blue Cross's delay was unreasonable. In fact, Blue Cross has never explained why it waited nearly eight months after service of the complaint to raise the possibility of arbitration. Courts have found unexplained delays of shorter periods unreasonable. (See, e.g., *Augusta v. Keehn & Associates* (2011) 193 Cal.App.4th 331, 338 (*Augusta*) [unexplained delay of six and a half months was unreasonable]; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557 [finding waiver where defendant "failed to offer any explanation for its decision to defer for three months its demand for arbitration"]; *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1228 [delay of five and a half months from the filing of the complaint was unreasonable].) And by the time the court ruled on the motion, after several joint requests by the parties to continue the hearing, trial was only two months away.

On the fourth *St. Agnes* factor, Blue Cross notes it did not file a cross-complaint without asking for a stay of the proceedings. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.) Fair enough, although, because Blue Cross filed a demurrer, the time for Blue Cross to file a cross-complaint without leave of court had not yet expired when Blue Cross filed its motion to compel arbitration. (See Code Civ. Proc., § 428.50, subd. (a).) The absence of a cross-complaint weighs slightly against a finding of waiver.

The fifth *St. Agnes* factor is "'"'whether important intervening steps (e.g., taking advantage of judicial discovery procedures not available in arbitration) had taken place.'"'" (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.) Blue Cross maintains this factor weighs in its favor because the discovery it conducted yielded only "information [it] would be entitled to in arbitration." Perhaps, depending on how the arbitrator conducted the arbitration. But the question is whether Blue Cross took advantage of "discovery *procedures* not available in arbitration." (*Ibid.*, italics added; see *Augusta*, *supra*, 193 Cal.App.4th at p. 340 ["type of discovery [can] signif[y] the intent to litigate rather than to arbitrate"].) Blue Cross propounded special interrogatories that Pawooskar had to answer in accordance with the Code of Civil Procedure, which required, among other things, that Pawooskar respond "under oath," i.e., under penalty of perjury. (See Code Civ. Proc., §§ 2015.5, 2030.010, 2030.210-2030.310.) The arbitration rules that would have applied here did not allow the parties to propound interrogatories; instead, they required the parties to "cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information . . . relevant to the dispute or claim."[5] (JAMS Comprehensive Arbitration Rules & Procedures, rule 17(a).) Thus, although this factor may not weigh heavily in favor of Pawooskar, it does not support Blue Cross.

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[5] The rules also allowed the arbitrator to "modify these obligations." (JAMS Comprehensive Arbitration Rules & Procedures, rule 17(a).)

Finally, Blue Cross's delay misled and prejudiced Pawooskar, a consideration that "is 'critical in waiver determinations.'" (*Sprunk*, *supra*, 14 Cal.App.5th at p. 809; see *St. Agnes*, at p. 1203 ["while "'[w]aiver does not occur by mere participation in litigation'" if there has been no judicial litigation of the merits of arbitrable issues, ""waiver could occur prior to a judgment on the merits if prejudice could be demonstrated"""].) For example, whereas Pawooskar noticed three depositions under the Code of Civil Procedure for February 2016, the arbitration rules allowed each party to take only one. In a declaration in opposition to Blue Cross's motion to compel arbitration, counsel for Pawooskar stated Pawooskar's "assent to push the previously-noticed deposition dates out as far as July [2016] was in reliance on Defendants' representations that they would continue to litigate this matter in this Court." Blue Cross does not dispute that statement. Allowing Blue Cross to compel arbitration as late as it did could cause Pawooskar to lose the opportunity to take depositions he otherwise could have taken. Similarly, it is reasonable to infer, as the trial court found, that Pawooskar relied on his understanding the matter would proceed in superior court when he agreed to dismiss two defendants and limit the scope of recovery for his first three causes of action. Again, Blue Cross does not contest that inference.

Lastly, as the trial court aptly observed in finding Blue Cross's delay prejudiced Pawooskar: "If the Court were to order arbitration today, it most likely would not be concluded for at least another year." Trial, on the other hand, was scheduled to begin in less than two months. Ordering the case to arbitration would have deprived Pawooskar of the ""efficient, streamlined procedure[ ]"" that is supposed to be arbitration's 'fundamental

attribute.'" (*Judge v. Nijjar Realty, Inc.* (2014) 232 Cal.App.4th 619, 634; see *Burton v. Cruise*, *supra*, 190 Cal.App.4th at p. 948 ["as *St. Agnes* recognized, the critical factor in demonstrating prejudice is whether the party opposing arbitration has been substantially deprived of the advantages of arbitration as a ""speedy and relatively inexpensive"" means of dispute resolution"].)

DISPOSITION

The order denying the motion to compel arbitration is affirmed. Pawooskar is to recover his costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.*

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