Filed 11/15/18 Fodor v. Beverly Hills Studios 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

SEAN FODOR et al., Plaintiffs and Respondents, v. BEVERLY HILLS STUDIOS LLC, et al., Defendants and Appellants.	B285348 (Los Angeles County Super. Ct. No. SC125631)

APPEAL from an order of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

The Internet Law Group, Kavon Adli and Seth W. Wiener for Defendants and Appellants.

Law Offices of Perrin F. Disner and Perrin F. Disner for Plaintiffs and Respondents.

Defendants Beverly Hills Studios, LLC (BHS) and John T. Knight, M.D., Inc. (JTKMD) (collectively, defendants) appeal from the denial of their motion to compel arbitration in a dispute with plaintiffs and respondents Sean Fodor, HAWI Studio, and Sports Surgeons, LLC (Sports Surgeons) (collectively, plaintiffs). Among other things, the trial court found that defendants had waived the right to arbitrate through the actions of their principal, John Knight,[1] who also was named as an individual defendant below. Knight in his individual capacity propounded discovery, successfully moved to compel responses to the discovery, and filed demurrers and a motion to strike the pleadings, actions that the trial court found benefitted defendants and were attributable to them.

On appeal, defendants argue that Knight's actions were insufficient to constitute waiver and cannot be attributed to defendants as separate parties in the litigation. Defendants have failed, however, to provide an adequate record from which we can assess error. Notably, the record lacks any documents pertaining to the demurrers, motion to strike, and motion to compel discovery responses, and only includes some of the discovery propounded by Knight. We therefore cannot determine whether Knight's actions were inconsistent with an intent to arbitrate, whether they prejudiced plaintiffs, or whether they benefitted

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[1] John Knight the individual should not be confused with John T. Knight, M.D., Inc., a business entity of which Knight is president. Knight was a party to the proceedings in the trial court but did not move to compel arbitration and is not a party to this appeal. As used in this opinion, the collective term "defendants," referring to BHS and JTKMD, does not include Knight, to whom we refer by his last name.

defendants, and must presume the trial court's ruling as to those questions was correct. On the record we do have, we hold that the trial court reasonably could conclude that Knight through his conduct effectively waived defendants' right to arbitrate.

Because the waiver issue is dispositive of this appeal, we do not reach defendants' challenges to the trial court's other findings and affirm the denial of the motion to compel arbitration.

BACKGROUND

1. Complaints, Discovery, Demurrers

On April 1, 2016, plaintiff Fodor filed a complaint against Knight for breach of contract. Fodor alleged that he and Knight had an oral agreement "to build and operate a multimedia broadcast studio," which Knight breached by locking Fodor out of the studio and keeping Fodor's equipment for eight weeks.

On July 21, 2016, Knight propounded form interrogatories and requests for production of documents on Fodor. The record on appeal includes the form interrogatories but not the requests for production. These discovery documents, however, are referenced in the trial court docket and in a declaration of plaintiffs' counsel submitted in the trial court.

On August 1, 2016, Fodor filed a first amended complaint (FAC) on behalf of himself and HAWI Studio and Sports Surgeons, entities in which he alleged he was a partner and a member, respectively. In addition to Knight, the FAC added as defendants BHS, JTKMD, and Suzanne Sena, an individual. The FAC alleged that JTKMD was "a close corporation controlled completely and solely by Knight" and was "nothing more than Knight's alter ego."

The FAC alleged the following: Fodor and Knight entered into an oral agreement to form and operate HAWI Studio, a multimedia production studio. Shortly thereafter, Fodor, Knight, and a third individual, Bal Rajagopalan, formed Sports Surgeons "for the purpose of producing and publishing multimedia content" regarding " 'sports performance enhancement and injury management.' " Later that year, Knight and Sena, his acting coach, formed BHS, intending that BHS "own and operate" the HAWI studio facilities and "produce and publish the sort of multimedia content" that Sports Surgeons was formed to produce. Knight eventually locked Fodor out of the HAWI Studio facilities and deprived Fodor of his use of the equipment for eight weeks. Knight also informed Fodor through counsel that he no longer intended to honor the agreement regarding HAWI Studio. Knight and Sena then "used the HAWI Studio facilities to produce and publish multimedia content for the purpose of promoting [BHS], JTKMD Inc., and/or various third-party clientele." The FAC alleged causes of action for breach of contract, conversion, breach of fiduciary duty, and unfair business practices.

The trial court docket indicates that Knight filed a demurrer to the FAC on September 27, 2016. The record on appeal does not contain the demurrer or the supporting and opposing papers. The trial court docket also indicates that on October 11, 2016, Knight moved to compel responses to the form interrogatories and requests for production of documents he had propounded, and sought sanctions. That motion and its supporting and opposing papers are also absent from the record on appeal.

The trial court docket does not indicate the trial court ruled on Knight's demurrer to the FAC. On November 15, 2016, Fodor filed a second amended complaint (SAC), again on his own behalf and on behalf of HAWI Studios and Sports Surgeons, and listing the same defendants as in the FAC. In addition to the causes of action alleged in the FAC, the SAC alleged causes of action for common counts of money had and received and goods and services rendered. The factual allegations in the SAC were similar to those in the FAC.

According to the trial court docket, the trial court ruled on Knight's motion to compel discovery responses on November 16, 2016. The record on appeal does not include the ruling, but we may infer the trial court granted both the motion and the request for sanctions because the trial court docket indicates that Fodor applied ex parte for a "stay of execution of the court's order granting defendant's motion [to] compel" and moved for a "protective order, relief from waiver of objections, and vacatur of sanctions." (Capitalization omitted.) The record does not indicate the outcome of Fodor's ex parte application and motion or include any of the documents pertaining to them.

The trial court docket indicates that on December 6, 2016, Knight filed a demurrer and a motion to strike the SAC. The record on appeal does not contain the demurrer or the motion, any of the supporting or opposing papers, or the trial court's ruling. Knight filed an answer to the SAC on July 31, 2017, however, in which he asserted that the trial court had sustained the demurrer as to all causes of action against him except conversion and unfair business practices, an assertion defendants repeat in their appellate briefing. Plaintiffs similarly state in

their appellate briefing that "the trial court granted the demurrer to plaintiffs' SAC."

2. Motion to Compel Arbitration

On August 8, 2017, defendants, but not Knight or Sena, filed a motion to compel arbitration. Defendants attached two agreements in support. One, entitled "Beverly Hills Studios, LLC Production Agreement" (Production Agreement) (boldface and some capitalization omitted), was between BHS and West Multimedia Productions. Knight, as president of JTKMD, signed on behalf of BHS, of which JTKMD was the managing member. Fodor signed as owner of West Multimedia Productions. The agreement included an arbitration clause stating: "In the event of a dispute arising out of the terms of this agreement, such disputes will be resolved by arbitration before a retired judicial officer, with such arbitration being conducted in Los Angeles County, State of California." The clause further provided that the parties agreed to waive their rights to a jury trial, and that the "arbitration may award the prevailing party reasonable attorneys' fees and costs." Apart from the above, the clause was silent as to what procedures would govern the arbitration, including as to discovery.

The second agreement was entitled "Operating Agreement" for Sports Surgeons, LLC (Operating Agreement). (Boldface and some capitalization omitted.) It was signed by Knight as president of JTKMD and by Fodor and Rajagopalan in their individual capacities. The agreement contained an arbitration clause stating: "All disputes arising under or in connection with this Agreement or any matter related to this entity, if not resolved by the parties, shall be resolved by binding arbitration." The clause provided that the arbitrator would be a retired judge

selected by the parties; if the parties could not agree on an arbitrator, any party "shall apply to the presiding judge of the Los Angeles County Superior Court for the appointment of the arbitrator." The clause stated that "[t]he arbitration shall be in conformity with and subject to the provisions applicable to arbitration in Delaware at the time of the notice, including those related to implementation and enforcement of the arbitration award." The clause gave the arbitrator "authority to award costs and attorneys' fees, including the arbitrator's fee." The clause stated, "The testimony of witnesses shall be given under oath and depositions and other discovery may be ordered by the arbitrator."

Plaintiffs opposed defendants' motion. Plaintiffs argued that defendants waived their right to arbitrate by filing demurrers, propounding discovery including "ten broad requests for production" and form interrogatories, and compelling discovery responses over the course of 16 months of litigation. Plaintiffs further argued that the arbitration clause in the Production Agreement was procedurally and substantively unconscionable and did not apply to plaintiffs' causes of action. Finally, plaintiffs argued that defendants should be estopped from invoking the arbitration clause in the Operating Agreement because the trial court in considering the demurrer to the SAC purportedly "would not consider the existence of a written Operating Agreement."

Along with the opposition, plaintiffs' counsel filed a declaration summarizing his communications with Knight's counsel and asserting that Knight's counsel never attempted to arbitrate the dispute. The declaration purported to attach a copy of the discovery requests propounded by Knight, although the

copy of the declaration in the record on appeal contains only the form interrogatories, not the requests for production. We cannot discern from the record whether the requests for production were never attached to the declaration, or whether the copy of the declaration in the clerk's transcript is incomplete.

Defendants filed a reply to the opposition, arguing that it was Knight, not defendants, who propounded discovery and engaged in motion practice, and "[n]o case has found a waiver of the right to compel arbitration based on the acts of another party." Defendants further argued that the Production Agreement's arbitration clause was broad enough to encompass plaintiffs' causes of action and was not unconscionable. Defendants disputed plaintiffs' contention that the trial court had refused to consider the Operating Agreement in ruling on the demurrer to the SAC, and argued that in any event, defendants had not yet appeared in the case at that time and should not be estopped by anything that occurred prior to their appearance.

Following a hearing, the trial court denied defendants' motion to compel arbitration. In its order, the trial court found that the arbitration provisions in the two agreements applied to all causes of action except breach of contract, which was "based upon an oral agreement between Fodor and Knight regarding the HAWI Studio." The trial court found, however, that "[t]he actions of Defendants constitute a waiver of the arbitration clauses." The trial court explained: "John Knight is the principal of both [BHS] and [JTKMD]. He signed the Production Agreement and the Sports Surgeons LLC Operating Agreement in his capacity as managing member and president of [BHS] and [JTKMD]. [¶] The acts of John Knight in this litigation are attributable to the

entities; the discovery he propounded benefits his companies. Further, John Knight demurred and moved to strike twice, resulting in a Second Amended Complaint. [¶] This action has been pending for nearly one year and one-half."

The trial court also cited and quoted from Code of Civil Procedure[2] section 1281.2, subdivision (c), stating that under that provision, "the Court [may] refuse enforcement of the arbitration clause where, 'a party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising ou[t] of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common[ ] issue of law and fact.' "

Defendants timely appealed from the trial court's order pursuant to section 1294, subdivision (a).

DISCUSSION

Defendants challenge the trial court's findings that the arbitration agreements did not encompass the cause of action for breach of oral contract, that defendants waived their right to arbitrate, and that section 1281.2, subdivision (c) applied. We conclude that defendants have failed to show error in the trial court's finding of waiver, and therefore do not reach defendants' other challenges.

A. Standard of Review

"Whether a party has waived the right to compel arbitration is generally a question of fact. A trial court's

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[2] Undesignated statutory citations are to the Code of Civil Procedure.

finding of waiver is therefore 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." ' " (*Sprunk v. Prisma LLC* (2017) 14 Cal.App.5th 785, 794 (*Sprunk*), quoting *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196 (*St. Agnes*).)

Here, although the parties do not dispute the underlying litigation events, defendants challenge the trial court's factual inferences that the actions of defendants' principal, Knight, were sufficiently inconsistent with an intent to arbitrate and prejudicial to plaintiffs to constitute a waiver of the right to arbitrate, and that the relationship between Knight and defendants was such that his actions could be attributed to them. "Because the trial court could reasonably draw different inferences from the undisputed events, we apply the substantial evidence standard in reviewing the court's findings on these issues." (*Sprunk*, *supra*, 14 Cal.App.5th at p. 795.) Under this standard, "[w]e 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.' " (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 443 (*Lewis*).)

In conducting our review, we are mindful that California law "reflects a strong policy favoring arbitration agreements," and therefore "waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195.)

Defendants' primary argument against waiver is that the trial court erred in attributing Knight's litigation conduct to them and finding waiver thereby. In their reply brief, defendants also dispute the trial court's conclusion that Knight's conduct, even if attributable to defendants, constituted a waiver. We begin with the second contention.

B. Defendants Have Failed To Show Error In The Trial Court's Conclusion That Knight's Litigation Conduct Constituted Waiver Of The Right To Arbitrate

1. Applicable law

As a general matter, if the trial court "determines that an agreement to arbitrate [a] controversy exists," it shall order the parties to arbitration upon petition of a party to the agreement. (§ 1281.2.) There are exceptions, however, including when "[t]he right to compel arbitration has been waived by the petitioner." (*Id.*, subd. (a).)

"[N]o single test delineates the nature of the conduct that will constitute a waiver of arbitration." (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195.) Our Supreme Court has stated that factors articulated in *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992 (*Sobremonte*) "are relevant and properly considered in assessing waiver claims." (*St. Agnes*, at p. 1196.) The 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.' " (*Ibid.*)

Here, the trial court found that defendants, through Knight, had waived their right to arbitrate by propounding discovery and filing demurrers and motions to strike. Although the trial court did not expressly discuss the *Sobremonte* factors listed above, based on its factual findings, we infer the trial court impliedly found Knight's conduct was inconsistent with arbitration, took advantage of discovery procedures not available in arbitration, and was prejudicial to plaintiffs. We thus review the record for substantial evidence supporting those implied findings. (See *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1195 (*Groom*) [assuming trial court impliedly found prejudice and reviewing the record for substantial evidence in support of the implied finding].)

2. Defendants have failed to show error in the trial court's implied finding that Knight's propounding and compelling responses to discovery prejudiced plaintiffs

Courts have found prejudice, and therefore waiver, when defendants seeking to compel arbitration have "used the discovery process of the court to gain information about plaintiff's case which defendants could not have gained in arbitration." (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 215 (*Davis*); see also *Berman v. Health Net*

(2000) 80 Cal.App.4th 1359, 1367.) In *Davis*, for example, the defendants "used court discovery procedures" to obtain 1,600 pages of documents and depose the plaintiff before moving to compel arbitration. (*Davis*, *supra*, 59 Cal.App.4th at p. 213.) The Court of Appeal affirmed the trial court's implied finding that the discovery was prejudicial: "After obtaining discovery from plaintiff by court processes, defendants then belatedly sought to change the game to arbitration, where plaintiff would not have equivalent discovery rights." (*Id.* at p. 215.)

Here, the record reflects that Knight served form interrogatories and requests for production of documents on Fodor. He then invoked the power of the trial court and successfully moved to compel Fodor to respond to those requests, obtaining sanctions against Fodor in the process. Plaintiffs would not "have equivalent discovery rights" in arbitration. (*Davis*, *supra*, 59 Cal.App.4th at p. 215.) The Production Agreement's silence as to discovery procedures "is taken as an agreement to operate without such procedures." (*Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 783, fn. 1 (*Christensen*); *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 690 ["Discovery is *not* a right in arbitration as it is in judicial proceedings."].) The Operating Agreement stated that "discovery may be ordered by the arbitrator," but did not provide for any discovery as a matter of right. Thus, we reject defendant's argument that "the arbitration provisions do not foreclose or limit [plaintiffs'] discovery rights." Indeed, under the agreements here, plaintiffs

would have *no* right to discovery in arbitration, absent permission from the arbitrator or a stipulation from defendants.[3]

In their reply brief, defendants contend that "it is doubtful" that "propounding an initial round of discovery[ ] would constitute a waiver." Defendants cite no authority for this proposition. Instead, they cite *St. Agnes* for the proposition that a party does not waive arbitration when it "d[oes] not seek discovery that was unavailable in arbitration." As we have explained, Knight did seek discovery that plaintiffs would not have a right to obtain in arbitration.

To the extent defendants are suggesting that Knight's "initial round" of discovery was not substantial enough to prejudice plaintiffs, they cite no supporting authority. Even had they done so, our review is impeded because the record as designated by defendants is incomplete and does not include all of the discovery propounded by Knight, specifically the requests for production. Nor does it include any documents related to Knight's motion to compel discovery responses. Without those documents, we have no basis to countermand the trial court's

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[3] Contrary to defendants' position at oral argument, the California Arbitration Act (§ 1280 et seq.) does not grant plaintiffs a right to discovery in arbitration. Although section 1283.05 contains discovery procedures applicable to arbitration, those procedures apply by default only to arbitration agreements covering claims based on personal injury or death. (§ 1283.1, subd. (a).) The procedures are not applicable to other types of arbitration agreements unless "the parties by their agreement so provide." (*Id.*, subd. (b).) Here, neither arbitration clause referred to any provision of the California Arbitration Act, so there is no reason to conclude the parties agreed to abide by the procedures under section 1283.05.

implied finding of prejudice. Defendants as the appealing party have the "burden of showing error by an adequate record" (*Gonzalez v. Rebollo* (2014) 226 Cal.App.4th 969, 977 (*Gonzalez*)), and "[w]e cannot presume error from an incomplete record" (*Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1412 (*Christie*)).

Although, as we previously noted, it is unclear from the record whether plaintiffs included the actual requests for production with their opposition to the motion to compel arbitration, plaintiffs expressly referred to the requests in their opposition and accompanying counsel's declaration, and the requests were already before the trial court (and in the trial court record) by virtue of Knight's successful motion to compel responses to those requests. We presume therefore the trial court took them into account when making its findings as to prejudice. In the absence in the appellate record of those requests and the papers related to Knight's motion to compel responses, we must presume the trial court correctly found that the requests for production and discovery motion practice, along with the form interrogatories, were prejudicial to plaintiffs.

3. Defendants have failed to show error in the trial court's implied finding that Knight's demurrers and motions to strike were inconsistent with an intent to arbitrate and prejudicial to plaintiffs

Litigating the merits of a lawsuit through demurrers and motions to strike can support a finding that the party has waived the right to arbitrate by taking actions inconsistent with an intent to arbitrate. (*Lewis*, *supra*, 205 Cal.App.4th at pp. 448-449.) " 'Partial or piecemeal litigation of issues in

dispute, through pretrial procedures, may in some instances justify a finding of waiver . . . .' " (*Id.* at p. 448.) " 'The trial court must . . . view the litigation as a whole and determine if the parties' conduct is inconsistent with a desire to arbitrate.' " (*Id.* at p. 449.) *Lewis*, for example, affirmed the trial court's conclusion that a defendant's filing two demurrers and a motion to strike over the course of five months before moving to compel arbitration was inconsistent with an intent to arbitrate. (*Ibid.*) *Groom*, *supra*, 82 Cal.App.4th 1189, in contrast, concluded that successfully demurring to two of nine causes of action did not constitute litigation on the merits supporting waiver, because the two causes of action were "merely alternative legal theories based on the same underlying facts, which have not been litigated." (*Id.* at p. 1195.)

Here again our review is impeded by an incomplete record. Knight filed two demurrers and a motion to strike, but defendants failed to designate in the record on appeal those filings, the papers in support or opposition, or the trial court's rulings. Apart from the parties agreeing in their appellate briefing that the second demurrer was sustained to some degree, we have no way to determine the content of the demurrers and motion to strike, the parties' arguments, the trial court's determinations, and the impact, if any, on the litigation. Thus, we cannot " 'view the litigation as a whole' " (*Lewis*, *supra*, 205 Cal.App.4th at p. 449) or determine, for example, whether any struck causes of action were "merely alternative legal theories" or independent claims based on separate facts (*Groom*, *supra*, 82 Cal.App.4th at p. 1195). Nor can we determine whether these findings were not prejudicial to plaintiffs.

As with the trial court's finding regarding discovery, defendants contend "it is doubtful" that "filing demurrers" constitutes waiver, citing *Groom*, but offer no further argument. *Groom*, however, acknowledged that litigation through pretrial procedures could justify a finding of waiver "depend[ing] on the circumstances." (*Groom*, *supra*, 82 Cal.App.4th at p. 1195.) Again, defendants have failed to provide an adequate record to assess error, and their challenge to the trial court's express and implied findings fails for that reason. (*Christie*, *supra*, 202 Cal.App.4th at p. 1412.)

C. Defendants Have Failed To Show Error In The Trial Court's Conclusion That Knight's Conduct Was Attributable To Them

Defendants contend that the trial court wrongly attributed Knight's conduct to them, and note that they had not yet appeared in the litigation at the time Knight conducted discovery and filed his demurrers and motion to strike. Defendants argue that the trial court should have considered each defendant's actions separately for purposes of waiver, citing our decision in *Zamora v. Lehman* (2010) 186 Cal.App.4th 1 (*Zamora*). Because defendants themselves did not propound discovery or file any demurrers or motions apart from the motion to compel arbitration, they claim they could not have waived their right to arbitrate the dispute. We disagree.

One purpose of the equitable doctrine of waiver in the context of arbitration is to prevent "procedural gamesmanship": " '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.' " (*Christensen*, *supra*, 33 Cal.3d at p. 784.) Decisions also have held " ' "that the

'bad faith' or 'wilful misconduct' of a party may constitute a waiver and thus justify a refusal to compel arbitration." ' " (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196, quoting *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 983.) *Davis*, for example, quoting *Christensen* and applying these principles, called the defendants' moving to compel arbitration after propounding extensive judicial discovery a "vice" that could be characterized, among other things, as " 'bad faith misconduct' " and " 'gamesmanship.' " (*Davis*, *supra*, 59 Cal.App.4th at p. 215.)

Here, on the limited record before us, we conclude that the trial court reasonably could find that Knight and defendants engaged in gamesmanship by exploiting the legal distinction between the individual and the entities he controlled to obtain benefits through court proceedings while attempting to avoid waiver of the right to arbitrate.

This implied finding is supported by substantial evidence. The trial court found that Knight was defendants' "principal," a finding defendants do not dispute. Knight himself declared that he was president of JTKMD, and the Production Agreement lists JTKMD as the "Managing Member" of BHS. Moreover, Knight and defendants shared trial counsel. The trial court therefore reasonably could conclude that Knight was dictating the litigation conduct of defendants, including when to have them appear in the litigation, whether to include them in discovery and motion practice, and if and when to move to compel arbitration. The trial court also reasonably could conclude that defendants would have access to any discovery Knight obtained from plaintiffs through court procedures, and that Knight could tailor his discovery and motion practice to benefit not only himself, but defendants as well. Under these circumstances, the fact that

Knight and the defendants were legally separate and defendants did not formally appear in the case or participate in discovery and motion practice was immaterial, because defendants nonetheless were receiving the benefits of judicial processes before appearing and asserting their right to arbitrate.[4]

We acknowledge the possibility that were we to review the actual discovery and motion practice documents in this case, we might conclude that they were not of significant benefit to defendants and there was no other indication that Knight intended any gamesmanship by engaging in litigation while the entities he controlled waited to move to compel arbitration. Again, however, we are hampered by the incomplete record, and must assume that the documents absent in the appellate record supported the trial court's findings. (See *Gonzalez*, *supra*, 226 Cal.App.4th at p. 977 ["Without a complete record, we are unable to determine whether substantial evidence supported the implied findings underlying the trial court's order."].)

Our decision in *Zamora* does not, as defendants argue, compel the conclusion that the trial court could not attribute Knight's actions to defendants for purposes of waiver. In *Zamora*, a bankruptcy trustee sued three former officers of a

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[4] Knight initially propounded discovery following service of the original complaint, before plaintiffs named JTKMD and BHS as defendants in the FAC, a fact that arguably weighs against a finding that Knight and defendants were acting in concert. Most of Knight's conduct, however, including invoking the trial court's power to compel discovery responses and impose sanctions, and twice demurring and moving to strike the pleadings, took place after plaintiffs named defendants in the FAC and Knight was able to coordinate defendants' litigation strategy with his own through common counsel.

defunct company for breach of fiduciary duty. (*Zamora*, *supra*, 186 Cal.App.4th at p. 5.) Four months before trial, the defendants moved to compel arbitration. (*Ibid.*) We held that two of the officers, Lehman and Weiss, had waived their right to arbitrate by, among other things, unduly delaying before asserting their right to arbitrate, engaging in extensive discovery that would not have been available in arbitration, and filing a counterclaim. (*Id.* at pp. 17-19.) We held that the third officer, Yukelson, had not waived the right to arbitrate because any delay in asserting that right was due to his attempts to settle the case, not litigate it, and his only participation in discovery was to question a witness for two hours in a deposition noticed by the other defendants. (*Id.* at pp. 19-20.)

In *Zamora*, we did not address the question of whether one defendant's conduct could be attributed to another for purposes of waiver analysis because that question was not at issue in that appeal. Moreover, while we did assess waiver separately for each defendant, the factual circumstances were completely different from those in this case. Yukelson had no control over his fellow defendants, both of whom were individuals. He did not act in concert with them, but conducted his own litigation strategy, including, notably, attempting to settle the case while Lehman and Weiss engaged in discovery and filed a counterclaim. Under those circumstances, there would be no basis to attribute the actions of Lehman and Weiss to Yukelson. Here, in contrast, Knight controlled defendants, had the same litigation counsel, and could dictate their litigation strategy, thus giving rise to an inference of procedural gamesmanship.

DISPOSITION

The order is affirmed. Plaintiffs are awarded their costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

CURREY, J.*

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