Filed 11/20/19 Nemore v. Renovate America, Inc. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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

REGINALD NEMORE et al., Plaintiffs and Respondents, v. RENOVATE AMERICA, INC., Defendant and Appellant.	B294459 (Los Angeles County Super. Ct. No. BC701810)

APPEAL from an order of the Superior Court of Los Angeles County. Carolyn B. Kuhl, Judge. Affirmed.

Reed Smith, Jesse L. Miller, James M. Neudecker, Matthew T. Peters, and Dennis Peter Maio for Defendant and Appellant.

Hogan Lovells, Michael M. Maddigan and Vassi Iliadis; Public Counsel, Cindy Panuco, Stephanie Carroll, and Nisha Kashyap; Bet Tzedek Legal Services, Jenna Miara and Jennifer Sperling for Plaintiffs and Respondents.

Defendant and appellant Renovate America, Inc. (Renovate) appeals from an order denying its petition to compel arbitration of claims in a class action complaint filed by plaintiffs and respondents Reginald Nemore, Violeta Senac, and Allen Bowen (collectively, plaintiffs).[1] We affirm the trial court's order.

BACKGROUND

The parties

Plaintiffs are homeowners who obtained financing from the County of Los Angeles (County) through its Property Assessed Clean Energy (PACE) program for energy efficiency or water saving improvements to their homes. Plaintiffs Senac and Bowen are ages 87, and 69, respectively. Renovate is one of two private companies retained by the County to administer the PACE program.[2] Renovate markets its PACE financing under the brand name "HERO."

The PACE program

The California legislature introduced the PACE program in 2008 as a method for financing energy efficiency and water conservation improvements for California homeowners. The primary participants in a PACE program are (1) a governmental entity such as the County; (2) a non-governmental entity, usually a private business that administers the program for the governmental entity; (3) home improvement contractors who

---

[1] Aurelia Millender is also a named plaintiff in this action; however, Renovate's petition does not seek to compel arbitration of Millender's claims.

[2] The County also contracted with another company, Renew Financial, to serve as a second PACE program administrator.

solicit homeowners to install energy efficient or water saving improvements and who perform the work; and (4) homeowners who contract for the improvements.

The County established its own PACE program in 2015. The County's PACE program authorizes it to disburse funds directly to a home improvement contractor who installs energy efficient or water saving improvements in a home and to issue bonds to secure funding for those disbursements. The cost of the improvements is financed pursuant to an Assessment Contract between the County and the homeowner. The Assessment Contract grants the County a lien on the homeowner's property in the amount of the principal, capitalized interest, and fees, and requires the homeowner to repay the financing through an additional annual property tax assessment. The lien on the homeowner's property runs with the land and has a priority position over any other mortgage or lien. The Assessment Contract does not contain an arbitration provision.

The County contracted with Renovate to administer the PACE program. Renovate's obligations as a PACE program administrator are set forth in an Administration Contract. Those obligations include managing the application process for homeowner PACE financing, and ensuring and implementing consumer protection measures such as "best in class protections for property owners from actions such as, including but not limited to, predatory lending, unscrupulous contractors and poor quality assessment servicing" and "special protection for seniors over 65 years of age to confirm they clearly understand the terms of the financing." The Administration Contract does not contain an arbitration provision.

Plaintiffs entered into home improvement contracts with contractors who installed PACE improvements in plaintiffs' homes. The home improvement contracts specify the PACE improvements to be installed; the scope of work, price, and timing of the improvements and installation; and the parties' responsibilities regarding insurance and standards of materials and workmanship. The home improvement contracts also contain arbitration provisions requiring binding arbitration "[i]n the event of any dispute, or a claim arising out of or relating to this agreement, or the enforcement or interpretation hereof"[3] or

---

[3] Senac's and Bowen's home improvement contracts contain arbitration provisions that state in relevant part: "In the event of any dispute, or a claim arising out of or relating to this agreement, or the enforcement or interpretation hereof, the parties agree that any such dispute or claim shall be determined exclusively by binding arbitration before the Better Business Bureau if Contractor is a member of the same, or if Contractor is not a member of the BBB, then in accordance with the Construction Industry Rules of the American Arbitration Association."

Senac entered into a second home improvement contract containing an arbitration provision that states in part: "Any controversy or claim arising out of or related to this contract, or breach thereof, shall be settled by binding arbitration in accordance with the construction industry arbitration rules of the American Arbitration Association."

Nemore initialed a box on his home improvement contract that states: "ARBITRATION OWNER: Initial this box if you agree to arbitration. Review the 'Arbitration of Disputes' section attached." The home improvement contract initialed and signed by Nemore that is contained in the record on appeal does not include an "Arbitration of Disputes" attachment.

of "any controversy or claim arising out of or related to this contract, or breach thereof."

The current lawsuit

Plaintiffs filed this action against Renovate and the County on behalf of themselves and other homeowners who entered into a HERO assessment contract with the County between March 1, 2015 and March 31, 2018.[4] They asserted causes of action against Renovate for financial elder abuse, breach of the Administration Contract under a third party beneficiary theory, violation of the Unfair Competition Law, and declaratory relief.[5]

Renovate filed a petition to compel arbitration and a request to stay judicial proceedings pending arbitration, invoking

---

[4] Plaintiffs asserted their claims on behalf of a loan class, consisting of homeowners in Los Angeles County who entered into a HERO assessment contract with the County during the class period where that assessment contract was recorded as a lien against the homeowner's real property and either (a) the homeowner's debt-to-income ratio (DTI) (including the homeowner's annual PACE obligation) at the time the contract was executed was 50 percent or more, or (b) the homeowner's DTI (including the annual PACE obligation) at the time the contract was executed was less than 50 percent, but left the household with residual monthly income of less than $1,000 per person, or $1,000 plus $500 for each additional household member. Senac, Millender, and Bowen also asserted claims on behalf of a subclass of persons who were 65 years old or older when they entered into the PACE assessment agreement.

Other plaintiffs filed a similar class action against Renew.

[5] Against the County, plaintiffs asserted causes of action for elder abuse, cancellation of taxes, and declaratory relief.

the arbitration provisions in the home improvement contracts between plaintiffs and contractors who installed PACE improvements. Renovate argued that even though it was not a signatory to the home improvement contracts, the doctrine of equitable estoppel applied to compel plaintiffs to arbitrate their claims against Renovate pursuant to the arbitration provisions in those contracts. Plaintiffs opposed the petition, arguing that the arbitration provisions in the home improvement contracts were unenforceable, and that even if the arbitration provisions were enforceable, equitable estoppel did not apply.

After a December 5, 2018 hearing, the trial court denied Renovate's petition, concluding that the doctrine of equitable estoppel did not apply to compel plaintiffs to arbitrate their claims against Renovate. This appeal followed.

DISCUSSION

I. Standard of review

Whether an arbitration agreement applies to a controversy is a question of law subject to de novo review when there is no conflicting extrinsic evidence to aid in interpreting the agreement. (*Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 12.) De novo review also applies to the legal determination of whether a nonsignatory to an arbitration agreement can enforce its terms. (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 708 (*Molecular Analytical*).)

II. Applicable law

Arbitration is a matter of contract; generally, one must be a party to an arbitration agreement to have the right to invoke it. (*Molecular Analytical, supra,* 186 Cal.App.4th at p. 705.) Certain limited exceptions to this rule allow a nonsignatory to an agreement containing an arbitration clause to compel arbitration

of a dispute that comes within the scope of the agreement. (*DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1353 (*DMS Services*).) The exception which Renovate claims applies here is the doctrine of equitable estoppel.

"Under the doctrine of equitable estoppel, 'if a plaintiff relies on the terms of an agreement to assert his or her claims against a nonsignatory defendant, the plaintiff may be equitably estopped from repudiating the arbitration clause of that very agreement.' [Citation.]" (*Molecular Analytical, supra,* 186 Cal.App.4th at p. 714.) "For the doctrine to apply, 'the claims the plaintiff asserts against the nonsignatory must be dependent upon, or founded in and inextricably intertwined with, the underlying contractual obligations of the agreement containing the arbitration clause.' [Citation.]" (*Id.* at p. 715.) The purpose of the doctrine is "to prevent a party from using the terms or obligations of an agreement as the basis for his claims against a nonsignatory, while at the same time refusing to arbitrate with the nonsignatory under another clause of that same agreement." (*Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 221 (*Goldman*).)

In the present case, the relevant inquiry is whether plaintiffs use the substantive terms of the home improvement contracts containing the arbitration provision as the foundation for their claims against Renovate, a nonsignatory. If the claims asserted against Renovate do not rely on any obligation imposed by the home improvement contracts, then plaintiffs "have engaged in no conduct that is 'contrary to equity,' and there is no basis in equity for requiring them to arbitrate with parties with whom they have no arbitration agreement." (*Goldman, supra,* 173 Cal.App.4th at p. 221.) California law governs this

determination. (*Arthur Anderson, LLP v. Carlisle* (2009) 556 U.S. 624, 631 [state law governs whether an arbitration clause is enforceable against a nonsignatory].)

III. Plaintiffs' claims against Renovate

To determine whether plaintiffs' claims against Renovate are dependent upon, or founded in and inextricably intertwined with the underlying contractual obligations of the home improvement contracts, we examine the facts alleged in their complaint. (*Goldman, supra,* 173 Cal.App.4th at pp. 229-230.)

In the general allegations of their complaint, plaintiffs allege that Renovate did not use licensed mortgage brokers to market or originate PACE loans, but instead used registered contractors to sell PACE financing and to sell and install PACE improvements. Typically, contractors introduced homeowners to the PACE program, controlled the financing application process, and obtained homeowners' signatures on PACE contracts. Plaintiffs allege that Renovate instructed its registered contractors to base the amount of improvements sold to a homeowner on the homeowner's available equity rather than the homeowner's ability to repay. As a result, PACE loans are typically larger than traditional home improvement loans. Because the PACE liens run with the land and are accorded priority status ahead of any other mortgage or lien, homeowners with PACE liens have difficulty selling or refinancing their homes.

Each of the named plaintiffs allege that they entered into PACE assessment contracts with the County to finance the cost of various energy efficient or water saving improvements and that liens securing the financing were recorded against their properties. Plaintiffs further allege that they receive fixed

incomes, primarily monthly Social Security payments; that entering into PACE assessment contracts caused their respective DTI ratios to increase substantially; and that repaying the PACE financing will consume most of their annual incomes.

In the cause of action for elder abuse, plaintiffs Senac and Bowen allege, based on the general allegations of the complaint, that Renovate "has taken, secreted, appropriated, obtained and/or retained the property of the Elder Subclass Members."

In their breach of contract cause of action, plaintiffs allege that Renovate breached its obligations under the Administration Contract to "ensure best in class protections for property owners" against predatory lending and poor assessment servicing and to provide "special" or heightened protections for senior citizens. Plaintiffs further allege Renovate's breaches have caused them damage, including loss of funds they have paid in connection with the PACE loans, increased risk of foreclosure, barriers to obtain refinancing or other debt secured by their homes, reduced value of their homes, and encumbrances that reduce the equity in their homes.

In their cause of action for violation of the Unfair Competition Law, plaintiffs allege that Renovate engaged in unlawful, unfair, or fraudulent business practices by (a) breaching its duties to plaintiffs under the Administration Contract, (b) failing to screen and monitor its registered contractors in accordance with its own policies, (c) charging an above-market rate of interest on PACE loans and a rate of interest in excess of the risks of return of principal, (d) encouraging predatory lending by determining PACE financing eligibility without considering homeowners' ability to repay, and (e) encouraging predatory lending by informing registered

contractors how much funding plaintiffs qualified for based on the equity in their homes. Plaintiffs allege that because of Renovate's unlawful, unfair, or fraudulent practices, they have incurred actual financial losses and injuries including first priority PACE liens that require payment and may trigger foreclosure by the County or by pre-existing conventional mortgage lenders.

In their declaratory relief cause of action, plaintiffs allege an actual controversy exists between them and Renovate regarding their legal rights and remedies toward one another in connection with the PACE program and PACE liens, and that they are entitled to a judicial declaration extinguishing the PACE liens on the properties, cancelling their obligations under the Assessment Contracts, and recovering payments made in connection with the PACE program and PACE liens.

IV. Equitable estoppel does not apply

Plaintiffs' complaint does not allege a breach of any obligation under the home improvement contracts, and does not rely on any provision in those contracts to support any of the asserted causes of action. (See, e.g., *DMS Services, supra,* 205 Cal.App.4th at p. 1355 [complaint alleging breach of duty against third party claims administrator under claims administration agreement did not and could not allege breach of workers' compensation insurance policies to which administrator was not a party]; *Goldman, supra,* 173 Cal.App.4th at pp. 213-214 ["The sine qua non for allowing a nonsignatory to enforce an arbitration clause based on equitable estoppel is that the claims the plaintiff asserts against the nonsignatory are dependent on or inextricably bound up with the contractual obligations of the agreement containing the arbitration clause"].) The contractual obligations

in the home improvement contracts -- to supply and install "standard grade" or "builders grade" PACE improvements in plaintiffs' homes,[6] are unrelated to the claims asserted against Renovate, which concern financing of the improvements. There is accordingly no basis for finding that the claims against Renovate are "intimately founded in" or "inextricably entwined with" plaintiffs' respective home improvement contracts and no basis for applying equitable estoppel to compel plaintiffs to arbitrate those claims under the arbitration provisions of their home improvement contracts.

As support for its equitable estoppel argument, Renovate argues that the arbitration clauses in plaintiffs' home improvement contracts, which cover any "claim arising out of or relating to this agreement, or the enforcement or interpretation hereof" are broad enough to cover the claims asserted against it. The standard for assessing whether a claim falls within a broad contractual arbitration provision is different, however, from the standard for equitable estoppel. The applicable standard is whether a claim is "intimately founded in" or "inextricably entwined with" a contract containing an arbitration clause. (*Goldman, supra,* 173 Cal.App.4th at p. 221.) That standard is not met here.

Renovate concedes that plaintiffs' claims do not rely on or make reference to their home improvement contracts. It erroneously argues, however, that equitable estoppel applies because plaintiffs' claims "presume the existence" of the home

---

6 Nemore's home improvement contract covers solar panel installation; Senac's contracts cover installation of toilets, windows, doors, and roofing material; and Bowen's contract covers solar panels and windows.

improvement contracts. The court in *Goldman* rejected this same argument: "'[P]resum[ing] the existence of ' an agreement is not a stand-alone principle, but merely an elaboration on the underlying principle, stated in *all* the cases: actual reliance on the terms of the agreement to impose liability on the nonsignatory. . . . [Defendants] simply omit the necessary central core of the standard: the plaintiff's allegations must rely on or depend on "'the terms of the written agreement"' [citation], not simply on the fact that an agreement exists." (*Goldman, supra*, 173 Cal.App.4th at p. 231.)

Turtle Ridge Media Group, Inc. v. Pacific Bell Directory (2006) 140 Cal.App.4th 828 (*Turtle Ridge*), on which Renovate relies, does not support its position. In that case, SBC Smart Yellow Pages (SBC) awarded a phonebook delivery contract to Clientlogic, who together with Turtle Ridge had submitted a successful coordinated bid for that work. The SBC/Clientlogic contract accordingly named Turtle Ridge as Clientlogic's sole approved subcontractor. (*Id.* at pp. 831, 834.) The Clientlogic/Turtle Ridge subcontract expressly incorporated by reference the SBC/Clientlogic contract. The SBC/Clientlogic contract contained an arbitration clause covering "any controversy arising under, out of, in connection with, or relating to" the contract. (*Id.* at p. 831.) Unknown to Turtle Ridge, SBC had deliberately inflated the number of phonebooks to be delivered, defrauding Turtle Ridge because it had calculated its subcontract price based on the inflated number. (*Ibid.*) Turtle Ridge sued SBC, who moved to compel arbitration of Turtle Ridge's claims. SBC argued that Turtle Ridge's claims arose from the subcontract with Clientlogic, which incorporated by reference

the arbitration provision in the SBC/Clientlogic contract. (*Id.* at p. 832.)

The court in *Turtle Ridge* applied equitable estoppel to compel arbitration, concluding that Turtle Ridge's claims against SBC were legally intertwined with the subcontract that contained an incorporated arbitration clause. (*Turtle Ridge, supra*, 140 Cal.App.4th at p. 834.) The court explained that "the allegations of Turtle Ridge's complaint presupposed the existence of the contract and subcontract as part of a tripartite, ongoing relationship that benefitted SBC, Clientlogic and Turtle Ridge." (*Ibid.*)

There is no similar intertwining of plaintiffs' claims against Renovate with the provisions of the home improvement contracts. Plaintiffs do not refer to, rely on, or support their claims with any term or provision in the home improvement contracts, nor do they allege any breach of those provisions. *Turtle Ridge* accordingly is distinguishable.

Lucas v. Hertz Corp. (N.D.Cal. 2012) 875 F.Supp.2d 991 (*Lucas*), a case also cited by Renovate, is equally distinguishable. In that case, the United States District Court of the Northern District of California held that Hertz Corporation could compel arbitration of the plaintiffs' claims against it pursuant to an arbitration clause in a car rental contract between the driver, and Hertz's licensee, a Costa Rican car rental company. Hertz was not a signatory to the contract. (*Id.* at p. 995.) The plaintiffs sued Hertz for strict liability and negligence, alleging that Hertz placed a defective car into the stream of commerce and failed to maintain the vehicle in a safe condition. (*Id.* at p. 997.) The court in *Lucas* found that "the entire factual basis" for the

plaintiffs' claim against Hertz "relies upon the existence of the car rental agreement." (*Id.* at p. 1003.)

Here, the factual basis for plaintiffs' claims is not the existence of the home improvement contracts or any alleged breach thereunder. Rather, plaintiffs' claims are based squarely on Renovate's obligations under the Administration Contract to "ensure best in class protections" against predatory lending and to "[p]rovide special protection for seniors over 65 years of age to confirm they clearly understand the terms of the financing."

Renovate argues that plaintiffs' claims against it are "intimately founded in and intertwined with" the terms and obligations of the home improvement contracts because they are premised on a "fundamental term" of those contracts -- the price term. Renovate contends: (1) without the price term and an obligation by plaintiffs to repay the cost of the PACE improvements, no funds would have been disbursed by the County; (2) without the County's disbursement of funds on plaintiffs' behalf, plaintiffs would have no repayment obligation; (3) absent any repayment obligation by plaintiffs, Renovate would have no obligation to determine their ability to repay; and (4) without any obligation by Renovate to determine plaintiffs' ability to repay, there would be no failure to discharge any obligation. No authority supports the application of equitable estoppel based on a similarly attenuated chain of reasoning. Case authority is to the contrary.

In *Kramer v. Toyota Motor Corp.* (9th Cir. 2013) 705 F.3d 1122 (*Kramer*) the Ninth Circuit, applying California law, rejected a similar argument by nonsignatory defendants seeking to enforce an arbitration provision in sales contracts signed by the plaintiffs. The plaintiffs in *Kramer* were purchasers of

Toyota vehicles who sued Toyota Motor Corporation, and Toyota Motor Sales, U.S.A, Inc. (collectively, Toyota) for defective brake systems. The plaintiffs purchased their vehicles on credit by entering into purchase agreements with various Toyota dealerships. The agreements set forth the terms of the sales, including the purchase price, and contained arbitration clauses. (*Id.* at p. 1124.) In affirming the order denying Toyota's petition to compel arbitration, the Ninth Circuit rejected Toyota's argument that the plaintiffs' claims relied on the price term of the purchase agreements because they sought damages for restitution or diminution in value of their vehicles:

> "Toyota erroneously equates Plaintiffs' purchase of the Class Vehicles and the existence of Purchase Agreements between Plaintiffs and the Dealerships with interrelatedness between Plaintiffs' claims and the obligations of the Purchase Agreements. Plaintiffs do not seek to enforce or challenge the terms, duties, or obligations of the Purchase Agreements. In fact, according to Plaintiffs' First Amended Complaint, the only operative documents are Toyota's marketing materials and express written warranties, which provide the basis of the false advertising claim."

(*Kramer, supra*, 705 F.3d at p. 1132.)

Similarly, plaintiffs in this case do not seek to enforce any of the terms or obligations in their respective home improvement contracts. The only operative agreement is the Administration Contract and Renovate's alleged breach of its duties under that agreement.

The claims asserted against Renovate are not founded in or inextricably entwined with the terms or obligations of the home

improvement contracts that contain arbitration provisions. The trial court did not err in denying the motion to compel arbitration.

DISPOSITION

The order denying the petition to compel arbitration is affirmed. Plaintiffs shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT