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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

LAKE BALBOA INVESTMENTS, LLC, Plaintiff and Respondent, v. J&J MAYFAIR, LLC, et al., Defendants and Appellants.	B254449 (Los Angeles County Super. Ct. No. KC066335)

APPEAL from an order of the Superior Court of Los Angeles County. Dan Thomas Oki, Judge. Affirmed.

Law Offices of Michael B. Montgomery and Michael B. Montgomery for Defendants and Appellants.

Russell J. Thomulka for Plaintiff and Respondent.

After Lake Balboa Investments, LLC (Lake Balboa) sued J&J Mayfair, LLC and others (Mayfair), Mayfair moved for an order compelling arbitration. The trial court denied the motion, and Mayfair appeals. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Lake Balboa sued Mayfair for breach of contract, specific performance, an accounting, and breach of fiduciary duty in a dispute arising out of an investment in a limited liability corporation that owned real estate. Mayfair moved for an order compelling arbitration based upon an arbitration provision in the written contract. In article X, section 13, the contract set forth that disputes would be resolved by arbitration, and then provided: "'NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHT YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.' [¶] 'WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION" PROVISION TO NEUTRAL ARBITRATION.'"

No party initialed this provision of the contract. Lake Balboa opposed the motion because the arbitration provision, by its own terms, required the parties to initial that clause of the agreement, and no party had done so. The court denied the motion to compel arbitration.

DISCUSSION

Mayfair appeals the trial court's denial of the motion for an order compelling arbitration. (See Code Civ. Proc., § 1294, subd. (a).) "The trial court may resolve motions to compel arbitration in summary proceedings, in which '[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation.]' (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972, 64 Cal.Rptr.2d 843, 938 P.2d 903.) 'We will uphold the trial court's resolution of disputed facts if supported by substantial evidence. [Citation.] Where, however, there is no disputed extrinsic evidence considered by the trial court, we will review its arbitrability decision de novo.' [Citations.]" (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 683.)

Code of Civil Procedure section 1281.2 provides that when a party moves to compel arbitration, the court "shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists," unless specified exceptions apply. The first task, then, for a trial court presented with a motion to arbitrate is to determine whether the parties have in fact agreed to arbitrate the dispute. (*Marcus & Millichap Real Estate Inv. Brokerage Co. v. Hock Inv. Co.* (1998) 68 Cal.App.4th 83, 89 (*Marcus*).) That determination is guided by general California contract law. (*Ibid*.) "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs its interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id*., § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' controls judicial interpretation unless 'used by the parties in a technical sense, or unless a special meaning

is given to them by usage. (*Id*., §§ 1638, 1644.)" (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 666-667.)

Here, the motion to compel arbitration was based on the arbitration provision in the contract, which required initialing to make the provision operative. No party initialed this provision. Applying general California contract law to these facts, we conclude, as did the trial court, that the parties did not enter into an agreement to arbitrate any disputes arising under the contract. Because the contract contemplated that the arbitration of disputes provision would be effective only if the parties assented to that provision, and the parties did not assent to the provision, the parties did not agree to arbitrate. (See *Marcus*, *supra*, 68 Cal.App.4th at p. 91.)

Mayfair appears to argue that the parties to the agreement waived the initialing condition of the arbitration provision "by implied oral understanding." Mayfair, however, has not established this purported understanding. Mayfair asserts that its declarants "swore to oral understandings," and cites to two pages in the record to support this contention. The first is a passage in the declaration of John Speidel that was submitted with the motion to compel arbitration. Speidel declared, "All original shareholders had agreed to the arbitration clause at the time of formation." The trial court sustained an evidentiary objection to this statement on the ground that it was a legal conclusion without foundation. The court explained, "[I]t is a conclusion of the declarant that is devoid of any specific facts demonstrating how the conclusion was reached—for example, was the arbitration provision specifically discussed by all shareholders prior to signing the Operating Agreement? Did they all discuss the fact that the arbitration provision states th[at] it must be initialed, and all agreed that was unnecessary if they all signed the document?"

The other purported evidence of an oral understanding on which Mayfair relies is a supplemental declaration submitted with the reply brief containing the same language as the Speidel declaration but signed by four others. This later declaration prompted the trial court to observe, "[T]his declaration does not appear to be signed by all of the original members/shareholders, nor has Plaintiff been provided with an opportunity to

respond thereto." Although the trial court did not specifically state that it was excluding this declaration, it suffers from the same infirmities as the Speidel declaration, with the additional deficiency that it was submitted in conjunction with the reply brief, precluding the responding party from addressing it. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers"].)

Although Mayfair challenges the court's evidentiary ruling, it provides no reasoned argument establishing any error. Mayfair merely quotes a treatise for the principle that evidence may be submitted by declaration, asserts that there was "nothing about the declarations that impair[s] the accuracy of the evidence submitted," and states that the court's purported "requirement . . . that specific evidentiary matter was required to have been adduced is unnecessary where all parties are of the same state of mind." Mayfair then provides case law concerning hearsay and the state of mind exception. It is not clear from the briefing what this claimed "requirement that specific evidentiary matter was required to have been adduced" is, or whether that relates in some way to the excluded evidence or to the court's finding that the evidence was insufficient to establish an enforceable agreement to arbitrate. In the reply brief, Mayfair specifies that it contends the court's exclusion of part of the declaration was error because statements of one person offered to show the state of mind of others are admissible despite the hearsay rule. Because the language in the Speidel declaration was not excluded as hearsay this argument is insufficient to show any error by the trial court.

It appears from the totality of its briefing that Mayfair contends that a court may conclude that there was an agreement to arbitrate even if that agreement was not memorialized in a properly initialed arbitration clause, and that here there was an agreement to arbitrate. Mayfair relies on *Basura v. U.S. Home Corp*. (2002) 98 Cal.App.4th 1205 (*Basura*). In *Basura*, however, dozens of form contracts were at issue and there was reason to conclude that the parties might have intended to be subject to arbitration in all of them. "All the plaintiffs herein initialed the arbitration clauses in their contracts. However, as to 28 of the plaintiffs, Home failed to initial the arbitration

clause." (*Id*. at p. 1209.) The appellate court concluded that the fact that Home had initialed the arbitration clauses in its contracts with 20 other plaintiffs, "it reasonably may be inferred that Home intended to be bound by arbitration across the board and that its failure to initial the arbitration clauses in each and every contract was simply due to clerical error." (*Id*. at p. 1216.) The reviewing court, therefore, directed the trial court to determine whether Home intended to be bound by the arbitration provision notwithstanding its failure to initial the arbitration clauses in the contracts. (*Ibid*.)

Here, there is no similar evidence that would permit a reasonable conclusion that the parties intended to be subject to the arbitration clause. What Mayfair terms "an exception for oversight" in *Basura* does not aid it, as there was no evidence here that the failure to initial that provision was an oversight. The only evidence provided in support of a purported intent to be bound by the arbitration clause were the two conclusory statements in the declarations (one of which was properly excluded and the other equally infirm), neither of which was supported by specific facts from which the court could find that the parties had intended to subject themselves to arbitration. Mayfair points out that all parties signed the contract, but signing the contract as a whole without initialing the provision that required separate initialization in order to become operative does not manifest an intention to be bound by the arbitration agreement. Similarly, the absence of "testimony in opposition to arbitration" does not establish an intention to be bound by this non-initialed provision of the contract. Accordingly, the trial court did not err in concluding that there was no agreement to arbitrate.

Mayfair's remaining arguments are insufficient to present any issues on appeal. Mayfair's argument entitled, "The Implied Oral Understanding" begins with a quotation from its reply brief in the trial court that consists only of a series of legal principles concerning oral modifications of a contract without application to the facts presented in this case. Next, Mayfair states, "While the Basura[, *supra*, 98 Cal.App.4th 1205] holding is the closest Appellant can come to enforcement of an 'arbitration clause absent initialing formalities[,'] the majority policy favors arbitration." Mayfair concludes this section of its brief with a quotation from a United States Supreme Court case standing for

the proposition that doubts about arbitrability should be resolved in favor of arbitration. Mayfair's final argument is entitled, "Respondent Lacks Standing to Challenge the Arbitration Clause." Mayfair quotes two paragraphs from the contract, states the general principle that a subsequent shareholder in a limited liability company is bound by an operating agreement previously adopted, and concludes, "Respondent is not a third-party beneficiary. (Hess v. Ford Motor Co., 27 Cal.4th 516, 524 (2002)). The very language of the Section 13 clause (last capitalized sentence) ("We . . . agree" (CT 89)) would appear to limit the agreement to arbitrate to the initial parties."

"This is no legal analysis at all. It is simply a conclusion, unsupported by any explanation of why" or how the trial court erred in its ruling. (*In re S.C.* (2006) 138 Cal.App.4th 396, 410.) An appellant must offer argument as to how the court erred, rather than citing general principles of law without applying them to the circumstances before the court. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699.) In the absence of coherent argument, we may treat the issue as waived. (*Berger v. California Ins. Guarantee Assn*. (2005) 128 Cal.App.4th 989, 1007.)

DISPOSITION

The order is affirmed. Respondents shall recover their costs on appeal.

ZELON, J.

We concur:

WOODS, Acting P. J.

SEGAL, J.*

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