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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

BRYAN PYNE,
Plaintiff and Respondent,
v.
FLETCHER JONES MANAGEMENT
GROUP, INC. et al.,
Defendants and Appellants.

A129654
(Alameda County
Super. Ct. No. RG09489522)

Plaintiff Bryan Pyne brought this action against his alleged former employers, Fletcher Jones Management Group, Inc. (FJMG) and Fremont Automotive Acquisition, Inc. (FAA), as well as Fletcher Jones and Keith May. Defendants moved to compel arbitration. The trial court granted the motion as to FAA and Jones, denied it as to FJMG and May, and stayed the arbitration pending resolution of Pyne’s court action against FJMG and May. In their appeal, FJMG and May contend that the trial court should have ordered Pyne to arbitrate his claims against them and that the arbitration should not have been stayed pending resolution of the claims to be tried in court. In his cross-appeal, Pyne contends the trial court should not have ordered him to arbitrate his claims against FAA and Jones. We conclude Pyne’s claims against all four defendants are subject to arbitration.

I.
BACKGROUND

In his complaint, Pyne alleged that he was employed by FAA and FJMG (which he referred to collectively as Fletcher Jones Motorcars) from January 2007 to March

2008 as general manager of an automobile dealership known as Fletcher Jones Motorcars of Fremont. According to the original complaint, Fletcher Jones was an owner and officer of and Keith May was president of Fletcher Jones Motorcars.¹

In his original complaint, Pyne alleged: that he was securely employed in Orange County when, in 2006, he was recruited to work for Fletcher Jones Motorcars; that he was promised he would have secure employment there as long as he performed his job satisfactorily and that he would be treated fairly and compensated well; that he accepted the job offer and moved his family from Orange County to the Bay Area; that his job performance was satisfactory; that he thereafter learned that Fletcher Jones Motorcars had been exporting Mercedes Benz cars without permission from Mercedes Benz and that it had used forged paperwork to cover up these exports as well as to evade paying California sales tax on certain cars it sold; and that he complained about this to higher management. Pyne also alleged he was subjected to sexual harassment because May and Tom Downer, the chief operating officer of Fletcher Jones Motorcars, engaged in offensive, explicit discussions at work of sexual matters. Pyne alleged, in addition, that May persistently tried to get Pyne to fire a competent, mature receptionist and replace her with a sexually attractive younger woman. Finally, Pyne alleged that, on two occasions during work discussions, May grabbed Pyne's genitals through his clothing, against his will. Fletcher Jones Motorcars allegedly fired Pyne in March 2008 without good cause.

Pyne alleged the following causes of action: (1) discharge in violation of public policies against tax evasion and forgery, against FJMG and FAA; (2) discharge in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) for opposing gender and age discrimination, against FJMG and FAA; (3) discharge in violation of public policy for opposing gender discrimination, against FJMG and FAA; (4) discharge in violation of oral and implied contract, against FJMG and FAA; (5) sexual harassment in violation of FEHA, against FJMG, FAA, and May;

¹ The first amended complaint alleged that Jones was an officer of Fletcher Jones Motorcars and May was president of FJMG.

(6) battery, against FJMG, FAA, and May; (7) promissory fraud, against FJMG, FAA, and Jones; (8) misrepresentation in violation of Labor Code section 970, against FJMG, FAA, and Jones; and (9) failure to reimburse for work expenses in violation of Labor Code section 2802, against FJMG and FAA.

Defendants moved to compel arbitration and to stay the court proceedings pending arbitration. In support of their motion, they submitted three signed arbitration agreements found in defendant's personnel file.² The pertinent language of each agreement reads: "I further agree and acknowledge that the Dealership and I will utilize binding arbitration to resolve all disputes that may arise out of the employment context. Both the Dealership and I agree than any claim, dispute, and/or controversy that either I may have against the Dealership (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) or the Dealership may have against me, arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Dealership shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act Included within the scope of this Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VIII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise I understand and agree to this binding arbitration provision, and both I and the Dealership give up our right to trial by jury of any claim I or the Dealership may have against each other." One of the agreements defined "Dealership" as "Fletcher Jones Dealerships of California"; the others did not define the term.

The parties conducted discovery related to the enforceability of the arbitration agreements. Pyne thereafter filed a first amended complaint. The substance of his

² The trial court found the signatures on the agreements were Pyne's. Pyne does not challenge the sufficiency of the evidence to support this finding.

allegations against defendants remained the same, but he amended certain allegations about the relationship of the parties. The original complaint had alleged that May was the president of Fletcher Jones Motorcars; the first amended complaint alleged he was the president of FJMG. The original complaint alleged Pyne worked as general manager of Fletcher Jones Motorcars. The first amended complaint alleged he worked as general manager of FAA; it continued to allege, however, that he “was employed with” both FJMG and FAA, collectively Fletcher Jones Motorcars. The original complaint alleged Fletcher Jones Motorcars had exported cars improperly; the amended complaint alleged that FAA had done so. Most crucially here, the original complaint alleged “that in doing the things alleged in this complaint, each defendant was acting as an agent or employee of every other defendant, was acting within the course and scope of this agency or employment, and was acting with the consent, permission, and authorization of each of the remaining defendants. Plaintiff is also informed and believes that all actions of each defendant alleged in this complaint were ratified and approved by the officers or managing agents of every other defendant.” The first amended complaint alleged instead that in doing the things alleged in the complaint, “Fletcher Jones, Jr.[.] was acting as the agent of Fletcher Jones Management Group., Inc. and Fremont Automotive Acquisition, Inc., acting within the course and scope of this agency or employment” and that “Keith May was acting as the agent of Fletcher Jones Management Group, Inc., acting within the course and scope of this agency or employment.” Finally, the original complaint alleged that as to certain causes of action, defendants were informed of and ratified, approved, and authorized the conduct of their employees, agents, and subordinates; the first amended complaint alleged instead that FJMG and FAA were informed of and ratified Jones’s conduct, and that FJMG was informed of and ratified May’s conduct.

The trial court denied the motion to compel arbitration as to FJMG and May. The court concluded that the “dealership” referred to in the arbitration agreements was FAA, and that defendants had not submitted evidence that FJMG or May fell within the categories of the dealership, or its owners, directors, officers, manager, employees, agents, or parties affiliated with its employee benefit and health plans. As the court

noted, May had testified at his deposition that he had never been an officer, agent, or employee of FAA, never acted on its behalf, and was never paid to do anything for FAA. The court concluded that although there was some unspecified affiliation between FAA and FJMG, there was no evidence FJMG was an owner or agent of FAA, and indeed, in their pleadings below, FJMG and May stated that they did not admit they were FAA's agents for all purposes. The court accordingly ruled the arbitration provision did not apply to FJMG or May. Moreover, the court noted, FJMG and May had provided no evidence that if they were to bring claims against Pyne arising out of his employment, Pyne could require them to arbitrate those claims; this "fundamental lack of mutuality," the court ruled, "provide[d] another reason why the Agreements should not be interpreted to require [Pyne] to arbitrate his causes of action against FJMG or May."

The court granted the motion to compel arbitration as to FAA and Jones. Although FAA did not sign the agreements, the court concluded they were mutually binding on plaintiff and FAA, and that plaintiff had not submitted any evidence contradicting his allegation that Jones at all times acted as the agent of FAA or disputing that he fell within the categories of " 'owners, directors, officers, managers, employees [or] agents' of FAA." The court concluded all of plaintiff's claims, including those for battery and harassment, fell within the broad scope of the arbitration provision.

Pursuant to Code of Civil Procedure section 1281.2, subdivision (c), the trial court ordered the arbitration of the claims against FAA and Jones stayed pending resolution of the civil action against FJMG and May.³

³ Code of Civil Procedure section 1281.2, subdivision (c) provides in pertinent part, "[i]f the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

All further undesignated statutory references are to the Code of Civil Procedure.

II. DISCUSSION

A. *Propriety of Cross-Appeal*

In their appeal, FJMG and May challenge the trial court's order to the extent it denied their petition to compel arbitration and stayed the arbitration pending the outcome of the court action between Pyne and the other defendants. In his cross-appeal, Pyne challenges the order to the extent it *granted* the petition and required him to arbitrate his claims against Jones and FAA. Among the grounds Pyne asserts in opposition to the appeal are that defendants waived their right to arbitrate, that the battery cause of action was not arbitrable, and that the agreement suffered from unconscionable lack of mutuality. He relies on the same or similar arguments for his cross-appeal.

As Pyne acknowledges, while an order *denying* a petition to compel arbitration is appealable (§ 1294, subd. (a)), an order *granting* such a petition is not (*Muao v. Grosvenor Properties, Ltd.* (2002) 99 Cal.App.4th 1085, 1088-1089). In appropriate circumstances, however, we may treat an appeal from an order granting a petition to compel arbitration as a petition for a writ of mandate to direct the trial court to set aside its order directing arbitration. (*Branham v. State Farm Mut. Auto. Ins. Co.* (1975) 48 Cal.App.3d 27, 32; *Muao, supra*, 99 Cal.App.4th at pp. 1088-1089; see also *Jacobs-Zorne v. Superior Court* (1996) 46 Cal.App.4th 1064, 1072 [treating appeal from order granting summary adjudication as writ petition].) Such circumstances exist here. Most of the issues Pyne raises in his cross-appeal are the same as or similar to those he raises in his opposition to the appeal, and would likely be raised again in any future appeal of a judgment entered after the arbitration is completed. (See *Muao, supra*, 99 Cal.App.4th at pp. 1088-1089.) No purpose would be served in resolving those issues as to only two of the four defendants now while declining to do so as to the other two defendants. We conclude it is proper to treat the appeal as a petition for writ of mandate and review Pyne's contentions at this time.

B. General Legal Principles Regarding Arbitration

When a party seeking to compel arbitration proves the existence of a valid arbitration agreement covering the dispute, the trial court must order the matter to arbitration. (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1404 (*Laswell*)). “Public policy favors arbitration as an expedient and economical method of resolving disputes, thus relieving crowded civil courts.” (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244.) Doubt about whether an arbitration agreement applies to a dispute is to be resolved in favor of arbitration. (*United Transportation Union v. Southern Cal. Rapid Transit Dist.* (1992) 7 Cal.App.4th 804, 808.)

“However, arbitration assumes that the parties have elected to use it as an alternative to the judicial process. [Citation.] Arbitration is consensual in nature. The fundamental assumption of arbitration is that it may be invoked as an alternative to the settlement of disputes by means other than the judicial process solely because all parties have chosen to arbitrate them. [Citations.] Even the strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement. ‘The right to arbitration depends on a contract.’ [Citations.]” (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.*, *supra*, 47 Cal.App.4th at pp. 244-245; see also *AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___, 131 S.Ct. 1740, 1745 [provision of Federal Arbitration Act, 9 U.S.C. § 2, reflects both liberal federal policy favoring arbitration and fundamental principle that arbitration is a matter of contract].)

Despite this general rule, however, “a nonsignatory to an arbitration clause may, in certain circumstances, compel a signatory to arbitrate, based on ordinary contract and agency principles. [Citations.]” (*Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 219-220.) Among the theories under which signatories may be required to arbitrate a dispute with a nonsignatory are agency and equitable estoppel. (*Ibid.*; see also *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 268 (*Boucher*)).

A party who petitions to compel other parties to an arbitration agreement to arbitrate a dispute bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence. (*Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 15.) A *nonsignatory* who seeks to enforce an arbitration agreement against a signatory has the burden to show that the nonsignatory is a *party* to the arbitration agreement covering the dispute. (*Ibid.*)

“There is no uniform standard of reviewing for evaluating an order denying a motion to compel arbitration. [Citation.] If the court’s order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court’s denial rests solely on a decision of law, then a *de novo* standard of review is employed. [Citations.]” (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

C. *The Merits*

1. Claims Based on Same Set of Facts

FJMG and May contend the trial court should have required Pyne to arbitrate his claims against them because Pyne’s claims against all defendants are based on the same set of facts. For this argument, they rely primarily on *Laswell, supra*, 189 Cal.App.4th 1399. The plaintiff in *Laswell*, who alleged she had received improper care at a health facility, brought claims against three defendants: AG Seal Beach, LLC, the licensee and operator of the health facility doing business as Country Villa Seal Beach Healthcare Center (the operator); AG Facilities Operations, LLC, which was the owner of AG Seal Beach, LLC and the healthcare facility (the owner); and Country Villa Service Corporation, doing business as Country Villa Health Services, which was the management company in charge of day-to-day operations at the healthcare facility (the management company). (*Id.* at p. 1402.) The plaintiff had signed an agreement providing for arbitration of any disputes or claims arising from the provision of services at the facility, defined as Country Villa Seal Beach Healthcare Center. (*Id.* at p. 1403.) The trial court denied the defendants’ petition to compel arbitration, in part on the ground

that there were parties who were not part of the arbitration agreement and would not participate in the arbitration. (*Id.* at pp. 1403-1404.)

The court of appeal reversed the order. (*Laswell, supra*, 189 Cal.App.4th at p. 1410.) It concluded that although the agreement defined the “facility” as Country Villa Seal Beach Healthcare Center, and the agreement was signed by a representative of the “facility,” the owner and the management company were equally bound by the agreement and thus entitled to enforce it against the plaintiff. (*Id.* at p. 1407.) The court reasoned that according to the plaintiff’s own allegations, all defendants were related Country Villa entities; the operator had entered into an agreement with the management company to operate the facility; the arbitration agreement was written on the management company’s letterhead; the owner owned both the operator and the facility; and defense counsel stated that all defendants were represented by the same counsel and would participate in the arbitration proceedings. (*Ibid.*) Moreover, “the substance of Laswell’s allegations is that all defendants are responsible for the improper care that she received while she resided at [the facility], demonstrating that her claims against all defendants are based on the same facts and theory and are inherently inseparable.” (*Ibid.*) Under those circumstances, the court concluded, the owner and the management company could enforce the arbitration agreement. (*Ibid.*) For this conclusion, the court relied on the rules that “ ‘nonparties to arbitration agreements are allowed to enforce those agreements where there is sufficient identity of parties,’ ” and that “ ‘ “[t]he equitable estoppel doctrine applies when a party has signed an agreement to arbitrate but attempts to avoid arbitration by suing nonsignatory defendants for claims that are “ ‘based on the same set of facts and are

inherently inseparable’ ” from arbitrable claims against signatory defendants.’ ” ’
[Citation.]” (*Ibid.*)⁴

FJMG and May argue that Pyne’s claims against them are based on the same facts and are inherently inseparable from those alleged against the signatory defendant and therefore, as in *Laswell*, they are entitled to arbitrate those claims. Although some of the language in *Laswell*, taken out of context, might support this conclusion, *Laswell*’s own reasoning and the cases upon which it relies show that the applicable rule is not as broad as FJMG and May contend. In *Laswell*, as we have just explained, the Court of Appeal relied not simply on the identity of the *claims* against the signatory and nonsignatory defendants but also on the defendants’ close relationships to each other, one as the owner and one as the management company for the signatory facility. (*Laswell, supra*, 189 Cal.App.4th at p. 1407.) Moreover, the language upon which FJMG and May rely—the reference to claims that are based on the same facts and inherently inseparable from arbitrable claims—is derived from cases applying the doctrine of equitable estoppel. (*Ibid*; see also *Rowe v. Exline, supra*, 153 Cal.App.4th at pp. 1287-1288 [applying California law]; *Turtle Ridge Media Group, Inc. v. Pacific Bell Directory* (2006) 140 Cal.App.4th 828, 833; *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1714.)

Metalclad explained the reasoning behind the application of equitable estoppel in this context: “ ‘Equitable estoppel precludes a party from asserting rights “he otherwise

⁴ As support for its conclusion that the owner and the management company could enforce the arbitration agreement and hence were not third parties under section 1281.2, subdivision (c) (discussed *infra*), the court cited cases holding that a defendant who signed an agreement as agent-employee of a corporate defendant and was a third party beneficiary of the agreement was bound by the arbitration provision (*RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1520), and that nonsignatory individual defendants could enforce an arbitration provision because the plaintiff alleged that the corporation signatory was an alter ego of the individuals and equitable estoppel applied to other causes of action (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276,1284-1290 [applying equitable estoppel under California law to “a plaintiff who seeks to held nonsignatories liable for damages under a contract, by alleging they are unified with the signatory entity]). (*Laswell, supra*, 189 Cal.App.4th at pp. 1407-1408.)

would have had against another” when his own conduct renders assertion of those rights contrary to equity.’ [Citation.] In the arbitration context, a party who has *not* signed a contract containing an arbitration clause may nonetheless be compelled to arbitrate when he seeks *enforcement of other provisions of the same contract* that benefit him.

[Citations.] As invoked by [the defendant], the equitable estoppel doctrine applies when a party has signed an agreement to arbitrate but attempts to avoid arbitration by suing nonsignatory defendant for claims that are ‘ “based on the same facts and are inherently inseparable” ’ from arbitrable claims against signatory defendants. [Citations.] Courts applying equitable estoppel have ‘looked to the relationships of persons, wrongs and issues, in particular whether the claims that the nonsignatory sought to arbitrate were “ “intimately *founded in and intertwined with the underlying contract obligations.*” ’ ’ ’ [Citation.]” (*Metalclad Corp. v. Ventana Environmental Organizational Partnership, supra*, 109 Cal.App.4th at p. 1713, some italics original, some added.)

Other cases confirm that, in applying equitable estoppel, courts must look not only to the relationship of the claims asserted, but also to whether those claims *arise from the contract containing the arbitration clause*. Thus, the court in *Goldman* noted that “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. In other words, a signatory to an agreement cannot ‘ “have it both ways” ’; the signatory ‘cannot, on the one hand, seek to hold the non-signatory liable pursuant to *duties imposed by the agreement*, which contains an arbitration provision, but, on the other hand, deny arbitration’s applicability because the defendant is a non-signatory.’ [Citation.]” (*Goldman v. KPMG, LLP, supra*, 173 Cal.App.4th at p. 220, italics added.) The court concluded that despite broader language that could be “cherry-pick[ed],” the “underlying principle, stated in *all* the cases” was “actual reliance on the terms of the agreement to impose liability on the nonsignatory.” (*Id.* at p. 231.)

Similarly, the court in *Boucher* concluded that a plaintiff employee was equitably required to arbitrate his claims under an employment agreement not only against the

employer with whom he had the agreement, but also against a company to which the employer had transferred all of the assets of the branch at which the plaintiff was employed. (*Boucher, supra*, 127 Cal.App.4th at pp. 265-266.) Relying on federal precedents, the court reasoned that “under equitable estoppel principles and in appropriate factual circumstances, a signatory to a[n] agreement containing an arbitration clause may be compelled to arbitrate its claims against a nonsignatory when the relevant causes of action *rely on and presume the existence of the contract*. [Citations.] As the Eleventh Circuit Court of Appeals has held: ‘[E]quitable estoppel applies when the signatory to a written agreement containing an arbitration clause “*must rely on the terms of a written agreement in asserting [its] claims*” against the nonsignatory. [Citation.]’ [Citation.]” (*Id.* at p. 269, italics added.) The court concluded the same rule applied under California decisional authority. (*Id.* at p. 271; see also *DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1353, fn. 3 [California and federal law identical for purposes of applying doctrine of equitable estoppel to arbitration agreements].)

In concluding that the plaintiff’s claims against the nonsignatory defendant were arbitrable, the court in *Boucher* noted that the claims relied on, made reference to, and presumed the existence of the employment agreement: that is, the plaintiff alleged the defendant failed to pay him accrued wages due under the terms of the employment agreement and the Labor Code; that its failure to pay compensation due under the employment agreement entitled him to penalties under the Labor Code; that the defendant breached the employment contract; that the defendant’s actions, including failing to pay wages due and asking the plaintiff to disclose confidential information in violation of the contract, amounted to unlawful, unfair, or fraudulent business acts; that the defendant disrupted the plaintiff’s performance under the employment agreement; and that by breaching the employment agreement, the defendant interfered with prospective economic advantage. (*Boucher supra*, 127 Cal.App.4th at p. 272.) Thus, all the claims made reference to and presumed the existence of the employment agreement. In addition, both the signatory and nonsignatory defendants were owned by the same entity.

In those circumstances, the court ruled, the plaintiff's claims against the nonsignatory defendant were "intimately founded in and intertwined with the . . . employment agreement; therefore, he is equitably estopped from avoiding arbitration of his causes of action against defendant." (*Id.* at pp. 272-273.)

The same cannot be said here. None of Pyne's causes of action refers to the three agreements containing arbitration clauses, and none alleges defendants breached obligations based on those agreements. The three agreements were (1) an "Applicant's Statement & Agreement," dated January 14, 2007, requiring Pyne to comply with the dealership's rules and regulations, agreeing that the dealership could do certain things (including requiring a physical examination and drug test, obtaining public records about Pyne, and contacting Pyne's previous employers), stating that the information Pyne had provided was correct, and agreeing that his employment would be terminable at will; (2) an agreement dated February 19, 2007, which provided that Pyne's employment would be terminable at will; and (3) an "Employment Acknowledgement and Agreement" dated February 18, 2007, reciting that Pyne had received a copy of the Fletcher Jones employee handbook, that except for the employment at-will status and the arbitration agreement, the dealership could change any policies at any time, and that Pyne's employment was at will. Pyne's causes of action do not depend on any obligations under these agreements, and in fact, the agreements were never mentioned in the complaint—not surprisingly, as they create virtually no obligations on the part of defendants other than the "Dealership's" agreement to arbitrate any disputes. Rather, Pyne alleges that FJMG and FAA discharged him in violation of law and public policy and of an oral and implied contract that he would have secure employment if he performed his job satisfactorily, and that they failed to reimburse him for work expenses; that FJMG, FAA, and May sexually harassed him; that FJMG, FAA, and May committed battery on him; and that FJMG, FAA, and Jones committed promissory fraud and misrepresentation in late 2006 in order to induce him to leave his previous job. None of these claims presumes the existence of the agreements containing arbitration clauses, and none is "intimately founded in and intertwined with" those agreements. (*Boucher, supra,*

127 Cal.App.4th at pp. 272-273.) In these circumstances, Pyne cannot be compelled to arbitrate his claims against nonsignatories based on the doctrine of equitable estoppel.

2. Agency

a. *Arbitration of Claims Against FJMG and May*

FJMG and May contend, however, that Pyne is bound by his initial allegation that all defendants acted as agents of each other. One of the exceptions to the general rule that a nonsignatory cannot invoke an arbitration agreement is that “when a plaintiff alleges a defendant acted as an agent of a party to an arbitration agreement, the defendant may enforce the agreement even though the defendant is not a party thereto.” (*Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 614 (*Thomas*); see also *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406, 418 [“If, as the complaint alleges, the individual defendants, though not signatories, were acting as agents for the Rams, then they are entitled to the benefit of the arbitration provisions”]; accord *DMS Services v. Superior Court, supra*, 205 Cal.App.4th at pp. 1353-1354 [nonsignatory may enforce arbitration agreement where nonsignatory and signatory are principal and agent or employer and employee, and there is “ ‘sufficient “identity of interest” ’ ”].)

As we have noted, the original complaint alleged that each defendant was acting as an agent or employee of every other defendant. The first amended complaint, filed after defendants petitioned to compel arbitration, alleged instead that Jones was an agent of FJMG and FAA, and that May was an agent of FJMG. FJMG and May contend Pyne’s original allegation—that all defendants acted as each others’ agents—was a binding judicial admission. (See *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746 [when complaint contains allegations of fact in support of claim, opposing party may rely on factual statements as judicial admissions].) Accordingly, they argue, they were entitled to be treated as agents of FAA—the signatory defendant—for purposes of enforcing the arbitration agreement. Pyne disagrees, arguing that the agency allegations in his original complaint are conclusions of law that may be amended freely. (See *Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 948-949; *Bahan v. Kurland* (1979)

98 Cal.App.3d 808, 812; *Avalon Painting Co. v. Alert Lbr. Co.* (1965) 234 Cal.App.2d 178, 184.)

We need not decide whether Pyne is bound by his original allegations that all defendants were agents of each other, because we conclude that even without the omitted allegations, the first amended complaint as a whole is most reasonably read as relying on a theory of agency as to all defendants. For example, plaintiff alleged that May was, and is, the president and agent of FJMG, that Jones was the agent of *both* FJMG and FAA, and that both FJMG and FAA wrongfully discharged plaintiff under four legal theories.⁵ The basis for the cause of action for discharge in violation of public policies against tax evasion and forgery is that Pyne complained of FAA's actions, yet Pyne sought to hold FJMG liable. Similarly, his claims for discharge for opposing gender and age discrimination were based on May's actions, yet he sought to hold not only FJMG (of which May was president) but also FAA liable. Plaintiff alleges he was subjected to sexual harassment and battery by May, yet his first amended complaint sought to recover for such wrongful acts from both FJMG and FAA. Further, plaintiff alleged that he was entitled to punitive damages (with respect to the first, second, third, fifth, sixth, and seventh causes of action) against FJMG and FAA due to their ratification of May's and Jones's actions. Plaintiff does not explain why May should not be considered an agent of FAA or of the dealership when it is at least implicitly alleged that May worked at

⁵ Many of the allegations are based on the conduct of Fletcher Jones Motorcars, defined as FJMG and FAA *collectively*.

plaintiff's work site, and actually alleged that while at work May subjected plaintiff to repeated sexual harassment and battery and also importuned him to fire the receptionist.⁶

Pyne points out, however, that he received employment-related documents from both FAA and FJMG, and argues that FAA and FJMG were therefore his joint employers, rather than agents of each other.⁷ But he does not show that, even if they were his joint employers, FAA and FJMG could not have had an agency relationship with each other, and offers no explanation of how *FJMG* could be liable for firing him based on his complaints about *FAA*'s actions unless an agency relationship existed between FJMG and FAA.

Pyne also argues that under *City of Hope v. Bryan Cave, L.L.P.* (2002) 102 Cal.App.4th 1356, 1370-1371, FJMG and May are estopped from invoking the arbitration agreement as agents because they declined to admit that they were agents of FAA or Jones. The plaintiff in *City of Hope*, a medical research facility, sued two of its former law firms, alleging breach of fiduciary duty, legal malpractice, fraud, and aiding and abetting, based on the law firms' actions in the course of an internal investigation and in negotiating allegedly ultra vires contracts with officers and employees. (*Id.* at

⁶ We are not persuaded by Pyne's suggestion that the first amended complaint does not rely on the theory of agency because FAA could be responsible for May's sexual harassment if Jones knew or should have known of the conduct. It is true that under FEHA, an employer may be liable for harassment of an employee by a nonemployee if the entity or its agents or supervisors knows or should have known of the conduct and fails to take appropriate corrective action. (Gov. Code, § 12940, subd. (j)(1).) Pyne did not make this allegation in the complaint, instead alleging only that FAA was informed of *Jones's* conduct and ratified, approved, and authorized it. In any case, he does not show that this rule applies to the other causes of action we have discussed.

⁷ The evidence showed that Pyne received pay stubs and tax forms listing FAA as his employer. May, writing on FJMG letterhead, sent him a letter with details of his bonus plan in February 2008, and Downer, writing on FJMG letterhead, wrote to him in April 2008 stating that at a meeting on February 25, 2008, "we made it absolutely clear that as a result of your actions, your employment was being terminated." In his deposition, Pyne testified that he worked for FAA, and that he "wasn't a Fletcher Jones employee."

pp. 1362-1366.) The plaintiff also sued two of its own former officers and ultimately settled the disputes. The settlement agreements provided that disputes under the agreements were to be submitted to arbitration, and the agreements released the parties and their agents from acts that had occurred before the agreements were signed. (*Id.* at p. 1367-1368.) After significant time was spent litigating the case, the plaintiff amended the complaints to add an allegation of conspiracy; as amended, the complaints alleged that in the course of the conspiracy, the law firms acted as agents of the co-conspirators, including the former officers. (*Id.* at p. 1367.) The law firms sought arbitration, arguing that as alleged agents of the former officers, they were entitled to enforce the arbitration provisions of the settlement agreements. (*Id.* at p. 1370.) The Court of Appeal rejected this contention, noting that although a nonsignatory may sometimes rely on estoppel to demand arbitration, “the linchpin of equitable estoppel is fairness. Here, there is no fairness principle upon which [the law firms] can rely. Both [of the law firms] deny they were ever the agents of the Former Officers, just as they deny they ever did anything wrong in their representations of City of Hope. Fairness in enforcing the arbitration agreement is of no aid or comfort to [the law firms].” (*Id.* at pp. 1370-1371.)

We recognize that in pleadings below, FJMG and May, as well as Jones, stated that they “voluntarily agree[d] to arbitrate under the Arbitration Agreement [but did] not admit that they[were] ‘agents’ of Fremont Automotive Group for all purposes.”⁸ In *City of Hope v. Bryan Cave, L.L.P.*, *supra*, 102 Cal.App.4th 1356, however, the gravamen of the complaints was the law firms’ independent breaches of their duties to their client, the medical facility. Here, as we have explained, much of the alleged liability is vicarious

⁸ Pyne also points out that May, FJMG’s president, testified that FJMG was not a dealership, that he did not know whether FJMG had any contracts with FAA, and, in response to a question about whether he knew if the two entities were related, that he was not familiar with the corporate structure of the entities.

and implicitly relies on agency relationships among the defendants. On the record before us, we conclude FJMG and May are entitled to enforce the arbitration provisions.⁹

b. Unconscionability

Pyne argues, however, that the trial court properly concluded that the arbitration agreement was unconscionable because it lacked mutuality. The court stated: “FJMG[] and May introduced no evidence to the effect that if they were to bring claims against Plaintiff arising out of his employment, Plaintiff could require them to arbitrate those claims under the Agreements between Plaintiff and FAA. This fundamental lack of mutuality provides another reason why the Agreements should not be interpreted to require Plaintiff to arbitrate his causes of action against FJMG[] or May.” For this conclusion, the court relied on *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 120, which stated: “ ‘[A]n arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences.’ ” The employment contract in question in *Armendariz* provided that if the employee claimed her employment had been terminated wrongfully, the matter would be submitted to arbitration, and it limited the amount of an award in the arbitration. (*Id.* at p. 92.) Our high court concluded this provision lacked mutuality because it “require[d] the arbitration of employee—but not employer—claims arising out of a wrongful termination.” (*Id.* at p. 120.)

The arbitration agreements signed by Pyne provided that he and the dealership would use binding arbitration to resolve disputes arising out of the employment context, and that any dispute or claim he had “against the Dealership (or its owners, directors,

⁹ We note that our decision is predicated upon the nonsignatory defendants’ implied admission of an agency relationship, at least for purpose of enforcing the arbitration agreement. The legal implications of that implied admission, however, are not before us. Consequently, we do not decide whether and under what legal principles defendants can assert an agency relationship in order to enforce an arbitration clause while denying an agency relationship for purposes of liability. (Cf. *Thomas, supra*, 204 Cal.App.4th at p. 614-615.)

officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) or the Dealership may have against me” would be submitted to binding arbitration. Pyne contends that because the agreements did not provide that FAA’s “ ‘owners, directors, officers, managers employees, agents, and persons affiliated with its employee benefit and health plans’ ” must also arbitrate their claims against *him*, the agreements lacked mutuality and were unconscionable under *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th 83.

In light of our conclusion that Pyne has sued FJMG and May as agents of FAA, we reject this contention. Our conclusion is not based on the contractual language requiring Pyne to submit his claims against FAA’s agents to arbitration. Rather, it is based on the consistently expressed rule that a nonsignatory to an arbitration agreement who is sued as an agent of a signatory is entitled to enforce the arbitration agreement.¹⁰

c. Arbitration of Claims Against Jones

In his cross-appeal, Pyne contends Jones was not bound by the arbitration agreement, and it was therefore improper for the trial court to order Pyne to submit his claims against Jones to arbitration. We disagree. Pyne alleged in his first amended complaint that in doing the things alleged in the complaint, Jones “was acting as the agent of [FJMG] and [FAA], acting within the course and scope of his employment.” Having alleged that Jones was acting as the agent of a signatory to the agreement, Pyne is bound by the rule that a nonsignatory defendant may enforce an arbitration agreement when the plaintiff alleges the defendant acted as an agent of a party to the agreement. (*Thomas, supra*, 204 Cal.App.4th at p. 614.)

3. Battery Cause of Action

Pyne contends his cause of action for battery does not fall within the scope of the arbitration provisions. In evaluating this claim, we are mindful that only those disputes that the parties have agreed to arbitrate are subject to an arbitration agreement. “ ‘ “ In

¹⁰ We reject Pyne’s contention that, by failing to discuss the issue in their opening brief, FJMG and May waived their right to contest the trial court’s ruling that the arbitration provision was unconscionable.

determining the scope of an arbitration clause, “[t]he court should attempt to give effect to the parties’ intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made [citation].” [Citation.]’ [Citation.]” (*RN Solution, Inc. v. Catholic Healthcare West*, *supra*, 165 Cal.App.4th at p. 1523.)

In this cause of action against FJMG, FAA, and May, Pyne alleges that on two occasions, May grabbed his genitals during a work discussion. We agree with the trial court that this claim falls within the broad scope of the arbitration provisions, under which Pyne agreed to arbitrate “all disputes that may arise out of the employment context,” and “any claim, dispute, and/or controversy” he had against the dealership or its employees or agents “arising from, related to, or having any relationship whatsoever with” his employment by the dealership, including “all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination and *harassment*, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise . . .” (Italics added.)

Pyne alleged the battery took place during a work discussion, and he sought to hold FJMG and FAA liable for it. Indeed, the same behavior formed part of the basis for his cause of action for sexual harassment in violation of FEHA—a cause of action he did not contend is outside the scope of the arbitration agreements. We agree with the trial court that these allegations indicate that the battery arose from, was related to, or had a relationship with his employment.

The cases Pyne relies on to argue that the tort of battery does not fall within an arbitration clause are distinguishable. In *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 737-738, 744-747, our high court concluded that the agreement of a patient at a hospital to arbitrate claims “arising from rendition or failure to render services under this Agreement” did not clearly extend to claims that a hospital employee sexually assaulted her, and that the ambiguity should be construed against the drafter. (*Id.* at p. 747.) In doing so, the court noted that the employee’s alleged conduct “was entirely outside the

scope of his employment. It had nothing to do with providing, or failing to provide, services.” (*Id.* at p. 745.)

In *RN Solution*, the court considered the arbitrability of personal injury causes of action (e.g., gender-based violence, assault, false imprisonment, and intentional infliction of emotional distress). (*RN Solution, Inc. v. Catholic Healthcare West, supra*, 165 Cal.App.4th at p. 1522.) The plaintiffs there were RN Solution, Inc. (RNS) and its chief executive officer, Tanya Woo, who had become involved in an intimate relationship with a vice president of Catholic Healthcare West (CHW), with which RNS had a recruiting contract. (*Id.* at p. 1513.) The contract contained a provision requiring arbitration of “ ‘any dispute between CHW and [RNS] aris[ing] out of the services contracted for in this Agreement,’ ” and “ ‘any dispute arising out of or in connection with this Agreement.’ ” (*Id.* at p. 1514.) The plaintiffs alleged that CHW’s vice president had coerced Woo into the relationship by threatening her with the loss of the contract and that he soon began a pattern of violent and abusive behavior toward her. (*Id.* at p. 1515.) The court of appeal concluded the battery-related causes of action were not arbitrable, reasoning, “[w]hile the language of the arbitration provision might be broadly construed to cover every type of business dispute that might arise between the two signators, it cannot seriously be argued that the parties intended it to cover tort claims arising from an alleged violent physical assault by an employee of one company against an employee of the other in the context of an intimate domestic relationship between them. . . . [N]othing in the language remotely suggests that it was intended to apply to personal injury tort claims arising outside of the business relationship between CHW and RNS. [Citation.]” (*Id.* at pp. 1523-1524; see also *Medical Staff of Doctors Medical Center in Modesto v. Kamil* (2005) 132 Cal.App.4th 679, 683-684 [stating in dictum that “a punch in the nose during a dispute over a medical billing” would not fall within scope of agreement to arbitrate disputes concerning terms of service agreement between medical group and insurance provider].)

The arbitration agreement here is broader than those in the foregoing cases, applying to “all disputes having any relationship whatsoever” with Pyne’s employment.

Moreover, it explicitly applied to claims of sexual harassment—and, as we have explained, Pyne contended the same conduct he alleged in his battery cause of action *also* constituted sexual harassment. Pyne alleged that the battery took place during a work discussion, and he thereby sought to impose liability on FJMG and FAA. In these circumstances, the battery cause of action is subject to the arbitration clause.

4. Waiver

Both in response to FJMG’s and May’s appeal and in his cross-appeal, Pyne contends defendants waived their right to arbitrate the dispute through delay and bad faith. Our Supreme Court has explained: “ ‘Generally, “waiver” denotes the voluntary relinquishment of a known right. But it can also mean the loss of an opportunity or a right as a result of a party’s failure to perform an act it is required to perform, regardless of the party’s intent to . . . relinquish the right.’ [Citation.] The varied meanings of the term ‘waiver’ are reflected in the case law on the enforcement of arbitration agreements. ‘In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the “bad faith” or “willful misconduct” of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citation.] [¶] Although a number of authorities properly caution that a waiver of arbitration is not to be lightly inferred [citation], our cases establish that no single test delineates the nature of the conduct of a party that will constitute such a waiver.’” (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 983.)

We may properly look to a variety of factors in assessing waiver claims, including: “ ‘“(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.”’ [Citation.]” (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.) The existence of waiver is a question of fact, and we are bound by the trial court’s finding if it is supported by substantial evidence. (*Ibid.*)

Pyne contends defendants waived their right to arbitration both by delay in seeking arbitration and by bad faith. In support of his claim of delay, Pyne pointed to evidence that he was summoned to a meeting with May and Downer in late February 2008. Pyne asked if he should bring his own lawyer to the meeting and was told it was not necessary. One lawyer was physically present at the meeting, and two others attended by speaker phone. During the meeting, Pyne was given the option of resigning voluntarily or being fired. Pyne sent letters to Downer in April and May 2008 asking for copies of all papers he had signed about getting or holding employment. Defendants did not send Pyne copies of the arbitration agreements, and Pyne averred in a declaration that he did not recall having signed them.

Pyne filed his complaint on December 17, 2009. His counsel submitted a declaration stating that he had been communicating with defendants’ attorney since late December 2009 or early January 2010 about defendants’ contention that there were applicable arbitration agreements. According to Pyne’s attorney, despite his efforts, defendants failed to provide him relevant information, aside from providing copies of the arbitration agreements on February 10, 2010, after defendants filed their motion to compel arbitration.¹¹ Pyne argues that by delaying more than a year and a half between

¹¹ Pyne’s counsel’s declaration, however, includes within its exhibits evidence that defendants’ attorney sent copies of the agreements at issue on January 13, 2010, although a page appears to be missing from one of the agreements. Pyne’s attorney responded to defendant’s counsel by noting that the documents did not appear to be complete and asked for more details on how the documents were signed and for the opportunity to examine the originals of the documents.

receiving his request for employment-related documents in the spring of 2008 and drawing the agreement to his attention in late 2009 or early 2010, defendants waived their right to arbitrate.

For his contention that defendants waived the right to arbitrate by bad faith conduct, Pyne relies not only on the assertedly belated production of the arbitration agreements, but also on other factors as well. He points to evidence that defendant's counsel did not send his attorney information he had requested, despite his efforts to meet and confer, and that defendants refused to appear at depositions or produce documents in response to discovery aimed at whether the case should proceed in arbitration.¹²

Pyne also argues that the discovery that ultimately took place showed that the declarations defendants submitted in support of their arbitration motion were false. FAA's controller signed a declaration stating, "from [her] own personal knowledge," that she was responsible to maintain FAA's personnel files; that she was familiar with the agreements containing arbitration that FAA used; that she had personally reviewed Pyne's personnel file, which contained three arbitration agreements; and that her declaration attached the three documents containing arbitration agreements, which she declared were "true and correct cop[ies] of the [agreements], as contained in Mr. Pyne's personnel file maintained by Fremont Automotive." Her declaration also noted the dates the agreements had been executed. In her deposition, she stated that she did not see Pyne sign the agreements and had no personal knowledge of who signed them. FAA's former controller stated in her declaration "from [her] own personal knowledge" that during the time she worked there, she was responsible for maintaining the employee personnel files, that Pyne was hired as general manager, that he received a new employee packet, which she saw on his desk, and that Pyne eventually returned the signed paperwork, including the signed arbitration forms. In her deposition, she acknowledged that she did not see the signed arbitration agreements at the time Pyne turned them in.

¹² On Pyne's application, the trial court later continued the hearing on the motion to compel arbitration and ordered discovery on the issue of arbitrability.

The trial court rejected Pyne’s waiver argument, concluding he had “not sufficiently shown that FAA’s or Jones’s conduct amounts to a waiver of their right to arbitrate. [Citation.] Among other things, while Defendants’ failure to provide Plaintiff with some or all of his employment records prior to filing this motion made it more difficult for Plaintiff initially to oppose the motion, the Court continued the hearing to allow discovery with respect to Plaintiff’s employment records. It does not appear that Plaintiff has been substantially prejudiced or that FAA’s or Jones’s conduct is so ‘inconsistent with the right to arbitrate’ as to amount to a waiver. [Citations.]”

Pyne has not persuaded us that this determination is not supported by substantial evidence. Defendants invoked the arbitration agreements soon after Pyne filed his complaint, and the litigation machinery had not been substantially invoked. (See *St. Agnes Center v. PacifiCare of California, supra*, 31 Cal.4th at p. 1196.) No intervening procedures had taken place, and the trial court reasonably could conclude any prejudice from the delay was mitigated by its order continuing the hearing to allow discovery. As to the declarations of the current and former FAA controllers, we have reviewed them and see no ground to conclude that they constituted misconduct or created a waiver of the right to arbitrate.

Pyne also relies on *Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 431, in which our high court affirmed a trial court’s order denying arbitration, on the ground that the trial court properly concluded that an insurer had breached its duty of good faith and fair dealing by denying its insureds’ claims without pointing out their rights to demand arbitration of a disagreement with the insurer. But, the facts here are different. There is no basis to conclude that by asking if he should have a lawyer at the meeting before he was dismissed and asking for copies of his employment-related documents, Pyne indicated he wished to bring proceedings to challenge his dismissal. The trial court here found there was no waiver, and substantial evidence supports this finding.

5. Stay of Arbitration

Our conclusions necessarily lead us to reverse the trial court's order staying arbitration pending resolution of Pyne's court action against FJMG and May. Section 1281.2, subdivision (c) allows a court to stay arbitration pending the outcome of a court action if it determines that a party to the arbitration is also a party to litigating in a pending court action with a "third party." In this context, "the term 'third party' means a party to the action that is not bound by or entitled to enforce the arbitration agreement." (*Thomas, supra*, 204 Cal.App.4th at p. 612, citing *Laswell, supra*, 189 Cal.App.4th at p. 1407 and *Rowe v. Exline, supra*, 153 Cal.App.4th at p. 1290.) As we have concluded FJMG and May *are* entitled to enforce the arbitration provisions, they are not third parties for purposes of section 1281.2, subdivision (c), and there is neither need nor authorization to stay arbitration pending resolution of Pyne's claims against them.¹³

¹³ Because we have concluded that all defendants are entitled to enforce the arbitration provisions and that the battery cause of action is subject to arbitration, we reject Pyne's contention that the trial court should have exercised its discretion under section 1281.2, subdivision (c) to have all his claims decided in the superior court.

III.
DISPOSITION

The order is reversed to the extent it denies FJMG and May's motion to compel arbitration and stays the arbitration. In all other respects, the order appealed from is affirmed. The matter is remanded for further proceedings consistent with this opinion.

RIVERA, J.

We concur:

RUVOLO, P. J.

REARDON, J.