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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MICHAEL LAWLER,

Plaintiff and Respondent,

v.

JOHN KEVIN CASEY et al.,

Defendants and Appellants.

A139417

(San Mateo County  
Super. Ct. No. CIV499881)

Defendants John and Patricia Casey are back before this court challenging the trial court’s second order denying their petition for arbitration. The court found the Caseys waived the right to seek arbitration because of their involvement in prior proceedings in Nicaragua and because of their delay in seeking arbitration in this lawsuit by, for instance, interposing a demurrer to plaintiff Michael Lawler’s initial complaint. The court also ruled the parties’ written agreement, containing the arbitration provision, was illegal under Nicaraguan law.

We affirm on the sole ground the Caseys have failed to carry their burden as appellants of demonstrating the trial court’s finding of waiver—based on their pre-petition conduct in this case—is erroneous. We also expressly reject the trial court’s second, “illegality” ground, for denying arbitration.

## BACKGROUND

### *Genesis of the Dispute*

We discussed the background of the present lawsuit in an earlier decision:<sup>1</sup>

“According to Lawler, on January 15, 2006, while in San Mateo, California, John Casey ‘represented’ to Lawler ‘he would enter into a joint venture and partnership with [Lawler] to purchase and develop real property into income producing properties in San Juan del Sur, Nicaragua, wherein [Lawler and Casey] would contribute equal amounts of capital for acquisition and improvement of real properties in Nicaragua and share equally in the income and profits.’ Lawler further claims the parties, in fact, entered an oral partnership agreement in San Mateo on January 21, 2006. He also claims Casey told him they would need to form an entity in Nicaragua, a ‘Societe Anonima,’ to carry out the partnership’s business.

“[O]n March 13, 2006, Casey and Lawler were in Rivas, Nicaragua and signed a written contract, which, while cryptically titled ‘Legal Document Number thirty eight (38) De Facto Corporation’, is essentially a partnership agreement. It states there will be a company called ‘Casey & Lawle [*sic*] S.A.’ that will operate a bed and breakfast in Port of San Juan del Sur, Nicaragua and other ventures. The company is to have the authority to do all things necessary and convenient to carry out its purpose. Further, ‘[t]he company shall have a term of duration of THREE years,’ which would be automatically extended ‘unless the partners request its dissolution and subsequent liquidation no less that [*sic*] six months before the date the term is set to expire.’ The contract states what percentage of each business the partners will own and what contributions to the company, financially and operationally, each is expected to make.

“The contract contains a ‘CLAUSE FIVE ON ARBITRATION,’ which states: ‘In the case of a disagreement of any kind between the partners, they shall submit to Arbitration under a Fair and Impartial Arbitrator that is herewith appointed to [*sic*] Mr. Carlos Luis Fuertes Gonzales, the undersigned Notary Public. The Parties shall be bound by law to abide by the Arbitrator’s determination.’

“Less than two years after signing their written contract, in 2008, the Casey and Lawler collaboration began to unravel . . . .”

First, the Caseys, themselves, went to court. On September 1, 2008, Patricia Casey sued John Casey in Nicaragua for an accounting related to the costs of acquiring

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<sup>1</sup> *Lawler v. Casey* (July 27, 2012, A132620) [nonpub. opn.].

and renovating what the parties refer to as the Las Cascadas and Marsella properties. Lawler was not involved with or notified about the case. It concluded three weeks later after mediation. The Caseys say they initiated the action on the advice of counsel so a public record of accounting would be made.

Then Lawler and the Caseys squabbled. From Lawler's perspective, the Caseys duped him into signing the March 2006 written agreement and various other agreements, each with terms he now claims were unfavorable and a surprise. The Caseys assert the 2006 written contract was translated for Lawler before he signed it, and he fully understood the parties' various commitments.

Lawler availed himself of the Nicaragua courts on September 8, 2008. He "filed a lien and was named the depositor of both the properties by the sitting judge of San Juan del Sur." He sought no further relief in that matter. Five days later, the Caseys filed a lien, which was also executed by the sitting judge of San Juan del Sur. Lawler was kept as the named depositor.

On September 23, Lawler filed a lawsuit against the Caseys seeking dissolution and liquidation of the S.A. The Caseys never responded, appeared at scheduled mediation sessions, or otherwise participated in the litigation. Lawler contends he and the Caseys were then living at Las Cascadas.

Seven months later, in April 2009, the Caseys filed a second lien. The deputy judge of San Jose del Sur executed the lien and substituted an employee of the Caseys as depositor. The deputy judge also ordered Lawler removed from the Las Cascadas property. The substitution and removal order, however, were reversed by the sitting judge of San Juan del Sur.

Next, a Chicago resident, Vince Tarallo, had acquired the Caseys' interest in the Marsella property. He sued Lawler and the Caseys in Nicaragua, also in April 2009, to establish the nature of his interest, particularly in light of Lawler's 2008 lawsuit.

The following month, in May 2009, the Caseys filed a suit against Lawler in

Nicaragua seeking \$50,000 in damages Lawler allegedly caused to the Las Cascadas property while residing there.

Nearly a year-and-a-half later, in October 2010, the Caseys filed liens on Las Cascadas and Marsella, again with the deputy judge. In December, the sitting judge nullified the liens. But his nullification order was not enforced due to the Christmas holiday. In the interim, Patricia Casey successfully disqualified the sitting judge, and the deputy judge refused to enforce the nullification. Lawler believed he had to remain “imprisoned” at Las Cascadas in order to protect his right in the property. He remained there for months.

In January 2011, the Caseys filed another suit in Nicaragua seeking damages and claiming Lawler “destroyed personal and partnership property.”

It appears, as Lawler conceded and the Caseys note, none of the civil cases pending between the parties in Nicaragua has been tried or dismissed.

### ***The Present Lawsuit***

#### ***Initial Proceedings***

In the meantime, Lawler filed the instant lawsuit in San Mateo County on October 19, 2010.

The Caseys did not immediately seek to arbitrate. Rather, they responded on November 19, 2010, they demurred and moved to strike. The demurrer and motion to strike are not included in the appellate record, and all we know about them is what appears in the trial court docket sheet and incorporated minutes.

On February 3, 2011, the trial court overruled the demurrer to the extent it asserted misjoinder, lack of subject matter jurisdiction, and an inability to determine the nature (written, oral, implied) of any alleged contract. It overruled the demurrer to the extent it was based on pending litigation outside California as to four of the causes of action. It also overruled the demurrer to the extent it was based on uncertainty as to the Racketeer Influenced and Corrupt Organization Act (28 U.S.C. §1962; RICO) claim. It sustained

the demurrer, however, as to the false imprisonment and accounting claims, but granted leave to amend to allege lack of consent (imprisonment) and the existence of a fiduciary relationship (accounting). In light of these rulings, the court ruled related, but unspecified, special demurrers were moot. The court also denied the motion to strike as to various causes of action, without further elaboration, and refused to strike references to demands for exemplary damages.

This prompted Lawler to file the operative, amended complaint on February 23, alleging: (1) a “common count” for an unspecified \$170,000 debt the Caseys owe Lawler; (2) fraud by the Caseys by falsely representing, in San Mateo in 2006, they would form a partnership in which Lawler and the Caseys would contribute and profit equally, and by failing to disclose the true costs of property acquisitions and improvements—all of which caused Lawler to unwittingly contribute \$315,000; (3) a RICO violation by the Caseys based on use of the mail and bank wires to perpetuate the alleged fraud and based on alleged misuse of the Nicaraguan judicial system to obtain liens on the Nicaraguan properties; (4) false imprisonment of Lawler, apparently in the Las Cascadas property; (5) conversion by the Caseys of the \$315,000; (6) accounting for money due Lawler under the oral partnership agreement allegedly made in 2006 in San Mateo; and (7) breach of fiduciary duty by the Caseys for failing to make an accounting as requested in July 2008.<sup>2</sup> Lawler seeks damages of \$500,000, exemplary and treble damages under RICO, interest, and attorney fees according to proof.

In the meantime, the parties had filed case management statements. The Caseys’ attorney left blank a space where willingness to arbitrate could have been indicated, estimated seven days for trial, and estimated a completion date for defendants’ discovery.

Also, the day Lawler filed his amended complaint, the Caseys moved to stay

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<sup>2</sup> Lawler has not argued on appeal that any of these claims would fall outside the broad scope of the 2008 contract’s arbitration clause, assuming the contract is lawful.

discovery, apparently pending another demurrer and motion to strike. Five days later, on February 28, Lawler filed three motions to compel discovery responses, which the Caseys opposed.

On March 24, six months after the lawsuit was filed, the Caseys filed a petition to compel arbitration. The trial court denied the petition, ruling the arbitration provision was invalid in its entirety because it named as the arbitrator an individual who had become biased in favor of the Caseys. We reversed, holding the provision naming the arbitrator was severable and not a wholesale bar to arbitration. We did not address Lawler's other defenses to arbitration the trial court had not addressed (waiver and illegality under Nicaragua law), and remanded for further proceedings.

#### ***Post-Remand Proceedings Now Under Review***

Following remand, the trial court solicited further briefing on arbitration.

In support of his waiver and illegality arguments, Lawler submitted his own declaration on the parties' litigious history and also declarations from a woman he asserts has expertise in Nicaraguan law (a woman the Caseys assert had become Lawler's romantic companion). One of these declarations, "Declaration of Dr. Jeanette Lugo Garcia in Support of Hearing to Establish Illegality of Contract and Waiver," purports to "certify" and give a summary of the various proceedings between the parties. The other, the "Declaration of Dr. Jeanette Lugo Garcia in aid of Plaintiff's Request for Judicial Notice," states Lugo's belief the 2006 contract is illegal under Nicaragua law and the arbitration clause is therefore deficient. This declaration refers to, and purports to explain, a variety of excerpts of Nicaraguan statutes attached to a separate request for judicial notice.

The trial court ruled much of this was inadmissible. It rejected the two Lugo declarations, agreeing with the Caseys that Lugo was not qualified to offer expert testimony on Nicaraguan law and lacked personal knowledge of various asserted facts. The trial court likewise denied Lawler's request for judicial notice related to the second

Lugo declaration.<sup>3</sup>

The Caseys, in turn, submitted their own declarations and a declaration from Mario Ernesto Guerra Fittoria, also an asserted expert in Nicaraguan law. He opined a contract can only be voided by mutual consent or for legal reasons. He also claimed Lugo was biased and not credible because her license to practice law had been suspended for one year, as a result of a complaint Patricia Casey had filed against her.

Following a hearing, the trial court again denied the Caseys' petition to compel arbitration on both waiver and illegality grounds. As to waiver, the court cited to the Caseys' efforts to secure liens in the Nicaragua courts on "property that would be subject to the arbitration agreement," the Caseys' litigation between themselves in Nicaragua, the Caseys' failure to respond to Lawler's Nicaragua action to dissolve the S.A., and the Caseys' two Nicaragua lawsuits for damages to property of the alleged partnership. The trial court also pointed to the Caseys' conduct in the instant lawsuit of demurring and moving to stay discovery—before ever seeking to compel arbitration.

The trial court also concluded the 2006 written contract was an "illegal contract under Nicaragua law lacking an enforceable arbitration agreement." The court initially explained this conclusion by stating if the agreement ever had a valid arbitration clause, it no longer did so in light of the waiver considerations. The evidence of waiver, said the trial court, "coupled with [the Caseys'] purported legal expert's lack of evidence that the S.A. was legal, supports the factual finding that the S.A. is illegal." The trial court did not identify any affirmative evidence of illegality, however—not surprisingly, since the court ruled Lawler's proffered evidence on that point was inadmissible.

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<sup>3</sup> The court also sustained the Caseys' objection (d) to the "Declaration of Dr. Jeanette Lugo Garcia," ruling paragraph 5 of that declaration was hearsay or irrelevant and their objection (e) to the "Declaration of Michael Lawler," ruling Exhibit No. 4 was not authenticated and lacked foundation.

## DISCUSSION

We start with the question of waiver. “ ‘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.’ ” (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 374–375 (*Iskanian*)). “ ‘[P]rejudice’ ” to the party opposing arbitration “ ‘is critical in waiver determinations.’ ” (*Id.* at pp. 376–377; see also *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1203 (*St. Agnes*); *Gloster v. Sonic Automotive, Inc.* (2014) 226 Cal.App.4th 438, 448 (*Gloster*)).

“[W]hile ‘ “[w]aiver does not occur by mere participation in litigation” ’ if there has been no judicial litigation of the merits of arbitrable issues, ‘ “ ‘waiver could occur prior to a judgment on the merits if prejudice could be demonstrated.’ ” ’ [Citation.]” (*St. Agnes, supra*, 31 Cal.4th at p. 1203.) A strong public policy favors speedy and inexpensive access to arbitration when chosen. (*Id.* at p. 1204.) Thus, “[p]rejudice typically is found only where the petitioning party’s conduct has substantially undermined this important public policy or substantially impaired the other side’s ability to take advantage of the benefits and efficiencies of arbitration.” (*Ibid.*; see also *Iskanian, supra*, 59 Cal.4th at p. 377.) Classic examples of prejudice include using discovery to obtain evidence that could not be obtained in arbitration, unduly delaying and waiting until the eve of trial to invoke an arbitration right, or unduly delaying such that evidence is lost. (*St. Agnes*, at p. 1204.)

Filing or answering a complaint or filing pretrial motions that concern, for example, jurisdiction, venue, and similar procedural matters, will generally *not* result in waiver. (*St. Agnes, supra*, 31 Cal.4th at p. 1205 [motion to change judicial venue of an

action prior to requesting arbitration does not waive right, as a position on venue does not necessarily reflect a position on arbitrability]; *Gloster, supra*, 226 Cal.App.4th at p. 449 [answering complaint].)

Pretrial motions seeking resolution of the merits of arbitrable issues, however, may indeed result in waiver. (*Gloster, supra*, 226 Cal.App.4th at p. 450; *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 446 (*Lewis*) [waiver when defendant “litigated the merits of . . . claims through two demurrers and a motion to strike and participated in discovery without raising its right to arbitration” for four months].) Thus, interposing a demurrer can constitute judicial litigation on the merits supporting a finding of waiver. (*Lewis, supra*, 205 Cal.App.4th at pp. 449–451 [waiver after demurrer on grounds plaintiff failed to allege facts sufficient to state a claim]; *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1447, 1451–1452 (*Adolph*) [waiver after demurrers for failure to state claim]; *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1980) 105 Cal.App.3d 946, 951 (*McConnell*); *Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1371, fn. 16; see also *St. Agnes, supra*, 31 Cal.4th at p. 1201 [noting possibility of waiver following demurrers].)

But this is not always so, such as when the demurrer’s primary purpose is not to resolve a claim on its merits (*Gear v. Webster* (1968) 258 Cal.App.2d 57, 64 [demurrer “did not touch upon the basic issues in the case”]; *Zamora v. Lehman* (2010) 186 Cal.App.4th 1, 20 [demurer for lack of specificity]) or when the demurrer primarily serves to clarify and sort through a vague complaint containing causes of action that manifestly are both arbitrable and not arbitrable, such that resolving the demurrer does not result in prejudice but rather facilitates the process of determining which claims should ultimately be arbitrated. (*Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1196–1198 (*Groom*);<sup>4</sup> accord, *St. Mary’s Medical Center of Evansville, Inc. v. Disco*

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<sup>4</sup> To the extent *Groom* might be read to broadly foreclose waiver arguments based on any demurrer, such a reading has been roundly rejected. (*Lewis, supra*,

*Aluminum Products Co., Inc.* (7th Cir. 1992) 969 F.2d 585, 589 [noting “it might be necessary for the defendant to file the motion [to dismiss] both to sort out the claims before it can intelligently decide whether to arbitrate and to protect its rights in court if the arguably non-arbitrable claims do turn out to be non-arbitrable,” but concluded the case before it “did not present that dilemma”].)<sup>5</sup>

When evaluating the impact of a demurrer, there is no bright-line rule and “[t]he trial court must . . . view the litigation as a whole and determine if the parties’ conduct is inconsistent with a desire to arbitrate.” (*McConnell*, *supra*, 105 Cal.App.3d at p. 952, fn. 2.) The rationale for finding waiver following demurrers seeking resolution of a case’s merits is explained in *McConnell*. “[N]umerous matters can be litigated before there is a final judgment.” (*Id.* at p. 951.) “Partial or piecemeal litigation of issues in dispute” through demurrers, motions for summary judgment, or the like can prejudice the party opposing arbitration. (*Ibid.*, quoted in *Lewis*, *supra*, 205 Cal.App.4th at pp. 448–449.) A litigant should not be permitted to “test[] the water before taking the swim” and “go elsewhere” if the “water is chilly.” (*McConnell*, at p. 951.) As put by our Supreme Court and as repeated by the Courts of Appeal: “‘The courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration.’” (*Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 784; *Adolph*, *supra*, 184 Cal.App.4th at pp. 1451–1452.)

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205 Cal.App.4th at p. 451; *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 948; *Gonsalves v. Infosys Technologies, LTD.* (N.D. Cal., Aug. 5, 2010, No. C 3:09-04112) 2010 WL 3118861, \*3–\*4 [finding *Groom* unpersuasive].)

<sup>5</sup> Federal cases take a similar approach with motions to dismiss under Federal Rule of Civil Procedure, rule 12(b)(6), finding waiver of arbitration if a defendant’s dismissal motion results in the district court addressing the merits of a claim. (See, e.g., *In re Pharmacy Ben. Managers Antitrust Litigation* (3d Cir. 2012) 700 F.3d 109, 118 [distinguishing motions to dismiss that target merits and those that do not]; *Hooper v. Advance America, Cash Advance Centers of Missouri, Inc.* (8th Cir. 2009) 589 F.3d 917, 921–922 [same].)

“ [A] determination by a trial court that the right to compel arbitration has been waived ordinarily involves a question of fact, which is binding on the appellate court if supported by substantial evidence. The appellate court may not reverse the trial court’s finding of waiver unless the record as a matter of law compels finding nonwaiver.’ ” (*Burton v. Cruise, supra*, 190 Cal.App.4th at p. 946, quoting *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211.) Only if the facts concerning waiver are undisputed would we review the waiver issue de novo. (*Iskanian, supra*, 59 Cal.4th at p. 375.)

Here, the Caseys both demurred and moved to strike, and the trial court identified their pre-petition conduct as one of the bases for its finding of waiver. As appellants, the Caseys have the burden of showing the trial court’s reliance on this conduct was error, including supplying a record that demonstrates such error. (See *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970 [noting “ three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error’ ”].) Failing to include crucial documents precludes effective review and results in affirmance. (*Gonzalez v. Rebollo* (2014) 226 Cal.App.4th 969, 977 [appellant did not include in appellate record documents he had lodged with the trial court and so Court of Appeal could not evaluate claim of trial court error]; *McAllister v. Los Angeles Unified School Dist.* (2013) 216 Cal.App.4th 1198, 1211 [missing reporter’s transcript]; *Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 348 [“ ‘Failure to provide an adequate record on an issue’ ”—in this case, omitting a reporter’s transcript and documentary evidence—“ ‘requires that the issue be resolved against appellant.’ ”]; *Bains v. Moores* (2009) 172 Cal.App.4th 445, 478 [“plaintiffs have failed to include in the record either the operative complaint or the demurrers, thus making it impossible for this court to review the complaint de novo to determine whether it states a cause of

action” and “[o]n that basis alone, we must reject plaintiffs’ claim”]; see also *In re Marriage of LaMoure* (2011) 198 Cal.App.4th 807, 825 [“ ‘Where the record is silent, all intendments and presumptions are indulged to support the judgment on those matters, and error must be affirmatively shown. [Citation.] Given the incompleteness of the record, appellant has failed to carry his burden to show affirmative error.’ ”].)

We have the barest record of the Caseys’ demurrer. From the trial court’s docket sheet incorporating the minute order, which is all that is before us, we can tell their demurrer had some procedural aspects but also attacked Lawler’s claims on their merits. Indeed, the trial court sustained the demurrer as to two causes of action with leave to amend. Had Lawler not amended, the case would have terminated as to those causes of action.

We do not have the Caseys’ demurrer itself or the memoranda in support and opposition—although both were in the trial court record and, thus, before the trial court—nor do we have other documents, such as a reporter’s transcript or a more formal written order, which, if they existed, might shed additional light on the demurrer proceedings. Accordingly, we have no means of determining all the relief the demurrer sought, the full extent of the parties’ engagement with the merits of the lawsuit, and all the issues the trial court considered. Thus, we have no solid basis for disturbing the trial court’s finding that, because of their demurrer, the Caseys invoked the judicial litigation machinery and eschewed the speedy remedy of arbitration, and therefore waived their right to demand arbitration.<sup>6</sup> Accordingly, on this ground, alone, the trial court’s finding of waiver and denial of the Caseys’ petition to compel arbitration must be affirmed. We therefore need not, and do not, decide whether the Caseys waived arbitration by their litigation activity in Nicaragua.

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<sup>6</sup> The parties barely discuss the demurrer proceedings in their appellate briefs, despite the fact the trial court singled out the demurrer as one of the reasons it was finding waiver.

However, given the parties' litigious history, we are compelled to address the other ground on which the trial court denied arbitration, the asserted "illegality" under Nicaraguan law of the March 2006 written agreement containing the arbitration provision. There is no basis in the record for this ruling.

Illegality was a defense Lawler raised to the petition to compel arbitration. (See Code Civ. Proc., § 1281.2, subd. (b) [court shall order arbitration if agreement exists, unless "[g]rounds exist for the revocation of the agreement"].) Thus, this was an issue as to which he bore the burden of proof. (See *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [party opposing petition bears burden on defenses to enforcement of arbitration agreement].) The trial court, however, *sustained* objections to all of his evidence and *denied* his request for judicial notice of asserted Nicaraguan legal principles in support of his defense. This left nothing in the record, as far as Lawler was concerned, demonstrating illegality.

The Caseys not only successfully objected to all of Lawler's evidence, they submitted evidence on the legality issue in response to Lawler's. The trial court did not make any adverse evidentiary rulings as to the Caseys' evidence, but stated it was not enough to persuade the court the contract was legal. This effectively—and erroneously—shifted the burden of proof on Lawler's defense to the Caseys. (See *Rosenthal, supra*, 14 Cal.4th at p. 413.)

Furthermore, having sustained objections to Lawler's evidence and essentially ignored the Caseys' evidence, the court effectively had *no evidence* before it on which to determine the legality of the written agreement. It may be the legality of the agreement will turn out to be an issue of law, making any evidentiary showing irrelevant. However, the trial court did not engage in any legal analysis either, and on this bare record, we cannot begin to determine what showing or analysis may ultimately be proper. In fact, the court seems to have conflated the issues of waiver and contractual illegality.

Thus, while we are affirming the order denying arbitration on the ground the trial

court's finding of waiver is supported by the Caseys' pre-petition litigation conduct, namely interposing a demurrer implicating the merits, we are also making clear the court's secondary ruling of "illegality" under Nicaraguan law is unsupported by the instant record and not a basis on which the order could be affirmed.

**DISPOSITION**

The order denying the petition to compel arbitration is affirmed. The parties to bear their own costs on appeal.

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Banke, J.

We concur:

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Humes, P. J.

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Dondero, J.

A139417, *Lawler v. Casey*