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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

DAVID ACHTERKIRCHEN et al.,

Plaintiffs and Respondents,

v.

JESUS A. MONTIEL,

Defendant and Appellant.

A140277

(San Francisco City & County
Super. Ct. No. CPF-11 511639)

Plaintiff David Achterkirchen and several other tenancy in common owners of a four-unit residential building sought arbitration against one of their fellow owners, defendant Jesus A. Montiel. The trial court compelled arbitration and confirmed the award following the conclusion of the arbitration. Montiel contends the trial court erred in refusing to vacate the award because various procedural provisions in the parties' arbitration agreement were not satisfied. We affirm.

I. BACKGROUND

Achterkirchen filed a petition to compel arbitration with Montiel in October 2011. The petition to compel alleged Achterkirchen and his wife were tenancy in common owners of one unit in a four-unit residence (property), while Montiel owned another of the units.¹ In early 2010, Achterkirchen learned tax liens had been filed against Montiel's interest in the property, in violation of the "Tenancy in Common Agreement" (agreement) executed by all the owners. Achterkirchen demanded Montiel cure the

¹ For simplicity, we will hereafter refer collectively to the tenancy in common owners of the property other than Montiel as the "other owners."

violation, but he failed to do so. Pursuant to the terms of the agreement, Achterkirchen sought arbitration of the dispute.

Under the agreement, an owner may commence a formal dispute against another owner by sending a “Notice of Actionable Violation,” such a violation defined to include, among other things, a breach of the agreement and the creation of a lien. The party receiving such a notice can “stay” the actionable violation by sending a notice of mediation within seven days of the “effective date” of the notice of actionable violation. The effective date of any notice is defined in the agreement as “the date of personal delivery, three (3) business days after mailing, or upon publication.” If a notice of mediation is timely provided, any actionable violation is stayed for the duration of diligent efforts to complete mediation and arbitration. In the absence of a timely notice of mediation, the party subject to a notice of actionable violation is given seven calendar days from the effective date of the notice to cure the violation. If not cured, an actionable violation becomes a default, which allows forced sale of the defaulting party’s interest.

The agreement contains an alternative dispute resolution provision. The parties agree “to appear for mediation and to attempt in good faith to resolve any dispute related to the Property.” A party “desiring mediation” is required to send an appropriate notice to the remaining owners specifying a mediator and setting a time for the mediation. Failure to appear for a noticed mediation is itself an actionable violation of the agreement.

The parties also agreed to arbitrate “[a]ny dispute related to the Property that is not resolved through mediation.” An arbitration proceeding is commenced through the sending of a notice of arbitration to the other owners designating a “qualified arbitrator” and setting a time for the arbitration. A “qualified arbitrator” is one having at least two years’ experience arbitrating real estate disputes and having no prior relationship to any party. The other parties are entitled to reject the designated arbitrator by sending a notice of rejection within 48 hours of the effective date of the notice of arbitration. Failure to provide a timely notice of rejection waives rejection of the designated arbitrator. In that event, “the Party desiring arbitration shall select the Qualified Arbitrator specified in the

Notice of Arbitration. Otherwise, the Party desiring arbitration shall initiate arbitration before the Judicial Arbitration and Mediation Service (JAMS).” Provision is also made for changing the designated time for arbitration. Arbitration is to be completed within one month of the date of the notice of arbitration unless all parties agreed otherwise. The failure to appear for arbitration is an actionable violation of the agreement.

Achterkirchen mailed two notices of actionable violation to Montiel, one each for two separate tax liens, on April 27, 2010. Montiel did not respond until May 18, 2010, when he provided to the other owners a notice of mediation, designating a mediation in Santa Ana, California at the offices of Judicate West. The other owners treated the notice of mediation as ineffective because it was untimely and voted to require a forced sale of Montiel’s interest. Because Montiel failed to cooperate with the forced sale, the other owners arranged for arbitration before arbitrator David Meadows. When Meadows contacted counsel for Montiel regarding the arbitration, Montiel’s counsel declined to cooperate, contending Montiel was not “a party in any pending action.”

On August 18, 2011, the other owners sent Montiel a notice of arbitration regarding his refusal to cooperate with the forced sale. Montiel’s attorney returned a “notice of rejection,” contending the notice of arbitration was “undecipherable as to the issues to be presented at arbitration” and the owners had forfeited the right to demand arbitration by their failure to participate in the mediation. The notice not only rejected Meadows as arbitrator, but also “any other person.” At this point, Achterkirchen filed a petition to compel arbitration. Claiming the agreement provided no means of selecting an arbitrator following rejection of a designated arbitrator, the petition to compel requested appointment of an arbitrator and listed five persons acceptable to Achterkirchen.

In opposition to the petition to compel, Montiel’s attorney, Thomas Smurro, filed a declaration acknowledging the notice of mediation was not sent until May 18, 2010. In a second declaration, Smurro explained the notice of mediation was tardy because he and Montiel had been out of the country at the time the notices of actionable violation were served, and neither returned to the United States before the due date for the notice of mediation.

The trial court granted the petition to compel, finding the notice of mediation to have been untimely. In the order granting the petition, the court nominated five potential arbitrators from the San Francisco office of ADR Services and instructed the parties to attempt to agree on one of them. When the parties were unable to agree, the court appointed Retired Judge Ina Gyemant. There is no indication in the record that either party objected at the time to the trial court's method for selecting an arbitrator or its eventual designation of Judge Gyemant.

On March 4, 2013, the other owners filed a petition to confirm the arbitration award rendered in connection with the arbitration. According to the petition, Judge Gyemant conducted an arbitration on various dates in late 2012. In February 2013, she rendered a 46-page award, a copy of which was attached to the petition. In the award, Judge Gyemant found that two federal tax liens had been recorded against the property as a result of Montiel's alleged tax deficiencies. The first, for \$40,153, was paid off and released in April 2012. The second, for \$359,195, remained at the time of the hearing. After discussing the evidence presented at the hearings, Judge Gyemant addressed and rejected a variety of procedural objections raised by Montiel under the terms of the agreement, including most of the arguments he raises in this appeal.

Judge Gyemant found Montiel had breached the agreement by allowing tax liens to be filed against the property and had failed to cure the violations in a timely manner. She awarded the other owners a forced sale of Montiel's interest in the property, liquidated damages of \$5,000, attorney fees and costs of \$334,526, fees and costs associated with enforcing the award, and prejudgment interest.

Montiel filed a verified petition to vacate the arbitration award. The notice of hearing on Montiel's petition to vacate was accompanied by extensive declarations from a tax expert, Montiel himself, and Smurro. The other owners' attorneys submitted declarations in opposition. Voluminous additional declarations were filed, including a 23-page, 91-paragraph reply declaration by Smurro describing various events at the arbitration.

Following a hearing in April 2013, the trial court entered a judgment confirming the arbitration award. At the April hearing, the trial court explained it had concluded Montiel failed to demonstrate grounds under Code of Civil Procedure section 1286.2 for vacating the award, but there is no further explanation in the appellate record for the trial court's decision.²

II. DISCUSSION

Montiel contends the trial court erred in confirming the arbitration award because (1) the trial court did not compel arbitration before JAMS, (2) the other owners forfeited the right to arbitrate the dispute when they failed to participate in the mediation noticed by Montiel, (3) the notice of arbitration was untimely because it was not sent within three days of the conclusion of mediation, (4) the other owners were required to initiate arbitration with JAMS after Montiel's rejection of their designated arbitrator, and (5) the arbitrator lacked jurisdiction over the proceedings because the arbitration was not concluded within 30 days of the notice of arbitration.

The first four of these contentions are, in effect, claims of error in the trial court's original order compelling arbitration, rather than an attack on the arbitration award per se. Because an order compelling arbitration is not immediately appealable, " 'the party resisting arbitration may seek review of the ruling on appeal from an order that confirms the award.' " (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1359.) "The standard of review of an order compelling arbitration is substantial evidence, where the trial court's decision was based upon the resolution of disputed facts, or de novo where the facts are not in conflict." (*Id.* at p. 1360.)

² The court's docket reflects the filing of a statement of decision. At a hearing on November 6, 2013, the trial court effectively withdrew this document as a statement of decision, explaining it did not view itself as required to prepare a statement of decision, and recharacterized it as an order ruling on the various motions. The parties have not included this document, however characterized, in the appellate record. The docket also reflects a flurry of postjudgment activity, but, again, the relevant documents are not before us. At the same November hearing, the trial court denied Montiel's motion for a new trial, finding it to be an untimely motion for reconsideration.

As Montiel acknowledges, however, each of the issues he raises on appeal, with the exception of the failure of the trial court to send the matter to JAMS, was ruled on by Judge Gyemant in her arbitration decision. She rejected each of them as a matter of contractual interpretation under the circumstances presented, which were not in material dispute. Our consideration of these issues is circumscribed by their resolution in the arbitration proceeding.

“Absent an express and unambiguous limitation in the contract or the submission to arbitration, an arbitrator has the authority to find the facts, interpret the contract, and award any relief rationally related to his or her factual findings and contractual interpretation.” (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1182 (*Gueyffier*)). “Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, ‘procedural’ questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.” (*John Wiley & Sons, Inc. v. Livingston* (1964) 376 U.S. 543, 557.) Doubts concerning the scope of arbitrable issues are “ ‘resolved in favor of arbitration.’ ” (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 26.)

The parties agreed to arbitrate “[a]ny dispute related to the Property that is not resolved through mediation.” This language was accompanied by a bold-face “NOTICE” stating: “**YOU ARE AGREEING TO HAVE ANY MATTER ARISING OUT OF THE ‘ARBITRATION’ PROVISION DECIDED BY NEUTRAL ARBITRATION . . . AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL.**” This language was broad enough to encompass Judge Gyemant’s interpretation of the agreement to determine whether the parties had satisfied the contractual prerequisites to invocation of the arbitration clause, as well as the arbitrator’s resolution of the 30-day issue. Montiel’s voluntary submission of each of these issues to

Judge Gyemant suggests his recognition that, as issues of contract interpretation, they came within the proper scope of the arbitrator's authority.³

In reviewing the denial of a petition to vacate an arbitration award, we do not review the arbitrator's decision for errors of law or fact. (*Gueyffier, supra*, 43 Cal.4th at p. 1184.) As the court explained in *Gueyffier*: "When parties contract to resolve their disputes by private arbitration, their agreement ordinarily contemplates that the arbitrator will have the power to decide any question of contract interpretation, historical fact or general law necessary, in the arbitrator's understanding of the case, to reach a decision. [Citations.] Inherent in that power is the possibility the arbitrator may err in deciding some aspect of the case. Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error, for "[t]he arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement." ' ' (*Ibid.*) We are, accordingly, bound by the arbitrator's ruling on these four issues. Montiel's claims of error must be rejected.

Montiel contends these issues should be decided by this court because courts have the exclusive authority to determine whether a party has waived the right to arbitrate.⁴

³ We requested supplemental briefing from the parties with respect to the weight to be given to Judge Gyemant's rulings. In his supplemental briefing, Montiel's attorney appears to deny having submitted these issues for decision to the arbitrator, stating, "the arbitrator simply chose to ignore [Montiel's] forceful objections and ruled on all four of the issues raised by appellant here." In connection with her discussion of each of these arguments, Judge Gyemant stated that Montiel raised the issue, and we have no reason to doubt these statements. The other owners had no motive to raise them, and it is difficult to conceive why Judge Gyemant would have raised these issues *sua sponte*, yet attributed them to Montiel. We note Montiel did not include in the appellate record the parties' briefing in the arbitration proceeding, which would have resolved this issue. We therefore accept the arbitrator's representations, in the absence of any admissible evidence casting doubt on those statements.

⁴ Montiel also argues that interpretation of a contract is a matter for the court. As the discussion quoted in the text from *Gueyffier* demonstrates, that is patently incorrect. As between the court and a jury, the court is vested with responsibility for contractual

(Code Civ. Proc., § 1281.2, subd. (a); *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 982 (*Engalla*)). While there is certainly language to support this claim in general terms, the scope of the waiver doctrine subject to exclusive court jurisdiction, if any, is by no means clear. In the arbitration context, the doctrine of waiver has been “ ‘used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost.’ ” (*St. Agnes Medical Center v. PacificCare of California* (2003) 31 Cal.4th 1187, 1195, fn. 4 (*St. Agnes*)). A review of the circumstances under which waiver of the right to arbitrate is found demonstrates it is a general equitable doctrine based on the conduct of the party seeking arbitration, independent of the language of the specific arbitration clause. “ ‘. . . 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 ‘wilful misconduct’ of a party may constitute a waiver and thus justify a refusal to compel arbitration.’ ” (*Id.* at p. 1196.) Waiver is also found if a party pursues litigation without invoking the right to arbitrate in a timely manner. (*Hong v. CJ CGV America Holdings, Inc.* (2013) 222 Cal.App.4th 240, 255.) As these examples illustrate, the doctrine of arbitration waiver is ordinarily one of general application governed by the common law.

In contrast, each of the issues resolved by Judge Gyemant arose from the specific language of the agreement, subject matter ordinarily well within the jurisdiction of the arbitrator. The requirement to participate in mediation prior to arbitration, the timing requirement for the notice of arbitration, the requirement of an arbitrator from JAMS, and the requirement to conclude the arbitration within 30 days of the notice of arbitration applied to the other owners only because of the language of the agreement, rather than

interpretation. In the context of contractual arbitration, however, the arbitrator is fully empowered to construe the terms of the contract.

more general principles of law. Further, as noted above, the doctrine of waiver addresses circumstances in which “ ‘a contractual right to arbitration has been lost.’ ” (*St. Agnes, supra*, 31 Cal.4th at p. 1195, fn. 4.) In contrast, as acknowledged by Montiel, the issues he raises relating to the other owners’ right to arbitrate are in the nature of conditions precedent. Rather than establishing circumstances in which the right to arbitration is lost, they are conditions the other owners were required to satisfy before their right to arbitration ever arose. (See, e.g., *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 (*Platt Pacific*) [right to arbitrate subject to conditions precedent in arbitration agreement].) For these reasons, it was proper for the arbitrator to address these issues, and we must defer to her rulings.

We acknowledge in some older cases, prominently *Platt Pacific, supra*, 6 Cal.4th 307, the court decided an issue of forfeiture due to the failure of a condition precedent, in the process characterizing the issue as one of “waiver.” (*Id.* at pp. 319–320.) In so doing, however, *Platt Pacific* did not suggest the court had exclusive jurisdiction over the issue. Rather, because the matter reached the court on review of the denial of a petition to compel arbitration, the issue never arose. (*Id.* at p. 313.) At most, *Platt Pacific* establishes that courts are entitled to decide such preliminary issues of contractual compliance in addressing a petition to compel arbitration. (See *Engalla, supra*, 15 Cal.4th at p. 982 [arbitrator does not have exclusive authority over preliminary procedural matters].) Where a party voluntarily submits to an arbitrator the issue of a condition precedent to arbitration, based on the specific language of the arbitration agreement, resolution of which is otherwise within the jurisdiction of the arbitrator, a court may not second-guess the arbitrator’s decision, notwithstanding the issue might be characterized as one of “waiver.”⁵

As to the one issue not addressed by Judge Gyemant, the trial court’s failure to send the arbitration to JAMS, Montiel forfeited this purported error when he failed to

⁵ We reject Montiel’s claim that the failure to complete the arbitration within 30 days could ever be characterized as one of “waiver.” It was a simple issue of contractual compliance over which the arbitrator had clear authority.

raise an objection in the trial court, prior to the referral to Judge Gyemant. Contractual rights may be waived if not properly asserted. (*O'Donoghue v. Superior Court* (2013) 219 Cal.App.4th 245, 262.) When a party is aware of a basis for resisting an order compelling arbitration, that basis must be raised during litigation of the petition to compel. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 681.) “The forfeiture rule exists to avoid the waste of scarce dispute resolution resources, and to thwart game-playing litigants who would conceal an ace up their sleeves for use in the event of an adverse outcome.” (*Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321, 328 (*Cummings*)). “Those who are aware of a basis for finding the arbitration process invalid must raise it at the outset or as soon as they learn of it so that prompt judicial resolution may take place before wasting the time of the adjudicator(s) and the parties.” (*Id.* at pp. 328–329, fn. omitted.)

As noted above, the trial court proposed five potential non-JAMS arbitrators in the order granting the petition to compel arbitration. The order instructed the parties “to send an email to [a court e-mail address] . . . stating whether or not they agreed on an arbitrator, and, if they did not, the Court will select the arbitrator from one of the nominees.” In response, Montiel’s counsel sent the court an e-mail noting the parties had failed to agree and stating, “. . . Defendant is not waiving his objection to all court action in this matter, including the arbitrator selection process, as being in non-compliance with the [agreement] that specifically prohibits all ‘court action’ other than as specifically provided for in said agreement.” For the first time at oral argument, counsel contended this e-mail notified the trial court of Montiel’s objection to the appointment of a non-JAMS arbitrator. In making the argument, counsel quoted the e-mail only through its reference to “the arbitrator selection process.” As the more complete quotation of the e-mail demonstrates, however, Montiel’s stated objection was that the agreement’s arbitrator selection process “prohibits all ‘court action’ other than as specifically provided for in said agreement.” Whatever may have been intended by this vague reference, there was no reason for the trial court to have interpreted it as an objection to its appointment

of a non-JAMS arbitrator. In its failure to expressly mention that ground for objection, the e-mail was inadequate to preserve the issue for appeal.

The court's next order stated "the parties informed the Court that they were unable to agree on an arbitrator" and appointed Judge Gyemant. Although this provided Montiel with another opportunity to raise an objection to the appointment of a non-JAMS arbitrator, there is no indication in the record such an objection was made. On the contrary, while Montiel filed a motion to have Judge Gyemant dismissed as arbitrator, he never raised her failure to work with JAMS as a ground for her dismissal. By failing to insist on his purported right to a JAMS arbitrator while the issue could still be cured without a "waste of scarce dispute resolution resources," Montiel forfeited any such right.⁶ (*Cummings, supra*, 128 Cal.App.4th at p. 328.)

III. DISPOSITION

The judgment of the trial court is affirmed.

⁶ At oral argument, Montiel argued, again for the first time, that he raised this issue before the arbitrator in his arbitration brief. Assuming this would be adequate to preserve the issue for appeal, nothing in the appellate record supports counsel's claim to have included the issue in his arbitration brief. The brief itself is not in the record, and the portion of the arbitrator's decision that counsel cited as demonstrating the issue was raised addresses only the *other owners'* failure to initiate proceedings with JAMS. The arbitrator's decision makes no reference to any claim by Montiel that the *trial court* erred in appointing a non-JAMS arbitrator.

Margulies, J.

We concur:

Humes, P.J.

Dondero, J.