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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

EDWARD ELMS,

Plaintiff and Respondent,

v.

LEAH AHN,

Defendant and Appellant.

(A141521)

(San Francisco City and County
Super. Ct. No. CPF-12-512674)

Appellant Leah Ahn appeals after the trial court granted respondent Edward Elms’s petition to confirm an arbitration award and denied Ahn’s petition to vacate the award, in a dispute arising from Elms’s work as a contractor in Ahn’s residence. On appeal, Ahn contends the trial court erred in confirming the arbitration award because the contract containing the arbitration provision failed to comply with Business and Professions Code section 7191,¹ which contains detailed language and formatting requirements for arbitration provisions in contracts for work on specified residential property. Because we conclude Ahn has forfeited this claim, we shall affirm the judgment.²

¹ All further statutory references are to the Business and Professions Code unless otherwise indicated.

² Because some of the relevant cases use the term “waiver” and others the term “forfeiture” to refer to the same loss of the right to challenge a contract or arbitration provision, in this opinion, we will not ascribe distinct meanings to the two terms. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1.)

FACTUAL AND PROCEDURAL BACKGROUND

In April 2007, Elms, a contractor, entered into a written contract with Ahn and the other owners of a three-unit residential property for the conversion of a basement into a three-car garage. The contract, provided by Elms, contained an arbitration provision.³

In December 2010, after a dispute arose between Elms and Ahn regarding Elms's work, Elms filed a demand for arbitration with the American Arbitration Association (AAA), seeking damages in the amount of \$27,500 for the remaining 10 percent owed on the contract and additional costs incurred. In January 2011, Ahn filed an answer to Elms's demand and a counterclaim, in which she alleged causes of action for, inter alia, indemnity, breach of contract, breach of implied warranty, negligence, intentional and negligent misrepresentation, trespass, private nuisance, and intentional and negligent infliction of emotional distress. She sought damages in excess of \$500,000, as well as additional punitive damages.

The arbitration began on February 23, 2012, and took place over a total of nine days between February and August 2012. Following the arbitration, on October 25, 2012, the arbitrator concluded that Elms was entitled to \$6,812 for "fees/permits and electrical work" and that Ahn was entitled to \$4,712 in damages "to complete/repair" the construction work and to replace the cold air return in the kitchen. The arbitrator also found that Elms was entitled to \$12,000 in attorney fees as sanctions. The arbitrator therefore awarded Elms a total of \$14,100.

On December 18, 2012, Elms filed a petition in the trial court to confirm the arbitration award. On December 27, 2012, Ahn, now in propria persona, filed a petition to vacate the arbitration award based, inter alia, "on legal precedent invalidating arbitration clauses which are not conspicuously located in a provider's contract with the

³ At the time of the arbitration, Elms submitted to the arbitrator the multipage contract between the parties, which included an arbitration provision. Subsequently, in support of his petition to confirm the arbitration award, Elms submitted to the trial court additional documents, which included a separate notice provision regarding arbitration of disputes and which Elms stated was provided to Ahn at the time the parties entered into the contract.

consumer and in which the provider has selected the arbitration rules without furnishing a copy to the consumer.” Then, in a March 21, 2013 response to Elms’s petition to confirm the award, Ahn, still in propria persona, for the first time specifically claimed that Elms had no right to compel arbitration because he had not complied with any of the requirements of section 7191.

On June 14, 2013, the trial court granted Elms’s petition to confirm the arbitration award and denied Ahn’s petition to vacate the award. Judgment was entered on June 25, and Ahn filed a notice of appeal on July 12.⁴

On August 12, 2013, the trial court denied Ahn’s motion for reconsideration. In its ruling, the court explained the basis of its prior order: “(1) In [*Woolls v. Superior Court* (2005) 127 Cal.App.4th 197 (*Woolls*),] the Petitioner (Wool[I]s) objected to the arbitration before it commenced and had filed a motion to stay the arbitration which was pending when the arbitration took place. Here, Ms. Ahn requested the arbitration, participated in it without objection, and only raised her objection under [section] 7191 when an adverse result was rendered. Therefore, for the purpose of statutory interpretation, the arbitration clause was not ‘enforced against’ her but rather both parties voluntarily participated. (2) [*Woolls*] does not obviate the concept of waiver under cases cited by Mr. Elms. [*Woolls*] only states that because Mr. Wool[I]s was an attorney, he cannot be said to have waived section 7191. [Citation.] (3) Further, Ms. Ahn did not meet her burden of proof to establish that the subject contract failed to comply with section 7191. . . .”

On June 9, 2014, Ahn’s appeal was stayed due to her initiation of bankruptcy proceedings. On September 11, 2015, following the close of the bankruptcy case, we issued an order returning the appeal to active status.

⁴ Ahn erroneously filed her notice of appeal in the Appellate Division of the Superior Court. On April 9, 2014, the Appellate Division issued an order transferring the appeal to this court.

DISCUSSION

Ahn contends the trial court erred when it granted Elms's petition to confirm the arbitration award, in light of the failure of the arbitration provision in the parties' contract to comply with the requirements set forth in section 7191. She further claims she did not waive this statutory protection or forfeit the issue by failing to object on this or any ground before the arbitrator rendered its decision.⁵

“ ‘On appeal from an order confirming an arbitration award, we review the trial court's order (not the arbitration award) under a de novo standard. [Citations.] To the extent that the trial court's ruling rests upon a determination of disputed factual issues, we apply the substantial evidence test to those issues.’ [Citation.]” (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1217.)

“Title 9 of the Code of Civil Procedure, as enacted and periodically amended by the Legislature, represents a comprehensive statutory scheme regulating private arbitration in this state. (Code Civ. Proc., § 1280 et seq.) Through this detailed statutory scheme, the Legislature has expressed a ‘strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.’ [Citations.] Consequently, courts will ‘indulge every intendment to give effect to such proceedings.’ [Citations.]” (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (*Moncharsh*)).

“Although arbitration is favored [citation], there is also ‘the recognition that “the right to select a judicial forum, vis-à-vis arbitration, is a ‘substantial right,” ’ not lightly to be deemed waived. [Citations.]” [Citation.]” (*Woolls, supra*, 127 Cal.App.4th at

⁵ Elms has requested, pursuant to Evidence Code sections 452 and 459, that we take judicial notice of the complaint for damages and a case management order in an action filed by Ahn against her former attorney, alleging malpractice related to the arbitration that occurred in this case. We deny the request as those documents are unnecessary to our resolution of the issues raised in this appeal. We likewise deny Ahn's request for judicial notice, filed pursuant to Evidence Code sections 452 and 459, of certain court records and the parties' briefing before the Appellate Division of the Superior Court, as those documents are also unnecessary to our resolution of the issues raised in this appeal.

p. 205.) The Legislature has therefore imposed mandatory disclosure requirements for arbitration provisions in various kinds of contracts, including contracts for work on specified residential property (§ 7191), contracts for medical services regarding professional negligence claims (Code Civ. Proc., § 1295), and health care service plans (Health & Saf. Code, § 1363.1). (*Woolfs*, at p. 205.)

As relevant to this case, through the enactment of section 7191, “the Legislature sought to ensure that an agreement to arbitrate disputes arising out of a contract for work on residential property of up to four units is obtained through a proper waiver of the right to a judicial forum.” (*Woolfs, supra*, 127 Cal.App.4th at p. 205, citing Sen. Floor Analysis, Assem. Bill No. 3302 (1993-1994 Reg. Sess.) Aug. 22, 1994, p. 2.) Section 7191, enacted in 1994, provides that an arbitration provision in a contract for work on such property must satisfy certain disclosure requirements and must be set forth in the contract in a prescribed format. (§ 7191, subds. (a) & (b).) Section 7191, subdivision (c) provides that arbitration provisions that do not comply with the statute “may not be enforceable against any person other than the licensee” doing the work on the property.

Before addressing Ahn’s contention that the trial court improperly granted Elms’s petition to confirm the arbitration award and denied her petition to vacate the award because the arbitration provision in the parties’ contract did not comply with the requirements of section 7191, we must address the preliminary question of whether Ahn waived that issue due to her voluntary participation in the arbitration without first objecting on that ground.

In *Moncharsh, supra*, 3 Cal.4th 1, which involved an appeal from the trial court’s denial of a petition to vacate an arbitration award, the California Supreme Court rejected the defendant’s argument that the plaintiff had waived a claim that a fee-splitting provision in the parties’ contract was illegal by failing to object on that ground in the trial court prior to the arbitration. (*Id.* at pp. 6-8, 29.) As the court explained, because the plaintiff’s illegality claim went to only a part of the agreement and did not include the arbitration clause itself, it remained arbitrable in the first instance. (*Id.* at p. 30.) Thus, although the issue would have been waived had the plaintiff failed to raise it before the

arbitrator, the plaintiff “was not required to first raise the issue of illegality in the trial court in order to preserve the issue for later judicial review.” (*Ibid.*) The court continued: “We thus hold that unless a party is claiming (i) the entire contract is illegal, or (ii) the arbitration agreement itself is illegal, he or she need not raise the illegality question prior to participating in the arbitration process, so long as the issue is raised before the arbitrator.” (*Id.* at p. 31.)

The corresponding rule suggested by our high court’s discussion in *Moncharsh*, which is applicable here, is “that if a party believes the entire contractual agreement or a provision of arbitration is illegal, it must oppose arbitration on this basis before participating in the process or forfeit the claim.” (*Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321, 328 (*Cummings*); accord, *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 681 [citing *Moncharsh* and *Cummings* for proposition that, to avoid forfeiture, party generally must raise contention that entire arbitration agreement is unlawful in opposition to motion to compel].) In *Cummings*, the Third District Court of Appeal explained that the forfeiture rule applies in this context “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. The proper criterion for dividing the sheep from the goats (Matthew 25:32) is a litigant’s *knowledge* of a defense to the jurisdiction of the arbitrator. 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. . . . [A] party who knowingly participates in the arbitration process without disclosing a ground for declaring it invalid is properly cast into the outer darkness of forfeiture.” (*Cummings*, at pp. 328-329, fns. omitted.)

Ahn vigorously maintains she never desired to arbitrate and did so only because she was informed by her then attorney that, because she had executed the contract, she was bound by the arbitration provision. Her attorney never indicated an awareness of section 7191, and Ahn only became aware of the statute and Elms’s failure to comply with its requirements during the proceedings on Elms’s petition to confirm the arbitration

award. In arguing that she has not forfeited the issue on appeal Ahn relies on the *Cummings* court's emphasis on a party's *knowledge* of the ground for contesting the arbitration process in determining whether an issue is forfeited, as well as *Moncharsh*'s use of the word "waiver," rather than "forfeiture." (See *In re Sheena K.*, *supra*, 40 Cal.4th at p. 880, fn. 1 [term "forfeiture" "refers to a failure to object or invoke a right, whereas [term 'waiver'] conveys an express relinquishment of a right or privilege," although, "[a]s a practical matter, the two terms on occasion have been used interchangeably"].) According to Ahn, the language in *Moncharsh* and *Cummings* demonstrates that, if a party is not aware of a basis for challenging an arbitration provision before or during the arbitration proceedings, he or she has not waived the right to subsequently challenge the provision in the trial court.

We sympathize with Ahn, but we cannot accept her argument. Absent factors not present in this case, ignorance of a law is not a defense to a charge of its violation (*Hale v. Morgan* (1978) 22 Cal.3d 388, 396.), nor can it excuse the failure to timely invoke the protections a law affords. Moreover, an attorney is his or her client's agent, and the agent's knowledge is imputed to the principal even where the agent does not actually communicate with the principal, who thus lacks actual knowledge of the imputed fact. (Civ. Code, §§ 2330, 2332; *Powell v. Goldsmith* (1984) 152 Cal.App.3d 746, 750–751. Additionally, an attorney's knowledge is generally imputed to his or her client (*Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 219), "and an attorney is 'presumed to know the laws and rules of procedure which govern the forms of litigation, the legal remedies, which he [or she] selects and pursues.'" (*Strong v. Sutter County Bd. of Supervisors* (2010) 188 Cal.App.4th 482, 498, quoting *American Home Assurance Co. v. Benowitz* (1991) 234 Cal.App.3d 192, 203.) We do not know whether Ahn was disserved by her former counsel, but that is not a claim for which a remedy is available in this proceeding.

It is also worth noting that Ahn and her attorney had some 14 months between Elms's initial demand for arbitration and the start of the arbitration proceedings to

investigate and discover this ground for objection.⁶ Instead, Ahn filed an answer and a counterclaim, alleging numerous causes of action and seeking damages in excess of \$500,000, as well as additional punitive damages.⁷

In these circumstances, Ahn must be presumed to have had knowledge of any defenses to enforceability of the arbitration provision, including section 7191, and to have waived any such defenses when she voluntarily participated in the arbitration process. (See *Moncharsh*, *supra*, 3 Cal.4th at p. 31; *Cummings*, *supra*, 128 Cal.App.4th at pp. 328-329.) To find otherwise would permit any party, even if represented by counsel, to use lack of knowledge of a defense to invalidate an arbitration award after voluntarily participating in an arbitration proceeding, if he or she were unhappy with the result of that proceeding. Such a rule would undermine the policies favoring arbitration and foster the very problems the *Moncharsh* rule seeks to avoid, including “ ‘procedural gamesmanship,’ ” and a waste of resources. (*Moncharsh*, at p. 30; see also *Cummings*, at

⁶ Because the arbitration in this case proceeded under a self-executing agreement without a preliminary court order, Ahn, as the objecting party, was required to participate in the proceeding and then raise her objections by petition to vacate the award or opposition to Elms’s petition to confirm. (See *National Marble Co. v. Bricklayers & Allied Craftsmen* (1986) 184 Cal.App.3d 1057, 1063-1064 [arbitration agreement is self-executing where it “ ‘permits and provides for arbitration under rules therein incorporated’ ”]; accord, *Tutti Mangia Italian Grill v. American Textile Maintenance Co.* (2011) 197 Cal.App.4th 733, 741.) That fact did not, however, excuse Ahn from her obligation to object to the arbitrator before submitting to the arbitration process, and then, if the arbitrator refused to stay the proceedings, again to the trial court after the arbitration was complete. Any other rule would undermine the policy favoring arbitration of disputes. (See *Moncharsh*, *supra*, 3 Cal.4th at p. 30; see also *Cummings*, *supra*, 128 Cal.App.4th at pp. 328-329.)

⁷ Indeed, in an email sent to Elms’s attorney on September 6, 2011, several months before the arbitration proceedings began, Ahn’s attorney wrote that “there is, to my knowledge, no court order ordering arbitration in this case; rather Mr. Elms elected to file his initial claim against Ms. Ahn with AAA, and Ms. Ahn filed an Answer and Counter-claim accordingly—the parties appear to have voluntarily subjected themselves to binding arbitration, but there is no actual judicial Order requiring it in this particular case.” In a second email, sent to an official at the AAA on December 14, 2011, Ahn’s counsel wrote that, in light of unsuccessful mediation efforts, “we request that this case be reset forthwith for three day binding arbitration sometime in the first quarter of 2012.”

pp. 328-329; compare *Woolls, supra*, 127 Cal.App.4th at p. 204, fn. 3 [homeowner’s participation in arbitration did not forfeit section 7191 challenge where he had filed a motion to stay arbitration and presented written objections to arbitrator prior to hearing, arguing that arbitration agreement was unenforceable because it failed to comply with section 7191].)⁸

Ahn maintains she should not be found to have forfeited her challenge to the arbitration provision because we have the discretion to address the issue regardless of whether it was raised in a timely manner. (See *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 24 [“Under settled law, the Court of Appeal had discretion to address [an] issue even though it had not been raised in the trial court,” where it involved “a question of law based on undisputed facts”]; *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 868 [appellate court exercised its discretion to address newly raised questions of law regarding allegedly unconscionable arbitration and attorney fees provisions in contract, which could be decided on undisputed facts].)⁹ Even assuming for the sake of argument that the facts are undisputed in this case, we decline to exercise our discretion to address her belatedly raised objection to arbitration because doing so would defeat the strong public policy favoring arbitration, which requires courts to “ “indulge every intendment to give effect to such proceedings,” ’ ’ as well as our Supreme Court’s

⁸ *Toal v. Tardif, supra*, 178 Cal.App.4th at pages 1212-1213, 1220, cited by Ahn, is distinguishable. There, attorneys for both parties signed a stipulation to arbitrate and no evidence was presented in the plaintiffs’ petition to confirm the arbitrator’s award that the defendants had consented to arbitration. On those facts, the award could not be confirmed because the plaintiffs had failed to prove, as required, that a valid arbitration agreement existed. (*Ibid.*)

⁹ In *D.C. v. Harvard-Westlake School, supra*, 176 Cal.App.4th at pages 867-868, the appellate court also addressed whether plaintiffs had waived another claim by failing to present it to the arbitrator. The court explained: “Because we lack the entire record of the arbitration proceedings, we cannot resolve the waiver issue. [Citation.] But the . . . argument *was* raised before *the trial court* in plaintiffs’ petition to vacate the arbitration award. And on appeal the parties have fully briefed [the issue]. We may therefore decide the issue even if it was not raised in earlier proceedings. [Citations.]” Here, it is undisputed that Ahn did *not* present the section 7191 issue to the arbitrator.

waiver rule. (*Moncharsh, supra*, 3 Cal.4th at pp. 9, 31.)¹⁰ Ahn’s remedy, if any, does not lie against Elms.

In sum, we conclude the trial court properly found that Ahn forfeited the claim, first raised in the trial court following her participation in the arbitration proceedings, that the arbitration provision in question was invalid due to its failure to comply with the requirements of section 7191.

DISPOSITION

The trial court’s judgment is affirmed. Costs on appeal are awarded to respondent Edward Elms.

¹⁰ Ahn makes several additional arguments against a finding of waiver or forfeiture, including that she was *prohibited* from waiving the provisions of section 7191, in light of the mandate contained in Civil Code section 3513, which provides: “Any one may waive the advantage of a law intended solely for his [or her] benefit. But a law established for a public reason cannot be contravened by a private agreement.” However, “[a] law has been established ‘for a public reason’ only if it has been enacted for the protection of the public generally, i.e., if its tendency is to promote the welfare of the general public rather than a small percentage of citizens. [Citations.]” (*Benane v. International Harvester Co.* (1956) 142 Cal.App.2d Supp. 874, 878.) Here, while section 7191 promotes the important policy of ensuring that specified property owners entering into contracts for work on their property understand that they are both agreeing to arbitrate any disputes and waiving the right to have those disputes decided in a judicial forum (*Woolls, supra*, 127 Cal.App.4th at p. 205), we do not agree that the statute was intended *primarily* to promote the general public’s welfare. Hence, Civil Code section 3513 does not apply in this case.

We also reject Ahn’s various other arguments, which rely on other inapplicable rules and cases. These include her arguments that the doctrine of estoppel, applied against a party that fails to comply with a statutory duty, is applicable here (see *Spray, Gould & Bowers v. Associated Internat. Ins Co.* (1999) 71 Cal.App.4th 1260, 1267-1268) and that a court may in certain circumstances review an arbitrator’s finding that implicates an important public policy (see *Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 32, 38).

Kline, P.J.

We concur:

Richman, J.

Miller, J.