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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

LISA RACZYNSKI, Petitioner and Respondent, v. DALAND NISSAN, INC., et al., Defendants and Appellants.	A146992 (San Mateo County Super. Ct. No. CIV518381)

Lisa Raczynski sued Daland Nissan, Inc. (Daland Nissan), JP Morgan Chase Bank (Chase), and Federated Mutual Insurance Company (Federated),[1] alleging causes of action arising out of her purchase of a used car. The parties acknowledged that a provision in the sales contract required arbitration of the disputed issues. The arbitrator awarded Raczynski a total of over of $358,000, including attorney fees and costs. As relevant here, the contractual arbitration provision provided for a second arbitration if the award exceeded $100,000. Defendants petitioned to compel a second arbitration, but the trial court denied the petition to compel, confirmed the award, and entered judgment. In their appeal, Defendants argue the trial court erroneously deprived them of judicial enforcement of the agreement to arbitrate. We agree and reverse.

[1] Daland Nissan, Chase, and Federated are hereinafter collectively referred to as Defendants.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2011, Raczynski purchased and financed a used car from Daland Nissan. In December 2012, Raczynski filed a complaint for breach of contract, fraud, and deceptive business practices against Daland Nissan and Chase, who accepted assignment of the contract, alleging Daland Nissan failed to properly disclose a prior accident and damage to the car. A first amended complaint (FAC) was filed on January 18, 2013.[2]

Daland Nissan answered the FAC and then moved to compel binding arbitration. Attached to its petition, as an exhibit, is a copy of the Retail Installment Sales Contract (the Sales Contract) signed by Raczynski. On the back of the Sales Contract, is an arbitration provision. Under the header "ARBITRATION CLAUSE" and the warning "PLEASE REVIEW—IMPORTANT—AFFECTS YOUR LEGAL RIGHTS," the arbitration provision states in part: "Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us . . . shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action." The arbitration clause further provides: "Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. . . . You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum . . . (www.arb-forum.com), the American Arbitration Association [(AAA)] . . . (www.adr.org), or any other organization that you may choose subject to our approval. . . . [¶] Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. . . . We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $2500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party

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[2] The operative complaint is Raczynski's "Fourth Amended Unverified Complaint in Arbitration." The fourth amended complaint alleged the following causes of action: (1) breach of contract; (2) violation of the Consumers Legal Remedies Act (CLRA; Civ. Code, §1750 et seq.); (3) violation of the unfair competition law (UCL; Bus. & Prof. Code, § 17200, et seq.; and (4) declaratory relief. Federated, as surety, was also named as a defendant.

shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Clause, then the provisions of this Arbitration Clause shall control. The arbitrator's award shall be final and binding on all parties, *except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel.* The appealing party *requesting new arbitration* shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs." (Italics added.)

Before the hearing on the petition to compel, the parties stipulated "[Raczynski's] claims will be resolved through binding arbitration pursuant to the Arbitration Clause," and an order was entered on that stipulation. Raczynski initially proposed JAMS or Judicate West as the arbitration forum. However, Defendants refused JAMS and the parties ultimately agreed on ADR Services, Inc. (ADR). Pursuant to ADR procedures, the Honorable Justice James Lambden (Retired) was randomly selected as arbitrator.

An arbitration hearing was held on November 3 and December 15, 2014. The arbitrator initially issued an interim arbitration award that determined Raczynski prevailed on her breach of contract, CLRA, and UCL causes of action. The interim arbitration award ordered "Respondent," in the singular and without further identification, to reimburse Raczynski the difference between the amount she paid for the car and the appropriate retail purchase price.

Raczynski sought correction and clarification of the award, requesting that "Respondent" be changed to the plural because the claims were asserted against "all [Defendants] based on their respective relationships." Defendants filed an objection, explaining their position that it was improper to impose any damages against Federated or Chase and, alternatively, maintaining any damages were limited by the Holder Rule (16 C.F.R. § 433.2) and Vehicle Code section 11710.

On March 20, 2015, the arbitrator issued a corrected interim arbitration award. The arbitrator awarded Raczynski $19,168.56 in damages, but also stated, "[b]ased upon their represented legal relationships, all three [Defendants] shall be jointly and severally liable for said amount plus interest." Raczynski successfully moved for attorney fees and costs in the total amount of $339,558.25. The corrected final arbitration award, served on July 14, 2015, awarded Raczynski damages of $19,168.56, plus interest at the legal rate, lodestar attorney fees in the amount of $188,529.50, an additional $94,264.75 "as an appropriate 1.5 multiplier enhancement," costs in the amount of $45,785, and an additional $10,979.00 for preparation of the fee application.

On July 20, 2015, Defendants demanded a new arbitration pursuant to the arbitration agreement. Raczynski filed a response and objection, in which she refused to submit to a second arbitration absent a court order. She attached a letter from ADR in a similar case, involving the same arbitration clause and same attorneys,[3] where ADR stated "[t]here is now a disagreement between the parties as to whether ADR . . . should proceed with the selection of the three-arbitrator panel in response to" the new arbitration demand. ADR concluded it lacked authority to resolve the parties' disagreement over whether a new arbitration was proper. Therefore, ADR would not go forward with the second arbitration and suggested the parties petition the trial court "for an order determining whether [ADR] should proceed with selection of the three-arbitrator panel." ADR stated it "will follow the directions set forth in the Court's order." ADR ultimately responded with a very similar letter in Raczynski's case, declining to convene a three-arbitrator panel for a new arbitration until the trial court resolved "whether [ADR] should proceed with the selection of the three-arbitrator panel," over Raczynski's objection, in which case ADR would "follow the directions set forth in the Court's order."

[3] This is the second of two appeals filed by Daland Nissan and Federated through its counsel, wherein virtually identical arguments have been made with respect to the right to a second arbitration under virtually identical sales contracts. As we discuss *post*, the first appeal was recently decided via published opinion by our colleagues in Division One of this court. (*Condon v. Daland Nissan, Inc*. (2016) 6 Cal.App.5th 263 (*Condon*).)

Raczynski filed a petition to confirm the arbitration award. Defendants filed a petition to compel a second arbitration. Raczynski opposed the petition to compel, arguing primarily that ADR's rules, in contrast to another arbitration forum (JAMS), did not provide for an "appeal" and that any ambiguity in the arbitration clause should be resolved against Defendants. Defendants, on the other hand, focused on ADR's statement that it could and would conduct a de novo arbitration before a three-arbitrator panel, if the trial court so ordered.

The trial court denied the petition to compel, granted Raczynski's petition to confirm the arbitration award, and entered judgement in the amount of $358,726.81, against Daland Nissan, Chase, and Federated. Defendants filed a timely notice of appeal. (See Code Civ. Proc., § 1294, (a), (d).)

II. DISCUSSION

Defendants challenge the trial court's order denying their petition to compel, arguing the plain language of the arbitration agreement clearly entitles them to a second arbitration in this situation. In the alternative, they maintain the judgment and order confirming the arbitration award must be reversed because the arbitrator exceeded his authority in holding Chase and Federated jointly and severally liable for the full award. Our review of a trial court's order confirming an arbitration award or denying a petition to compel arbitration is de novo unless the order hinges on a factual finding, which we review for substantial evidence. (*Bunker Hill Park Ltd. v. U.S. Bank National Assn*. (2014) 231 Cal.App.4th 1315, 1324; *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1099; *Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 892, fn. 7.) Defendants' first argument is meritorious and compels reversal. Accordingly, we do not reach their second argument.

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner;

or [¶] (b) Grounds exist for the revocation of the agreement. [¶] . . . [¶] If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit." (Code Civ. Proc., § 1281.2; accord, 9 U.S.C. §§ 2, 4.) "A petition to compel arbitration ' "is in essence a suit in equity to compel specific performance of a contract." ' " (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 411.) "If the party opposing the petition raises a defense to enforcement—either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation [citations]—that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Id.* at p. 413.)

In denying Defendants' petition to compel a second arbitration, the trial court determined ADR does *not* have a process to convene a three-arbitrator panel for a new arbitration hearing. In its written order, the trial court reasoned: "[*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899 (*Sanchez*)] is inapposite. While the *Sanchez* court found that a nearly identical provision was not *unconscionable*,[4] there was no discussion whatsoever about a situation where, as here, the parties actually proceeded with arbitration, chose the arbitration organization and rules after negotiation, and then the losers demand a 'new arbitration' because the chosen arbitration organization has no appellate rules or procedure. The parties' agreement simply does not provide for relief

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4 Unconscionability is not at issue in this case. In *Sanchez, supra*, 61 Cal.4th 899, our Supreme Court concluded an identical " 'new arbitration' " clause in an automobile sales contract was not substantively unconscionable and, thus, enforceable against the purchaser despite the existence of "some degree of procedural unconscionability." (*Id.* at p. 915; *id.* at pp. 908, 915–917.) The *Sanchez* court cautioned that requiring a consumer to front any appellate filing fees or other arbitration costs "has the potential to deter the consumer from using the appeal process" and could be held unconscionable with a showing that such fees and costs were in fact unaffordable or would have a substantial deterrent effect in the particular case. (*Id.* at p. 920.) Because the consumer/plaintiff in that case, who purchased a preowned Mercedes-Benz for over $53,000, did not claim the cost of appellate arbitration filing fees were unaffordable, the court concluded the arbitral appeal fee provision was not unconscionable. (*Id.* at pp. 907, 921.)

from the Court where a 'new arbitration' is unavailable under the rules of the chosen arbitral forum."

We agree with Defendants that the plain language of the arbitration clause is unambiguous and that no evidence in the record supports the trial court's finding. To the contrary, ADR has expressed its ability to perform a second arbitration before a three-arbitrator panel, if the trial court so orders. The challenged portion of the arbitration agreement provides: "The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, *that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel.* The appealing party *requesting new arbitration* shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs." (Italics added.)

Raczynski asks us to affirm because, in her view, the trial court correctly found the conditions precedent to a second arbitration have not been satisfied.[5] More specifically, she asserts ADR has no rules or procedures for an "appeal" and thus, by selecting ADR instead of JAMS, Defendants waived a "new arbitration." It may be undisputed that ADR has no "appellate" rules or procedures. But, as we demonstrate below, that fact is not determinative.

Raczynski's position is that, without an "appellate" procedure, no second arbitration can be held as provided for by the parties' contract because the arbitration clause specifies a "party may request a new arbitration *under the rules of the arbitration organization* by a three-arbitrator panel." (Italics added.) She insists the term "new arbitration" is ambiguous and should be construed against the drafter of the arbitration

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[5] At oral argument, Raczynski raised a new argument—that the courts lack contractual authority to determine whether the parties agreed to a second arbitration. We do not address the argument, as it was not raised in Raczynski's respondent's brief. (See *County of Sonoma v. Superior Court* (2010) 190 Cal.App.4th 1312, 1326, fn. 10 [an argument not made in briefs is forfeited and cannot properly be raised at oral argument].)

clause—Defendants. (See Civ. Code, § 1654 ["[i]n cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist"]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 801.) To bolster her argument that "a new arbitration" really means "an appeal," Raczynski points out the arbitration clause also specifies the "*appealing party* requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to" further consideration by the panel. (Italics added.) In the alternative, she asserts the permissive language of the "new arbitration" clause does not guarantee anything, rather, such a request can be denied in the discretion of the court or arbitration forum.

Our colleagues in Division One, in *Condon, supra,* 6 Cal.App.5th 263, recently rejected the same arguments in a case involving precisely the same " 'new arbitration' " clause. (*Id.* at pp. 265, 267–268.) Because the plain language of the arbitration provision authorized " 'a *new arbitration* . . . by a three-arbitrator panel," rather than "an *appeal* as that term is used in our judicial system," the *Condon* court recognized, "the arbitration agreement permits a 'do-over'—governed by the same rules that applied to the first arbitration." (*Id.* at p. 268.) The clause's single reference to an " 'appealing party' " did not change the fact that what that party will receive is a " 'new arbitration.' " (*Ibid.*) The *Condon* court determined ADR was "ready and able to provide a new arbitration before a three-member panel and declined to do so only because it perceived it lacked the authority to impose the new arbitration on [an objecting party] absent a court order." (*Ibid.*) The absence of "appellate" rules was irrelevant. (*Ibid.*)

Condon also dismissed the notion that the use of the phrase " '*may* request,' " in the " 'new arbitration' " clause, means a court or arbitration forum has discretion to deny the request, even if a triggering condition is met. (*Condon, supra,* 6 Cal.App.5th at p. 268.) The court explained: "This is not a reasonable reading of this provision. On the contrary, the provision imbues the *aggrieved party* with a choice, to accept the award or ask for a new arbitration. If the party chooses an arbitration re-do, it is, by the plain language of the arbitration agreement, entitled to that recourse." (*Ibid.*) The judgment

confirming the arbitration award and the order denying a new arbitration were reversed, and the trial court was directed to order the parties to proceed with a new arbitration before a three-arbitrator panel at ADR. (*Id.* at p. 269.)

We agree with the *Condon* court that the arbitration agreement unambiguously provides for "a new arbitration under the rules of the arbitration organization by a three-arbitrator panel," rather than an appeal. We are not persuaded that this interpretation renders superfluous the phrases "appealing party" and "under the rules of the arbitration organization." No showing has been made that the "rules of the arbitration organization" are in any manner violated by a new arbitration before a three-arbitrator panel. ADR has expressed its capability and willingness "to provide a new arbitration before a three-member panel and declined to do so only because it perceived it lacked the authority to impose the new arbitration on [an objecting party] absent a court order." (*Condon, supra,* 6 Cal.App.5th at p. 268.) And the phrase "appealing party" is merely a shorthand, that is unambiguously defined by both the preceding sentence and the very words appearing after "appealing party"—"requesting new arbitration." We likewise agree that the permissive language of the "new arbitration" clause can only reasonably be read as granting the losing party the choice to request a second arbitration.[6]

The trial court erred in denying the petition to compel a second arbitration. Accordingly, the trial court's other orders must also be reversed.

III. DISPOSITION

The judgment, order confirming the arbitration award, and order denying the petition to compel a new arbitration are reversed. The court is directed to enter new

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[6] *Condon* did not specifically address whether "award . . . in excess of $100,000" includes an award, such as that obtained against Defendants in this case, where damages awarded are less than $100,000 but fees and costs result in a total award above $100,000, although the elements of the award in *Condon* were similar to the award here. Raczynski did not object to a new arbitration on this basis in the trial court, and we believe the plain language of the Sales Contract remains clear that, in order to trigger the "new arbitration clause," all that is required is "an award . . . against a party" exceeding $100,000. We cannot read in the word "damages" where it was omitted.

orders denying confirmation of the arbitration award, and granting Defendants' petition to compel a new arbitration. Defendants are to recover their costs on appeal.

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BRUINIERS, J.

WE CONCUR:

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JONES, P. J.

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NEEDHAM, J.

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