

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

HPROF, LLC,

Plaintiff and Respondent,

v.

BANK OF AMERICA, N.A., et al.,

Defendants and Appellants.

A147748

(Alameda County
Super. Ct. No. RG14713260)

Defendants Bank of America, N.A. and The Bank of New York Mellon appeal from an order denying their motion to compel arbitration of plaintiff HPROF, LLC's complaint for breach of contract. Defendants contend the trial court erred in concluding that they waived their right to arbitrate by unreasonably and prejudicially delaying the arbitration demand while actively participating in the litigation of plaintiff's claim. On appeal, defendants argue that the question of waiver should have been decided by the arbitrator and, alternatively, that if the court had authority to decide the question, it erred in failing to compel arbitration because plaintiff did not make a sufficient showing of prejudice. We find no error and thus shall affirm the order.

Factual and Procedural Background

On February 7, 2014, plaintiff filed a complaint for breach of contract against defendants. The complaint alleges that in November 2012, plaintiff entered into an agreement in connection with the purchase and sale of real property in Pleasanton, California and that defendants breached the agreement by failing to disclose that a third-party held a 10-year lease on the property.

Section 17 of the agreement includes an arbitration provision reading as follows, “Buyer and seller agree that any dispute or claim in law or equity between them arising out of or in any way connected to this agreement or the purchase and sale of the property which is a subject of this agreement shall first be the subject of non-binding mediation with a retired California superior court judge (or other full time neutral acceptable to the parties) held within ninety (90) days of when the dispute arises, and, upon failure of such mediation to fully resolve the dispute or claim, shall be decided by neutral binding arbitration consistent with the procedures set forth in schedule I attached hereto.” Schedule I provides for appointment of an arbitrator by the American Arbitration Association.

On March 17, 2014, defendants filed a joint answer. The answer does not assert the right to arbitration as an affirmative defense. Plaintiff commenced discovery in April 2014.

On June 23, 2014, a trial date was set for July 31, 2015, and the parties were ordered to “complete[] sufficient discovery” by November 19, 2014, so that the case could be referred to alternative dispute resolution (ADR).

In September 2014, defendants’ counsel discussed the arbitration provision with plaintiff’s counsel and informed plaintiff’s counsel that defendants “would move to compel arbitration and stay the litigation if we did not resolve the case with mediation, as provided in the purchase agreement.” Thereafter, the parties agreed to stay the litigation for 90 days while the parties attended mediation.

The mediation was scheduled for December 19, 2014. Defendants’ mediation statement advised plaintiff, “While the parties have agreed to proceed with mediation in the hopes of obtaining an expeditious settlement, defendants expressly reserve their right to move to compel arbitration in line with the purchase agreement’s dispute resolution provisions should this matter not settle at mediation.” The December 2014 mediation did not resolve the litigation.

In February 2015, defendants commenced discovery by propounding a set of requests for admissions. Defendants also filed a motion for judgment on the pleadings.

In early March 2015, defendants submitted a case management statement to the court requesting a nonjury trial. The statement indicates that mediation was completed on December 19, 2014, and that they were willing to participate in a settlement conference. Defendants advised the court that their motion for judgment on the pleadings was scheduled to be heard on March 12 and “[i]f necessary, defendants intend to file a motion for summary judgment.” Finally, the document states, “Subject to the ruling on defendants’ motion for judgment on the pleadings, a trial continuance might be necessary. While the parties have diligently litigated the case, they stayed the case in order to conduct a meaningful mediation. The parties did not settle and have now resumed litigation.” Nowhere in the case management statement do defendants mention an intent to demand arbitration under the terms of the agreement.

Defendants’ motion for judgment on the pleadings was denied, and on April 9, 2015, the parties agreed to continue the trial date to November 2015. At the hearing on the motion to continue, plaintiff’s counsel indicated that “[t]here may be a few discovery disputes, so that [date] gives us adequate time for a motion for summary judgment if they would like to file and for any discoveries.” The court confirmed a case management conference for June and asked the parties if they were “doing any [A]DR at this point.” Defendants’ counsel replied, “We’ve already done one mediation. I think we have talked about whether to do another session. We might once we get some more discovery done.” Plaintiff’s counsel confirmed that June was a good date for a conference because “there is going to be enough discovery done then to bring [ADR] up again if it it’s necessary.” Again, defendants’ counsel did not mention arbitration under the terms of the agreement.

On July 23, 2015, defendants filed a motion for summary judgment and a hearing was set for October 6, 2015.

Discovery continued throughout the summer of 2015. On August 28, defendants served on plaintiff their third set of requests for production of documents and a set of special interrogatories. On September 11, defendants served a deposition subpoena for the production of business records, and on September 22 defendants served a third notice of deposition of Jeff Hutchinson with requests for production of documents. In August

2015, the parties also attended a mandatory settlement conference but did not settle the litigation.

On September 14, 2015, the parties submitted a joint stipulation to the trial court requesting a continuance of the November trial date. The stipulation explains that the parties “have been diligently conducting discovery and preparing for trial” but that they “are also actively trying to settle the matter.” The stipulation continues, “After the settlement conference, the parties have engaged in informal settlement negotiations and believe another private mediation could help the parties reach a settlement. Because the parties wish to pursue an amicable resolution without incurring the expense of further litigation, the parties have agreed to a 90-day continuance of the trial to February 5, 2016.” Shortly after submitting the stipulation, however, plaintiff’s counsel informed defendants’ counsel that he did not have authority to enter the stipulation and requested it be withdrawn. As a result, defendants’ counsel filed an ex parte application to continue the trial.

At the hearing on the motion to continue, the court again asked about ADR. When plaintiff’s counsel indicated that plaintiff was not “agreeable right now” and would rather “wait to see what happens to the motions that are pending and then . . . revisit that issue,” defendants’ counsel stated, “Perhaps we set a mediation compliance date after the current October 6 hearing, and if it doesn’t settle, then my client would reserve its right to have additional ADR procedures pursuant to the purchase contract.” Defendants’ attorney continued, “I just want to note for the record, the first mediation was not complete. Bank of America did not make an offer. So we would take the position that we still need to complete mediation in this case.” Plaintiff’s counsel responded, “There was an offer made. So let’s clear the record. There was an offer made on this. Rescission plus 100,000. That was the offer. So let’s dispense with the formalities.”

Defendants’ motion for summary judgment was argued and taken under submission following a hearing on October 6, 2015. On October 13, defendants’ counsel wrote to plaintiff’s counsel asking if plaintiff was ready to resume mediation. The letter also stated, “We believe now is a good time to complete mediation. While Defendants

intend to vigorously enforce the terms of the purchase agreement, the parties must complete mediation before defendants can proceed. Defendants are therefore committed to mediation because mediation has not yet failed. Indeed, since the December 2014 mediation, we have tried to resume the mediation and/or engage in informal settlement negotiations.” Plaintiff’s attorney responded by email the following day, “There is no agreement to continue with the mediation process. While my client is not opposed to mediation per se, it is not interested in going back to mediation based upon the last offer—and really the same offer made by [Bank of America] from the December 2014 mediation.”

On November 10, defendants’ counsel again wrote to plaintiff’s counsel seeking to resume mediation. The letter indicates that if plaintiff did not propose a mediation date by Wednesday, November 11, defendants will assume plaintiff is not interested in mediation. Plaintiff’s counsel confirmed that plaintiff was not interested in mediation “at this point.”

On November 16, 2015, defendants filed a motion to compel arbitration. Shortly thereafter, the court filed an order denying defendants’ motion for summary judgment.

On January 28, 2016, the trial court issued an order denying the motion to compel arbitration. The court concluded that defendants had waived their right to arbitrate under the purchase agreement by unreasonably and prejudicially delaying in demanding arbitration and participating in the litigation.

Defendants timely filed a notice of appeal.

Discussion

Like any contract right, the right to arbitration can be waived. (*Nicholas v. KBR, Inc.* (5th Cir. 2009) 565 F.3d 904, 907). Waiver of arbitration occurs when a party seeking arbitration invokes the judicial process to such a substantial degree that compelling arbitration would work to the detriment or prejudice of the other party. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187.)

In this case, the trial court denied the motion to compel, having found that defendants waived their right to arbitrate their disagreement with HPROF. Initially, the

parties dispute whether the waiver of a party's right to enforce an arbitration provision based on the party's litigation conduct is a question for the trial court or the arbitrator.

In *Hong v. CJ CGV America Holdings, Inc.* (2013) 222 Cal.App.4th 240, 258, the court held that absent "language in the[] agreement requiring the arbitrator to determine the waiver issue under all circumstances," a trial court properly determines the questions of whether the party seeking arbitration has waived its rights by participating in the litigation. (See also *Grigsby & Associates, Inc. v. M Securities Inv.* (11th Cir. 2011) 664 F.3d 1350, 1353 ["[I]t is presumptively for the courts to adjudicate disputes about whether a party, by earlier litigating in court, has waived the right to arbitrate."]; *Ehleiter v. Grapetree Shores, Inc.* (3rd Cir. 2007) 482 F.3d 207, 221 [Waiver of the right to arbitrate based on litigation conduct is an issue for the court to decide absent an agreement that contains "clear and unmistakable evidence" of an intent to refer the issue to the arbitrator.]; *Marie v. Allied Home Mortgage Corp.* (1st Cir. 2005) 402 F.3d 1, 9-15 [same].)

Defendants argue that the incorporation of the rules of the American Arbitration Association, and specifically Commercial Arbitration Rule R-7(a), into the terms of the agreement evinces a clear intent to arbitrate the question of waiver by litigation. Rule R-7(a) provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Although no California state court has resolved this issue, several federal courts have held that incorporation of the rules of the American Arbitration Association or other provisions that delegate the "arbitrability of any claim" to the arbitrator do not evidence an intent to delegate to the arbitrator the issue of whether the right to arbitrate has been waived by litigation conduct.

In *Plaintiffs' Shareholders Corp. v. Southern Farm Bureau Life Ins. Co.* (11th Cir. 2012) 486 Fed.Appx. 786, 789, the defendant argued, as defendants do in this case, that the "incorporation of the rules of the American Arbitration Association, and specifically Rule 7(a), evinces a clear intent to arbitrate" a claim of waiver based on litigation conduct. The court rejected this argument, explaining that the waiver claim did not

challenge the validity of the agreement within the meaning of Commercial Arbitration Rule R-7(a), but questioned only whether the defendant was “ ‘prevented from taking advantage of an admittedly binding arbitration clause’ ” based on its conduct in the litigation. (*Id.* at p. 790.)

In *Ehleiter v. Grapetree Shores, Inc.* (3rd Cir. 2007) 482 F.3d 207, 222, the court held that a provision that delegated to the arbitrator authority to decide “the issue of arbitrability of any claim or dispute” did not include whether the right to arbitrate had been waived by litigation conduct. The court explained, “While it is clear from this provision that the parties intended to have an arbitrator determine the gateway question of whether the underlying substantive dispute between them is arbitrable, . . . we do not believe that this provision similarly evinces a clear and unmistakable intent to have an arbitrator decide procedural questions of arbitrability that arise only after the parties have bypassed a gateway determination of substantive arbitrability by the arbitrator and actively litigated the underlying dispute in court. There are no references to waiver of arbitration in this or any other provision of the Agreement. We cannot interpret the Agreement’s silence regarding who decides the waiver issue here ‘as giving the arbitrators that power, for doing so . . . [would] force [an] unwilling part[y] to arbitrate a matter [he] reasonably would have thought a judge, not an arbitrator, would decide.’ [Citation.] Litigants would expect the court, not an arbitrator, to decide the question of waiver based on litigation conduct, and the Agreement here does not manifest a contrary intent.” (*Id.* at p. 222.)

In *Marie v. Allied Home Mortgage Corp., supra*, 402 F.3d at pages 14-15, the court also found that the clause that referred to binding arbitration “any and all disputes, claims . . . , and disagreements concerning the interpretation or application of this Agreement . . . including the arbitrability of any such controversy or claim” did not evince “clear and unmistakable” intent for the arbitrator to decide the issue of waiver by litigation conduct. (Italics omitted.) The court explained, “ ‘Arbitrability’ itself encompasses a variety of possible meanings, but the most obvious meaning focuses on certain substantive issues, and particularly the question of whether a particular kind of

dispute at issue falls within the scope of the arbitration clause. . . . The context of the agreement suggests that this sort of substantive meaning is intended for the term ‘arbitrability’ here; the reference to ‘arbitrability’ is surrounded by references to which types of claims should be arbitrated and which should not be. We cannot say that the use of the term here evinces a clear and unmistakable intent to have waiver issues decided by the arbitrator. There are no references to waiver or similar terms anywhere in the arbitration agreement. Neither party should be forced to arbitrate the issue of waiver by conduct without a clearer indication in the agreement that they have agreed to do so. The issue of who would decide such a question is an ‘arcane’ one that employees are unlikely to have considered unless clearly spelled out by the employer.” (*Id.* at p. 15.) We find the reasoning in these cases persuasive.

Republic of Ecuador v. Chevron Corp. (2d Cir. 2011) 638 F.3d 384, relied on heavily by defendants, is not to the contrary. In that case, the Republic of Ecuador argued that the arbitration agreement was invalid because Chevron, through its conduct in other related litigation, had “either waived its right to or is estopped from entering into a binding agreement to arbitrate.” (*Id.* at p. 394.) The court held that the provision in the agreement that delegates to the arbitrator “the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the . . . arbitration agreement” provided “clear and unmistakable evidence” that the parties intended the question of waiver be decided in arbitration. (*Ibid.*) The court emphasized, however, that “Ecuador characterizes its waiver and estoppel arguments as undermining the agreement itself, not merely as preventing Chevron from taking advantage of an admittedly binding arbitration clause.” (*Ibid.*) In contrast, plaintiff here does not contest the validity of the agreement, but only whether defendants’ litigation conduct prevents them from taking advantage of the agreement in this instance.

Defendants’ reliance on *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551 and *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231 is also misplaced. In *Malone*, the court held that a contractual provision that provided that the arbitrator “ ‘has exclusive authority to resolve any dispute relating to the interpretation, applicability, or

enforceability of this binding arbitration agreement,’ ” delegated to the arbitrator the question of whether the agreement was unconscionable. (226 Cal.App.4th at p. 1560.) Likewise in *Tiri*, the court held that a contractual provision providing that “ ‘[t]he Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including, but not limited to, any claim that all or any part of this Agreement is void or voidable,’ ” delegated to the arbitrator the question of whether the agreement was unconscionable. (226 Cal.App.4th at p. 237.) The agreements in both of these cases expressly delegated to the arbitrator the issue of the “enforceability” of the particular agreement, while Commercial Arbitration Rule R-7(a) refers only to the existence, scope or validity of the arbitration agreement. More importantly, a claim that an agreement is unconscionable questions the validity of the agreement itself. Whether a party’s conduct has resulted in a waiver of the right to enforce an otherwise valid agreement is not a challenge to the validity of the agreement. These cases do not support defendants’ contention. The trial court here properly decided plaintiff’s claim of waiver.

We thus turn to the merits of the trial court’s ruling. In *St. Agnes Medical Center v. PacifiCare of California, supra*, 31 Cal.4th at page 1195, the court held “State law, like the [Federal Arbitration Act], reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims. [Citation.] Although a court may deny a petition to compel arbitration on the ground of waiver [citation], waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof. [Citations.] [¶] Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration.” (*Ibid.*) “ ‘In determining waiver, a court can consider “(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether ‘the litigation machinery has been substantially invoked’ and the parties ‘were well into preparation of a lawsuit’ before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;

(4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) ‘whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place’; and (6) whether the delay ‘affected, misled, or prejudiced’ the opposing party.’ ’ ’ (Id. at p. 1196.)

“Generally, the determination of waiver is a question of fact, and the trial court’s finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] ‘When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court’s ruling.’ ’ ’ (St. Agnes Medical Center v. PacificCare of California, supra, 31 Cal.4th at p. 1196.)

Here, the trial court found that “almost all” of the above factors were met in this case. The court found that defendants unreasonably delayed the demand for arbitration. The court explained, “Plaintiff filed this action on February 7, 2014 and defendants did not move to compel arbitration until November 16, 2015. During that time, defendants did not raise arbitration as an affirmative defense in their answer, did not indicate an intent to arbitrate on case management statements, and did not object to the court’s trial setting orders. As discussed further below, for over a year and a half, defendants litigated this matter on the merits and now seek to compel arbitration only after moving for summary judgment and on the eve of trial.” The court rejected defendants’ argument that they did not have a right to compel arbitration until November 2015, when it finally became clear that mediation failed to resolve the dispute. The court explained, “Defendants submitted evidence that the parties discussed dispute resolution in September 2014 and agreed to mediation prior to arbitration. . . . Defense counsel advised plaintiff’s counsel that defendants would seek to compel arbitration and stay the litigation if the case did not resolve with mediation as provided in the parties’ agreement. The parties agreed to stay the case for up to 90 days while the parties attended mediation. . . . On December 19, 2014, the parties attended mediation, but the case did not settle. . . . Case management conference statements filed on behalf of defendants with the court

indicate that mediation was ‘completed’ on December 19, 2014. . . . The evidence shows that the parties’ first attempt at mediation failed, and that under the terms of the purchase agreement, the dispute was to be resolved by binding arbitration thereafter but defendants did not seek to compel arbitration until they filed this motion in November 2015. By not seeking to compel arbitration until almost another year after the initial mediation failed, defendants waived the right to compel arbitration.” The court also found that defendants waived the right to arbitrate by litigating on the merits. The court explained, “Defendants filed an answer to the complaint without asserting a right to arbitrate, failed to assert arbitration and requested a jury trial on case management statements, failed to object to trial setting orders, participated actively in discovery, and made several motions to this court, including a motion for judgment on the pleadings, a motion to set aside request for admissions responses, and a motion for summary judgment. Such conduct is inconsistent with a desire to arbitrate.” Finally, the court found that defendants’ conduct prejudiced plaintiff. The court explained, “Defendants’ unreasonable delay in asserting the right to arbitrate has undoubtedly deprived plaintiff of the possibility of a swift resolution through arbitration. Plaintiff has had to litigate the entire action until virtually the eve of trial. To order arbitration at this point would allow defendants to benefit from both litigation and arbitration.”

On appeal, defendants contend plaintiff did not meet its “heavy burden” of showing prejudice. They argue that they did not obtain any undue benefit from participating in the litigation and that any harm caused by the delay was self-inflicted by plaintiff.

Whether or not litigation results in prejudice is critical in waiver determinations. (*St. Agnes Medical Center v. PacifiCare of California, supra*, 31 Cal.4th at p. 1203.) “[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.] [¶] Because merely participating in litigation, by itself, does not result in a waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and

legal expenses. [Citations.] [¶] Rather, courts assess prejudice with the recognition that California's arbitration statutes reflect “a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution” and are intended “to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.” [Citation.] Prejudice 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. [¶] For example, courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side’s case that could not have been gained in arbitration [citations]; where a party unduly delayed and waited until the eve of trial to seek arbitration [citation]); or where the lengthy nature of the delays associated with the petitioning party’s attempts to litigate resulted in lost evidence [citation].” (*Id.* at pp. 1203-1204.)

Contrary to defendants’ argument, they did obtain a benefit by participating in the litigation and not moving to compel arbitration until shortly before trial. While the arbitration agreement does provide for discovery, it is limited to that which the arbitrator “deems appropriate” upon a “showing of good cause.” In addition, through their motions for judgment on the pleadings and for summary judgment, defendants attempted to limit and test plaintiff’s claim before demanding arbitration. (See *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 996 [The disclosure of defenses and strategies is a prejudice which accrues through the belated demand for arbitration].)

Finally, defendants contend that plaintiff is responsible for any prejudice suffered because they chose to file the litigation rather than pursue arbitration. They argue, “With full knowledge of the arbitration provision, HPROF did not proceed to arbitration (or its condition precedent, mediation). Instead, HPROF brought this lawsuit and immediately initiated extensive discovery. The expense and ‘prejudice’ said to result from those maneuvers was self-imposed.” Defendants cite *Martin v. Yasuda* (9th Cir. 2016) 829 F.3d 1118, 1126, in which the court stated, “To prove prejudice, plaintiffs must show more

than ‘self-inflicted’ wounds that they incurred as a direct result of suing in federal court contrary to the provisions of an arbitration agreement. [Citations.] Such wounds include costs incurred in preparing the complaint, serving notice, or engaging in limited litigation regarding issues directly related to the complaint’s filing, such as jurisdiction or venue.” In that case, however, the court concluded that the plaintiffs “easily [met] the prejudice requirement” where, much like in this case, the defendants failed to move for arbitration for seventeen months. (*Id.* at p. 1127.) The court explained, “When a party has expended considerable time and money due to the opposing party's failure to timely move for arbitration and is then deprived of the benefits for which it has paid by a belated motion to compel, the party is indeed prejudiced. [Citations.] At that point, the cost and expenses of litigating in district court are no longer simply ‘self-inflicted’ wounds on the part of the plaintiffs, [citation], because the defendants’ actions have shown that they, too, have sought at least for some period of time to attempt to resolve the issue in court rather than in arbitration.” (*Ibid.*) The court added, “even if the parties exchanged the same information in court as they would have in arbitration, the process of doing so in federal court likely cost far more than determining the answer to the same question in arbitration. The unnecessary, additional costs incurred by the plaintiffs as a result of the defendants’ dilatory motion to compel constitutes obvious prejudice.” (*Id.* at p. 1128.)

Defendants’ reliance on *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1125-1126, is also misplaced. In that case, the court reversed the trial court’s finding that defendant had waived its right to demand arbitration. The court concluded that none of the *St. Agnes* factors supported waiver where defendant “did not resort to litigation itself and acted to invoke arbitration immediately upon learning that [plaintiff] had instituted litigation.” (*Ibid.* [describing the delay as “minimal—approximately 30 days from [plaintiff’s] filing his lawsuit in state court to [defendant’s] motion to compel arbitration”].) The court reasonably observed that under those circumstances any prejudicial delay or costs should be attributed to plaintiff rather than defendant based on plaintiff’s failure to properly file his claim with the American Arbitration Association. (*Id.* at p. 1126.) That case is clearly distinguishable on its facts from the present case.

Accordingly, there was no error in the court's denial of defendants' motion to compel arbitration.

Disposition

The order is affirmed. Plaintiff shall recover its costs on appeal.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.