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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

AMY IMBURGIA et al.,

Plaintiffs and Respondents,

v.

DIRECTV, INC.,

Defendant and Appellant.

B239361

(Los Angeles County
Super. Ct. No. BC398295)

APPEAL from an order of the Superior Court of Los Angeles County. John Shepard Wiley, Jr., Judge. Remanded.

Kirkland & Ellis, Melissa D. Ingalls, and Robyn E. Bladow for Defendant and Appellant.

FEM Law Group, F. Edie Mermelstein; Stevens LC, Paul D. Stevens; Consumer Watchdog, Harvey Rosenfield; Evans Law Firm, Ingrid Maria Evans; Milstein Adelman, and Mark A. Milstein for Plaintiffs and Respondents.

In May 2011, DIRECTV, Inc. (DIRECTV) filed motions in the trial court to compel arbitration with the individual plaintiffs, to decertify the class, and to dismiss or stay the action pending arbitration. The plaintiffs opposed the motions on several grounds, including: (1) pursuant to the express terms of the agreement between the parties, DIRECTV was not entitled to arbitration; and (2) DIRECTV waived its right to arbitration. The trial court denied DIRECTV's motion on the contract grounds asserted by plaintiffs and did not rule on whether DIRECTV had waived arbitration. In *Imburgia v. DIRECTV, Inc.* (2014) 225 Cal.App.4th 338, revd. *sub nom. DIRECTV, Inc. v. Imburgia* (2015) __U.S. __ [136 S.Ct. 463, 193 L.Ed.2d 365], we affirmed the trial court's ruling on the contract issue and, in light of that ruling, did not consider the waiver issue.

Thereafter, the United States Supreme Court granted DIRECTV's petition for writ of certiorari. (*DIRECTV, Inc. v. Imburgia* (2015) __ U.S. __ [135 S.Ct. 1547, 191 L.Ed.2d 636].) The sole question presented in DIRECTV's petition, and considered by the Court, was: "Whether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law preempted by the Federal Arbitration Act."¹ The parties did not brief issues concerning waiver.

In December 2015, the Supreme Court reversed this court, stating that our interpretation of the agreement did "not give 'due regard . . . to the federal policy favoring arbitration' " and was "pre-empted by the Federal Arbitration Act." (*DIRECTV, Inc. v. Imburgia, supra*, 136 S.Ct. at p. 471.) "Hence," the Court concluded, "the California Court of Appeal must 'enforc[e]' the arbitration agreement." (*Ibid.*, quoting 9 U.S.C. § 2) The Court remanded the case to this court "for further proceedings not inconsistent with [its] opinion." (*Ibid.*)²

¹ <http://www.supremecourt.gov/qp/14-00462qp.pdf>.

² The operative provisions of the Supreme Court's mandate provide: "It is ordered and adjudged . . . by this Court that the judgment [in *Imburgia v. DIRECTV, Inc.*, *supra*, 225 Cal.App.4th 338] is reversed with costs, and the cause is remanded to the

The parties have submitted supplemental briefs addressing whether DIRECTV waived arbitration. The plaintiffs request that we affirm the trial court’s denial of DIRECTV’s motion to compel arbitration based on “the overwhelming undisputed evidence of waiver.” DIRECTV, on the other hand, argues that the Supreme Court has precluded consideration of waiver, and, in any case, that, as a matter of law, it did not waive arbitration.

DIRECTV contends that the Supreme Court has precluded any consideration of waiver because its opinion stated that the Court of Appeal must “ ‘enforc[e]’ the arbitration agreement.” (*DIRECTV, Inc. v. Imburgia, supra*, 136 S.Ct. at p. 471.) We disagree.

We are, of course, “bound to carry the mandate of the [Supreme Court] into execution and [cannot] consider the questions which the mandate laid at rest.” (*Sprague v. Ticonic Bank* (1939) 307 U.S. 161, 168; see also *Hutto v. Davis* (1982) 454 U.S. 370, 375 [Supreme Court precedent must be followed by lower courts “no matter how misguided the judges of those courts may think it to be”].) The converse is also true: A lower court “ ‘may consider and decide any matters left open by the mandate of [the Supreme Court].’ ” (*Quern v. Jordan* (1979) 440 U.S. 332, 347 fn. 18; see also *In re Sanford Fork & Tool Co.* (1895) 160 U.S. 247, 256.)

Our opinion in *Imburgia v. DIRECTV, Inc., supra*, 225 Cal.App.4th 338—the object of the Supreme Court’s review—did not address the waiver issue. In granting certiorari, the Supreme Court framed the sole issue presented as whether we erred in interpreting the parties’ agreement. The parties’ Supreme Court briefs were limited to that issue and made no mention of waiver. Waiver was not raised during the Supreme Court’s oral argument and was not mentioned in the Court’s opinion. There is, in short, nothing in our prior opinion, the parties’ Supreme Court briefs, the Supreme Court’s

Court of Appeal of California, Second Appellate District, Division One, for further proceedings not inconsistent with the opinion of this Court. [¶] This cause is remanded to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and Laws of the United States.” (Boldface and capitalization omitted.)

statement of the issue presented, oral argument before the high court, or the Supreme Court's opinion to suggest that the Supreme Court considered or decided, explicitly or implicitly, whether DIRECTV waived arbitration. The statement that we must "enforc[e] the arbitration agreement," does not, therefore, preclude a court from considering waiver.

The merits of waiver must, however, be determined in the first instance by the trial court. Under both federal law and California law, the question whether a party to an arbitration agreement has waived its right to arbitrate is ordinarily a question of fact. (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 426; *MidAmerica Federal S&L v. Shearson/American Exp.* (10th Cir. 1989) 886 F.2d 1249, 1259; *Republic Ins. Co. v. PAICO Receivables, LLC* (5th Cir. 2004) 383 F.3d 341, 346.) The "appellate court's function is to review . . . trial court's findings regarding waiver to determine whether [the findings] are supported by substantial evidence." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 983.) When, as here, the trial court has made no factual findings concerning the issue and we cannot decide the question as a matter of law, we "leave it to the trial court to determine on remand whether waiver of the right to compel arbitration has in fact occurred." (*Id.* at p. 984; see also *Del E. Webb Const. v. Richardson Hosp. Authority* (5th Cir. 1987) 823 F.2d 145, 151 [circuit court remanded case to district court to determine factual issue of arbitration waiver, which the lower court had not addressed].)

DISPOSITION

The matter is remanded to the trial court for further proceedings not inconsistent with the United States Supreme Court's mandate and this court's opinion. Parties to bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

MILLER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.