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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ANDREW MILDER,

Plaintiff and Appellant,

v.

SHAWN HOLLEY et al.,

Defendants and Respondents.

B267974

(Los Angeles County  
Super. Ct. No. BC581072)

Appeal from a judgment of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Reversed.

Andrew Milder, in pro. per., for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer,  
Marshall R. Cole for Defendants and Respondents.

## INTRODUCTION

Plaintiff and appellant Andrew Milder filed a complaint in the trial court asserting causes of action arising from a dispute with his former attorney, defendant and respondent Shawn Holley, and the law firm in which she was a partner, defendant and respondent Kinsella Weitzman Iser Kump & Aldisert, concerning Holley's representation of Milder in a criminal case. Defendants demurred to the complaint on the ground that Milder previously had initiated an arbitration of the dispute pursuant to the parties' retainer agreement and thus there was another action pending between the parties on the same causes of action within the meaning of Code of Civil Procedure section 430.10, subdivision (c) (section 430.10(c)). The trial court sustained the demurrer without leave to amend and entered judgment in defendants' favor.

On appeal, Milder contends that an arbitration is not an "action" within the meaning of section 430.10(c); his trial court action was not subject to section 430.10(c) because it asserted a cause of action for declaratory relief claiming he was fraudulently induced to agree to the arbitration provision in the retainer agreement, a claim not asserted in the amended demand for arbitration; if his trial court action was subject to section 430.10(c), then the proper remedy was abatement and not dismissal of that action; and the trial court erred in ruling that the arbitrator and not the trial court was to decide Milder's claim that defendants fraudulently induced him to agree to the arbitration provision. We reverse.

## **FACTUAL AND PROCEDURAL BACKGROUND**

In October 2011, Milder retained defendants to represent him in a criminal case. In connection with that representation, Milder executed a retainer agreement that included an arbitration provision pursuant to which he agreed to submit to arbitration any dispute arising out of or related to the retainer agreement or defendants' representation of him, including a claim of fraud.

In May 2012, defendants moved to withdraw as Milder's counsel in the criminal case. Milder demanded that defendants refund the retainer he had paid and other costs. Holley refused.

In September 2014, Milder filed a demand for arbitration with ADR Services, Inc. based on his dissatisfaction with defendants' representation. In a subsequent amended demand for arbitration, Milder asserted claims for breach of contract, breach of fiduciary duty, fraud, and unfair business practices in violation of Business and Professions Code section 17200.

In support of his arbitration claims, Milder alleged, among other things, that defendants promised to provide him with the "highest quality legal services" and always to place his interest above their own. He alleged that those promises were false, and that Holley provided him with ineffective assistance of counsel and placed her career interests above her representation of him.

On May 6, 2015, Milder filed his trial court action against defendants. In his complaint, he asserted causes of action for declaratory relief, fraud, breach of fiduciary duty, breach of contract, violation of Business and Professions Code section 17200, unjust enrichment, and intentional infliction of emotional distress.

Like his amended arbitration demand, the factual basis for most of the causes of action in Milder's complaint was Holley's alleged deficient representation in his criminal case. The allegations supporting the declaratory relief cause of action and part of the fraud cause of action in the complaint, however, differed from any of the allegations in the amended arbitration demand. In his declaratory relief cause of action, Milder sought a declaration that the arbitration provision in the parties' retainer agreement was void. He alleged that he was fraudulently induced to sign the retainer agreement based on the false assertion in the arbitration provision that "disputes can be resolved 'with less expense to all concerned by binding arbitration than by court action,' and that 'attorneys' fees and other costs incurred by both sides are usually *substantially* less in arbitration than in court." In his fraud cause of action, in addition to other allegations, Milder re-alleged that defendants induced him to sign the arbitration agreement "by falsely stating 'attorneys' fees and other costs incurred by both sides are usually *substantially* less' in arbitration than in court."

Relying on section 430.10(c), defendants demurred to each of the causes of action in Milder's complaint on the ground that an identical action was pending between the parties in the arbitration. The trial court sustained the demurrer without leave to amend. As to Milder's declaratory relief and fraud causes of action, the trial court relied on *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415-417, in ruling that a claim that a contract containing an arbitration provision was induced by fraud is decided by the arbitrator and not the trial court. It further ruled that other allegations in the fraud cause of action and the allegations in Milder's remaining causes of action

were based on the same facts and allegations as Milder’s arbitration claim and thus subject to abatement pursuant to section 430.10(c).

## **DISCUSSION**

### **I. Standard of Review**

“A demurrer tests the legal sufficiency . . . of the factual allegations in a complaint. We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 [106 Cal.Rptr.2d 271, 21 P.3d 1189].) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [6 Cal.Rptr.3d 457, 79 P.3d 569].) We construe the pleading in a reasonable manner and read the allegations in context. (*Ibid.*)” (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 81, disapproved on another ground in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939, fn. 13.)

### **II. Application of Relevant Principles**

Milder contends the trial court erroneously ruled that the arbitrator and not the trial court was to decide whether defendants fraudulently induced Milder to agree to the arbitration provision in the retainer agreement. We agree.

“[A]n arbitrator has the power to decide an issue only if the parties have authorized the arbitrator to do so. Because parties

frequently disagree as to whether a particular dispute is arbitrable, courts play a limited threshold role in determining ‘whether the parties have submitted a particular dispute to arbitration, i.e., the “question of arbitrability.”’ (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83 [154 L.Ed.2d 491, 123 S.Ct. 588], italics omitted (*Howsam*)). [¶] “[Q]uestion[s] of arbitrability” are limited to a narrow range of gateway issues. They may include, for example, ‘whether the parties are bound by a given arbitration clause’ or ‘whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.’ (*Howsam, supra*, 537 U.S. at p. 84; see *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, 452 [156 L.Ed.2d 414, 123 S.Ct. 2402] (plur. opn. of Breyer, J.) . . . .) Courts generally presume that so-called ‘gateway dispute[s]’ are “for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.” (*Howsam, supra*, at p. 83.) (*Garden Fresh Restaurant Corp. v. Superior Court* (2014) 231 Cal.App.4th 678, 684, disapproved on another ground in *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 260, fn. 9.)

Our Supreme Court has held that “claims of fraud in the inducement of the contract (as distinguished from claims of fraud directed to the arbitration clause itself) will be deemed subject to arbitration”—i.e., decided by the arbitrator and not the trial court. (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323; *King v. Prudential-Bache Securities, Inc.* (1990) 226 Cal.App.3d 749, 753.) Where, however, “it is claimed that fraud induced the entering into of the arbitration clause itself, the matter must be resolved by the court

rather than the arbitrator.” (*Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, 1095.)

In his declaratory relief cause of action, Milder alleged he was fraudulently induced to agree to the arbitration provision. Accordingly, the trial court and not the arbitrator must decide that claim. (*Johnson v. Siegel, supra*, 84 Cal.App.4th at p. 1095.)

Defendants contend that *Rosenthal v. Great Western Fin. Securities Corp., supra*, 14 Cal.4th at page 416, *Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 958, *Larian v. Larian* (2004) 123 Cal.App.4th 751, 761, and *Hayes Children Leasing Co. v. NCR Corp.* (1995) 37 Cal.App.4th 775, 781 establish that “a claim that a party was fraudulently induced into entering into the contract (with the arbitration clause) is to be decided by the arbitrator, not the court.” Defendants’ contention, although correct, misses the point. Milder does not contend that he was fraudulently induced to enter the retainer agreement and that agreement happened to contain an arbitration provision. Instead, Milder claims he was fraudulently induced to agree to the arbitration provision itself. As explained above, such claims are decided by the trial court and not the arbitrator. (*Johnson v. Siegel, supra*, 84 Cal.App.4th at p. 1095.)

Finally, we reverse the remainder of the trial court’s order sustaining the demurrer that was based on section 430.10(c) because that part of the order depended on the trial court’s erroneous ruling that the arbitrator was to determine whether Milder was fraudulently induced to agree to the arbitration clause.<sup>1</sup> That is, if the arbitration provision was invalid, then

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<sup>1</sup>For this reason, we do not reach Milder’s other contentions that an arbitration is not an “action” within the meaning of section 430.10(c); his trial court action was not

Milder was not contractually obligated to arbitrate his dispute with defendants and there would not be a pending “action” for section 430.10(c) purposes.

**DISPOSITION**

The judgment is reversed. Milder is awarded his costs on appeal.

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KUMAR, J.\*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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subject to section 430.10(c) because it asserted a cause of action for declaratory relief claiming he was fraudulently induced to agree to the arbitration provision in the retainer agreement, a claim not asserted in the amended demand for arbitration; if his trial court action was subject to section 430.10(c), then the proper remedy was abatement and not dismissal of that action.

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