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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

UT NGO,

Plaintiff and Appellant,

v.

A. DONALD TROTTER,

Defendant and Respondent.

D059278

(Super. Ct. No. 37-2009-00079304-
CU-MM-SC)

APPEAL from an order of the Superior Court of San Diego County, William S. Cannon, Judge. Affirmed.

This action arises from alleged medical malpractice that occurred when plaintiff Ut Ngo had sinus surgery performed by defendant Donald M. Trotter, M.D.. Nearly a year after Ngo filed his action, he filed a petition to compel arbitration based upon an agreement to arbitrate he signed at Dr. Trotter's office before the sinus surgery. Although there was a provision in the agreement to arbitrate for Dr. Trotter's signature to also agree to arbitration, Dr. Trotter did not sign the agreement.

The court denied the petition, finding that because Dr. Trotter did not sign the arbitration agreement, there was no showing that he intended to be bound by that agreement.

On appeal, Ngo asserts the court erred in denying his petition to compel arbitration because (1) the arbitration agreement was a final written offer to arbitrate by Dr. Trotter, which Ngo accepted by signing the agreement; (2) and denying enforcement of the arbitration agreement would encourage manipulation of the arbitral forum and undermines notions of mutuality. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

In November 2008 Ngo presented to Dr. Trotter for consideration of endoscopic sinus surgery. On November 5, 2008, Ngo went to Dr. Trotter's office for a preoperative visit. Before meeting with Dr. Trotter, however, Ngo was presented with two documents: (1) a "Consent for Operation," and (2) a "Patient-Physician Arbitration Agreement" (arbitration agreement).

The consent for operation form relates solely to the patient and contains only a section for the patient to sign and for a witness to the patient's signature. The consent for operation form makes no reference to arbitration, nor does it make Ngo's agreement to arbitrate part of his consent to undergoing sinus surgery with Dr. Trotter. The consent form relates to potential surgical risks and complications to which Ngo must consent and/or understand prior to receiving medical treatment.

The arbitration agreement states in paragraph 6: "*I [Ngo] UNDERSTAND THAT I DO NOT HAVE TO SIGN THIS AGREEMENT TO RECEIVE THE PHYSICIAN'S SERVICES, AND THAT IF I DO SIGN THE AGREEMENT AND CHANGE MY MIND WITHIN 30 DAYS FROM TODAY, THEN I MAY REVOKE THIS AGREEMENT BY GIVING WRITTEN NOTICE . . . TO THE DOCTOR WITHIN THAT TIME STATING THAT I WANT TO WITHDRAW FROM THIS ARBITRATION AGREEMENT. After the expiration of 30 days, this agreement may be changed or revoked only by a new agreement signed by both the doctor and myself.*" (Italics added.)

Immediately above the patient signature line there is the following language: "NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY A NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL."

Immediately above the signature line for the physician it states: "Physician's Agreement to Arbitrate: [¶] In consideration of the above-named Patient's promise to be bound by this Patient-Physician Arbitration Agreement, I likewise agree to be similarly bound by its terms, as set forth in this agreement."

Ngo contends his understanding of the forms was by agreeing to undergo sinus surgery with Dr. Trotter he was also agreeing to have any dispute about the surgery submitted to arbitration as opposed to a jury.

It is undisputed the "Physician's Agreement to Arbitrate" section of the arbitration agreement was never signed by Dr. Trotter. Moreover, Dr. Trotter never discussed

arbitration or the arbitration agreement form with Ngo. According to Dr. Trotter, he was unaware Ngo even signed an arbitration document until around the same time he was sued by Ngo. Dr. Trotter also contends that he never intended to waive his rights to a jury trial should a dispute arise concerning the quality of his medical care.

Ngo subsequently underwent sinus surgery with Dr. Trotter on or about November 10, 2008. He later developed pain and redness in his right eye, as well as double vision. He also developed bleeding from his right eye. Ngo later discovered that his right eye socket was penetrated during the sinus surgery and that he suffered damage to the muscles of that eye, leaving him unable to fully move that eye.

B. The Instant Action

In October 2009 Ngo served Dr. Trotter with a notice of intent to file suit, which included a demand for arbitration. In November 2009, Ngo filed the instant action, alleging medical malpractice against Dr. Trotter. Subsequently, Ngo filed a first amended complaint, the operative complaint in this action (1 AA 1-12.)

C. Petition To Compel Arbitration

In October 2010, almost one year after filing suit, Ngo filed a petition to compel arbitration. Ngo's petition relied upon the arbitration agreement, as well as his declaration. Ngo's declaration, which was drafted with "the help of [his] attorney and [his] family members," as he speaks "very little English," claims he understood from these documents that he would agree to undergo sinus surgery and that any dispute that arose would be subject to arbitration.

In response, Dr. Trotter submitted his own declaration, stating he was unaware of the arbitration agreement at the time he treated Ngo, never discussed it with Ngo, never intended to waive his rights to a jury in favor of arbitration, and never signed the arbitration agreement itself. Dr. Trotter's opposition papers also cited several cases requiring a "clear agreement" to arbitrate before courts will infer the right to a jury trial has been waived.

D. *Court's Ruling*

The trial court denied the petition to compel arbitration. In doing so, the court noted that "[a]bsent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived." The court found that because Dr. Trotter "did not sign the arbitration agreement even though there is a specific provision on the agreement labeled 'Physician's Agreement to Arbitrate' where the physician is expected to sign if he or she agrees to be bound by the agreement," there was no objective manifestation of his to agreement to arbitrate medical malpractice disputes with Ngo.

DISCUSSION

I. *APPLICABLE LEGAL PRINCIPLES*

Code of Civil Procedure section 1281.2 governs petitions to compel arbitration, and provides:

"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." (Italics added.)

Thus, contractual arbitration is available only when the parties have agreed to arbitrate a controversy. (*Herman Feil, Inc. v. Design Center of Los Angeles* (1988) 204 Cal.App.3d 1406, 1414 [arbitration "only comes into play when the parties to the dispute have agreed to submit to it"].) "Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived." (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 569.)

"The right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract. [Citations.] There is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate." (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.)

When interpreting an arbitration clause, courts start "with the basic premise that arbitration is consensual in nature. The fundamental assumption of arbitration is that it may be invoked as an alternative to the settlement of disputes through the judicial process "solely by reason of an exercise of choice by [all] parties." [Citation.] In other words, *a party cannot be compelled to arbitrate a dispute he has not agreed to submit.*"

(*Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501, 1505, italics added.)

California courts recognize that the right to pursue claims in a judicial forum is a substantial right and one not lightly to be deemed waived. (*Id.* at p. 1507; *Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 643.) Because the parties to an

arbitration clause surrender this substantial right, the general policy favoring arbitration cannot replace an agreement to arbitrate. (*Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271; *American Home Assurance Co. v. Benowitz* (1991) 234 Cal.App.3d 192, 200.)

In determining whether an enforceable agreement to arbitrate exists, we apply principles of California contract law. (*Wolschlager v. Fidelity National Title Ins. Co.* (2003) 111 Cal.App.4th 784, 789.) The plain language of a contract governs its interpretation. (Civ. Code, § 1638; *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1605.) Where language is clear and unambiguous, interpretation is unnecessary. (See *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 392.)

California follows the objective theory of contracts: it is the objective intent of the parties, as evidenced by the words of the contract that controls, not the parties' subjective intent. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 956.)

Whether the parties to a contract have agreed to arbitration is ultimately a legal question subject to de novo review. (*Arista Films, Inc. v. Gilford Securities, Inc.* (1996) 43 Cal.App.4th 495, 501.) "An appellate court is not bound by a trial court's construction of a written instrument where such construction is based solely on the instrument without extrinsic evidence." (*Slaughter v. Bencomo Roofing Co.* (1994) 25 Cal.App.4th 744, 748.) Even where extrinsic evidence is offered, construction of the contract is still subject to de novo review where such evidence consists only of written declarations. (*Marcus &*

Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co. (1998) 68 Cal.App.4th 83, 89; see *Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1369.)

II. ANALYSIS

Here it is undisputed that Dr. Trotter did not sign that portion of the arbitration agreement indicating his agreement to arbitrate disputes as to medical malpractice. Thus, under the foregoing authorities, we will not infer that Dr. Trotter's right to a jury trial has been waived because there is no clear agreement on the part of Dr. Trotter to submit this dispute to arbitration. (*Adajar v. RWR Homes, Inc., supra*, 160 Cal.App.4th at p. 569.)

Ngo asserts that when the arbitration agreement was delivered to him it constituted an offer for purposes of contract formation. His signing it was an acceptance, leading to a binding agreement to arbitrate. This contention is unavailing.

""An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."" (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 271.) Further, "[t]he determination of whether a particular communication constitutes an operative offer . . . depends upon all the surrounding circumstances." (*Ibid.*) Moreover, "the pertinent inquiry is whether the individual to whom the communication was made had reason to believe that it was intended as an offer." (*Ibid.*)

In this regard, the trial court was presented undisputed evidence that, by not signing the arbitration agreement, Dr. Trotter made no manifestation of objective intent to agree to arbitrate and Ngo could not reasonably have believed an incomplete, unsigned form was a legal offer that required only his signature to be mutually binding. The form

Ngo signed contained a separate "Physician's Agreement to Arbitrate" section that was unsigned, immediately under Ngo's signature. Under these facts, the arbitration agreement was not an offer that could be accepted by only NGO signing the agreement. This is particularly so given the unanimous authority that a party will not be bound by an arbitration agreement unless he or she agrees to do so.

Such an interpretation of this agreement—that it required signatures of both parties to be valid—also comports with its other terms. For example, as stated, *ante*, paragraph 6 provides that upon execution of the agreement it could not be revoked except "by a new agreement signed *by both the doctor and myself*." (Italics added.) If the language of the contract itself envisions any "new agreements" for arbitration as requiring signatures from both parties to be valid, then the original agreement itself necessarily has that same expectation.

Further, where the evidence demonstrates that signatures of both parties were required before the contract would become binding, the courts have held the contract to be incomplete and not binding until signed by both parties. (*Anthony Macaroni Co. v. Nunziato* (1935) 5 Cal.App.2d 588, 589; *Helperin v. Guzzardi* (1951) 108 Cal.App.2d 125, 128; *Nakatsukasa v. Wade* (1954) 128 Cal.App.2d 86, 91) The arbitration agreement here, by containing a specific section for the "Physician's Agreement to Arbitrate" with its own consenting language, envisioned the document would not become a binding contract until signed by Dr. Trotter. This is particularly true under that law governing arbitration agreements: there must be a clear indication of an agreement to waive a right to a jury trial for there to be an enforceable agreement to arbitrate.

Ngo also asserts that failure to enforce the arbitration agreement violates notions of "mutuality of obligation," allowing Dr. Trotter to enforce the agreement against NGO, but escaping its enforcement if he so chooses. We reject this contention.

There is no problem with mutuality of obligation present here as Dr. Trotter is not attempting to force arbitration upon Ngo under an agreement that Dr. Trotter himself did not sign. Rather, it is Ngo that is attempting to enforce an agreement to arbitrate against a person that did not agree to arbitrate. If the reverse were true, Ngo having not signed the arbitration agreement, it could not be argued that Dr. Trotter could enforce that agreement against Ngo.

In support of this contention, Ngo cites *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, which involved a "mandatory arbitration agreement" in connection with an employment application that contained various one-sided arbitration terms favoring the employer. (*Id.* at pp. 90-91.) However, the mandatory arbitration agreement in that case was made a requirement of employment; whereas in this case the arbitration agreement expressly stated that Ngo's agreement to arbitrate was *not* required in order for him to receive medical treatment. Additionally, the arbitration agreement in *Armendariz* was held unenforceable by *the employers* to whom the arbitration agreement, under its terms, did not apply. (*Id.* at p. 127.)

Ngo also cites to *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322 which, like the *Armendariz* case, involved an employee who was forced to sign a unilateral arbitration agreement as a necessary condition of her employment. (*Kinney, supra*, at pp. 1324-1327.) Again, in this case, Ngo was *not*

required to sign the arbitration agreement in order to receive medical treatment from Dr. Trotter.

Last, Ngo cites *Saika v. Gold* (1996) 49 Cal.App.4th 1074, which, unlike this case, involved a *defendant physician* seeking to enforce the terms of an arbitration agreement against a patient/plaintiff. The court in *Saika* declined to enforce a clause that allowed the physician to request a trial de novo if the patient received an award over \$25,000 because it frustrated the policies favoring arbitration, and only benefitted the defendant physician. (*Id.* at p. 1081.)

That case has no application here, where the only question is whether Dr. Trotter agreed to submit medical malpractice disputes to arbitration. We have concluded that he did not.¹

¹ Based upon our holding that Dr. Trotter did not agree to arbitrate Ngo's medical malpractice claims, we need not reach Dr. Trotter's alternative claim that by waiting nearly a year after filing his lawsuit to file his petition to compel arbitration, Ngo has waived the right to compel arbitration.

DISPOSITION

The judgment is affirmed. Dr. Trotter shall recover his costs on appeal.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.