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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN C. O'MALLEY et al.,

Plaintiffs and Respondents,

v.

MICHAEL J. AVENATTI et al.,

Defendants and Appellants.

G045806

(Super. Ct. No. 30-2011-00491511)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Appeal dismissed.

Eagan Avenatti and Michael J. Avenatti for Defendants and Appellants.

Callahan & Blaine, Daniel J. Callahan, Stephen E. Blaine, Edward Susolik, and Michael J. Wright for Plaintiffs and Respondents.

* * *

Defendants¹ appeal from an order denying their cross-petition to compel arbitration with plaintiff John C. O'Malley, individually and as a professional corporation (O'Malley). The appeal is dismissed because defendants are not aggrieved by the order. They already initiated the arbitration they sought to compel and the order did not stay or enjoin it.

FACTS

O'Malley sued defendants in Orange County Superior Court in July 2011. He alleged he, Michael Eagan, and Michael J. Avenatti formed the law firm Eagan O'Malley & Avenatti (the firm) in 2007 pursuant to a written partnership agreement. O'Malley further alleged he left the firm in December 2010 pursuant to a written separation agreement. O'Malley asserted Eagan, Avenatti, and Avenatti and Associates breached the partnership agreement, the separation agreement, and their fiduciary duties by failing to honor his ownership interest in the firm, failing to pay him his promised compensation, forcing him out of the firm, and continuing to use the firm's name after his departure. He further asserted a quantum meruit cause of action against the firm, and causes of action against all defendants for unjust enrichment, declaratory relief, and accounting.

Two weeks later, O'Malley petitioned to compel arbitration in Orange County pursuant to arbitration clauses in the partnership agreement and separation agreement. The partnership agreement provided: "The parties agree that any and all disputes between or among the Founding Partners and/or relating to or arising out of this Agreement or any equity and/or partnership interest issued in the Firm, shall be resolved by binding arbitration before one arbitrator at [the Judicial Arbitration and Mediation

¹ Defendants are Michael J. Avenatti, Avenatti & Associates, Michael Eagan, Eagan O'Malley & Avenatti LLP, and Eagan Avenatti LLP.

Services (JAMS)] and in accordance with the JAMS rules then currently in effect as to selection of an arbitrator and the timing and scope of the dispute.” It further provided that “disputes pertaining to the involuntary removal of [O’Malley] as a partner and/or any dilution or forfeiture of his partnership interest in the Firm or status at the Firm . . . shall be resolved before the Orange County panel of JAMS.” It required arbitration of similar disputes pertaining to Avenatti to be arbitrated in Los Angeles, and those pertaining to Eagan to be arbitrated in San Francisco. The separation agreement provided that any disputes relating to it shall be resolved pursuant to the partnership agreement’s arbitration clause.

In opposition, defendants stated “there is no disagreement that this dispute should proceed to arbitration.” But they did “dispute . . . the proper scope of the arbitration, who is to make that determination, and where the arbitration is to proceed.” Defendants contended the court lacked jurisdiction to compel arbitration because the partnership agreement and JAMS rules entrusted the arbitrability determination to the arbitrator. Defendants insisted the court could do no more than “issue a stay and an order that all issues relating to arbitrability, venue, scope of the arbitration, and selection of the arbitrator are to be decided by JAMS.”

And even if the court had authority to decide arbitrability and venue, defendants asserted it could not compel arbitration in Orange County. They claimed O’Malley had voluntarily relinquished his partnership interest — there was no “involuntary removal” triggering the Orange County venue clause.

In the alternative, defendants cross-petitioned to compel arbitration in San Francisco. Defendants stated they had already initiated arbitration there over alleged “misconduct and outright fraud by [O’Malley] that has resulted in the dilution of [Eagan’s] partnership interest” Defendants attached their JAMS statement of claim, which was dated the day after O’Malley filed his petition to compel arbitration. Defendants sought declaratory relief resolving the disputes O’Malley had raised in his

complaint. They further alleged O'Malley misrepresented his book of business, lied to clients, and mismanaged the firm as managing partner. And they alleged O'Malley made "false and misleading statements . . . to a prospective attorney, now resident at the Firm, that the attorney, would receive a significant partnership interest that would result from the dilution of [Eagan's] interest in the Firm and negatively affect the equity position of [Eagan]." Defendants claimed this allegation brought the arbitration within the San Francisco venue clause.

In opposition to defendants' cross-petition, O'Malley offered a letter from the San Francisco JAMS office to the parties. It stated: "JAMS has reviewed the parties' submissions with respect to staying this arbitration and the location for the arbitration. The parties' submissions present various disputes concerning the appropriate location of the Arbitration as well as the venue for the hearing which will require legal review and decision by an Arbitrator. However, given that JAMS has been presented with an arbitration agreement and demand for arbitration in San Francisco, JAMS will continue to administer the matter in San Francisco where the matter was filed. Any further challenges or requests for stay in this regard may be presented to the Arbitrator once he or she is appointed. In addition, pursuant to JAMS Rules, the Arbitrator may determine the proper location of the hearing as a preliminary matter." The letter continued: "Should the Court issue an order otherwise, JAMS will of course honor the Court's ruling. In the meantime, the parties should proceed with Arbitrator selection and address any further issues to the Arbitrator once appointed." (Underscoring omitted.)

The court granted O'Malley's petition. It ruled: "The parties have agreed that this dispute should be arbitrated. [¶] The court finds that Paragraph 29.1 of the Partnership Agreement designated a location for the arbitration under these circumstances. It appears that the settlement agreement was, in effect, either an involuntary termination or a complete dilution of O'Malley's partnership interest. Moreover, Plaintiff filed first in Orange County and the principal place of business of the

Partnership is in this county. Therefore, the court directs the matter to the Orange County JAMS office. [¶] Orange County JAMS shall select the arbitrator and the location for the hearing and determine any other necessary issues.” At the hearing, the court agreed defendants’ cross-petition was “by implication denied.”

DISCUSSION

O’Malley has moved to dismiss the appeal. To be sure, defendants may not appeal from the order granting O’Malley’s petition to compel arbitration. (*State Farm Fire & Casualty v. Hardin* (1989) 211 Cal.App.3d 501, 506 (*Hardin*) [“an order compelling arbitration is nonappealable”].) But defendants have not appealed from that order. Defendants’ notice of appeal identifies the appealed order as the “order denying [their cross-]Petition to Compel Arbitration” And in their written opposition to the motion to dismiss, defendants state “this appeal is *not* from the grant of a petition to compel arbitration . . . but rather is from the denial of a petition to have JAMS decide arbitrability pursuant to the terms of the parties’ agreement.” By seeking to refer the issue of arbitrability to the arbitrator, defendants were in fact seeking to compel arbitration. And the denial of their arbitration request is appealable. (Code Civ. Proc., § 1294, subd. (a).)

But we can see why O’Malley might have thought defendants had appealed from the order granting his petition to compel arbitration. In their appellate briefs, defendants challenge the propriety of arbitration in Orange County. No matter. Defendants did not identify this order in their notice of appeal, and thus have not appealed from it. (See Cal. Rules of Court, rule 8.100(a)(2) [notice of appeal must “identif[y] the particular judgment or order being appealed”]; see also *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43 [to be reviewed, a judgment or order “‘must be expressly specified’” in a notice of appeal]; cf. *Gonzales v. R.J. Novick Constr. Co.*

(1978) 20 Cal.3d 798, 805 [“an appeal from a distinct and independent part of a judgment does not bring up the other parts for review in the appellate court”].) And if defendants had purported to appeal from the order granting O’Malley’s petition, we would dismiss it. (*Hardin, supra*, 211 Cal.App.3d at p. 507 [dismissing appeal from nonappealable order compelling arbitration]; *Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 645 [court “must dismiss an appeal from a nonappealable order”].)

Relying on *Hardin*, O’Malley asks us to dismiss the appeal, even if it is understood as an appeal from the denial of defendants’ cross-petition. But O’Malley reads too much into *Hardin*. That case held an order compelling an insurance appraisal (a kind of arbitration) was not appealable even though court had also denied a cross-petition to compel a more limited appraisal. (*Hardin, supra*, 211 Cal.App.3d at pp. 506-507.) It held: “The order denying the cross-petition is, in effect, a denial of a request to exclude certain items from the appraisal process; it is not an order denying a request to compel arbitration. Considered in its entirety, with its substance and effect prevailing over mere form [citation], the order is one to compel appraisal arbitration of the entire loss, and, as such, is not appealable.” (*Ibid.*) So in *Hardin*, the denied cross-petition was basically a request to limit the scope of the arbitration. In other words, it was just a limited opposition to the granted arbitration petition.

But we face the opposite situation of *Hardin*. Defendant’s cross-petition does not seek to exclude certain issues from the arbitration. Defendants do not want a narrower arbitration than O’Malley. They want a broader arbitration. In their cross-petition, defendants seek to resolve O’Malley’s disputes over his partnership interest, compensation, and departure from the firm — the same issues O’Malley wants to arbitrate. But they also seek to resolve their additional claims against O’Malley for his alleged misrepresentations and mismanagement. So the denied cross-petition seeks to compel arbitration of claims not addressed by the granted arbitration petition. Thus, it is

a petition to compel arbitration of claims not embraced by O'Malley's petition. It is not just a disguised opposition, unlike the cross-petition in *Hardin*.

Even so, there remains something troubling about defendants' appeal. They appeal the denial of their cross-petition to compel arbitration before JAMS in San Francisco. But they already initiated that arbitration. O'Malley has apparently appeared in that arbitration — JAMS has considered “the parties' submissions.” And JAMS promises to “continue to administer the matter in San Francisco” unless “the Court issue[s] an order otherwise.” (Underscoring omitted.) While the court compelled arbitration of a subset of the parties' dispute in Orange County, it did so without reference to the pending arbitration of a larger set of claims in San Francisco. The court did not stay or enjoin the ongoing San Francisco arbitration.²

Only a “party aggrieved may appeal. . . .” (Code Civ. Proc., § 902.) “[A]ny entity . . . whose interest is adversely affected by the judgment is an aggrieved party and is entitled to be heard on appeal. However, the aggrieved party's interest must be immediate, pecuniary and substantial” (*In re FairWageLaw* (2009) 176 Cal.App.4th 279, 285.) The order denying defendants' cross-petition to compel an arbitration they already initiated does not adversely affect them. Thus, we dismiss the appeal. (See *Crook v. Contreras* (2002) 95 Cal.App.4th 1194, 1201 [dismissing nonaggrieved party's appeal]; *In re Marriage of Behrens* (1982) 137 Cal.App.3d 562, 571, 578 [same].)

² In a supplemental brief submitted at our invitation (see Gov. Code, § 68081), defendants assert JAMS has subsequently transferred the San Francisco arbitration to Orange County. That does not revive this appeal. This appeal was taken from the court's order. That order did not require any transfer, and so defendants are still not aggrieved by the order. We do not reach whether defendants are aggrieved by JAMS's interpretation of the order or its application of its own rules. We do note the incongruity between defendants' complaint about JAMS's decision and their steadfast position that the arbitrator should decide the scope and venue of the arbitration.

What about the Orange County arbitration of a subset of the parties' claims? That has to continue. The court ordered that, defendants cannot appeal from that order, and we lack jurisdiction to review it. (See *Hardin, supra*, 211 Cal.App.3d at pp. 506-507.)

Having two overlapping arbitrations in two different JAMS offices is hardly ideal, but it is the entirely foreseeable consequence of defendants' tactics. Defendants responded to O'Malley's petition to compel arbitration by initiating their own arbitration the very next day. Faced with the prospect of one arbitration being compelled by a nonappealable order, defendants chose to initiate another one. One plus one equals two.

DISPOSITION

O'Malley's motion to dismiss is granted, but the sanctions request is denied. O'Malley shall recover costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.