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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PACIFIC WESTLINE, INC.,

Plaintiff and Appellant,

v.

C.W. DRIVER, INC.,

Defendant and Respondent.

G046357

(Super. Ct. No. 30-2008-00113282)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Sheila Fell,  
Judge. Affirmed.

Rogers, MacLeith and Stolp, and Douglas R. MacLeith for Plaintiff and  
Appellant.

Law Offices of Ted R. Gropman and Ted R. Gropman for Defendant and  
Respondent.

## INTRODUCTION

Pacific Westline, Inc. (Pacific), has appealed an order compelling arbitration after a judgment confirming the arbitration award. Pacific was a subcontractor of general contractor C.W. Driver, Inc. (Driver), for remodeling work on a hotel at Disneyland. Pacific alleged that Driver ordered additional work on the hotel for which it refused to pay. Driver successfully petitioned to compel arbitration of the dispute. Pacific appeals from the order granting Driver's petition.

We affirm. The language of the subcontract supports arbitration of disputes such as the one between Driver and Pacific. The court correctly granted the petition to compel arbitration.

## FACTS<sup>1</sup>

Pacific subcontracted with Driver in 2008 to do finish carpentry and other ornamentation work for a luxury suite at a Disneyland hotel. Driver was the general contractor on the project. According to Pacific's complaint, Driver ordered additional work on the suite and refused to pay for it.

Pacific sued Driver and Walt Disney World Co. (the hotel owner) in October 2008. The causes of action were all contract-based: breach of written contract, breach of oral contract, and three common counts.<sup>2</sup> Disney successfully demurred to the two causes of action against it by pointing out the lack of any allegation of privity between itself and Pacific for claims based on a contract. The court allowed Pacific to

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<sup>1</sup> These facts are taken from the record on appeal. In their briefs, by contrast, both parties have chosen to recount "facts" for which they have provided no citation to the record – thereby violating rule 8.204(a)(1)(C) of the California Rules of Court – and which actually do not appear anywhere in the record. The minimum penalty for such conduct is the disregarding of all unsupported assertions of facts. (See *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839, 846.)

<sup>2</sup> Disney was a defendant in only the last two common counts, for labor and materials furnished and for goods sold and delivered.

amend the complaint, but it did not do so and ultimately dismissed Disney from the action.

The subcontract between Pacific and Driver incorporated the dispute resolution procedure adopted in the “prime contract” (the contract between Disney and Driver) into the Pacific-Driver subcontract, except for “disputes not involving the acts, omissions or otherwise the responsibility of [Disney] under the prime contract. . . .” The subcontract then mandated arbitration “for disputes not involving the acts, omissions or otherwise the responsibility of [Disney].” “For claims not involving the acts, omissions or otherwise the responsibility of [Disney] under the prime contract, the parties hereto shall submit any and all disputes arising under or relating to the terms and conditions of the Subcontract to arbitration in accordance with the Construction Industry Rules of the American Arbitration Association.” The subcontract also contained a “Pass Through Claims” provision, obligating Driver to present “[a]ll claims of [Pacific] arising out of the acts or omissions of [Disney]” to Disney on Pacific’s behalf. Pacific’s claims against Disney were to be “finally resolved through the claims procedure (arbitration, litigation or otherwise) applicable between [Driver] and [Disney].”

Driver petitioned to compel arbitration; Pacific opposed the petition on the grounds that the subcontract did not compel arbitration, because the dispute “involved” Disney. The court granted the petition in July 2009 and stayed the action.<sup>3</sup>

The arbitration commenced in October 2009. One of the first issues placed before the arbitrator was whether he had jurisdiction to hear the matter. The arbitrator ruled that he did.<sup>4</sup> The arbitration hearing took place in March 2011, and the arbitrator

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<sup>3</sup> At the hearing on Driver’s petition, Pacific’s main objection to arbitration was its concern that it would not be able to get discovery from Disney.

<sup>4</sup> Driver argues that Pacific waived its right to contest the order compelling arbitration by moving for a determination of arbitrability in the arbitration itself. Since nothing in the record supports the factual underpinnings of Driver’s argument, we disregard it. (See *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 990.)

issued his award on May 20, 2011. He awarded Pacific nothing.<sup>5</sup> The court confirmed the award and entered judgment on November 17, 2011. Pacific appealed from both the judgment and the order compelling arbitration. Its sole issue on appeal, however, is the order.

## DISCUSSION

An order compelling arbitration, although not itself appealable, can be reviewed on appeal from the judgment confirming the arbitration award. (*Handy v. First Interstate Bank* (1993) 13 Cal.App.4th 917, 922.) We review an order compelling arbitration de novo if the court interpreted the contract language without the aid of extrinsic evidence or for substantial evidence if the trial court based its decision on a resolution of disputed facts. (*Hartnell Community College Dist. v. Superior Court* (2004) 124 Cal.App.4th 1443, 1448-1449.)

California has a strong public policy favoring arbitration. “Courts should indulge every intendment to give effect to such proceedings [citation] and order arbitration unless it can be said with assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” (*Pacific Inv. Co. v. Townsend* (1976) 58 Cal.App.3d 1, 9.) Doubts are resolved in favor of sending the matter to arbitration. (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1282.)

When presented with a petition to compel arbitration, a court has two main tasks. First, it must determine whether an agreement to arbitrate exists. If it does, then the court decides – if the party opposing arbitration raises the objection – whether the agreement is enforceable. The party petitioning to compel arbitration bears the burden of proving its existence by preponderance of the evidence. The party opposing arbitration bears the burden of proving the agreement is not enforceable. (*Rosenthal v. Great*

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<sup>5</sup> The arbitrator found Pacific had willfully ignored the contract provisions regarding change orders and had not properly kept track of its actual costs for the additional work. He considered the amount Pacific was paid for the extra work reasonable under the circumstances.

*Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413; see also Code Civ. Proc., § 1281.2.)

In opposing Driver’s petition, Pacific raised no defense to enforcement, such as unconscionability, fraud, waiver, or the like. It argued instead that no agreement to arbitrate existed because its lawsuit “involved” Disney and therefore came under one of the exceptions to arbitration.<sup>6</sup> The right to arbitration thus hinges mainly on the interpretation of “involve.”

“Involve” has several meanings. It can mean “engage in as a participant,” as in a country involved in a war or in political intrigues. “Involve” can also mean “entail” (becoming a championship swimmer involves a lot of work), “include” (a mystery story usually involves a dead body), or “affect” (the virus involves the entire respiratory system), among other meanings. (See Webster’s 3d New Internat. Dict. (1981) p. 1191, col. 2.)

In light of the rule that doubts are resolved in favor of arbitration, “[i]t seems clear that the burden must fall upon the party opposing arbitration to demonstrate that an arbitration clause *cannot* be interpreted to require arbitration of the dispute.” (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686-687; see also *Molecular Analytical Systems v. CIPHERGEN Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 705 [“The party opposing arbitration has the burden of showing that the agreement, as properly interpreted, does not apply to the dispute.”].)

Obviously the arbitration clause in this case can be interpreted to require arbitration. One common meaning of “involve” is “engage in as a participant.” Pacific’s dispute or claim does not “involve” Disney’s acts, omissions, or responsibility under the prime contract; nothing in the complaint suggests that Disney participated in – or indeed

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<sup>6</sup> Pacific did not attach a copy of the subcontract to the complaint, and its causes of action for breach of written and oral contracts did not include allegations regarding an arbitration clause. Nevertheless, arbitration could still be compelled because Pacific’s claims “arise under” or “relate to” the subcontract’s terms and conditions.

had anything to do with – Driver’s refusal to pay Pacific according to the terms of the contract alleged in Pacific’s complaint. Of course Disney was “involved” in the hotel project itself; it was after all Disney’s hotel that was being renovated. But involvement in the project is not the key to arbitration; the clause speaks instead of involvement in the *claim* or the *dispute*. The only claims or disputes alleged in the complaint are those against Driver, for failing to pay what was owing under either a written or an oral contract or according to common counts.

Pacific argues that the declaration of one of its officers, in opposition to Driver’s petition, presented evidence of Disney’s involvement. The declarant stated that Disney requested the work done on the project and that the subcontract incorporated the prime contract’s provisions into the subcontract.

In the first place, this evidence may not have been properly before the court. “In determining whether an arbitration agreement applies to a specific dispute, the court may examine only the agreement itself and the complaint filed by the party refusing arbitration . . . .” (*Weeks v. Crow* (1980) 113 Cal.App.3d 350, 353.) If the court must resolve disputed facts in order to determine enforcement, then the parties may submit evidence in the form of documents and declarations. The court may also, in its discretion, order oral testimony. (See *Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at pp. 413-414.) Pacific’s opposition, however, did not appear to raise any disputed factual issues. It was not disputed that Disney requested all the work on the project or that the subcontract incorporated the prime contract.

But even if it was properly considered, Pacific’s evidence would not defeat arbitration. The evidence showed only Disney’s involvement in the *project*, not in the dispute with Driver for refusal to pay under the alleged contracts (oral or written) between Pacific and Driver. If “involvement” covered as much ground as Pacific claims for it, arbitration could almost never be ordered. Disney would always have some connection with a project of which it was the owner; as long as the dispute between

contractor and subcontractor centered on the project, Disney would be “involved.” The arbitration clause would come into play only on the vanishingly rare occasions when a dispute was completely unrelated to the project. It is unlikely that the parties intended to arbitrate only in these anomalous situations.

The main argument Pacific makes on appeal differs utterly from what it placed before the superior court by way of the complaint. On appeal, Disney is the villain – ordering extra work and refusing to pay for it or paying a small fraction of its value (factual assertions lacking any citation to the record). The complaint, however, makes no mention of any misbehavior by Disney. The bad actor in the complaint is Driver, which ordered the extra work and refused to pay for it.

When it made its ruling on the motion to compel arbitration, the court had before it Pacific’s complaint, the subcontract between Pacific and Driver containing the arbitration clause, and Pacific’s declaration. The complaint was clearly framed in terms of a breach of agreements between Pacific and Driver. Pacific alleged no contract between itself and Disney, and the only claims in the complaint were contract claims. After Disney successfully demurred, the court allowed Pacific to amend its complaint. It not only chose not to amend, it also requested Disney’s dismissal, thereby tacitly acknowledging Disney’s lack of connection with the dispute. The subcontract required arbitration of disputes purely between the general contractor and the subcontractor. According to the complaint extant when the court made its decision, this was one of those disputes.

Pacific repeatedly asserts that it could not sue Disney because it had no contract with Disney, only with Driver. True, Pacific could not sue Disney for breach of contract. But if Disney was truly pulling the strings that made Driver refuse to pay what it owed, Pacific could have sued for contract interference. (See, e.g., *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55 [elements of cause of action].) There was also a potential suit for unfair business practices if, in truth, Disney “act[ed] in

bad faith, underpaying subcontractors as part of an ongoing practice,” as stated in Pacific’s opening brief (but not in the complaint). (See Bus. & Prof. Code, §§ 17200 et seq.) Or Pacific could have amended the complaint to explain how Disney orchestrated the non-payment of Pacific’s charges.<sup>7</sup> Pacific did not amend, but instead focused its attention on Driver and on Driver’s failure to pay for the extra work it had ordered on Disney’s hotel.

According to the complaint and the evidence before the court at the time Driver petitioned for arbitration, none of Disney’s acts or omissions had any bearing on Driver’s refusal to pay Pacific pursuant to the contract between these two parties, and Pacific alleged no responsibility of Disney under the prime contract for Driver’s refusal to pay Pacific. The case was properly sent to arbitration.

#### **DISPOSITION**

The order granting the petition to compel arbitration is affirmed.  
Respondent is to recover its costs on appeal.

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<sup>7</sup> Pacific also does not explain why it did not sue Driver under the subcontract’s “Pass Through Claims” provision. If Pacific had a claim against Disney that Driver failed to present and resolve, then Driver breached this portion of the subcontract. Such a breach would almost certainly “involve” Disney’s acts or omissions under any definition of “involve.” Pacific asserts, without any supporting citation to the record, that Driver refused to comply with this portion of the subcontract.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.