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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DYLAN LAW, a Minor, etc., et al.,

Plaintiffs and Respondents,

v.

JOHN R. GORNY,

Defendant and Appellant.

G046953

(Super. Ct. No. 30-2011-00489125)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thierry Patrick Colaw, Judge. Affirmed.

Schmid & Voiles, Denise H. Greer and Kathleen D. McColgan for Defendant and Appellant.

Aitken Aitken Cohn, Richard A. Cohn and Atticus N. Wegman for Plaintiffs and Respondents.

John R. Gorny appeals from an order denying his petition to compel arbitration of the medical malpractice action filed against him by Dylan Law, by and through his guardian ad litem and mother, McKenzie Law, and his parents McKenzie and Jesse Law, individually. (For clarity we will refer to the plaintiffs collectively as the Laws and individually by their first names. No disrespect is intended.) Gorny contends the trial court erred by finding he had waived his contractual right to arbitration by waiting to pursue arbitration and participating in discovery. We conclude the order is supported by substantial evidence and, accordingly, it must be affirmed.

FACTS AND PROCEDURE

On July 6, 2011, the Laws filed their complaint for medical malpractice against Gorny, the obstetrician who delivered Dylan, and Mission Hospital Regional Medical Center (Mission) where Dylan was born in 2008. They alleged Dylan suffered severe and permanent injuries during labor and delivery due to the alleged negligence of Gorny and Mission. (In later discovery responses, the Laws asserted the defendants were negligent in “fail[ing] to call for and perform a C-Section earlier.”) They alleged each of the defendants was an agent and employee of the remaining defendants acting within the scope of that agency and employment.

The Laws served their complaint on Gorny on September 8, 2011. Gorny filed his answer on October 11, 2011. Gorny’s answer included as an affirmative defense that the dispute was covered by a binding arbitration agreement. Mission was also served and answered the complaint and, apparently, there is no arbitration agreement between it and the Laws.

On February 17, 2012, Gorny filed a case management statement on which he failed to check the box indicating he was willing to participate in binding arbitration (box 10 (c)(5)), but under “other motions” indicated he was filing a motion to compel arbitration. Gorny filed his petition to compel arbitration under Code of Civil Procedure

section 1281.2¹ that same day, and sought an order staying the action (as between only himself and the Laws) while arbitration took place. The arbitration agreement was the only evidence submitted with the petition.

The Laws opposed the petition to compel arbitration, largely on the ground Gorny had waived arbitration by delaying and participating in the litigation discovery process. They also argued there was no arbitration agreement with Mission and the court should not allow the case to be heard in a piecemeal fashion.

The Laws' counsel submitted his declaration detailing the discovery that had taken place between the time the complaint was filed and the motion to compel arbitration was filed. On October 7, Gorny served three sets of form and special interrogatories on the Laws (one for each plaintiff), and a request for document production on Dylan. Mission served similar discovery on the Laws on October 12. The Laws had already responded to all the discovery requests. Gorny and Mission had both subpoenaed medical records. The Laws had propounded form interrogatories on Gorny and Mission and each had responded to those discovery requests.

The Laws' counsel declared that although Gorny's answer raised the arbitration agreement as an affirmative defense, a petition to compel arbitration was not filed. Accordingly, the Laws responded to and propounded discovery, and retained and consulted with experts, with the understanding and expectation that the case would be tried against both defendants simultaneously. Counsel declared he would have made different strategic decisions had he known they were going to arbitrate the dispute as to one of the defendants. In particular, the Laws would not have answered interrogatories so as to divulge contentions against "empty chair defendant[s]." The Laws relied on the fact they were trying the case against two defendants simultaneously and would be prejudiced if the action against Gorny was now severed and sent to arbitration. The Laws

¹ All further statutory references are to the Code of Civil Procedure.

additionally argued the action against Gorny and Mission should be heard together in the same forum. The Laws contended Mission was not only a medical provider, but it and its nurses were acting under the direction, control, and agency of Gorny.

In his reply, Gorny argued his pre-petition litigation activities were not inconsistent with his intent to arbitrate the dispute. Although the Laws' complaint was *filed* in July 2011, it was not *served* on Gorny until September 8. The sets of interrogatories Gorny served on the Laws on October 7, had written on each caption page the following disclaimer, "The propounding of this discovery under the Superior Court caption is not intended to act as a waiver of [Gorny's] right to assert binding arbitration in this matter." On December 14, 2011, Gorny's counsel sent the Laws' counsel a letter demanding they stipulate to arbitration, with a proposed stipulation included. The Laws did not respond to Gorny's discovery requests until January 5, 2012. On January 10, 2012, Gorny's counsel sent the Laws' counsel a letter confirming their agreement that taking the Laws' depositions would not constitute a waiver of his right to arbitrate the disputes. Sometime after January 10, Laws' counsel advised Gorny's counsel he would not stipulate to arbitration, and Gorny filed his petition to compel arbitration on February 17, 2012.

The trial court denied the petition to compel arbitration. The minute order indicated the court agreed with the Laws on both of their arguments: i.e., Gorny had waived arbitration and it would be unfair to force the Laws to litigate in multiple forums, "What happens to the allegations of agency?"

DISCUSSION

A. Legal Principles of Waiver and Standard of Review

California law strongly favors arbitration as a means of resolving disputes quickly and inexpensively. (*St. Agnes Medical Center v. PacificCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*)). For this reason, "section 1281.2 requires a trial court to enforce a written arbitration agreement unless one of three limited exceptions applies.

[Citation.]” (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 955, 967 (*Acquire II*).

One of those exceptions is when the “right to compel arbitration has been waived” by the moving party. (§ 1281.2, subd. (a).) “Although the statute speaks in terms of ‘waiver,’ the term is used “as a shorthand statement for the conclusion that a contractual right to arbitration has been lost.” [Citation.] This does not require a voluntary relinquishment of a known right; to the contrary, a party may be said to have ‘waived’ its right to arbitrate by an untimely demand, even without intending to give up the remedy. In this context, waiver is more like a forfeiture arising from the nonperformance of a required act. [Citations.]” (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 944 (*Burton*).

In light of the public policy favoring arbitration where a valid agreement to arbitrate exists, “waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof.” (*St. Agnes, supra*, 31 Cal.4th at p. 1195.) There is no single test to determine if a petitioner has waived its right to arbitrate. In *St. Agnes*, the Supreme Court cited with approval a list of factors identified in *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992 (*Sobremonte*), that a court may consider in determining whether a party has waived the right to arbitrate: ““(1) whether the party’s actions are inconsistent with the right to arbitrate; (2) whether ‘the litigation machinery has been substantially invoked’ and the parties ‘were well into preparation of a lawsuit’ before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) ‘whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place’; and (6) whether the delay ‘affected, misled, or prejudiced’ the opposing party.” [Citations.]” (*St. Agnes, supra*, 31 Cal.4th at p. 1196.)

St. Agnes also establishes that when a party argues the petitioner has waived the right to arbitrate by participating in litigation, prejudice is a critical element in the determination of waiver. (*St. Agnes, supra*, 31 Cal.4th at p. 1203.) “Prejudice typically is found only where the petitioning party’s conduct has substantially undermined [the important public policy of arbitration as a speedy and inexpensive means of dispute resolution], or substantially impaired the other side’s ability to take advantage of the benefits and efficiencies of arbitration. [¶] For example, courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side’s case that could not have been gained in arbitration [citations]; where a party unduly delayed and waited until the eve of trial to seek arbitration [citations]; or where the lengthy nature of the delays associated with the petitioning party’s attempts to litigate resulted in lost evidence [citation].” (*Id.* at p. 1204.)

Whether a party to an arbitration agreement has waived the right to arbitrate is a question of fact. “[T]he trial court’s finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.]” (*St. Agnes, supra*, 31 Cal.4th at p. 1196.) “Only “in cases where the record before the trial court establishes a lack of waiver as a matter of law, [may] the appellate court . . . reverse a finding of waiver made by the trial court.” [Citation.]” (*Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1450 (*Adolph*); see also *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557 (*Guess?*).)

Gorny argues there are no disputed facts in this case and we therefore should apply a de novo standard of review. But that ignores the conflicting inferences that can be drawn from the facts. “If more than one reasonable inference may be drawn from undisputed facts, the substantial evidence rule requires indulging the inferences favorable to the trial court’s judgment. [Citations.]” (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211 (*Davis*).)

For the first time in his reply brief, Gorny adds a new wrinkle to the applicable standard of review. He argues the trial court's failure to issue a statement of decision (§ 632), precludes us from inferring findings to support the ruling, and moreover, is separate grounds for outright reversal of the order. We need not consider argument raised for the first time in a reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-766.) Furthermore, a statement of decision is required only if properly requested. (See *Acquire II, supra*, 213 Cal.App.4th at p. 970 [trial court required to issue statement of decision when denying petition to compel arbitration only when properly requested].)

Here, no statement of decision was requested. Gorny's counsel's comment to the court at the conclusion of the hearing after the court ruled, "I just want to know the basis for your denial, if you relied on any--specifically, because I was distinguishing *St. Agnes* and--" did not suffice. This vague, nonspecific request is insufficient to compel a formal statement of decision by the court. (See § 632 ["request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision"]; *Conservatorship of Hume* (2006) 140 Cal.App.4th 1385, 1394 [party not entitled to statement of decision based on "general inquisition"]; see also *City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1292-1293.) Accordingly, we presume the trial court made all findings necessary to support its decision and consider only if there is substantial evidence supporting those implied findings.

The record before us reveals substantial evidence supporting the trial court's determination of waiver. This evidence may be analyzed under three general categories that encompass the *St. Agnes/Sobremonte* factors: (1) unreasonable delay; (2) acts inconsistent with the right to arbitrate; and (3) prejudice.

B. Unreasonable Delay and Acts Inconsistent with Intent to Arbitrate

Substantial evidence supports the implied finding Gorny unreasonably delayed in filing his petition to compel arbitration and engaged in conduct inconsistent with his right to arbitrate the dispute. “[A] demand for arbitration must not be unreasonably delayed. When an arbitration agreement does not specify the time within which arbitration must be demanded, a reasonable time is allowed; a party who does not demand arbitration within a reasonable time is deemed to have waived the right to arbitration. [Citations.] ‘[W]hat constitutes a reasonable time is a question of fact, depending on the situation of the parties, the nature of the transaction, and the facts of the particular case. [Citations.]’ [Citation.]” (*Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035, 1043.)

The Laws served their complaint on Gorny on September 8, 2011. Although Gorny could have responded to the complaint by immediately filing a petition to compel arbitration (§ 1281.7 [petition to compel arbitration “may be filed in lieu of filing an answer to a complaint”]), Gorny answered the complaint and did not file his petition to compel arbitration until February 17, 2012, over five months after being served. During that time, Gorny participated in extensive discovery by propounding interrogatories and document production requests on the Laws, and responding to discovery propounded by them. Gorny offered absolutely no explanation for the delay in filing his petition. We note that other courts have found similar delays to be unreasonable and justification for a waiver finding. (See *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 446 (*Lewis*) [four-month delay in seeking arbitration unreasonable]; *Augusta v. Keehn & Associates* (2011) 193 Cal.App.4th 331, 338-339 (*Augusta*) [six and one-half months between filing lawsuit and motion to compel arbitration]; *Adolph, supra*, 184 Cal.App.4th at pp. 1446, 1449, 1451-1452 [six months between filing lawsuit and demand for arbitration]; *Guess?, supra*, 79 Cal.App.4th at p. 556 [less than four months between filing lawsuit and motion to compel arbitration];

Kaneko Ford Design v. Citipark, Inc. (1988) 202 Cal.App.3d 1220, 1228-1229 (*Kaneko*) [five and one-half months between filing lawsuit and motion to compel arbitration].)

Gorny argues he did not delay unreasonably and he timely asserted his right to arbitrate. Gorny first points out he raised arbitration as an affirmative defense in his answer to the Laws' complaint. But an arbitration clause is not self-executing. (*Augusta, supra*, 193 Cal.App.4th at p. 338.) "Mere announcement of the right to compel arbitration is not enough. To properly invoke the right to arbitrate, a party must . . . timely raise the defense and take affirmative steps to implement the process." (*Sobremonte, supra*, 61 Cal.App.4th at p. 997; *Davis, supra*, 59 Cal.App.4th at p. 217.) Gorny argues he followed up by sending the Laws' counsel a letter on December 14, demanding they stipulate to arbitration. The trial court was not required to find this sufficient implementation of the right to arbitrate so as to avoid a waiver. The requests came after Gorny had served discovery requests on the Laws, and we note that although the arbitration agreement specifically required each party designate an arbitrator within 30 days of a demand for arbitration, there is nothing suggesting Gorny took that step. (See generally *Burton, supra*, 190 Cal.App.4th at pp. 946-947.)

Gorny also argues conducting discovery was not inconsistent with his right to arbitration because the discovery he took was allowable in arbitration proceedings, a point we discuss in more detail below, and the interrogatories Gorny served on the Laws had written on each caption page the following disclaimer, "The propounding of this discovery under the Superior Court caption is not intended to act as a waiver of [Gorny's] right to assert binding arbitration in this matter." Gorny cites *Hall v. Nomura Securities International* (1990) 219 Cal.App.3d 43, 51, as approving the use of such disclaimers in discovery so as to prevent a finding of waiver. But in *Hall*, the discovery initiated was simply noticing a deposition, which respondent explained was necessary because of "stringent time constraints" applicable to the litigation while respondent awaited appellant's response to its demand for arbitration. (*Ibid.*) Moreover, the court was

affirming the trial court's factual finding of no waiver; it did not hold a disclaimer prevents a finding of waiver as a matter of law. On this record, the trial court properly considered the totality of the circumstances in determining whether Gorny unreasonably delayed his demand for arbitration. (*Lewis, supra*, 205 Cal.App.4th at pp. 448-449 [court must view litigation as a whole in determining whether parties' conduct is inconsistent with desire to arbitrate].) The court's conclusions are supported by the record and we cannot disturb them.

C. Prejudice

Substantial evidence also supports the trial court's implied finding of prejudice. "In California, whether or not litigation results in prejudice . . . is critical in waiver determinations. [Citation.]" (*St. Agnes, supra*, 31 Cal.4th at p. 1203.) Prejudice does not occur by a party's mere participation in litigation. (*Ibid.*) Nor does it result simply because "the party opposing arbitration shows . . . it incurred court costs and legal expenses." (*Lewis, supra*, 205 Cal.App.4th at p. 452.) But prejudice can be shown where a delayed arbitration request deprived the party opposing arbitration "of the benefits available through arbitration, including a speedy resolution of the dispute. [Citation.]" (*Burton, supra*, 190 Cal.App.4th at p. 949.) And prejudice can be shown where a party seeking arbitration used discovery to gain information about the other side's case that would not have been available in arbitration, or caused the other side to reveal trial tactics or legal strategies. (*Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1366 (*Berman*).)

For example, in *Berman, supra*, 80 Cal.App.4th 1359, before filing their petition to compel arbitration, defendants propounded discovery that included demands for production of documents, special interrogatories, form interrogatories, notices of deposition, and third-party document subpoenas. (*Id.* at p. 1364.) Plaintiff responded to some of the written discovery and produced requested documents. (*Id.* at p. 1367, fn. 7.) The appellate court found substantial evidence supported the trial court's inference

defendant “had sought and obtained information not available in arbitration, thus causing prejudice to plaintiff.” (*Id.* at p. 1366.)

Similarly, in *Guess?*, *supra*, 79 Cal.App.4th 553, defendant answered the complaint but did not plead arbitration as an affirmative defense, participated in discovery, and waited three months after answering the complaint before demanding arbitration. (*Id.* at p. 555.) Although defendant had not propounded its own discovery, the court found its conduct prejudiced plaintiff because defendant’s participation in the litigation and discovery processes “exposed [plaintiff] to the substantial expense of pretrial discovery and motions that would have been avoided had [defendant] timely and successfully asserted a right to arbitrate. Through its use of the discovery process, [plaintiff] has disclosed at least some of its trial tactics to [defendant], certainly more so than would have been required in the arbitral arena. Through [defendant’s] delay—which it has not even *tried* to explain—[plaintiff] has lost whatever efficiencies that would otherwise have been available to it through arbitration.” (*Id.* at p. 558; *Davis, supra*, 59 Cal.App.4th at pp. 213-215.)

Here, Gorny argues the Laws could not possibly have been prejudiced by the judicial discovery because he had the same discovery rights in arbitration. He points out the arbitration agreement specifically provides “discovery shall be conducted pursuant to . . . section 1283.05, however, depositions may be taken without prior approval of the neutral arbitrator.” Section 1283.05, subdivision (a), gives parties to the arbitration “the right to take depositions and to obtain discovery . . . as if the subject matter of the arbitration were pending before [the] superior court . . . subject to” a specific limitation on depositions—prior approval by the arbitrator—which the parties contracted around in this case.

Although Gorny’s participation in discovery would not necessarily *compel* a finding of prejudice and waiver (see e.g., *Keating v. Superior Court* (1982) 31 Cal.3d 584, 607 (*Keating*), overruled on other grounds in *Southland Corp. v. Keating* (1984) 465

U.S. 1, 11), this presents a factual question for the trial court based on the particular circumstances of the case. (*Keating, supra*, 31 Cal.3d at pp. 605-608.) And Gorny's argument ignores that it is not so much the *type* of available discovery that suggests prejudice, rather "[t]he vice involved here . . . is that defendants used the discovery processes of the court to gain information about plaintiff's case which defendants could not have gained in arbitration." (*Davis, supra*, 59 Cal.App.4th at p. 215.) When this case began it was a malpractice action against *two* defendants—Gorny and Mission—one of whom was *not* subject to arbitration. Rather than immediately petition to compel arbitration, Gorny participated in judicial discovery while both defendants were still involved in the judicial proceeding. It was not until *after* Gorny received the Laws' discovery responses that he filed his petition to compel arbitration. The Laws presented evidence in the form of their counsel's declaration that the Laws responded to Gorny's discovery, propounded their own discovery, and retained and consulted with experts, with the understanding and expectation the case would be tried against both defendants simultaneously. Counsel declared he would have made different strategic decisions had he known they were going to arbitrate the dispute as to one of the defendants. In particular, the Laws would not have answered interrogatories so as to divulge contentions against "empty chair defendant[s]."

In *Burton, supra*, 190 Cal.App.4th at pages 949-950, this court concluded designation of experts for a medical malpractice case based on the assumption the case would be tried, rather than arbitrated, constituted substantial evidence of prejudice. We appreciate the facts in *Burton* were more egregious than those in the present case. In *Burton*, the medical malpractice plaintiff was the party seeking arbitration. (*Id.* at pp. 943-944.) After plaintiff filed her complaint, she delayed 11 months, completed discovery, designated her experts, and requested a jury trial before she ever mentioned arbitration. (*Ibid.*) But *Burton's* observations about the prejudice that results from a

litigant's delaying action to compel arbitration while it sees what it can find out from the opposing party through judicial discovery are nonetheless informative. (*Id.* at pp. 950-951.)

Gorny also argues the Laws were not prejudiced because their discovery responses were not particularly informative and shed very little light on the case beyond the allegations in the complaint. A similar argument was rejected in *Berman, supra*, 80 Cal.App.4th at pages 1367-1368, where the court observed, "Even if [plaintiffs'] discovery responses added nothing to the allegations in their . . . complaint, that fact in and of itself would be highly significant to [defendant] in developing its strategy for arbitration, litigation, or settlement. The important fact here is [defendant's] discovery forced [plaintiffs'] to reveal their hand. Whether that hand consisted of a royal flush (in the form of, say, specific and previously undisclosed facts supporting every facet of [plaintiffs'] case) or a pair of twos (in the form of allegations from the complaint, repeated under oath), it is the *fact* of the disclosure, not the specifics of its content, which constitutes the prejudice." The disclosure of defenses and strategies is a prejudice which accrues in such circumstances. (*Zimmerman v. Drexel Burnham Lambert Inc.* (1988) 205 Cal.App.3d 153, 159-160; *Kaneko, supra*, 202 Cal.App.3d at p. 1229.)

While the prejudice to the Laws from Gorny's delay might be relatively minimal, it is not our job to *reweigh* the evidence so as to reach a different conclusion. We are bound by our standard of review. We cannot reverse the trial court's finding of waiver unless the record compels a finding of nonwaiver as a matter of law. (*Burton, supra*, 190 Cal.App.4th at p. 946.) Contrary to Gorny's assertion, based on the record in this case we cannot conclude that, as a matter of law, he did not waive any rights he had to require the Laws to arbitrate their claims against him. (*Ibid.*) Because we conclude

substantial evidence supports waiver, we need not consider whether section 1281.2, subdivision (c), provides an alternate basis for affirming the order.

DISPOSITION

The order denying the petition to compel arbitration is affirmed.

Respondents are entitled to their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.