

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CYCLE SHACK, INC,

Plaintiff and Appellant,

v.

HARLEY-DAVIDSON MOTOR
COMPANY, INC., et al.,

Defendants and Respondents.

G048736

(Super. Ct. No. 30-2011-00472929)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

Law Offices of Anthony A. Ferrigno, Anthony A. Ferrigno; Law Offices of Arthur C. Chambers and Arthur C. Chambers for Plaintiff and Appellant.

Foley & Lardner, Tami S. Smason, A. Joel Richlin and Jacqueline E. Brennehan for Defendants and Respondents.

*

*

*

According to the complaint in this matter, plaintiff and appellant Cycle Shack, Inc. (Cycle Shack) supplied Harley-Davidson Motor Company, Inc. (Harley-Davidson) with postproduction exhaust pipes and mufflers. In 2006, Harley-Davidson had Cycle Shack provide Markland Industries (Markland) with component parts so Markland could help Cycle Shack fill back orders to Harley-Davidson. Cycle Shack sued, believing Harley-Davidson supplied Markland with Cycle Shack's proprietary designs and Markland supplied Harley-Davidson with more mufflers than Cycle Shack. Over Cycle Shack's opposition, the superior court ordered the matter to arbitration pursuant to the master supply agreement (MSA) between Cycle Shack and Harley-Davidson. When Cycle Shack's efforts to stop the arbitration process failed, the parties stipulated to an arbitration award wherein Harley-Davidson and Markland prevailed so that Cycle Shack could appeal. Cycle Shack contends the contract providing for arbitration, the MSA, never became operable and Harley-Davidson and Markland obtained the court's order compelling arbitration as a result of a fraud perpetrated on the court. We reject Cycle Shack's arguments and affirm.

I

FACTUAL AND PROCEDURE BACKGROUND

Cycle Shack is a manufacturer and supplier of accessory parts for motorcycles. Markland is a manufacturer and supplier of motorcycle accessories as well. Cycle Shack began its business relationship with Harley-Davidson, a motorcycle manufacturer, in 1981. Cycle Shack supplied replacement mufflers to Harley-Davidson. While at least one of the products provided to Harley-Davidson was not specially made for Harley-Davidson, Cycle Shack started making custom built exhaust systems for Harley-Davidson in 1982.

On May 6, 2005, at the insistence of Harley-Davidson, Cycle Shack president Buzz Dyer signed an intellectual property module,¹ after he conferred with his attorney and a buyer at Harley-Davidson. That module related to ownership of “inventions, discoveries, improvements, processes, designs, ideas and software” developed by Harley-Davidson and/or Cycle Shack.

According to Dyer, Harley Davidson provided Cycle Shack with the MSA in 2005. The MSA contained more than 20 modules including, *inter alia*, those relating to purchase orders, delivery, acceptance, and payment, products liability, conflict of interest, intellectual property, insurance, and dispute resolution and arbitration. The dispute resolution and arbitration module required mediation and, in the event mediation failed, required the parties to arbitrate their disputes.

Dyer had misgivings about signing the MSA. He hoped to modify some of the terms relating to the insurance module, the late delivery module, some aspects of the dispute resolution module, and possibly the supplier confidentiality module as well. Dyer had signed a confidential agreement with Harley-Davidson in 1995 and thought the confidentiality module of the MSA “was excessive.” Dyer said he thinks he told Tony Nicosia of Harley-Davidson that he did not want to sign “the whole” MSA. Nicosia said he would refer the matter to Harley-Davidson’s legal department to determine if modification would be acceptable.

Dyer and Nicosia spoke again about the MSA in January 2006. Nicosia informed Dyer that Harley-Davidson’s other suppliers had signed the MSA and that Harley-Davidson would not change the MSA for Cycle Shack. Dyer said he would speak with his partners and get back to Nicosia. Dyer told the partners Harley-Davidson was

¹ Harley-Davidson apparently entitles agreements concerning discreet subjects as modules. Thus, a contract covering a number of subjects will contain a corresponding number of modules.

being hard-nosed and Cycle Shack would have to sign the MSA if it wanted to continue doing business with Harley-Davidson.

Dyer reviewed the MSA with an attorney. After Dyer had the MSA for about two months and still had not signed and returned it to Harley-Davidson, Jonathan Barber of Harley-Davidson spoke with Dyer about the MSA when they met at a trade show in Indianapolis. Dyer said he had spoken with other suppliers who said they signed the MSA and that he would too, upon his return to California. Shortly thereafter, Dyer signed each module of the MSA and faxed the MSA to Harley-Davidson.

In the top right corner of each module are places for the parties to insert the effective date of the module and the signature date. Every module contains a signature date of January 18, 2006, but the effective date on each module was left blank. After Dyer signed the MSA on behalf of Cycle Shack, Harley-Davidson placed orders with Cycle Shack amounting to approximately \$13 million.

In 2006, Cycle Shack got behind in its orders to Harley-Davidson. Harley-Davidson asked Cycle Shack to supply Markland with component parts for replacement mufflers for a limited duration so Markland could help fill the back orders. In 2008, Dyer was informed Markland was supplying more mufflers to Harley-Davidson than Cycle Shack and Harley-Davidson did not intend to purchase mufflers from Cycle Shack after the model 2010 year ended. Dyer believed Harley-Davidson supplied Markland with Cycle Shack's proprietary designs, which Markland then used without Cycle Shack's consent.

On March 20, 2007, Dyer wrote to Tony Nicosia of Harley-Davidson about Nicosia's concerns regarding Cycle Shack using Harley-Davidson's "confidential or proprietary knowledge" in making mufflers similar to a design sold to Harley-Davidson. In that letter, Dyer maintained the conflict of interest module of the MSA did not apply. He did not claim the MSA did not apply because it never took effect. Rather, he asserted

Cycle Shack independently developed the design for the mufflers and thus was not in breach of the conflict of interest module.

On May 3, 2011, Cycle Shack filed a complaint against Harley-Davidson and Markland for fraud, misappropriation of trade secrets, breach of contract, and other causes of action relating to Cycle Shack's design of postproduction exhaust pipes and replacement mufflers. Harley-Davidson and Markland, each filed a petition to compel arbitration. The petitions alleged the MSA between the Cycle Shack and Harley-Davidson required arbitration of all disputes between them. The court ordered arbitration and stayed court proceedings on the complaint.

Thereafter, Cycle Shack filed a brief in arbitration seeking remand to the superior court. Cycle Shack contended the lawsuit was not subject to arbitration because the MSA was "not a valid contract that requires arbitration." Cycle Shack argued the MSA did not go into effect because the "effective date" on each module was left blank, although the signature date (January 18, 2006) was filled in. It also claimed the superior court ordered arbitration as the result of fraud on Harley-Davidson and Markland's part. Cycle Shack reasoned that as the MSA never went into effect and Harley-Davidson and Cycle Shack had entered into an intellectual property module in May 2005 that did not have an arbitration provision, Cycle Shack was not required to arbitrate its claims. The purported fraud consisted of Harley-Davidson's failure to provide the court with a copy of the 2005 intellectual property module.

The arbiter found the MSA valid despite the lack of an effective date, the May 2005 intellectual property module was not a stand-alone module, and the express terms of the MSA state it superseded previous agreements. The arbiter noted the court found "the parties engaged in substantial business under the MSA," resulting in Cycle Shack's waiver of its no effective date argument. Additionally, the arbiter rejected Cycle Shack's argument that Harley-Davidson fraudulently obtained the superior court's order compelling arbitration.

Cycle Shack then filed an ex parte application in the superior court to lift the stay of proceedings pending arbitration, claiming the May 2005 agreement was controlling, did not require arbitration, and was not supplied to the court by Harley-Davidson prior to the court ordering arbitration. Cycle Shack further argued the six-month limitation period provided in the MSA was unconscionable, as were the discovery provisions of the MSA. The court denied Cycle Shack's request to lift the stay and left the arbitration proceedings intact.

Cycle Shack, Harley-Davidson and Markland then entered into a stipulation in the arbitration proceedings. According to the stipulation, Cycle Shack concluded that once it lost its challenges to the arbitration process, it could not prevail on its action. Cycle Shack therefore agreed the arbitrator should find no liability on Harley-Davidson or Markland's part and award them \$100,000 jointly, subject to Cycle Shack's right to appeal the award. Harley-Davidson and Markland agreed to petition the superior court to enter judgment confirming the award for the purpose of facilitating Cycle Shack's appeal. It was further stipulated Cycle Shack would not make "any claim" on appeal that the 2006 MSA or the 2005 intellectual property module were fraudulently induced. The arbiter then entered the award pursuant to the stipulation. Harley-Davidson and Markland filed a petition to confirm the award. Cycle Shack filed a motion to vacate the award. The superior court confirmed the arbitration award and denied Cycle Shack's motion to vacate the award. Judgment was subsequently entered pursuant to the confirmed stipulated arbitration award and Cycle Shack appealed.

II

DISCUSSION

Cycle Shack's opening brief contains three headings in the argument section of its opening brief. It contends its motion in opposition to confirmation of the arbitration award and its motion to vacate the award were proper under the applicable statutes; the court and arbiter erred in concluding the MSA superseded the 2005

intellectual property module, which it contends was a “stand-alone” provision that did not require arbitration; and Harley-Davidson committed a fraud on the court and obtained an order compelling arbitration by withholding from the court “a Stand-Alone Intellectual Property Module” that went into effect in 2005.

Code of Civil Procedure section 1286.2 authorizes a court to vacate an arbiter’s award if the court finds “[t]he award was procured by . . . fraud” (Code of Civ. Proc., § 1286.2, subd. (a)(1)), the arbiter exceeded his or her power, affecting the merits of the controversy (Code of Civ. Proc., § 1286.2, subd. (a)(4)), and a party’s rights were substantially prejudiced by the arbiter’s failure to postpone the hearing upon a showing of sufficient cause to continue (Code of Civ. Proc., § 1286.2, subd. (a)(5)). We review a superior court’s order affirming a contractual arbitration award de novo. (*San Francisco Housing Authority v. Service Employees Internat. Union, Local 790* (2010) 182 Cal.App.4th 933, 944.) “To the extent that the trial court’s ruling rests upon a determination of disputed factual issues, we apply the substantial evidence test to those issues. [Citations.]” (*Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 892, fn. 7.)

According to Cycle Shack, the MSA was never in effect because the “effective date” of each module was left blank. Consequently, it contends the MSA module requiring the parties to arbitrate their disputes was not controlling and there was no obligation to arbitrate this matter. We disagree.

The MSA contained more than 20 separate modules. The dispute resolution and arbitration module requires the parties to promptly submit any dispute to an arbiter “in accordance with the Commercial Arbitration Rules of the American Arbitration Association,” if they cannot resolve it themselves or through mediation. Although the effective date of each of the MSA modules were left blank, the signature date on each module was filled in and representatives of Cycle Shack and Harley-Davidson signed off on each and every one of the modules, including the module

requiring arbitration of disputes. The fact that the effective dates of the MSA and its numerous modules were not filled in does not mean there was no contract covering the various subjects set forth in the more than 20 modules. When the parties have entered into an agreement and evidenced their intent to be bound by the agreement, the contract is enforceable notwithstanding an omission in one of the terms of the agreement. (*Patel v. Liebermensch* (2008) 45 Cal.4th 344, 352.)

It is evident Cycle Shack and Harley-Davidson entered into the MSA intending to be bound by it. Harley-Davidson pressed Cycle Shack to agree to the MSA. When Cycle Shack did not immediately sign the MSA, Harley-Davidson delayed issuing production purchase orders for Cycle Shack's products. After Cycle Shack agreed to the terms of the MSA, Harley-Davidson placed orders with Cycle Shack amounting to approximately \$13 million.

Additionally, about a year after the MSA was signed by Cycle Shack and Harley-Davidson, a dispute arose between them. Harley-Davidson apparently concluded Cycle Shack was in violation of the conflict of interest module of the MSA. Cycle Shack responded that the conflict of interest module did not apply in that instance. Tellingly, Cycle Shack did not argue the conflict of interest module was inapplicable because it never went into effect. Rather, it maintained the module did not apply because the product that was the subject of the dispute had been developed by Cycle Shack, not by Harley-Davidson and therefore there was no breach of the conflict of interest module. Thus, once the parties signed the MSA, they acted as if it controlled their business relationship. The conduct of the parties subsequent to the formation of the contract indicates they intended it to be effective. (See *Everly v. Creech* (1956) 139 Cal.App.2d 651, 657 [parties' intent may be demonstrated by their conduct].) We therefore conclude the superior court and the arbiter did not err in finding the MSA became effective and the dispute resolution and arbitration module required arbitration of the present matter.

Cycle Shack contends it was free to file its lawsuit under the 2005 intellectual property module, which it argues was a “stand-alone” agreement. Apparently the argument is based on the fact that there was no arbitration module in effect at the time the 2005 intellectual property module was signed, and the action was brought under the 2005 intellectual property module. Cycle Shack has cited no authority in support of its contention, and we have not found any. We find, consistent with the general module of the MSA, that the 2005 intellectual property module was superseded by the MSA and its intellectual property and arbitration modules.

Lastly, we address Cycle Shack’s contention that the superior court ordered arbitration as a result of a fraud perpetrated on it by Harley-Davidson and Markland. The purported fraud consists of Harley-Davidson’s failure to supply the court with the “stand-alone” 2005 intellectual property module prior to the court ordering the matter to arbitration. According to Cycle Shack, Markland is guilty of the purported fraud as well because although it was not a party to the 2005 intellectual property module or the MSA, it had the same attorney as Harley-Davidson and therefore “presumably had access to the same documents” as Harley-Davidson. Again, Cycle Shack fails to cite any authority for finding Markland responsible under these facts. (Cal. Rules of Court, rule 8.204(a)(1)(B).) We also note Cycle Shack’s factual premise is incorrect. Harley-Davidson and Markland had different attorneys at the time their petitions to compel arbitration were filed.

But even if there was a way to attribute Harley-Davidson’s failure to Markland, it would make no difference. Contrary to Cycle Shack’s contention, Harley-Davidson and Markland did not mislead it and the court. Dyer signed the 2005 intellectual property module, just as he had the other 20-plus modules that make up the MSA. He knew or should have known about the existence of the prior intellectual property module and did not submit it to the court either. He says he had “completely forgotten” about the earlier intellectual property module, which begs the question: How

can it seriously be contended the *parties* did not intend the MSA to be effective and instead, intended to operate under the earlier 2005 intellectual property module when at least one of the two parties forgot the prior module even existed?

As the MSA superseded the earlier, limited agreement between Cycle Shack and Harley-Davidson, Harley-Davidson (and Markland) did not perpetrate a fraud on the court by failing to provide the court with the earlier, superseded intellectual property module. Accordingly, we affirm the judgment.²

III

DISPOSITION

The judgment is affirmed. Harley-Davidson and Markland shall recover their costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.

² We do not address issues not raised under separate headings or unsupported by authority, including whether the discovery provision and the limitation on actions provision of the arbitration module were improper. (Cal. Rules of Court, rule 8.204(a)(1)(B) [“Each brief must: . . . [s]tate each point under a separate heading or subheading summarizing the point”].)