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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LPT PROPERTIES, LLC,

Plaintiff, Cross-defendant and
Respondent,

v.

WYSTEIN OPPORTUNITY FUND, LLC,
et al.,

Defendants, Cross-complainants and
Appellants;

TOM SIMPSON et al.,

Defendants, Cross-defendants and
Respondents;

ZETA INVESTMENTS, INC., et al.,

Cross-defendants and Respondents.

G048803

(Super. Ct. No. 30-2012-00574495)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,
James Di Cesare, Judge. Affirmed. Request for judicial notice. Denied.

Michelman & Robinson, Sanford L. Michelman, Robin James and Imran Hayat for Defendants, Cross-complainants and Appellants.

Nokes & Quinn and Thomas P. Quinn, Jr., for Plaintiff, Cross-defendant and Respondent.

Bunt & Shaver and David N. Shaver for Defendants, Cross-defendants and Respondents.

Sunderland | McCutchan, Robert J. Sunderland and Ann Marie Thompson for Cross-defendants and Respondents.

* * *

INTRODUCTION

Wystein Opportunity Fund, LLC (Wystein), John W. Stewart, Paul Wylie, Lamerica, L.P. (Lamerica), and Marika Smith (collectively, Appellants) appeal from an order denying their petition to compel arbitration. The trial court found that Appellants had waived their right to arbitrate. We conclude substantial evidence supported that finding because (1) Appellants undertook actions that were inconsistent with a right to arbitrate, (2) Appellants unreasonably delayed in seeking arbitration, and (3) the parties opposing arbitration suffered prejudice from that delay. We therefore affirm the order denying the petition to compel arbitration.

FACTS AND PROCEDURAL HISTORY

Wystein purchased a home in Coto de Caza, California (the Property), with the intention of reselling it. Wystein hired Tom Simpson Construction, Inc., and Tom Simpson (together, the Simpson Parties) to conduct repairs necessary to allow the Property to be resold. The contract between Wystein and the Simpson Parties (the Construction Contract) included an arbitration clause stating: “Any controversy or claim arising out of or related to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the

American Arbitration Association [¶] . . . [¶] . . . [Y]ou are giving up your jud[i]cial rights to discovery and appeal, unless those rights are s[p]ecifically included in the ‘Arbitration of Disputes’ provision.” The arbitration clause in the Construction Contract provides the Construction Industry Arbitration Rules of the American Arbitration Association (AAA Rules) shall apply.

LPT Properties, LLC (LPT), entered into a contract to purchase the Property from Wystem (the Purchase Contract). The Purchase Contract included an arbitration clause stating, “Buyer [(LPT)] and Seller [(Wystem)] agree that any dispute or claim in Law *[sic]* or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration. . . . The parties shall have the right to discovery in accordance with Code of Civil Procedure §1283.05.”

During that transaction, Zeta Investments, Inc., doing business as Real Estate One (Re/Max) and Barbara Anne Dorber represented Wystem and LPT. The listing agreement between Lamerica/Wystem and Re/Max (the Listing Contract) included an arbitration clause stating, “Seller [(Lamerica/Wystem)] and Broker [(Re/Max)] agree that any dispute or claim in law or equity arising between them regarding the obligation to pay compensation under this Agreement . . . shall be decided by neutral, binding arbitration The parties shall have the right to discovery in accordance with California Code of Civil Procedure §1283.05.” (Boldface omitted.)

Thus, there was an arbitration clause contained in each of (1) the Construction Contract, (2) the Purchase Contract, and (3) the Listing Contract.¹

In June 2012, LPT filed a complaint against Appellants and the Simpson Parties alleging undisclosed defects in the Property. LPT’s complaint asserted causes of action for strict liability, breach of contract, negligence, fraud/misrepresentation,

¹ Our holding renders it unnecessary to address the validity and scope of the arbitration clauses.

fraud/nondisclosure, and breach of fiduciary duty. Appellants demurred to and moved to strike portions of the complaint. The hearing on the demurrer and motion to strike was scheduled for November 30, 2012.

In October 2012, Appellants filed a case management statement in which it checked the box next to the word “Mediation” and the box next to the words “Settlement conference,” but did not check the boxes next to the words “Nonbinding judicial arbitration” and “Binding private arbitration.” Appellants requested a jury trial, specified the dates on which the parties or their attorneys would not be available, and estimated the trial to last 10 days.

The case management conference was held on October 18, 2012. All parties demanded a jury. The trial court estimated the trial would last seven days and set trial to commence on August 5, 2013.

In the fall of 2012, Wystem propounded a set of 35 specially prepared interrogatories, a set of form interrogatories, and a set of 46 demands for production of documents. LPT served its responses to the special interrogatories, form interrogatories, and demands for production of documents, and produced thousands of pages of documents.

On November 16, 2012, before the hearing on Appellants’ demurrer and motion to strike, LPT filed a first amended complaint. The demurrer and motion to strike were taken off calendar. In the answer to the first amended complaint, filed in late December 2012, Appellants alleged 22 affirmative defenses but did not make a demand for arbitration. With the answer, Appellants filed a cross-complaint against LPT for breach of the Purchase Contract and various other causes of action, against Re/Max and Dorber for negligence and various other causes of action, and against the Simpson Parties for breach of the Construction Contract and various other causes of action. Appellants’ cross-complaint did not demand arbitration.

Re/Max and Dorber moved to disqualify the trial judge on February 26, 2013. The case was assigned to a different judge, but LPT filed a motion to disqualify him. As a consequence, the case was assigned to Judge Di Cesare in April 2013.

In March 2013, Tom Simpson Construction, Inc., filed a cross-complaint against Wystein, asserting breach of the Construction Contract. Wystein answered that cross-complaint in April, but in so doing did not demand arbitration. With the filing of Wystein's answer, the pleadings became at issue.

On April 16, 2013, Appellants substituted Michelman & Robinson, LLP, as their counsel of record. On April 25, 2013, three months before the scheduled trial date, Appellants brought an ex parte application for an order continuing the trial. They did not mention arbitration in the application. The trial court granted the application and continued the trial to January 27, 2014.

On May 24, 2013, less than one month after the trial court continued the trial date, Appellants filed a petition to compel arbitration. At the time Appellants filed the petition, Wystein had propounded the following discovery: (1) on LPT, form interrogatories, two sets of requests for production, and two sets of special interrogatories; (2) on cross-defendant Antoinette Holguin Mosley, special interrogatories; (3) on cross-defendant Curtis Mosley, special interrogatories; (4) on Dorber, form interrogatories, requests for production, requests for admission, and special interrogatories; (5) on Re/Max, form interrogatories, requests for production, requests for admission, and special interrogatories; (6) on Tom Simpson, form interrogatories; and (7) on Tom Simpson Construction, Inc., form interrogatories, requests for production, and special interrogatories.

LPT had also propounded requests for production of documents on Wystein, Lamerica, and Tom Simpson Construction, Inc. Stewart had propounded special interrogatories on LPT. Antoinette Mosley had propounded special interrogatories on Wystein and on Lamerica. Re/Max had propounded form

interrogatories, requests for production, requests for admission, and special interrogatories on Wystein; form interrogatories and requests for production on Lamerica; and form interrogatories on Wylie, Stewart, and Smith. In January 2013, LPT had moved to compel the Simpson Parties to produce documents.

As of May 24, 2013, when Appellants filed their petition to compel arbitration, three responses to discovery requests had been served—(1) LPT’s responses to Wystein’s first set of requests for production, (2) LPT’s responses to Wystein’s first set of special interrogatories, and (3) Tom Simpson Construction, Inc.’s responses to LPT’s requests for production. No depositions had been taken. LPT’s motion to compel the Simpson Parties to produce documents was pending.

The trial court denied the petition to compel arbitration in July 2013. In the order denying the petition, the court found (1) Wystein answered the cross-complaint without raising arbitration as a defense; (2) Appellants filed a demurrer without mentioning arbitration; (3) Appellants had represented they needed the trial to be continued because of the case’s complexity, but they did not mention arbitration; and (4) Appellants did not explain the delay in bringing their petition to compel arbitration. Based on those findings, the trial court concluded Appellants had waived arbitration and had “conducted [themselves] in this litigation as if no arbitration agreement exist[ed] or that [their] intent is to waive enforcement.” The trial court also found that Appellants’ delay had caused the opposing parties to suffer prejudice. The court stated, “[t]he abrupt demand for arbitration, following [Appellants’] representations regarding trial dates, the motion itself, the filing of a demurrer and the unexplained delay place the opposing parties in an inequitable position.”

Appellants timely filed a notice of appeal from the order denying their petition to compel arbitration. The order is appealable pursuant to Code of Civil Procedure section 1294, subdivision (a).

DISCUSSION

I.

Standard of Review

We review an order denying a petition to compel arbitration under the substantial evidence standard unless the trial court considered no extrinsic evidence, in which case we review the order de novo. (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 683.) “Generally, the determination of waiver is a question of fact, and the trial court’s finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] ‘When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court’s ruling.’ [Citation.]” (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196 (*St. Agnes*).

Under a sufficiency of the evidence standard of review, we construe all reasonable inferences and resolve all ambiguities to support a trial court’s decision. (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 946 (*Burton*); *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211.) In this case, the facts related to the waiver issue are undisputed, but more than one reasonable inference can be drawn from them. We therefore review the trial court’s finding of waiver for sufficiency of the evidence and draw all reasonable inferences in support of the trial court’s decision. (*St. Agnes, supra*, 31 Cal.4th at p. 1196; *Davis v. Continental Airlines, Inc., supra*, at p. 211.)

II.

Factors Considered in Determining Waiver of Arbitration

A trial court may deny a petition to compel arbitration of a controversy on the ground of waiver. (Code Civ. Proc., § 1281.2, subd. (a).) In determining waiver, a

court may consider such factors as ““(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.”” (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.)

In a recent opinion, the California Supreme Court focused on three factors in its analysis of waiver of the right to arbitrate: (1) “whether the party asserting arbitration has acted inconsistently with the right to arbitrate” (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 376 (*Iskanian*)); (2) “or whether a delay was ‘unreasonable’” (*ibid.*); and (3) “‘prejudice,’” which is “‘critical in waiver determinations’” (*id.* at pp. 376-377).

III.

Appellants Waived Their Right to Arbitrate.

A. Appellants’ Actions Were Inconsistent with Their Right to Arbitrate.

Partial or piecemeal litigation of issues in a dispute is enough to find a party’s actions to be inconsistent with a right to arbitrate. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 448.) Courts have classified a number of actions to be inconsistent with an intent to arbitrate, including whether the party has (1) filed a demurrer or a motion to strike (*id.* at p. 450); (2) accepted and contested discovery, engaged in efforts to schedule discovery, and omitted to mark or assert arbitration in a case management statement (*Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th

1443, 1451 (*Adolph*)); (3) requested a jury trial on a case management statement (*Burton, supra*, 190 Cal.App.4th at p. 947); (4) filed a cross-complaint (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 994); and (5) filed an answer to a complaint without asserting arbitration as a defense (*Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 555).

Here, Appellants undertook all of those actions, and more, deemed to be inconsistent with the right to arbitrate. Appellants demurred to and moved to strike portions of LPT's initial complaint. (*Lewis v. Fletcher Jones Motor Cars, Inc., supra*, 205 Cal.App.4th at p. 450.) By the time Appellants filed their petition to compel arbitration, Wystem had propounded some 19 sets of discovery requests and had accepted discovery responses from LPT. (*Adolph, supra*, 184 Cal.App.4th at p. 1451.) On the case management statement, Appellants estimated trial would take 10 days. Appellants did not check "Nonbinding judicial arbitration" or "Binding private arbitration" and specified the dates on which the parties or attorneys would not be available for trial. During the case management conference, Appellants demanded a jury trial. (*Burton, supra*, 190 Cal.App.4th at p. 947.) Appellants filed a cross-complaint, in which they did not demand arbitration. (*Sobremonte v. Superior Court, supra*, 61 Cal.App.4th at p. 994.) In their answer to the first amended complaint, Appellants alleged 22 affirmative defenses, none of which asserted a right to arbitration. (*Guess?, Inc. v. Superior Court, supra*, 79 Cal.App.4th at p. 555.) In addition, roughly a month before Appellants filed their petition to compel arbitration, they brought an ex parte application for an order continuing the trial, which was three months away. Appellants did not mention arbitration in the ex parte application.

Those actions together amply support the trial court's conclusion that Appellants "conducted [themselves] in this litigation as if no arbitration agreement exist[ed] or that [their] intent is to waive enforcement."

B. *Appellants' Delay Was Unreasonable.*

“‘[A] demand for arbitration must not be unreasonably delayed. . . . [A] party who does not demand arbitration within a reasonable time is deemed to have waived the right to arbitration. [Citations.]’” (*Sobremonte v. Superior Court, supra*, 61 Cal.App.4th at p. 992.) The party seeking to compel arbitration has the responsibility to “‘timely seek relief either to compel arbitration or dispose of the lawsuit, before the parties and the court have wasted valuable resources on ordinary litigation.’ [Citation.]” (*Id.* at pp. 993-994.) “[A] party’s unreasonable delay in demanding or seeking arbitration, in and of itself, may constitute a waiver of a right to arbitrate.” (*Burton, supra*, 190 Cal.App.4th at p. 945.) To determine if there was unreasonable delay, courts have considered the amount of time that has passed from the commencement of the action to the expression of the desire to arbitrate. (*Lewis v. Fletcher Jones Motor Cars, Inc., supra*, 205 Cal.App.4th at p. 446 [four months was unreasonable delay]; *Adolph, supra*, 184 Cal.App.4th at p. 1451 [six months was unreasonable delay]; *Guess?, Inc. v. Superior Court, supra*, 79 Cal.App.4th at p. 556 [less than four months was unreasonable delay].)

LPT filed its initial complaint on June 5, 2012, and it filed its amended complaint on November 16, 2012. Appellants did not file their petition to compel arbitration until May 24, 2013, almost one year after LPT commenced this action. The only justifications Appellants have offered for their delay are LPT waited until November 16, 2012 to file its first amended complaint, the other parties requested a change in judge, and the pleadings did not become at issue until April 16, 2013. The parties’ requests to change judges did not prevent Appellants from filing a petition to compel arbitration, and they were not required to wait for the first amended complaint or the pleadings to be at issue before filing their petition. In addition, as the trial court stated, “[t]here is much discussion about the absence of prejudice to the other parties, but no explanation for the delay or for the misleading representations made in the recent

motion.” Appellants’ unreasonable delay therefore supports the trial court’s finding of waiver.²

C. *The Parties Opposing Arbitration Suffered Prejudice.*

Without some prejudice to the opposing party, participation in litigation will not be enough to find waiver. (*St. Agnes, supra*, 31 Cal.4th at pp. 1203-1204.) Delay in seeking arbitration can, in itself, result in prejudice: “[A] petitioning party’s conduct in stretching out the litigation process itself may cause prejudice by depriving the other party of the advantages of arbitration as an “expedient, efficient and cost-effective method to resolve disputes.” [Citation.]” (*Iskanian, supra*, 59 Cal.4th at p. 377.) “Arbitration loses much, if not all, of its value if undue time and money is lost in the litigation process preceding a last-minute petition to compel.” (*Ibid.*)

In *Adolph, supra*, 184 Cal.App.4th at page 1451, the defendant delayed six months after the complaint was filed to request arbitration. During that time period, the defendant filed two demurrers, failed to request arbitration in the case management statement, accepted and contested discovery requests, and attempted to schedule discovery. (*Ibid.*) The Court of Appeal concluded the defendant’s delay resulted in prejudice sufficient to justify denial of the defendant’s petition to compel arbitration. (*Id.* at pp. 1451-1452.)

The prejudice caused by Appellants’ delay in seeking arbitration is stronger than the prejudice found in *Adolph* to justify denial of a petition to compel arbitration. Here, there was nearly a 12-month delay from the time LPT commenced the action to the time Appellants requested arbitration. During that period of time, Appellants filed a demurrer, and Wysteine propounded significant amounts of discovery requests.

² Appellants have requested we take judicial notice of (1) their request for an extension of time to file the appellants’ opening brief and (2) our order granting the request. Appellants make the request to refute LPT’s argument they had delayed proceedings in this court. In concluding Appellants unreasonably delayed, we are considering only trial court proceedings and therefore deny the request for judicial notice.

Appellants did not request arbitration in their case management statement but demanded a jury trial. Appellants' conduct "depriv[ed] the other party of the advantages of arbitration as an "expedient, efficient and cost-effective method to resolve disputes." (Iskanian, supra, 59 Cal.4th at p. 377.) Thus, substantial evidence supported the trial court's finding that "[t]he abrupt demand for arbitration, following [Appellants'] representations regarding trial dates, the motion itself, the filing of a demurrer and the unexplained delay place the opposing parties in an inequitable position."

Prejudice can also arise when a party uses court discovery processes to gain information it could not gain in arbitration. (*Davis v. Continental Airlines, Inc.*, supra, 59 Cal.App.4th at p. 215.) In this case, the Construction Contract required an arbitrator to use the AAA rules. Under the AAA Rules, the regular track procedures apply unless the parties request otherwise, there are more than two parties involved in the case, or a disclosed claim or counterclaim is at least \$1 million.³ (AAA Rules (2009) rule R-1, available at <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004219> [as of Oct. 21, 2014].) The regular track AAA Rules state, "[t]he arbitrator may direct [¶] (i) the production of documents and other information, and [¶] (ii) the identification of any witnesses to be called. [¶] . . . [¶] . . . There shall be no other discovery, except as indicated herein, unless so ordered by the arbitrator in exceptional cases." (AAA Rules, supra, rule R-24(a), (d).)

Without direction from an arbitrator, Wystein propounded on Tom Simpson form interrogatories and propounded on Tom Simpson Construction, Inc., form interrogatories, requests for production of documents, and special interrogatories. By so

³ The regular track procedures would apply to this case because there was no disclosed claim or counterclaim for at least \$1 million. Several parties, including LPT and Tom Simpson Construction, Inc., requested relief such as "compensatory damages in an amount within the jurisdiction of this Court" and "according to proof."

doing, Wystein attempted to gain information from the discovery process that it could not obtain during arbitration, and this fact supports the trial court's finding of waiver.

DISPOSITION

The order denying the petition to compel arbitration is affirmed.
Respondents shall recover costs incurred on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.