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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JUNG TAEK HUH,

Plaintiff, Cross-Defendant and
Appellant,

v.

HWAN JOO JEONG et al.,

Defendants, Cross-Complainants
and Respondents.

H037148

(Santa Clara County
Super. Ct. No. CV081609)

I. INTRODUCTION

Appellant Jung Taek Huh, a contractor doing business as Omega Construction Co., (hereafter, collectively Huh) entered into a written agreement with respondent Hwan Joo Jeong to build a new residence in Los Altos for Jeong and his wife, respondent Soon Ryeon Jeong. A dispute regarding the construction arose and Huh filed an action against the Jeongs for breach of contract and for mechanic's lien foreclosure. The Jeongs cross-complained, alleging Huh had breached the contract because the construction of their residence was defective and untimely.

After attending a mediation, the parties executed a writing memorializing their settlement agreement that was captioned "Settlement Agreement & Release."

(Capitalization omitted.)¹ Huh subsequently repudiated the settlement agreement. The Jeongs brought a motion to enforce the settlement under Code of Civil Procedure section 664.6, which the trial court granted. On April 28, 2011, the trial court entered a judgment in the Jeongs' favor, pursuant to the settlement agreement, in the amount of \$166,262.69 plus interest.

On appeal, Huh challenges the judgment on the ground that the trial court erred in granting the Jeongs' Code of Civil Procedure section 664.6 motion to enforce the settlement. He contends that (1) the settlement agreement was inadmissible because it was protected by the Evidence Code's mediation confidentiality statutes; (2) the court improperly ordered the parties to participate in a binding mediation; and (3) the court improperly enforced the mediator's decision regarding a term of the settlement agreement.

For reasons that we will explain, we determine that the settlement agreement is unenforceable because it is inadmissible under the Evidence Code provisions governing mediation confidentiality. (Evid. Code, § 1115 et seq.²; § 1123, subd. (b); see *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 199-200 (*Fair*.) We will therefore reverse the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Pleadings

On March 12, 2007, Huh filed a complaint alleging that he had entered into an agreement with Hwan Joo Jeong to construct a new residence in Los Altos; he had

¹ As a matter of convenience, we will use the term "settlement agreement" to refer to the "Settlement Agreement & Release" that memorialized the parties' settlement agreement. We acknowledge that Huh disputes the enforceability of the settlement agreement.

² All further statutory references are to the Evidence Code unless otherwise indicated.

performed all of his obligations under the agreement; and Jeong had failed to pay him \$158,960 owed under the agreement. The complaint included causes of action for breach of contract and mechanic's lien foreclosure.

Jeong answered the complaint and filed a cross-complaint for breach of contract and declaratory relief, in which he asserted that he had made all of the payments required under the construction agreement. Jeong also alleged that Huh had "breached the agreement by . . . failing to supervise subcontractors, ordering wrong-sized roof tile, removing extra-ordered roof tile from the job site, providing wrong-sized roof trusses, failing to install built-in furniture, failing to timely complete landscaping, failing to seal concrete, failing to adequately and professionally liaison with representatives of the City of Los Altos, and failing to timely construct the project."

Jeong also filed a first amended cross-complaint, which Huh answered. Jeong stated in the amended cross-complaint that the cost of construction was agreed to be \$505,000. He also elaborated on the defects in Huh's construction of the residence. As amended, the cross-complaint included causes of action for breach of contract, negligence, disgorgement of compensation, and declaratory relief.

B. The Mediation and the Settlement Agreement

The parties, their attorneys, and their consultants attended an all-day mediation with mediator Brick McIntosh on November 30, 2009. Before the mediation took place, the Jeongs' consultant prepared a report estimating that the total cost of repairs needed due to the alleged negligence of Huh was \$214,258.69. The Jeongs' consultant also reported that the Jeongs owed Huh \$49,000 for the reasonable value of work done by Huh.

With the assistance of the mediator, the parties entered into a settlement agreement that they memorialized in a writing entitled "Settlement Agreement & Release." The settlement agreement stated, among other things, that the parties had agreed to settle all claims against each other; Huh would perform specified repairs and obtain building

permits; Huh would complete the job by October 30, 2010; the parties' consultants would confer regarding the actual amount that Jeong owed Huh, and, if they did not agree, "mediator Brick McIntosh will make the determination as to the actual amount owing"; and Huh would sign a stipulated judgment in the amount of \$214,258.69 less the amount determined to be owed by Jeong to Huh.

The settlement agreement also stated that "[t]he parties will sign a more complete mutual release and settlement agreement within 45 days of today's date and agree to dismiss the complaint and cross-complaint with prejudice once [Huh] completes the work in accordance with this agreement;" and "[t]he parties stipulate that the mediation completed on November 30, 2009 with Brick McIntosh was judicially supervised pursuant to [Code of Civil Procedure] section 664.6."

C. Motion to Enforce the Settlement

On February 18, 2010, Jeong and his wife³ brought a motion to enforce the settlement under Code of Civil Procedure section 664.6. They asserted that during the November 30, 2009 mediation the parties had "agreed to settle the entire case [and] the significant terms of such settlement were reduced to writing with the parties executing the agreement." The Jeongs further asserted that Huh "now refuses to perform any of the terms of the Settlement Agreement and Release he signed on November 30, 2009."

Since the parties had signed the settlement agreement, the Jeongs argued that the settlement was enforceable under Code of Civil Procedure section 664.6. They asked the trial court to rule that (1) the parties had entered a valid settlement agreement on November 30, 2009; (2) Huh had breached the settlement agreement; (3) they were entitled to judgment in their favor in the amount of \$214,258.69, less the amount that the Jeongs owed Huh; (4) the parties' consultants were to determine the final amount to be

³ The record is silent as to how or when Jeong's wife, Soon Ryeon Jeong, became a named defendant.

deducted from \$214,258.69 to reach the final amount of the stipulated judgment; if the consultants did not agree, the parties would retain McIntosh to determine the final amount of the stipulated judgment; and (5) within seven days of receiving McIntosh's determination, the Jeongs would submit the final amount of the judgment to the court for entry of judgment.

In his opposition to the motion, Huh argued that the settlement agreement was unenforceable. Specifically, Huh contended that the settlement agreement could not be enforced because it included a term allowing the mediator to resolve a disputed payment term after the agreement was signed; the settlement agreement was unjust because the construction estimate attached to the agreement was prepared by the Jeongs' consultant, who was an unlicensed contractor; the trial court should hear the testimony of Huh's consultant that the agreement was " 'overly harsh' " and " 'one-sided' "; and Huh did not assent to the settlement agreement because he does not fully comprehend English.

The Jeongs' reply included, among other things, the declaration of McIntosh in which he stated that he was able to converse with Huh and always believed that Huh could understand what was being discussed during the mediation. McIntosh also stated that Huh had agreed to perform all of the terms set forth in the settlement agreement, which McIntosh believed "correctly reflects the terms explained by [him] to both parties and their attorneys and agreed to by both parties during the mediation hearing."

D. The Order Granting the Motion

The trial court granted the Jeongs' motion to enforce the settlement under Code of Civil Procedure section 664.6 on May 14, 2010. The order included the following rulings: (1) the parties entered into a valid settlement agreement on November 30, 2009; (2) Huh was in breach of the agreement; (3) the Jeongs were "entitled to have judgment entered in their favor in the amount of \$214,258.69 less an amount to be determined by their consultants or mediator Brick McIntosh"; (4) the parties' consultants were to determine the final amount to be deducted from \$214,258.69 to reach the final amount of

the stipulated judgment, and, if the consultants did not make a determination in 10 days, the parties would retain McIntosh to determine “the final amount to be entered into the judgment”; and (5) the Jeongs were awarded attorney’s fees and costs in the amount of \$3,062.50. The order also included a handwritten notation, “Please see attached discussion.”

The “attached discussion” was filed on May 14, 2010 and signed by the trial court judge. It appears to be in the nature of a statement of decision, since a statement of decision “allows the court to place upon *the record* its view of facts and law of the case. [Citation.]” (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647.) In the “attached discussion” the trial court stated, “The court signed the order submitted by defendants. However, the issues raised in plaintiff’s opposition to the motion to enforce the settlement agreement require discussion.” The court then stated the following findings: Huh was not forced to settle; the status of the license of the Jeongs’ consultant had no bearing on the settlement agreement; the parties had reached an agreement on a process to resolve the issue of the final amount owed by Huh to the Jeongs; and the process agreed to by the parties did not constitute an improper “ ‘binding mediation.’ ”

E. The Mediator’s Order

On October 19, 2010, the trial court entered an order signed by mediator McIntosh and captioned “Order Following Hearing on Determination of Amount Owing on Final Invoice.” The order stated that pursuant to the terms of the November 30, 2009 settlement agreement and the trial court’s prior order, and due to the consultants’ inability to reach an agreement, McIntosh had heard evidence and determined that the Jeongs owed Huh “on the final invoice the amount of \$76,996.00.” The order further stated that the parties had agreed that this amount would be reduced by \$10,000, which was the amount the Jeongs had paid for materials that Huh had agreed to pay, and also reduced by \$19,000, the amount the parties had agreed that Jeong had overpaid for changes during

construction. The order concluded, “[t]herefore, the final amount owing by Jeong to Huh is \$47,996.00.”

Huh filed a motion on January 7, 2011, to vacate the mediator’s order. He argued that the mediator’s order was inadmissible under the mediation confidentiality statutes, section 1115 et seq., because the order was prepared pursuant to a mediation; the parties had not agreed to a binding decision; and that the settlement agreement was unenforceable under Code of Civil Procedure section 664.6 because it allowed a third party to provide a final settlement term. Anticipating that the Jeongs would contend that the parties had agreed that McIntosh would serve as an arbitrator, Huh also argued that they had failed to follow the proper procedure to confirm an arbitration award.

Additionally, Huh contended that the settlement agreement was inadmissible under section 1123 because the agreement did not include any words to the effect that it was binding, enforceable, admissible, or subject to disclosure. He denied that he had waived mediation confidentiality by failing to object to the admissibility of the settlement agreement at the time of the hearing on the Jeongs’ motion to enforce the settlement.

In their opposition to Huh’s motion, the Jeongs argued that the mediator’s order was enforceable because the parties had agreed to resolve the issue of the final amount of the judgment by a certain process, and, in any event, the trial court’s order finding the settlement agreement to be enforceable was now final.

F. Judgment

On April 28, 2011, the trial court issued its order denying Huh’s motion to vacate the mediator’s October 19, 2010 order. The court stated that Huh’s motion was effectively a motion for reconsideration “which must be denied.” The court also found that “[a]lthough the word ‘binding’ did not appear in this agreement, there was sufficient language to memorialize the parties’ agreement of [*sic*] the effect of the Settlement Agreement & Release.” Further, the court found that there “was no evidence that [Huh] was taken advantage of or that he was in an inferior legal position during the agreed upon

procedures. . . . This agreement was a rational and efficient method of resolving this dispute.” The court also found that “[c]ompliance with [section] 1123, [subdivision] (b) permitted the Settlement Agreement & Release to be disclosed.” Finally, the court indicated that it had signed the Jeongs’ proposed judgment and awarded them attorney’s fees of \$2,340.

The trial court entered judgment in the total amount of \$166,262.69 plus interest (\$214,258.69 from the court’s May 14, 2010 order less \$47,996 from McIntosh’s October 19, 2010 order) in the Jeongs’ favor on April 28, 2011. The judgment also provides that Huh shall recover nothing on his cross-complaint and the Jeongs’ property is released from Huh’s mechanic’s lien.

Huh filed a timely notice of appeal from the judgment on June 24, 2011.

III. DISCUSSION

On appeal, Huh challenges the judgment on the ground that the trial court erred in granting the Jeongs’ Code of Civil Procedure section 664.6 motion to enforce the settlement agreement. He contends that (1) the settlement agreement was inadmissible because it was protected by the Evidence Code’s mediation confidentiality statutes; (2) the court improperly ordered the parties to participate in a binding mediation; and (3) the court improperly enforced the mediator’s decision regarding a term of the settlement agreement.

A. Standard of Review

This court has previously stated the applicable standard of review: “The trial court’s factual findings on a motion to enforce a settlement under Code of Civil Procedure section 664.6 ‘are subject to limited appellate review and will not be disturbed if supported by substantial evidence.’ [Citation.] In instances involving questions of law . . . the trial court’s decision is not entitled to deference and will be subject to independent review. [Citation.]” (*Chan v. Lund* (2010) 188 Cal.App.4th 1159, 1166 (*Chan*).

Before we reach Huh's contentions regarding the merits of the Jeongs' Code of Civil Procedure section 664.6 motion to enforce settlement, we will address the threshold issue of appealability that the Jeongs raise in their respondents' brief.

B. Appealability

Relying on this court's decision in *Critzer v. Enos* (2010) 187 Cal.App.4th 1242 (*Critzer*), the Jeongs contend that the appeal should be dismissed because the May 14, 2010 order granting their motion to enforce the settlement under Code of Civil Procedure section 664.6 was an appealable order that Huh failed to timely appeal. They explain that under *Critzer*, Huh had the right to appeal the May 14, 2010 order because it finally determined the rights of the parties in the action and was therefore appealable in the absence of formal entry of judgment. We understand the Jeongs' argument as follows: Huh's appeal from the judgment is moot, since Huh failed to appeal the May 14, 2010 order enforcing the settlement agreement and, as a result, he is precluded from raising any issue on appeal regarding the enforceability of the settlement agreement.

Huh disagrees that the May 14, 2010 order finally disposed of the rights of all of the parties and contends that the order was interlocutory and not appealable. He points out that the amount owing to him on his complaint remained to be decided and maintains that an essential element of the settlement was therefore undetermined. For that reason, Huh contends that the settlement agreement could not be enforced by the entry of judgment on May 14, 2010.

We will resolve the issue under the well established rules governing appealability. “ ‘It is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is

interlocutory.’ [Citations.]’ (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698 (*Griset*).

In the present case, we determine that the May 14, 2010 order was interlocutory and not appealable. The order provided, among other things, that the Jeongs were “entitled to have judgment entered in their favor in the amount of \$214,258.69 less an amount to be determined by their consultants or mediator Brick McIntosh.” The order also provided that the parties’ consultants were to determine the final amount to be deducted from the \$214,258.69 owed by Huh to the Jeongs, in order to reach the final amount of the stipulated judgment, and, if the consultants did not make a determination in 10 days, the parties were to retain McIntosh to determine “the final amount to be entered into the judgment.”

The May 14, 2010 order therefore left an issue for future consideration: The amount that the Jeongs owed Huh, which was the subject of the breach of contract cause of action in Huh’s complaint. The general rule is that “ ‘an appeal cannot be taken from a judgment that fails to complete the disposition of all causes of action between the parties[.]’ ” (*Griset, supra*, 25 Cal.4th at p. 697.) Since the May 14, 2010 order did not dispose of Huh’s breach of contract cause of action, it did not finally determine the rights of the parties and was interlocutory and nonappealable. (*Ibid.*; *Critzer, supra*, 187 Cal.App.4th at pp. 1251-1252.)

The Jeongs rely on *Critzer* to support their argument that the May 14, 2010 order is appealable, but that decision is distinguishable. In *Critzer*, the defendant homeowner association brought a Code of Civil Procedure section 664.6 motion to enforce the settlement of an action filed by two homeowners. (*Critzer, supra*, 187 Cal.App.4th at p. 1246.) The trial court’s order on the motion provided that if the parties could not agree on the language for their settlement agreement, the court would select the appropriate settlement agreement from the drafts submitted by the parties. (*Ibid.*) When the parties were unable to agree, the court entered a second order holding that the homeowner

association's version of the settlement agreement accurately reflected the parties' settlement and declaring that settlement agreement was binding. (*Ibid.*) This court determined that the second order finally disposed of the litigation and there were "no further matters to be determined in the case." (*Id.* at p. 1252.) Accordingly, this court amended the second order to include an appealable judgment. (*Ibid.*)

Here, in contrast, the May 14, 2010 order did not finally dispose of the parties' litigation because two matters remained for determination: (1) the amount that the Jeongs owed Huh on his breach of contract cause of action; and (2) the corresponding reduction in the amount of the judgment. Accordingly, we find that the May 14, 2010 order was interlocutory and not appealable, and for that reason we deny the Jeongs' request to dismiss the appeal.

Having determined that the April 28, 2011 judgment is appealable, we turn to the merits of Huh's appeal, beginning with the issue of the admissibility of the settlement agreement.

C. Admissibility

"[A] settlement agreement drafted during mediation must be admissible before a court can reach the issue of enforceability." (*Fair, supra*, 40 Cal.4th at p. 199.) Therefore, we will begin our analysis by addressing the threshold issue of whether the parties' settlement agreement, which was reached during the November 30, 2009 mediation, is admissible under the Evidence Code provisions governing mediation confidentiality.

1. Mediation Confidentiality

"In order to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding." (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 117 (*Cassel*); see also *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14 [confidentiality is essential to effective mediation].) The

statutory scheme for mediation confidentiality,⁴ section 1115 et seq., therefore protects “the confidentiality of mediation proceedings, with narrowly delineated exceptions.” (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 574 (*Simmons*).

In the statutory scheme, “[s]ection 1119 governs the general admissibility of oral and written communication made during the mediation process. It ‘prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation.’ [Citation.] Section 1119, subdivision (a) states, in pertinent part, that: ‘Except as otherwise provided in this chapter: [¶] (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation . . . is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any . . . civil action. . . .’ ” (*Simmons, supra*, 44 Cal.4th at p. 578.)

“Further, statements made during mediation and mediation materials are confidential not only during the mediation, but also after the mediation ends. Section 1126 clarifies that ‘[a]nything said, any admissions made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.’ ” (*Simmons, supra*, 44 Cal.4th at p. 580.)

The general rule with regard to writings, which is set forth in section 1119, subdivision (b), states in pertinent part that “ ‘[e]xcept as otherwise provided in this chapter: [¶] . . . [¶] No writing . . . that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to

⁴ This court has noted that: “ ‘Practitioners and the courts sometimes refer to the confidentiality afforded by statute to communications made in connection with mediation as a “mediation privilege.” [Citations.] Since the Evidence Code does not use the term “privilege,” we will use “mediation confidentiality” in our discussion of the statutory provisions rendering communications made in connection with mediation confidential.’ [Citation.]” (*Chan, supra*, 188 Cal.App.4th at p. 1180, fn. 26.)

discovery, and disclosure of the writing shall not be compelled, in any . . . civil action’ ” (See *Simmons, supra*, 44 Cal.4th at p. 578.)

The type of writing at issue here, a settlement agreement, is expressly addressed in the statutory scheme for mediation confidentiality. Section 1123 states the exceptions to the general rule of mediation confidentiality that allow the disclosure of a written settlement agreement produced during a mediation. (*Fair, supra*, 40 Cal.4th at p. 196.)

Section 1123 provides: “A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied: [¶] (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect. [¶] (b) The agreement provides that it is enforceable or binding or words to that effect. [¶] (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure. [¶] (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.”

“Thus, mediation confidentiality now clearly applies to prohibit admissibility of evidence of settlement terms made for the purpose of, in the course of, or pursuant to a mediation unless the agreement falls within express statutory exceptions. (§ 1119, subd. (a).)” (*Simmons, supra*, 44 Cal.4th at p. 581; *Cassel, supra*, 51 Cal.4th at p. 128.)

2. The Parties’ Contentions

Huh contends that the November 30, 2009 settlement agreement is inadmissible in a civil proceeding because it is protected from disclosure under section 1119, subdivision (b).⁵ Huh further contends that no statutory exception to the general rule of

⁵ Section 1119, subdivision (b) provides: “No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any . . . civil action . . . in which, pursuant to law,

mediation confidentiality applies, since “the settlement agreement does not contain any words that it is enforceable, binding, admissible, subject to disclosure, or words to that effect.” (Fn. omitted.) Huh acknowledges that he did not object to the admission of the settlement agreement at the time of the hearing on the Jeongs’ motion to enforce the settlement. However, he argues that he did not waive mediation confidentiality, relying on the California Supreme Court’s ruling in *Simmons*, *supra*, 44 Cal.4th at page 585 that mediation confidentiality cannot be waived by implication.

Huh further argues that McIntosh’s order of October 19, 2010, which included a ruling on the amount the Jeongs owe Huh under the settlement agreement, is also inadmissible because it is based on the inadmissible settlement agreement. He therefore contends that judgment was improperly entered on two writings protected by mediation confidentiality.

The Jeongs disagree. They contend that Huh forfeited the issue of admissibility by failing to raise the issue at the time of their motion to enforce the settlement. Alternatively, they maintain that the November 30, 2009 settlement agreement is not protected by mediation confidentiality, and is therefore admissible and enforceable in a civil action, because it can be inferred from the language of the settlement agreement that it is binding and subject to disclosure.

3. Analysis

Implied Waiver

At the outset, we consider the Jeongs’ contention that Huh forfeited the issue of mediation confidentiality by failing to object to the admission of the settlement

testimony can be compelled to be given.” Section 250 provides: “ ‘Writing’ means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.”

agreement at the time of their February 2010 motion to enforce settlement. The record reflects that Huh did not raise the issue of mediation confidentiality as a bar to enforcement of the settlement agreement until he brought a motion in January 2011 to vacate the mediator's order.

The issue of whether mediation confidentiality may be waived by implication was addressed by the California Supreme Court in *Simmons*. In that medical malpractice action, the plaintiffs sought to enforce an oral settlement agreement reached during mediation. (*Simmons, supra*, 44 Cal.4th at p. 574.) During subsequent trial court proceedings, the defendant physician argued that the settlement agreement was unenforceable; however, she did not assert that mediation confidentiality was a bar to enforcement until months later when she filed her trial brief. (*Id.* at pp. 576-577.) The Court of Appeal majority ruled that the defendant physician was estopped from asserting mediation confidentiality due to her failure to object during pretrial motions. (*Id.* at p. 577.)

Our Supreme Court in *Simmons* determined that the Court of Appeal majority had erred in relying on “the doctrine of estoppel to create a judicial exception to the statutory requirements of confidentiality of mediation proceedings. (§ 1115 et seq.)” (*Simmons, supra*, 44 Cal.4th at p. 577.) To begin with, the court noted the rule that “[a] court may not extend waiver provisions beyond their existing statutory limits. [Citation.]” (*Id.* at p. 586.) Next, the court determined that the statutory scheme for mediation confidentiality unambiguously provides, at section 1122, subdivision (a)(1),⁶ that

⁶ Section 1122, subdivision (a)(1) provides: “A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied: [¶] All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.”

mediation confidentiality may be waived with regard to a communication made during mediation only if all the participants in the mediation “*expressly agree* in writing, or orally in accordance with Section 1118, to disclosure.” (*Simmons, supra*, 44 Cal.4th at p. 586.)

The *Simmons* court concluded that “[s]ection 1122 plainly states that mediation communications or writings may be admitted *only on agreement* of all participants. Such agreement *must be express, not implied*.” (*Simmons, supra*, 44 Cal.4th at p. 587.) Accordingly, the court ruled that “[b]oth the clear language of the mediation statutes and our prior rulings support the preclusion of an implied waiver exception. The Legislature chose to promote mediation by ensuring confidentiality rather than adopt a scheme to ensure good behavior in the mediation and litigation process. The mediation statutes provide clear and comprehensive rules reflecting that policy choice.” (*Id.* at p. 588.)

Having rejected judicial creation of an implied waiver exception to mediation confidentiality, the *Simmons* court then rejected the plaintiffs’ contention that the defendant physician had impliedly waived mediation confidentiality by failing to object during pretrial motions, and ruled that all evidence pertaining to the parties’ oral settlement agreement was inadmissible. (*Simmons, supra*, 44 Cal.4th at pp. 587-588.) In so ruling, the court noted that “by creating fixed procedures that allow only certain evidence produced at mediation to be admitted in later civil proceedings, the Legislature was undeniably aware that some agreements made during mediation would not be enforceable.” (*Id.* at p. 583.)

Following our Supreme Court’s instruction in *Simmons*, we reach a similar result in the present case. Although it is undisputed that Huh did not object to the admission of the November 30, 2009 settlement on the grounds of mediation confidentiality at the time of the hearing on the Jeongs’ motion to enforce settlement, his failure to object during that pretrial motion did not constitute a implied waiver of mediation confidentiality. (See *Simmons, supra*, 44 Cal.4th at pp. 587-588.)

Section 1123, subdivision (b)

Next, we consider Huh's contention that the settlement agreement is inadmissible under the statutory scheme for mediation confidentiality. In its April 28, 2011 order denying Huh's motion to vacate the mediator's October 19, 2010 order, the trial court found that "[a]lthough the word 'binding' did not appear in this [settlement] agreement, there was sufficient language to memorialize the parties' agreement of [*sic*] the effect of the Settlement Agreement & Release." The court also found that "[c]ompliance with [section] 1123, [subdivision] (b) permitted the Settlement Agreement & Release to be disclosed."

Section 1123, subdivision (b) states, "A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied: [¶] The agreement provides that it is enforceable or binding or words to that effect."

Huh contends that the trial court erred in finding that the language of the parties' settlement agreement was sufficient to show that the section 1123, subdivision (b) exception to mediation confidentiality applied. Relying on the California Supreme Court's decision in *Fair, supra*, 40 Cal.4th 189, Huh maintains that the parties' intention that a settlement agreement reached during mediation be binding may not be inferred from the language of the agreement where, as here, the agreement does not expressly state that the parties agree that it is subject to "disclosure, admissibility, enforceability, binding effect, or 'words to that effect.' "

The Jeongs argue to the contrary that the settlement agreement is admissible under section 1123, subdivision (b), because "it can be inferred from the agreement that it is binding." They rely on this court's decision in *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565 (*Stewart*) for the proposition that "[p]arties need not precisely state that the agreement is admissible or subject to disclosure to meet the [section] 1123

exception to mediation confidentiality, so long as the same import can be inferred from the words used.”

According to the Jeongs, the words in the settlement agreement from which an exception to mediation confidentiality may be inferred under section 1123, subdivision (b) include the following: (1) “the parties ‘hereby agree to settle all claims against each other’ ”; and (2) “ ‘the parties stipulate that the mediation . . . was judicially supervised pursuant to [Code of Civil Procedure section] 664.6.’ ” The Jeongs also point to the attorney fees provision, as well as the provision in which Huh agreed to sign a stipulated judgment, as evidence that the settlement agreement was intended to be binding and admissible. Based on this language in the settlement agreement, the Jeongs contend that substantial evidence supports the trial court’s finding that the settlement agreement is binding and enforceable.

We agree with Huh that our resolution of the issue is governed by the California Supreme Court’s decision in *Fair*, which interpreted the language of section 1123, subdivision (b). In *Fair*, the parties concluded a mediation session by signing a memorandum entitled “ ‘Settlement Terms.’ ” (*Fair, supra*, 40 Cal.4th at p. 192.) The final provision in the memorandum stated, “ ‘Any and all disputes subject to JAMS [(Judicial Arbitration and Mediation Services)] arbitration rules.’ ” (*Ibid.*) The Court of Appeal determined that the JAMS arbitration provision constituted “ ‘words to the effect,’ ” within the meaning of section 1123, subdivision (b), that the parties intended the document to be “ ‘enforceable or binding’ ” and therefore admissible. (*Id.* at p. 194.) The California Supreme Court reversed, finding that the Court of Appeal’s reading of section 1123, subdivision (b) was “unduly expansive.” (*Id.* at p. 192.)

The correct interpretation of section 1123, subdivision (b), the *Fair* court determined, was far more narrow. “In order to preserve the confidentiality required to protect the mediation process and provide clear drafting guidelines, we hold that to satisfy the ‘words to that effect’ provision of section 1123(b), a writing must directly

express the parties' agreement to be bound by the document they sign." (*Fair, supra*, 40 Cal.4th at p. 197.) "Durable settlements are more likely to result if the statute is applied to require language directly reflecting the parties' awareness that they are executing an 'enforceable or binding' agreement." (*Id.* at p. 198.) "Thus, to satisfy section 1123(b), a settlement agreement must include a statement that is 'enforceable' or 'binding,' or a declaration in other terms with the same meaning. The statute leaves room for various formulations. However, arbitration clauses, forum selection clauses, choice of law provisions, terms contemplating remedies for breach, and similar commonly employed enforcement provisions typically negotiated in settlement discussions do not qualify an agreement for admission under section 1123(b). [Citations.]" (*Fair, supra*, 40 Cal.4th at pp. 199-200, fn. omitted.)

In other words, the *Fair* court further instructed, "the writing must make clear that it reflects an agreement and is not simply a memorandum of terms for inclusion in a future agreement. The writing need not be in finished form to be admissible under section 1123(b), but it must be signed by the parties and include a direct statement to the effect that it is enforceable or binding." (*Fair, supra*, 40 Cal.4th at p. 192.)

For several reasons, we find that the settlement agreement in the present case does not meet the standard set forth in *Fair* for admissibility under section 1123, subdivision (b). First, we note that at paragraph 12, the settlement agreement states that "[t]he parties will sign a more complete mutual release and settlement agreement within 45 days of today's date." Thus, the language of the settlement agreement indicates that it is a nonbinding "memorandum of terms for inclusion in a future agreement." (*Fair, supra*, 40 Cal.4th at p. 192.)

Second, the settlement agreement does not include an express statement that it is " 'enforceable' or 'binding,' or a declaration in other terms with the same meaning." (*Fair, supra*, 40 Cal.4th at pp. 199-200.) Significantly, the Jeongs do not claim that the settlement agreement includes such a statement or declaration. Their argument is the

parties' intention that the settlement agreement be binding and enforceable may be inferred from various provisions in the agreement. However, the Jeongs' argument lacks merit in light of the *Fair* court's rejection of a similar argument. In *Fair*, the plaintiff argued that "the settlement memorandum . . . must be viewed as a whole and construed by the standard rules of contract interpretation to determine whether it is 'enforceable' for purposes of section 1123(b)." (*Id.* at p. 199.) Our Supreme Court disagreed, stating "[t]hat approach has been taken in other jurisdictions [citation], but our Legislature has imposed a different rule. Section 1123(b) requires the parties to affirmatively provide that their agreement is enforceable or binding." (*Ibid.*)

Finally, the Jeongs' reliance on this court's decision in *Stewart* for the proposition that section 1123, subdivision (b) may be satisfied by the inclusion in the settlement agreement of phrases such as " 'a full [and] final settlement of all claims,' " is misplaced. The Jeongs contend that the parties in *Stewart* similarly stated in their settlement agreement that they " 'hereby agree to settle all claims against each other.' " *Stewart* is distinguishable because in that case, the settlement agreement expressly provided that it was enforceable, stating " '[t]he parties intend that this settlement is enforceable pursuant to the provisions of Code of Civil Procedure [s]ection 664.6.' " (*Stewart, supra*, 134 Cal.App.4th at p. 1578.) This court determined that "[i]t therefore satisfied the requirement that '[t]he agreement provide[] that it is enforceable or binding or words to that effect.' [Citations.]" (*Id.* at pp. 1578-1579.) Here, the word "enforceable" does not appear in the parties' settlement agreement.

For these reasons, we determine that the settlement agreement in the present case is not admissible under section 1123, subdivision (b) because it does not include "a direct statement to the effect that it is enforceable or binding." (*Fair, supra*, 40 Cal.4th at p. 192.) Having also determined that Huh did not waive mediation confidentiality, we conclude that in the absence of an admissible settlement agreement, the settlement agreement is unenforceable and trial court erred in granting the Jeongs' motion to enforce

the settlement under section 664.6. Consequently, the trial court also erred in entering judgment in accordance with the settlement agreement. We will therefore reverse the judgment.

Having resolved the appeal on the threshold issue of admissibility, we need not address Huh's contentions that the trial court improperly ordered the parties to participate in a binding mediation and improperly enforced the mediator's decision regarding a term of the settlement agreement.

IV. DISPOSITION

The judgment is reversed. Costs on appeal are awarded to appellant.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

DUFFY, J.*

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.