Filed 12/6/04 Cheng v. Superior Court CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DENIS C. CHENG, Petitioner, v. SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent, STRATA INFORMATION GROUP, INC. et al., Real Parties in Interest.	D044514 (Super. Ct. No. GIC815944)

Petition for writ of mandate or other appropriate relief from an order of the Superior Court of San Diego County, Patricia Y. Cowett, Judge. Petition granted.

Petitioner Denis C. Cheng seeks a writ of mandate directing the superior court to vacate its order granting the petition of Strata Information Group, Inc. (SIG) and its

employee, Sam Ellis (Ellis), to compel Cheng to arbitrate his claims against them pursuant to an arbitration provision contained in Cheng's employment separation agreement with the Imperial Community College District. We conclude that the trial court erred in ordering the parties to arbitrate Cheng's claims against SIG and Ellis, and grant Cheng's petition for a writ of mandate.

I.

FACTUAL AND PROCEDURAL BACKGROUND

In 2000, the Imperial Community College District (the District) hired Cheng to be the Technical Center Coordinator for Imperial Valley College (the College). In that capacity, he was responsible for coordinating information technology at the College.

In May 2002, while Cheng was employed in this position, the College contracted with SIG to provide professional consulting services and staff to assist the College with information technology matters. Ellis, an SIG employee, provided services to the College on SIG's behalf.

Approximately six months after Strata began providing services to the College, the District terminated Cheng's employment. Cheng entered into an employment separation agreement (Separation Agreement) with the District in which he agreed to release his claims against the District in exchange for "certain benefits" he would "not otherwise be entitled to." The Separation Agreement contained an arbitration provision. Neither SIG nor Ellis was a signatory to the Separation Agreement, and neither was mentioned or referenced in the document.

In August 2003, Cheng filed an action against SIG and Ellis (collectively, Strata)[1] for defamation and other tortious conduct which Cheng alleged had caused the District to terminate his employment. Cheng's complaint included claims of intentional interference with a contract, intentional interference with prospective earning advantage, defamation, and intentional infliction of emotional distress.

Strata filed and served a petition to compel Cheng to arbitrate his claims against the defendants on February 6, 2004. Strata's notice of hearing set the hearing on the petition to compel for March 19, 2004. On March 9, 2004, ten days before the hearing on Strata's petition to compel, Cheng filed and served a memorandum of points and authorities in opposition to the petition to compel and a response to the petition to compel, in which he denied the allegations in the petition.

The trial court held a hearing on the petition to compel arbitration on March 19, 2004. The trial court found that Cheng's response had not been filed in compliance with Code of Civil Procedure sections 1290 and 1290.6[2] in that the response was not filed within 10 days of the date on which Cheng was served with the petition. Because Cheng failed to comply with the filing and service rules set forth in the Code of Civil Procedure for petitions for arbitration, the trial court "deemed admitted" all of the allegations

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1 SIG and Ellis are represented by the same counsel and have litigated the underlying case and the writ matter as one. In the interest of simplicity and because the issues before us relate to both defendants in the same way, we will refer to both defendants as Strata, a single entity.

2 All further statutory references are to the Code of Civil Procedure unless otherwise specified.

contained in Strata's petition. Based on these admissions, the trial court concluded, "A valid agreement to arbitrate is deemed to exist between all of the parties to this case requiring plaintiff to submit his claims against defendants to final and binding arbitration." On this basis, the trial court granted Strata's petition to compel Cheng to arbitrate his claims against the defendants.

In response to the trial court's order, on April 1, 2004, Cheng filed a motion to set aside the deemed admissions pursuant to section 473. The trial court denied Cheng's motion by its ruling of May 7, 2004.

On June 18, 2004, Cheng filed a petition for writ of mandate or other appropriate relief seeking review of the order granting Strata's petition to compel arbitration. As the real parties in interest, SIG and Ellis filed an informal letter brief in opposition to the petition for writ of mandate on July 12, 2004. We issued an order to show cause on July 15, 2004. Thereafter, SIG and Ellis filed a return by answer to Cheng's petition for a writ, and Cheng filed a reply to the return.

II.

DISCUSSION

Cheng maintains that (1) he never agreed to arbitrate his claims against Strata; (2) the trial court erred in deeming admitted Strata's allegations in its petition to compel arbitration; and (3) the trial court erred in denying his request to set aside the deemed admissions pursuant to section 473. We conclude that the trial court erred in ordering that Cheng's claims against Strata be arbitrated, since there is no valid and enforceable arbitration agreement between Cheng and Strata, and there is no other legal basis for

allowing Strata to invoke the benefits of the arbitration agreement between Cheng and the District.

A. General Arbitration Principles

An order directing parties to arbitrate is not appealable. (*Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 353.) Generally, the order is reviewable on appeal from a judgment confirming the award after arbitration is complete. (See §§ 1294, 1294.2; *Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co*. (1969) 271 Cal.App.2d 675, 692.) However, such an order may be reviewable by way of a petition for writ of mandate "if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement." (*Atlas Plastering, Inc. v. Superior Court* (1977) 72 Cal.App.3d 63, 67-68.)

A proceeding to compel arbitration is, in essence, a suit in equity to compel specific performance of a contract. (*La Pietra v. Freed* (1978) 87 Cal.App.3d 1025, 1030.) Under both the Federal Arbitration Act (FAA) and California state law, agreements to arbitrate generally must be in writing. (9 U.S.C. § 2; Code Civ. Proc. §1281.2.)

When considering a petition to compel arbitration, "[t]he trial court *must determine in advance* whether there is a duty to arbitrate the controversy. [Citation.] This determination 'necessarily requires the court to examine and, to a limited extent, construe the underlying agreement.' [Citation.]" (*Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63, 69, italics added; see also *Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 413 ["[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the

controversy, the court itself must determine whether the agreement exists"].) Because the existence of an agreement to arbitrate is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. (*Rosenthal,* at p. 413.)

B. Standards of Review

"It is . . . solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." (*Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865.) "Where the trial court's decision on arbitrability is based upon resolution of disputed facts, we review the decision for substantial evidence," but if no facts are in dispute, "we review the trial court's decision de novo." (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71-72; see also *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1715-1716 (*Metalclad*) [even though estoppel is equitable in nature, when parties do not dispute facts in context of applying equitable estoppel to determine arbitrability, the matter is a question of law].)

Here, there was no extrinsic evidence presented concerning the interpretation of the arbitration clause, nor was there conflicting evidence pertaining to the relationships among the various entities. Both parties agree that Strata was merely an independent contractor, hired by the College as a consultant. Because the facts are not in dispute, we review the matter de novo to determine whether the facts alleged by Strata and "deemed admitted" by the trial court are sufficient to require Cheng to arbitrate with Strata, a third-party nonsignatory to the arbitration agreement.

C. There Is No Enforceable Arbitration Agreement between Strata and Cheng

In its order granting Strata's petition to compel arbitration, the trial court stated, "A valid agreement to arbitrate is deemed to exist between all of the parties to this case requiring plaintiff to submit his claims against defendants to final and binding arbitration." Cheng challenges this conclusion, arguing that he never entered into an arbitration agreement with Strata.

"Although '[t]he law favors contracts for arbitration of disputes between parties' [citation], '"there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate. . . ."' [Citations.]" (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.) Therefore, "[t]he initial step in determining whether there is an enforceable [arbitration] agreement between [the parties] involves applying ordinary state law principles that govern the formation and interpretation of contracts in order to ascertain whether the parties have agreed to some alternative form of dispute resolution." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 787.) Under both federal and California law, arbitration is a matter of contract between the parties. (*Ibid*.) Even the "'liberal federal policy favoring arbitration agreements,' [citation] . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements." (*Mitsubishi Motors v. Soler Chrysler-Plymout*h (1985) 473 U.S. 614, 625.)

1. Under State Law Contract Principles, Strata's Petition Fails to Sufficiently Allege that Cheng and Strata Agreed to Arbitrate Cheng's Claims

The trial court determined that the allegations of Strata's petition would be "deemed admitted" by Cheng because he failed to file and serve a response to the petition

within the 10-day window provided in section 1290.6.[3] The trial court proceeded to conclude that because the allegations of the petition were deemed admitted, Strata had met its burden to show that the controversy at issue is subject to arbitration pursuant to the Separation Agreement between Cheng and the District.

However, Strata's petition to compel arbitration fails to allege facts or to provide prima facie evidence of the existence of a written agreement between Cheng and Strata to arbitrate this controversy. Specifically, the petition includes no allegations that Strata and Cheng entered into an arbitration agreement of any kind. The only arbitration agreement Strata alleges exists is the arbitration provision included in the Separation Agreement Cheng entered into with the District. Strata admits it is an entity independent of the District.

In addition, the allegations in the petition are devoid of facts that would establish that Strata may be deemed to be a party to the Cheng/District agreement based on Strata's relationship with the College. The petition alleges merely that the College hired Strata as an independent contractor. Specifically, the petition states that Strata "entered into a professional services contract with [the College] to provide consulting services and professional staff, employees of [Strata], to assist [the College], among other things, in the development of an information technology plan addressing administrative

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[3] Even if the allegations of Strata's petition are deemed true, they are insufficient as a matter of law to establish that Cheng's claims against Strata must be arbitrated. Therefore, we need not consider whether the court erred in deeming admitted the material allegations of the petition on the ground that Cheng failed to file a timely response to the petition.

information systems, technology infrastructure, and instructional computing." There are no factual allegations in the petition that would support the conclusion that Strata was an agent of the District, or that Strata was an alter ego of the District.

Further, Strata's petition does not, and cannot, establish that Strata was a party to, or a beneficiary of, the Separation Agreement it seeks to invoke. The pertinent provision of the Separation Agreement reads, "You [Cheng] agree that any and all disputes arising from your employment or this Agreement will be submitted to and wholly subject to binding arbitration before a neutral arbitrator, with legal fees and costs of such arbitration being borne by the non-prevailing party." Although this provision is written in broad terms, other portions of the Separation Agreement make it clear that Cheng and the District are the only parties to the agreement.[4]

Other portions of the document also support our reading of the Separation Agreement. Under the section entitled "Terms of Agreement," which includes the arbitration provision, the parties to the contract are again identified: "In order to effect the separation . . . you [Cheng] and the ICCD agree as follows . . . ." Further, the Separation Agreement was in the form of a letter, sent by Jack Fujimoto, the interim superintendent/president of the Imperial Valley College, to Cheng, requesting Cheng's signature. Cheng "[a]ccepted and agreed to" the terms of the District's offer by signature dated December 12, 2002. No other parties signed the Separation Agreement. In fact,

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4 For example, the agreement begins: "This letter proposes the following Separation Agreement and General Release ('Agreement') *between you—Denis C.*

Strata was not even mentioned in the Separation Agreement.[5] Thus, when read in context, the arbitration provision clearly covers only those potential disputes *between Cheng and the District* arising from Cheng's employment or the Separation Agreement itself.

Despite the fact that Strata is not a signatory to the Separation Agreement, Strata contends that the language of the arbitration provision is so broad as to cover any and all disputes between Cheng and any third party, if the dispute arises out of Cheng's employment with the College. We decline to interpret the admittedly broad language of the arbitration provision in a manner that would allow it to usurp the inherent function of a contract—i.e., to bind only the parties entering into the contract to the terms of that contract—and that would deprive Cheng of his right to trial in disputes with third parties. The arbitration provision must be read in the context of the Separation Agreement, which is between Cheng and the District only. There is no reason to accord the arbitration provision as broad a scope as Strata urges, particularly when doing so would require us to read the provision out of context and ignore the clear intent of the parties as evidenced elsewhere in the document.

Cheng—and the Imperial Community College District ('ICCD') regarding the terms of your separation from the Imperial Valley College." (Italics added.)

5 The Separation Agreement was offered to Cheng by letter dated November 21, 2002, approximately six months after Strata began contracting with the College. If the parties to the contract had intended to include Strata as a party to, or beneficiary of, the Separation Agreement, they could have done so.

2. Strata Has Not Shown, and Cannot Show, that It May Invoke the Benefits of the Separation Agreement Between Cheng and the District Pursuant to the Federal Substantive Law of Arbitrability

Despite its status as a nonsignatory to the Separation Agreement , Strata contends that it nevertheless may compel Cheng to arbitrate his claims against Strata under the "federal substantive law of arbitrability." According to Strata, under federal law a nonsignatory to an arbitration agreement may invoke the benefits of that agreement where "the signatory's claims are within the scope of the arbitration provision and there is an integral relationship between the parties." We conclude that Strata may not invoke the benefits of the Separation Agreement between Cheng and the District under federal law.

a. Applicability of Federal Law

Strata claims that federal arbitration law applies here because the contract at issue involves interstate commerce. The FAA regulates the duty to honor an agreement to arbitrate under any contract involving "commerce among the several states or with foreign nations." (9 U.S.C. § 2; *Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24, 26, fn. 32.) In its petition to compel, Strata alleges that it "relies on instrumentalities of interstate commerce such as the mails, telephones, internet and on-line services," and that both Strata and the College are "employer[s] engaged in commerce, or in an industry affecting commerce." Taking these factual allegations as true, we conclude that they are sufficient to trigger application of the FAA. (See *Prima Paint Corp. v. Flood & Conklin Mfg. Co*.(1967) 388 U.S. 395, 401-402, fn. 7 [FAA governs if underlying contract facilitates interstate commercial transactions or directly or indirectly affects commerce between states].)

Strata contends that under federal law, Cheng should be equitably estopped from pursuing his claims against Strata in court. In support of this argument, Strata relies on a number of federal cases in which courts have applied the doctrine of equitable estoppel to allow a nonsignatory to an arbitration agreement to invoke the agreement and require a signatory to arbitrate claims against the nonsignatory. We look to the federal law of arbitrability to assess Strata's contention regarding equitable estoppel. (See *Metalclad , supra,* 109 Cal.App.4th at p. 1712 [courts look to federal law of arbitrability when neither the formation of a contract nor the revocability of a contract are at issue]; see also, *Inter. Paper v. Schwabedissen Machinen & Anlagen* (4th Cir. 2000) 206 F.3d 411, 417, fn. 4 ["Because the determination of whether International Paper, a nonsignatory, is bound by the Wood-Schwabedissen contract presents no state law question of contract formation or validity, we look to the 'federal substantive law of arbitrability' to resolve this question"].)

b. Application of Equitable Estoppel

A number of federal circuit courts have found that in certain limited circumstances, nonsignatories to an arbitration agreement may invoke the agreement and compel arbitration, pursuant to the doctrine of equitable estoppel. (See *MS Dealer Service Corp. v. Franklin* (11th Cir. 1999) 177 F.3d 942, 947 (*MS Dealer*); *Sunkist Soft Drinks v. Sunkist Growers*. (11th Cir. 1993) 10 F.3d 753, 756-757 (*Sunkist*); *McBro Planning and Develop. v. Triangle Elec. Const.*. (11th Cir. 1984) 741 F.2d 342, 343 (*McBro*); *Choctaw Generation Ltd. v. American Home Assur.* (2d Cir. 2001) 271 F.3d 403, 406; *Grigson v. Creative Artists Agency* (5th Cir. 2000) 210 F.3d 524, 527; *J.J.*

Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A. (4th Cir. 1988) 863 F.2d 315, 320-321; *Hughes Masonry v. Greater Clark County Sch. Bldg.* (7th Cir. 1981) 659 F.2d 836, 838.)

Generally, the doctrine of equitable estoppel precludes a party from enjoying rights and benefits under a contract while being able to avoid its burdens and obligations. (See, e.g., *Hughes Masonry v. Greater Clark County Sch. Bldg.*, *supra*, 659 F.2d at pp. 838-839.) "'[T]he doctrine of equitable estoppel . . . by definition applies where there is no written contract between the parties.'" (*DSMC Inc. v. Convera Corp*. (D.C. Cir. 2003) 349 F.3d 679, 683.) "In the arbitration context, the doctrine [of estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." (*Washington Mut. Finance Group, LLC v. Bailey* (5th Cir. 2004) 364 F.3d 260, 268.) Alternatively, if a signatory to a contract that includes an arbitration provision files an action against a nonsignatory based on the provisions of the contract, the signatory may be estopped from objecting when the nonsignatory attempts to enforce the arbitration provision of the contract at issue. (See *Grigson v. Creative Artists Agency*, *supra*, 210 F.3d at p. 526.)

Under federal law, application of equitable estoppel "rests on the foundation that ultimately, each party must rely on the terms of the written agreement in asserting their claims." (*Sunkist, supra*, 10 F.3d at p. 757.) The plaintiff's claims must be "intimately founded in and intertwined with" the underlying contract sought to be invoked. (*Metalclad, supra,* 109 Cal.App.4th at p. 1717.) Courts have found this nexus where

"each of a signatory's claims against a nonsignatory 'makes reference to' or 'presumes the existence of' the written agreement" so that "the signatory's claims 'arise[ ] out of and relate[ ] directly to the [written] agreement'. . . . [Citation.]" (*MS Dealer, supra*, 177 F.3d at p. 947.) Further, in addition to looking for this nexus, courts have looked to the nature of the relationship between the nonsignatory and the other party to the agreement, being willing to apply equitable estoppel only where an "integral relationship" is present. (*Metalclad, supra*, 109 Cal.App.4th at p. 1717.) Therefore, in order to determine whether equitable estoppel applies, a court must scrutinize both the allegations of the nonsignatory's petition to compel arbitration *and* the nature of the claims against the nonsignatory. (See *Sunkist*, *supra*, 10 F.3d at p. 758.)

(i) Cheng's Claims Against Strata Do Not Arise Out of the Separation Agreement

Cheng's claims do not arise out of or relate to the Separation Agreement with the District. Cheng does not allege that Strata violated the terms of that agreement, nor does he allege that Strata caused the College or the District to violate any of the terms of that agreement. Rather, Cheng's claims are based on Ellis's allegedly defamatory conduct—conduct Cheng asserts occurred *before* the Separation Agreement was created. It is impossible for Cheng's claims to "presume the existence" of an agreement that did not exist at the time the conduct complained of is alleged to have taken place.

Strata nevertheless suggests that Cheng's claims must arise out of the Separation Agreement because Cheng alleges that Strata and Ellis caused the District to terminate Cheng's employment. Citing *Metalclad* and *Sunkist*, Strata asserts that "[e]ach of the

causes of action alleges that but for the alleged wrongful conduct by Strata and Ellis, Cheng's employment relationship with the College would not have been terminated."

Strata's argument reverses the rationale underlying the application of equitable estoppel as discussed in *Sunkist* and *Metalclad*. In *Sunkist*, the plaintiff claimed that the nonsignatory parent caused its signatory subsidiary to violate the underlying license agreement—the agreement that contained the arbitration provision being invoked. (*Sunkist, supra*, 10 F.3d at p. 758.) Similarly, in *Metalclad*, the plaintiff claimed that the nonsignatory parent corporation caused the signatory subsidiary to breach the underlying acquisition contract—the contract that contained the arbitration provision being invoked. (*Metalclad*, *supra*, 109 Cal.App.4th at p. 1717.) Thus, in *Sunkist* and *Metalclad*, but for the existence of the contracts, which included the contested arbitration provisions, the plaintiffs in those cases would have had no claims at all. Here, in contrast, Cheng claims that a nonsignatory to his Separation Agreement with the District caused the District to terminate his employment, not that the nonsignatory caused the District to breach any part of the Separation Agreement. Cheng's claims relate to the termination of his employment—not to the Separation Agreement. Even if the Separation Agreement had never existed, Cheng could still bring his claims against Strata alleging that, as a result of Ellis's conduct, Cheng's employment was terminated. Therefore, Cheng's claims do not depend upon the existence of the Separation Agreement.

(ii) There Is No "Integral Relationship" Between Strata and the District

Strata also claims that equitable estoppel may apply even when the nonsignatory is not "related to" a signatory, as was the case in both *Sunkist* and *Metalclad*. However, the

cases clearly require an "integral relationship" between the nonsignatory and a signatory to the contract *in addition to* requiring that the claims rely on the agreement at issue. (See *Metalclad, supra*, 109 Cal.App.4th at p. 1717.) This integral relationship may be in the form of a parent-subsidiary relationship (*Sunkist*, *supra*, 10 F.3d at p. 755), or may be evidenced by references to the nonsignatory party in the contract as issue (*McBro, supra*, 741 F.2d at p. 344 [contract was "replete" with references to nonsignatory's duties as construction manager on behalf of signatory]).

We conclude that under the circumstances as presented by Strata's petition to compel, Strata and the District do not have the type of "integral relationship" that must exist before a nonsignatory will be permitted to invoke the benefits of an arbitration agreement. Strata is merely an independent contractor for the College, and has no other relationship with the College or the District. Further, despite the fact that at the time the District and Cheng entered into the Separation Agreement the College had been contracting with Strata for approximately six months, the Agreement did not refer to Strata or to its duties with respect to the College. However, even if Strata had the type of "integral relationship" with the District that would be necessary to allow it to require Cheng to arbitrate his claims against Strata, this alone would not be sufficient to require Cheng to arbitrate because, as discussed above, Cheng's claims against Strata do not "rely on" the agreement being invoked.

In these circumstances, it would be unfair to allow Strata to benefit from the Separation Agreement when it has had to bear none of the contract's burdens. (Cf. *Metalclad, supra*, 109 Cal.App.4th at p. 1719 [""He who takes the benefit must bear the

burden." (Citation.)'"].) Equitable estoppel is a doctrine premised on "fairness." To apply it in this case to require Cheng to arbitrate his claims against Strata would be fundamentally unfair.

III.

CONCLUSION

Cheng cannot be compelled to arbitrate his claims against Strata when there is no allegation that he ever entered into an agreement with Strata to arbitrate such claims. Further, Strata cannot compel arbitration under the Separation Agreement based on principles of equitable estoppel because Cheng's claims against Strata do not arise from or relate to the terms of the document Strata seeks to invoke. Therefore, even if all of the factual allegations of the petition to compel arbitration are taken as true, they are insufficient to establish that Strata may invoke the benefits of the Separation Agreement.

IV.

DISPOSITION

Let a writ of mandate issue directing the superior court to vacate its order granting the petition to compel arbitration. Costs are awarded to petitioner.

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AARON, J.

WE CONCUR:

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NARES, Acting P. J.

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McDONALD, J.