CD Listening Bar, Inc. v. Superior Court
Cal.App. 4 Dist.,2001.
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Court of Appeal, Fourth District, Division 3, California.
CD LISTENING BAR, INC., Petitioner,
v.
The SUPERIOR COURT OF ORANGE COUNTY, Respondent;
McGLADREY & PULLEN, Real Party in Interest.
No. G029317.
(Super.Ct.No. 00CC14372).

Dec. 28, 2001.

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Ronald C. Kline, Judge. Motion to dismiss. Request for judicial notice. Petition granted. Motion to dismiss denied. Request for judicial notice granted.

Klein & Wilson, Gerald A. Klein and Mark B. Wilson , for Petitioner.
No appearance for Respondent.
Keker & Van Nest, Christopher C. Kearney, Steven A. Hirsch and Henry M. Burgoyne, for Real Party in Interest.

OPINION

RYLAARSDAM, J.
***1** Petitioner CD Listening Bar, Inc., sued real party McGladrey & Pullen alleging breach of contract and negligence arising out of a contract for the purchase and installation of accounting software. Real party moved to compel arbitration as a third party beneficiary of a licensing agreement between petitioner and Great Plains Software. Petitioner now challenges the court's order compelling it to arbitrate its claims against real party. Real party is not entitled to enforce the arbitration clause. We therefore grant the petition.

FACTS

Petitioner operates retail stores specializing in prerecorded music. Under the name Super Discount CD's & DVD's, petitioner also acts as "a worldwide wholesaler of music and movies in all configurations."As its business expanded, petitioner "experienced growing pains"; its computer accounting software was quickly proving inadequate and needed to be upgraded.

Real party, a national accounting firm, and "an independent value reseller of Great Plains Software," offered to provide software "implementation, installation, training and continuing support" to petitioner. Petitioner accepted real party's proposal and signed an authorization letter incorporating the proposal. Concurrently, petitioner signed a "Master Software License Agreement" for the use of the Great Plains accounting software. The specified parties to the license agreement were Great Plains and petitioner. The agreement also provided for arbitration of disputes "of any kind or nature whatsoever ... which shall arise out of or relate to (1) the Agreement, or the breach, termination or invalidity of this Agreement, (2) the sale, installation, modification or use of the Software sold, or (3) any services rendered in connection with the sale, installation, modification or use of the Software.... The place of arbitration shall be Fargo, North Dakota."

In its lawsuit, petitioner alleged that real party failed to install the software in "a prompt, workmanlike" manner, and eventually "walked off the job and abandoned" petitioner without completing the installation. Pursuant to California and federal arbitration statutes, real party moved for an order compelling arbitration under the arbitration clause

contained in the licensing agreement and to stay the action. (Code. Civ. Proc., §§ 1281.2, 1281.4; 9 U.S.C. § 1 et seq.) While acknowledging the agreement was between petitioner and Great Plains, real party argued it could compel arbitration as an intended third party beneficiary. Alternatively, it argued that under federal case law a nonsignatory may compel a signatory to arbitrate when the signatory's claims are necessarily dependent on the agreement that includes the arbitration clause.

In its ruling granting the motion, the court concluded real party was a third party beneficiary of the licensing agreement based on the language mandating arbitration for any dispute arising out of the "sale, installation, modification or use" of the Great Plains software. The court also ruled that petitioner understood real party to be a party to the arbitration clause because petitioner "knew [Great Plains] was not installing or selling it the software; [real party] was."Instead of granting a stay pending arbitration, the court dismissed the action because "the arbitration provision is binding and mandatory."

DISCUSSION

The Petition Was Properly Verified

***2** As a preliminary matter, real party requests that we dismiss this proceeding because petitioner failed to properly verify the facts alleged in its petition as mandated by California Rules of Court, rule 56(a). In relevant part this rule states, "A petition to a reviewing court for a writ of mandate, certiorari, or prohibition ... must be verified and shall set forth the matters required by law to support the petition...." (Cal. Rules of Court, rule 56(a).) Real party alleges the verification here is deficient because it "is absolutely devoid of factual allegations regarding the substance of the controversy."We disagree.

In *Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, the court dismissed a petition for writ of mandate and discharged an alternative writ of mandate as having been improvidently granted for failure to properly verify the allegations in the petition. (*Id.* at p. 203.)Real party correctly states that the *Star Motors* court found that a verification based on the attorney's "*information and belief* " was insufficient to support the allegations. (*Ibid.*) However, the court only looked to the attorney's declaration *after* explaining that the petition was wholly unsupported by any record of the "superior court's criticized rulings, or the oral proceedings on which they were based," and lacked "any excuse for such a record's nonproduction."(*Ibid.*)

Here, the petition is supported by the entire record of the underlying proceedings including the court's ruling on the motion to compel arbitration. Although the record filed concurrently with the petition did not include a transcript of oral proceedings in the superior court, petitioner satisfactorily explained that the transcript was not available at that time and promptly filed the transcript as a supplemental exhibit. Petitioner substantially complied with California Rules of Court, rule 56(a), and we deny the motion to dismiss.

Real Party Is Not an Intended Third Party Beneficiary

Petitioner contends the court erred by granting the motion because its agreement to arbitrate is with Great Plains alone, and real party is not an intended third party beneficiary of the licensing agreement. We agree.

Real party cites case law for the proposition that under federal law it was an intended third party beneficiary to the licensing agreement. (We grant real party's request to take judicial notice of out-of-state and federal court opinions.) However, although arbitration clauses related to interstate commerce are governed by federal law, we must first decide under state law whether there is a valid agreement to arbitrate between petitioner and real party. "When deciding whether the parties agreed to arbitrate a cer-

tain matter ..., courts generally ... should apply ordinary state-law principles that govern the formation of contracts. [Citations.]" (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944; see also *Bolter v. Superior Court* (2001) 87 Cal.App.4th 900, 906.)

***3** "[A] party can be compelled to submit a dispute to arbitration only where he [or she] has agreed in writing to do so. [Citation.] While arbitration is a favored method of resolving disputes, the policy favoring arbitration cannot displace the necessity for an agreement to arbitrate [citation] and does not extend to those who are not parties to such an agreement. [Citation.] Whether or not an arbitration agreement is operative against a person who has not signed it involves a question of 'substantive arbitrability' which is to be determined by the court. [Citation.]" (*Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271(*Boys Club*); see also *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744; 1 Domke on Commercial Arbitration (Wilner ed.2001) § 10:00, pp. 1-2.)

As noted, real party concedes the arbitration clause is part of the licensing agreement between petitioner and Great Plain, and that the agreement does not mention real party. Of the three contracts relevant to this proceeding, the licensing agreement is the only one to include an arbitration clause. For instance, the "National Account Agreement" between Great Plains and real party provides that "in the event of any suit or litigation relative to [that] agreement[,] venue shall be proper in the City of Fargo."The authorization letter signed by petitioner and real party and the proposal it incorporates are completely silent on the question of dispute resolution. In an era of the ubiquitous commercial arbitration clause (*United Multiple Listing Service, Inc. v. Bernstein* (1982) 134 Cal.App.3d 486, 490), this oversight by seemingly sophisticated business entities is baffling.

Nonetheless, real party contends the arbitration clause, read in light of its separate agreements with both Great Plains and petitioner, expressed petitioner's intent to arbitrate disputes with real party. Under the agreement with Great Plains, real party was an authorized reseller of Great Plains's software. This fact was clearly stated in the proposal that was incorporated into the authorization letter petitioner signed. Moreover, the contract between real party and petitioner was expressly for the sale and installation of Great Plains's software. Thus, real party argues that it necessarily falls within the language contained in the arbitration clause covering any dispute arising out of "the sale, installation, modification or use of the Software sold[.]"

When a contract expressly provides for a benefit to a noncontracting party, that third party beneficiary is empowered to enforce its rights under the contract. (Civ.Code, § 1559; *Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1724.)A noncontracting party may also be considered an intended beneficiary even if he or she is not expressly mentioned in the contract. (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591;Rest.2d Contracts, § 308.) So long as the terms of the contract and the context in which it was executed establish the intent to benefit the third party, he or she may enforce the benefit so conferred. (*Bancomer, S.A. v. Superior Court* (1996) 44 Cal.App.4th 1450, 1458; see also Rest.2d Contracts, § 304, com. d, pp. 449-450.) But the same is not true for an incidental beneficiary. (*Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, 400.)"The fact that the third party is only incidentally named in the contract or that the contract, if carried out to its terms, would inure to the third party's benefit is insufficient to entitle him or her to demand enforcement. [Citation.]" (*Jones v. Aetna Casualty & Surety Co., supra,* 26 Cal.App.4th at pp. 1724-1725; see also Rest.2d Contracts, §§ 302, com. e, 315, pp. 443, 477.)

***4** Under the prevailing rule as stated in the Restatement Second of Contracts, a nonsignatory is an intended beneficiary to a contract if either "(a) the performance of the [contracting party's] promise will satisfy an obligation of the promisee to pay

money to the beneficiary; or [¶] (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."(Rest.2d Contracts, § 302; see also *Outdoor Services, Inc. v. Pabagold, Inc.* (1986) 185 Cal.App.3d 676, 684.)

The licensing agreement states, "Great Plains grants [petitioner] the non-exclusive and non-transferable right ... to: [¶] i. copy the Application Software onto an unlimited number of computers and use the Application Software ... and [¶] ii. use the associated Documentation."It does not expressly provide for the payment of money to anyone, let alone to real party. Nor does it provide for any performance by petitioner or Great Plains that would benefit real party. This is not a case where the contract expressly authorizes one party to engage third parties to effectuate the goals of the contract and obligates the other contracting party to pay for those third party services. (*Outdoor Services, Inc. v. Pabagold, Inc., supra,* 185 Cal.App.3d at p. 684 [third party could enforce arbitration clause when " 'recognition of a right to performance in the [third party] beneficiary is appropriate to effectuate the intention of the parties' "].)

Nor is it clear from the context in which the licensing agreement was signed that petitioner intended to give real party "the benefit of the promised performance" (Rest.2d Contracts, § 302, subd. (1)(b)), or that real party is a member of a class "for whose benefit the contract was made. [Citation.]" (*Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1064.)As noted, the only performance provided for in the licensing agreement was that Great Plains would allow petitioner to use the software and petitioner would abide by the terms of the conditional use, including the agreement to arbitrate disputes. Real party argues that because it was hired or retained to sell, install, and modify the software, petitioner must have clearly understood that the agreement included real party as an intended beneficiary. But this overlooks key facts. The agreement for the sale, installation, and modification of the software was a wholly separate and integrated contract. Had the contract incorporated the licensing agreement, petitioner would be bound to arbitrate with real party. (See *Boys Club, supra,* 6 Cal.App.4th at p. 1271.)

Moreover, although the "National Account Agreement" between Great Plains and real party appears to establish that Great Plains only sold its software "to dealers and others for licensing to customers," this contract was not part of the context in which petitioner entered into its contract with real party or the licensing agreement with Great Plains. Neither of the latter two contracts incorporated the terms of the resale agreement. Real party's assertion that petitioner knew of this fact is not supported by the record, and its conclusion that petitioner must arbitrate a dispute with a nonsignatory contradicts the established policy of this state that a party may not be compelled to arbitrate unless it has agreed to do so. (*Victoria v. Superior Court, supra,* 40 Cal.3d at p. 744.)

***5** The court also erred by dismissing the lawsuit instead of granting a stay. When presented with a proper application, the court is authorized to compel arbitration and mandated to stay the lawsuit. (Code Civ. Proc., §§ 1281.2, 1281.4; *Los Angeles Police Protective League v. City of Los Angeles* (1985) 163 Cal.App.3d 1141, 1149, disapproved on another ground in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 427, fn. 28.)But even when the arbitration clause is "binding and mandatory," as here, the Code of Civil Procedure does not provide for a complete dismissal.

Petitioner Is Not Estopped From Opposing Arbitration

As an alternative basis for denying the petition, real party maintains that petitioner is precluded from arguing that it is not bound to arbitrate because its purported causes of action, alleged breach of contract and negligence, are necessarily intertwined

with the terms of the licensing agreement. We disagree.

"An [equitable] estoppel theory has been recognized by several [federal] courts of appeals whereby nonsignatories to the arbitration agreement have standing to compel arbitration against a signatory[,] and the signatory is estopped from avoiding arbitration with a nonsignatory[,] when the issues which the nonsignatory wants to resolve are intertwined with the agreement that the signatory signed."(1 Domke on Commercial Arbitration, *supra,* § 10:07, pp. 18-19, fn. omitted.) Although widely adopted in the federal courts, this theory is not without its critics. " '[N]early anything can be called estoppel. When a lawyer or a judge does not know what other name to give for his [or her] decision to decide a case in a certain way, he [or she] says there is an estoppel.' " (*Grigson v. Creative Artists Agency* (5th Cir.2000) 210 F.3d 524, 531, fn. omitted (dis. opn. of Dennis, J.).)

More importantly for our purposes, real party has not cited to any published opinions of this state adopting this particular theory, and we have found none. (See *Rogers v. Peinado* (2000) 85 Cal.App.4th 1, 9-10, fn. 6 [citing federal case law for the equitable estoppel theory, but declining to "invoke the principles of equity"], disapproved on another ground in *Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310, 317.)We decline to do so here.

DISPOSITION

The petition is granted; the alternative writ is discharged. Real party's request to take judicial notice is granted, and its motion to dismiss is denied. Let a writ of mandate issue directing the Superior Court to enter a new order denying the motion to compel arbitration and reinstating the lawsuit. Petitioner shall recover its costs.

WE CONCUR: SILLS, P.J., and O'LEARY, J.
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