APPENDIX

TABLE OF CONTENTS

		Page
Appendix A:	Court of appeal opinion, Apr. 30, 2018	1a
Appendix B:	Supreme court order, Aug. 15, 2018	19a
Appendix C:	Superior court judgment, Jun. 23, 2016	20a
Appendix D:	Superior court order, May 26, 2016	22a
Appendix E:	Arbitration scheduling order, Nov. 26, 2014	31a
Appendix F:	Arbitration supplemental scheduling order, May 9, 2016	34a

APPENDIX A

22 Cal.App.5th 970
Court of Appeal, Fourth District,
Division 3, California.

Rae WEILER, Plaintiff and Appellant,
v.
MARCUS & MILLICHAP REAL ESTATE
INVESTMENT SERVICES, INC. et al.,
Defendants and Respondents.

G053953
|
Filed 4/30/2018

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OPINION

THOMPSON, J.

INTRODUCTION

Plaintiff Rae Weiler seeks a declaration and order from the superior court that defendants Marcus & Millichap Real Estate Investment Services, Inc., et al., must either (1) pay plaintiff's share of the costs in the previously ordered arbitration, or (2) waive their

contractual right to arbitrate the underlying claims and allow them to be tried in the superior court. We conclude, based primarily on *Roldan v. Callahan & Blaine* (2013) 219 Cal.App.4th 87, 161 Cal.Rptr.3d 493 (*Roldan*), plaintiff may be entitled to the relief she seeks.

Plaintiff and her husband allegedly lost more than $2 million at the hands of defendants—the basis for her underlying breach of fiduciary duty, negligence and elder abuse claims. After being ordered to arbitration and pursuing her claims in that forum for years, plaintiff asserted she could no longer afford to arbitrate. According to plaintiff, if she must remain in arbitration and pay half of the arbitration costs—upwards of $100,000 —she will be unable to pursue her claims at all.

Plaintiff initially sought *Roldan* relief from the arbitrators. But they ruled it was outside their jurisdiction, and they directed her to the superior court. So, plaintiff filed this declaratory relief action in the superior court, again seeking relief under *Roldan*. However, the superior court granted summary judgment to defendants on the grounds the arbitration provisions were valid and enforceable, and that plaintiff's claimed inability to pay the anticipated arbitration costs was irrelevant. This was error.

Though the law has great respect for the enforcement of valid arbitration provisions, in some situations those interests must cede to an even greater, unwavering interest on which our country was founded—justice for all. Consistent with *Roldan*, and federal and California arbitration statutes, a party's fundamental

right to a forum she or he can afford may outweigh another party's contractual right to arbitrate.

In this case, there are triable issues of material fact regarding plaintiff's present ability to pay her agreed share of the anticipated costs to complete the arbitration. The trial court therefore erred in granting defendants' motion for summary judgment.

FACTS AND PROCEDURAL HISTORY

Plaintiff and her husband, now both in their 80's, were fairly well-off at one point in their lives. Among their assets were two properties in Las Vegas, Nevada. In 2006, they exchanged the Las Vegas properties, under federal Internal Revenue Code section 1031, for a commercial property in Texas which was improved with a Red Robin restaurant and was supposedly worth $4.1 million.

Defendants represented plaintiff and her husband in the property exchange transactions. All of the relevant contracts plaintiff and her husband signed with defendants contained arbitration clauses.

When they acquired the Texas property, plaintiff and her husband believed they would receive rent payments from the tenant, Red Robin. They also understood that the lease obligated the tenant to pay the property taxes.

Shortly after the Texas escrow closed, the tenant became delinquent in making rent payments and failed to pay the property taxes. This persisted

throughout the next seven years, leading to an alleged loss to plaintiff and her husband of more than $600,000 in income alone. The couple ultimately sold the Texas property for $2.1 million less they [sic] paid for it.

Before selling the Texas property at a loss, plaintiff filed suit against defendants (the underlying court action), claiming breach of fiduciary duty, negligence, negligent misrepresentation and elder abuse, and seeking compensatory and punitive damages. The complaint in the underlying court action alleged plaintiff had informed defendants "she knew very little about commercial real estate investing, . . . and that she wanted a safe and secure investment with a decent return." It further alleged defendants recommended the Texas property because it was a "wonderful investment" and the restaurant on the property "was busy and doing well financially." And it alleged she acquired the Texas property for $2 million above fair market value, based on misrepresentations and other wrongdoing by defendants.

In response to the complaint, defendants filed a motion to compel arbitration. Plaintiff did not oppose the motion, and the court ordered the matter to be arbitrated by the American Arbitration Association (AAA). The court also stayed underlying court action pending completion of the arbitration, and it expressly retained jurisdiction for purposes of monitoring the progress of the arbitration.

Over the course of the next two years or so, the arbitration proceedings moved forward slowly. From

the outset, the parties disagreed not only about the substance of plaintiff's claims, but also about how the arbitration should proceed. For example, due to the amount of plaintiff's claim—$2.8 million—defendants insisted the AAA rules dictated the case could "*only be heard and determined by a Panel of three arbitrators*." Plaintiff, on the other hand, believed a single arbitrator was permissible and appropriate. An arbitrator eventually ordered the case to be decided by a three-person panel, at an hourly rate of $1,450.

The arbitration panel set a discovery schedule and established procedural rules for the arbitration. The parties engaged in discovery.

Nearly three years after the court ordered the arbitration, and during a second prehearing conference with the arbitrators, plaintiff asserted she was unable to afford her 50-percent share of the arbitration costs. Relying on *Roldan, supra*, 219 Cal.App.4th 87, 161 Cal.Rptr.3d 493, plaintiff asked the arbitrators to issue an order giving defendants two options: (1) continue with the arbitration and pay the entire cost of it; or (2) have the matter tried in superior court instead. At the time, plaintiff's share of the arbitration costs had already exceeded $15,000, and she anticipated the overall costs to complete the arbitration would be upwards of $100,000, not including expert witness and discovery related fees.

The arbitrators concluded *Roldan* relief was beyond their jurisdiction. So, the panel ordered plaintiff to ask the superior court to determine whether *Roldan*

required defendants to be given the two above-described options.

Plaintiff filed this separate declaratory relief action, seeking a declaration and order that either: (1) "Defendants [shall] bear the full financial responsibility of the costs of the arbitration"; or (2) "Defendants have waived their right to arbitration and the [u]nderlying [a]ction shall be remanded or refiled in the [s]uperior [c]ourt. . . ."

Defendants eventually moved for summary judgment in this case. Defendants characterized plaintiff's *Roldan* claim as being an "unconscionability" issue. Defendants argued unconscionability must be determined as of the time the arbitration agreement is entered into, and they claimed it was undisputed plaintiff and her husband were wealthy at that time. They also argued plaintiff's *Roldan* claims were untimely because she should have raised them when the court originally considered defendants' motion to compel arbitration.

Plaintiff opposed the motion. She contended, based on *Roldan*, the court had to consider her current financial situation to determine whether defendants should be forced to pay her share of arbitration costs or have the matter tried in the superior court. She submitted a declaration detailing her current financial situation. She argued the motion should be denied because there were triable issues of material fact concerning whether she could still afford to arbitrate.

Although the court's tentative ruling was to grant the motion, part way through the hearing it appeared convinced there were triable issues of fact. Defendants, however, persuaded the court to accept additional briefing. After considering the additional briefing and hearing further argument, the court granted summary judgment to defendants. The court believed the issue to be decided was whether the arbitration clause was unconscionable, and the court determined plaintiff's present financial status was irrelevant. It agreed with defendants that unconscionability "look[s] to the facts in existence when the agreement was entered into, not years after the date the contract was entered into[,]" and that the undisputed facts showed plaintiff was previously wealthy.

DISCUSSION

Though presented and argued in various ways, the primary point of contention between the parties is this: Are plaintiff's current financial circumstances relevant to whether her underlying claims against defendants remain in the arbitral forum, at defendants' sole expense, or get transferred to, and tried in, the superior court? For the reasons explained below, we conclude plaintiff's current financial circumstances are relevant, and the summary judgment was granted in error, because there are triable issues of material fact concerning plaintiff's ability to pay her share of the arbitration costs.

"'On review of an order granting or denying summary judgment, we examine the facts presented to the trial court and determine their effect as a matter of law.' [Citation.] We review the entire record, 'considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.' [Citation.] Evidence presented in opposition to summary judgment is liberally construed, with any doubts about the evidence resolved in favor of the party opposing the motion. [Citation.]" (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618, 230 Cal.Rptr.3d 415, 413 P.3d 656.)

"[A]ny party to an action, whether plaintiff or defendant, 'may move' the court 'for summary judgment' in his favor. . . ." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 107 Cal.Rptr.2d 841, 24 P.3d 493 (*Aguilar*).) "The court must 'grant [ ]' the 'motion' 'if all the papers submitted show' that 'there is no triable issue as to any material fact' . . . and that the 'moving party is entitled to a judgment as a matter of law.'" (*Ibid*., citations omitted.) The party opposing summary judgment may defeat the motion by demonstrating there is one or more triable issues of material fact. (*Id*. at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493.) The opposing party "'may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.'" (*Ibid*.)

Relying principally on *Roldan, supra*, 219 Cal.App.4th 87, 161 Cal.Rptr.3d 493, plaintiff questions defendants' ability to force her to continue with the arbitration despite a drastic change in her financial circumstances which allegedly makes arbitration unaffordable for her now. Her declaratory relief complaint seeks a judgment declaring that defendants must pay the entire cost of arbitration if they wish to remain in such a forum, and that if they choose not to do so, the matter may instead proceed to trial in the superior court. These were precisely the issues on which she sought an order from the arbitrators, and the arbitrators told plaintiff to seek *Roldan* relief in the superior court because they believed these issues were outside their jurisdiction.

Roldan involved proceedings much like those in this case. The plaintiffs, a group of elderly individuals, sued the lawyers who had represented them in litigation concerning toxic mold contamination in the apartment building where the plaintiffs lived. (*Roldan, supra*, 219 Cal.App.4th at p. 90, 161 Cal.Rptr.3d 493.) Among the allegations were claims of financial elder abuse, conversion, and breach of fiduciary duty. (*Id*. at p. 92, 161 Cal.Rptr.3d 493.) One of the defendant law firms successfully moved to compel arbitration based on an arbitration provision contained in the retainer agreement the plaintiffs had signed. (*Ibid*.) The trial court stayed the case before it pending resolution of the matters via arbitration.

A couple of years after being ordered to arbitration, the *Roldan* plaintiffs filed a motion in the

superior court, "seeking an order decreeing they [were] not required to pay any portion of the 'up front' costs of the arbitration between themselves and [the defendant]." (*Roldan, supra*, 219 Cal.App.4th at pp. 92-93, 161 Cal.Rptr.3d 493.) They claimed relief was warranted because their circumstances had changed after the ordered arbitration. (*Id*. at p. 93, 161 Cal.Rptr.3d 493.) It was undisputed the plaintiffs had since been declared indigent by the court and they could not afford the costs of arbitration, so they contended requiring them to pay arbitration fees in advance would preclude them from pursuing their claims in the arbitral forum. (*Ibid*.) The trial court denied the motion, believing the plaintiffs' changed financial status to be irrelevant. (*Ibid*.)

On appeal, we reversed. (*Roldan, supra*, 219 Cal.App.4th at p. 96, 161 Cal.Rptr.3d 493.) We assumed the trial court's orders compelling arbitration were valid (*id*. at p. 95, 161 Cal.Rptr.3d 493), but went further based on "California's long-standing public policy of ensuring that all litigants have access to the justice system for resolution of their grievances, without regard to their financial means." (*Id*. at p. 94, 161 Cal.Rptr.3d 493.) We explained that if the plaintiffs, in fact, lacked the means to pay their share of the costs of arbitration, forcing the matter to remain in such a forum would effectively result in the plaintiffs being deprived of any forum to resolve their claims against the defendant. This was unacceptable. (*Id*. at p. 96, 161 Cal.Rptr.3d 493.)

In fashioning a remedy, we recognized we do not have the authority to order the arbitrators to waive their fees or to order the defendant to pay the plaintiffs' share of them. (*Roldan, supra*, 219 Cal.App.4th at p. 96, 161 Cal.Rptr.3d 493.) So, we held that if the trial court were to conclude, on remand, that any of the plaintiffs were unable to share the costs of arbitration, then the defendant should be given a choice: "either pay[ ] that plaintiff's share of the arbitration cost [and remain in arbitration,] or waive its right to arbitrate that plaintiff's case." (*Ibid*.) Giving this choice to the defendant ensured the plaintiffs would have an affordable forum for resolving their claims without stripping the defendant of the ability to stay out of court if it so desired. (*Ibid*.)

The facts in this case are not materially different from *Roldan*. Plaintiff was ordered to arbitrate her claims and she proceeded to do so. But after nearly three years of arbitration, during which defendants supposedly "engaged in a scorched earth policy and . . . 'piled on' the onerous costs of arbitration[,]" she claims to be unable to continue to afford to arbitrate. Though there are factual disputes about her current financial situation, if her claimed inability to pay is true, forcing her to remain in the arbitral forum with an obligation to pay half the fees will lead to "the very real possibility [that she] might be deprived of a forum" to resolve her grievances against defendants. (*Roldan, supra*, 219 Cal.App.4th at p. 96, 161 Cal.Rptr.3d 493.) As in *Roldan*, such an outcome is intolerable.

The very reason plaintiff filed the underlying court action against defendants is because their alleged wrongful acts led her and her husband to lose a significant amount of money. And, in the many years of pursuing her case in arbitration, it appears defendants' tactical decisions have further contributed to plaintiff's ostensible financial ruin. In other words, defendants appear to have effectively hindered plaintiff's continued performance under the arbitration provisions. Basic contract law dictates that "hindrance of the other party's performance operates to excuse that party's nonperformance." (*Erich v. Granoff* (1980) 109 Cal.App.3d 920, 930, 167 Cal.Rptr. 538.)

Further, from a public policy standpoint, a defendant accused of wrongdoing should not be permitted to avoid potential liability by forcing the matter to arbitration and subsequently making it so expensive that the plaintiff eventually has no choice but to give up. To hold otherwise would be to turn "' "and justice for all" '" into "' "and justice for those who can afford it" '" and "'threaten the very underpinnings of our social contract.'" (*Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 263, fn. 25, 91 Cal.Rptr.3d 241.) The interest in avoiding such an outcome far outweighs the interest, however strong, in respecting parties' agreements to arbitrate. (*Gutierrez v. Autowest, Inc*. (2003) 114 Cal.App.4th 77, 90, 7 Cal.Rptr.3d 267 [preference for arbitration not served by "agreement that effectively blocks every forum for the redress of disputes, including arbitration itself"].)

The California Arbitration Act (Code Civ. Proc., § 1280 et seq. (CAA)) and the Federal Arbitration Act (9 U.S.C. § 1 et seq. (FAA)) lend further credence to our conclusion.[1] Both are driven by a strong public policy of enforcing arbitration agreements. (*American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228, 233, 133 S.Ct. 2304, 186 L.Ed.2d 417; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 98, 99 Cal.Rptr.2d 745, 6 P.3d 669, fn. omitted.) Thus, a court generally must compel arbitration in accordance with the agreement when requested by one of the parties. (Code Civ. Proc., § 1281.2; 9 U.S.C. § 2.) However, the court action does not disappear and it is effectively held in abeyance until the arbitration "has been had in accordance with the terms of the agreement." (9 U.S.C. § 3; compare Code Civ. Proc., § 1281.4.)[2] The court retains vestigial jurisdiction over

[1] Because we will conclude the pertinent portions of the CAA and the FAA are to be interpreted in a like manner, we need not decide which scheme governs here.

[2] The cited provision of the FAA states more fully: "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action *until such arbitration has been had* in accordance with the terms of the agreement. . . ." (9 U.S.C. § 3, italics added.) The cited provision of the CAA similarly states: "If a court of competent jurisdiction . . . has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding *until an arbitration is had* in accordance

the court action during that time. (*Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1796, 13 Cal.Rptr.2d 678; *PMS Distributing Co., Inc. v. Huber & Suhner, A.G.* (9th Cir. 1988) 863 F.2d 639, 642.)

What it means for an FAA arbitration "to be had" was considered under similar circumstances by the Ninth Circuit Court of Appeals in *Tillman v. Tillman* (9th Cir. 2016) 825 F.3d 1069 (*Tillman*). The plaintiff, an attorney who sued a law firm that had represented her in a wrongful death action, was ordered to arbitrate her claims before the AAA pursuant to an arbitration clause in a retainer agreement invoked by the defendant law firm. (*Id*. at pp. 1071-1072.) As the case progressed, the plaintiff "objected to several aspects of the arbitration as unnecessarily increasing costs." (*Id.* at p. 1072.) The arbitrators nevertheless moved forward with those aspects and required a deposit of approximately $18,500 from the plaintiff. (*Ibid*.) She did not have the money to pay the deposit, and the defendant refused to pay it for her. (*Ibid*.)

After the arbitration was terminated by AAA due to the unpaid deposit, the defendant filed a motion in the district court, asking the court to lift its stay and dismiss the complaint due to, what defendant characterized as, the plaintiff's violation of the order to arbitrate. (*Tillman, supra*, 825 F.3d at p. 1072.) The court found the plaintiff was unable to pay her share of the

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with the order to arbitrate or until such earlier time as the court specifies." (Code Civ. Proc., § 1281.4, italics added.)

arbitration fees, but nevertheless dismissed the case because it believed it lacked the authority to hear the arbitrable claims despite the plaintiff's financial condition. (*Id*. at pp. 1072-1073.)

The Ninth Circuit reversed. It found that all the relevant AAA rules had been followed: the AAA prescribed fees, it requested the parties pay the fees in advance as it deemed necessary, and the arbitration proceedings were suspended and, ultimately, terminated due to nonpayment of the full deposit. (*Tillman, supra*, 825 F.3d at p. 1074.) Accordingly, "the arbitration had 'been had' pursuant to the agreement between the [parties,]" and it was proper to lift the stay of the court proceedings. (*Ibid*.) In addition, because the arbitration terminated before the merits were reached or an award issued, the court concluded the plaintiff must be allowed to pursue her claims in the district court—it was "the only way her claims [would] be adjudicated." (*Id.* at p. 1076.) It remanded the case to the district court so that could occur. (*Id*. at p. 1076.)

We find the Ninth Circuit's reasoning in *Tillman* to be sound and agree its conclusion should apply equally to this case under the CAA.

To be clear, this case is not about "unconscionability." A party arguing unconscionability generally contends that, despite being a term mutually agreed to by the parties, the arbitration provision should be deemed unenforceable because: (1) it is "'"'so one-sided as to "shock the conscience'"'"" (i.e., it is substantively unconscionable); and (2) it came about by surprise or

through a process which was unreasonably oppressive due to, for example, unequal bargaining power (i.e., it is procedurally unconscionable). (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910-911, 190 Cal.Rptr.3d 812, 353 P.3d 741.) When proven, it is a complete defense to enforcement of an arbitration provision. (*Ibid*.)

Here, plaintiff did not argue unconscionability or otherwise challenge the enforceability of the arbitration provisions. She acknowledged the court properly granted defendants' motion to compel arbitration and had issued a corresponding nonappealable order. And, her summary judgment opposition papers clearly stated: "[Plaintiff] is not trying to claim that the arbitration clause was unconscionable when signed nor is she seeking to deprive [defendants] of their right to arbitration. Plaintiff is fine with either forum so long as she can proceed in one of them." The court, therefore, erred in focusing on unconscionability as the primary issue to be decided.

In sum, we hold, as we did in *Roldan*, when a party who has engaged in arbitration in good faith is unable to afford to continue in such a forum, that party may seek relief from the superior court. If sufficient evidence is presented on these issues, and the court concludes the party's financial status is not a result of the party's intentional attempt to avoid arbitration, the court may issue an order specifying: (1) the arbitration shall continue so long as the other party to the arbitration agrees to pay, or the arbitrator orders it to pay, all fees and costs of the arbitration; and (2) if neither of

those occur, the arbitration shall be deemed "had" and the case may proceed in the superior court.[3]

As our Supreme Court has explained, "[b]oth California and federal law treat the substitution of arbitration for litigation as the mere replacement of one dispute resolution forum for another, resulting in no inherent disadvantage." (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1152, 163 Cal.Rptr.3d 269, 311 P.3d 184.) With the rising costs of arbitration (see *Toyo Tire Holdings Of Americas Inc. v. Continental Tire North America, Inc.* (9th Cir. 2010) 609 F.3d 975, 980-981), our decision today ensures those compelled to arbitrate will not, as a result, be inherently disadvantaged.

DISPOSITION

The judgment is reversed. The matter is remanded with directions to deny defendants' motion for

[3] At oral argument, defendants claimed that allowing parties to seek relief from arbitration in the courts based on their current financial condition creates an open invitation for abuse by those seeking to escape their arbitration obligations. We seriously doubt parties will purposefully make themselves impecunious to have their cases returned to the courts. Regardless, we are more concerned with deep-pocketed parties leveraging their wealth to deprive their opponents of the right to resolve their disputes than we are with parties choosing to bankrupt themselves as a way out of arbitration and into court. And, under our holding today, a court may not grant relief if the evidence demonstrates a party's financial status is a result of the party's intentional attempt to avoid arbitration.

summary judgment. Plaintiff is entitled to her costs on appeal.

WE CONCUR:

BEDSWORTH, ACTING P.J.

MOORE, J.

APPENDIX B

Court of Appeal, Fourth Appellate District,
Division Three – No. G053953

S249263

IN THE SUPREME COURT OF CALIFORNIA

En Banc

RAE WEILER, Plaintiff and Appellant,

v.

MARCUS & MILLICHAP REAL ESTATE
INVESTMENT SERVICES, INC. et al.,
Defendants and Respondents.

(Filed Aug. 15, 2018)

The petition for review is denied.

The request for an order directing depublication of the opinion is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

RAE WEILER, Plaintiff, vs. MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES, INC., a California corporation; MARCUS & MILLICHAP CAPITAL CORPORATION, Defendants.	CASE NO. 30-2015-00764843-CU-MC-CJC **JUDGMENT** Judge James Crandall (Filed Jun. 23, 2016)

Defendants' motion for summary judgment came on for hearing on April 21, 2016 and May 26, 2016, the Honorable James Crandall presiding. On May, 2016, the Court issued its order granting Defendants' Motion for Summary Judgment. In accordance with the terms of that order, IT IS NOW ORDERED, ADJUDGED AND DECREED that:

Judgment is entered against Plaintiff Rae Weiler and in favor of Defendants Marcus & Millichap Real Estate Investment Services, Inc. and Marcus & Millichap Corporation. Plaintiff shall take nothing by way of her Complaint.

DATED: 6-23-2016

/s/ James Crandall
James Crandall
Judge of the Orange
County Superior Court

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

RAE WEILER, Plaintiff, vs. MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES, INC., a California corporation; MARCUS & MILLICHAP CAPITAL CORPORATION, Defendants.	CASE NO. 30-2015-00764843-CU-MC-CJC **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** *RESERVATION NO.: 72313242* The Hon. James Crandall Dept.: C33, Central Justice Center Date: May 26, 2016 Time: 1:30 p.m. Action Filed: January 7, 2015 Trial Date: May 31, 2016

The Motion for Summary Judgment Defendants Marcus & Millichap Real Estate Investment Services, Inc. and Marcus & Millichap Capital Corporation ("Defendants") came on for hearing in Department C33 302 on April 21, 2016 at 1:30 p.m. and May 26, 2016 at 1:30 p.m. All parties were represented by counsel, as noted

on the record. After full consideration of the evidence submitted by the parties, the Court finds as follows:

Motion for Summary Judgment – Granted.

When a defendant seeks summary judgment, it bears the burden of proof by a preponderance of the evidence to establish that an action has no merit, that plaintiff cannot prove an element or some elements of a cause of action, or that a complete defense is established as a matter of law entitling it to judgment. *C.C.P.* § 437c(p)(2), and *Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1287.

If the moving party carries its initial burden, then the party opposing the motion must produce admissible evidence to show that a triable issue of fact, or issues of fact, exists. *C.C.P.* § 437c(p)(2), and *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 72.

On a declaratory relief action, the defendant's burden is to establish the plaintiff is not entitled to a declaration in its favor. It may do this by establishing

1. the sought-after declaration is legally incorrect;

2. undisputed facts do not support the premise for the sought-after declaration; or

3. the issue is otherwise not one that is appropriate for declaratory relief. *Gafcon, Inc. v. Ponsor & Associates*, 98 Cal. App. 4th 1388, 1401-02, 120 Cal. Rptr. 2d 392, 400-01 (2002)

Standard of Review

Unconscionability is ultimately a question of law, which we review de novo when no meaningful factual disputes exist as to the evidence. Civ.Code, § 1670.5. Here, there are no "meaningful factual disputes" and therefore the question of unconscionability is one of law.

Pleading

The complaint in this action consists of one cause of action for declaratory relief. By way of this action plaintiff seeks the following:

> 1. For a judgment under the First Cause of Action declaring that Defendants bear the full financial responsibility of the costs of the arbitration of the Underlying Action;
>
> 2. Alternatively, for a judgment under the First Cause of Action that Defendants have waived their right to arbitration and the Underlying Action shall be remanded or refiled in the Superior Court of California with a finding that the Underlying Action has been tolled from August 21, 2012 through the entry of judgment herein;

Unconscionability

The issue here is whether or not the arbitration agreement may be altered and/or ignored based on plaintiffs inability to pay the arbitration fees. Plaintiff contends that the high cost of a three person arbitration panel is prohibitively expensive and unless

defendants either agree to absorb the cost of arbitration or the court mandates the arbitration back to superior court she will be deprived of her "day in court."

On the other hand, defendant contends "unconscionability" is determined at the time the arbitration agreement is entered into. As it is undisputed that plaintiff could afford the arbitration fees at the time the agreement was entered into, she cannot now claim the agreement is unconscionable.

> Generally, "unconscionability is determined as of the time the contract was entered into, not in light of subsequent events." (Morris, supra, 128 Cal.App.4th at p. 1324, 27 Cal.Rptr.3d 797; see also Gutierrez, supra, 114 Cal.App.4th at p. 91, 7 Cal.Rptr.3d 267.) Civil Code section 1670.5, subdivision (a) permits a court to refuse to enforce a contract "[i]V the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made. . . ." Determining ability to pay at the time a party seeks to enforce a contract is contrary to statute and would make enforceability subject to change based on factors potentially outside the knowledge and control of the party seeking to enforce arbitration. *Prada v. Sup. Ct.* (2009) 176 CA4th 1554, 1583.

Plaintiff cites the case of *Roldan v. Callahan & Blaine* (2013) 219 CA4th 87 for the proposition this court has the power to order defendants to pay all of the arbitration fees or to remand this claim to the Superior Court. However, the facts of *Roldan* are different

than those presented here. Here, it is undisputed plaintiff could afford the arbitration fees at the time the contract was entered into. (Defendants' UMF's 3-5.) That was not the case with the *Roland* plaintiffs. The *Roland* Court described the plaintiff's situation as follows:

> **At the time these retainer agreements were entered into**, each of these elderly clients was the recipient of federal section 8 housing subsidies. Consequently, it would seem unlikely that any would be expected to have sufficient available funds to pay a pro rata share of the cost of even a fairly brief arbitration. When we combine that with the fact Callahan has already sought dismissal of the arbitration proceeding due to plaintiffs' claimed inability to pay their portion of the upfront cost, it suggests an affirmative effort to deprive plaintiffs of access to any forum at all. (Emphasis added.) *Roldan v. Callahan & Blaine*, supra at 95.

In *Roldan*, the court did make some accommodation in consideration of the plaintiff's financial condition, but again, the court looked to the facts in existence when the agreement was entered into, not years after the date the contract was entered into.

None of the evidence offered by Plaintiff indicates that she was unable to pay her share of arbitration fees at the time the arbitration agreements were signed. Plaintiffs' UMFs 1-10 refer to her current financial condition and are thus immaterial to this motion.

Here, plaintiff has pointed to no authority which permits a court to essentially overturn a prior court's order compelling arbitration. Plaintiff should have raised her concerns about the cost of arbitration in connection with the original motion to compel arbitration. Either she didn't or the court rejected those arguments. It was not until 2 years after the arbitration was initiated that plaintiff filed this action.

The time line reveals:

April 2005-January 2006 – Plaintiff signs the arbitration agreements

February 24, 2012 – Plaintiff initiates the underlying action

August 12, 2012 – Judge Marks grants the motion to compel arbitration

January 27, 2013 – Arbitration initiated

January 27, 2014 – Arbitration claim amended

June 18, 2014 – Preliminary arbitration conference

Nov. 25, 2014 – Second preliminary arbitration conference

January 7, 2015 – This case initiated

No authority has been provided by plaintiff which would authorize this court to interrupt an ongoing arbitration to consider a party's ability to pay arbitration costs.

Further, the question of allocation of fees is one for the arbitrator, not the court. Unless the parties agree otherwise, provider rules incorporated into the arbitration agreement may permit the arbitrator to require either party to pay the arbitration fees, subject to reallocation in the final award. [*Dealer Computer Services, Inc. v. Old Colony Motors, Inc.* (5th Cir. 2009) 588 F3d 884, 887-888—payment of arbitration fees is procedural condition precedent for arbitrators to decide.

Number of arbitrators

Plaintiff contends she is entitled to only one arbitrator, rather than the more costly three. She contends AAA Rule L-2(a) permits the use of one arbitrator. However, federal case law holds the question of how many arbitrators should hear a case is one for the arbitrator to decide, not the court.

> The presumption of arbitration applies in this case, because whether one arbitrator or three ought to hear the parties' dispute is not a "question of arbitrability," but instead a procedural one it is not an issue that parties would have expected a court rather than an arbitrator to decide, because the AAA rules, which the parties contractually agreed to employ, provide specific non-judicial procedures for its resolution. *Dockser v. Schwartzberg*, 433 F.3d 421, 426 (4th Cir. 2006) (internal citations omitted.)

Based on the above, this court cannot reach the issue of the proper number of arbitrators.

Moving Party has submitted a clarification of the Arbitration Panel's Supplemental Scheduling Order No. 2. That supplemental order states:

> "By order of the Arbitrator, Item 3 of Scheduling Order No. 2 is clarified to read as follows:
>
> "3. By order of the Arbitrators, Claimant will apply to the Orange County Superior Court for a determination of the following question over which the Panel does not have jurisdiction, namely this; whether Respondent must pay Claimant's arbitration fees as a condition of maintaining their arbitration rights (Roldan v. Callahan & Blaine)"

This clarification emphasizes the issue to be submitted to this court is one over which the Panel does not have jurisdiction. However, the Panel *does have jurisdiction* over the procedural issues such as allocation of the payment of fees and as to the number of arbitrators.

What the Panel does not have jurisdiction over is the question of unconscionability. Therefore, the question here is whether or not the arbitration agreement was unconscionable at the time it was entered into. Again, the *Roldan* court determined that the time to consider the facts supporting an unconscionability argument is the time when the parties entered into the contract.

Therefore, *although it may seem patently unfair*, plaintiff cannot obtain an order reallocating the arbitration fees by way of this declaratory relief action.

She needs to bring that argument to the Arbitration Panel.

Plaintiff has provided no authority that an arbitration agreement that has been found "conscionable" by the court can somehow become "unconscionable" almost two years after the arbitration process has begun.

Further, the question of allocation of payment of fees is one for the arbitrator, not the court.

Unless the parties agree otherwise, provider rules incorporated into the arbitration agreement may permit the arbitrator to require either party to pay the arbitration fees, subject to reallocation in the final award. *Dealer Computer Services, Inc. v. Old Colony Motors, Inc.* (5th Cir. 2009) 588 F3d 884, 887-888).

The same is true for the issue of whether one or three arbitrators should hear the claim. *Dockser v. Schwartzberg*, 433 F.3d 421, 426 (4th Cir. 2006).

Defendants Marcus & Millichap Real Estate Investment Services, Inc. and Marcus & Millichap Corporation's motion for summary judgment on the declaratory relief complaint filed by plaintiff Rae Weiler is **granted**.

IT IS SO ORDERED.

DATED: May 26, 2016

/s/ James Crandall
James Crandall
Judge of the Superior Court

APPENDIX E

AMERICAN ARBITRATION ASSOCIATION

Rae Weiler

v.

Marcus & Millichap Real Estate Services, Inc., et al.

AAA Case # 72 20 1300 0092

SCHEDULING ORDER NO.2

A further telephonic preliminary hearing was held on November 25, 2014, before Arbitrators Randall L Erickson, Hon. Robert C. Bonner and Howard F. Harrison. Cornelius P. Behan appeared for claimant and Jill B. Rowe and William G. Norman appeared for respondents.

By agreement of the parties and order of the Arbitrators, the following is now in effect:

1. Marcus & Millichap Capital Corporation is determined to be a party respondent in this proceeding.

2. Claimant has permanently withdrawn the request that the panel recuse itself.

3. Claimant will apply to the Orange County Superior Court, on an expedited basis, for a determination that respondents should pay claimant's arbitrator's fees or the matter should be returned to the Superior Court (Roldan v. Callahan & Blaine).

4. Pending claimant's application to the Court, the parties shall meet and confer to resolve their differences regarding pending written discovery, to

schedule any further written discovery, to schedule percipient witness depositions, and to schedule expert designation and expert witness depositions. The scheduling of such further discovery matters shall be set so as to occur following the Court's determination.

5. A telephonic status conference is set for January 30, 2015, at 2:00PM. THE CASE MANAGER IS REQUESTED TO MAKE THE NECESSARY ARRANGEMENTS. On January 26, 2015, each side will submit a brief report to the Arbitrators as to the status of efforts to resolve discovery issues and the status of claimant's application to the Court. If the Court has not yet ruled, the conference will be postponed to a future date to follow the Court's anticipated ruling. At the status conference, a schedule will be set for respondents to submit a further request to bring a dispositive motion and for claimant to file opposition to the request. Also at the conference, the Arbitrators will set deadlines for the balance of the discovery and expert designation and will set times for the submission of pre-hearing briefs, witness lists, exhibit lists and a statement of stipulated facts.

6. Hearings are set to begin in this matter on October 12, 2015, at 9:00AM at the offices of Crowell & Moring, LLP 3 Park Plaza, 20th floor, Irvine, CA 92614. Ten (10 days are reserved for the hearings.

Although the hearing start date discussed at the further preliminary hearing was October 5, 2015, the scheduling on October 12 Is necessary to accommodate Judge Bonner's schedule.

7. Except as modified herein, all provisions of Scheduling Order No.1 remain In full force and effect.

Dated: November 26, 2014

/s/ Randy Erickson
Randall L. Erickson,
Chair, For the Panel

APPENDIX F

AMERICAN ARBITRATION ASSOCIATION

Rae Weiler

v.

Marcus & Millichap Real Estate Investment Services, Inc., et al.

AAA Case # 72 20 1300 0092

SUPPLEMENTAL SCHEDULING ORDER NO. 2

By order of the Arbitrators, Item 3 of Scheduling Order No. 2 is clarified as read as follows:

3. By order of the Arbitrators, Claimant will apply to the Orange County Superior Court for a determination of the following question over which the Panel does not have jurisdiction, namely this: whether Respondents must pay Claimant's arbitrator fees as a condition of maintaining their arbitration rights (Roldan v. Callahan & Blaine).

Except as modified herein, all provisions of Scheduling Order No. 2 remain in full force and effect.

Dated: May 9, 2016

/s/ H. Harrison
Howard F. Harrison For the Panel