NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KYUNGZA NAMKOONG et al.,

Plaintiffs and Respondents,

v.

MAGNOLIA GARDENS CONVALESCENT HOSPITAL et al.,

Defendants and Appellants.

B141492

(Super. Ct. No. PC 023672 X)

APPEAL from an order of the Superior Court of Los Angeles County. William A. MacLaughlin, Judge. Affirmed.

Huskinson & Brown, Stephen J. Kelley and David W. T. Brown for Defendants and Appellants.

Newkirk, Rolin & Drucker and William H. Newkirk; Law Office of Bruce Adelstein and Bruce Adelstein for Plaintiffs and Respondents.

Kyungza, Kyuo, So Hee, and Kyuwon Namkoong sued Magnolia Gardens Convalescent Hospital, its corporate owners and managers, and one each of its doctors, administrators, and nurses, for wrongful death and related causes of action arising from defendants' care of plaintiffs' mother Jung Ok Lee.

Plaintiffs filed and served the complaint, defendants sought and received discovery, the court ruled on defendants' demurrers and motions to strike, plaintiffs filed a first amended complaint, and defendants answered. Defendants then moved to compel arbitration based on an arbitration clause signed when plaintiffs admitted their mother to the Hospital. Plaintiffs opposed the motion, arguing the arbitration agreement did not comply with statutory requirements, and defendants waived their right to arbitrate by engaging in litigation.

The trial court denied the motion, accepting both plaintiffs' arguments. Defendants sought reconsideration, attaching an additional arbitration clause signed by plaintiffs upon their mother's hospital admission, but presenting no additional evidence on the waiver issue. The trial court and plaintiffs agreed the additional arbitration clause satisfied the statutory requirements. However, the trial court reaffirmed its denial of the motion to compel arbitration on the waiver ground.

As permitted by statute, defendants appeal from the order denying their motion to compel arbitration. (Code Civ. Proc., § 1294, subd. (a); *Boys Club of San Fernando Valley, Inc.* v. *Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1270, fn. 1; all further undesignated section references are to the Code of Civil Procedure.) Defendants contend insufficient evidence supports the waiver finding. (*Banner Entertainment, Inc.* v. *Superior Court* (1998) 62 Cal.App.4th 348, 357.) Plaintiffs correctly agree the standard of review is substantial evidence (*Engalla* v. *Permanente Medical Group, Inc.* (1997) 15

Cal.4th 951, 983; *Berman* v. *Health Net* (2000) 80 Cal.App.4th 1359, 1363), but argue the trial court's waiver finding is so supported.

We reject defendants' contention and affirm the challenged order.

FACTS

Plaintiffs first lodged their mother at the Hospital in March 1997. Plaintiffs signed an arbitration agreement. Lee was discharged without incident after a short stay.

From June 5-28, 1998, plaintiffs again lodged Lee at the Hospital. Plaintiffs again signed an arbitration agreement. According to the first amended complaint, during her 1998 stay, Lee, then 93 years old, "sustained a severe injury to her hip, foot, ankle, forearms and other portions of her body, some of which, or all of which required emergen[cy] medical care, suffered a fractured hip, requiring emergen[cy] medical evaluation, care and treatment, became severely dehydrated and malnourished, suffered metabolic imbalances, developed decubitus ulcers, sustained severe and permanent damage to internal organs, and eventually was required to undergo emergency surgery as a result of [d]efendant[s'] callous, willful and reckless withholding of necessary medical and nursing care, and negligent medical and nursing care, [and] experienced pain and suffering as a consequence of the above physical condition. [Lee] died on July 7, 1998, after surgery at another facility for injuries sustained as a consequence of [d]efendants' care, as a direct result of [d]efendants' acts and failures to act."

The first amended complaint alleged causes of action for medical malpractice and wrongful death, willful misconduct, intentional and negligent infliction of emotional distress, fraud, and unfair business practices.

On March 11, 1999, plaintiffs sent defendants a 90-day notice of intent to sue. (§ 364.) Plaintiffs filed their original complaint on June 17, 1999. Plaintiffs served defendants with the complaint between June 29 and July 12, 1999.

On July 26, 1999, as their first actions after having been served, defendants began serving discovery requests on all four plaintiffs. Defendants served four sets of special interrogatories, four sets of admissions requests, four sets of written document requests, and four sets of form interrogatories, one of each set on each of the four plaintiffs.

The special interrogatories consisted of 8 questions. No. 3 asked, "state each act or omission on the part of defendant[s] . . . that you contend was below the standard of care." No. 4 asked: "State how each act or omission by defendant[s] . . . which was below the standard of practice caused or contributed to the injuries you are claiming in this lawsuit." No. 5 asked: "State the name of each and every health care provider whose care you contend was below the standard of practice." No. 6 asked: "For each health care provider whose care was below the standard of practice, set forth each act or omission which you contend was below the standard of care." No. 7 asked: "State how each act or omission by any health care provider caused or contributed to the demise of decedent . . . LEE." No. 8 asked for the name and address of every health care provider who had treated Lee in the last 10 years.

The admissions requests asked plaintiffs to admit that defendants' treatment of Lee was within the applicable standard of medical care. The document requests demanded all bills documenting damage claims, insurance policies providing coverage for claimed losses, correspondence involving "the incident, attendant circumstances and claimed damages that serve as a basis for this action[,]" "[a]ny and all notes, calendars, diaries or memoranda concerning the incident, attendant circumstances and claimed damages that

serve as a basis for this action[,]" all medications and doctors' notes concerning plaintiffs' treatment since the incident, and all photos, slides, movies, or videotapes related to the incident.

The form interrogatories asked over 40 questions, covering all aspects of the incident, resulting damage claims, medical treatment of Lee and the plaintiffs, descriptions of how the incident occurred, lost income claims, disclosure of potential witnesses, documents, notes, photos, and videos relating to the incident or resulting damages, and asking for all facts, witnesses, and documents relating to denials of the related admissions requests.

In addition, one of the individual defendants, represented by the same attorneys as were all defendants, served additional parallel discovery and a damages statement requests. Plaintiffs responded to all defendants' discovery requests.[1]

On July 29, 1999, three days after filing the discovery requests described above, one defendant filed the first demurrer and motion to strike the complaint. Other defendants later joined these motions. On September 28, 1999, before the court could decide these motions, plaintiffs filed their first amended complaint, mooting defendants' pending demurrer and motion to strike. On October 27, 1999, one defendant filed a second demurrer and motion to strike the first amended complaint. Other defendants later joined those motions. On December 8, 1999, the trial court sustained the second

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1 Neither party included plaintiffs' discovery responses in their papers on the two motions to compel arbitration. However, plaintiffs note in their response brief that the parties agreed below that both sides engaged in discovery, and the trial court assumed without contradiction that plaintiffs had so responded. Moreover, during the reconsideration motion, the parties agreed discovery occurred, but disputed only its extent. Given the short statutory response period and the absence of motions to compel responses, along with the parties' statements, the trial court could reasonably infer plaintiffs responded. On appeal, defendants do not claim plaintiffs did not respond, nor did they dispute plaintiffs' argument in their reply brief.

demurrer in part and overruled it in part. Likewise, the court granted the motion to strike in part and denied it in part. Plaintiffs did not further amend and defendants answered the first amended complaint on January 20, 2000.

Defendants first referred to arbitration in an October 22, 1999, letter to plaintiffs demanding arbitration under the March 1997 arbitration clause. On October 28, 1999, one day after defendants filed their second demurrer, plaintiffs replied, refusing the demand. Plaintiffs stated the cited clause failed to meet the statutory requirements, and defendants waived arbitration by pursuing litigation. Defendants took no further action regarding arbitration until after answering the first amended complaint.[2]

On January 28, 2000, defendants filed their motion to compel arbitration. On March 8, 2000, as noted, the trial court denied the motion. As relevant to the waiver argument, the trial court stated: "[T]he court finds that [defendants] have, by their conduct, waived the right to compel arbitration. This action was originally filed on June 17, 1999 and the[] . . . defendants responded by filing a demurrer and motion to strike on July 29, 1999 which was eventually ordered off calendar by the court on October 12, 1999 because plaintiffs had filed a first amended complaint on September 29 1999 after having obtained the court's approval on September 22, 1999 to make an elder abuse claim.

"On November 17, 1999, [defendants] joined in the demurrer and motion to strike of another defendant directed to the first amended complaint which was heard and ruled upon by the court on December 8, 1999. While the challenge to the pleading was

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2 In their reply brief, without citation to the record, defendants claim the parties engaged in voluntary negotiations during this period, including discussions about whether to submit the case to arbitration.

proceeding, defendant[s] . . . submitted special interrogatories, form interrogatories and production demands to each plaintiff on July 26, 1999[. Another] defendant . . . submitted production demands, requests for admissions, special interrogatories and a request for a statement of damages to each plaintiff on September 23, 1999 and, presumably, received written responses to all this discovery before any demand for arbitration was made.

"The first such request was made by letter dated October 22, 1999 which was rejected by letter dated October 28, 1999. This motion to compel was not filed until January 28, 2000. Had defendants sought to compel ar[bi]tration in a timely manner, the nature of the claims being made would have been resolved by the American Arbitration Association at a preliminary hearing and the discovery managed and probably limited. [Citation.]

"The court concludes that defendants have sought to use the court for their own purposes in limiting the pleadings and conducting written discovery. In so doing, they have substantially reduced the benefits of arbitration to plaintiffs and secured advantages to themselves. Such conduct is inconsistent with a sincere desire for this matter to proceed by arbitration and has waived the right to compel it."

DISCUSSION

In cases such as this, involving private or nonjudicial arbitration, "the Legislature has expressed a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' [Citations.] Consequently, courts will '"indulge every intendment to give effect to such proceedings."' [Citations.]" (*Moncharsh* v. *Heily & Blase* (1992) 3 Cal.4th 1, 9.) The Supreme Court explained the

rationale for this rule: "'The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.' [Citation.] 'Typically, those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts.' [Citation.]" (*Ibid.*)

However, the legislative scheme governing the enforcement of private arbitration agreements expressly provides that the right to compel arbitration may be waived. "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner[.]" (§ 1281.2, subd. (a), emphasis added.)

In interpreting section 1281.2, courts have established that "'[a]rbitration is not a matter of absolute right.' [Citation.] . . . [¶] Whether a party to an arbitration agreement has waived the right to arbitrate is a question of fact, and a trial court's determination on that matter will not be disturbed on appeal if supported by substantial evidence. [Citations.] As with any appeal, we presume the trial court's order granting [or denying a] [ ] petition to compel arbitration is correct, and it is the responsibility of [appellant] to show reversible error. [Citation.] [¶] Since arbitration is a strongly favored means of resolving disputes, courts must 'closely scrutinize any claims of waiver.' [Citations.] A party claiming that the right to arbitrate has been waived has a heavy burden of proof. [Citation.]" (*Sobremonte* v. *Superior Court* (1998) 61 Cal.App.4th 980, 991 [reversing a

trial court order compelling arbitration because appellate court concluded the party seeking to compel arbitration had waived that right].)

"There is no single test for waiver of the right to compel arbitration, but waiver may be found where the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with willful misconduct. [Citations.] The moving party's mere participation in litigation is not enough; the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration. [Citation.]" (*Davis* v. *Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211-212 [affirming waiver of arbitration finding].)

While accepting a similar set of factors to be considered in determining waiver, *Sobremonte* v. *Superior Court*, *supra*, 61 Cal.App.4th at page 992 gave a somewhat longer, more specific list: "In determining waiver, a court can consider '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party. [Citations.]' [Citation.]"

Factors which have been found to sufficiently support a waiver finding include using discovery to obtain information a party could not have discovered in arbitration

(*Davis* v. *Continental Airlines, Inc.*, *supra*, 59 Cal.App.4th at p. 215); unexplained 10-month delay in seeking to compel arbitration, even where a party earlier notified its opponent of the existence of an arbitration clause (*Sobremonte* v. *Superior Court*, *supra*, 61 Cal.App.4th at pp. 992-993); getting discovery responses devoid of content, because doing so itself exposes strengths and weaknesses in an opponent's case (*Berman* v. *Health Net*, *supra*, 80 Cal.App.4th at pp. 1367-1368); and engaging in discovery, motions, and other conduct inconsistent with a desire to arbitrate which prejudiced the opponent. (*Guess?, Inc.* v. *Superior Court* (2000) 79 Cal.App.4th 553, 557-559.)

Applying these rules to our facts, we conclude substantial evidence supports the trial court's waiver finding. Defendants engaged in extensive discovery, although they did not take depositions. Nonetheless, defendants demanded and received extensive information, documents, and facts outlining the strength and weaknesses of plaintiffs' position. This discovery response prejudiced plaintiffs, both due to the time, effort, and expense of compiling it, and by exposing the strengths and weakness of their case. Moreover, defendants litigated multiple demurrers and motions to strike, forcing plaintiffs to amend their complaint, and limiting some theories of recovery. Thus, plaintiffs had to undergo the expense and delay of litigation, without the speed and economy of arbitration. Although defendants notified plaintiffs of their desire to arbitrate in October, they waited to see how their motions would turn out before moving to compel arbitration. Other than the possibility of settlement, always present until finality, defendants offered no explanation for delaying from late June 1999 until late January 2000 before seeking to compel arbitration. Unlike the situation in *Groom* v. *Health Net* (2000) 82 Cal.App.4th 1189, where the party resisting arbitration never responded to the moving party's discovery requests, plaintiffs here produced a great deal of discovery.

This production constitutes substantial evidence of prejudice supporting the trial court's ruling. Thus, defendants' conduct was inconsistent with a desire to obtain the benefits of arbitration, and prejudiced plaintiffs. Substantial evidence supports the trial court's findings and order.

DISPOSITION

We affirm the challenged order. Plaintiffs are entitled to their appellate costs.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P.J.

VOGEL (Miriam A.), J.