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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BRET CASADY, Plaintiff and Appellant, v. THE WAFFLE, LLC, et al., Defendants and Respondents.	B235553 (Los Angeles County Super. Ct. No. BC390138)

APPEAL from orders of the Superior Court of Los Angeles County. Terry A. Green, Judge. Affirmed.

Charles E. Brumfield for Plaintiff and Appellant.

Sidley Austin and Jonathan M. Brenner for Defendants and Respondents.

Bret Casady (Casady), the appellant, was ordered to arbitrate his disputes against The Waffle, LLC (The Waffle), Gavin Polone (Polone) and John Papsidera (Papsidera) (collectively The Waffle Parties). Casady refused to pay a share of the arbitrator's fee and the arbitration was dismissed. The trial court denied Casady's request to restore his civil action, and his subsequent request to order that the dismissed arbitration be recommenced. Casady appeals from each of the trial court's orders. Upon review, we find no error and affirm.

FACTS

The Waffle

Palone and Papsidera are principals in The Waffle. In 2005, through Palone and Papsidera, The Waffle planned to own and operate a restaurant located in space it was renting in the Sunset Media Tower.

The architect contract

On May 4, 2005, Papsidera entered into a contract with John Hamilton (Hamilton) to provide architect services on tenant improvements. In the event of a dispute, the parties agreed to arbitrate.

The design contract

On June 2, 2005, The Waffle entered into a contract with Frederick G. J. Sutherland, doing business as Frederick Sutherland & Co. (Sutherland), to design the tenant improvements.

The Sutherland agreement provided that Sutherland's design and decorating services "shall relate to the design of the following areas of the Project: the main floor dining room and counter, the front patio seating area, the main entry lounge area, the restrooms, the offices, the cocktail lounge, and misc[ellaneous] storage and employee areas." It explained that "[a]ll basic plans, drawings, schedules, and sketches will be reviewed with [The Waffle] . . . and are subject to written approval. The foregoing items will then be assigned respective monetary allowances, and will ultimately be submitted to bretco (general contract license #761809) to perform construction (for an additional fee and under a separate contract). The quality and supervision of the work shall be the

obligation of the general contractor, although we will provide 'reasonable supervision' (which, for purposes of this Agreement, consists of one site visit per week for up to twelve weeks or reasonable equivalent) to determine if the contractor's work conforms to our design specifications."

The third page of the design contract contained the following exclusion: "Not included in this Agreement will be the design of any[] A.V. Systems, I.T. Systems, P.O.S. Systems, Plumbing or Electrical Systems, H.V.A.C. Systems, Drainage/Irrigation Systems, Fire Suppression Systems, Alarm Systems, Roof Systems, Kitchen Design, Graphics, Logos, Corporate Identity, and/or additional Project locations." In addition, the third page stated: "Any controversy or claim arising out of or relating to this contract . . . shall be settled by arbitration administered by the American Arbitration Association."

The design contract was drafted by Casady.[1]

Casady's February 8, 2006, e-mail

Casady sent an e-mail to Papsidera that read: "Hope all is well with you. We received the latest drawings for The Waffle today from Chris Connelly. He has requested that [Sutherland] review the implemented design changes to the main restaurant, mezzanine, and kitchen area that were discussed at our meeting last week at [Hamilton]. [¶] As you know[,] we have already provided a few different kitchen layouts and kitchen equipment schedules to date, all of which are outside our original contracted scope of design work for this project. To help maintain momentum and flow, we are more than happy to provide this service to you, although we will need to discuss additional compensation sometime in the future. [¶] [Sutherland] has requested that you forward him a copy of your most recent menu to aid in his refinement of the final kitchen design/layout and equipment schedule. You can e-mail this back to me and I will see that he gets it. [¶] At this time we would also like to respectfully request a design progress payment in the amount of $12,000." Casady ended the e-mail with the following

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[1] At a hearing in 2008, Casady stated: "Sometimes I do work for [Sutherland] in an administrative assistant capacity."

salutation: "Sincerely, [¶] Bret Casady [¶] [Sutherland]" and then by providing a single telephone number.

The construction contract

On February 16, 2007, The Waffle entered into a construction contract with Casady.[2] He agreed to complete the work specified by Sutherland as well as the work specified by Hamilton. Regarding Casady's fees, the construction contract stated: "The total contract fee shall be 15 [percent] . . . of the hard costs relative to the TOTAL construction budget . . . , plus 5 [percent] . . . of the hard costs relative to the total construction budget. . . . Contract price is based on, but not limited to the $1,214,400.00. . . . TOTAL construction budget as indicated in the [Sutherland] Scope of Work Worksheet dated January 26, 2007." Sutherland's worksheet was attached to the construction contract.

The revised estimated budget

On March 21, 2007, Casady faxed a revised estimated budget to Papsidera. It totaled $1,368,236.40. A week later, Casady e-mailed Papsidera and requested a progress payment on the design fee.

Completion of the project; The Waffle's opening

After the project commenced, Polone was informed that the project was over budget and off schedule. He learned that there were various deficiencies in the project. For example, the original design did not include a "smog hog," a piece of equipment that had to be installed before the restaurant could open. Upon meeting with Casady and Sutherland, Polone said he would not approve any further payments until the project's deficiencies had been resolved.

When the deficiencies were not resolved to Polone's satisfaction, he hired another contractor to complete the project. The Waffle opened its restaurant for business on February 21, 2008.

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[2] Casady was doing business as "bretco."

Casady's mechanic's lien

Casady recorded a mechanic's lien on March 6, 2008. It claimed that The Waffle owed him $104,827.

The Waffle's arbitration demand

Pursuant to the arbitration clause in the design contract, The Waffle made an arbitration demand against Sutherland, Casady and Hamilton. It was filed with the American Arbitration Association. According to The Waffle's demand, Sutherland, Casady and Hamilton breached their respective contracts. In addition, they engaged in negligent conduct and negligent misrepresentation. The Waffle sought $850,991 in damages.

Casady's complaint

On May 2, 2008, Casady filed a complaint against The Waffle Parties for foreclosure of mechanic's lien.

The motions to compel Casady and Hamilton to arbitrate

The Waffle Parties argued that Casady should be compelled to arbitrate his mechanic's lien claim because Casady was an intended third-party beneficiary of the Sutherland agreement; Casady and Sutherland have a preexisting agency relationship such that Casady is subject to the arbitration agreement in Sutherland's agreement with The Waffle Parties; and the principles of equitable estoppel required that The Waffle Parties' disputes with Casady and Sutherland be decided in one consolidated arbitration to avoid conflicting rulings.

To establish that Casady was a third party beneficiary of the design contract, The Waffle Parties explained that a "third party beneficiary is a nonsignatory who is intended to derive a benefit from the contract between other parties and may be bound by the arbitration agreement of that contract. [Citation.] Intent of the contracting parties is the touchstone of this inquiry. [Citation.] Such intent must be evident from the terms of the contract and, thus, explicit references to another party weighs strongly in favor of a finding that the parties intended the contract to benefit that third party. [Citation.] [¶] In the instant case, the intent of The Waffle and Sutherland to make [Casady] a third party

beneficiary to [the design contract] is plainly evident from the language of the contract. [¶] The [design contract] reads in pertinent part: [¶] . . . [Sutherland's] basic plans, drawings, schedules and sketches will . . . be assigned respective monetary allowances, and will ultimately be submitted to [Casady] . . . to perform construction. . . . [¶] . . . [¶] Thus, this contract inextricably links the obligations of Sutherland and the expectations of The Waffle to the designation of [Casady] as the general contractor of the project. Sutherland's performance is made contingent upon [Casady's] performance. The [design contract] presupposes the inclusion of [Casady] in this project. Stripped to its essence, the above passage operates as a biconditional agreement, locking The Waffle into a contract with both Sutherland *and* [Casady] when [The Waffle] entered into this agreement. . . . Indeed, when [Casady] subsequently entered into his own contract with [The Waffle Parties], that contract also specifically referenced the [design contract], thus demonstrating that [Casady] had intended to be bound by [the design contract] and further tying [Casady's] performance to Sutherland's." In The Waffle Parties' view, Casady realized a direct benefit from the design contract: he became the contractor for the construction project.

As evidence that Sutherland and Casady were essentially acting as agents of each other, The Waffle Parties argued that they were "the functional equivalent of business partners." On Casady's Web site, his company boasts that it has over 40 years of combined experience, 15 of which are accounted for by Casady and 27 of which are accounted for by Sutherland. "It . . . states that [Casady's] background is in 'the field of architectural redevelopment, construction, and project management,' but states that design is also one of the services [Casady] offers 'in conjunction with Designer [Sutherland].' . . . This site clearly indicates that these two companies work in tandem, with [Casady] offering contracting services and Sutherland offering design services. Such a partnership is precisely the type of agency relationship that sway[s] the equities in favor of enforcing the arbitration agreement of one partner against the other." In any event, Casady knew that he had been selected as the contractor by The Waffle Parties and Sutherland. Casady then began to work on the project. He knew that Sutherland was

essentially acting as his agent and remained silent. Under the principles of agency, he is therefore required to arbitrate.

Last, regarding equitable estoppel, The Waffle Parties argued that Casady is attempting to enforce his rights under both the design contract and the construction contract. He should be prevented from trying to evade an arbitration clause in a contract he wants to enforce. Further, there is a pending arbitration involving claims by The Waffle Parties against Sutherland and Hamilton and a counterclaim by Sutherland. "Given the fact that the arbitration concerns the same facts, transaction, claims, and defenses as in this case, if [Casady's] action is allowed to proceed, then [The Waffle Parties will] be materially prejudiced. That is because, given the substantial number of overlapping and interrelated issues[s], it is almost certain that conflicting rulings would result. Moreover, it would be an injustice to force [The Waffle Parties] to litigate this dispute in separate forums because that would allow Sutherland and [Casady] to each avoid liability by pointing the finger at each other in the absence of the other party. Therefore, in order to ensure consistent rulings on these substantially related claims, [Casady] should be required to arbitrate his claims in a consolidated arbitration proceeding with Sutherland and Hamilton."

Polone filed a declaration and stated: Sutherland introduced Hamilton and Casady into the project. The estimated cost of the project given to Polone was based on the collective work of the designer, architect and contractor. It was Polone's understanding that the work was a package deal.

In his opposition, Casady argued that he was not a third party beneficiary of the design contract because it contemplated that The Waffle would enter into a separate contract with Casady for construction. At most, the design contract recommended Casady's services. That recommendation did not confer an enforceable benefit on Casady. The Waffle's attempt to characterize Sutherland as Casady's agent must fail. Casady did not sign a writing that gave Sutherland authority to bind Casady to an agreement to arbitrate. Moreover, there is no ostensible agency. Sutherland never said he represented Casady. Equitable estoppel does not apply because Casady is not

attempting to enforce the design contract. Rather, he is simply trying to enforce his mechanic's lien.

After filing a motion to compel against Casady, The Waffle Parties filed a similar motion against Hamilton.

At the hearing,[3] the trial court stated: "In this case there's no question in my mind . . . that [Casady is] a third party beneficiary. . . . It was at all times contemplated that this would be a team or a package deal . . . where [Casady] would be involved in this project." Casady disagreed. In particular, he argued that he received no benefit from the design contract because it did not require The Waffle Parties to hire him as the contractor. The trial court said, "Yes it does." The Waffle Parties added: "If we were to choose another contractor, . . . we'd be in breach of that contract." The trial court agreed. As a result, the trial court ordered Casady to arbitrate and dismissed his civil action without prejudice. Also, it retained jurisdiction to hear any petitions to confirm, vacate or modify the arbitration award. Subsequently, The Waffle Parties and Hamilton entered into a stipulated order, signed by the trial court, to resolve their disputes in the pending arbitration.

Casady's request for a reduction or deferral of fees

On September 22, 2008, Casady called the American Arbitration Association and said he could not afford the filing and administrative fees. Consequently, he requested that those fees be reduced or deferred. In the supporting documentation, he listed his assets as $50,000 in a checking account; $20,000 in a savings account; a 1966 Mercedes worth $5,000; a pickup truck; stock worth $4,500; and a home with an unspecified value. As liabilities, he listed a $3,500 monthly mortgage payment; a $489 monthly lease payment on a vehicle; monthly medical expenses up to $500; $30,000 to $40,000 owed to

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[3] Casady represented himself at the hearing. However, he was accompanied by his father, an inactive attorney. The trial court allowed Casady and Casady's father to participate in the oral argument. Casady's father appeared and spoke at all subsequent hearings.

subcontractors; $25,000 in credit card debt; and an annual $5,000 bill for the cost of education.

A week later, a case manager for the American Arbitration Association wrote a letter to Casady and acknowledged his phone call. In relevant part, the letter stated: "In order to properly evaluate whether all or a portion of the fees should be deferred or waived, the [American Arbitration Association] requires that the requesting party provide financial details substantiating its claim of extreme hardship in [an] . . . Affidavit of Hardship and [provide] copies of Federal Income Tax Returns (with schedules) from the past two years and bank statements for the past three months. In addition, the requesting party should provide a brief history of why the fees would place an undue financial burden on the party."

Casady's responsive letter stated: ". . . I am a General Contractor . . . and I am the sole proprietor of my business. I have no job or source of income at this time. I am married and I am the father of two small children ages 1 and 5. I am the breadwinner in my family. My monthly expenses are upwards of $7,500.00+ and include a mortgage payment, an equity line of credit payment, insurance payments, health care payments, credit card payments, wife's car lease payment, education payments, groceries, gas, clothing, etc. My monthly income at this time is $0.00. [¶] I have no other [source] of income other than those indicated in my American Arbitration Association Affidavit in Support of Reduction or Deferral of Filing and Administrative Fees. [¶] My current financial situation is a direct result of the failure of the [The Waffle Parties] in this case to pay a just debt. [¶] The small amount of money I do have in the bank must be allocated to the needs and well being of my business and my family. The fact of the matter is that I currently have no job, no paycheck, and no income. My bank account is draining at a steady rate of around $9,000.00 a month. I cannot afford to pay any filing or administrative fees at this time."

In connection with his letter, Casady submitted an affidavit, bank account statements and tax returns.

On October 24, 2008, the case manager wrote: "After careful consideration of your request, the [American Arbitration Association] has determined to defer $2,750.00 of the non-refundable initial filing fee of $4,250.00. Therefore, in order to initiate this matter, the [American Arbitration Association] will require a $1,500.00 non-refundable filing fee. If we do not receive the filing fee within 7 days, we will return all paperwork, and will not consider this matter properly filed. The $2,750.00 balance of the filing fee will be due at the conclusion of the case regardless of the outcome. [¶] The [American Arbitration Association] has no authority to defer arbitrator compensation and expenses or non-[American Arbitration Association] hearing room expenses. [¶] . . . This consideration will be accepted until **October 31, 2008**, at which time the above deferral will be withdrawn."

On November 2, 2008, Casady sent a follow up letter and asked the case manager to reconsider her position. He explained: "Since [The Waffle Parties] have refused to pay their bill, I have had to apply for 2 credit cards . . . , which have been maxed out, for the sole purpose of paying subcontractors that were owed money for work performed for [The Waffle Parties]. I am making minimal payments on these credit cards until [The Waffle Parties] pay their past due bills. This additional credit/debit has had a negative [e]ffect on my credit rating. I am out of pocket several thousands of dollars, having paid other subcontractors that don't take credit cards and simply can't wait for payment. Furthermore, the American Arbitration Association has already collected over $8,000.00 in fees relative to this case. I believe that should serve as a sufficient deposit."

A couple of weeks later, the American Arbitration Association agreed to defer the $4,250 filing fee until the conclusion of the case.

Selection of the arbitrator; discovery; suspension of arbitration

The parties selected Henry J. Silberberg (Silberberg) as their arbitrator. After the parties conducted discovery and made discovery motions but before Silberberg heard any evidence, he suspended the proceedings because none of the parties had paid their arbitrator fees.

Casady's ex parte application for order reinstating civil action

On July 16, 2009, Casady requested that his civil action be reinstated. He stated, in part: "In compliance with the [the trial court's] order, [Casady] proceeded to arbitration. Ultimately an arbitrator was selected by agreement of all parties. Ultimately, the discovery process for the arbitration was agreed to by all parties. Ultimately, discovery, which included depositions and document exchange, was completed per the instructions of the arbitrator. The arbitration was finally schedule to commence July 6, 2009. [¶] . . . After over one year of elapsed time, the arbitration pending before the [American Arbitration Association] . . . is now stalled and soon to be terminated due to non-payment of fees to the arbitrator by all parties including [Casady] [and] The Waffle. [Casady's] financial situation is a matter of record with the American Arbitration Association. [¶] . . . It has been more than one year since [Casady] was compelled to arbitrate his claim, all to no avail. It is time for this case to be reinstated, for the matter to go forward in this court, and for a trial date to be scheduled."

The parties convened for a hearing. Casady was not represented by counsel. He said the arbitration was about to be dismissed due to nonpayment of fees by all parties and he wanted "to either go back to court or get some sort of financial help on, you know, I am not doing well." Counsel for The Waffle Parties replied, stating: "The nonpayment was by Mr. Casady of his pro rata share of [Silberberg's] fees. Because [Casady] declared he would not pay that, . . . the administrator had told me that [Silberberg] has suspended the case pending further action." Continuing on, counsel explained that "there is well-established case law that says that if the party is refusing to pay his pro rata share of the arbitrator's fees, [the party] can't come back to court. That would just be a circumvention of the [trial court's] order compelling him to arbitration."

Casady stated that he was unable to pay rather than unwilling.

The trial court asked how much the fee was. Counsel said it was $7,000. Upon hearing this number, Casady said, "There's an initial filing fee and then the arbitration

fees. It's a total of about $12,000.[4] I simply don't have $12,000 to throw at justice[, which is] why I want to be in court." In rejoinder, counsel for The Waffle Parties stated that the American Arbitration Association "already waived their initial filing fee and it is just [Silberberg's] fees at this time. [Silberberg] has also offered to negotiate on his fees. This is an arbitrator that we selected knowing what his rates were going to be way back last year."

The trial court informed Casady that he would have to "make your pitch to [Silberberg]."

In the end, the trial court concluded that it was premature to rule because Silberberg had not yet terminated arbitration. Consequently, Casady's ex parte application was taken off calendar.

The fee deadline; termination of the arbitration

Silberberg issued an order stating that "the arbitration shall be dismissed" unless his fees were paid by August 20, 2009. The Waffle Parties paid $142.50 to cover some of Silberberg's previous charges and $7,823.12 to cover their pro rate share of Silberberg's hearing fees. Casady, Sutherland and Hamilton did not. At Silberberg's direction, the arbitration was terminated.

Casady's second ex parte application for order reinstating civil action

With a few additions, Casady's second request for an order reinstating the civil action was the same as the first.

The Waffle Parties opposed and argued: There was no basis under the California Arbitration Act to vacate the dismissal because it was consistent with the American Arbitration Association's rules for nonpayment of fees. Though Casady complained that he could not pay any arbitration fees, Silberberg already considered that argument. Silberberg reviewed Casady's financial records and ruled that he was entitled to a deferment on some fees. However, he was still required to pay his pro rata share of the

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[4] At one point in 2009, the American Arbitration Association sent Casady a document entitled "Financial History." It indicated that his unpaid balance for the case was $12,712.50.

remaining fees. The trial court does not have the authority to review the merits of Silberberg's decision. In any event, Casady failed to offer any evidence that he lacks the financial ability to pay. Under these circumstances, case law establishes that a civil action cannot be reinstated.

Because Casady did not provide The Waffle Parties with proper notice, the trial court set a new hearing for November 2, 2009.

Casady's motion for order reinstating civil action

In a formally noticed motion, Casady argued that he was entitled to have his civil action reinstated for the following reason: (1) he has a constitutional right to speedy and efficient enforcement of a lien upon property; (2) Polone waived his right to arbitrate by failing to pay Silberberg's fees; and (3) because the arbitration was terminated, there is no longer a risk that there will be conflicting rulings rendered by the arbitrator and by the trial court.

The Waffle Parties, in their opposition, argued that the motion should be denied because it was an improper collateral attack on the American Arbitration Association's findings and orders. Also, the motion was an improper motion for reconsideration of the order compelling Casady to arbitrate. Finally, he failed to provide evidence that he cannot afford to pay arbitration fees.

At the hearing, the trial court stated that the case had been bothering him. He did not think it would be fair to deny an indigent person justice because he could not afford the cost of arbitration. However, contrary to the trial court's expectations, Casady provided no evidence of indigence. The evidence submitted to the arbitrator showed that Casady had $70,000 in the bank plus a home and two cars. The trial court did not understand why Casady did not pay approximately $6,000 in arbitrator fees to recover on his claims.

The motion was denied.

The waiver of fees

Casady wrote to the American Arbitration Association and requested a waiver of all his fees. He explained that he did not have the means to pay for arbitration. He had

$3,800 in his business checking account and three months of reserve funds in his savings account to cover living expenses. He offered to pay $40 a month to cover Silberberg's outstanding fees.

The next day, the American Arbitration Association replied. It stated that it had canceled the filing fee of $4,250. However, that fee would be charged if a new case was filed. Regarding $1,389.38 owing to Silberberg, Casady was given two options. He could pay 80 percent of the balance by November 30, 2009, or he could pay $125 a month until the full balance was paid.

Casady's renewed motion for order reinstating civil action

Casady filed a renewed motion. In support, he identified two new facts: the American Arbitration Association waived all Casady's administrative fees in the amount of $4,250 due to his financial circumstances; and Silberberg offered Casady a 20 percent discount on the arbitrator fee. In his motion, Casady argued that it is unconscionable to force a person to arbitrate his claims when that person cannot afford the cost of arbitration.

The Waffle Parties filed a responsive brief. They argued that the motion was an improper and untimely motion for reconsideration of the trial court's previous orders. Also, the motion amounted to an improper collateral attack on Silberberg's findings and orders regarding Casady's financial status, the payment of fees and the termination of the arbitration. In any event, they argued that the record contradicted Casady's claim that he was indigent. "At the time he applied for a reduction/deferral of the [American Arbitration Association's] fees in September 2008, Casady represented . . . that he had $70,000 in cash, $4,500 in stock holdings, a house on the Westside of Los Angeles (of purportedly unknown value), and two cars. In addition to these assets, Casady also shared with the [American Arbitration Association] that his private contracting company did $1.91 million in business in 2007, and that Casady reported $114,644 in total personal income for his household that year." During 2008, Casady's wife worked part time and earned $12,000. Furthermore, "[a]ccording to the public real estate valuation website, Zillow.com, Casady's home has a present value of $804,000. . . . The website

also indicates that [the] home was last purchased in 2001 (presumably by Casady) for a price of $345,000." In The Waffle Parties' view, Casady could pay his $6,512 share of Silberberg's hearing fees.

The trial court concluded that Casady's purported new facts were not new and did not satisfy Code of Civil Procedure section 1008.[5] The motion was denied.

Casady's motion to recommence arbitration

On June 10, 2011, Casady filed a motion requesting an order that the arbitration be recommenced. In his notice of motion, he stated, in part: "The motion is made upon the grounds that [Casady] is entitled to a forum where his claims may be heard by an impartial trier of fact." In their opposition, The Waffle Parties argued that the trial court had no power to compel Silberberg to recommence an arbitration that he dismissed due to nonpayment of his fees.

At oral argument, the trial court stated that it did not have jurisdiction to grant the motion. Casady's father was present at the hearing. The trial court allowed him to speak. He said: ". . . I want to go on record as saying, I have arranged financing and . . . if the [trial court] . . . is so duty-bound to have matters resolved by arbitration, I'm willing to write a check this morning to whatever amount you think is appropriate to . . . get a hearing." The trial court stated that the time to write the check was in 2008.

The motion was denied. Casady's action was dismissed with prejudice and judgment was entered for The Waffle Parties.

This timely appeal followed.

DISCUSSION

I. The Order Compelling Arbitration.

A. Appealability.

An order compelling arbitration is typically challenged in connection with an appeal from a final judgment entered after arbitration. (*Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 766.) Thus, even though this appeal was filed years after Casady was

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[5] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

ordered into arbitration, this appeal was timely filed after the denial of Casady's postarbitration motions. The denial of those motions, as a functional matter, ended the proceeding before the trial court.

B. Standard of review.

"'Whether an arbitration agreement applies to a controversy is a question of law to which the appellate court applies its independent judgment where no conflicting extrinsic evidence in aid of interpretation was introduced in the trial court.' [Citation.]" (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.) But where "the trial court's decision on arbitrability is based upon resolution of disputed facts, we review the decision for substantial evidence. [Citation.]" (*Ibid*.)

An appellate court analyzes a contract "de novo where '(a) the trial court's contractual interpretation is based solely upon the terms of the written instrument without the aid of extrinsic evidence; (b) there is no conflict in the properly admitted extrinsic evidence; or (c) the trial court's determination was made on the basis of improperly admitted incompetent evidence. [Citation.]' [Citations.]" (*Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1180.) If the interpretation of an ambiguous provision turns upon the credibility of conflicting extrinsic evidence, an appellate court determines whether the interpretation adopted in the trial court is supported by substantial evidence. If that interpretation is supported, it will be upheld if the interpretation is a reasonable one. (*Ibid*.) Notably, there is no conflict in extrinsic evidence when the facts are undisputed but merely give rise to conflicting inferences. (*Medical Operations Management Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 891.)

C. Principles of contract interpretation.

"Subject to the other rules of interpretation, the language of a contract governs its interpretation if the language is clear and explicit and does not involve an absurdity. [Citation.] The whole contract must be considered together in order to 'give effect to every part, if reasonably practicable, each clause helping to interpret the other.' [Citation.] 'The words of a contract are to be understood in their ordinary and popular

sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.' [Citation.] 'Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.' [Citation.] 'A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.' [Citation.] [¶] To the extent the foregoing rules involve parol evidence, the evidence is admissible as follows: 'The determination whether to admit parol evidence involves a two-step process. "First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid the second step—interpreting the contract."' [Citation.]" (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 72–73, fns. omitted.)

D. Casady was properly compelled to arbitrate.

A nonsignatory may be bound by an arbitration clause based on a third party beneficiary theory, agency or estoppel. (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513.) The trial court determined that Casady was bound by the arbitration clause in the design contract because he was a third party beneficiary. According to Casady, the trial court's ruling was manifest error.

"'The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [Citation.] If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract.' [Citations.] In other words, 'the doctrine presupposes that the defendant made a promise which, if performed, would have benefited the third party.' [Citation.]" (*Spinks v. Equity Residential Briarwood*

Apartments (2009) 171 Cal.App.4th 1004, 1022 (*Spinks*).) "Under the intent test, 'it is not enough that the third party would incidentally have benefited from performance.' [Citation.] . . . ' . . . The contracting parties must have intended to confer a benefit on the third party.' [Citation.] 'The effect of [this rule] is to exclude enforcement by persons who are only incidentally or remotely benefited.' [Citation.]" (*Ibid*.) "While intent is pivotal, there is no requirement that 'both of the contracting parties must intend to benefit the third party. . . .' [Citation.] Rather, 'it is sufficient that the promisor must have understood that the promisee had such intent.' [Citations.]" (*Id*. at p. 1023.) "Ultimately, the determination turns on the manifestation of intent to confer a benefit on the third party. [Citation.] 'Ascertaining this intent is a question of ordinary contract interpretation.' [Citation.]" (*Ibid*.)

The design contract stated that "[a]ll basic plans, drawings, schedules, and sketches will be reviewed with [The Waffle] . . . and are subject to written approval. The foregoing items will then be assigned respective monetary allowances, and will ultimately be submitted to [Casady] (general contract license #761809) to perform construction (for an additional fee and under a separate contract)." The plain language of the design contract contemplates that The Waffle Parties would hire Casady as the general contractor on the project. But under *Spinks*, the question is whether The Waffle Parties had a choice.

The phrase "will ultimately be submitted to" Casady is mandatory. So, too, is the phrase "to perform construction (for an additional fee under a separate contract)." Thus, The Waffle Parties promised to enter into a separate contract with Casady to be the general contractor on the project. If the promise is enforceable, then Casady received a direct and intended benefit. Per *Spinks*, we must presume that the parties to the design contract intended its consequences.

There is no suggestion that the contractual language is ambiguous. Assuming for the sake of argument that the language is ambiguous, we note the following: "'A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.' [Citation.] 'In determining the meaning of a written contract

allegedly made, in part, for the benefit of a third party, evidence of the circumstances and negotiations of the parties in making the contract is both relevant and admissible.' [Citations.] [¶] Additionally, a court may consider the subsequent conduct of the parties in construing an ambiguous contract. [Citation.] In determining intent to benefit a third party, the contracting 'parties' practical construction of a contract, as shown by their actions, is important evidence of their intent.' [Citation.]" (*Spinks*, *supra*, 171 Cal.App.4th at pp. 1023–1024.)

Polone declared that it was his understanding that there was a package deal involving Sutherland, Hamilton and Casady. The trial court stated: "In this case there's no question in my mind but that you're a third party beneficiary. . . . It was at all times contemplated that this would be a team or package deal, as the Defense said, where [Casady] would be involved in this project." Casady did not object to Polone's declaration. Nor does Casady challenge the trial court's finding. That finding, by itself, supports the trial court's ruling. In addition, we note that Casady was involved in the project before he signed the construction contract. While working for Sutherland, he drafted the design contract. Also, he communicated with Polone on behalf of Sutherland. Then, subsequently, The Waffle Parties entered into the construction contract with Casady and he performed the specified construction services. Thus, the circumstances surrounding the design contract and the subsequent conduct of the parties provide substantial evidence to support a finding that the parties to the design contract intended to directly benefit Casady.

It is plain from Casady's position in the trial court and on appeal that he does not appreciate the analysis that we espouse. We infer a reason for his lack of appreciation. It appears from his arguments that he has confused the existence of a promise that benefits him with the enforceability of that promise. In essence, when The Waffle Parties signed the design contract, they agreed to agree with Casady about the construction of the contemplated project. That is the promise at issue. Thus, it does not matter that the design contract does not specify Casady's fee, the pricing of the construction or any other matters left for future negotiation. Whether the agreement to agree is enforceable is an

issue that Casady failed to develop below and on appeal. It is true that his briefs contain stray suggestions that the promise was not binding, but they were offered in support only of the argument that there was no direct benefit. Casady did not cite law regarding agreements to agree, which is a waiver. "'[E]very brief should contain a legal argument with citation to authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citation.] [¶] It is the duty of appellant's counsel, not of the courts, 'by argument and the citation of authorities to show that the claimed error exists.' [Citation.]" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.)

To be complete, a few observations are in order. The law provides: "Agreements to agree are valid and enforceable if unessential elements only are reserved for the future agreement. 'The general rule is that if an "essential element" of a promise is reserved for the future agreement of both parties, the promise gives rise to no legal obligation until such future agreement is made.' [Citations.] [¶] Whether a term is 'essential' 'depends upon the relative importance and the severability of the matter left to the future; it is a question of degree. . . .' [Citation.] The relative importance of a term may turn in part upon the intentions of the parties. [Citation.] When, however, 'a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable.' [Citations.] At times, subsequent conduct of the parties may establish the contours of an agreement that appeared uncertain at its inception and thus render it enforceable. [Citation.]" (*Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 417.) Based on the intent of the parties, as well as their subsequent conduct, it is conceivable that the agreement to agree was enforceable either at its inception or after Casady negotiated his terms. In any event, the trial court presumed that the agreement to agree in the design contract was enforceable by Casady. Unless error is demonstrated, we must presume the same. "'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate

practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

E. The scope of arbitration.

Even assuming he was an intended third party beneficiary of the design contract, Casady argues that he should not have been compelled to arbitrate because: (1) the design contract cannot be stretched to cover disputes over work that was excluded from the design contract; and (2) the arbitration presented issues regarding liens outside the arbitrator's authority to decide. These arguments were waived because they were not raised in the trial court.

In any event, Casady's position lacks merit.

Though the design contract was more limited in scope than the construction contract, the point is not relevant. The design contracted stated: "Any controversy or claim arising out of or relating to this contract . . . shall be settled by arbitration." The construction contract arose out of and was related to the design contract. Thus, the scope of arbitration is broad enough to encompass all of Casady's liability claims with respect to his unpaid invoices.

Casady points out that an arbitrator could not order foreclosure of the mechanic's lien against the owners of the Sunset Media Tower or its lender. But that did not prevent arbitration of The Waffle Parties' liability. Indeed, in his opening brief Casady cites a construction handbook for the proper procedure when a contractor wants to foreclose on a mechanic's lien but it is subject to arbitration. He quotes the handbook as stating: "In common practice: the claimant records a claim of mechanic's lien; the claimant demands arbitration; the claimant files an action to foreclose the mechanic's lien; the claimant records a notice of lis pendens; the claimant petitions the court to stay litigation pending arbitration; the award determines the balance due to the claimant; the claimant petitions the [trial court] to dissolve the stay of litigation; the claimant petitions the court to confirm the award; the claimant proceeds to trial against third parties who may claim an interest in the property; and a final judgment of foreclosure determines the priority of the claim of mechanic's lien against all parties who claim an interest in the title to the real

estate." Nothing prevented Casady from following this roadmap, even if he was the one compelled to arbitrate. Thus, nothing prevented Casady from obtaining an arbitration award against The Waffle Parties, petitioning to confirm that award and then going to trial on his foreclosure claim and litigating with the owners of the Sunset Media Tower and their lender.

II. The Orders Denying Casady's Postarbitration Motions.

A. Standard of review.

As we discuss, the trial court's order denying Casady's various postarbitration motions functioned as orders denying petitions to vacate Silberberg's arbitration award. Such orders are reviewed de novo. (*SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1196.)

B. Applicable law.

A party may petition to confirm, correct or vacate an arbitration award. (§ 1285.) The trial court "shall confirm the award . . . unless . . . it corrects the award and confirms it as corrected, vacates the award or dismisses the proceeding." (§ 1286.) The grounds to vacate an arbitration award are limited to the following: (1) the award was procured by corruption, fraud or other undue means; (2) there was corruption in any of the arbitrators; (3) the rights of the party were substantially prejudiced by misconduct of a neutral arbitrator; or (4) the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. (§ 1286.2, subd. (a).)

C. Division One's recent decision regarding the dismissal of arbitration.

In *Cinel v. Christopher* (2012) 203 Cal.App.4th 759 (*Cinel*), Division One of the Second Appellate District considered whether the dismissal of an arbitration is an award. The facts were these. The plaintiff sued six defendants for securities fraud and related claims. One of the defendants, Barna, filed a petition to compel arbitration. The trial court granted the petition and stayed the plaintiff's civil action. The American Arbitration Association requested that each of the parties make an initial deposit for the arbitrator's fees. Of the defendants, only Barna and Christopher paid their share. Due to

nonpayment by the other defendants, a panel of three arbitrators terminated the arbitration. Christopher filed a petition to confirm the arbitration award and dismiss the plaintiff's complaint. (*Id*. at p. 764.) "The trial court denied the motion, stating, 'Nothing happened [at the arbitration]. It should go back. And we'll set it for trial here. If you don't want to go to arbitration, then you're going to have a trial here. [¶] . . . [¶] This happens all the time. People don't want to pay fees. It comes back. . . . You have one person who doesn't [pay], there's no judgment, I won't confirm an arbitration award where nothing really took place because someone didn't want to pay the fees." (*Ibid*.) Following its ruling, the trial court lifted the stay and set the matter for trial. (*Id*. at p. 769.)

The *Cinel* court noted that section 1283.4 provides that an arbitration award shall "'include a determination of all the questions . . . the decision of which is necessary in order to determine the controversy.'" (*Cinel*, *supra*, 203 Cal.App.4th at p. 767.) Based on that statute, the court concluded that the order of the arbitration panel did not constitute an award "within the meaning of section 1283.4 such that it was subject to confirmation pursuant to section 1285." (*Cinel*, *supra*, at p. 767.) The court added: "Before confirming an award, the trial court has a duty, in order to follow the dictates of section 1283.4, to ensure that the arbitrator's 'award' is an 'award' within the meaning of that statute. To do so, it may inquire into the substance of the award without violating the prohibition against judicial review of arbitration awards except in very limited circumstances. As a result, dismissing Christopher's petition did not amount to an unauthorized vacation of the award. Rather, the trial court 'denied' the petition to confirm because there was no substantive award to confirm, correct or vacate." (*Cinel*, *supra*, at p. 767, fns. omitted.)

As for the fate of the plaintiff's claims, *Cinel* said: "Section 1281.4 provides for a stay of pending litigation while a related arbitration is proceeding. [Citation.] Once a stay is granted the trial court retains vestigial powers over the matters submitted to arbitration, including the power to rule on a petition to confirm, correct, or vacate an award. [Citations.] 'This vestigial jurisdiction over the action at law consists solely of

making the determination, upon conclusion of the arbitration proceedings, of whether there was an award on the merits (in which case the action at law should be dismissed because of the res judicata effects of the arbitration award) [citations] or not (at which point the action at law may resume to determine the rights of the parties). [Citations.]' [Citation.] As a consequence here, because the arbitration had been terminated and the trial court did not confirm, correct or vacate Christopher's petition, but instead dismissed the petition, the stay terminated and the trial court properly set the matter for trial." (*Cinel*, *supra*, 203 Cal.App.4th at p. 769, fns. omitted.)

D. Casady was not entitled to reinstatement of his civil action.

Casady contends that the arbitration was terminated without an award on the merits and he was therefore entitled to a determination of his mechanic's lien claim in his civil action. This contention lacks merit.

As a practical matter, the dismissal of the arbitration was an award on the merits. Our conclusion is based on *Cinel* and *Young v. Ross-Loos Medical Group, Inc.* (1982) 135 Cal.App.3d 669, 672 (*Young*).

Per *Cinel*, the trial court was required to look at the substance of the award. With respect to Casady's claim, the substance of the award amounted to a sanction for his failure to pay fees.[6] These facts stand in sharp contrast to *Cinel*. Neither the appellant nor respondent in *Cinel* failed to pay their arbitration fees, so the dismissal—as to them—was not a sanction. Accordingly, the dismissal was not an award on the merits. In other

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[6] If Casady could not afford the cost of arbitration, then Casady's inability to gain access to a forum for his claims would be harsh. Nonetheless, the harsh result would be unavoidable given that Casady was compelled to arbitrate his claims and Silberberg had the authority to dismiss the arbitration due to the nonpayment of fees. The record, however, suggests that Casady refused to pay his share of the arbitration costs even though he was able. Casady admittedly had cash and assets. Instead of paying his arbitration fees, he wanted to pay other bills and otherwise reserve money for living expenses. That was a choice he made and one he must live with. A party who is compelled to arbitrate should not be permitted to avoid the arbitration process by refusing to pay his share of the costs.

words, having played fairly and paid their arbitration fees, they could not be denied a forum for their claims.

Another distinction between this case and *Cinel* bears mention. The civil action in *Cinel* was stayed rather than dismissed. When the arbitration failed, the trial court had jurisdiction to lift the stay and proceed to trial. Here, the civil action was dismissed. The trial court had no jurisdiction to resurrect it. The only jurisdiction it retained was to hear a petition to confirm, correct or vacate.

In *Young*, the arbitrator dismissed the arbitration based on the five-year limit for civil actions. The court held: "It was the arbitrator's decision that [the claimants] take nothing on their claims by reason of their dilatory prosecution. Such an order, even if regarded as in the nature of a sanction, is as much an 'award' as any other final resolution of the arbitration proceeding. [Citation.]" (*Young, supra*, 135 Cal.App.3d at p. 673.) Here, Silberberg determined that the parties should take nothing on their claims due to the nonpayment of his arbitrator fees. In our view, as already indicated, this was essentially an award based on a sanction due to Casady's failure to share the cost of arbitration. And there is no dispute that the rules of the American Arbitration Association gave Silberberg the discretion to dismiss the arbitration under the facts presented.[7] Thus, we conclude that this case is akin to *Young* and it should guide our hand.

For additional guidance, we have looked at the law of dismissals in civil cases. We note that in *Kahn v. Kahn* (1977) 68 Cal.App.3d 372 (*Kahn*), the court concluded that a terminating sanction due to an abuse of discovery is a judgment on the merits. (*Id*. at pp. 382–383.) One rationale is "that a persistent refusal to comply with an order for the production of evidence is tantamount to an admission that the disobedient party really has

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[7] R-54 of the commercial arbitration rules of the American Arbitration Association provides in relevant part: "If arbitrator compensation or administrative charges have not been paid in full, the [American Arbitration Association] may so inform the parties in order that one of them may advance the required payment. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings." (<http://www.adr.org/aaa/faces/rules> (as of Jan. 3, 2013).)

no meritorious claim or defense to the action." (*Id*. at p. 382.) In addition, because the dismissal was not specifically acknowledged in the dismissal statutes—sections 581 et seq.—the dismissal fell within the catchall provision of section 582. That section provides that in all other cases, judgment shall be rendered on the merits. (*Kahn*, *supra*, at p. 382.) *Kahn* establishes that to have teeth, a dismissal based on a party's noncompliance with rules must be binding.

Casady repeatedly points out that Sutherland and Hamilton also did not pay the requisite fees. That does not change our analysis. Casady did not receive a hearing on his claims in arbitration or in court solely because he did not cover his pro rata share of the arbitration hearing. If Casady had paid his fees but no one else did, and if the arbitration was dismissed, then presumably there would not have been an award on the merits of Casady's claims because the dismissal would not count as a sanction against Casady due to nonpayment of fees. Also, The Waffle Parties presumably would have waived their right to arbitrate. In that instance, there would have been a path for Casady to refile his civil action because there would be no arbitration award on the merits with res judicata effect. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 825 [an arbitration award is res judicata].) If Casady and The Waffle Parties had both paid their fees but Sutherland and Hamilton had not, we anticipate that Silberberg would have conducted an arbitration regarding only the claims by Casady and The Waffle Parties. But if Silberberg had still dismissed the arbitration, then Casady and/or The Waffle Parties could have filed a new civil action.

Brock v. Kaiser Foundation Hospitals (1992) 10 Cal.App.4th 1790 (*Brock*), cited by Casady, does not change our analysis. In *Brock*, the court stated: "Once a court grants the petition to compel arbitration and stays the action at law, the action at law sits in the twilight zone of abatement with the trial court retaining merely a vestigial jurisdiction over matters submitted to arbitration. This vestigial jurisdiction over the action at law consists solely of making the determination, upon conclusion of the arbitration proceedings, of whether there was an award on the merits (in which case the action at law should be dismissed because of the res judicata effects of the arbitration

award [citations]) or not (at which point the action at law may resume to determine the rights of the parties). [Citations.]" (*Id.* at p. 1796.)

Brock essentially states that if an arbitrator issues something short of an award on the merits, a civil action can resume. As far as that proposition goes, we agree with it. But the point is of no moment. *Brock* did not consider what happens if an arbitration is dismissed for nonpayment of fees. Nor did it decide whether that type of dismissal qualifies as an award. Thus, *Brock* does not aid Casady's cause. Cases are not authority for propositions not considered. (*Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1439.)

The only statutory basis to attack an arbitration award on the merits is through a motion to correct or vacate. Casady did not ask that the award be corrected. Rather, he asked for it to be disregarded. In our view, the only way to make sense of the motion under the statutory scheme is to view Casady's motion as a petition to vacate the arbitration award. Casady did not argue below—and he does not now argue on appeal—that there are statutory grounds for his motion, e.g., that Silberberg was guilty of misconduct or exceeded his powers. Thus, we easily conclude that Casady has failed to demonstrate grounds for reversal.

E. Casady was not entitled to an order reopening arbitration.

Casady argues that the trial court should have granted his motion to reopen the arbitration. Not so. His motion was an attack on Silberberg's award and qualified as a petition to vacate because the only way for Casady to return to arbitration was if the award was nullified. In his papers, Casady failed to establish a statutory basis for relief. At this juncture, we need not provide further analysis. "It is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

III. The Judgment.

In his final argument, Casady contends that the trial court erred when it dismissed his action with prejudice. The premise of his argument is that Silberberg did not make an

award on the merits. But, as previously discussed, the dismissal for nonpayment of fees qualifies as such an award.

In the alternative, Casady contends that his civil action should not have been dismissed and judgment should not have been entered against him because the dismissal was the result of The Waffle Parties' request for dismissal at the hearing. Casady argues that "no proper petition had been filed giving [Casady] fair notice and opportunity to be heard. The state and federal Constitutions prohibit the government from depriving persons of property without due process."

Here are the problems with Casady's plea.

First, Casady's action was dismissed without prejudice when he was compelled to arbitrate. It is unclear how the trial court could dismiss an action that was already dismissed. The way we construe the record, the trial court simply dismissed the special proceeding regarding Casady's attempt to vacate the arbitration award. Section 1286 specifically contemplates that one outcome of a petition to vacate is that the petition will be denied and the special proceeding will be dismissed. Thus, when the trial court denied Casady's motion and dismissed the special proceeding, it did nothing more than act as it was authorized to by statute.

Second, the dismissal flowed as a consequence of Casady's motion. His motion required a ruling, and the ruling was a denial and dismissal. He had notice of the hearing because he was the one who put the motion on calendar. The trial court's ruling was not prompted by some sort of oral petition by The Waffle Parties. For Casady to characterize what transpired as a violation of his due process rights is patently frivolous and deserves no further analysis.

DISPOSITION

The orders are affirmed.

The Waffle Parties shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ