

LITIGIZATION OF ARBITRATION GONE AWRY – A CASE EXAMPLE

By, Rebecca Callahan

Weller v. Marcus & Millichap Real Estate Investment Services

____ Cal. App. 5th ___, 2018 DJAR 3906 (4th Dist. May 2, 2018)

“Litigization of arbitration” is a phrase that has been coined to describe litigation over process, which results in litigation over procedural issues being preferred to a hearing and decision on the merits of the dispute. This case is a fine example of exactly that!

Twelve years ago, while in her 70’s, Rae Weller made an investment in commercial real estate that resulted in a \$2.6 million loss that significantly depleted her wealth and retirement savings. She claims that she had no experience in commercial real estate and was persuaded to make the investment by defendant Marcus & Millichap, a law firm specializing in real estate investment, and that the firm misrepresented the value of the property and the income-producing capacity of the property.

After several years of trying make the property work, Weller sold the property at a loss and sued Marcus & Millichap for breach of fiduciary duty, negligence, negligent misrepresentation and elder abuse. Based upon the arbitration clause contained in the firm’s engagement agreement, Marcus & Millichap moved to compel arbitration, which the court granted. The matter then proceeded to arbitration. This all happened in about 2012.

For two years, the arbitration moved forward very slowly, with the parties disagreeing not only about the substance of plaintiffs’ claims, but about how the arbitration should proceed. For starters, the arbitration clause provided that the arbitration would be administered in accordance with the AAA’s Commercial Rules. Due to the amount of the plaintiffs’ claim - \$2.6 million – the AAA Rules require a three-arbitrator panel, and Marcus & Millichap insisted that the AAA Rules “dictated” that a three-arbitrator panel be appointed. Weller disagreed and asked for a single arbitrator because the expense for arbitrator time would be approximately \$1,500 per hour with a three-arbitrator panel versus about \$500 per hour with a single arbitrator. An arbitrator was appointed to decide the issue and concluded that a three-arbitrator panel was required. Once the panel was selected, a scheduling order was issued that set discovery, and that is what the parties did until 2015 when Weller could no longer afford the cost of the arbitration.

In 2015, Weller made a motion to the three-arbitrator panel asking them to give the defendant two options: (1) continue with the arbitration and pay the entire cost of it (since it had required the arbitration clause in its engagement agreement), or (2) have

the matter referred back to court for trial. This request was based upon an earlier Fourth District decision in *Roldan v. Callahan & Blaine*, 219 Cal. App. 4th 87 (2013), where such a choice was given to a law firm under similar circumstances, holding that where a party to an arbitration agreement is financially incapable of sharing the costs of the arbitration, the Court has discretion to retain jurisdiction over the action and deny arbitration because to do otherwise would deprive the indigent party of a forum for resolution of the dispute. The arbitrators concluded that “*Roldan* relief” was beyond the scope of their jurisdiction. So they ordered Weller back to the superior court to determine the issue.

Weller then filed a separate declaratory relief action seeking a declaration and order that: (1) defendants bear the full financial responsibility of the costs of the arbitration, or (2) defendants have waived their right to arbitration and the matter shall be remanded to the superior court. Marcus & Millichap moved for summary judgment, arguing that the *Roldan* decision was based on the unconscionability defense and that unconscionability must be determined as of the time the arbitration agreement is entered into, not years later, and that Weller’s *Roldan* claim was untimely. The trial court determined there was no triable issue of fact and granted summary judgment in favor of Marcus & Millichap. This appeal followed.

In May 2018, with Weller now in her 80’s and her breach of fiduciary duty / negligence claims firmly ensconced on the back burner, the Fourth District reversed the trial court’s summary judgment order and remanded with instructions to the trial court to conduct an evidentiary hearing with regard to Weller’s declaratory relief claim because there was a fact dispute concerning Weller’s current financial condition and her alleged inability to pay the costs associated with arbitration.

Side Note: The predicate for “*Roldan* relief” – i.e., allowing the court to reclaim jurisdiction over the merits of a dispute that has been ordered to arbitration – is found in the Ninth Circuit’s 2016 decision in *Tillman v. Tillman*, 825 F.3d 1069 (9th Cir. 2016). In that case, the plaintiff sued a law firm that had represented her in a wrongful death action for malpractice. On motion by the law firm, the matter was ordered to arbitration pursuant to an arbitration clause contained in the retainer agreement. As the case progressed, plaintiff objected to several aspects of the arbitration on the grounds that they unnecessarily increased the cost of the arbitration.¹ The arbitrators nevertheless moved forward with these aspects and required a deposit of approximately \$18,500

¹ In particular, plaintiff objected to the arbitrators’ decision to adjudicate the matter as a “case-within-a-case” adjudication in which the arbitrators would reheat witnesses and evidence presented in the underlying wrongful death action.

from both parties. Plaintiff did not pay because she did not have the money to fund the deposit, and the defendant refused to pay it for her. In accordance with the AAA rules, the arbitration was terminated without a hearing or decision on the merits due to the unpaid deposit.

The defendant then filed a motion in district court asking it to lift its stay order and dismiss plaintiff's complaint due to what the defendant described as the plaintiff's violation of the court's order to arbitrate. The district court found that plaintiff could not afford to pay the deposit, but nevertheless dismissed because it believed it lacked authority to hear the arbitrable claims despite plaintiff's financial condition. The Ninth Circuit reversed, finding that all the relevant AAA rules had been followed concerning suspension and termination of the arbitration due to nonpayment of the full deposit for the arbitrators' fees. Accordingly, the Court determined that an arbitration had "been had" pursuant to the parties' agreement and in conformance with Section 3 of the FAA, and it was thus proper to lift the stay of the court proceedings. Additionally, because the arbitration had terminated before the merits were reached or an award issued, the court concluded that plaintiff must be allowed to pursue her claims in the district court because that was the only way her claims would ever be adjudicated. 825 F.3d at 1074, citing, *Pre-Paid Legal Services, Inc. v. Cahill*, 786 F.3d 1287, 1293-1294 (10th Cir. 2015), cert. denied, ____ U.S. ___, 136 S.Ct. 373 (2015).