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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

LYLE L. BARNES et al.,

Plaintiffs and Appellants,

v.

BAKERSFIELD DODGE, INC., et al.,

Defendants and Respondents.

F067495

(Super. Ct. No. S-1500-CV-271087)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Lorna H. Brumfield, Judge.

Rosner, Barry & Babbitt, Hallen D. Rosner, Christopher P. Barry and Lacey B. Smith for Plaintiffs and Appellants.

Callahan, Thompson, Sherman & Caudill, Robert W. Thompson and Charles S. Russell for Defendants and Respondents.

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Plaintiffs appeal from the order denying their motion for class certification. The trial court denied the motion on the ground plaintiffs' claims were not typical of the class claims and plaintiffs did not share with the other members a community of interest in questions of law and fact because a prior opinion of this court established that defendants waived their right to arbitration of plaintiffs' claims, but did not establish that defendants

waived their right to arbitrate the claims of the other class members. Plaintiffs contend the prior opinion established waiver as to the named plaintiffs and all class members. We conclude the issue of defendants' waiver of the right to arbitrate the claims of the proposed class members was not before the court in the prior appeal; accordingly, we agree with the trial court's interpretation of our prior opinion and affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

Plaintiffs, on behalf of themselves and all other persons similarly situated, sued Bakersfield Dodge, Inc., doing business as Haddad Dodge/Kia (Dodge) and Kern Schools Financial Services, doing business as Kern Schools Federal Credit Union (KSFS) alleging violations of the Automobile Sales Finance Act (Civ. Code § 2981 et seq.), the Unfair Competition Law (Bus. & Prof. Code, § 1720 et seq.), and the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.; CLRA). Plaintiffs alleged they purchased a vehicle from Dodge pursuant to a retail installment sale contract in which Dodge failed to properly itemize the fees paid for license, registration, transfer, and titling. The contract reflected \$488 for license fees and a notation of "N/A" for registration, transfer and titling fees, instead of separating the \$220 license fee from the other fees and reflecting the latter on the separate line. Plaintiffs alleged the fees were not properly disclosed, in violation of the cited statutes, but did not allege they were overcharged for such fees. Plaintiffs' contract was assigned to KSFS, which did not correct the alleged violations.

¹ We notified the parties of our intent to take judicial notice of the record in the prior appeal (*Barnes v. Bakersfield Dodge, Inc.* (May 22, 2012, F063370) [nonpub. opn.]), and afforded them the opportunity to express their views pursuant to Evidence Code section 459, subdivisions (c) and (d). In this matter, defendants objected; plaintiffs did not. One of the primary issues in this appeal is the interpretation of our decision in the prior appeal. We cannot interpret that decision in a vacuum. To put it in context, we must consider the record that was before us in the prior appeal. Accordingly, we take judicial notice of the appellants' appendix and the reporter's transcript from that appeal.

Plaintiffs alleged that each class member purchased a vehicle from Dodge for personal use and executed a retail installment sale contract that failed to separately itemize and disclose the registration, transfer, and titling fees. They alleged a subclass of members whose contracts were assigned to KSFS. Plaintiffs' complaint sought declaratory and injunctive relief, rescission, restitution, actual damages, statutory damages, punitive damages, and attorney fees.

Ten months after the original complaint was filed, after the United States Supreme Court rendered its decision in *AT&T Mobility LLC v. Concepcion* (2011) __ U.S. __, 131 S.Ct. 1740 (*Concepcion*), defendants moved to compel arbitration pursuant to an arbitration agreement included in plaintiffs' contract. The arbitration agreement provided that any party could choose to arbitrate a dispute between the parties and if the dispute was arbitrated, plaintiffs gave up their right to proceed by class action or class arbitration. The trial court granted the motion and plaintiffs appealed. We reversed the order, concluding defendants had waived their right to compel arbitration by litigating the matter in court and expressly stating in pleadings and discovery documents that they were not seeking to compel arbitration.

After remand to the trial court, plaintiffs moved for certification of the class, asserting the same improper lumping together of fees appeared in all class members' retail installment contracts. Defendants opposed plaintiffs' motion and filed their own motion to deny class certification. Defendants asserted the appellate court's prior opinion determined only that defendants had waived their right to compel arbitration of plaintiffs' individual claims, not that they waived their right to compel arbitration of the claims of all proposed class members. Defendants contended the proposed class members were still subject to arbitration pursuant to arbitration agreements in their standard form contracts, and a major issue in the case would be whether defendants could compel them to arbitrate. Accordingly, defendants argued plaintiffs were not adequate class

representatives because their claims were not typical of the proposed class and they were not situated similarly to the proposed class members. For the same reason, defendants argued common issues of law and fact did not predominate.

In response, plaintiffs argued the prior appellate opinion determined defendants waived their right to arbitrate the claims of all proposed class members. Further, they asserted defendants failed to demonstrate all proposed class members even had arbitration clauses in their contracts, and, if they did, defendants had not demanded arbitration of their claims, so the issue of compelling arbitration or determining waiver might never arise.

The trial court denied certification of the proposed class, concluding plaintiffs did not share a well-defined community of interest in questions of law and fact with the proposed class members; it found plaintiffs are not subject to the defense of the arbitration provision, but the proposed class members are. This “undermines a finding of predominant common questions of law and fact, and a finding plaintiffs are class representatives with typical claims or defenses of the class.” Plaintiffs appeal the denial of class certification.

DISCUSSION

I. Standard of Review

“The denial of certification to an entire class is an appealable order.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*)). The trial court’s ruling on a motion for class certification is reviewed for abuse of discretion. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*)). “Trial courts have discretion in granting or denying motions for class certification because they are well situated to evaluate the efficiencies and practicalities of permitting a class action. [Citation.] Despite this grant of discretion, appellate review of orders denying class certification differs from ordinary appellate review. Under ordinary appellate review, we do not

address the trial court's reasoning and consider only whether the result was correct. [Citation.] But when denying class certification, the trial court must state its reasons, and we must review those reasons for correctness. [Citation.] We may only consider the reasons stated by the trial court and must ignore any unexpressed reason that might support the ruling." (*Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 939 (*Knapp*).

"We will affirm an order denying class certification if any of the trial court's stated reasons was valid and sufficient to justify the order, and it is supported by substantial evidence." (*Knapp, supra*, 195 Cal.App.4th at p. 939.) "[A] trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]' [citation]." (*Linder, supra*, 23 Cal.4th at pp. 435-436.)

II. Motion for Class Certification

A class action is authorized "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (Code Civ. Proc., § 382.) "The party seeking certification [of the class] has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. [Citations.] The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Sav-On, supra*, 34 Cal.4th at p. 326.)

Plaintiffs' motion for class certification defined the class as: "All persons who, between July 21, 2006, and July 21, 2010, (1) purchased a vehicle from Defendant Bakersfield Dodge, Inc., dba Haddad Dodge/Kia ... for personal use, and (2) signed a Retail Installment Sale Contract ('RISC') that included the disclosure 'N/A' as the

amount due for 'registration/transfer/titling fees' on Line 2.B. of the Itemization of Amount Financed Section of the RISC." Plaintiffs also sought certification of a subclass of class members "whose RISC was assigned to and/or is held by" KSFS.

Plaintiffs presented excerpts from the deposition of Dodge's president, Elias Haddad, and asserted he admitted that, prior to mid-2008, it was Dodge's practice to aggregate the fees due and list the total on the line for license fees, while noting "N/A" on the line for registration, transfer, and titling fees. There was also evidence some contracts Dodge entered into during that period were assigned to KSFS. Plaintiffs asserted the class was ascertainable, as defined, and Dodge could identify the members through its files; the class included approximately 4,000 members. Plaintiffs contended there were common questions of fact, because all class members purchased a vehicle from Dodge, signed a contract, and the contract disclosed the registration, transfer, and titling fees as "N/A." There were common questions of law, including whether failing to separately disclose the registration, transfer, and titling fees or overstating the license fees violated the consumer protection statutes plaintiffs sued under. Plaintiffs asserted their claims were typical of the claims of the class, because they purchased a vehicle from Dodge and their contract improperly combined the fees on the license fee line and reflected "N/A" on the line for registration, transfer, and titling fees. They maintained that with their counsel, they could adequately represent the class and a class action would be superior to other available methods of adjudicating the class claims.

In opposition to plaintiffs' motion, defendants argued, among other things, that the class should not be certified because plaintiffs' claims were not typical of the class claims; the proposed class members were subject to arbitration agreements that required them to separately arbitrate disputes with defendants, but the named plaintiffs were not. Defendants asserted this also precluded a finding of numerosity, because all the proposed

class members were bound to litigate through bilateral arbitration, so there would be no class members left to litigate with plaintiffs in court.

Defendants filed a motion to deny class certification, in which they argued at greater length that, unlike the named plaintiffs, the unnamed proposed class members were still subject to arbitration and had waived their right to proceed as a class. Defendants asserted this demonstrated an absence of the required community of interest among proposed class members: it rendered plaintiffs' claims atypical, raised issues that plaintiffs did not share in common with the proposed class, and rendered plaintiffs' representation of the proposed class inadequate, because they lacked standing to challenge the arbitration clauses of the proposed class members.

In response, plaintiffs argued our prior opinion determined defendants waived their right to arbitration of all the claims alleged in the complaint, including the class claims. Alternatively, they contended the arbitration clauses in the contracts of the proposed class members, if they were identical to the clause in plaintiffs' contract, were optional and would not take effect until one party or the other elected to arbitrate the dispute; because defendants had not yet demanded arbitration of the claims of the proposed class, the issue was raised prematurely.

The trial court denied class certification on the ground plaintiffs did not share a well-defined community of interest with the proposed class in questions of fact and law. It concluded plaintiffs were not subject to the defense of the arbitration and class action waiver provisions, but the proposed class members were. The trial court stated:

“The survival of this contract defense, at this point in time, against the proposed class members substantially undermines a finding of predominant common questions of law and fact, and a finding plaintiffs are class representatives with typical claims or defenses of the class. [¶] Defendant Bakersfield Dodge waived application of the arbitration clause and the class action waiver clause as to these individual plaintiffs only. The other proposed class members' contracts contain express agreements that they will not pursue class action resolution for any dispute and will instead

litigate their issues arising out of their vehicle purchase from Bakersfield Dodge individually.... The Fifth District Court of Appeal's unpublished opinion in F063370, in this case, found only that Dodge waived the contract defense as to Lyle and Karen Barnes in their individual capacities.” (Unnecessary capitalization omitted.)

Thus, the trial court's stated reason for denying class certification was that the prior appellate opinion found only that defendants waived their right to arbitration as to plaintiffs' claims, not as to all proposed class members' claims. As a result, the proposed class members' claims are subject to defenses to which plaintiffs' claims are not subject; common questions of law and fact do not predominate, and plaintiffs do not share with the proposed class members a well-defined community of interest in questions of law and fact.

Plaintiffs contend the trial court made an erroneous legal assumption when it interpreted the prior appellate opinion to establish waiver only as to plaintiffs' claims and not as to the claims of the proposed class members. Further, they contend the trial court's reasons for denying class certification are not supported by substantial evidence. Accordingly, we will review the trial court's decision to determine whether it is based on an erroneous legal assumption and whether it is supported by substantial evidence.

III. Prior Court of Appeal Opinion

In our opinion in plaintiffs' appeal from the order granting defendants' motion to compel arbitration, we concluded defendants waived their right to arbitration. The parties dispute the scope of that decision.

Defendants' motion to compel arbitration sought “an order compelling binding contractual arbitration,” and was brought “on the grounds that Plaintiffs executed a valid agreement to submit all controversies or disputes between them and Defendants to binding arbitration.” Defendants asserted “Arbitration of Plaintiffs' action is not only appropriate but must be upheld and in light of the class action waiver it must proceed as an individual action and not a class action.” They presented plaintiffs' purchase contract

as evidence of the arbitration agreement. Defendants asserted it was not until the United States Supreme Court issued its decision in *Concepcion, supra*, 131 S.Ct. 1740, which held that California's *Discover Bank* rule invalidating class action waivers in consumer contracts (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148), was preempted by the Federal Arbitration Act (9 U.S.C. § 1, et seq.), that they were aware the class action waiver was not invalid and they could demand arbitration of plaintiffs' claims separately from those of the proposed class.

In opposition to defendants' motion to compel arbitration, plaintiffs argued defendants waived their right to compel arbitration by litigating the matter in court and affirmatively representing they were not demanding arbitration. Further, plaintiffs asserted they did not consent to arbitration, because the arbitration agreement was hidden on the back of the contract, and was not pointed out to them or discussed with them, so they were unaware it was included in their contract. Plaintiffs also argued the arbitration agreement found in their contract was unconscionable, and therefore unenforceable; they based this argument on the provisions of their contract and the circumstances under which they signed it. Finally, plaintiffs contended the waiver of class claims was invalid, at least as to the claims under the CLRA, and by its own terms, the arbitration provision was unenforceable if the waiver of class claims was unenforceable.

The trial court granted "[t]he Motion to Compel Arbitration between the parties, pursuant to the contract between the parties." The motion to compel sought arbitration of the claims of Lyle and Karen Barnes only. The only contract before the trial court was the contract between Lyle and Karen Barnes and Dodge. The only arbitration agreement before the trial court was the agreement contained in the contract between Lyle and Karen Barnes and Dodge. Plaintiffs appealed the trial court's order granting defendants' motion to compel arbitration of plaintiffs' individual claims. There was no order compelling arbitration of the class claims.

On appeal, we reversed the trial court's order, concluding defendants had waived their right to arbitrate plaintiffs' claims by litigating in the trial court and affirmatively asserting they were not demanding arbitration. We directed the trial court to enter a new order denying defendants' motion. We did not rule on any issue of waiver of the right to arbitrate any class claims; that issue was not before the court in the prior appeal. The trial court did not order arbitration of the class claims, plaintiffs did not appeal any such order, and we did not have occasion to rule on the validity or propriety of any such order.

Plaintiffs focus on isolated language in the prior appellate opinion to support their argument that the prior appeal established waiver of defendants' right to arbitrate the claims of the class members, as well as plaintiffs' claims. They cite, for example, language in our discussion of prejudice to plaintiffs from defendants' failure to promptly demand arbitration: "Defendants' lengthy delay in demanding arbitration deprived plaintiffs of the expediency and efficiency of the arbitration process. It denied them the opportunity to resolve the issue of arbitration at the outset, before they had expended substantial time and funds preparing their case and determining their strategies based upon the belief the merits of their claims, including the class claims, would be tried by a jury in court." This passing reference to the class claims in discussing the effect of the delay on plaintiffs was not, and was not intended to be, a substantive ruling on an issue that was not before the court, i.e., whether defendants' waiver of the right to arbitrate plaintiffs' claims extended to the class claims.

We conclude the trial court's decision was not based on an erroneous legal assumption; the trial court correctly interpreted the opinion in the prior appeal to establish only that defendants waived their right to compel arbitration of plaintiffs' individual claims and not to extend that waiver to the class claims.

IV. Substantial Evidence

“An appealed judgment is presumed correct, and the appellant must affirmatively demonstrate error. [Citation.] An appellant challenging the sufficiency of the evidence to support the judgment must cite the evidence in the record supporting the judgment and explain why such evidence is insufficient as a matter of law. [Citations.]” (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1408 (*Rayii*)). “An appellant must provide an argument and legal authority to support his contentions.” (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) If no legal argument with citation of authorities is furnished on a particular point, the court may treat the point as waived, and disregard it. (*Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 694.) All factual matters will be viewed most favorably to the prevailing party. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.)

The trial court’s order states: “Proposed class representatives and individual plaintiffs Lyle Barnes and Karen Barnes are not subject to the defense of the arbitration clause and class action waiver clause contained in their retail installment sales contract while the proposed class members are so subject... The survival of this contract defense, at this point in time, against the proposed class members substantially undermines a finding of predominant common questions of law and fact, and a finding plaintiffs are class representatives with typical claims or defenses of the class.” (Unnecessary capitalization omitted.) Plaintiffs contend the trial court’s decision is not supported by substantial evidence. They assert the only evidence supporting a finding that the proposed class members’ claims are subject to an arbitration agreement was the declaration of Dodge’s business manager, who stated: “In my position as Business Manager, I am familiar with the form Retail Installment Sales Contract (‘RISC’) used by Bakersfield Dodge, Inc. Since at least July of 2006 the form RISCs used for all consumer sales transactions at Bakersfield Dodge, Inc., have contained an arbitration clause. To

my knowledge, every consumer who purchased a vehicle from Bakersfield Dodge at any time since July 2006 signed a RISC containing an arbitration clause.”

Plaintiffs claim this evidence is inadmissible hearsay, and complain that Dodge did not present the proposed class members’ contracts or “any other evidence of the terms of these alleged arbitration clauses.” They present no reasoned argument or citation of legal authority in support of their assertions. They simply posit that the evidence is hearsay and conclude the trial court erred when it determined that, without evidence, every proposed class member would be subject to arbitration. We disregard plaintiffs’ assertion that the evidence was hearsay due to lack of reasoned argument supported by legal authorities.

The trial court found common questions of law and fact did not predominate and plaintiffs did not have claims and defenses typical of the class because the class members are subject to arbitration of their claims and plaintiffs are not. We find no error in the trial court’s conclusion. Defendants produced evidence that every vehicle sales contract Dodge entered into with consumers during the relevant time period contained an arbitration clause. Whatever the terms of the arbitration agreements in the class members’ contracts,² the class members’ claims are subject to the defense that the claims must be arbitrated pursuant to their contracts; they may give rise to issues that will not arise in plaintiffs’ case, including: whether there was a proper demand for arbitration by one party and a refusal to arbitrate by the other party; whether the arbitration agreement covers the current dispute; whether the particular arbitration agreement is valid and enforceable; whether there was a waiver of the right to arbitrate; whether there was any other reason not to enforce the arbitration agreement; and whether the particular arbitration agreement precludes arbitration or litigation as a class. These are all questions

² We note plaintiffs’ dispute that the arbitration agreements in the class members’ contracts are all identical to the arbitration agreement in plaintiffs’ contract.

the proposed class members do not have in common with plaintiffs because plaintiffs are no longer subject to an arbitration agreement. For the same reason, plaintiffs' claims and defenses are not typical of those of the proposed class. Additionally plaintiffs cannot effectively represent any of the class members who must arbitrate their claims, if plaintiffs' claims are being adjudicated in a different forum. Plaintiffs have failed to meet their burden of demonstrating that substantial evidence does not support the trial court's decision.

Plaintiffs' final argument is that substantial evidence supports a finding that plaintiffs share a community of interest with the proposed class members. "The fact that there was substantial evidence in the record to support a contrary finding does not compel the conclusion that there was no substantial evidence to support the judgment." (*Rayii, supra*, 218 Cal.App.4th at p. 1408.) "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.) Thus, we cannot reverse the trial court's order simply because substantial evidence would have supported a contrary ruling.

DISPOSITION

The order denying certification of the class is affirmed. Defendants are entitled to their costs on appeal.

HILL, P. J.

WE CONCUR:

LEVY, J.

KANE, J.