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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

COPY

EDWARD S. PAGTER and
JOANNE TONEY PAGTER,

Plaintiffs and Respondents,

H017971
Santa Clara County
Super.Ct.No. CV766996

v.

FIRST ALLIANCE MORTGAGE and
JEFFREY E.A. PHILLIPS,

Defendants and Appellants.

FILED

FEB 5 - 1999

Court of Appeal - Sixth App. Dist.

DEPUTY

Plaintiffs Edward Pagter and Joanne Pagter are elderly homeowners who refinanced their home with First Alliance Mortgage Company (FAMCO) through its loan officer Jeffrey Phillips. The Pagters brought an action against FAMCO and Mr. Phillips in which they alleged the loan was obtained by fraud. At issue in this appeal, however, is whether the underlying dispute over the loan should be resolved in arbitration. The trial court found that the parties' arbitration agreement was obtained by fraud and denied defendants' petition to compel arbitration and its motion to stay further proceedings. We affirm.

Factual and Procedural Background¹

At the time of their loan from FAMCO, the Pagters lived in Santa Clara, California. Mr. Pagter, who was then 67 years old, operated a swimming pool business, which he had owned and managed since 1975. He had been receiving kidney dialysis treatment since 1993. He was required to drink water "almost constantly." At the time of the loan, Mrs. Pagter was 64 years old and employed as a cafeteria manager.

At the end of 1995, the Pagters began to consider refinancing their existing mortgage, which was approximately \$141,000, because the monthly payments on their adjustable rate mortgage were due to increase in January or February 1996. Shortly thereafter, the Pagters were contacted by FAMCO and they arranged for a FAMCO appraiser to evaluate their home. After the appraisal was completed, the Pagters visited the FAMCO office in San Jose.

On January 3, 1996, the Pagters met with Mr. Phillips. At this time, they were aware that Mrs. Pagter was going to retire in ten or eleven months, at which time they intended to sell their home and move to Lamore, California to live near their daughter. After the Pagters explained that they wanted to save \$2,000 or \$3,000 over the next ten months, Mr. Phillips told them he could save them \$6,000 to \$7,000. He also showed them documents that reflected savings of \$6,000 to \$10,000. Mr. Phillips then presented a loan to the Pagters that would

¹ After an evidentiary hearing on the petition to compel arbitration, the trial court specifically found that the testimony of the Pagters was credible and that of Mr. Phillips was not credible. Accordingly, the statement of facts is based on the testimony of the Pagters.

refinance their existing mortgage, pay off their credit card debt of \$5,730,² and provide the Pagters with approximately \$500 in cash. The Pagters signed various documents to apply for a loan and were given copies of some of these documents.

After the Pagters' loan was approved by FAMCO, they returned on January 10, 1996 to sign the final loan documents. The Pagters signed an Adjustable Rate Note, which shows the principal amount of the loan (\$171,657)³, a Deed of Trust, an Oral Disclosure Statement, Notices of Right to Cancel, and a Mediation and Arbitration Agreement.

Regarding the signing of the documents, Mr. Pagter testified: "Q When you went in to see Mr. Phillips on January 10th, were you in any hurry on that day? [¶] A No, I wasn't. [¶] Q Was Mr. Phillips in a hurry on that day? [¶] A Yes, he was. [¶] Q And what did Mr. Phillips tell you was the reason that he was in a hurry? [¶] A Well, the reason he told us he was in a hurry was because he had to go out and pick [up] one of his children -- a daughter I believe up at a soccer game because his wife wasn't going to be able to get to it and so he had to hurry to get there to do that.⁴ [¶] Q And did Mr. Phillips indicate anything to you about rushing you through the documents? [¶] A Well, -- [¶] Mr. Johnson: Object. [¶] The Witness: He was rushing through the documents because he was in a hurry supposedly to go out and pick up whoever it was at the soccer game. [¶] Q (By Mr. Steinbock): Did he indicate anything to you about rushing

² This amount was later lowered to \$5,524 at the Pagters' request.

³ This amount includes the loan origination fee of \$19,950.

⁴ According to Mr. Phillips, he did not "have another engagement which was pressuring or causing [him] to rush through the meeting."

you through the documents? [¶] Mr. Johnson: Objection. [¶] Mr. Steinbock: I'll rephrase it. [¶] Q (By Mr. Steinbock) Did Mr. Phillips make any apologies to you or indicate anything to you about rushing you through the documents? [¶] A Well, he said, we have to hurry. We'll have to hurry here, apologize for that, but if you sign these documents they will be filled out the way they're supposed to be filled out and we will — just the way we discussed. And so we signed them rather hurriedly. They were passed, shuffled back and forth and passed out between my wife and I and we signed and initialed as rapidly as we could. [¶] Q Now describe if you would — I mean you moved your hand back and forth but describe if you would for the court when you say they were shuffled, what do you mean? [¶] A He would push them out. All right. And then I would initial one and he'd switch them over the same one I signed and initialed to my wife and once she signed and initialed and rolled them back and a couple more out until the forms were signed. [¶] Q Mr. Phillips indicated in his testimony that he went through each document with you, explained each document and explained all of the figures on all of the documents to you before you signed the documents on the 10th. Did that happen? [¶] A No, it did not."

According to Mrs. Pagter, during the visit on January 10, "it was extremely hot, because [Mr. Phillips] said the air conditioning was out in the building and it was just stifling in the office. So we were, you know, it was miserable in there. And also he said he had to leave because he was in a hurry, so this would be a short meeting, we would get through with it very fast." The Pagters were in the FAMCO office 25 minutes⁵ and Mr. Pagter left frequently to drink water due to

⁵ Mrs. Pagter testified that the meeting lasted 25 minutes, while Mr. Pagter estimated that it was 45 minutes.

his kidney disability. In presenting the documents to the Pagters, Mr. Phillips "was getting them confused in his pile of documents, and he would have to shuffle through them and pick out different ones, and it was not very organized." The Pagters did not read the documents before signing them.

The Mediation and Arbitration Agreement is a separate, one-page document.⁶ It is titled in all capital letters and in bold-faced type. The waiver of

⁶ The Mediation and Arbitration Agreement states: "MUTUAL AGREEMENT TO RESOLVE [¶] It is hereby agreed that any Dispute arising out of this Agreement, or any other agreement with First Alliance Mortgage Company, its assigns, agents or employees (together, "First Alliance") concerning the loan, loan documents, disclosure, the relationship between the parties or their performance shall be resolved exclusively by the terms of this Agreement. [¶] "Dispute" shall include: [¶] 1. Any claimed wrongdoing, claim, cause of action, debt, liability, tort, statutory claim or contract claim. [¶] 2. Any claimed violation of state or federal laws, including, but not limited to, state and federal laws and regulations governing consumer credit, disclosure, civil rights, equal opportunity and settlement procedures. [¶] "Dispute" shall not include: [¶] Actions by First Alliance to judicially or non-judicially foreclose on the note and deed of trust (or any other Security Instrument) for the loan, to enjoin waste, to collect rents, interpleader actions or actions for a receiver, for unlawful detainer or relief from the automatic stay in bankruptcy. [¶] MEDIATION AND ARBITRATION OF DISPUTES: [¶] If a borrower(s) has a Dispute with First Alliance, such dispute shall be resolved by taking these steps in this order: [¶] Step. 1. Notice. Borrower(s) must give First Alliance written notice that a Dispute may exist so that First Alliance can look into and hopefully resolve the Dispute. [¶] Step. 2. Arbitration with Mandatory Mediation. If Step 1 has not resolved the matter to borrower(s) or First Alliance's satisfaction, the party wishing to pursue the matter shall initiate binding arbitration under the rules of the American Arbitration Association ("AAA"). The parties hereby stipulate to pre-arbitration mediation under the rules of the AAA. [¶] Arbitration shall be filed in and held at the office of the AAA nearest to the real property securing the loan. Discovery shall be at the discretion of the arbitrator(s). Each party shall bear

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right to jury trial and other waivers are also in capital letters and directly above the signature line. The Pagters signed this document on January 10, 1996.

The Pagters do not recall that Mr. Phillips asked them to sign an arbitration agreement. However, Mrs. Pagter recalls that he said something to the effect "you can mediate," but he did not mention arbitration. The Pagters were not aware that they had signed an arbitration agreement. They would not have signed the document if they had known of its contents, because Mr. Pagter had previously submitted a dental malpractice claim to arbitration and found the experience unsatisfactory.

FAMCO trained its employees to use various methods, including deception, to sell its services. For example, employees were trained to describe the Mediation and Arbitration Agreement as a Fair Lending Notice. As Mr. Phillips explained, they were trained to tell borrowers that "this form states that we're licensed by the State of California, and therefore we adhere to the laws of the State of California which are we are not to discriminate against anyone for race, religion or ethnic background, where they live, that we are not to charge them more if they're living in a specific area and disclosed where -- if a client felt that this had happened to them, any of those things I just mentioned, to government agencies where they could contact, and, you know, make complaints

their own arbitration costs and attorney's fees for mediation and arbitration of Disputes, regardless of what is said in any other agreement between borrower(s) and First Alliance. Judgment on the award may be entered in any court of competent jurisdiction. [¶] WAIVERS [¶] BORROWER(S) AND FIRST ALLIANCE HEREBY FREELY WAIVE THE RIGHT TO TRIAL BY JUDGE OR JURY, THE RIGHT TO APPEAL, PRETRIAL DISCOVERY AND APPLICATION OF THE RULES OF EVIDENCE."

regarding that." Though Mr. Phillips knew that this description of the Mediation and Arbitration Agreement was false, he gave it to borrowers.

According to Mr. Phillips, FAMCO stopped training their loan officers to misrepresent the Mediation and Arbitration Agreement in 1992. However, he was unable to recall any documents that he received regarding this issue. Moreover, his testimony at the hearing and his deposition were in conflict as to who told him that he should stop representing the agreement incorrectly, when he was told, and what he was told.

On June 20, 1997, the Pagters filed a complaint alleging fiduciary abuse of an elder (Welf. & Inst. Code, § 15600), fraud and deceit regarding a consumer credit transaction, fraud and deceit regarding a mediation and arbitration agreement, negligent misrepresentation, negligent lending, breach of a fiduciary duty, unfair and deceptive practices (Civ. Code, § 1770), and unlawful business practices and false advertising (Bus. & Prof. Code, §§ 17200, 17500).

On August 4, 1997, defendants filed a petition to compel arbitration and a motion for stay pending arbitration. Following an evidentiary hearing, the trial court denied the petition. It stated: "The petition to compel arbitration is denied. It is denied on the ground of fraud. Fraud was concealment. The concealment is clearly outlined in the testimony of the Pagters. The court believes the testimony of the Pagters. The court specifically does not believe the testimony of Mr. Phillips."

Discussion

Standard of Review

When the decision of the trial court is based upon undisputed facts, the reviewing court exercises independent review of the trial court's findings. (Ghirardo v. Antonioli (1994) 8 Cal.4th 791, 799.) However, to the extent the trial court's decision turns upon a factual determination, the standard on appeal is whether there is substantial evidence to support the trial court's findings. (Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519, 1527, fn. 2.)

Pursuant to Code of Civil Procedure sections 1281 and 1281.2, the trial court shall grant a petition to compel arbitration if it determines that a written agreement to arbitrate exists, unless the court finds that the right to arbitrate has been waived or there are grounds to revoke the agreement.⁷ The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, and a party opposing the petition bears the burden

⁷ Code of Civil Procedure section 1281 states: "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."

Code of Civil Procedure section 1281.2 states in relevant part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement."

of proving by a preponderance of the evidence any fact necessary to its defense. (Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951, 972.)

Defendants contend that the trial court erred in denying their petition to compel arbitration. They contend that the Pagters had, as a matter of law, a reasonable opportunity to review the arbitration agreement before signing it. We disagree.

In Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394, the court outlined the procedure for deciding a petition to compel arbitration and the sufficiency of the plaintiffs' declarations regarding fraud to avoid arbitration. In that case, the plaintiffs were individuals who had invested in mutual funds through Great Western Financial Securities Corporation (GWFSFC). Most of the plaintiffs had been long-time depositors with Great Western Bank (GWB), a separate corporation related to GWFSFC. They alleged that representatives of both corporations led them to believe GWFSFC representatives worked for GWB, that the mutual funds sold by GWFSFC were insured, and that the GWFSFC mutual funds were backed by GWB or the United States Government. When the plaintiffs' investments decreased in value, they brought claims against GWB and GWFSFC. (Id. at pp. 402-403.)

GWFSFC and four individual defendants then brought a petition to compel arbitration on the ground that the plaintiffs had entered into agreements containing an arbitration clause. The plaintiffs opposed the petition and argued that there had been fraud in the execution of the agreements. Many of the plaintiffs stated that GWFSFC representatives told them that the agreements were unimportant or that they did not need to read them before signing them. The court rejected this evidence. "Such statements, even if falsely and fraudulently made, do not void a written contract, because it is generally unreasonable, in reliance on such assurances, to neglect to read a written agreement before signing

it. One party's making of such an assurance does not, by itself, deprive the other party to a prospective contract of the reasonable opportunity to discover the character and essential terms of the agreement." (*Id.* at p. 424.) The court also noted that "[s]ome plaintiffs also declare that the GWFSC representative 'did not give me any time' to read the agreement (*Allen*), or that they felt 'rushed' (*Carcano*) or 'pressured' (*Rosenthal*). Without evidence the representative actually took some action or said something to hurry or pressure the prospective client, however, these claims add nothing to plaintiffs' showing." (*Id.* at p. 424, fn. 12.)

The plaintiffs further argued that they placed their trust in the GWFSC representatives and relied on their assurances, because they were long-time depositors with *GWB* and were led to believe the GWFSC representatives worked for *GWB*. The court also rejected this argument. "We do not believe, however, these facts are so compelling as to make reasonable plaintiffs' complete reliance on the representatives. To make out a claim of fraud in the execution, it must be remembered, plaintiffs must show their apparent assent to the contracts - their signatures on the client agreements - is negated by fraud so fundamental that they were deceived as to the basic character of the documents they signed and had no reasonable opportunity to learn the truth." (*Id.* at p. 425.) In rejecting the plaintiffs' claims, the court further stressed that the "plaintiffs' declarations do not establish any actual *concealment* by GWFSC of the arbitration clause, or any affirmative misrepresentations regarding the existence or meaning of an arbitration clause in the client agreements." (*Id.* at p. 426.)⁸

⁸ The *Rosenthal* court concluded that the declarations of four of the plaintiffs were sufficient to require further proceedings as to whether they had a reasonable
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Here the Pagters did not read the arbitration agreement before they signed it. However, the record establishes that Mr. Phillips took advantage of their circumstances, particularly those of Mr. Pagter, and thus the Pagters did not have a reasonable opportunity to discover the existence of an arbitration agreement. The January 10 visit to FAMCO lasted 25 minutes in an overheated office. Both Pagters were elderly and Mr. Pagter had severe health problems that required his leaving frequently to obtain drinking water. Disregarding the Pagters' limitations, Mr. Phillips urged them to hurry with their signatures on the pretense that he had to pick up his child at a soccer game. He told them that they "would get through with it very fast." He also told them that the documents would "be filled out the way they're supposed to be." Mr. Phillips then rapidly shuffled 17 documents consisting of 27 pages between the Pagters for their signatures. Moreover, though Mr. Phillips referred to mediation, he never mentioned arbitration to the Pagters. This conduct was consistent with FAMCO's practice of misrepresenting the nature of the Mediation and Arbitration Agreement. Under these circumstances, the trial court properly denied the petition to compel arbitration.⁹

opportunity to learn the terms of the documents that they signed. (Rosenthal v. Great Western Fin. Securities Corp., supra, 14 Cal.4th at pp. 428-429, 431.) Two of the plaintiffs were illiterate and one was legally blind. The fourth plaintiff suffered from Alzheimer's disease. (Id. at pp. 427-431.)

⁹ Defendants' reliance upon Bolanos v. Khalatian (1991) 231 Cal.App.3d 1586, and Rowland v. Paine Webber, Inc. (1992) 4 Cal.App.4th 279, is misplaced. Neither of those cases involved the egregious circumstances of the instant case. Here the signing of the arbitration agreement occurred under conditions which were adverse to an elderly severely disabled client and involved a loan officer who misrepresented the nature of documents, pressured his clients to hurry with the ruse that he needed to pick up his child, and quickly shuffled papers between the two clients.

Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Wunderlich, J.

Pagter v. First Alliance

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