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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOHN C. LABONTY, JR., Plaintiff and Respondent, v. MOMAGER, INC., et al., Defendants and Appellants.	B289830 (Los Angeles County Super. Ct. No. BC676635)

APPEAL from an order of the Superior Court of Los Angeles County, Michelle Court Williams, Judge. Affirmed.

Kinsella Weitzman Iser Kump & Aldisert, Michael Kump, Jonathan P. Steinsapir and Nicholas C. Soltman for Defendants and Appellants.

Allen Matkins Leck Gamble Mallory & Natsis, Todd E. Whitman and Scott J. Leipzig for Plaintiff and Respondent.

The question presented is whether the trial court correctly concluded there was no arbitration agreement, express or via equitable estoppel, between plaintiff John LaBonty and defendants Kim, Khloe, and Kourtney Kardashian; their mother and manager Kris Jenner; their four respective corporations, Kimsaprincess, Inc., Khlomoney, Inc., 2Die4Kourt, Inc., and Momager, Inc.; and their attorney Todd Wilson (collectively the Kardashian defendants). Plaintiff/respondent John LaBonty alleged he was terminated as Chief Executive Officer (CEO) of Haven Beauty, Inc., (Haven) at the instigation of the Kardashian defendants who wanted to deprive him of his equity interest in Haven. The Kardashian defendants moved to compel arbitration. Finding no applicable agreement to arbitrate, the trial court denied the Kardashian defendants' motion to compel arbitration. We affirm.

BACKGROUND

LaBonty's complaint states the following allegations:

The Kardashian defendants routinely grant licenses to third parties to sell various Kardashian products. In May 2012, some of the Kardashian defendants entered into a Licensing Agreement with Boldface Group, Inc., (Boldface) which authorized Boldface to sell Kardashian branded cosmetics and to use the Kardashians' trademark, names, likenesses, and images in connection with sale of those cosmetics. (¶ 18.) The Licensing Agreement between Boldface and the Kardashians included an arbitration clause.

In December 2013, LaBonty began consulting for Boldface. In March 2014, LaBonty signed a three-year written Employment Agreement to serve as Boldface's CEO and President. The Employment Agreement between Boldface and LaBonty included an arbitration clause. LaBonty soon discovered that Boldface was in financial distress. LaBonty advised the board of directors that Boldface was insolvent and needed a buyer, a merger partner, a receivership, bankruptcy protection, or some other restructuring event to survive. (¶¶ 23-25.) Boldface's largest secured creditor was Hillair Capital Management LLC.

In July 2014, the Kardashian defendants, Hillair, and Boldface decided the best course of action was for the Boldface assets, including the Kardashian licenses, to be sold through a vehicle known as an assignment for the benefit of creditors. It was agreed that the Kardashian defendants, Hillair, and LaBonty would form, own, and operate a new company (Newco later named Haven). On July 30, 2014, Hillair and the Kardashian defendants signed a Term Sheet for the new business. The Term Sheet stated Hillair would contribute about $5 million to Newco—about $2 million through a credit bid for Boldface's assets in contemplated insolvency proceedings and about $3 million in equity capital. The Term Sheet provided the [unnamed] CEO of Newco/Haven would have a 5 percent equity interest in the company, with the possibility of earning an additional 4 percent. LaBonty was not a signatory to the Term Sheet, but it is undisputed that the term "CEO" in the Term Sheet referred to him. (¶¶ 29-33, Exh. A.)

Hillair believed Boldface's shareholders would be unwilling to sell the company's assets to Newco so Hillair, as a secured creditor, brought a lawsuit against Boldface, in effect, to foreclose on Boldface's assets. Hillair sought and obtained appointment of a receiver to take over Boldface's assets and property. During the receivership, LaBonty continued to act as CEO of Boldface. (¶¶37–40.)

In October 2014, the receiver scheduled an auction of Boldface's assets. On October 17, 2014, Hillair won the auction with a credit bid. On October 22, 2014, Boldface's assets were awarded to Newco/Haven. The next day, the Kardashian defendants and Hillair named LaBonty CEO of Newco/Haven. (¶¶ 42–46.)

About one year later, on September 21, 2015, Hillair principals notified LaBonty he was being terminated as CEO of Haven effective immediately. (¶ 55.)[1]

On September 20, 2017, LaBonty filed this lawsuit against Hillair and the Kardashian defendants, alleging causes of action for (1) breach of contract based on the Term Sheet; (2) breach of the implied covenant of good faith and fair dealing, also based on the Term Sheet; (3) intentional interference with prospective economic advantage, based on the equity share provision in the Term Sheet; and (4) intentional interference with contractual relations, based on the Term Sheet.

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[1] Interestingly, in March 2016, Hillair filed a separate action in Los Angeles Superior Court against the Kardashian defendants. Hillair's complaint alleges "the core of [that] dispute is a term sheet agreement entered into between Hillair and the Kardashians in July 2014." (BC614374.) (¶ 1.) That action was ordered to arbitration.

In the general allegations of the complaint, LaBonty alleged that after he was terminated, the Kardashian defendants and Wilson "took steps to undermine the deal set forth in the Term Sheet." (¶ 60.) LaBonty alleged two specific examples: on information and belief the Kardashian defendants "ceased making any effort to market, promote, and support the Kardashian Beauty line, as well as interfered with Haven's ability to effectively distribute the Kardashian Beauty line." (¶ 61.) LaBonty then alleged that "[m]ultiple examples of the Kardashian Defendants' failure to perform under the Term Sheet and their conscious effort to undermine Haven are set forth in the Hillair Complaint." (¶ 62.) The allegations in Paragraphs 1 through 62 are incorporated by reference into all four causes of action. For each cause of action LaBonty alleged he was a third-party beneficiary of the Term Sheet and the Kardashian-prompted termination of his employment deprived him of his equity interest in Haven. For each cause of action LaBonty sought damages in the amount of the value he put on the equity interest in Haven granted to him by the Term Sheet.

DISCUSSION

"Both the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and the California Arbitration Act (Code Civ. Proc.,[2] § 1280 et seq.) favor enforcement of valid arbitration agreements. (*Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24–25 [74 L.Ed.2d 765, 103 S.Ct. 927] ['the [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in

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2 All further undesignated statutory references are to the Code of Civil Procedure.

favor of arbitration . . .']; *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 25–26 [58 Cal.Rptr.3d 434, 157 P.3d 1029] [strong public policy in favor of arbitration].) 'The fundamental policy underlying both acts "is to ensure that arbitration agreements will be enforced in accordance with their terms." ' [Citation.]" (*UFCW & Employers Benefit Trust v. Sutter Health* (2015) 241 Cal.App.4th 909, 918-919, fn. omitted.)

"The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration." (*Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990; accord, *Matthau v. Superior Court* (2007) 151 Cal.App.4th 593, 598.)

The parties to an arbitration agreement may agree to delegate the issue of arbitrability to the arbitrator, when, for example, an arbitration agreement incorporates all the JAMS rules for arbitration. (See *Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1442–1443 (*Greenspan*) [incorporation of JAMS rules evidences intent to delegate issue of arbitrability to arbitrator].) However, an agreement to delegate arbitrability does not relieve a party seeking arbitration of its burden of proving to a court the existence of a valid arbitration agreement. As the United States Supreme Court recently made clear, "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. See 9 U.S.C. § 2. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." (*Henry Schein, Inc. v. Archer & White Sales,*

Inc. (2019) 586 U.S. ___ [139 S.Ct. 524, 530] (*Henry Schein, Inc.*).)[3]

California cases interpreting the California Arbitration Act are in accord. " 'The question of whether a nonsignatory is a party to an arbitration agreement is one for the trial court [to decide] in the first instance.' " (*Benaroya v. Willis* (2018) 23 Cal.App.5th 462, 469; see also *American Builder's Assn. v. Au-Yang* (1990) 226 Cal.App.3d 170, 179 ["If an arbitrator, rather than a trial court, were to determine whether an arbitration provision were operative against a nonsignatory, a stranger to the agreement might be subjected to and be bound by an arbitration to which such stranger had not consented and would be without effective review."].)

When a party brings a motion to compel arbitration, the trial court may resolve the motion "in summary proceedings, in which '[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation.]' [Citation.] 'We will uphold the trial court's resolution of disputed facts if supported by substantial

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[3] The Kardashians concede that where a signatory is seeking to enforce an arbitration agreement against a non-signatory who disputes the agreement's applicability, arbitrability must be decided by the court. It is undisputed that LaBonty is not a signatory to the licensing agreement.

evidence. [Citation.] Where, however, there is no disputed extrinsic evidence considered by the trial court, we will review its arbitrability decision de novo.' [Citations.]" (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 683.)

A. It Was The Trial Court's Obligation to Consider Whether The Boldface Employment Agreement Was A Valid Arbitration Agreement.

It is undisputed that the Employment Agreement between LaBonty and his former employer Boldface contains an arbitration provision. The Kardashian defendants contend the trial erred "by ruling on arbitrability at all" as to the Employment Agreement because that agreement incorporated the JAMS rules for arbitration, and in doing so the parties agreed to have the issue of arbitrability decided by the arbitrator. (See *Greenspan, supra,* 185 Cal.App.4th at pp. 1442–1443.)

"[B]efore referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. See 9 U.S.C. § 2. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." (*Henry Schein, Inc.*, *supra*, 139 S.Ct. at p. 530.)

Here, the trial court determined that the Employment Agreement was not a valid arbitration agreement between LaBonty and the Kardashian defendants. It found that the Employment Agreement between LaBonty and Boldface had not been adopted by LaBonty and/or Haven, and so did not govern or apply to LaBonty's employment with Haven. This is a finding that no valid arbitration agreement existed, a decision entrusted only to the trial court and not to any arbitrator.

B. The Employment Agreement Between LaBonty And Boldface Does Not Govern LaBonty's Relationship With Haven.

The Kardashian defendants contend in the alternative that the trial court erred in refusing to compel arbitration under the Employment Agreement between LaBonty and Boldface because Haven adopted the written Employment Agreement between Boldface and LaBonty and LaBonty's claims arise out of his employment with Haven.

The parties offered conflicting evidence on whether Haven adopted the Employment Agreement between LaBonty and Boldface.

LaBonty stated in his declaration in opposition to the motion to compel arbitration: "During my tenure as CEO of Haven Beauty, Inc. I did not have a written employment agreement. [¶] At no time during my tenure as CEO of Haven Beauty, Inc., did I discuss or agree that I would be employed by Haven Beauty, Inc. pursuant to the terms of my written employment agreement with Boldface Group, Inc." He attached a copy of a severance agreement proffered to him upon his termination, and noted that it "makes no reference to any written employment agreement with Haven Beauty, Inc., because one did not exist."

The Kardashian defendants offered evidence "that the amount for which Plaintiff settled [his termination claim against Haven] is the same as the salary under the Boldface agreement." The trial court noted there were at least two apparent differences between the Boldface Employment Agreement and LaBonty's agreement with Haven: (1) the complaint alleges LaBonty as CEO was paid considerably more by Haven than he was paid by

Boldface; and (2) the Boldface employment agreement itself contained a provision providing for LaBonty to acquire an equity interest in Boldface, yet LaBonty's entitlement as CEO to an equity share in Haven was specified in the Term Sheet.

The court found the Kardashian defendants' evidence "insufficient to establish that Plaintiff and Haven agreed Plaintiff's employment would be under the terms and conditions as set out in the Boldface agreement." The court also found Haven was "not the assignee or successor in interest to Boldface, but the purchaser of its asset at a receivership auction."

Undisputed facts establish Haven as a newly formed corporation which acquired the assets of Boldface at a receivership auction. Haven's status as purchaser only of Boldface's assets, LaBonty's declaration, and the difference in the location of the equity interest provisions are substantial evidence to support the trial court's finding that Haven and LaBonty did not agree LaBonty's employment with Haven would be under the same terms and conditions as his employment with Boldface. If we were to review the record de novo, we would reach the same conclusion as the trial court. That LaBonty decided to settle his claims against Haven for the same salary he had received from Boldface does not support an inference that the parties had adopted or ratified all the terms of the written Employment Agreement between LaBonty and Boldface. The Boldface Employment Agreement and its arbitration clause do not reach the claims between LaBonty and the Kardashian defendants.

C. Equitable Estoppel Does Not Compel Arbitration Under the License Agreement.

The Kardashian defendants contend the trial court committed reversible error in failing to address their argument that equitable estoppel compelled application of the arbitration clause of the Licensing Agreement to LaBonty's claims. They argue LaBonty's claims depend on and are inextricably intertwined with the License Agreement executed by certain Kardashian defendants and Boldface.[4] They further contend this court can independently determine the applicability of the doctrine and compel arbitration.

LaBonty replies the Kardashian defendants have forfeited their claim of error based on omissions in the court's written explanation of its ruling. We agree. Ordinarily, we would apply the doctrine of implied findings to this issue. However, because the Kardashian defendants did not offer any extrinsic evidence to

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[4] The Kardashian defendants also argued in the trial court that the License Agreement had been incorporated by reference into the Term Sheet and so could be used to compel arbitration of a dispute under the Term Sheet. The trial court found the License Agreement had not been incorporated. The court found that nothing in the Term Sheet indicated an intent to incorporate the terms of the licensing agreement, and that the agreement was "merely an asset of Haven, not a governing document for the company." The court also found there was no evidence LaBonty's equity share provision in the Term Sheet was to be subject to the terms and conditions of the licensing agreement and that defendants had "not identified any term in the licensing agreement regarding the CEO of either Boldface or Haven." The Kardashian defendants do not identify any error in this ruling on the doctrine of incorporation by reference and we see none.

support their claim, and relied on the allegations of the complaint and the relevant agreements, we presume only that the trial court ruled against the Kardashian defendants. We will review the merits of their claim. We determine that equitable estoppel does not apply.

1. Forfeiture

A statement of decision can be issued in support of a trial court's order denying a motion to compel arbitration. (*Metis Development LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 687.) Section 1291 provides: "A statement of decision shall be made by the court, if requested pursuant to Section 632, whenever an order or judgment, except a special order after final judgment, is made that is appealable under this title." As the Court in *Metis* explained, "[S]ection 1291 mandates the issuance of a statement of decision in the part of the Code of Civil Procedure that pertains to petitions to compel arbitration, and the denial of a petition to compel arbitration is an appealable order, [so] the logical inference is that the Legislature intended to require the trial court to issue a statement of decision, upon proper request under section 632, when denying a petition to compel arbitration." (*Metis,* at p. 687.)

The Kardashian defendants failed to request a statement of decision. "A party's failure to request a statement of decision when one is available has two consequences. First, the party waives any objection to the trial court's failure to make all findings necessary to support its decision. Second, the appellate court applies the doctrine of implied findings and presumes the trial court made all necessary findings supported by substantial evidence. [Citations.] This doctrine 'is a natural and logical corollary to three fundamental principles of appellate review:

(1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.' [Citation.]" (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970.)

Notwithstanding the absence of a request, the trial court sua sponte issued a written decision explaining its ruling. The Kardashian defendants assert the writing is "the functional equivalent of a statement of decision." They contend that we should look to the court's writing to determine whether it was supported by the facts and the law and determine the trial court erred in failing to discuss their equitable estoppel argument.

Treating the writing as a statement of decision means it was rendered pursuant to section 632 et seq. "[S]ection 634 requires that any omissions or ambiguities in the statement of decision must be 'brought to the attention of the trial court either prior to entry of judgment or in conjunction with' a new trial motion (§ 657) or a motion to vacate the judgment (§ 663), thus allowing the court to respond to objections before the taking of an appeal." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 982.) When a party "fails to object under section 634 (depriving the trial court of the opportunity to clarify or supplement its statement of decision before losing jurisdiction), objections to the adequacy of a statement of decision may be deemed waived on appeal." (*Id.* at p. 983.)

The Kardashian defendants believe that because the trial court made a written ruling, this court should review the writing without regard to the waiver doctrine. They rely on *In re Marriage of Rising* (1999) 76 Cal.App.4th 472, where the Court of Appeal undertook a substantive review of a statement of decision

issued sua sponte by the trial court, found the trial court failed to explain the reasons for its step-down order, and remanded the matter for further proceedings. (*Id*. at pp. 476–479 & fn. 7.) In that case, however, "appellant specifically objected to the court's statement of decision on the ground it did not specify the factual or legal basis for the step-downs." (*Id*. at p. 477, fn. 7.) Thus, *Rising* does not assist the Kardashian defendants.

2. Equitable estoppel does not apply.

Equitable estoppel is generally a question of fact. (*Mt. Holyoke Homes, LP v. California Coastal Com.* (2008) 167 Cal.App.4th 830, 840.) If the trial court's decision depends on disputed facts or extrinsic evidence, the doctrine of implied findings applies. If "the facts bearing on the trial court's decision derive solely from the language of plaintiff's complaint and from the terms of the [arbitration agreement], [and] neither [are] in dispute," the "doctrine of implied factual findings does not come into play." (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 708.) In such instances we independently review the questions of law raised by the decision. (*Ibid*.)

Here, the Kardashian defendants did not offer extrinsic evidence to support their argument that equitable estoppel applied. They generally relied on the allegations of the complaint and the language of the Term Sheet and License Agreement. Independently reviewing the record, we find that the doctrine of equitable estoppel cannot be supported by the allegations of the complaint and the language of the agreements alone.

The Kardashian defendants relied on one or two phrases from the general allegations of the complaint, specifically LaBonty's allegation that "the Kardashian Defendants and Wilson took steps to undermine the deal set forth in the Term Sheet. [¶] . . . [T]he Kardashian Defendants ceased making any effort to market, promote and support the Kardashian Beauty line." (¶¶ 60, 61.) LaBonty further alleged that defendants took these "steps to undermine the deal set forth in the Term Sheet in part to deprive LaBonty of any benefits to which he might otherwise be entitled." (¶ 63.) They contend the Term Sheet does not impose any duty on them to make such an effort, and any duty must therefore arise from the License Agreement. Hence the arbitration clause of the License Agreement must apply.

The Kardashian defendants do not address the remainder of the allegations in the post-termination section of the complaint. There, LaBonty also alleges that the Kardashian defendants "interfered with Haven's ability to effectively distribute the Kardashian Beauty line" and that "[m]ultiple examples of the Kardashian Defendants' failure to perform under the Term Sheet and their conscious effort to undermine Haven are set forth in the Hillair Complaint." (¶¶ 61, 62.) It is not possible to determine from these allegations whether LaBonty's termination claim depends on and is intertwined with the Kardashian defendants' actions or inactions after his termination.

The quoted allegations may " ' "touch matters" relating to' " the License Agreement, but that is not sufficient under state and federal law to support application of the equitable estoppel doctrine to a non-signatory plaintiff. (*Jensen v. U-Haul Co. of California* (2017) 18 Cal.App.5th 295, 306.) The allegations do

not show that LaBonty's "claims are so dependent on and inextricably intertwined with the underlying contractual obligations of the agreement containing the arbitration clause that equity requires those claims to be arbitrated." (*Id*. at p. 307.) Regardless of the Kardashian defendants' post-termination conduct with respect to their marketing obligations under the Licensing Agreement, LaBonty's claims all rest on their decision to terminate him so they would not have to give him the equity interest set forth in the Term Sheet.

The Kardashian defendants urge that even if doubts exist about the applicability of equitable estoppel, those doubts should be resolved in favor of arbitration, noting that "California has a strong public policy in favor of arbitration," with any doubt "resolved in favor of arbitration, not against it." (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686–687.) However, the "strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement." (*Benasra v. Marciano*, *supra*, 92 Cal.App.4th at p. 990.)

We note that in their reply brief on appeal, the Kardashian defendants make factual arguments they only hinted at in the trial court: "Haven had gone belly up" by the time LaBonty brought this lawsuit. "[W]ithout the Kardashians' performance of these separate marketing and promotion obligations, LaBonty could not receive any benefits from the 'Term Sheet' bargain (i.e., the value of the equity in the licensee)." (Italics omitted.) "In mathematical terms, 9 percent of a penniless company . . . is of course $0. Only if the Kardashians proximately caused the company to go under would the lost equity have harmed LaBonty in a legal sense." (Italics omitted.)

Claims raised for the first time in a reply brief on appeal are generally forfeited, but even if these specific arguments had been raised in the opening brief, they would not succeed. Assuming Haven is insolvent is a fact not found in the record before us; indeed, appellants include no citations to the record to show that this insolvency argument was a basis of the motion to compel arbitration. The Kardashian defendants did not establish factually or legally that LaBonty could only receive the value of his equity interest by relying on the Kardashian defendants' non-performance under the License Agreement.

To "demonstrate error, an appellant must supply the reviewing court with some cogent argument supported by legal analysis and citation to the record." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 286–287.) The Kardashian defendants have not done so. We may and do "disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he wanted us to adopt." (*Id.* at p. 287.) "We are not bound to develop appellants' arguments for them." (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.)

DISPOSITION

The trial court's order denying arbitration is affirmed. Respondent is awarded costs on appeal.

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STRATTON, J.

We concur:

GRIMES, Acting P. J.

WILEY, J.