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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KYLE C. HUNTER, Plaintiff and Appellant, v. GLORIA ALLRED et al., Defendants and Respondents.	B305869 (Los Angeles County Super. Ct. No. BC663840)

APPEAL from an order of the Superior Court of Los Angeles County, David Sotelo, Judge. Affirmed.

Barnes Law, Robert E. Barnes, for Plaintiff and Appellant.

Kaufman Dolowich & Voluck, Andrew J. Waxler and Brian D. Peters, for Defendants and Respondents.

Plaintiff Kyle Hunter (plaintiff) appeals from a judgment of dismissal to challenge an earlier trial court order compelling arbitration of his malpractice suit against defendants Gloria Allred, Michael Maroko, John S. West, and their law firm, Allred, Maroko & Goldberg (defendants). We are asked to decide whether the malpractice-related claims asserted in plaintiff's lawsuit come within the scope of the parties' agreement to arbitrate. Specifically, we consider whether the parties agreed to arbitrate only disputes related to or arising out of representation during pre-litigation settlement negotiations or also representation after commencement of litigation concerning the same asserted wrongful conduct that was at issue in the settlement talks.

I. BACKGROUND

A. Plaintiff Retains Defendants to Represent Him and Consents to Arbitration

Plaintiff is a meteorologist. He came to believe CBS Broadcasting, Inc. (CBS) discriminated against him on the basis of his gender and age by refusing to hire him as an on-air weather broadcaster at two Los Angeles-area television stations: KCBS and KCAL.

In December 2010, plaintiff signed a three-page agreement to retain defendants as his attorneys (the "Retainer"). In pertinent part, the Retainer described the scope of the representation as follows: "We have agreed to undertake negotiations of your dispute with CBS, exercising our best efforts to achieve an out-of-court resolution. In exchange, we shall be entitled to forty percent (40%) of the value of any settlement we obtain for you, including the value of benefits we obtain on your

behalf. [¶] . . . [¶] Since we have had no contact with any representative of CBS, we are unable to predict whether there will be any response to the demand which we will make on your behalf, or whether CBS will make a good faith effort to resolve this matter at all. However, we will exercise our best efforts to obtain a reasonable settlement offer from CBS. [¶] . . . [¶] Although we promise to exercise our best efforts to achieve an out-of-court resolution of this matter, we can give you no assurance that this will occur or that any specific amount can be obtained for you. [¶] . . . [¶] If a satisfactory settlement cannot be achieved within a reasonable period of time, our representation of you will terminate. If you like, at that time we will review your case and make a decision whether or not to represent you in litigation. We will again review the evidence, including that gathered during negotiations, and advise you of your rights at that time. If it is determined that Allred, Maroko & Goldberg will not represent you further, we will assist you in referring you to other attorneys who handle employment matters, if you wish."

The Retainer also included an arbitration provision, and that provision is of course key to resolution of this appeal. It provides (underscoring in original): "In the event of any dispute between you and our firm . . . relating in any way to this agreement or our representation of you, the parties agree that either party may proceed as the law may require to initiate one or more arbitrations as follows: all fee dispute issues will be resolved by arbitration with the Los Angeles County Bar Association, and all other matters and claims arising out of or relating to this Agreement or our professional services rendered to or for you, including without limitation disputes as to

malpractice claims, or claims for breach of confidential or fiduciary relationship, will be resolved by binding arbitration with the American Arbitration Association in Los Angeles, California."

B. Plaintiff, with Defendants as His Attorneys, Sues CBS After No Settlement Is Forthcoming

Settlement negotiations defendants initiated with CBS in or about January 2011 regarding plaintiff's discrimination claims went nowhere. The record reveals little about communications between plaintiff and defendants in the ensuing months, but we do know that in March 2012, defendants—as plaintiff's attorneys—filed a discrimination complaint against CBS alleging, in essence, the same wrongs earlier presented as a basis for an out-of-court settlement.

CBS filed a special motion to strike plaintiff's complaint pursuant to Code of Civil Procedure section 425.16,[1] the anti-SLAPP statute, taking the position that its weatherperson hiring decisions were protected by the first amendment. After two trips to the Court of Appeal concerning the trial court's rulings on CBS's anti-SLAPP motion (*Hunter v. CBS Broadcasting Inc.* (Jan. 19, 2016, B258668) [nonpub. opn.]; *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510), the end result was a direction to grant the anti-SLAPP motion; another panel of this court held plaintiff had not established his discrimination claims had the requisite minimal merit (largely as a result of a failure to produce evidence in opposition to CBS's anti-SLAPP

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[1] Undesignated statutory references that follow are to the Code of Civil Procedure.

motion). The trial court struck plaintiff's complaint in its entirety.

C. Plaintiff Sues Defendants for Malpractice in Connection with the Stricken Discrimination Suit and the Trial Court Orders the Matter to Arbitration Based on the Retainer

Dissatisfied with defendants' representation of him in the discrimination dispute with CBS, plaintiff sued defendants for legal malpractice, breach of fiduciary duty, fraud, and infliction of emotional distress. Plaintiff maintains his malpractice suit only complains about defendants' representation of him after his suit against CBS was filed and not during the pre-litigation settlement negotiations. Though there are statements in plaintiff's malpractice complaint that appear to contradict that position (e.g., asserted failures to contact witnesses before litigation was filed and the existence of an executed retainer agreement with defendants that, according to the complaint, provided the basis for their attorney-client relationship "[a]t all times relevant herein"),[2] we shall accept plaintiff's view of his malpractice complaint just for purposes of resolving this appeal.

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[2] There are also communications between plaintiff and defendants that reveal plaintiff understood the Retainer's arbitration provision to apply to his malpractice dispute with them. For example, a July 25, 2016, letter from plaintiff states: "I prefer to settle this matter with you privately and personally and you are welcome to contact me directly to arrange a meeting to resolve this matter. If you prefer to go the arbitration route as per agreement, then I will engage lawyers and proceed accordingly."

Defendants moved to compel arbitration of the matters raised in plaintiff's malpractice complaint, relying on the Retainer's arbitration provision plus extrinsic evidence (some of which we have already mentioned). The trial court granted defendants' motion. As recounted in the very brief settled statement prepared by counsel for plaintiff, the trial court "heard sufficient argument from both sides, the matter was taken under submission[,] and later, that same date, the motion to [c]ompel [a]rbitration was granted . . . ."[3]

Arbitration thereafter proceeded, and the arbitrator granted summary judgment for defendants. Defendants then returned to court and asked the trial judge to dismiss plaintiff's malpractice complaint, proceedings on which had been stayed pending the arbitration. The court ordered the dismissal and plaintiff now appeals, challenging only the earlier order compelling arbitration.

II. DISCUSSION

Plaintiff advances four arguments on appeal, but three are really just window dressing. The sole issue on which this appeal turns is whether plaintiff's malpractice lawsuit is a dispute "arising out of or relating to" the professional services defendant rendered to plaintiff as described in the Retainer. As we will explain, it plainly is, and it therefore does not matter whether it

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[3] The settled statement counsel prepared is inadequate: it includes no statement of points to be raised on appeal and it cannot be said to include a narrative of the oral proceedings; it simply reports there *were* oral proceedings. (Cal. Rules of Court, rule 8.137(d)(1), (2).) Because it does not change our disposition of the appeal, we overlook the deficiency.

is true that ambiguity in an arbitration agreement should be construed against the drafter or a lawyer, nor does it matter what the retainer agreement said about when it would terminate.

"Section 1281.2 requires a court to order arbitration 'if it determines that an agreement to arbitrate . . . exists . . . .' (§ 1281.2.)" (*Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1153.) The Retainer's arbitration provision requires arbitration of "any dispute" between the parties that relates in any way to the Retainer or defendants' representation of plaintiff, and further clarifies it applies to "all other matters and claims arising out of or relating to this Agreement or our professional services rendered to or for you."

This is broad language that is not ambiguous, at least on the facts of this case. (See, e.g., *Rice v. Downs* (2016) 248 Cal.App.4th 175, 186 [arbitration clause using language such as "'*any claim* arising from or *related to* this agreement'" is broad]; *Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell* (1999) 76 Cal.App.4th 227, 230 [same]; cf. *Sentynl Therapeutics, Inc. v. U.S. Specialty Insurance Co.* (S.D.Cal. 2021) 527 F.Supp.3d 1203, 1208 [breadth should not be mistaken for ambiguity].) That is, even assuming (as plaintiff contends) the arbitration provision can apply only to representation with some connection to the Retainer rather than any dispute between the parties in perpetuity, and even assuming (as plaintiff *now* contends) that the Retainer did not set the terms of defendants' representation of plaintiff once litigation commenced because the Retainer stated it would terminate if defendants did not procure

a satisfactory settlement in a reasonable time,[4] it is still the case that the plain language of the arbitration provision covers the claims raised in plaintiff's malpractice lawsuit. That lawsuit complains of defendants' performance in litigation against the very same adverse party (CBS) and involving the very same alleged legal wrong (the refusal to hire him as an on-camera weatherman) that was the subject of defendants' representation of plaintiff in pre-litigation settlement demands. On any fair understanding, the representation in litigation accordingly "relates to" the Retainer and the pre-litigation settlement efforts.[5] And that means arbitration of plaintiff's malpractice lawsuit was required.

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[4] Settlements, however, can and often do come after litigation commences.

[5] Particularly notable, in this respect, is the language in the Retainer stating defendants would review the evidence—including any evidence gathered during settlement negotiations—and advise plaintiff of his rights in deciding whether to represent him in litigation. In other words, the Retainer on its face contemplates the possibility that defendants would represent plaintiff in litigation and may use evidence gathered during the pre-litigation negotiations.

DISPOSITION

The trial court's order is affirmed. Defendants shall recover their costs on appeal.

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BAKER, J.

I concur:

MOOR, J.

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RUBIN, P. J. - Concurring

I agree with the majority that the trial court's order should be affirmed. I write separately only to record my views on the termination clause in the parties' December 8, 2010, retainer agreement ("Retainer"). The Retainer covered defendants' representation of plaintiff in settlement negotiations with CBS: "We [defendants] have agreed to undertake negotiations of your [plaintiff's] dispute with CBS, exercising our best efforts to achieve an out-of-court settlement."

The Retainer acknowledged the eventuality that defendants might not be able to settle the dispute with CBS and provided: "If a satisfactory settlement agreement cannot be achieved within a reasonable period of time, our representation of you will terminate." The only fair reading of this clause is that defendants were not obligated (through the Retainer, at least) to represent plaintiff if he were to bring suit against CBS. The next sentence in the Retainer confirms this: "If you like, at that time we will review your case and make a decision whether or not to represent you in litigation."

The dispute did not settle, plaintiff retained defendants to sue CBS, suit was brought, and plaintiff lost. Plaintiff then sued defendants for malpractice.

The majority holds the plain language of the Retainer – a document that is limited to defendants' representation of plaintiff in pre-litigation settlement negotiations – also requires plaintiff to arbitrate his malpractice claim arising, not out of the settlement negotiations, but out of defendants' representation of plaintiff in subsequent litigation against CBS. "The sole issue on

which this appeal turns is whether plaintiff's malpractice lawsuit is a dispute 'arising out of or relating to' the professional services defendant rendered to plaintiff as described in the Retainer." The majority answers the question in the affirmative. (Maj. opn. at p. 7.)

I part with the majority because, the arbitration clause's breadth notwithstanding, the plain reading of the Retainer is that it terminated once the settlement negotiations concluded. The subsequent malpractice litigation did not arise out of the settlement negotiations and did not pertain to defendants' representation under the Retainer agreement. The alleged malpractice occurred after the Retainer agreement terminated and after the parties agreed *separately* that defendants would represent plaintiff in the CBS litigation.

To be sure, California has strong policies that favor arbitration. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97.) Those policies do not allow us to avoid careful consideration of whether arbitration may be compelled in any particular case. I write to remind us of something that we know: that these policies do not extend to compelling arbitration where the parties have not agreed to arbitrate. "As a general rule, a party cannot be compelled to arbitrate a dispute that he or she has not agreed to resolve by arbitration." (*Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 680.) In my view, the issue is not whether the language of the Retainer might be susceptible to a reading that encompassed defendants' subsequent representation of plaintiff, but whether the parties intended it to do so.

As I read the Retainer, it terminated before the CBS litigation started and claims arising out of the litigation,

including plaintiff's malpractice claim, are not covered by the Retainer's arbitration clause. I say that rather baldly because apparently, at a critical time in this matter, plaintiff Hunter himself disagreed with me.

On July 25, 2016, after plaintiff had decided that defendants were responsible for CBS's judgment against him, but before his malpractice claim had been filed, plaintiff wrote to defendants: "I prefer to settle this matter with you privately and personally and you are welcome to contact me directly to arrange a meeting to resolve this matter. *If you prefer to go the arbitration route as per agreement, then I will engage lawyers and proceed accordingly*." (Italics added.) On February 3, 2017, plaintiff sent an email to defendants stating in part, "Regarding arbitration, again, it has taken me longer to investigate the case and prepare it. . . . When an award comes, you will be paying my lawyers and costs and fees of arbitration, when you could settle this matter directly with me for considerably less."

Plaintiffs' statements, made at a time before the parties disagreed about whether the malpractice claim was subject to mandatory arbitration, is a significant consideration in how a court should interpret the Retainer. Plaintiff's own words implicate the so-called "practical construction rule," venerable since 1906:

"It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as

to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it. The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. (*Mitau v. Roddan* (1906) 149 Cal. 1, 14-15; see also *Alameda County Flood Control & Water Conservation Dist. v. Department of Water Resources* (2013) 213 Cal.App.4th 1163, 1200.)

At a time when the exchange between the parties was focused on arbitration versus settlement, and resort to the civil courts was not being discussed, plaintiff's words are telling. Considering the Retainer agreement alone, I believe the better view is that it does not cover the arbitration of the malpractice claims against defendants. But plaintiff explicitly stated that the malpractice claims were to go "the arbitration route as per agreement." Plaintiff's statements, made before the parties disagreed on the proper forum, is the best evidence of what the Retainer meant, and arbitration was properly compelled.

RUBIN, P.J.