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Lawyers lose right to arbitrate despite clear contract terms

By Timothy D. Reuben

When love, law and money intersect, lawyers may lose their right to arbitrate malpractice claims against them. At least that is what happened in *Barsegian v Kessler & Kessler,* 2013 DJDAR 4813 (Cal. App. 2nd Dist. April 15, 2013). Barsegian sued in a single complaint both her own prior lawyers for malpractice as well as her prior boyfriend, his brother-in-law, and a related entity for fraud and other claims.

The trial court refused to allow the lawyers to arbitrate the malpractice claim separately because of the possibility of inconsistent rulings. Affirming a decision by Judge John Segal of the Los Angeles County Superior Court, 2nd District Court of Appeal Justice Frances Rothschild (with Justices Robert Mallano and Victoria Chaney concurring) provides a primer on judicial admissions in determining that the Kessler firm could not arbitrate Barsegian's malpractice claim despite a fully signed and proper arbitration provision in the fee agreement — obviously a very sad result for the lawyers, who now are co-defendants with several alleged defrauders.

According to the complaint, Barsegian's then boyfriend, Newman, introduced her to his brother-in-law, Danny Pakravan, who was looking to sell a property owned by his wholly owned entity, 218 LLC. Barsegian happened to be looking to buy. Allegedly, Pakravan recommended to Barsegian that she retain the Kessler firm to represent her in the transaction, but failed to tell her that Kessler "had a longstanding attorney-client relationship" with Pakravan. (It is hard to believe that if this was true, the Kessler firm did not disclose it and obtain a conflict waiver; however, the case does not reveal anything about this.) In a leaseback deal, Barsegian bought 218 LLC's property for 3.8 million dollars, in part by borrowing half of the purchase price from 218 LLC, the seller and tenant. About a year and a half later when the romance was apparently well over — surprise! — Pakravan's LLC stopped paying rent.

Without the rent, Barsegian could not pay 218 LLC back its loan — and Pakravan's LLC, which probably was not paying rent to cause Barsegian's default, in a classic case of hypocrisy, threatened foreclosure. When Barsegian sued her lawyers, she alleged that the Kessler firm "secretly represented" Pakravan in the leaseback transaction when the firm was supposed to be representing her — presumably because the structure of the leaseback agreement negotiated by Kessler had allowed this unfair turn of events.

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Kessler successfully demurred (the trial court granted leave to amend), but then changed its approach and moved to compel arbitration. Barsegian opposed based on waiver (the demurrer) and also based on CCP Section 1281.2(c), claiming that the two sets of claims arose from the same facts and that there was a possibility of conflicting rulings if arbitration was allowed on just the legal malpractice claim. Judge Segal denied the motion on both counts, but the Court of Appeal only considered the Section 1281.2 argument in affirming and did not reach waiver.

Interestingly, the Kessler firm argued that the entire matter was subject to arbitration because of the classic boilerplate agency allegation seen in virtually all complaints that each defendant was a "principal, partner, co-venturer, agent, servant, trustee or employee" of each other. Kessler argued that this standard language constituted a judicial admission that Barsegian could not contradict, and that since the other defendants were alleged to be Kessler's partners, they also should be included in the arbitration. However, this very clever argument went the way of many clever arguments — it was rejected.

Indeed, the appellate court noted that if this argument were "sound," then in every case with multiple defendants where one defendant had a valid arbitration clause, everyone could compel arbitration, regardless of "how tenuous or nonexistent the connections among the defendants might actually be. The implausibility of the conclusion might lead one to suspect that the argument lacks merit." And it did.

The key here is that an allegation in a complaint, by itself, is not a judicial admission. Rather, to constitute a judicial admission, *both* sides have to agree to it. "The factual allegation is removed from the issues in the litigation because the parties agree to its truth." Thus, a judicial admission cannot be contradicted by either party — and obviously the Kessler firm did not agree or acknowledge it was Pakravan's agent or partner. Indeed, that was the very nature of Barsegian's malpractice claim. Simply put, Kessler here could not have its cake and eat it too — that is, use the judicial admission to compel everyone to arbitration and then dispute the admission and prove the opposite in arbitration. Judicial admissions must be based on a position or fact agreed amongst the parties to be binding.

In practice, most believe that a statement made in a complaint constitutes a judicial admission, but as this opinion points out, that is not the law. The court easily rejected a bootstrapping argument that attempted to use the standard agency allegation as a basis to compel arbitration of matters not subject to the arbitration agreement. However, what is very troubling about this case is that plaintiffs can so easily avoid their contractual obligation to arbitrate claims against their attorneys simply by adding some third party to their complaint. Frankly, the allegations of this complaint against the Kessler firm, although theoretically possible, are highly suspicious and sound unlikely: that the lawyers were secretly representing the opposing party instead of their own client. Clients who have a poor result may sometimes feel that way, but it is almost never true.

This case against the lawyers is really about alleged malpractice in negotiating and advising on the deal and should be subject to arbitration in compliance with the duly executed and negotiated fee agreement. Here, as a result of these rulings, the lawyers are certainly not getting the benefit of their bargain, particularly if they are linked with an alleged fraudulent seller and conniving ex-boyfriend before a jury. And while it is possible that there could be inconsistent rulings if the motion had been granted and only the malpractice claims were arbitrated, there are a number of ways to avoid this, such as staying the case against Pakravan until the arbitration is completed or scheduling the trial in a manner so that it falls after the arbitration is completed (which would likely happen anyway). And if the lawyers were found in arbitration not to have conspired against their own client, that would by no means have absolved Pakgravan, Neuman and the LLC, who were sued on multiple theories including fraud and breach of contract.

So while the appellate court's ruling affirming the trial court is undoubtedly sound in its analysis based on the issues on appeal, perhaps the wrong issue was evaluated. The lawyers lost their rights, which should not have happened, and the overtaxed and underfunded judicial system has to handle the malpractice matter: not a good result!


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