

Filed 5/10/11

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

PAULETTE D. DIAZ,

Plaintiff and Respondent,
v.

MARIE L. BUKEY, as Trustee, etc.,

Defendant and Appellant.

2d Civil No. B225548
(Super. Ct. No. PR90337A)
(San Luis Obispo County)

The beneficiary of a trust petitions to remove her sister as trustee of their parents' trust. The trustee responds by seeking to compel arbitration of their dispute as provided by the trust documents. Though the sisters are beneficiaries of the trust, neither was party to any agreement that such disputes would be resolved by arbitration. Here we hold that the beneficiary of a trust who did not agree to arbitrate disputes arising under the trust may not be compelled to do so.

Marie L. Bukey appeals from an order denying her motion to compel arbitration of a petition seeking to remove her as trustee of the Diaz Family Trust and for an accounting pursuant to Probate Code section 17200. We affirm.

Statement of Facts and Procedural History

In 1995, Daniel and Marie Diaz established the Diaz Family Trust (Trust). On November 1, 2004, appellant Marie L. Bukey was appointed successor trustee of the Trust. Bukey and respondent Paulette D. Diaz (Diaz) are sisters and beneficiaries of the Trust. The

Trust became irrevocable upon the death of the surviving settlor, Marie Diaz, on November 6, 2006.

On May 8, 2009, Diaz's attorney made a written request that Bukey provide an accounting of the financial activities of the Trust during her tenure as trustee. The accounting Bukey provided was not satisfactory to Diaz. On November 5, 2009, Diaz filed a petition for order removing trustee, appointing successor trustee, and compelling trustee to account and reimburse Trust pursuant to Probate Code section 17200. The petition alleged, inter alia, that Bukey breached her fiduciary duties by failing to provide a proper accounting, failing to distribute the assets of the Trust, and using Trust assets for her personal benefit.

In response, Bukey filed a demurrer and a petition for order compelling arbitration and stay of proceedings. The petition asserted that an arbitration provision contained in the Trust required that Diaz's claims be settled by binding arbitration. The arbitration provision states: "Any dispute arising in connection with this Trust, including disputes between Trustee and any beneficiary or among Co-Trustees, shall be settled by the negotiation, mediation and arbitration provisions of that certain *LawForms Integrity Agreement (Uniform Agreement Establishing Procedures for Settling Disputes)* entered into by the parties prior to, concurrently with or subsequent to the execution of this Trust. In the event that the parties have not entered into a *LawForms Integrity Agreement (Uniform Agreement Establishing Procedures for Settling Disputes)*, then disputes in connection with this Trust shall be settled by arbitration in accordance with the rules of the American Arbitration Association. Any decision rendered either in accordance with the *LawForms Integrity Agreement (Uniform Agreement Establishing Procedures for Settling Disputes)* or the rules of the American Arbitration Association shall be binding upon the parties as if the decision had been rendered by a court having proper jurisdiction."

Diaz opposed the demurrer and petition to arbitrate. On May 13, 2009, the trial court issued its order overruling the demurrer and denying the petition to compel arbitration. The trial court reasoned that Diaz, as a beneficiary, was not contractually bound

to submit disputes with the trustee concerning administration of the Trust to arbitration. The court stated, "The moving party has not met the burden establishing a contract binding the beneficiary to participate in arbitration. . . . There is nothing in this ruling that prevents the parties from entering into a[n] agreement to arbitrate the above dispute."

On appeal, Bukey asserts the trial court erred because the arbitration provision in the Trust is binding on Diaz as a beneficiary of the Trust under a third party beneficiary or equitable estoppel theory.¹

DISCUSSION

Standard of Review

Whether an arbitration provision applies to a controversy is a question of law which we review de novo. (*Alan v. Superior Court* (2003) 111 Cal.App.4th 217, 223.)

Effect of the Trust's Arbitration Clause

Bukey contends the trial court erred by denying her motion to compel arbitration under the California Arbitration Act, Code of Civil Procedure section 1280 et seq., because the Trust contains an arbitration provision and the Trust is a contract. We disagree.

The applicability of the California Arbitration Act requires the existence of a contract. "[S]ubject to limited exceptions, only parties to an arbitration contract may enforce it or be required to arbitrate." (*Nguyen v. Tran* (2007) 157 Cal.App.4th 1032, 1036.) Arbitration is a favored method of solving disputes, but the policy favoring arbitration does not eliminate the need for an agreement to arbitrate and does not extend to persons who are not parties to an agreement to arbitrate. (*Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271; see *Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1220 [". . . there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate and which no statute has made arbitrable".].)

"It is essential to the existence of a contract that there should be: [¶] 1. Parties capable of contracting; [¶] 2. Their consent; [¶] 3. A lawful object; and, [¶] 4. A

¹ We deny appellant's request to take additional evidence on appeal.

sufficient cause or consideration." (Civ. Code, § 1550.) "If there is no evidence establishing a manifestation of assent to the "same thing" by both parties, then there is no mutual consent to contract, and no contract formation. . . ." (*Estate of Thottam* (2008) 165 Cal.App.4th 1331, 1340; see also *Marsch v. Williams* (1994) 23 Cal.App.4th 250, 255 [a party can be compelled to submit a dispute to arbitration only when he has agreed in writing to do so].) There is no policy compelling persons to arbitrate controversies when they have not agreed to do so. (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.) The Trust does not meet the statutory definition of a contract because there is no evidence that the beneficiaries gave either their consent or consideration to achieve the status of beneficiary.

Bukey contends that Diaz is a third party beneficiary of the Trust and she is equitably estopped from denying her obligation to arbitrate. Bukey cites circumstances in which the courts have enforced arbitration agreements against and in favor of persons who did not agree to arbitrate the dispute. (See, e.g., *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513 ["There are circumstances in which nonsignatories to an agreement . . . can be compelled to arbitrate under that agreement . . . ' . . . incorporation by reference; . . . assumption; . . . agency; . . . veil-piercing or alter ego; . . . estoppel; and . . . third-party beneficiary"'].) However, none of the cited cases has held that a beneficiary is bound by an arbitration provision in a trust.

No California case has directly addressed the issue. More than a century ago, our Supreme Court said: "[I]t is quite plain that the matter of the contest cannot be submitted to arbitration. The matter of the probate of a will is a proceeding *in rem binding* on the whole world. A few individuals claiming to be the heirs cannot, by stipulation, determine such controversy." (*Estate of Carpenter* (1900) 127 Cal. 582, 585-586.) Although *Carpenter* involved a will, "[t]he California Probate Code applies the same general rules of interpretation to 'a will, trust, deed and any other instrument.'" (*Burkett v. Capovilla* (2003) 112 Cal.App.4th 1444, 1449.)

The California Arbitration Act expresses the same policy. Code of Civil Procedure section 1281.2, subdivision (c), gives a trial court discretion to deny arbitration due to "a possibility of conflicting rulings on a common issue of law or fact." (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 349-350.) The record discloses that not all of the Trust beneficiaries are parties to the litigation, thus raising the possibility of conflicting rulings if arbitration were to occur at this time.

Bukey relies on a trio of cases--*Estate of Bodger* (1955) 130 Cal.App.2d 416, *Estate of Guasti* (1953) 117 Cal.App.2d 612, and *Estate of Whitney* (1926) 78 Cal.App. 638 --in which appellate courts have characterized a trust as a contract between a trustor and trustee when determining whether a court may deviate from trustee compensation provisions in a trust. *In Bodger*, the court went further and stated that a trust is a third party beneficiary contract within the meaning of Civil Code section 2218. (*Bodger*, at p. 425 [". . . The person whose confidence creates a trust is called a trustor; the person in whom the confidence is reposed is called the trustee; and the person for whose benefit the trust is created is called the beneficiary"].)

We do not find these cases persuasive for several reasons. First, they are factually inapposite. The controversy here involves a dispute between the trustee and a beneficiary over the internal affairs of the Trust, not a dispute concerning trustee compensation. Moreover, in both *Bodger* and *Whitney*, the characterization of a trust as a contract was unnecessary to the decision in those cases and was dictum—both cases turned on the interpretation of Civil Code section 2274, which states that when a trust specifies the amount of compensation due a trustee, the trustee is entitled to that amount and no more. A case is not authority for a point unnecessary to its decision. (*Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1301.)

In *Saks v. Damon Raike & Co.* (1992) 7 Cal.App.4th 419, the court rejected the argument that a trust was a third party beneficiary contract. The court said: "The rules governing the respective rights of action of trustees and beneficiaries of express trusts are not the same as those generally applicable to promisees and third party beneficiaries.

[Citation.] The California Supreme Court has stated that 'Section 1559 of the Civil Code, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it, has no application to [a] case where a trust has been created in favor of such third person. Such trust is governed by the provisions of the code with reference to trusts.' [Citation.]

"[Appellants] have cited no authority that would permit trust beneficiaries to maintain an action as third party beneficiaries of contracts between the trustee and agents of the trustee concerning the internal affairs of the trust. Civil Code section 1559 makes no reference to trusts. The general right of a third party beneficiary to sue on a contract made expressly for his or her benefit has no application where a trust has been created in favor of that party, and the contract in question is between the trustee and an agent of the trustee. [Citation.] The Probate Code clearly manifests the Legislature's intent to vest the exclusive subject matter jurisdiction for all proceedings concerning the internal affairs of trusts in the probate department, and establishes the specific remedies and procedures for trust beneficiaries. (Prob. Code, §§ 16401, 16420, 16421, 17000, 17200.)

". . . To permit a third party beneficiary cause of action in a case such as this, parallel to the comprehensive remedies and procedures established by the Probate Code, would run counter to the clear legislative intent to make the probate department the exclusive arbiter of these kinds of trust disputes." (*Saks v. Damon Raike & Co.*, *supra*, 7 Cal.App.4th at pp. 430-431.)²

In *Schoneberger v. Oelze* (2004) 208 Ariz. 591 [96 P.3d 1078], the court construed an arbitration provision in a trust substantially similar to that involved here. We find its reasoning persuasive. In *Schoneberger*, two trust beneficiaries filed separate, but similar, lawsuits against the settlors and trustees of the trusts asserting claims of breach of

² Bukey also cites *Roehl v. Ritchie* (2007) 147 Cal.App.4th 338 to support her claim that an arbitration provision in a trust is enforceable against a beneficiary. In that case, the trial court ordered the matter submitted to binding arbitration pursuant to the arbitration clause in the trust agreement. (*Id.* at p. 342.) There is no indication any party in *Roehl* objected to the arbitration and the case does not address the issue of the propriety of arbitration when one party objects thereto. (*People v. Jennings* (2010) 50 Cal.4th 616, 684.)

trust, conversion and fraudulent concealment, mismanagement and dissipating trust assets. Among other relief, each beneficiary demanded an accounting.

Defendants answered, denied the allegations of wrongdoing and alleged that the beneficiaries' claims were subject to mandatory arbitration under the Arizona arbitration statute.³ The defendants asserted the arbitration clauses in the trust documents constituted provisions in a written contract requiring arbitration, and although the beneficiaries were not signatories to the trusts, they were nevertheless obligated to arbitrate as third party beneficiaries. Alternatively, they contended the beneficiaries were equitably estopped from objecting to arbitration as they were affirmatively seeking benefits under the trusts. The beneficiaries opposed defendants' motion to compel arbitration. They argued the arbitration provisions in the trusts were unenforceable because the trusts were not contractual agreements. They also asserted that, as nonsignatories to the trust documents, they had never agreed to arbitrate their claims against the defendants.

The trial court denied the motion to compel and the Court of Appeals affirmed. The court reasoned. "Under either theory, . . . defendants face a fundamental problem that defeats their demand for arbitration: section 12-1501 required defendants to prove the existence of 'a provision in a *written contract* to submit to arbitration.' (Emphasis added.) They failed to make this showing because, as a matter of law, the trusts at issue here were not contracts.

".....

"[A] beneficiary of a trust receives a beneficial interest in trust property while the beneficiary of a contract gains a personal claim against the promissor. Moreover, a fiduciary relationship exists between a trustee and a trust beneficiary while no such relationship generally exists between parties to a contract. . . .

".....

³ Arizona Revised Statutes section 12-1501 is substantially similar to Code of Civil Procedure section 1281 and provides: "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

"The legal distinctions between a trust and a contract are at the heart of why [the beneficiaries] cannot be required to arbitrate their claims against the defendants. Arbitration rests on an exchange of promises. Parties to a contract may decide to exchange promises to substitute an arbitral for a judicial forum. Their agreement to do so may end up binding (or benefitting) nonsignatories. In contrast, a trust does not rest on an exchange of promises. A trust merely requires a trustor to transfer a beneficial interest in property to a trustee who, under the trust instrument, relevant statutes and common law, holds that interest for the beneficiary. [Citation.] The 'undertaking' between trustor and trustee 'does not stem from the premise of mutual assent to an exchange of promises' and 'is not property characterized as contractual.' [Citation.]" (*Schoneberger v. Oelze, supra*, 96 P.3d at pp. 1082-1083.)

The judgment is affirmed. Costs on appeal are awarded to respondent.

CERTIFIED FOR PUBLICATION.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Martin J. Tangemen, Judge

Superior Court County of San Luis Obispo

Central Coast Estate Planning & Fiduciary Services and Jed D. Hazeltine for
Appellant.

Law Offices of Wm. Peter Terhune and Wm. Peter Terhune for Respondent.

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**ORDER MODIFYING OPINION
AND DENYING REHEARING**

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on May 10, 2011, be modified as follows:

On page 2, delete the first sentence in the third paragraph beginning "Diaz opposed the demurrer."

[There is no change in the judgment.]

Appellant's petition for rehearing is denied.