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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WILLIAM E. RICE, Plaintiff and Respondent, v. GARY P. DOWNS, Defendant and Appellant.	B286296 (Los Angeles County Super. Ct. No. BC506921)

APPEAL from an order of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed as modified.

Shaw Koepke & Satter and Jens B. Koepke for Defendant and Appellant.

Glaser Weil, Fink Howard Avchen & Shapiro, Michael Cypers, Alexander Linhardt; Greines, Martin, Stein & Richland, Robin Meadow and Jeffrey E. Raskin for Plaintiff and Respondent.

This is the second appeal in this action brought by William E. Rice, respondent here, against Gary P. Downs. In the first appeal (*Rice v. Downs* (2016) 248 Cal.App.4th 175 (*Rice I*)), we held the trial court erred in granting Downs' motion to compel arbitration with respect to Rice's causes of action for legal malpractice, breach of fiduciary duty, and rescission, because those causes of action did not arise out of the operating agreements for an entity in which both parties had ownership interests. The causes of action arose, instead, from the attorney-client relationship between the parties, placing them outside the scope of the arbitration provision in the operating agreements. (*Id*. at pp. 187, 191–194.)

Rice then amended his complaint, adding among other things allegations related to transactions in Hawaii involving Rice and Downs; it is these allegations that are at issue in this second appeal. Downs filed a second motion to compel arbitration, arguing that unlike the claims held non-arbitrable in *Rice I*, the Hawaii claims arose out of an alleged breach of his duties as a member of the entities involved in the deal rather than an alleged breach of his duties as an attorney.

The trial court denied Downs' motion because Rice had a pending action for rescission of Downs' interest in the operating agreement containing the arbitration provision, which if successful, could leave Downs with no basis upon which to compel arbitration. The trial court also found that, under *Rice I*, some or all of the Hawaii claims were not arbitrable, although the scope of that ruling is unclear.

Downs appeals, arguing that the trial court erred in denying his motion pending resolution of Rice's rescission action. Downs argues that the arbitrator, not the trial court, should

decide the rescission issue. Further, he disputes the merits of Rice's rescission action, contending that it is not legally tenable, and even if successful, would revive an earlier agreement containing an identical arbitration provision.

Downs also challenges the trial court's conclusion that some or all of the Hawaii claims are not arbitrable under *Rice I*. Finally, Downs challenges an earlier decision by the trial court to order trial such that a jury would decide any legal issues before the trial court ruled on Rice's rescission claim.

We hold that the trial court did not err in denying Downs' motion pending resolution of Rice's rescission action. *Rice I* forecloses Downs' argument that the arbitrator should decide the rescission issue. We decline to address Downs' arguments as to the merits of Rice's rescission claim, on which the trial court has yet to rule.

We further hold that some of the Hawaii claims are encompassed by the relevant arbitration provision. We do not consider Downs' challenge to the trial court's earlier decision on the order of trial, which is not properly before us in this appeal.

We direct the trial court to modify its order denying Downs' motion to compel arbitration to specify that it is without prejudice to Downs filing a new motion after resolution of Rice's rescission action. As modified, we affirm.

BACKGROUND

I. *Rice I*

A. The Allegations of Rice's Original Complaint

Rice's original complaint, filed in April 2013, asserted causes of action for legal malpractice, breach of fiduciary duty,

breach of contract, unjust enrichment, and rescission and restitution. The complaint alleged the following:

Rice, Kristopher Kaufmann, and companies with which they were affiliated, did business in the affordable housing market. Downs and his law firms served as their counsel. Rice, Kaufmann, and Downs decided to form their own company to develop affordable housing. "To that end, Downs, acting as counsel for Rice, Kauf[ ]mann, and the new company, Highland Property Development, LLC (HPD), prepared an operating agreement [the 2003 operating agreement] and formed HPD." Downs became a joint owner of HPD with Rice and Kaufmann while still serving as their attorney. He did not advise them of actual or potential conflicts of interest; neither did he comply with California Rules of Professional Conduct, rule 3–300 (rule 3–300) regarding avoiding interests adverse to a client and obtaining written consent before entering into business with a client. (*Rice I*, *supra*, 248 Cal.App.4th at p. 180.)

The operating agreement contained an arbitration provision: " 'Except as otherwise provided in this Agreement, any controversy between the parties arising out of this Agreement shall be submitted to the American Arbitration Association for arbitration in Los Angeles, California.' " (*Rice I*, *supra*, 248 Cal.App.4th at p. 180.)

In 2007, HPD added a fourth member, Douglas B. Day. The complaint alleged that Downs, again in his capacity as counsel, prepared an amended operating agreement for HPD (the 2007 operating agreement); the 2007 operating agreement contained the same arbitration provision as the earlier agreement. Downs also formed Highland Property Construction,

Inc. (HPC) to contract for construction work on HPD projects.[1] Rice, Kaufmann, Downs, and Day were the shareholders in HPC. Again, Downs failed to advise the others of actual or potential conflicts of interest, or to comply with rule 3–300. (*Rice I*, *supra*, 248 Cal.App.4th at p. 180.)

The complaint alleged that, on legal advice from Downs, Kaufmann was removed as a member and manager of HPD for cause. Kaufmann challenged the removal and demanded arbitration. He sought a declaration that he was not properly removed for cause and was still a member of HPD. Downs arranged for an attorney to represent himself, Rice, and Day in the arbitration initiated by Kaufmann. He did not disclose or seek a waiver of conflicts of interest. During the course of the arbitration, Rice and Day learned that Downs had been improperly billing HPD for certain services in violation of the 2007 operating agreement. Rice and Day confronted Downs, who accused them of breaching the 2007 operating agreement. Downs filed his own arbitration demand against them. (*Rice I*, *supra*, 248 Cal.App.4th at p. 181.)

The complaint alleged that Downs committed legal malpractice by failing to advise his clients Rice, Day, Kaufmann, HPD, and HPC, of actual or potential conflicts of interest, failing to obtain their informed consent, and failing to comply with rule 3–300 before forming HPD and HPC, drafting the 2003 and 2007 operating agreements, and entering into business transactions with them. The complaint further alleged that Downs committed legal malpractice by, among other things,

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[1] Day, HPD, and HPC were plaintiffs below but were not parties to the first appeal (*Rice I*, *supra*, 248 Cal.App.4th at p. 179, fn. 1) and are not parties to this appeal.

“ ‘placing his own interests above those of his clients, in part by drafting and structuring the Operating Agreement for HPD in a manner that, based on Downs’ present contentions, was detrimental to his clients and beneficial to Downs’; and ‘providing poor or incorrect legal advice and counseling with respect to the dispute with Kaufmann, resulting in exposure of HPD, Rice and Day to damages and litigation, including strategies premised on incorrect readings of the Operating Agreement, or ambiguities in the Operating Agreement drafted by Downs, and by arranging for a single attorney to represent Downs, Rice and Day without disclosing and obtaining informed consent to actual or potential conflicts.’ ” (*Rice I*, *supra*, 248 Cal.App.4th at pp. 181–182.)

The breach of fiduciary duty cause of action was against both Downs and his law firm, Nixon Peabody. It was based on the same breaches of duty as the legal malpractice cause of action. (*Rice I*, *supra*, 248 Cal.App.4th at p. 182.)

In addition, the complaint alleged breach of contract and unjust enrichment causes of action against Downs based on his improper billing. (*Rice I*, *supra*, 248 Cal.App.4th at p. 182.) The complaint also alleged causes of action for rescission of Downs’ rights under the “ ‘Operating Agreement’ ” and restitution based on Downs’ legal malpractice, breach of fiduciary duty, failure to comply with rule 3–300, and “ ‘his failure to disclose and obtain informed consent with respect to actual and potential conflicts with his clients.’ ” (*Id*. at pp. 182–183.)

B. Downs’ Motion to Compel Arbitration

Downs moved to compel arbitration of all causes of action in Rice’s complaint based on the arbitration provisions in the

2003 and 2007 operating agreements.[2] Downs informed the court that his original demand for arbitration had been consolidated with the arbitration initiated by Kaufmann. He requested that the claims in Rice's complaint be resolved in the consolidated arbitration. (*Rice I*, *supra*, 248 Cal.App.4th at p. 183.)

Rice opposed Downs' motion and moved to stay the arbitration initiated by Downs. The trial court granted Downs' motion to compel arbitration of all the claims in Rice's complaint and denied Rice's stay request. Rice then refiled his claims against Downs as a cross-claim in the arbitration proceeding. (*Rice I*, *supra*, 248 Cal.App.4th at p. 183.)

C. The Arbitration and Judgment Confirming the Arbitration Award

Due to difficulties with discovery, Rice dismissed his cross-claim in arbitration without prejudice. At Downs' request, however, the arbitrator ordered the cross-claim dismissed with prejudice, and awarded Downs other relief not relevant to this appeal. On Rice's motion, the trial court vacated the arbitration award to the extent it dismissed the cross-claim with prejudice, thus reinstating Rice's dismissal without prejudice, but otherwise confirmed the award. Rice and Downs both appealed. (*Rice I*, *supra*, 248 Cal.App.4th at p. 184.)

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[2] Though not relevant to this appeal, Downs also filed a separate action in the trial court against Rice, Day, and Kaufmann seeking to "void and prevent performance of a settlement agreement" among them. (*Rice I*, *supra*, 248 Cal.App.4th at p. 183.)

D. Our Opinion

In *Rice I*, Rice contended that his tort claims—malpractice, breach of fiduciary duty, and rescission—were not claims encompassed by the arbitration provision in the 2003 and 2007 operating agreements. We agreed, and accordingly held that the trial court should not have ordered those claims to arbitration. (*Rice I*, *supra*, 248 Cal.App.4th at pp. 179–180, 187.)

Based on the language of the arbitration provisions in the 2003 and 2007 operating agreements, we stated that the relevant inquiry was "whether the particular claims in issue are controversies 'arising out of' the operating agreements." (*Rice I*, *supra*, 248 Cal.App.4th at p. 187.) After analyzing applicable case law and the language of the arbitration provisions "in the context of the whole agreements" (*id.* at pp. 188–190), we concluded that "while the arbitration provision encompasses contractual claims and perhaps even tort claims arising from the agreement, a tort claim based upon violation of an independent duty or right originating outside of the agreement does not *arise* from the agreement and falls outside the scope of the arbitration provision" (*id.* at pp. 190–191).

Applying this principle to the allegations in Rice's complaint, we held that Rice's cause of action for legal malpractice was "based upon violations of duties created by the attorney-client relationship, not by the operating agreements. The cause of action does not turn on an interpretation of any clause in the contract and is not based upon performance or failure to perform under the contract. Thus, the malpractice cause of action does not *arise out of* the agreements," and was not subject to the arbitration provisions. (*Rice I*, *supra*, 248 Cal.App.4th at p. 191.)

Similarly, we held that the breach of fiduciary duty cause of action was not arbitrable because it also was “premised upon a duty owed to Rice and the other plaintiffs ‘by virtue of their relationship as attorney and client,’ which preceded the formation of the business and the operating agreements.” (*Rice I*, *supra*, 248 Cal.App.4th at p. 193.)

We further held that the cause of action for rescission and restitution was “expressly based” on Downs’ legal malpractice, breach of fiduciary duty, failure to comply with rule 3–300, and failure to disclose and obtain informed consent with respect to actual and potential conflicts of interest with his clients. (*Rice I*, *supra*, 248 Cal.App.4th at pp. 193–194.) “All of these were alleged violations of duties owed to Rice by virtue of the attorney-client relationship between Downs and Rice, not as a result of any duty created by the operating agreements.” (*Id.* at p. 194.) Although the rescission cause of action was “connect[ed]” to the operating agreements to the extent Rice alleged that Downs “ ‘improperly obtained benefits under the terms of’ ” the agreements, the duties did not therefore *arise* under the operating agreements.[3] (*Ibid.*)

II. The Trial Court Stays Arbitration Pending Trial Of Rice’s Rescission Claim

The remittitur in *Rice I* issued on September 12, 2016. On September 14, 2016, Rice filed a motion to stay the arbitration between Rice, Downs, and Kaufmann, which was pending following the partial vacation of the arbitration award.

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[3] The other issues addressed in *Rice I*, including the issues raised by Downs in his appeal, are not relevant to this appeal, and we do not summarize them here.

Rice argued that if he succeeded in rescinding Downs' interest in the 2007 operating agreement, Downs could no longer invoke the arbitration provision in the agreement, which "could render non-arbitrable many of the claims asserted in the . . . arbitration." Rice requested that the trial court stay the arbitration until it had ruled on Rice's rescission claim.

In opposition, Downs argued that even if Rice prevailed on his cause of action to rescind the 2007 operating agreement, the original 2003 operating agreement and its identical arbitration provision would again be in effect, and Rice and Downs would remain obligated to arbitrate their disputes. Downs also argued it was not legally possible for Rice to rescind the 2007 operating agreement as to Downs only while retaining the benefits he received under that agreement.

On October 19, 2016, the trial court granted Rice's motion to stay arbitration as to the claims between Rice and Downs "only so as to adjudicate Rice's rescission claim which seeks to rescind Downs' interest in the 2007 Operating Agreement. If Rice is successful in his rescission action, the arbitration and claims between him and Downs would become non-arbitrable." (Footnote omitted.) The trial court declined to "decide at this time whether Rice can rescind the 2007 Operating Agreement as to Downs' interest, whether the 2003 Operating Agreement will become reinstated, or whether Downs was Rice's attorney."[4]

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[4] In addition to the action before us, Rice, individually and on behalf of HPD, filed a dissolution action against Downs and Kaufmann on May 5, 2016. Downs and Kaufmann petitioned to compel arbitration of the dissolution action. Among the arguments in his opposition, filed less than a month after filing his September 14, 2016 stay motion in the instant action, Rice again contended that the trial court should resolve his rescission

On January 31, 2017, the trial court, with the agreement of counsel, ordered the action bifurcated, with Rice's rescission cause of action to be tried first. It also issued an order to show cause regarding trial sequencing, specifically whether the rescission claim should be tried by the court or by a jury.

Downs filed a response to the order to show cause, arguing that rescission was an equitable claim that should be resolved in a bench trial prior to empaneling a jury. Rice opposed, arguing that a jury should decide the legal issues first, after which the trial court could decide the equitable issues.

On March 27, 2017, the trial court ruled that "Rice's rescission claim and all other related claims . . . shall be tried at one time by jury." The trial court continued: "If the jury finds that an attorney[-]client relationship existed and that Downs[ ] violated the Rules of Professional Conduct, then the Court will decide the equitable issues (remedy) and whether to void Downs' interests." Finally, "[i]f the jury finds that an attorney[-]client relationship did not exist or that, if one existed, Downs[ ] did not violate the Rules of Professional Conduct, then there will be no equitable issues for the Court to decide."

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claim before ordering the parties to arbitration. In reply, Downs and Kaufmann argued, as Downs had in opposing Rice's stay motion, that rescission of the 2007 agreement would revive the 2003 agreement and its arbitration provision, and that it was not legally possible to partially rescind as to Downs only. The trial court ruled on the petition the same day it issued its order granting Rice's stay motion in the instant case, and, consistent with that order, denied the petition as to Downs without prejudice pending resolution of Rice's rescission claim.

III. Rice's First Amended Complaint

On June 7, 2017, the trial court granted Rice leave to file a first amended complaint (FAC), which he filed on June 12. The FAC continued to assert causes of action for legal malpractice, breach of fiduciary duty, and rescission and restitution. It eliminated the breach of contract and unjust enrichment causes of action from the original complaint and added a cause of action for negligent retention and supervision against Nixon Peabody. Rice brought all causes of action on his own behalf, and purported to bring the causes of action for legal malpractice and breach of fiduciary duty derivatively on behalf of HPD and HPC as well. Day, a plaintiff in the original complaint, was not included as a plaintiff in the FAC.

The FAC added allegations regarding a " 'Hawaii Deal' "; those allegations are the focus of this appeal, and we limit our summary to those allegations. The FAC alleged that around January 2012, HPD and its members began pursuing a development project in Honolulu, Hawaii. Downs and Nixon Peabody represented HPD and its members in connection with the project, and participated in drafting an operating agreement for a new entity, Honolulu Affordable Housing Partners, LLC (Honolulu Partners), consisting of HPD and others. Downs and Nixon Peabody did not disclose to Rice any actual or potential conflicts of interest that might exist as a result of Downs being both a member of Honolulu Partners and its lawyer. Neither did they obtain written consent from Rice as required by rule 3–300 for attorneys doing business with their clients.

Throughout 2012, Downs and Nixon Peabody billed HPD hundreds of thousands of dollars in connection with their work

for Honolulu Partners. Nixon Peabody withdrew from representing HPD and Honolulu Partners on December 19, 2012.

About October 2013, it became apparent that the Honolulu development project might not be feasible due to disputes among the HPD members. "[O]n or about October 31, 2013, Downs unilaterally submitted $671,406.10 of his personal money to the State of Hawaii, purportedly on behalf of [Honolulu Partners]—without seeking or obtaining the approval of the managers of HPD as required by the 2007 Amended Operating Agreement—to force the continuation of the Hawaii Deal. The payment was to reserve approximately $100 million in tax exempt bonds for the deal." The FAC alleged that Downs made the payment "against the wishes of the other Members of HPD." The FAC alleged that Downs' unilateral payment "jeopardized a $5 million good faith deposit that HPD . . . had already made" and "committed HPD to what ultimately became substantial losses of overhead and expenses paid," estimated at $2 million or more.

The FAC alleged that following this unilateral payment, Rice negotiated a $6 million deal for another investor to purchase Honolulu Partners' interests in the development project and to repay HPD's millions of dollars of costs thus far. However, "Downs unilaterally refused to proceed with the $6 million deal on the grounds that Downs could not secure an additional 10% portion of the deal for himself and Kaufmann, which would have come at the expense of Rice and Day. Downs was able to interfere with the $6 million deal as a result of the membership voting provisions of the 2007 Amended Operating Agreement drafted by Downs" and his law firm at the time, Pillsbury Winthrop Shaw Pittman.

The FAC referenced the Hawaii allegations again in asserting its causes of action for legal malpractice and breach of fiduciary duty, alleging identically under both causes of action that Downs breached his duties by "[c]osting Rice and HPD millions of dollars in damages and lost opportunity costs by providing poor or incorrect legal advice and counseling and deliberately interfering with the Hawaii Transaction," thus jeopardizing the $5 million deposit already paid and leading to losses of at least $2 million, as well as "at least $6 million in lost opportunity costs when Downs unilaterally refused to allow HPD to proceed with a multi-million dollar deal to sell the Hawaii transaction on the grounds that Downs could not secure an additional 10% portion of the deal for himself and Kaufmann, at the expense of Rice and Day."

The cause of action for rescission and restitution contained more detailed allegations than the equivalent cause of action in the original complaint, but similarly was based on Downs' alleged breaches of fiduciary duty to his clients and failure to comply with the Rules of Professional Conduct, specifically rules 3–300 and 3–310, when entering into business transactions with them. The FAC alleged the transactions were the product of "undue influence" and that Downs' actions "violated the public policy of California." The FAC sought to "void Downs' interests" in the HPD transactions as well as in the 2007 operating agreement.

IV. Downs' New Motion To Compel Arbitration

On July 13, 2017, Downs filed a new motion to compel arbitration and to partially stay the proceedings. Downs sought "an order compelling the arbitration of [Rice's] breach of fiduciary duty claim arising from Downs' alleged wrongdoing in connection with a development project in Hawaii that [HPD] was

pursuing . . . and staying the legal malpractice claim arising from that same alleged wrongdoing."

Downs argued that the Hawaii claims arose from Downs' purported breach of duties created by the 2007 operating agreement, not the attorney-client relationship, and thus under *Rice I* were arbitrable. Downs further argued, as he had previously, that Rice's pending rescission claim should not delay arbitration, because full rescission of the 2007 agreement would revive the 2003 agreement and its arbitration clause, and partial rescission as to Downs' interest only is not a legally available remedy. Downs also requested that the trial court stay trial of the legal malpractice claim arising from the Hawaii allegations until after arbitration of the breach of fiduciary duty claim.

In opposition to Downs' motion, Rice argued that the Hawaii claims arose from Downs' breach of duties arising from the attorney-client relationship, and thus under *Rice I* were not arbitrable.[5] Rice also urged the trial court to abide by its earlier ruling to decide Rice's rescission claim before ordering the parties to arbitration. Rice again disputed Downs' arguments that it was legally untenable to void only Downs' interests in the 2007 agreement and that full rescission would revive the 2003 agreement.

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[5] In making this argument Rice's opposition frequently referred only to his legal malpractice claim, not his breach of fiduciary duty claim. Thus, it is unclear if he was arguing that no aspect of the Hawaii claims was arbitrable, or only those allegations that pertained to attorney malpractice. On appeal, Rice concedes that some of the Hawaii claims do not arise from Downs' duties as an attorney and are arbitrable. (See Discussion, Part B, *post*.)

The trial court issued a written order denying Downs' motion, reiterating that it "will not compel arbitration as [Rice] has a pending claim to rescind Downs' interest in the 2007 Amended Operating Agreement, which then would leave Downs with no basis upon which to compel arbitration." The trial court disagreed with Downs that rescinding the 2007 operating agreement necessarily would revive the 2003 agreement. As it had in its October 19, 2016 order granting Rice's motion to stay arbitration, the trial court declined to "decide whether [Rice] can rescind the 2007 Operating Agreement as to Downs' interest only, whether the 2003 Operating Agreement and its arbitration provision will become reinstated if [Rice's] rescission is successful, or whether Downs was [Rice's] attorney and fulfilled his duties as [Rice's] attorney," because "[s]uch matters are not properly before the Court at this time."

The trial court continued: "Also, the Court of Appeal[ ] has already determined that the claims involving duties owed by virtue of any purported attorney-client relationship between Rice and Dow[n]s cannot be compelled to arbitration. [Citation.] Rice's malpractice and breach of fiduciary duty claims involve the Hawaii Deal, involve the business entity set up by Downs and Nixon Peabody to consummate the transaction, and derive from the fiduciary duties allegedly owed by Downs from the attorney-client relationship. [Citation.] Rice alleges that Downs and Nixon Peabody, as counsel to HPD and its members, drafted and revised the operating agreement for the new business entity created to consummate the Hawaii Deal. [Citations.] Rice alleges that Downs breached fiduciary duties through lopsided voting and management provisions, which were provisions Downs and his colleagues inserted into the 2007 Amended Operating

Agreement while representing Rice individually. [Citation.] That the attorney-client relationship may have ended would not permit Downs to take advantage of agreements he drafted in his favor while Rice's attorney and now claim such actions were in his managerial capacity and unrelated to the attorney-client relationship."

Downs timely appealed from this order.[6]

DISCUSSION

A. The trial court did not err in denying Downs' motion to compel arbitration pending resolution of Rice's rescission cause of action

Downs challenges the trial court's refusal to compel arbitration until it had decided Rice's rescission cause of action. First, Downs argues the arbitrator, not the trial court, should resolve the issue of rescission. Second, Downs argues that rescission of the 2007 operating agreement as to Downs only is not legally tenable because the agreement is not severable and Rice failed to restore Downs' consideration.[7] Third, Downs

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[6] Downs moves to augment the record with a notice of entry of judgment, with attachments, from a separate case, *Highland Companies, LLC v. Impact Development Group* (Super. Ct. Los Angeles County, No. BC548740), and a partial interim award from an arbitration, *Kaufmann v. Rice et al.* (JAMS Arbitration No. 1220048799). The documents are irrelevant to our resolution of this appeal. Accordingly, we deny the motion. (See *Steele v. International Air Race Assn.* (1941) 47 Cal.App.2d 61, 63.)

[7] Downs raises the consideration argument for the first time on appeal.

argues that rescission of the 2007 operating agreement would revive the 2003 operating agreement, and Downs would have the right to compel arbitration under that agreement.

1. ***Under the law of the case doctrine, we cannot reconsider whether Rice's rescission claim is arbitrable.***

Downs did not argue in the trial court that the arbitrator should decide the rescission issue, and the parties disagree whether Downs may make that argument for the first time on appeal.

We need not decide whether the question properly is before us. Even were we to reach the merits, *Rice I* forecloses Downs' argument, which presupposes that the arbitration provision encompasses Rice's rescission claim—that is, that the parties to the 2007 operating agreement agreed to arbitrate disputes of that type. (See *Diaz v. Sohnen Enterprises* (2019) 34 Cal.App.5th 126, 129 [" ' " 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit' " ' "].) *Rice I* held that the arbitration provision of the 2007 operating agreement did *not* encompass Rice's cause of action for rescission and restitution, and therefore the cause of action was not arbitrable. (*Rice I*, *supra*, 248 Cal.App.4th at pp. 193–194.)

We are bound by *Rice I*'s holding, which is law of the case. As we explained in *Sargon Enterprises, Inc. v. University of Southern California* (2013) 215 Cal.App.4th 1495 (*Sargon*), under the law of the case doctrine, " ' "the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." ' " (*Id.* at p. 1505.) " 'The doctrine is one of

procedure that prevents parties from seeking reconsideration of an issue already decided absent some significant change in circumstances.' " (*Ibid.*)

The FAC did not allege facts that would constitute a significant change of circumstances with respect to the rescission and restitution cause of action; like the original complaint, the FAC based the rescission and restitution cause of action on Downs' alleged breach of his fiduciary duties and ethical responsibilities as an attorney. Downs does not argue to the contrary. Therefore, neither the trial court nor this court may reconsider the issue.

Downs argues that "[t]hese rescission issues were not before this Court in [*Rice I*]." The question, however, of whether the arbitrator or the court should decide Rice's rescission claim unquestionably was before us in *Rice I*, and we held that the court should decide the claim. (*Rice I*, *supra*, 248 Cal.App.4th at pp. 193–194.) We are bound to apply that same rule of law to the FAC's analogous cause of action for rescission.

2. *We will not consider the issue of the tenability of a partial rescission claim or whether rescission would revive the 2003 agreement when the trial court has not yet ruled on those issues.*

As to the legal tenability of Rice's partial rescission claim and the potential revival of the 2003 operating agreement should Rice prevail, the trial court expressly declined to address these questions in ruling on Downs' motion to compel arbitration, instead deferring them until the pending trial on Rice's rescission cause of action. This was entirely within the trial court's discretion. As we stated in *Little v. Pullman* (2013) 219 Cal.App.4th 558 (*Little*), although a trial court may

adjudicate a rescission action in the context of a motion to compel arbitration, it need not do so when a filed complaint or cross-complaint also seeks rescission. (*Id.* at p. 570.) In that event, the trial court "would be within its discretion to table the [motion to compel arbitration] and adjudicate the complaint or cross-complaint first." (*Ibid.*) Apart from his contention, foreclosed by *Rice I*, that the arbitrator, not the court, should decide the rescission issue, Downs offers no argument or authority to the contrary.

Downs through this appeal asks us to decide questions the trial court has yet to address. We decline to do so. "It is beyond dispute that the [trial] court may control its processes so as to most efficiently and effectively safeguard judicial economy and administer substantial justice. To that end, the trial court may bifurcate proceedings and determine the order of presentation of evidence." (*Little*, *supra*, 219 Cal.App.4th at p. 570.) Absent an abuse of discretion, we will not intrude on the trial court's authority to decide the matters before it in the order and manner it sees fit.

Our holding assumes the trial court's denial of the motion to compel arbitration was without prejudice to Downs filing another motion to compel arbitration after the resolution of Rice's rescission action. We direct the trial court to modify its order to so specify.

B. Some of the Hawaii claims are encompassed by the 2007 operating agreement's arbitration provision

In addition to denying Downs' motion to compel arbitration pending the litigation of Rice's rescission cause of action, the trial court cited *Rice I*'s holding that "claims involving duties owed by virtue of any purported attorney-client relationship

between Rice and Dow[n]s cannot be compelled to arbitration." The trial court then stated that "Rice's malpractice and breach of fiduciary duty claims involve the Hawaii Deal, involve the business entity set up by Downs and Nixon Peabody to consummate the transaction, and derive from the fiduciary duties allegedly owed by Downs from the attorney-client relationship." It thus appears that the trial court ruled that under *Rice I* some or all of the claims involving the Hawaii transactions were not encompassed by the arbitration provision in the 2007 operating agreement.

Downs challenges this conclusion. He characterizes the Hawaii claims as "rooted primarily" in two acts by Downs alleged in the FAC: Downs unilaterally making a payment to the State of Hawaii without the approval of the other managers, and Downs refusing to proceed with the buyout of HPD's interest in the Hawaii deal. Downs contends that these were "actions Downs took as a member of HPD, and pursuant to his rights under the 2007 Agreement. Because of this, the Hawaii Claims are a controversy 'arising out of' the 2007 Agreement. That means they should be resolved in arbitration."

Rice "concedes that *some* of his Hawaii-related claims are based upon Downs' member duties [and] that these fall within the arbitration clause as interpreted by *Rice I*." Rice identifies as arbitrable the allegations that Downs "ma[de] certain payments on HPD's behalf without the approval of the other HPD managers as required by the 2007 operating agreement." Rice maintains, however, that the claim that Downs interfered with the buyout did not arise from the 2007 operating agreement, which Rice alleged gave Downs the authority to interfere—that claim instead arose from Downs' malpractice and breach of

fiduciary duty in drafting the agreement giving him the authority to interfere in the first place.

Because of the possibility that Downs will file another motion to compel arbitration of the Hawaii claims after resolution of Rice's rescission action, we provide the following guidance for the trial court's benefit.

1. *The arbitration provision encompasses Rice's claim that Downs unilaterally made a payment to the State of Hawaii.*

We agree with Downs and Rice that, under the law of the case as determined by *Rice I*, the claim that Downs breached his fiduciary duty by unilaterally making a payment to the State of Hawaii is encompassed by the arbitration provision in the 2007 operating agreement. *Rice I* held that Rice's cause of action for breach of fiduciary duty in the original complaint was not arbitrable because it was "premised upon a duty owed to Rice . . . 'by virtue of their relationship as attorney and client,' " and that duty "did not arise from the operating agreements, and the cause of action neither depends upon an interpretation of any portion of the agreements nor is based upon performance or failure to perform under the agreements." (*Rice I*, *supra*, 248 Cal.App.4th at p. 193.) In contrast, the FAC made clear that the duty Downs purportedly breached by making a payment to the State of Hawaii arose from the 2007 operating agreement, not from the attorney-client relationship. The FAC alleged that Downs made the payment "without seeking or obtaining the approval of the managers of HPD as required by the 2007 Amended Operating Agreement" and that the payment was "against the wishes of the other Members of HPD." Thus, the arbitration provision encompasses Rice's claim that Downs

breached a fiduciary duty by paying money to the State of Hawaii.

The FAC's cause of action for legal malpractice, like the cause of action for breach of fiduciary duty, also appears to be based in part on Downs' unilateral payment, because it refers to the consequences allegedly stemming from that payment, namely the risk of loss of the $5 million deposit and incursion of more than $2 million in overhead and expenses. Downs argues that our ruling on the arbitrability of the unilateral payment allegations should apply to the legal malpractice cause of action as well as the breach of fiduciary duty cause of action.[8]

We agree. The fact that Rice included allegations related to the unilateral payment under the legal malpractice cause of action does not change the fact that the duties allegedly breached by Downs in making the payment arose from the 2007 operating agreement, not the attorney-client relationship. Whether pleaded as malpractice or breach of fiduciary duty, Rice's claim that Downs harmed him by making the unilateral payment to the State of Hawaii is encompassed by the arbitration clause.[9]

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[8] Although Downs did not make this argument in the trial court, it raises a purely legal question that we may address for the first time on appeal. (See *Doe v. Claremont McKenna College* (2018) 25 Cal.App.5th 1055, 1066, fn. 7.)

[9] To be clear, this holding pertains solely to the FAC's allegations concerning Downs' unilateral payment to the State of Hawaii, and not to any of the other allegations under the FAC's causes of action for legal malpractice and breach of fiduciary duty.

2. *The arbitration provision does not encompass Rice's claim that Downs interfered with the buyout.*

Rice I dictates that the claim that Downs interfered with the buyout using "membership voting provisions of the 2007 Amended Operating Agreement drafted by Downs and Pillsbury" is not arbitrable because it arises from Downs' drafting of the operating agreement, not his actions under the agreement. The original complaint alleged, under the legal malpractice cause of action, that Downs had "plac[ed] his own interests above those of his clients, in part by drafting and structuring the Operating Agreement for HPD in a manner that . . . was detrimental to his clients and beneficial to Downs." The original complaint sought rescission on the basis that Downs had "improperly obtained benefits under the terms of" the operating agreements. *Rice I* concluded both of these causes of action arose from Downs' duties as an attorney, not as a member of HPD. (*Rice I*, *supra*, 248 Cal.App.4th at pp. 191, 194.) Thus, even if the causes of action "relate[d] to" or were "connected with" the operating agreements, they did not "arise out of" the agreements and were not arbitrable. (*Id.* at pp. 191, 193.)

Similarly, the FAC did not allege that Downs acted contrary to the 2007 operating agreement by interfering with the buyout; instead, it alleged he was "able to interfere . . . as a result of the membership voting provisions" he and his firm had inserted into the agreement. This is akin to the allegations in the original complaint that Downs "draft[ed] and structur[ed] the Operating Agreement for HPD in a manner that . . . was detrimental to his clients and beneficial to Downs," and thereby "improperly obtained benefits under the terms of" the operating

agreement. Given the similarity of these allegations, *Rice I* compels the conclusion that the claim that Downs interfered with the buyout opportunity is not subject to arbitration.[10]

We disagree with Downs that resolving the buyout interference claim requires "interpreting the 2007 Agreement and whether Downs was permitted to take the actions he did . . . under that Agreement." Again, the issue is not whether the agreement authorized Downs' actions, but whether Downs violated any duties by drafting the agreement to give him the authority in the first place.

Downs argues that *Rice I* cannot be law of the case as to the Hawaii allegations because Rice had not made those allegations at the time we decided *Rice I*. *Rice I*, however, defined a framework through which to determine whether the arbitration provision in the 2007 operating agreement encompassed particular claims. It thus established a " ' "rule of law necessary to the decision of the case," ' " which we are bound to follow, including when assessing the arbitrability of new claims not pleaded at the time of *Rice I*. (See *Sargon*, *supra*, 215 Cal.App.4th at p. 1505.) The Hawaii allegations did not

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[10] In his respondent's brief, Rice represents, as we have concluded above, that the FAC did not allege "that Downs breached his duty as an HPD member or violated" the 2007 operating agreement by interfering with the buyout. We accept this representation, which is consistent with our interpretation of the FAC. If Rice later chooses to advance the theory that Downs' alleged interference with the buyout also breached duties arising under the operating agreement, the arbitration provision would encompass such a claim.

constitute a " 'significant change in circumstances' " permitting us to reconsider our earlier decision.[11] (*Sargon*, at p. 1505.)

C. We cannot review the trial court's ruling as to the order of trial on appeal from the order denying the motion to compel arbitration

Downs also challenges the trial court's March 27, 2017 ruling on the order of trial, arguing that the trial court abused its discretion by ordering that the jury decide both legal and equitable issues.

As an initial matter, Downs mischaracterizes the trial court's order. The trial court did not order that the jury decide the equitable issues; rather, the trial court stated that "[i]f the jury finds that an attorney[-]client relationship existed and that Downs[ ] violated the Rules of Professional Conduct, then *the Court* will decide the equitable issues (remedy) and whether to void Downs' interests." (Italics added.)

More important, the issues raised by the trial court's March 27, 2017 order are not properly before us on appeal. As Downs concedes, the order appealed from here did not address those issues, and Downs does not contend the March 27, 2017 order is separately appealable. Downs relies instead on Code of Civil Procedure[12] section 1294.2, which on review of an order denying a motion to compel arbitration also permits review of "any intermediate ruling, proceeding, order or decision

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[11] Because *Rice I* is law of the case and determinative, we do not consider the other authorities cited by Downs on the issue of arbitrability.

[12] Further statutory citations are to the Code of Civil Procedure.

which . . . necessarily affects the order . . . appealed from."[13] Downs argues that "[s]ince trying the rescission issue first was the trial court's primary reason for denying arbitration, the bifurcation issues necessarily affect how the trial court would consider and resolve the rescission claim."

We fail to see how the trial court's March 27, 2017 order "necessarily affects" the order denying Downs' motion to compel arbitration. (§ 1294.2.) The trial court denied Downs' motion because of the pending litigation of the rescission issue; there is no indication that the order in which it had directed trial to proceed had any bearing on that decision. Regardless of whether the trial court resolves the legal or equitable issues first, the fact remains that the equitable issue of rescission has yet to be determined, and until it is, the trial court is not inclined to order the parties to arbitration. Thus, even accepting arguendo Downs' contention that "the bifurcation issues necessarily affect how the trial court would consider and resolve the rescission claim," this would not necessarily affect the trial court's decision to defer compelling arbitration until after it had resolved that claim. Accordingly, Downs has no basis to challenge the March 27, 2017 order in this appeal.

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[13] Downs cites to section 906 as opposed to section 1294.2. Although sections 906 and 1294.2 both contain the language invoked by Downs, section 906 applies only to appeals under sections 904.1 and 904.2, which do not include appeals from orders denying motions to compel arbitration.

DISPOSITION

The trial court's order denying Downs' motion to compel arbitration is modified to specify that it is without prejudice to Downs filing another motion to compel arbitration after resolution of Rice's rescission action. As modified, the order is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.