Filed 1/31/08 Clearwater Ins. v. Super. Ct. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CLEARWATER INSURANCE COMPANY,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

ALLIANZ GLOBAL CORPORATE AND SPECIALTY COMPANY et al.,

Real Parties in Interest.

No. B200692

(Los Angeles County Super. Ct. No. BS107438)

ORIGINAL PROCEEDINGS in mandate. Gregory W. Alarcon, Judge. Petition granted.

Charlston, Revich & Chamberlin, Charlston, Revich & Wollitz, Howard Wollitz and Allan J. Favish for Petitioner.

No appearance for Respondent.

Watson Law Group, Stephen A. Watson and Blake S. Posner for Real Parties in Interest.

INTRODUCTION

When can a nonsignatory to an agreement containing an arbitration clause compel arbitration against a signatory to that agreement? Here, the trial court, relying on an equitable estoppel theory, granted real parties in interest Allianz Global Corporate and Specialty Company's (AIC Global) and Allianz Underwriters Insurance Company's (AUIC Underwriters) petition to compel Clearwater Insurance Company into arbitration, even though AIC Global is *not* a signatory to the underlying agreement containing an arbitration clause.[1] Arguing that equitable estoppel is inapplicable, Clearwater petitioned this court for a writ of mandate. We issued an order to show cause. We now conclude that although under certain circumstances a nonsignatory to an arbitration agreement may invoke equitable estoppel to compel a signatory to arbitrate, this is not such a circumstance. We therefore grant Clearwater's petition and issue the writ.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *AIC Global issues insurance policies to MacArthur.*

AIC Global issued Excess Umbrella Policy No. 599516 and Excess Umbrella Policy No. 599351 to MacArthur Company in 1979 and in 1980, respectively. The 1979 policy, No. 599516, had a $4 million limit for each occurrence and an aggregate $4 million policy limit applicable to products liability.[2] The 1980 policy, No. 599351, had a

---

[1] Allianz Global and Corporate Specialty Risks was formerly known as Allianz Insurance Company, and, in the briefing, is referred to as "AIC." Allianz Underwriters Insurance Company was formerly known as Allianz Underwriters Company and is referred to in the briefing as "AUIC."

[2] Although there are two boxes at the policy's signature line, one for AUIC Underwriters and one for AIC Global, only the box next to AIC Global was checked. But, at the signature page, the agreement was signed on behalf of AUIC Underwriters and AIC Global.

policy limit of $5 million for each occurrence and an aggregate $5 million policy limit applicable to products liability.

B. *AIC Global and Clearwater enter into the facultative certificates, which reinsure the MacArthur policies and which do not contain arbitration clauses.*

Clearwater[3] issued two facultative certificates to AIC Global reinsuring the MacArthur policies: facultative certificate No. 25166 reinsured MacArthur policy No. 599516, and facultative certificate No. 25962 reinsured MacArthur policy No. 599351. Under facultative certificate No. 25166 Clearwater's liability was 50 percent of the MacArthur policy limit, namely $2 million. Under facultative certificate No. 25962 Clearwater's liability was "25% ($1,000,000) part of $4,000,000 excess of $1,000,000 of the Limit stated in Section B." Section B states: "$5,000,000. Per Occurrence and Aggregate excess of primary CGL $500/500 BI, $200/200 PD; Auto $500 CSL, EL $100,000, and SIR $10,000." AIC Global's retention share was "50% ($500,000) of the First $1,000,000 plus 50% ($2,000,000) part of $4,000,000 excess of $1,000,000 of the Limit stated in Section B."

The facultative certificates do not contain arbitration clauses.

C. *Clearwater and AUIC Underwriters enter into reinsurance agreements, which do contain arbitration clauses.*

In or about May 1982, Clearwater entered into two excess reinsurance agreements, also known as "treaties," with AIC Global's self-described "sister company," AUIC Underwriters.[4] Under both agreements, Clearwater agreed to "indemnify the Company, as provided herein, in respect of the excess liability of the Company arising under the Company's policies, binders and/or contracts of insurance or reinsurance, oral or written,

---

3 Formerly known as Skandia America Reinsurance Corporation.

4 The record also contains an excess reinsurance agreement dated February 1980 between Clearwater and AIC Global and AUIC Underwriters, which was allegedly superseded by the 1982 treaties. AIC Global and AUIC Underwriters do not dispute, for the purposes of this writ proceeding, that the 1982 treaties are the controlling documents.

or other evidences of liability . . . assumed by or on behalf of the Company and covering business classified by the Company as Casualty Business."

Both reinsurance agreements contain arbitration clauses. The clauses provide, in part: "As a precedent to any right of action hereunder, if any dispute shall arise between the Company and the Reinsurer with reference to the interpretation of this Agreement or their rights with respect to any transaction involved, whether such dispute arises before or after termination of this Agreement, such dispute, upon the written request of either party, shall be submitted to three arbitrators, one to be chosen by each party, and the third by the two so chosen. . . ."

D. *MacArthur settles litigation with its insurers.*

In the 1980's and 1990's, products liability claims were made against MacArthur. "Allianz"[5] settled those claims and made cash calls to its reinsurers, including Clearwater. Clearwater paid.

Thereafter, in 2004, MacArthur and its insurers entered into another settlement agreement under which insurers paid $45 million to settle coverage disputes arising out of asbestos liability claims against MacArthur.[6] The settlement agreement lists policies being settled, and, as is relevant to this dispute, it purportedly lists UMB No. 599516 and UMB No. 599351. "Allianz" paid its $6.75 million share of the settlement, and then issued a $2,281,250 cash call to Clearwater. Clearwater refused to pay.

II. Procedural background.

A. *AUIC Underwriters files a demand for arbitration.*

AUIC Underwriters filed a demand for arbitration in which it described the dispute as follows: "The nature of this dispute is . . . [Clearwater's] nonpayment of its

---

[5] Although AIC Global and AUIC Underwriters assert that "Allianz"—a reference to the two companies collectively—settled the claims, they also assert that AUIC Underwriters negotiated and settled the claims. None of the settlement papers or documents related to the MacArthur settlement are part of the record on the appeal.

[6] Again, the record does not contain the settlement agreement.

proportionate amount of indemnity and expense related to Allianz's defense and settlement of claims against its insured Western MacArthur relating to policy numbers UMB599516 and UMB599351."[7] After filing its demand for arbitration, AUIC Underwriters amended its demand to add AIC Global as a petitioner.

Clearwater responded that it had no arbitration agreement with AIC Global, although it did not contest the appropriateness of arbitration with AUIC Underwriters; the agreements between Clearwater and AIC Global, the facultative certificates, do not contain arbitration clauses; and AUIC Underwriters did not issue the MacArthur policies, and it therefore should not have paid out on those policies. Clearwater also filed a counterdemand in arbitration in which it contended it was entitled to reimbursement for any payments it made under the 1982 treaties between it and AUIC Underwriters.

B. *AIC Global and AUIC Underwriters petition the Superior Court to compel arbitration against Clearwater.*

AIC Global and AUIC Underwriters petitioned the superior court to compel arbitration against Clearwater. They argued that Clearwater should be compelled into arbitration because AIC Global and AUIC Underwriters are "sister companies," and because AIC Global issued the MacArthur policies "on behalf of" AUIC Underwriters. Therefore, Clearwater is equitably estopped from denying that AIC Global's policies with MacArthur fall under AUIC Underwriter's treaties with Clearwater. Clearwater opposed the petition and argued that equitable estoppel was inapplicable. It submitted documents showing that AIC Global and AUIC Underwriters are separately incorporated.

The trial court initially denied the petition to compel arbitration, but it reversed itself and granted it. The court found that AIC Global and AUIC Underwriters are "closely related entities," with each operating a different aspect of "Allianz's" business. The court stated, "[AIC Global's] obligation to Western MacArthur was also the basis for

---

[7] This description of the demand for arbitration is from Clearwater's position statement filed in the arbitration proceedings. The actual demand is not a part of the record on appeal.

[AUIC's Underwriter's] reinsurance contract with Clearwater. Thus, [AIC Global's] seeking indemnity from Clearwater is intimately founded in and intertwined with [AUIC Underwriter's] contract with Clearwater." The court found that the facultative certificates link AIC Global to Clearwater, "but are brief and not nearly as comprehensive as the reinsurance contract between [AUIC Underwriters] and Clearwater. The court believes that the parties did not intend the certificates to stand alone and foreclose the possibility of arbitration. Moreover, equitable estoppel only requires claims be intertwined with a contract. [AIC Global's] claims appear interwoven with the contract between AUIC [Underwriter] and Clearwater and the existence of [the] certificates does not establish otherwise."

Clearwater thereafter filed the petition for writ of mandate, and we issued an order to show cause.

DISCUSSION

I. Is Clearwater equitably estopped from avoiding arbitration with AIC Global?

The issue before us does not concern the validity of the arbitration agreement or what it covers. The issue is *who* may invoke that agreement; namely, can AIC Global, a nonsignatory to the 1982 treaties, invoke the arbitration clauses in those treaties to compel a signatory, Clearwater, to arbitrate with it?[8] (See, e.g., *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1712-1713 (*Metalclad*); *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1283.) Where, as here, there is no conflicting evidence, the question of whether and to what extent a party can enforce an arbitration clause is a question of law, which we review de novo. (*Turtle Ridge Media Group, Inc. v. Pacific Bell Directory* (2006) 140 Cal.App.4th 828, 832-833; *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 266-267 (*Boucher*).)

---

[8] AUIC Underwriters is *already* arbitrating with Clearwater, and it is therefore unclear why the trial court granted the petition to compel arbitration as to AUIC Underwriters.

Also, the party seeking to compel arbitration has the burden of proving the existence of a valid agreement to arbitrate by a preponderance of the evidence. (See *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.)

Generally, only signatories to an agreement to arbitrate can be compelled to arbitrate. (*Rowe v. Exline, supra,* 153 Cal.App.4th at p. 1284.) But five theories have been recognized under which an arbitration clause can be enforced by or against a nonsignatory: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. (*Boucher, supra,* 127 Cal.App.4th at p. 268; see also *Inter. Paper v. Schwabedissen Maschinen & Anlagen* (4th Cir. 2000) 206 F.3d 411, 416-417 ["Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties"]; *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406, 418; *City of Hope v. Bryan Cave, L.L.P.* (2002) 102 Cal.App.4th 1356, 1370 [recognizing that "[e]stoppel may sometimes allow nonsignatories to a contract to demand arbitration"].)[9]

---

9 California courts have recognized agency (*Dryer*) and alter ego and equitable estoppel (*Rowe v. Exline*, *supra*, 153 Cal.App.4th 1276). But the majority of cases applying those theories, including equitable estoppel, involve arbitration agreements governed by the Federal Arbitration Act. Neither party here has addressed whether federal or California law applies. Based on the similarities between California law and the Federal Arbitration Act and that California courts typically look to the corresponding federal law (*Stasz v. Schwab* (2004) 121 Cal.App.4th 420, 439), the outcome here is the same regardless of whether we apply California or federal law. We agree with the observation in *Rowe* that "[m]erely because a legal concept emanates from federal jurisprudence does not necessarily make it unreasonable, inapplicable, or unpersuasive in a California case. The equitable estoppel theory espoused in *Boucher*, *Turtle Ridge*, and *Metalclad* did not arise from a federal statute or case law that conflicts with California's arbitration law. Indeed, both federal and California arbitration law favor the arbitration of disputes. Furthermore, the notion of estoppel is familiar to California law, and California's concern for equity is just as strong as that of federal law." (153 Cal.App.4th at p. 1288.)

Clearwater contends that it cannot be compelled to arbitrate with AIC Global under the doctrine of equitable estoppel.[10] Under that doctrine, nonsignatories have been allowed to invoke arbitration clauses to compel a signatory into arbitration when, for example, "a party has signed an agreement to arbitrate but attempts to avoid arbitration by suing nonsignatory defendants for claims that are ' "based on the same facts and are inherently inseparable" ' from arbitrable claims against signatory defendants." (*Metalclad, supra,* 109 Cal.App.4th at pp. 1713-1714; see also *MS Dealer Service Corp. v. Franklin* (11th Cir. 1999) 177 F.3d 942, 947 [equitable estoppel applies "when the signatory to a written agreement containing an arbitration clause 'must rely on the terms of the written agreement in asserting [its] claims' against the nonsignatory. [Citation.] When each of a signatory's claims against a nonsignatory 'makes reference to' or 'presumes the existence of' the written agreement, the signatory's claims 'arise[ ] out of and relate[ ] directly to the [written] agreement,' and arbitration is appropriate. [Citation.]") "The fundamental point is that a party may not make use of a contract containing an arbitration clause and then attempt to avoid the duty to arbitrate by defining the forum in which the dispute will be resolved." (*Boucher, supra,* 127 Cal.App.4th at p. 272; see also *Metalclad, supra,* 109 Cal.App.4th at p. 1714 [estoppel "prevents a party from playing fast and loose with its commitment to arbitrate, honoring it when advantageous and circumventing it to gain undue advantage"]; *Sunkist Soft Drinks v. Sunkist Growers* (11th Cir. 1993) 10 F.3d 753, 758 (*Sunkist*) [where signatory's claims against nonsignatory "arises out of and relates directly" to the agreement containing an arbitration clause, nonsignatory can compel signatory into arbitration].)

As in *Metalclad, Boucher,* and *Sunkist*, here too a nonsignatory to the 1982 treaties—AIC Global—seeks to compel a signatory—Clearwater—to arbitrate. Nevertheless, there are significant differences between the situations in those cases and the one before us. The first difference is that the "integral" nature of the relationships

---

10 AIC Global and AUIC Underwriters also contend, alternatively, that Clearwater must arbitrate with them under an agency theory. We address that contention *post*.

between the parties in *Metalclad*, *Boucher*, and *Sunkist* were supported by detailed evidence.

For example, in *Metalclad*, Metalclad entered into a written agreement containing an arbitration clause with Geologic, which was one of Ventana's portfolio companies. Although the agreement was with Geologic, Metalclad negotiated it with a Ventana representative. Metalclad thereafter sued Ventana based on claims arising out of the written agreement between Metalclad and Geologic. (*Metalclad, supra,* 109 Cal.App.4th at p. 1710.) Ventana successfully compelled arbitration against Metalclad, even though Ventana was not a signatory. The court looked to the relationships of persons, wrongs and issues, in particular whether the claims the nonsignatory sought to arbitrate were intimately founded in and intertwined with the underlying contract obligations. (*Id.* at p. 1714.) Based on the "nexus" between Metalclad's claims against Ventana and the underlying contract between Metalclad and Geologic, as well as the "integral relationship" between Geologic and Ventana as subsidiary and parent, the court held that equitable estoppel prevented Metalclad from avoiding arbitration with Ventana.

In *Boucher*, Financial employed Boucher under a written agreement. Boucher sued Financial and Alliance, both of whom moved to compel arbitration. Alliance submitted evidence showing that Financial's sole shareholder was Alliance's majority shareholder and that Financial had transferred all of its assets to Alliance. (*Boucher, supra,* 127 Cal.App.4th at p. 266.) The court said that a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are intimately founded in and intertwined with the underlying contract obligations. (*Id.* at p. 271.) The court thus held that Boucher had to arbitrate his claims against Alliance, the nonsignatory, because his claims relied on and assumed the existence of the employment agreement with Financial and because of the close relationship between Financial and Alliance.

Similarly, in *Sunkist*, Sunkist and SSD entered into a licensing agreement to market and to sell soft drinks. (*Sunkist, supra,* 10 F.3d at p. 755.) Thereafter, Del Monte acquired all of SSD's stock and absorbed SSD into its own beverage products division.

Sunkist sued Del Monte and SSD based on claims arising out of the licensing agreement. Del Monte, a nonsignatory to the licensing agreement, moved to compel arbitration. In finding that Sunkist had to arbitrate its claims against both Del Monte and SSD, the court cited the "nexus between Sunkist's claims and the license agreement, as well as the integral relationship between SSD and Del Monte, . . ." (*Id.* at p. 758.)

In contrast to the substantiated relationships between the parties in *Metalclad*, *Boucher*, and *Sunkist*, what is the precise nature of the relationship between AIC Global and AUIC Underwriters is unclear. AIC Global and AUIC Underwriters assert they are "sister companies" and that, as such, AIC Global issued the MacArthur insurance policies "on behalf of" AUIC Underwriters.[11] The sole support for the assertion that AIC Global and AUIC Underwriters are sister companies is a document printed from the Internet showing that AIC Global and AUIC Underwriters are a part of the "Allianz Group of Companies in North America."[12] But unlike in *Metalclad*, there is no showing of how the two companies were involved in negotiations with either MacArthur regarding the insurance policies or with Clearwater regarding the 1982 treaties and facultative certificates. Unlike in either *Boucher* or *Sunkist*, there is no showing of common stock ownership or of a parent-subsidiary or other relationship between AIC Global and AUIC Underwriters.[13]

---

[11] The consequence of this assertion is that although AUIC Underwriters did not issue the MacArthur policies, the 1982 treaties between AUIC Underwriters and Clearwater nevertheless may reinsure those policies.

[12] From the Internet document it appears that Allianz of America, Inc., is AIC Global's and AUIC Underwriters's parent company. The document states, "Allianz of America is a holding company which . . . provides investment services to insurance affiliates of the Allianz Group of North America."

[13] As an alternative to equitable estoppel, AIC Global asserts, based on the same evidence cited to support equitable estoppel, that there was an agency relationship between it and AUIC Underwriters, which justifies compelling arbitration. For the same reasons equitable estoppel does not apply, agency does not apply.

Even if we accept the assertion that AIC Global and AUIC Underwriters are "sister companies," that tells us little about the relationship between those two companies with respect to the 1982 treaties, the facultative certificates, and Clearwater. The only hint of what that relationship may be is the statement of an "Allianz" claims specialist that "Allianz" and Clearwater have a "longstanding business relationship" during which it has been a "common practice" for AIC Global to issue policies on behalf of AUIC Underwriters. No further evidence has been submitted to substantiate that "common practice" and Clearwater's participation in it.

We do note, however, that Clearwater at some point in time apparently paid out under the 1982 treaties in connection with the McArthur litigation. This certainly could support a finding that Clearwater treated AIC Global and AUIC Underwriters interchangeably and only now, in the face of being compelled into arbitration with AIC Global, "asks for strict adherence to the corporate form." (*Smith/Enron Cogeneration v. Smith Cogeneration, supra,* 198 F.3d at p. 97.) Nonetheless, other than the fact that Clearwater apparently paid out reinsurance monies under the 1982 treaties in connection with the MacArthur litigation, AIC Global has submitted no other evidence showing that Clearwater knowingly treated it and AUIC Underwriters interchangeably, and only now wants to preserve a corporate separateness between the two companies to avoid arbitration with AIC Global. (Cf. *ibid.* [evidence, such as correspondence and addresses, established that signatory treated a group of related companies as though they were interchangeable].)

Thus, the only conclusion we can draw based on this record is there is *some* relationship between AIC Global and AUIC Underwriters. But that relationship has not been shown to be of the "integral" type vis à vis the transactions with Clearwater

---

Also, although there is some indicia of alter ego, AIC Global and AUIC Underwriters have neither argued nor presented sufficient evidence relating to an alter ego theory. We nevertheless note that in at least one case, a nonsignatory was permitted to "pierce [its] own corporate veil" to permit it to compel a signatory to arbitrate. (*Smith/Enron Cogeneration v. Smith Cogeneration* (2nd Cir. 1999) 198 F.3d 88, 97.)

necessary for equitable estoppel to apply. (See *Thomson-CSF, S.A. v. American Arbitration Ass'n* (1995) 64 F.3d 773, 777 ["As a general matter, . . . a corporate relationship alone is not sufficient to bind a nonsignatory to an arbitration agreement"].)

Nor has there been a showing AIC Global's claim is " 'intimately founded in and intertwined with' " the 1982 treaties containing the arbitration clauses. (*Metalclad, supra,* 109 Cal.App.4th at p. 1717.) AIC Global's claim is Clearwater owes reinsurance obligations to it and to AUIC Underwriters under the 1982 treaties and under the facultative certificates. Because these transactions are "related," it is equitable for AIC Global to insert itself into the arbitration proceeding between AUIC Underwriters and Clearwater, even though AIC Global is a nonsignatory to the 1982 treaties. It may be that the transactions are related, but that is a disputed issue that cannot be resolved on this record. In fact, we note that the facultative certificates predate the 1982 treaties by several years (indicating that they were not a part of one transaction). Also, a facultative certificate is negotiated individually and covers risk only as to a particular policy, whereas treaty insurance reinsures all or specified classes of policies written by the ceding insurer. (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2007) [¶] 8:364, p. 8-71.) Therefore, without further evidence that AIC Global issued the MacArthur policies on AUIC Underwriters's behalf and that Clearwater treated the two companies interchangeably, equitable estoppel, on this record, does not apply.

Moreover, the mere fact that AIC Global's claims may be related to or intertwined with the claims AUIC Underwriters is arbitrating against Clearwater does not necessarily render equitable estoppel applicable. Rather, the linchpin of the estoppel doctrine is fairness: " 'Equitable estoppel precludes a party from asserting rights "he otherwise would have had against another" when his own conduct renders assertion of those rights contrary to equity.' " (*Metalclad, supra,* 109 Cal.App.4th at p. 1713, quoting *Inter. Paper v. Schwabedissen Maschinen & Anlagen, supra,* 206 F.3d at pp. 417-418; see also *City of Hope v. Bryan Cave, L.L.P., supra,* 102 Cal.App.4th at pp. 1370-1371.) In *Metalclad*, *Boucher*, and *Sunkist*, it was equitable to compel the signatories into

arbitration against nonsignatories because the signatories had raised claims against the nonsignatories that were founded on the underlying contracts; the signatories thus sought the benefit of the contracts against nonsignatories while seeking to avoid the burden of the contracts, namely, arbitration. Here, Clearwater has made no claim against AIC Global under the 1982 treaties. Clearwater thus cannot be accused of suing AIC Global to obtain some benefit under the treaties while, at the same time, trying to avoid arbitration with AIC Global under the same agreements.

AIC Global and AUIC Underwriters caution that to permit Clearwater to avoid arbitration with AIC Global sanctions Clearwater's "shell games." We do not agree. Clearwater is currently arbitrating with AUIC Underwriters. Clearwater does not contest the appropriateness of that arbitration. We see no reason why AUIC Underwriters cannot argue and establish in the arbitration that AIC Global issued the MacArthur policies on its behalf and that Clearwater, under whatever applicable theory, owes reinsurance obligations in relation to those policies. We merely hold that, on this record, AIC Global may not use the doctrine of equitable estoppel to insert itself into the arbitration between Clearwater and AUIC Underwriters.

DISPOSITION

The petition for writ of mandate is granted. The superior court is directed to set aside its order compelling arbitration. Petitioner is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.