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Court of Appeal, First District, Division 5, California.

Brent WOODS, Plaintiff and Respondent,
v.
CINGULAR WIRELESS, Defendant and Appellant.

No. A106569.
|
(San Francisco County Super.
Ct. No. CGC-03-427659).
|
May 18, 2005.

Attorneys and Law Firms

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Opinion

JONES, P.J.

***1** Plaintiff Brent Woods brought suit against Cingular Wireless to challenge the cancellation fees charged to customers who end their wireless telephone service before the expiration of the term of the service agreement. Plaintiff is not and never has been a subscriber to Cingular's wireless service. He sued not on his own behalf but solely as a private attorney general under the Unfair Competition Law (UCL) (Bus. & Prof.Code, § 17200 et seq.) for the benefit of the general public. [1]

The wireless telephone service agreement at issue in the lawsuit provides for arbitration of all disputes and claims arising out of or related to the agreement. Based upon that arbitration clause, Cingular petitioned to compel arbitration of plaintiff Woods's claims. The trial court denied the petition, concluding that plaintiff could not be compelled to arbitrate when he was not a party to the arbitration agreement. On this appeal by Cingular, we affirm the order denying arbitration.

DISCUSSION

The California Supreme Court has held that claims under the UCL for injunctive relief to benefit the general public are not arbitrable. (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316; see also *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1079-1082 [claims for injunctive relief under the Consumer Legal Remedies Act].) Cingular conceded below and acknowledges on appeal that plaintiff's claims for injunctive relief are not arbitrable under existing precedent. The only question before us, then, is whether plaintiff's claim for monetary relief is arbitrable. [2] We agree with the trial court that plaintiff cannot be compelled to arbitrate.

By statute, an order compelling arbitration is warranted when "an agreement to arbitrate the controversy exists" and "a party thereto refuses to arbitrate such controversy." (Code Civ. Proc., § 1281.2.) The fundamental assumption of arbitration is that the parties have consented to resolving their disputes outside the judicial process. The strong policy favoring arbitration as a means of resolving disputes does not extend to persons who are not parties to the arbitration agreement and have not elected to submit to arbitration. (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244-245; accord *Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990.) A proceeding to compel arbitration is essentially a suit in equity for specific performance of an arbitration agreement. A court in equity has no power to compel third party nonsignatories to arbitrate absent some implied authority by the signatory to bind the nonsignatory. (47 Cal.App.4th at pp. 242-245; see also *Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-89.) [3]

As discussed at length in *County of Contra Costa v. Kaiser Foundation Health Plan, Inc., supra,* 47 Cal.App.4th at pages 242-245, a nonsignatory has been held bound by an arbitration agreement in limited cases involving a

preexisting relationship between the nonsignatory and a party to the agreement.[4] (E.g., *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 702, 704, 709 [insured employee bound by arbitration clause in medical services contract entered into by employer]; *Mormile v. Sinclair* (1994) 21 Cal.App.4th 1508, 1511 [wife bound by arbitration clause in husband's physician-patient agreement]; *Keller Construction Co. v. Kashani* (1990) 220 Cal.App.3d 222 [general partner of the signatory limited partnership bound by arbitration clause in construction agreement].) Here, no preexisting relationship exists between plaintiff and the wireless telephone subscribers he purports to represent; there is no basis for finding that the wireless subscribers had authority to bind plaintiff to the arbitration agreement.

***2** *Net2Phone, Inc., v. Superior Court* (2003) 109 Cal.App.4th 583, upon which Cingular relies, is not on point. The question in that case was whether a forum selection clause could be enforced against a plaintiff who was not a party to the telephone service contract but who brought the action as a private attorney general under the UCL. We draw a distinction between a forum selection clause and an arbitration clause. A forum selection clause may be enforced against a nonparty who is "closely related to the contractual relationship." (*Id.* at pp. 587, 588; *Lu v. Dryclean-U.S.A. of California, Inc.*, (1992) 11 Cal.App.4th 1490, 1493.) Enforcement of an arbitration clause, in contrast, requires more than the nonparty's connection to the contract. (E.g., *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 143 [father's arbitration agreement with medical providers did not bind his adult daughters on their wrongful death claims]; *Benasra v. Marciano, supra,* 92 Cal.App.4th at p. 990 [arbitration agreement signed by corporation's president not binding on the individual in his claim for libel]; *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1229 [arbitration clause in contract between designer and third party not binding on property owner].)

Our Supreme Court has left unresolved the question whether a plaintiff seeking restitution as a private attorney general under the UCL can be compelled to arbitrate when the plaintiff is not a party to the arbitration agreement but is acting on behalf of injured consumers who are parties to the arbitration agreement. (*Cruz v. PacifiCare Health Systems, Inc., supra,* 30 Cal.4th at p. 320, fn. 7.) We observe that the question has little practical significance, because the same factors that preclude a private attorney general from being compelled to arbitrate also serve to limit the plaintiff's relief in court. While civil penalties may be assessed when the action is initiated by a governmental prosecutor (Bus. & Prof.Code, § 17206), monetary damages are not recoverable under the UCL. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266.) A private plaintiff is limited to injunctive relief or restitution, i.e., the return of money obtained through an unfair business practice (Bus. & Prof.Code, § 17203). And, restitution requires an ownership or vested interest in the money; nonrestitutionary disgorgement of profits is not available to an individual acting as a private attorney general under the UCL. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149-1152.) As the Supreme Court explained, "The breadth of standing under this act allows any consumer to combat unfair competition by seeking an injunction against unfair business practices. *Actual direct victims of unfair competition may obtain restitution* as well." (*Id.* at p. 1152; italics added.) In the present case, plaintiff is not an actual direct victim of Cingular's early termination fee and is acting only as a private attorney general. He has no monetary remedies under the UCL, even assuming arguendo that his claims remain viable. (See fn. 1, *ante* .) At most, his remedy is injunctive relief, and, as we have said, the claims for injunctive relief are not arbitrable.

DISPOSITION

***3** The order denying arbitration is affirmed.

We concur: STEVENS and SIMONS, JJ.

All Citations

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Footnotes

1 At the time of the proceedings below, section 17204 of the Business and Professions Code provided in relevant part: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or any [authorized] county counsel ... or any [qualified] city attorney ... or by *any*

person acting for the interests of itself, its members or *the general public.*" (Bus. & Prof.Code, § 17204, italics added.) While this appeal was pending, on November 2, 2004, the electorate amended the UCL by Proposition 64 to delete the provision for a private attorney general. (2004 West's Cal. Legis. Service, Prop. 64.) Although we asked the parties for supplemental briefing, we find it unnecessary to examine the effect of Proposition 64 upon the present appeal.

Whether plaintiff is entitled to proceed as a private attorney general under the UCL is not an issue that is cognizable on Cingular's petition to compel arbitration. Cingular's assertions in its supplemental briefs that plaintiff now lacks standing and that his claims should be entirely dismissed must be addressed to the trial court by appropriate motion.

2 Plaintiff's complaint prays for a judgment "to restore to any person in interest any money acquired by means of such unfair, unlawful or fraudulent business practices."

3 A nonsignatory third party may invoke an arbitration clause against a signatory based upon equitable estoppel. (E.g., *Alliance Title Co. v. Boucher* (2005) 127 Cal.App.4th 262; *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal .App.4th 1705.)

4 Another theory for binding a nonsignatory is the doctrine of incorporation by reference. (E.g., *Slaught v. Bencomo Roofing Co.* (1994) 25 Cal.App.4th 744, 748-749 [arbitration clause in construction contract between property owner and general contractor incorporated into subcontracts]; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271-1274 [arbitration clause in construction agreement incorporated into surety bond].)