CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Bowers v Lucia Companies 5/30/12

Enforcement of Settlement Agreements; CCP section 664.6; "Med/Arb"

Bowers sued Lucia and other entities for defamation and business related torts. Lucia filed an arbitration proceeding against plaintiffs asserting similar claims. The arbitration commenced following dismissal of Lucia from the suit. After several days of arbitration, the parties agreed to settle their dispute before the arbitration panel reached a decision. The parties informed the panel they were agreeing to bring the case to a full day of mediation, "with a component which, if it's not resolved, rolls over to arbitration. I guess it's – it's mediation with a binding arbitration component following." The panel chairman confirmed: "Med/Arb." The essential term was to the extent the matter could not be resolved in mediation, the matter would become an arbitration with a range of $100,000 and $5 million that the arbitrator would then have the freedom to choose after presentation of the case during mediation.

Within a week the parties signed a settlement agreement and release. The agreement provided that if the mediation failed to produce an agreement, the mediator would be empowered to set the amount of the judgment in favor of plaintiffs against the Lucia Companies at some point between $100,000 and $5,000,000, "… such binding mediator judgment to then be entered as a legally enforceable judgment in San Diego Superior Court without objection of any party." At the mediator's request, the agreement was later modified to provide that in the event the arbitration phase proceeded, the parties were to provide the mediator their "…last and final offer which offer shall be some amount between $100,000 and $5,000,000. The mediator shall then be empowered to set the amount of the judgment in favor of plaintiffs and against Raymond J. Lucia Companies, Inc. by choosing either Plaintiffs' demand or Defendants' offer…" In

effect, the parties agreed to binding "baseball" arbitration.

Following a day of mediation which did not conclude with a settlement, the mediator asked each side for their final demands. The parties stuck to the numbers set forth in the agreement. After allowing the parties to submit additional information for consideration, and meeting with counsel, the mediator ultimately selected the $5 million number. Defendant then obtained new counsel, who requested that the mediator reopen the proceeding to allow for further exchange of information, or to reconsider his decision. The new attorney did not request the mediator formally convene a traditional arbitration proceeding, nor did counsel object to the failure to move the mediation into a formal arbitration proceeding.

Plaintiffs petitioned to confirm the mediator's award and defendants opposed the petition. Defendants argued the trial court could not confirm the award because it was a mediation award, rather than an arbitration award. The trial court agreed and declined to confirm the award. Instead, the trial court enforced the settlement agreement and subsequent mediator's award under CCP section 664.6. The trial court explained that, "despite their use of undefined legal terms such as 'mediation with a binding arbitration component' and 'mediation/binding baseball arbitration', the parties clearly agreed in writing that the mediator would decide the amount of the judgment with the 'binding mediator judgment' to be entered as a legally enforceable judgment in Superior Court." There was no provision in the agreement for a formal arbitration where each side would present witnesses and evidence. Any ambiguity in the term 'binding baseball arbitration' was resolved by the amendment requiring the mediator to select either plaintiffs' demand or defendants' offer.

The court noted the case involved sophisticated parties and knowledgeable counsel who could have explicitly provided for a separate arbitration had that been what they intended. Consistent with this ruling, the trial court then entered a $5 million judgment for plaintiffs. Defendants' motion for reconsideration and for new trial was denied, and this appeal to the Fourth District followed.

Division One of the Fourth DCA turned to the applicable statute to begin its discussion. A trial court cannot enforce a settlement under section 664.6,

unless the court finds the parties expressly consented, in writing, to the material terms of the settlement. (*Weddington Productions, Inc. v Flick* (1998) 60 Cal.App.4th 793) The defendants presented three distinct arguments in favor of reversal. First, they contended the settlement was unenforceable for lack of mutual consent. That is, defendants contend they did not agree to settle the dispute through binding mediation. Instead they claim their intent was to proceed through mediation, which if unsuccessful, would be followed by a binding arbitration which included an evidentiary hearing. One of the essential elements of an enforceable contract is mutual consent. To be mutual, the parties must all agree on the same thing in the same sense. (Civil Code sections 1580 & 1636) The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestation of consent would lead a reasonable person to believe. (*Weddington*, a p. 811)

Here, the trial court found the parties agreed to a full day mediation, followed by the mediator making a binding award by selecting either plaintiffs' final demand or defendants' final offer, if the case did not settle. The transcript recording the settlement agreement reveals the parties' intent and says nothing about an evidentiary hearing. The Justices pointed out that the reference to binding baseball arbitration in the agreement does not undermine this conclusion as the terminology is reasonably interpreted as a description of the type of binding mediation to which the parties agreed. Binding mediated arbitration is a hybrid of mediation and arbitration where the parties attempt to resolve their dispute with the assistance of a mediator, and if unsuccessful, the mediator issues a final, binding award, just as an arbitrator would. Baseball-style arbitration, in which an arbitrator decides a monetary dispute by selecting from the parties' final proposals, is an example of binding mediation.

The Appellate Court found support for the agreement with the absence of any indication defendants or their counsel ever requested an arbitration hearing after the mediation hearing ended or objected because the mediator failed to commence an arbitration hearing after mediation ended. (*Okun v Morton* (1988) 203 Cal.App.3d 805) If the parties had agreed to conduct a post mediation hearing, or if defendants thought they had such an agreement, the Justices could not "…fathom any reason why defendants would not have raised the issue at the time or in any post mediation correspondence with the mediator." They

concluded that mutual consent was present in forming the subject agreement.

Defendants next contend the settlement agreement is unenforceable because binding mediation is an inherently uncertain term. In order for acceptance of a proposal to result in the formation of a contract, the proposal must be sufficiently definite, or call for such definite terms in the acceptance, that the performance promised is reasonably certain. The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. (*Weddington*, at p. 811-812)

Defendants rely on *Lindsay v Lewandowski* (2006) 139 Cal.App.4th 1618, where the parties signed a stipulated settlement agreement following mediation. Most of the parties signed a version stating they agreed to resolve the dispute by binding arbitration, but some of the parties signed a version requiring a return to the mediator to resolve disputes. Over objection the parties participated in a binding mediation to determine the terms of payment, and the mediator issued an award. Appellants argued the stipulated settlement agreement was unenforceable because the parties never agreed on a specific procedure to resolve their payment dispute. The appellate court agreed. Because various discrepancies prevented the appellate court from ascertaining what the parties meant when they used the term "binding mediation" the court concluded the agreement was too uncertain to be enforceable.

Here, the 4th DCA noted the *Lindsay* case demonstrated an absence of a meeting of the minds, including an objection to binding mediation at the outset of the mediation. No such objection was lodged in the case on appeal, nor did the Lucia defendants insist they were entitled to an evidentiary hearing. In addition, unlike the parties in *Lindsay*, the parties here further elaborated on what they meant by the alternative dispute resolution method they chose. Thus, the Justices found, the agreement is sufficiently certain to be enforceable. (Civil Code section 3390; *Blackburn v Charnley* (2004) 117 Cal.App.4th 758)

Finally, defendants contend the settlement agreement is unenforceable because binding mediation is not among the constitutionally and statutorily permissible means of waiving jury trial rights. The statutory means of waiving a jury trial are by: (1) failing to appear at the trial; (2) written consent

filed with the clerk or judge; (3) oral consent, in open court, entered in the minutes; (4) failing to announce, at the appropriate time, that a jury trial is required; or (5) failing to deposit jury fees. (CCP section 631 (a) & (d)) Although binding mediation is not among the methods listed in section 631 for waiving a jury trial, this does not preclude enforcement of the subject settlement agreement. As the Supreme Court explained, "Section 631 … relates only to the manner in which a party to a pending court action can waive his right to demand a jury trial instead of a court trial. It does not purport to prevent parties from avoiding jury trial by not submitting their controversy to a court of law in the first instance. Indeed it has always been understood without question that parties could eschew jury trial either by settling the underlying controversy, or by agreeing to a method of resolving that controversy, such as arbitration, which does not invoke a judicial forum." (*Madden v Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699)

In this case, the parties agreed to settle their dispute through binding mediation in a nonjudicial forum. Thus, section 631 does not apply and any failure to comply with it does not render their agreement unconstitutional and unenforceable. Whether a jury trial waiver must comport with section 631 depends on whether the parties have selected a judicial or nonjudicial forum. (*Grafton Partners v Superior Court* (2005) 36 Cal.4th 944) As the parties in this case selected a nonjudicial forum, section 631 has no bearing on the enforceability of their agreement.

The judgment is affirmed. Plaintiffs are awarded their costs on appeal.