Filed 6/14/12 Alspaugh v. Dunham CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BOB ALSPAUGH, Individually and as Trustee, etc. et al., Plaintiffs and Respondents, v. RONALD DUNHAM et al., Defendants and Appellants.	D059673 (Super. Ct. No. 37-2009-00083103-CU-FR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

Defendants Ronald Dunham, Nick Studebaker, Gold Coast Capital Partners, LLC, Parlago Marketing Group, LLC, Parlago Group, LLC, Parlago Development Group, LLC, Vision Investment Group, RDN Ventures, LLC, RDD LP, Free Enterprise Seminars, ERRCV, LLC, and Gold Coast Real Estate Fund, LLC (collectively Defendants) appeal an order denying their petition to compel arbitration of the investment

fraud action filed against them by a group of plaintiffs (collectively Plaintiffs).[1] On appeal, Defendants contend the trial court erred by finding: (1) Plaintiffs were not required to arbitrate their disputes pursuant to written arbitration agreements; and (2) Defendants waived any rights they had to enforce arbitration agreements.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In February 2009, Plaintiffs filed a complaint against Defendants in the instant case. In September 2010, after multiple demurrers by Defendants, Plaintiffs filed the operative third amended complaint alleging causes of action for fraud and deceit, securities fraud, civil conspiracy, breach of contract, conversion, elder abuse, common counts, and negligence. Defendants filed an answer to that complaint, raising the affirmative defense of mandatory mediation and/or arbitration.[3] On October 26,

---

1 Plaintiffs include Bob and Betty Alspaugh, Gwendolyn Cruchon, Debbie Gooden, Frances Gregoire, Sharrill and Roger Harley, Gordon Haskett, Joe and Darlene Hoyt, Gene Marie Jones, Ruth Joy, Doreen Kearley, Sally Lindenskov, Garrett and Paula Lumbattis, Carol Lee Marie, Ronald Olsen, David and Miriam Praklet, Norma Recore, George Riebau, Robert and Jeanne Small, William and Elsie Speck, Joan Stebe, Leah Stevens, John Caputo, Beverly Duncan, Raymond and Carol Moore, Marilyn Dickson, Steve Dickson, and Scott Dickson.

2 Because we decide this appeal on the waiver issue, we present only a brief factual and procedural discussion.

3 Defendant's answer asserted: "39. To the extent that the transactions involved in this case are deemed to be securities, which Answering Defendants deny, Plaintiffs' securities fraud cause of action is nevertheless barred in so far as the subject transactions are required to be resolve[d] by means of mandatory mediation and/or arbitration rather than judicial action."

Defendants deposed Scott Dickson and Marilyn Dickson and questioned them about arbitration provisions contained in their subscription agreement.

On March 23, 2011, Defendants filed a motion to compel arbitration and stay litigation in the instant case. Defendants attached to the motion Exhibit A, which consisted of a private placement memorandum for the Gold Coast Real Estate Fund LLC (Fund), an unsigned draft of an operating agreement for Fund, and a Fund subscription agreement signed by Marilyn Dickson.

Plaintiffs opposed the motion to compel arbitration, arguing that Defendants did not attach to the motion any arbitration agreements between Plaintiffs and Defendants and, in any event, Defendants had waived any right to require arbitration of the instant dispute. Plaintiffs objected to Exhibit A attached to Defendants' motion. In support of their opposition, Plaintiffs submitted the declaration of Matthew Faust, their counsel, regarding Defendants' conduct in this case. Defendants filed a reply attaching additional documents and arguing they had not waived their right to arbitration.

On April 25, 2011, the trial court issued its order denying Defendants' motion to compel arbitration, stating:

> "As a preliminary matter, Plaintiffs' . . . objection to Exhibit A is sustained based on lack of authentication. [¶] . . . [¶]
>
> "It is well-settled that someone who is not a party to the arbitration agreement cannot be compelled to arbitrate. [Citation.] Thus, the majority of the Plaintiffs who did not sign the documents presented to the Court by the . . . Defendants cannot be compelled to arbitrate their claims against the . . . Defendants. . . . This case is similar to [*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376] in that only some of the parties were subject to arbitration agreements. . . . [A]ssuming arguendo that the FAA [Federal

> Arbitration Act] applied, it would not bar this Court from denying arbitration pursuant to [Code of Civil Procedure] section 1281.2, subd. (c).
>
> "Plaintiffs also pointed out that a FINRA arbitration applies only to a customer and a member or associated person of a member but that Dunham was not a member of FINRA. [Citation.]
>
> "As to the Plaintiffs who did sign the documents proffered by the . . . Defendants, the . . . Defendants waived their right to arbitrate.
>
> "California courts have determined that questions of waiver are determined by the court, not the arbitrator, in connection with a motion to compel arbitration. [Citations.] [¶] . . . [¶]
>
> "Here, the . . . Defendants' actions are inconsistent with arbitration. More specifically, their Answer did not plead arbitration as an affirmative defense. In addition, they have filed multiple substitutions of attorney, bankruptcy filings, requests to continue trial, counter claims, etc. [Citation.] They also invoked the litigation machinery by filing multiple demurrers, taking 40 depositions, propounding 10,000 discovery requests, and prosecuting a cross-complaint until its final disposition. [Citation.] As to the . . . Defendants' assertion that they only 'recently' found out about their right to arbitrate, Plaintiffs' counsel pointed out that defense counsel questioned the Dicksons in October 2010 about a purported arbitration provision in their deposition[s]. [Citation.]"

Defendants timely filed a notice of appeal.

DISCUSSION

I

Motion to Strike Portions of Appellants' Appendix and Opening Brief

Plaintiffs filed a motion to strike portions of the appellants' appendix (AA) and the appellants' opening brief (AOB) filed by Defendants in this appeal. Plaintiffs argue volumes 3 through 24 and 29 through 37 of the AA should be stricken because they were not part of the trial court file when the trial court decided the motion to compel

arbitration. They further argue volumes 25 through 28 of the AA should be stricken because Defendants did not rely on those documents in their motion to compel and they are unnecessary to disposition of this appeal. Finally, Plaintiffs argue those portions of the AOB unsupported by citations to the record on appeal (after striking the improper portions) should be either disregarded or stricken. Defendants oppose the motion.

We conclude Defendants improperly included volumes 3 through 24 and 29 through 37 in the AA because they were not part of the trial court file at the time the trial court decided the motion to compel arbitration. Under rule 8.124 of the California Rules of Court,[4] an appellants' appendix may include only documents in the trial court's file for that case. (*The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404.) Rule 8.124(g) provides: "Filing an appendix constitutes a representation that the appendix consists of accurate copies of *documents in the superior court file*. . . ." (Italics added.) "An appellant's appendix may only include copies of documents that are contained in the superior court file." (*The Termo Co*, at p. 404.) Because volumes 3 through 24 and 29 through 37 of the AA consist entirely of transcripts from various depositions taken in this case—none of which were part of the trial court's file, we grant Plaintiffs' motion to strike those volumes from the AA and thus the record on appeal. (*Ibid*.)

We also conclude Defendants improperly included volumes 25 through 28 in the AA because Defendants did not rely on them in their motion to compel and those documents are unnecessary to the disposition of this appeal. Those volumes consist of

---

4 All rule references are to the California Rules of Court.

documents related to codefendant Stuart Financial Corp.'s motion for summary judgment of Plaintiffs' claims against it. Because Stuart Financial Corp. is not one of the Defendants involved in this appeal, those summary judgment documents are irrelevant to Defendants' motion to compel arbitration and unnecessary for proper disposition of the issues in this appeal. Rule 8.124(b)(3) provides that an appellant's appendix "must *not*: [¶] (A) [c]ontain documents or portions of documents filed in the superior court that are *unnecessary for proper consideration of the issues*." (Italics added.) We grant Plaintiffs' motion to strike volumes 25 through 28 of the AA and thus the record on appeal. (Rule 8.124(b)(3)(A); cf. *Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145, 151, fn. 6; *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1058, fn. 4.)

Finally, we agree with Plaintiffs that Defendants' AOB contains many statements of purported fact or procedure unsupported by citations to the record on appeal that remains after we have stricken the improper portions (i.e., volumes 3 through 37 of the AA have been stricken). Only volumes 1 and 2 of the AA remain as part of the record on appeal in this case. Based on our review of Defendants' AOB, there are many statements of purported facts and procedure not supported by *any* citations to the record. Furthermore, of those statements of purported fact or procedure that contain citations to the AA, many of them cite portions of the AA that we have now stricken from the record on appeal. Rule 8.204(a)(1)(C) provides that appellate briefs must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. . . ." Accordingly, for purposes of our disposition of

this appeal, we have disregarded all statements of purported fact or procedure contained in Defendants' AOB not supported by proper citations to the record on appeal as it is now constituted (i.e., vols. 1 and 2 of the AA and the reporter's transcript from the April 22, 2011, hearing). (Rule 8.204(a)(1)(C); *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 990.)

II

Motion to Dismiss and for Sanctions

Plaintiffs filed a motion to dismiss this appeal and for imposition of related sanctions against Defendants. Citing *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, Plaintiffs argue Defendants' appeal is both subjectively and objectively frivolous. They argue this appeal is totally and completely without merit from a reasonable person's perspective and that Defendants filed the appeal only to harass Plaintiffs or for purposes of delay. However, because we cannot conclude this appeal is objectively frivolous (i.e., totally and completely without any legal merit from a reasonable person's perspective), we deny Plaintiffs' motion to dismiss this appeal and impose sanctions on Defendants. (*Id*. at pp. 649-651.)

III

Substantial Evidence to Support Trial Court's Finding of Waiver

Defendants contend the trial court erred by finding they waived any rights they had to enforce arbitration agreements they had with all or some of Plaintiffs. In response, Plaintiffs argue there is substantial evidence to support the trial court's finding that Defendants waived whatever arbitration rights they had.

A

As discussed above, the trial court denied Defendants' motion to compel arbitration based on a number of grounds, including the independent ground that Defendants had waived the right to require Plaintiffs to arbitrate their claims. The court stated in part:

> ". . . Defendants waived their right to arbitrate. [¶] California courts have determined that questions of waiver are determined by the court, not the arbitrator, in connection with a motion to compel arbitration. [Citations.] . . . [¶] . . . [¶]
>
> "Here, the . . . Defendants' actions are inconsistent with arbitration. . . . [T]hey have filed multiple substitutions of attorney, bankruptcy filings, requests to continue trial, counter claims, etc. [Citation.] They also invoked the litigation machinery by filing multiple demurrers, taking 40 depositions, propounding 10,000 discovery requests, and prosecuting a cross-complaint until its final disposition. [Citation.] As to the . . . Defendants' assertion that they only 'recently' found out about their right to arbitrate, Plaintiffs' counsel pointed out that defense counsel questioned the Dicksons in October 2010 about a purported arbitration provision in their deposition. [Citation.]"

B

"Federal and state laws reflect a strong public policy favoring arbitration . . . . Nonetheless, federal and California courts may refuse to enforce an arbitration agreement 'upon such grounds as exist at law or in equity for the revocation of any contract,' including waiver." (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 443-444 (*Lewis*).) "State law, like the FAA [Federal Arbitration Act], reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims. [Citation.] Although a court may deny a petition to compel arbitration on

the ground of waiver ([Code Civ. Proc.,] § 1281.2, subd. (a)), waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) Code of Civil Procedure section 1281.2 provides that, on a petition to compel arbitration, a trial court shall order the parties to arbitrate a controversy if it determines an agreement to arbitrate the controversy exists, *unless* the court determines: "(a) [t]he right to compel arbitration has been waived by the petitioner . . . ."

"[U]nder the [FAA] and the California Arbitration Act [citation] courts apply the same standards in determining waiver claims. [Citation.] . . . In *St. Agnes*, the California Supreme Court adopted as the California standard the same multifactor test employed by nearly all federal courts for evaluating waiver claims." (*Lewis, supra*, 205 Cal.App.4th at p. 444.) In *St. Agnes*, the California Supreme Court concluded the following factors should be considered by a trial court in assessing a claim that a party has waived a right to arbitrate: " ' "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party." ' " (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.)

The question whether a party has waived a right to arbitrate is ordinarily a question of fact for the trial court, and not an arbitrator, to decide. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 982-983.) On appeal "an appellate court's function is to review a trial court's findings regarding waiver to determine whether these are supported by substantial evidence." (*Engalla*, *supra*, at p. 983.) "[T]he trial court's finding [of waiver], if supported by substantial evidence, is binding on the appellate court." (*St. Agnes*, at p. 1196.) We cannot reverse the trial court's finding of waiver unless the record compels a finding of nonwaiver as a matter of law. (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 946.)

"When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) The substantial evidence standard of review involves two steps. "First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences. [Citation.] Second, one must determine whether the evidence thus marshaled is substantial. While it is commonly stated that our 'power' begins and ends with a determination that there is substantial evidence [citation], this does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. . . . [Citation.] '[I]f the word "substantial" [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable . . . ,

credible, and of solid value . . . .' [Citation.] The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633, fns. omitted.) "[T]he power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

C

Based on our review of the entire record on appeal, we conclude there is substantial evidence to support the trial court's finding that Defendants waived any rights they had under arbitration agreements (or otherwise) to require Plaintiffs to arbitrate their claims against Defendants. The trial court considered all six *St. Agnes* factors and found, in effect, they each weighed in favor of a finding that Defendants had waived any right they had to require Plaintiffs to arbitrate. We briefly address the trial court's findings and the supporting evidence.

1. *Unreasonable Delay*. The trial court implicitly found Defendants unreasonably delayed before requesting arbitration of Plaintiffs' claims. There is substantial evidence to support that finding. In support of their opposition, Plaintiffs submitted Faust's

declaration in which he stated: "As of [April 1,] 2011, . . . this case was 779 days old. Prior to the filing of this motion [on March 23, 2011], the . . . Defendants have not requested arbitration." At the time Defendants requested arbitration, the case was about 770 days old. Defendants waited *more than two years* after the original complaint in this case was filed before moving to compel arbitration. Numerous cases have held that delays of just a few months can support a finding of waiver of arbitration. (See, e.g., *Lewis*, *supra*, 205 Cal.App.4th at p. 446 [delay of about five months]; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 556 [less than four months]; *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1228-1229 [five and one-half months]; *Augusta v. Keehn & Associates* (2011) 193 Cal.App.4th 331, 338-339 [six and one-half months]; *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1450-1451 [six months].) Defendants' delay of more than two years before filing their motion to compel arbitration is overwhelmingly substantial evidence to support a finding Defendants had " ' "delayed for a long period before seeking a stay [i.e., filing a petition to compel arbitration]." ' " (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.)

Furthermore, the trial court expressly rejected Defendants' assertion that they had learned of their right to arbitration only recently before they filed their motion to compel arbitration. The court stated: "As to the . . . Defendants' assertion that they only 'recently' found out about their right to arbitrate, Plaintiffs' counsel pointed out that defense counsel questioned the Dicksons in October 2010 about a purported arbitration provision in their deposition." Faust's declaration stated that Defendants' counsel had deposed both Scott Dickson and Marilyn Dickson on October 26, 2010, and questioned each of them

regarding purported arbitration provisions. In support of his declaration, Faust attached excerpts from transcripts of those depositions. We conclude there is substantial evidence to support the trial court's finding that Defendants had *not* only "recently" learned of their purported right to arbitration.

2. *Inconsistent Actions*. The trial court found Defendants acted inconsistently with their purported right to arbitrate, having "filed multiple substitutions of attorney, bankruptcy filings, requests to continue trial, counter claims, etc."[5] There is substantial evidence to support that finding. To act consistently with a right to arbitrate, a party generally would be expected to promptly move to compel arbitration without substantial delay or engaging in other substantial defensive litigation tactics. Faust's declaration shows that by the time of Defendants' motion to compel arbitration, they apparently had made two substitutions of counsel. In March 2010, RDN Ventures, LLC, one of Defendants, filed for bankruptcy. Based on that filing, Defendants sought to stay all discovery by Plaintiffs and requested and received another continuance of the trial date. In June and December 2010, Defendants requested and received further continuances of the trial date. In August 2010, Defendants sought leave to file a cross-complaint against

---

[5] Although the trial court also found Defendants acted inconsistently by not pleading arbitration as an affirmative defense in their answer, the record shows their answer to the third amended complaint listed the affirmative defense of mandatory mediation and/or arbitration. We do not rely on that factor in finding substantial evidence to support the court's finding.

codefendant American Land Company, LLC.[6] Furthermore, as discussed below, Defendants filed multiple demurrers, apparently took 40 depositions, and propounded almost 10,000 discovery requests. These litigation actions constitute substantial evidence to support the trial court's finding that Defendants' actions were inconsistent with their purported right to arbitrate the instant dispute. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.)

3. *Litigation machinery*. The trial court found Defendants "invoked the litigation machinery by filing multiple demurrers, taking 40 depositions, propounding 10,000 discovery requests, and prosecuting a cross-complaint until its final disposition." There is substantial evidence to support that finding. Faust's declaration stated that Defendants demurred to the original complaint and the first amended complaint. His declaration also stated that in April 2010 Defendants propounded nearly 10,000 discovery requests on Plaintiffs. In August 2010, Defendants sought leave to file a cross-complaint against codefendant American Land Company, LLC. Although Plaintiffs do not cite to the record on appeal showing Defendants took over 40 depositions, Faust's declaration shows Defendants took depositions of Scott Dickson and Marilyn Dickson. Furthermore, Defendants do not dispute the trial court's finding that they took 40 depositions in this matter. There is substantial evidence to support the trial court's finding that Defendants invoked the litigation machinery in this case. Furthermore, there is substantial evidence to support an implied finding that the parties were well into preparation both of a lawsuit

---

[6] Neither party cites to the record on appeal showing whether the trial court granted leave to file a cross-complaint.

and for trial before Defendants filed their motion to compel arbitration. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196 [litigation machinery has been substantially invoked and parties were well into preparation of a lawsuit before party gave notice of intent to arbitrate].)

4. *Filing of cross-complaint*. There is also substantial evidence to support the trial court's finding that Defendants filed a cross-complaint before moving to compel arbitration. Faust's declaration stated that in August 2010, Defendants sought leave to file a cross-complaint against codefendant American Land Company, LLC. Although Plaintiffs do not cite to the record showing whether the trial court granted leave to file a cross-complaint, Defendants' action in seeking a leave, by itself, is inconsistent with an intent to arbitrate Plaintiffs' claims. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196 [filing of counterclaim without seeking stay of proceedings].)

5. *Intervening steps/discovery*. There is substantial evidence to support the trial court's implied finding that Defendants had taken intervening steps (e.g., took advantage of judicial discovery) before moving to compel arbitration. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.) Faust's declaration stated that in April 2010 "Defendants propounded nearly 10,000 discovery requests upon Plaintiffs." Furthermore, he stated that in October 2010, Defendants took the depositions of Scott Dickson and Marilyn Dickson. Defendants' action in taking advantage of judicial discovery before moving to compel arbitration was inconsistent with an intent to arbitrate the instant dispute.

6. *Prejudice to Plaintiffs*. There is substantial evidence to support the trial court's implied finding that Plaintiffs were prejudiced by Defendants' delay in moving to compel

arbitration. *St. Agnes* stated that one factor in a trial court's determination whether a party has waived a right to arbitrate is whether the delay affected, misled, or prejudiced the opposing party. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1196.) Furthermore, a finding of waiver of arbitration by a party requires a showing of prejudice to the other party. (*Augusta v. Keehn & Associates*, *supra*, 193 Cal.App.4th at p. 337.) In this case, the evidence supports a finding that Plaintiffs were prejudiced by Defendants' delay in moving to compel arbitration. Defendants delayed over two years before moving to compel. They took multiple depositions and propounded nearly 10,000 discovery requests. During the two-year delay, they allowed Plaintiffs to serve extensive discovery requests that resulted in Defendants ultimately serving on Plaintiffs over 22,000 pages of discovery documents. The trial court could consider the presumably substantial litigation expenses Plaintiffs incurred and the long two-year delay as factors in determining whether Plaintiffs were prejudiced. (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 983-984; *Burton v. Cruise*, *supra*, 190 Cal.App.4th at p. 948 ["a petitioning party's conduct in stretching out the litigation process itself may cause prejudice by depriving the other party of the advantages of arbitration as an 'expedient, efficient and cost-effective method to resolve disputes' "].)

Conclusion. Because there is substantial evidence to support the trial court's findings that each of the six *St. Agnes* factors weighed in favor of a finding of a waiver of arbitration by Defendants, we conclude there likewise is substantial evidence to support the trial court's ultimate finding that, on its weighing of those *St. Agnes* factors, Defendants waived any right they had to require Plaintiffs to arbitrate their claims against

Defendants. (Cf. *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832, 844-848.) "[T]he trial court's finding [of waiver], if supported by substantial evidence, is binding on the appellate court." (*St. Agnes*, at p. 1196.) We cannot reverse the trial court's finding of waiver unless the record compels a finding of nonwaiver as a matter of law. (*Burton v. Cruise*, *supra*, 190 Cal.App.4th at p. 946.) Contrary to Defendants' assertion, based on the record in this case we cannot conclude that, as a matter of law, Defendants did not waive any rights they had to require Plaintiffs to arbitrate their claims against them. (*Ibid*.) None of the cases cited by Defendants are apposite to this case or otherwise persuade us to reach a contrary conclusion.

D

Because we affirm the order based on the trial court's finding of waiver, we do not address the merits of the alternative grounds cited by the trial court for its order denying Defendants' motion to compel arbitration.

DISPOSITION

The order is affirmed. Plaintiffs are entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.