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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WAGNER CONSTRUCTION COMPANY, Plaintiff and Appellant, v. PACIFIC MECHANICAL CORPORATION, Defendant and Respondent.	B178996 (Los Angeles County Super. Ct. No. SC081031)

APPEAL from an order of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Marks, Golia & Finch, P. Randolph Finch, Jr., Jason R. Thornton, for Plaintiff and Appellant.

McInerney & Dillon, Timothy F. Winchester, William A. Barrett, Alexander Bannon, for Defendant and Respondent.

I. INTRODUCTION

Plaintiff, Wagner Construction Company, filed a verified complaint. Plaintiff then filed a petition to compel arbitration which was denied. Plaintiff appeals from the order denying its petition to compel arbitration arising out of a 1997 subcontract with defendant, Pacific Mechanical Corporation. The subcontract required plaintiff to provide shoring for a public work of improvement known as for the Moss Avenue Pump Station in Santa Monica ("the project"). We affirm the order denying plaintiff's petition to compel arbitration.

II. BACKGROUND

Plaintiff filed the current action on July 22, 2004. The complaint contained causes of action for: contract breach (first); a common count for reasonable value of services (second); a violation of Public Contract Code, section 7107 (third); and a violation of Business and Professions Code, section 7108.5 (fourth). Plaintiff alleged the general contractor of the project, Montgomery Watson Americas, Inc., entered into a subcontract with defendant. Under the terms of the subcontract, defendant agreed to perform concrete shell and related work on the project. Defendant and plaintiff entered into a written subcontract on November 1997 to perform shoring. In 1998, plaintiff filed an action against defendant to enforce the claims asserted in the current action. While the 1998 action was pending, plaintiff and defendant became parties to a personal injury action in Contra Costa Superior Court relating to the project. Defendant tendered its defense and claims for indemnity in the personal injury action to plaintiff.

The complaint in this lawsuit further alleged that, in January 1999, plaintiff and defendant through their officers and directors agreed that the 1998 action would be dismissed and all applicable statutes of limitations would be tolled while the personal injury action was pending. In reliance on the agreement, plaintiff filed a dismissal

without prejudice of the 1998 action. The personal injury action was resolved on April 16, 2003.

After the filing of the complaint in this action, on August 20, 2004, plaintiff filed a petition to compel arbitration. In support of the petition, plaintiff relied on Article 12 of the subcontract which provides: "Should any dispute arise out of this Subcontract, or its performance, either party may demand arbitration. The demand must be made in writing and served upon the other party and specify the arbitrator chosen by the party making the demand. Within ten (10) days after delivery of such demand, the other party shall appoint an arbitrator by written notice served on the party making the demand. The two arbitrators so chosen shall select a third arbitrator. The decision of any two arbitrators shall be binding and conclusive, shall be in writing and shall be a condition precedent to any right of legal action upon this contract."

Defendant opposed the petition to compel arbitration on two grounds. First, defendant argued plaintiff did not timely seek to arbitrate their dispute. Second, defendant argued plaintiff failed to show that the parties agreed in writing to toll the four-year statute of limitations which is required by sections 360 and 360.5 of the Code of Civil Procedure.[1]

The trial court denied the petition to compel arbitration on the ground the claims were barred by applicable statutes of limitations and plaintiff thus waived the right to arbitrate the dispute. Specifically, the court ruled the four-year limitation under section 337 barred the contract and the common count claims. Also, the court concluded, the court ruled plaintiff's statutory claims were barred by section 338, subdivision (a). In denying the petition, the trial court ruled that the statute of limitations was in essence one of waiver under section 1281.2, subdivision (a). In addition, the court concluded

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

plaintiff's tolling agreement argument was without merit in the absence of a written waiver of the statute of limitations as required by sections 360 and 360.5. Plaintiff filed a timely notice of appeal from the order denying the petition to compel arbitration.

III. DISCUSSION

Plaintiff asserts the trial court should not have denied the petition to compel arbitration because the statute of limitations had expired. Plaintiff argues the merits of the statute of limitations issue were to be decided by an arbitrator. We conclude that the trial court properly decided whether plaintiff waived the right to compel arbitration as a preliminary under section 1281.2, subdivision (a) which provides: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: . . [¶] The right to compel arbitration has been waived by the petitioner . . . ." (See *Freeman v. State Farm Mutual Automobile Ins. Co.* (1975) 14 Cal.3d 473, 482-487; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1274-1276; *Pagett v. Hawaiian Ins. Co.* (1975) 45 Cal.App.3d 620, 622.)

In *Freeman v. State Farm Mutual Automobile Ins. Co., supra,* 14 Cal.3d at pages 482-487, the Supreme Court held that the issue of whether the right to compel arbitration had been waived by failure to comply with a one-year statute of limitation under former Insurance Code section 11580.2, subdivision (i) was an issue to be determined by the court rather than an arbitrator pursuant to section 1281.2, subdivision (a). In explaining why the issue was properly one for the court, *Freeman* concluded: it is consistent with the rule that where a contract provides that arbitration may be demanded within a specific time, the failure to make a demand to arbitrate within the statute of limitations waives the right to resort to the arbitral forum; under section 1281.2, subdivision (a), a court has the

responsibility to determine whether a party has waived the right to arbitrate by failing to seek it in a timely manner; and where there is a statutory time limit requiring compliance with conditions precedent or waiver, the issue of waiver may be decided very differently by the arbitrator than the court. (*Id*. at pp. 483-484, 486.) With respect to the statutory time limit issue, the Supreme Court noted that former Insurance Code section 11580.2, subdivision (i) was, in effect, a statute of limitations. The purpose of such a statute of limitations is to preclude consideration of the merits of an untimely claim. (*Id*. at p. 484.) The *Freeman* court explained: "'It should not be overlooked that a determination of this issue of waiver (or compliance with conditions precedent, whichever it be called) may be very different it is tried before an arbitrator rather than a court. A court determines the facts upon the weight of competent evidence, and applies the law as it is laid down by the authorities. Arbitrators, on the other hand, "may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action." [Citation.] Thus, what an arbitrator would find to be compliance could be something other than compliance as measured by the standards of the law. [¶] [Statutes of limitation] are intended to set controversies at rest by foreclosing consideration thereafter as to the merits of the claim. To reject a strict application of the law in favor of "broad principles of justice and equity" would make a statute of limitation meaningless.' [Citation.]" (*Id*. at pp. 483-484.)

The *Freeman* decision then concluded: "[Although] we favor full and complete determination by the arbitrator of matters properly submitted to him [or her], we cannot allow our enthusiasm for the expeditious and economical disposition of such matters to intrude upon our responsibility to determine whether the right to compel arbitration has been waived through failure to seek it in a timely manner." (*Id*. at pp. 485-486.)

The *Freeman* opinion relied in part on *Sawday v. Vista Irrigation Dist.* (1966) 64 Cal.2d 833, 836-837. *Sawday* concluded that a party seeking to compel arbitration had waived the right to do so under section 1281.2, subdivision (a) by waiting seven years to make contractual claims subject to the four-year statutory limit for contract actions

(§ 337). (*Id*. at pp. 836-837 & fn. 2.) This is virtually the same situation as in the present case.

As in *Sawday*, plaintiff seeks to compel arbitration of claims that accrued in March 1998 and were brought six years later, in July 2004. Under *Freeman* and *Sawday*, the trial court was required to determine whether plaintiff had complied with the applicable statutes of limitation in deciding the waiver issue pursuant to section 1281.2, subdivision (a). The complaint in the 1997 Contra Costa County action specifically alleged that the causes of action accrued as of March 31, 1998. The statute of limitations for the contract and common count claims was four-years. (§ 337.) The time to pursue these claims expired on April 1, 2002. The limitation for the statutory claims was three years. (§ 338, subd. (a).) The time limit to present the statutory claims expired on April 1, 2001. The claims which are brought six years after they accrued are barred by the time limits in sections 337 and 338, subdivision (b). Therefore, the trial court properly ruled plaintiff's right to arbitrate was waived by the failure to seek arbitration in a timely manner. (§ 1281.2, subd. (a); *Freeman v. State Farm Mutual Auto. Ins. Co., supra,* 14 Cal.3d at pp. 482-486; *Sawday v. Vista Irrigation Dist., supra,* 64 Cal.2d at pp. 836-837 & fn. 2.)

Moreover, we disagree with plaintiff that a different result is required based on *Kennedy, Cabot & Co. v. National Assoc. of Securities Dealers, Inc.* (1996) 41 Cal.App.4th 1167, 1174-1179 and *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co., supra,* 6 Cal.App.4th at pages 1274-1276. As noted above, in *Freeman*, the California Supreme Court held that section 1281.2 requires the trial court to determine whether a party has waived the right to compel arbitration by failing to comply with statutory time limits. (*Freeman v. State Farm Mutual Auto. Ins. Co., supra,* 14 Cal.3d at pp. 482-486.) In addition, as will be noted, both *Kennedy* and *Boys Club* were decided on the facts which are materially distinguishable from those present in this case.

Kennedy, Cabot & Co. v. National Assoc. of Securities Dealers, Inc., supra, 41 Cal.App.4th at pages 1174-1179 involved a request for injunctive relief against an arbitration of a securities matter. The party requesting injunctive relief had previously

agreed to arbitrate within the six-year period permitted by the arbitration agreement. During the arbitration proceeding, the parties submitted for resolution by the arbitrator the statute of limitations issue. At issue was whether the six-year period specified in the arbitration agreement applied or shorter California statutes of limitations had expired. (*Id*. at p. 1171.) The trial court had enjoined the arbitration from proceeding against the defendant. The *Kennedy* court framed the issues thusly: "Is the statute of limitations issue within the scope of the dispute submitted to arbitration? Does a court have authority to enjoin a pending arbitration based upon its ruling on the statute of limitations issue?" (*Id*. at p. 1174.) *Kennedy* concluded the injunction should not have issued. The Court of Appeal held the demand to arbitrate was made within the time frame specified in the arbitration clause and any statute of limitations issues were within the scope of the pending arbitral proceedings. (*Id*. at p. 1170; compare *Platt Pacific, Inc v. Andelson* (1993) 6 Cal.4th 307, 314-321 [a court decides that issue of whether the demand to arbitrate was timely or that right was waived where the arbitration agreement provides a time limit for serving the demand]; *Freeman v. State Farm Mut. Auto. Ins. Co., supra*, 14 Cal.3d at pp. 482-486 [court is required by § 1281.2, subd. (a) to determine whether waiver has occurred by failing to serve a demand within the time frame specified in an insurance contract which is based on a statutory time limit]; *Jordan v. Friedman* (1946) 72 Cal.App.2d 726, 727 [court determines the waiver issue when the contract provides that arbitration may be demanded within a stated time].) *Kennedy* differs from this case in the following ways. In this case: there was no request for injunctive relief against a pending arbitration; the waiver issue was raised in opposition to a section 1281.2 petition to compel arbitration; there is no contractual time limit for bringing the arbitration; there is no contractual time limit that exceeds the applicable California statutes of limitations; and there is no pending arbitration which the parties had previously submitted to and in which they had raised the timeliness issues.

In *Boys Club*, a party sought to compel a surety under a performance bond to participate in an ongoing arbitration. The petition to compel was filed three years after

the arbitration commenced. (*Boys Club of San Fernando, Inc. v. Fidelity & Deposit Co., supra,* 6 Cal.App.4th at p. 1274.) The surety opposed the petition to compel on two grounds. First, the surety contended the plaintiff had waived its right to arbitrate by waiting three years after commencing arbitration to amend the demand to include the surety. Second, the surety argued the demand was untimely under the two-year statute of limitations contained in the performance bond. (*Id*. at pp. 1274-1276)

Boys Club rejected the surety's waiver contention. The Court of Appeal concluded the waiver question is a preliminary matter which the trial court must decide in ruling on a petition to compel arbitration under section 1281.2. (*Id*. at pp. 1274, 1276.) The Court of Appeal held no waiver had occurred. (*Ibid*.) *Boys Club* further concluded that the surety's contention that the demand was barred under the terms of the performance bond was an issue to be raised in the pending arbitration proceeding. (*Id*. at p. 1276.) Thus, *Boys Club* actually supports the trial court's ruling that the waiver issue must be decided by the court as a preliminary matter under section 1281.2, subdivision (a). (*Id*. at pp. 1274, 1276.) *Boys Club* differs from our case in that there was an issue of a timely demand within the meaning of the arbitration agreement. As noted above, there is no such issue in this case. In sum, the trial court correctly concluded that it was required to resolve the statutes of limitations issue as it impacted on the waiver question in deciding to deny the petition to compel arbitration. (§ 1281.2, subd. (a); *Freeman v. State Farm Mutual Automobile Ins. Co., supra*, 14 Cal.3d at pp. 482-487; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co., supra,* 6 Cal.App.4th at pp. 1274-1276; *Pagett v. Hawaiian Ins. Co., supra,* 45 Cal.App.3d at p. 622.)

Moreover, the trial court properly concluded plaintiff failed to establish the various statutes of limitations were tolled. Plaintiff argues the parties agreed to extend the time to bring the present action until the Contra Costa personal injury lawsuit was concluded. The personal injury action was concluded in April 2003. However, pursuant

to sections 360,[2] any such extension of the statute of limitations must be in writing and signed by the party to be charged with the waiver of the statutory time limit. Section 360.5[3] further provides in part, "No waiver shall bar a defense to any action that the action was not commenced within the time limited by this title unless the waiver is in writing and signed by the person obligated." There is no evidence that the parties ever entered into a *written* agreement to extend the applicable statute of limitations. (§ 360.) There is also no evidence that defendant waived the right to assert the lack of timeliness of the action as a defense to the petition to compel arbitration. (§ 360.5.) Accordingly, the trial court properly denied the petition to compel. (See *Santangelo v. Allstate Ins. Co.*

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[2] Section 360 provides: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby, provided that any payment on account of principal or interest due on a promissory note made by the party to be charged shall be deemed a sufficient acknowledgment or promise of a continuing contract to stop, from time to time as any such payment is made, the running of the time within which an action may be commenced upon the principal sum or upon any installment of principal or interest due on such note, and to start the running of a new period of time, but no such payment of itself shall revive a cause of action once barred."

[3] Section 360.5 provides: "No waiver shall bar a defense to any action that the action was not commenced within the time limited by this title unless the waiver is in writing and signed by the person obligated. No waiver executed prior to the expiration of the time limited for the commencement of the action by this title shall be effective for a period exceeding four years from the date of expiration of the time limited for commencement of the action by this title and no waiver executed after the expiration of such time shall be effective for a period exceeding four years from the date thereof, but any such waiver may be renewed for a further period of not exceeding four years from the expiration of the immediately preceding waiver. Such waivers may be made successively. The provisions of this section shall not be applicable to any acknowledgment, promise or any form of waiver which is in writing and signed by the person obligated and given to any county to secure repayment of indigent aid or the repayment of moneys fraudulently or illegally obtained from the county."

(1998) 65 Cal.App.4th 804, 811; *Hambrecht & Quist Venture Partners v. American Medical Internat. Inc.* (1995) 38 Cal.App.4th 1532, 1547.)

IV. DISPOSITION

The order denying the petition to compel arbitration is affirmed. Defendant, Pacific Mechanical Corporation is awarded its costs on appeal from plaintiff, Wagner Construction Company.

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TURNER, P.J.

I concur:

ARMSTRONG, J.

MOSK, J., Dissenting

I respectfully dissent.

I believe that the arbitrator rather than the court should determine if the statute of limitations bars the claim. In this regard, I am in agreement with recent authorities. (See Knight, Alternative Dispute Resolution (Rutter Group 2004) § 5:166.5, p. 5-100 ["Under California law, the arbitrator decides whether the applicable statute of limitations bars enforcement of an arbitration agreement"]; *American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 265 ["We are aware of cases standing for the proposition that timeliness and waiver are issues for the arbitrator to decide"].)

Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal.3d 473 (*Freeman*) does not compel a different conclusion. In that case, a party petitioned to compel arbitration under the uninsured motorist provisions of an automobile insurance policy. Insurance Code section 11580.2, subdivision (i) at the time required, *inter alia*, that the "insured has formally instituted arbitration proceedings," within one year from the date of the accident. The court held that the failure to commence arbitration within the one year period constituted a waiver under Code of Civil Procedure section 1281.2, subdivision (a) of the right to arbitrate and that the court rather than the arbitrator determines whether such a waiver occurred. The Insurance Code requires arbitration of certain limited disputes between the insured and the insurer over recovery under the uninsured motorist provisions—the determination of whether the uninsured motorist was liable to the insured and, if so, the amount to be recovered under the policy. (Ins. Code, § 11580.2, subd. (f).)

In this case we do not deal with a statutory requirement to commence an arbitration, but rather with the statute of limitations as to the claim itself. If the period of limitations has run, a party has not waived its right to arbitrate. Its claim is subject to being extinguished, but only if the other party invokes the statute of limitations as an

affirmative defense. (See 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 407, p. 512.)

Also, in this case, the arbitration clause calls for arbitration of any dispute arising out of the contract—not just the disputes specified by the Insurance Code. Thus, whether the statute of limitations bars a claim is a dispute arising out of the contract. As the court in *Kennedy, Cabot & Co. v. National Assn. of Securities Dealers, Inc.* (1990) 41 Cal.App.4th 1167, 1178 (*Kennedy*) said, "in *Freeman*, by statute, the arbitration was narrowly limited to two issues, the liability of the uninsured motorist for the accident and the amount of damages. It was appropriate for the court, in its determination of the waiver issue of Code of Civil Procedure section 1281.2, to consider the statutory time requirements expressly adopted by the Legislature for submittal of those limited issues to arbitration."

In *Kennedy, supra*, 41 Cal.App.4th 1167, the court held that the issue of whether the six year limitation on filing an NASD (National Association of Securities Dealers) arbitration claim was barred, is left to the arbitrator. The court said, "The arbitrators may consider issues of accrual of the various claims as well as factors which extend or toll applicable limitation periods. Whether Wascher's claim has merit and whether the various causes of action alleged in the claim may be barred on the basis of any applicable California statutes of limitations are issues for the arbitrators, not the court in the circumstances of this particular case." (*Id.* at 1179.) In *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1276, the court said, "Fidelity argues that it cannot be made a party to the arbitration because the filing of the amended demand for arbitration was barred by the statute of limitations contained in the performance bond. That is an issue to be raised in the arbitration proceeding, not in this judicial proceeding."

Thus, the authorities have limited *Freeman, supra,* 14 Cal.3d 473 to uninsured motorist claims and analogous situations. *Freeman* should be so limited. The United States Supreme Court has suggested that statute of limitation issues are for the arbitrators

and not the courts. (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 85-86; see Knight, Alternative Dispute Resolution, *supra,* at § 5.166.6, p. 5-101 ["Likewise, under federal law, the arbitrator decides statute of limitations issues"].) If parties have agreed to arbitrate disputes, it would be contrary to their agreement to have a court determining such matters as the applicable period of limitations, when it accrued, whether it has been waived or has been tolled, or whether equitable estoppel or tolling applies. It is inappropriate for these types of issues to be decided in a summary proceeding to compel or stay arbitration.

If *Freeman*, *supra,* 14 Cal.3d 473, can be viewed as applying to this case, I recommend that the application of *Freeman* be further analyzed, for the legal issue is one of continuing public interest. (Cal. Rules of Court, rule 976, subd. (c).) For all of the foregoing reasons, I would reverse the order of the trial court and would instruct the trial court to grant the petition to arbitrate.

MOSK, J.