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 # 4 ~~TENTATIVE~~ RULING 8:30 a.m., Monday, April 17, 2017

BEVERLY HILLS GATEWAY, L.P. v. TUFELD CORP., et al. [#BC 648888]

A. RULING ON DEMURRER OF DEFENDANTS CUSHMAN & WAKEFIELD, INC. ["C&W"], CUSHMAN & WAKEFIELD WESTERN, INC. ["CUSHMAN"] and JAMES MYERS TO PLAINTIFF'S COMPLAINT

This is an action alleging breach of contract and fraud arising from an underlying appraisal arbitration –

TIMELINE:
prior to 8/31/16: BHG owned a 10-story office building in Beverly Hills. It leased the underlying land from defendant TUFELD. Under the terms of the lease, the property had to be periodically appraised to determine any adjustments in the rent. The lease set forth a procedure for selecting appraisers, etc.
7/8/16: TUFELD filed a Petition to Compel Arbitration in case #BS 163317
8/22/16: Judge MACKEY took the Petition to Compel Arb O/C and stayed the action, based on a representation by the Respondent that it didn't oppose arbitration and that the parties had agreed on an appraisal procedure
o/a 8/31/16: TUFELD selected defendants MYERS and CUSHMAN as its appraiser, and BHG selected "DIETRICH." The parties agreed to select defendant RHOADES as a neutral 3rd appraiser. Appraisal reports were then prepared and submitted. DIETRICH concluded that the appraised value was $18,100,000. Plaintiff alleges that, by engaging in a series of "fraudulent and corrupt acts," TUFELD, MYERS and CUSHMAN came up with an appraised value of $50 mil., and RHOADES allegedly "sanctioned and endorsed... this misconduct."
1/10/17: MYERS and RHOADES issued an award, valuing the property at $40 mil. Plaintiff BHG claims that, as a result, it is "now faced with a rental amount that exceeds the cash flow of the property..." etc.
2/1/17: Plaintiff filed this action, asserting 8 causes of action:
1. br/K v. TUFELD
2. br/K v. ALL DEFENDANTS
3. br/covenant of GF/FD v. TUFELD
4. br/covenant of GF/FD v. ALL DEFENDANTS
5. fraudulent concealment v. C&W, CUSHMAN, MYERS
6. intentional misrep v. C&W, CUSHMAN, MYERS
7. injunctive relief v. TUFELD
8. declaratory relief v. TUFELD

3/10/17: MP defendants filed general demurrers to causes of action 2 and

4-6 and also purport to demur specially to the same causes of action on grounds of uncertainty.

THE GENERAL DEMURRERS OF DEFENDANTS CUSHMAN & WAKEFIELD, INC. ["C&W"], CUSHMAN & WAKEFIELD WESTERN, INC. ["CUSHMAN"] and JAMES MYERS TO CAUSES OF ACTION 2 AND 4-6 OF PLAINTIFF'S COMPLAINT ARE SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

THE SPECIAL DEMURRERS ARE TAKEN OFF CALENDAR AS MOOT, IN VIEW OF THE ABOVE, AND FOR LACK OF SPECIFICITY [see, e.g., Fenton v. Groveland (1982) 135 CA3d 797].

The causes of action at issue here are: 2. br/K v. ALL DEFENDANTS; 4. br/covenant of GF/FD v. ALL DEFENDANTS; 5. fraudulent concealment v. C&W, CUSHMAN, MYERS; and 6. intentional misrep v. C&W, CUSHMAN, MYERS. Each of those causes of action arises from Plaintiff's allegation that the defendant appraisers engaged in wrongdoing in connection with an appraisal of commercial property in Beverly Hills. Appraisal proceedings are essentially equivalent to arbitration proceedings, and are treated as such where, as here, they function to resolve an issue between the parties. See, e.g., CCP 1280(a); Kirkwood v. Cal. State Auto Ass'n Interinsurance Bureau (2011) 193 CA4th 49, 57. California extends the principle of judicial immunity to arbitration proceedings. See e.g. Moore v, Cunliffe (1994) 7 Cal.4th 634, 644; also see Stasz v. Schwab (2004) 121 Cal.App.4th 420, 432. As moving defendants point out:

> California's public policy encouraging arbitration as a means of dispute resolution, has led to the development of a strong public policy seeking to assure that arbitrators are able to employ "independent judgments which are free from fear of legal action." Thiele v. RML Realty Partners, (1993) 14 Cal. App.4th 1526, 1531 (citing Corey v. New York Stock Exchange, (1982) 691 F.2d 1205, 1211.); see also La Serena Properties v. Weisbach (2010) 186 Cal App 4th 893, 901. "A suit against an arbitrator or a sponsoring organization is nothing more than a collateral attack on the arbitration award. And, under state law, the exclusive means of attacking an award is by way of a petition to vacate the award as provided in the California Arbitration Act." Stasz v. Schwab (2004) 121 Cal.App.4th 420, 440-41.

Under the judicial immunity doctrine, arbitrators are absolutely immune from civil lawsuits for any function which is integrally related to the arbitration process. Appraisers are entitled to benefit of arbitral immunity. See Lambert v. Cerneghi (2008) 158 CA4th 1120.

As defendants further point out:

> The doctrine of arbitral immunity "shields all functions which are 'integrally related to the arbitral process," Stasz, supra, 121 Cal.App.4th at 431 (citing Thiele, supra, 14 Cal.App. 4th at 1530). And, as explained by the Court, the scope of

that immunity is broad and applies to any assertion of a "failure to exercise care or skill in the performance of [an arbiter's] arbitral functions, "bias," "fraud," "misconduct," "discretionary acts," and "administrative acts." Stasz, supra, 121 Cal.App.4th at 43 1-32, 439. Moreover, the immunity applies regardless of whether the civil action states a claim in tort or in contract because, as the Court recognized:

> Virtually any claim of misconduct in arriving at a decision could be stated as a breach of the implied covenant of good faith and fair dealing. Arbitral immunity could thus be effectively circumvented in most, 'if not all, cases by labeling the wrong as a contract breach.

Plaintiff's argument to the effect that only "neutral," as opposed to "party-affiliated" arbitrators/appraisers are entitled to immunity is unsupported, as are Plaintiff's arguments that only the "neutral" appraiser serves in a "quasi-judicial" capacity and that the "party-affiliated" appraisers serve as agents of the party appointing them. None of the cases cited by Plaintiff make such sweeping findings. See, e.g., Howard v. Drapkin (1990) 222 CA3d 843. Were Plaintiff's position to be adopted, it would have a chilling effect on the arbitration process – no one would ever want to serve as a party-affiliated arbitrator for fear of being subjected to litigation by parties dissatisfied with the results of the arbitration/appraisal.

Plaintiffs are not without a remedy, and in fact, they have taken advantage of the remedy afforded them under California law by petitioning to vacate the arbitration/ appraisal award issued. That petition was denied by Judge Mackey on 4/10/17. While the decision in that other case may not yet be final, the Court notes that it will likely have res judicata effect, since the issues of whether the appraisers acted wrongfully either were or could have been litigated in connection with the petitions to confirm and to vacate the arbitration/appraisal award. That plaintiff is seeking relief against the arbitrators in this action, as opposed to the party(s) who appointed them, doesn't change this result.

In view of these findings, the Court sustains the demurrers and it need not reach the question of whether moving defendants are also protected by the litigation privilege of CC 47(b). The Court is allowing leave to amend only because this is the first challenge to the pleadings herein; however, the Court opines that it appears unlikely that Plaintiffs could amend to state a valid cause of action as against these moving defendants based on the facts alleged in the complaint.

B. RULING ON DEMURRER OF DEFENDANT TUFELD CORP. TO PLAINTIFF'S COMPLAINT:

TENTATIVE RULING: THE GENERAL DEMURRERS OF DEFENDANT TUFELD CORP. TO CAUSES OF ACTION 1-4 AND 7-8 OF PLAINTIFF'S COMPLAINT ARE

SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

The causes of action at issue here are: 1. br/K v. TUFELD; 2. br/K v. ALL DEFENDANTS; 3. br/covenant of GF/FD v. TUFELD; 4. br/covenant of GF/FD v. ALL DEFENDANTS; 7. injunctive relief v. TUFELD; and 8. declaratory relief v. TUFELD. Despite Plaintiff's attempt to cast this case as involving breaches by TUFELD of an agreement to proceed in a particular way in connection with the appraisal process, each of those causes of action arises from Plaintiff's allegation that the defendant appraisers engaged in wrongdoing in connection with an appraisal of commercial property in Beverly Hills.

As noted in the Court's ruling addressed to the demurrer of the defendant appraisers, appraisal proceedings are essentially equivalent to arbitration proceedings, and are treated as such where, as here, they function to resolve an issue between the parties. See, e.g., CCP 1280(a); Kirkwood v. Cal. State Auto Ass'n Interinsurance Bureau (2011) 193 CA4th 49, 57. California extends the principle of judicial immunity to arbitration proceedings. See e.g. Moore v, Cunliffe (1994) 7 Cal.4th 634, 644; also see Stasz v. Schwab (2004) 121 Cal.App.4th 420, 432. As the defendant appraisers point out in their demurrer:

> California's public policy encouraging arbitration as a means of dispute resolution, has led to the development of a strong public policy seeking to assure that arbitrators are able to employ "independent judgments which are free from fear of legal action." Thiele v. RML Realty Partners, (1993) 14 Cal. App.4th 1526, 1531 (citing Corey v. New York Stock Exchange, (1982) 691 F.2d 1205, 1211.); see also La Serena Properties v. Weisbach (2010) 186 Cal App 4th 893, 901. "A suit against an arbitrator or a sponsoring organization is nothing more than a collateral attack on the arbitration award. And, under state law, the exclusive means of attacking an award is by way of a petition to vacate the award as provided in the California Arbitration Act." Stasz v. Schwab (2004) 121 Cal.App.4th 420, 440-41.

Under the judicial immunity doctrine, arbitrators are absolutely immune from civil lawsuits for any function which is integrally related to the arbitration process. Appraisers are entitled to benefit of arbitral immunity. See Lambert v. Cerneghi (2008) 158 CA4th 1120.

As the defendant appraisers further point out:

> The doctrine of arbitral immunity "shields all functions which are 'integrally related to the arbitral process," Stasz, supra, 121 Cal.App.4th at 431 (citing Thiele, supra, 14 Cal.App. 4th at 1530). And, as explained by the Court, the scope of that immunity is broad and applies to any assertion of a "failure to exercise care or skill in the performance of [an arbiter's] arbitral functions, "bias," "fraud," "misconduct," "discretionary acts," and "administrative acts." Stasz, supra, 121 Cal.App.4th at 43 1-32, 439. Moreover, the immunity applies regardless of

whether the civil action states a claim in tort or in contract because, as the Court recognized:

> Virtually any claim of misconduct in arriving at a decision could be stated as a breach of the implied covenant of good faith and fair dealing. Arbitral immunity could thus be effectively circumvented in most, 'if not all, cases by labeling the wrong as a contract breach.

Again, Plaintiff's argument to the effect that only "neutral," as opposed to "party-affiliated" arbitrators/appraisers are entitled to immunity is unsupported, as are Plaintiff's arguments that only the "neutral" appraiser serves in a "quasi-judicial" capacity and that the "party-affiliated" appraisers serve as agents of the party appointing them. None of the cases cited by Plaintiff in opposition the appraisers' demurrers make such sweeping findings. See, e.g., Howard v. Drapkin (1990) 222 CA3d 843. And again, were Plaintiff's position to be adopted, it would have a chilling effect on the arbitration process – no one would ever want to serve as a party-affiliated arbitrator for fear of being subjected to litigation by parties dissatisfied with the results of the arbitration/appraisal.

In connection with the appraisers' demurrers, the Court noted that Plaintiffs are not without a remedy, and in fact, they have taken advantage of the remedy afforded them under California law by petitioning to vacate the arbitration/ appraisal award issued. That petition was denied by Judge Mackey on 4/10/17. While the decision in that other case may not yet be final, the Court notes that it will likely have res judicata effect, since the issues of whether the appraisers acted wrongfully either were or could have been litigated in connection with the petitions to confirm and to vacate the arbitration/ appraisal award. That plaintiff is seeking relief against TUFELD, who appointed C&W/MYERS to perform appraisal services, only makes it more likely that Judge MACKEY's decision will have res judicata effect. Any claim of wrongdoing by TUFELD in connection with the appraisal would have to have been made in connection with the petitions to confirm and/or vacate the appraisal award. That Plaintiff now attempts to assert that claim under a breach of contract theory is a distinction without a difference. The primary right involved is the same – i.e., the right to a fair appraisal of the property.

In view of these findings, the Court sustains the demurrers to causes of action 1-4, and it need not reach the question of whether moving defendants are also protected by the litigation privilege of CC 47(b). Re cause of action 7, the Court agrees with movant's argument to the effect that injunctive relief is a remedy, not a cause of action, and that this claim fails as it derives from causes of action 1-4. Re cause of action 8: In view of the ruling above, there is no "actual controversy" as between these parties which requires a declaration from the Court.

The Court is allowing leave to amend only because this is the first challenge to the pleadings herein; however, the Court opines that it appears unlikely that Plaintiffs could amend to state a valid cause of action as against these moving defendants based on

the facts alleged in the complaint.

MPs are to serve notice of rulings. This TR shall be the order of the court, unless changed at the hearing, and shall by this reference be incorporated into the Minute Order.