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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ALBERT MNATSAKANYAN, et al., Plaintiffs and Respondents, v. CALFARM INSURANCE COMPANY, Defendant and Appellant.	B212159 (Los Angeles County Super. Ct. No. BC274814)

APPEAL from a judgment of the Superior Court of Los Angeles County, David L. Minning, Judge. Reversed and Remanded.

Cannon & Nelms, Anthony L. Cannon and Derrick R. Sturm; Horvitz & Levy, Peter Abrahams and Mitchell C. Tilner for Defendant and Appellant.

The Najarian Law Firm and Sean Najarian; Haight Brown & Bonesteel and Rita Gunasekaran for Plaintiffs and Respondents.

Plaintiffs GAM Holdings, Albert Mnatsakanyan, and Garnick Mnatsakanyan ("GAM") sued CalFarm Insurance Company ("CalFarm") in Los Angeles Superior Court for, inter alia, insurance bad faith and breach of contract.[1] According to the operative complaint and its attachments, CalFarm issued a "Businessowners [*sic*] Portfolio Policy" to GAM covering lost income from business property. GAM alleged that CalFarm wrongly denied policy benefits for lost income from a Carl's Jr. Restaurant that was destroyed in a fire at a strip mall owned by GAM. Following submission of the case to voluntary arbitration, the arbitrator found for GAM on both its claims, and awarded $3,838,085.20. The trial court later confirmed the award, and entered judgment for GAM in the sum of $4,665,073.02 (the arbitration award of $3,838,085.20 plus prejudgment interest of $826,987.82).

On appeal, CalFarm contends that the undisputed evidence showed that it did not authorize its counsel to waive its right to a jury trial and stipulate to arbitration of any claim that would result in liability exceeding $500,000. Therefore, the court erred in confirming the arbitration award. Relying in large part on the recent decision in *Toal v. Tardif* (2009) 178 Cal.App.4th 1208 (*Toal*), we agree. Consistent with *Toal,* we reverse the judgment and remand the case to the trial court for a new evidentiary hearing on GAM's petition to confirm the arbitration award, at which the court shall determine whether a valid arbitration agreement exists between GAM and CalFarm, and, if so, whether it permits confirmation of the arbitration award in full or only subject to a $500,000 cap on CalFarm's liability.

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[1] GAM also alleged claims for breach of fiduciary duty, negligence, and misrepresentation. The record is unclear as to what became of these claims.

BACKGROUND

GAM's Petition to Confirm the Arbitration Award

On September 9, 2008, GAM filed a petition to confirm the arbitration award. GAM alleged that the case "was submitted to binding arbitration by stipulation executed by the parties and filed with the court." Attached to the petition was a copy of a document entitled "Stipulation to Binding Arbitration," filed with the court on March 20, 2007.[2] It stated: "All parties to this action hereby agree to submit [GAM's] remaining cause of action for breach of contract to final and binding arbitration before William Sheffield, terms and conditions of which are more fully outlined in a separate document. The present filing is provided for the Court's use and reference, and confidential terms of the actual Stipulation between the parties are not included herein." The stipulation stated that the arbitration would be conducted on two dates, April 24, 2007, and May 16, 2007. It was signed by Patricia Law as counsel for GAM and by Anthony Cannon as counsel for CalFarm. It was not executed by representatives of the parties, GAM and CalFarm.

Although the stipulation referred only to arbitration of GAM's "remaining cause of action for breach of contract," the petition to confirm the arbitration award alleged that "[t]he issues submitted to arbitration called for a determination of [GAM's] causes of action for breach of insurance contract *and* breach of the implied covenant of good faith and fair dealing." (Italics added.) According to the petition, the arbitration was conducted in two phases. The first involved determining CalFarm's affirmative defense of fraud, and the second involved determining GAM's breach of contract and bad faith claims.

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[2] The petition alleged that the stipulation was filed on February 4, 2008. However, the copy of the stipulation attached as an exhibit bears a filing stamp of March 20, 2007.

Attached to the petition were copies of three arbitration awards. The first, dated May 10, 2007, stated that the "sole issue" presented for arbitration was CalFarm's affirmative defense that GAM fraudulently overstated the value of lost income from the damaged Carl's Jr. restaurant. The arbitrator concluded that CalFarm had failed to prove this affirmative defense by a preponderance of the evidence.

The second arbitration award was dated June 12, 2008. In it, the arbitrator stated that the parties "ask[ed] [him] to decide . . . whether [CalFarm] breached its insurance contract with GAM and, if so, whether that breach rose to the level of bad faith." The arbitrator concluded that CalFarm had breached the insurance policy and was guilty of bad faith. He awarded damages of $2,819,000.

The third arbitration award, entitled "Final Arbitration Award and Rulings on Motion to Correct and Motion for Attorney Fees and Costs," was dated August 18, 2008. In this award, the arbitrator repeated his findings on the breach of contract and bad faith claims, and denied CalFarm's motion to correct the award.

The arbitrator also ruled on GAM's motion for attorney fees under *Brandt v. Superior Court* (1985) 37 Cal.3d 813 (*Brandt*). The arbitrator stated that CalFarm opposed the motion for attorney fees on the ground that the case had been arbitrated pursuant to a cap on damages, and that an award of fees would violate that cap. The arbitrator rejected this argument: "In its opposing brief, CalFarm argues 'The parties stipulated to a cap on damages in submitting this action to arbitration.' The argument seems disingenuous. Not only was no written damage stipulation submitted to me, either during the arbitration, or afterwards as part of CalFarm's opposition, there was also not even a declaration of counsel reciting the terms of an oral stipulation. In short, I have received no competent evidence of

any stipulation relating either to attorney fees or an overall cap. Hence, the argument is rejected."

The arbitrator awarded GAM attorney fees under *Brandt* of $993,216.54 and costs of $25,868.66. Combined with the earlier damage award of $2,819,000, the total award was $3,838,085.20.

In its petition to confirm, GAM sought confirmation of this final award. In addition, GAM alleged that it had served on CalFarm an offer to compromise for $400,000 under Code of Civil Procedure section 998 in August 2006, which CalFarm rejected. Therefore, GAM sought pre-judgment interest of $826,987.82 under Civil Code section 3291.

CalFarm's Opposition to the Petition to Confirm[3]

In its opposition, CalFarm argued that the parties had stipulated to arbitrate subject to a "floor" of $0 and a "ceiling" of $500,000. According to CalFarm, this limitation was not presented to the arbitrator "so that nothing would be read into these numbers by him." CalFarm urged the court either to vacate the arbitration award, or to correct it to reflect an award of $500,000.

CalFarm relied on the attached declaration of Derrick Sturm, counsel for CalFarm, in which Sturm explained his negotiations with Patricia Law, GAM's

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[3] CalFarm did not appear at the initial hearing on the petition to confirm, and filed no opposition. The court entered judgment as requested by GAM in the sum of $4,665,073.02 (the arbitration award of $3,838,085.20 plus prejudgment interest of $826,987.82). However, two days later, after receiving notice of the judgment, CalFarm filed an ex parte application for an order setting aside the judgment under Code of Civil Procedure section 473 on the ground that CalFarm had not received notice of the petition to confirm the arbitration award. The court granted the application in part, permitting CalFarm to file an opposition to the petition to confirm and setting the matter for hearing, but it did not set aside the judgment.

attorney, over the terms of the arbitration. Attached to the declaration were copies of relevant documents, including letters, emails, and proposed stipulations to arbitration.

According to Sturm, in late 2006 he mentioned to Law that the case might be appropriate for binding arbitration, if the parties could agree on a "high" and a "low." In response, Law sent Sturm a letter dated December 28, 2006, stating: "Please be advised that for the arbitration our clients propose a zero floor and a million dollar high." By letter dated January 2, 2007, Sturm acknowledged receipt of Law's proposal, and informed Law that he had forwarded it to CalFarm.

In January and February 2007, Sturm and Law continued to discuss the terms of the proposed arbitration. Ultimately, Law informed Sturm that she believed that her client would stipulate to a high of $400,000 in exchange for a low of a waiver of costs by CalFarm. Sturm then prepared a proposed stipulation to that effect, with blanks for signatures by the attorneys and representatives of GAM and CalFarm, and faxed it to Law on February 13, 2007. Sturm also faxed a cover letter, which recited in part: "Please keep in mind that this [proposed stipulation] has not yet been reviewed by our client. It seems that the path of least resistance [is] for you and I to come to a tentative agreement on the arbitration terms before our respective clients are given the opportunity to chime in on this."

Law later notified Sturm that GAM would agree to arbitration only if the cap was increased to $500,000. Sturm informed CalFarm's litigation manager, Cheryl Henkel, of this development in an email on February 26, 2007. He explained: "The terms of the Stipulation to Submit Matter to Arbitration that I prepared is agreeable in all relevant terms with the exception of the high (the most significant issue, obviously). . . . Anyway, they have drawn the line in the sand at $500K (for which Ms. Law is very apologetic since she was entirely certain that she could sell

her clients on the $450K)." Henkel responded to Sturm by email the next day, "Okay to agree to 0 low and high of 500K."

Although the parties had not yet formalized a written stipulation between themselves setting forth all the terms under which the case would be arbitrated, including the $500,000 cap, Sturm filed with the court a "Stipulation to Binding Arbitration" on March 20, 2007. This stipulation was the one referred to in GAM's petition to confirm the arbitration award. It was signed by Law and Anthony Cannon, Sturm's co-counsel (not by representatives of GAM and CalFarm). It referred to arbitration only of GAM's "remaining cause of action for breach of contract," and stated that the "terms and conditions of [the arbitration] are more fully outlined in a separate document." (As we have noted, however, no such "separate document" had been executed by the attorneys or the parties.)

According to Sturm, he "issued" a confirming letter to Law dated April 4, 2007, accepting her proposal to increase the arbitration cap to $500,000. The letter stated: "I have discussed your client's revised demand for a ceiling of $500,000 in the binding arbitration of this matter, and that number is agreeable. Therefore, it appears that this matter can proceed to arbitration as contemplated." Sturm also revised the proposed "Stipulation to Binding Arbitration" between the parties (with blanks for signatures by the attorneys and representatives of GAM and CalFarm) to reflect a ceiling of $500,000. The revised stipulation provided in part: "Regardless of the nature and amount of the award of the arbitrator, the parties agree that in the event an award is issued in favor of [GAM], [CalFarm] shall pay the award up to $500,000.00, and all recoverable costs will be waived by Plaintiff. In the event that an award is issued in favor of [CalFarm], no payment shall be made to [GAM]. Regardless of the outcome of the arbitration, CalFarm shall waive all recoverable costs against [GAM]." The revised stipulation also provided

that it was not to be filed with the court unless its terms were placed in issue, and that the terms could be revealed to the arbitrator "except that the high and low limits . . . shall not be provided to the arbitrator at any time before the arbitrator issues his final and binding arbitration award."

Copies of the letter and revised stipulation were attached to Sturm's declaration. However, neither copy bore a fax legend indicating if or when it was transmitted to Law.

In his declaration, Sturm stated that when the parties appeared at the first arbitration session on April 24, 2007, they disagreed over what claims were being arbitrated. CalFarm believed that only GAM's claim for breach of contract was submitted for arbitration. However, GAM intended to arbitrate both its breach of contract *and* insurance bad faith claims. Thus, little was accomplished at this session. (Although not mentioned in Sturm's declaration, the parties apparently later agreed to have the arbitrator decide CalFarm's affirmative defense of fraud to the breach of contract claim, as stated in the first arbitration award dated May 10, 2007, which was included with the petition to confirm the arbitration award.)

Thereafter, according to Sturm, he received a letter from Law dated June 14, 2007. Law wrote: "This letter will offer a stipulation to have <u>all</u> remaining causes of action submitted to binding arbitration under the same terms and conditions as previously agreed. [¶] This shall also serve to clarify that [GAM] shall only be seeking the business interruption damages of 5201 and the consequential money damages of the sale of the property as the entire and full measure of their damages at the arbitration, should we be able to so agree." (Underlining in original.) Sturm understood Law's reference to "the same terms and conditions as previously agreed" to incorporate the cap of $500,000 on CalFarm's liability.

On March 26, 2008, Sturm submitted another "Stipulation to Binding Arbitration" to the court. This stipulation was signed by Law and Sturm (not by the parties' representatives), and stated: "The parties to this action have stipulated to have this entire matter, including all remaining causes of action (*breach of contract and breach of the implied covenant of good faith and fair dealing*) and damages to final and binding arbitration before Judge William Sheffield on April 28, 2008, *terms and conditions of which are more fully outlined in separate documents*. The instant filing is provided for the Court's use and reference, *and confidential terms of the actual Stipulation between the parties are not included herein*." (Italics added.) (Again, although the stipulation filed with the court referred to "separate documents" containing the terms and conditions of the arbitration, it appears that no such documents had been executed by the attorneys or the parties.)

During the resulting arbitration, according to Sturm, GAM claimed that because CalFarm failed to pay policy benefits for the lost rents relating to the destroyed Carl's Jr. restaurant, GAM was forced to sell the property. GAM's appraisal expert had prepared a report appraising the property at a value ranging from $4,269,000 to $4,369,000. Sturm told Law that because of the $500,000 damages cap, he would stipulate to a value of $4,269,000 and would not call CalFarm's appraisal expert to testify to a different value. Sturm declared: "If Ms. Law knew at that time that her client did not intend to be bound by the damages cap . . . , she certainly had an obligation to inform me of this prior to proceeding with the arbitration."

In an email to Law and Sturm dated June 12, 2008, the arbitrator noted that GAM's arbitration brief referred to the appraisal done by its expert, but the arbitrator could not locate the appraiser's report in the record. Sturm responded by

email that day, stating that he could provide a copy of the appraisal, but "this may not be necessary. The subject report utilized different valuation methods that resulted in different valuations. . . . The parties stipulated to the [fair market value] of the building and land to be the lower of these two numbers: $4,269,000. (CORRECT ME IF I MISRECOLLECT HERE, MS. LAW. If I am incorrectly stating anything, it is not intentional)." Having stipulated to the value of the property, Sturm did not call any witnesses on the issue at the arbitration.

In his declaration, Sturm noted that GAM's petition to confirm the arbitration award "conspicuously does not mention the damages cap to which the parties to this matter agreed. . . . [¶] What [GAM] apparently claims is that even though it made an offer to submit this matter to binding arbitration with a high-low of $0 to $1,000,000 on December 28, 2006, these parameters somehow changed to a binding arbitration with no cap on damages with CalFarm retaining no right to appeal. This makes no sense."

In its points and authorities in support of its opposition, CalFarm argued in relevant part, based on Sturm's declaration and the supporting documentation, that CalFarm and GAM did not reach a "meeting of the minds" regarding the terms under which the case would be arbitrated: CalFarm agreed to arbitrate only subject to a $500,000 cap, whereas GAM now claimed a different understanding of the arbitration terms. Therefore, the court was required to vacate the award, or, in the alternative, to correct the award with GAM's consent to $500,000.

GAM's Reply

GAM filed a reply to CalFarm's opposition. It provided no additional evidence – no declaration from Law, no other documents -- disputing Sturm's declaration or its supporting exhibits. Rather, the reply was signed by another

attorney in Law's firm, Brian Unitt. The reply presented two arguments. First, GAM pointed to the portion of the arbitrator's final award dated August 18, 2008, in which the arbitrator rejected CalFarm's claim that an award of *Brandt* attorney fees would violate the cap on damages. GAM argued that CalFarm was bound by the arbitrator's ruling.

Second, GAM argued that CalFarm failed to prove "that a limitation on damages was ever reduced to writing signed by the parties" or agreed to by GAM and its attorneys. GAM stated that CalFarm presented "considerable evidence of negotiations concerning a possible cap on damages, but no evidence of a signed agreement." According to GAM, "[t]he scope of the matters to be arbitrated was finally delineated in March of this year by stipulation approved by the Court: 'The parties to this action have stipulated to have this entire matter, including all remaining causes of action (breach of contract, and breach of implied covenant of good faith and fair dealing) and damages to final and binding arbitration before Judge William Sheffield, on April 28, 2008, terms and conditions of which are more fully outlined in separate documents.'" GAM argued that the reference to "separate documents" meant Law's letter to Sturm dated June 14, 2007, in which Law "offer[ed] a stipulation to have <u>all</u> remaining causes of action submitted to binding arbitration under the same terms and conditions as previously agreed." (Underlining in original.) GAM described the letter as being "devoid of reference to a 'cap' on damages."

Ruling on the Petition to Confirm

The court heard the petition to confirm the arbitration award on October 29, 2008. The court stated that its tentative decision was to confirm the award: "I have gone through this about every way I can and I went through [the arbitrator's

analysis], and I went through my own analysis, and I can't find anything in the record, any evidence in the record to support that there was a contract to limit the award of the arbitrator. There are exchanges of correspondence . . . , but there is no agreement. I can't find anything on the record that indicates that there actually was an agreement."

On behalf of CalFarm, Sturm's co-counsel, Anthony Cannon, argued that Sturm's declaration and the supporting documents showed that the negotiations resulted in the parties agreeing to a cap of $500,000. Cannon noted that Law was not present at the hearing, and had not filed a declaration disputing CalFarm's evidence. Cannon stated: "Where is Ms. Law saying there . . . was no agreement under penalty of perjury? You have an officer of the court, Mr. Sturm, who has prepared a declaration under pain [of] perjury . . . that says this agreement exists. We don't get the same thing from [GAM]. Nobody will stand up. . . . No one from the other side has given you any declaration under penalty of perjury or . . . any evidence that there was no cap."

Sturm, who was also present at the hearing, stated that he had brought a copy of the stipulation containing the cap to the arbitration to be executed. He explained: "When this [issue] came up, I looked for the copy that I had signed and provided to [Law] which I understood to have been signed [but it] was not in my file. And so it leads me to believe that it was picked up [at the arbitration]."

Cannon asked that if the court were inclined to confirm the arbitration award, the court first conduct an evidentiary hearing "and let the lawyers who were there take the stand under oath and make these claims. I don't think it is a coincidence that [Law] is not here and that there is not a declaration."

GAM's attorney, Brian Unitt, described CalFarm's request for a hearing at which Law would testify as being "trumped . . . up for the first time today. I think

that is outrageous." He noted that he could not locate any copy of the stipulation containing the $500,000 cap in GAM's case file, and he reiterated the arguments in GAM's written reply: "The court's initial take on this was the correct take. We had a series of negotiations that did not result in an agreement [on a cap]. They went forward with the arbitration. They submitted their complaint to the arbitrator on this very issue and they lost, and this petition should be granted."

The court granted the petition to confirm the arbitration: "I agree with [the arbitrator]. The burden is on the defense to indicate . . . that there was the limitation[.] [T]hat failed and . . . the arbitration award is confirmed." The court entered judgment for GAM in the sum of $4,665,073.02 (the arbitration award of $3,838,085.20 plus prejudgment interest of $826,987.82).

DISCUSSION

CalFarm contends that the undisputed evidence showed that it did not authorize its counsel to waive its right to a jury trial and stipulate to arbitration for any claim which would result in liability exceeding $500,000. Therefore, the court erred in confirming the arbitration award. On the record presented, we agree. We review the trial court's order de novo, though to the extent the ruling rests on a determination of disputed facts, we apply the substantial evidence standard. (*Cochran v. Rubens* (1996) 42 Cal.App.4th 481, 484-486.)

Under the law of agency, absent the client's consent or later ratification, an attorney cannot enter a binding stipulation to arbitrate a client's claim. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 407-408 (*Blanton*).) As stated in *Blanton,* "an attorney, merely by virtue of his employment as such, has no apparent authority to bind his client to an agreement for arbitration. We find no reason in logic, or policy, for holding his apparent authority in that respect is enlarged by

reason of the fact that he has been retained to engage in litigation. When a client engages an attorney to litigate in a judicial forum, the client has a right to be consulted, and his consent obtained, before the dispute is shifted to another, and quite different, forum, particularly where the transfer entails the sort of substantial consequences present here." (*Ibid.*) Further, "when it comes to such a substantial matter as compromise of an action, 'a person dealing with an attorney, as dealing with any agent, must ascertain whether the agent has authority to do the purported act and assumes the risk if in fact the agent has no such authority.' [Citations.]" (*Id.* at p. 406.)

We find the recent decision in *Toal v. Tardif, supra,* 178 Cal.App.4th 1208, instructive. There, the plaintiffs sued the defendants for various claims related to plaintiffs' purchase of defendants' house. (*Id.* at p. 1213.) The attorneys for the parties and the court signed a stipulation and order to submit the case to arbitration. The stipulation stated that the parties agreed that the case would be resolved by binding arbitration. The attorneys' signature lines stated that the signatures were "for" the clients, but the clients themselves did not sign the stipulation. (*Ibid.*) The court ordered the matter to arbitration, and the arbitrator issued an award of more than $55,000 for the plaintiffs. (*Id*. at p. 1214.) The plaintiffs petitioned the court to confirm the original arbitration award and, in a subsequent proceeding, a corrected arbitration award. The plaintiffs produced only the stipulation to arbitrate that was executed by the attorneys and the court, but no other evidence of the agreement to arbitrate. In both confirmation proceedings, one defendant, now self-represented, asserted that he had never agreed to arbitration, that he had so informed his attorney, and that the attorney had informed him that it was too late because the attorney had agreed to arbitrate on his behalf. (*Id.* at pp. 1214-1215.)

The trial court ultimately confirmed the corrected arbitration award. (*Id.* at p. 1215.)

The appellate court reversed. It noted that in *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394 (*Rosenthal*), the California Supreme Court held that in ruling on a petition to *compel* arbitration, the trial court must first determine whether a valid agreement to arbitrate exists, and the petitioner bears the burden of proof on that issue. (*Toal, supra*, 178 Cal.App.4th at pp. 1219-1220.) Reasoning by analogy, the court in *Toal* held that a trial court ruling on a petition to *confirm* an arbitration award has the same duty, and the petitioner the same burden of proof, unless a prior determination that a valid agreement exists has already been made. The court stated: "We have found no case that describes (as clearly as did *Rosenthal* for petitions to compel arbitration) the postarbitration duty of a court to determine the existence and validity of an arbitration contract, and the burden of proof borne by an award's proponent, when enforcement of an arbitration award is requested under circumstances where, as here, no prior judicial determination has been made as to the existence of the contract to arbitrate. But we see no reason why *Rosenthal's* analysis should not apply equally at this juncture. Absent an enforceable agreement, an arbitration award is invalid. We conclude *Rosenthal's* prescription for the court's duty, as well as the parties' respective burdens of proof, applies to proceedings for confirmation of an arbitration award. Thus, the party seeking to enforce an award must prove by a preponderance of the evidence that a valid arbitration contract exists. The court may not confirm an award without first finding the parties agreed in writing to arbitrate their dispute, unless a judicial determination of the issue has already been made (e.g., by a court considering a petition to compel arbitration)." (*Toal, supra*, 178 Cal.App.4th at p. 1220.)

The court in *Toal* repeated the lesson of *Blanton, supra,* 38 Cal.3d 396: "Because an attorney lacks apparent authority to sign an arbitration contract on his or her client's behalf, the lawyer's signature *alone* is not sufficient evidence the client consented to arbitration. A party may, of course, *expressly* authorize counsel to sign an arbitration stipulation on his or her behalf. [Citation.] But '"[a]bsent express authority, it is established that an attorney does not have implied plenary authority to enter into contracts on behalf of his client."' [Citation.]" (*Toal, supra,* 178 Cal.App.4th at p. 1222.) Further, the court noted that although a client may ratify the attorney's unauthorized act, "[a] client . . . does not necessarily ratify an attorney's unauthorized arbitration stipulation simply by allowing the arbitration to proceed to an award." (*Ibid.*)

On the facts presented, the court in *Toal* concluded that the plaintiffs had failed to prove the existence of a valid agreement to arbitrate: "Plaintiffs attached a copy of the arbitration stipulation to their initial petition to confirm the award, but not to their petition to confirm the corrected award. They provided or proffered no other evidence that defendants consented to arbitrate the dispute or ratified the arbitration stipulation. [¶] This showing was insufficient to support plaintiffs' petitions. A person seeking judicial enforcement of a private arbitration award does *not* meet the burden of proving the existence of a valid arbitration contract simply by submitting a copy of the contract signed by a party's attorney rather than by the party personally. Lacking the signature of the adverse party on the contract to arbitrate, the award's proponent must provide additional substantiation of the agreement sufficient to prove by a preponderance of the evidence that the opposing party expressly authorized counsel to sign on his or her behalf, or evidence the opposing party ratified the unauthorized arbitration contract." (*Toal, supra,* 178 Cal.App.4th at pp. 1222-1223.)

The court held that the trial court erred in confirming the arbitration award. Because it appeared that the trial court had not decided whether defendants had consented to arbitration, the appellate court remanded the matter for a hearing on the plaintiff's petition to confirm the corrected arbitration award. (*Toal, supra*, 178 Cal.App.4th at p. 1223.)

We agree with the analysis in *Toal.* It largely controls on the record here and requires that the judgment confirming the arbitration award be reversed.

When GAM brought its petition to confirm the arbitration award, there had been no prior determination by the court that a valid arbitration agreement existed. As in *Toal*, there had been no petition to compel arbitration. Rather, the court had earlier been presented with a "Stipulation to Binding Arbitration" filed in March 2007 and March 2008, signed only by counsel. Those stipulations were not sufficient to prove the existence of a valid agreement between the parties (*Toal, supra*, 178 Cal.App.4th at p. 1222), and we do not read the court's orders in the present case in response to the March 2007 and March 2008 stipulations to constitute such a finding. When presented with the March 2007 and March 2008 stipulations, the court simply executed proposed orders which: (1) stated that the parties had "demonstrated *through counsel* to the satisfaction of the Court that they have stipulated to submit the present matter to binding arbitration," and (2) set a date for an order to show cause re: completion of arbitration. (Italics added.) The court did not, and could not on the stipulations by counsel, make a finding that a valid arbitration agreement between *the parties* existed.

Thus, in bringing its petition to confirm the arbitration award, GAM had the burden of proving that a valid agreement to arbitrate existed, so as to permit the court to enter judgment on the award sought to be confirmed. It failed to do so. As proof of the agreement to arbitrate, GAM attached to its petition a copy of the

"Stipulation to Binding Arbitration" filed with the court on March 20, 2007, which was signed only by counsel for the parties, Law and Cannon (Sturm's co-counsel), and referred only to arbitration of GAM's breach of contract claim, not to arbitration of its insurance bad faith claim. GAM presented no evidence that the attorneys – particularly CalFarm's attorney – were authorized by the clients to consent to arbitration, and no explanation of how the stipulation to submit the breach of contract claim to arbitration authorized the arbitrator to issue an award on both the breach of contract *and* bad faith claims. Under *Toal,* this showing was insufficient as a matter of law to prove that the parties agreed to the arbitration that resulted in the award GAM petitioned to confirm -- the "Final Arbitration Award and Rulings on Motion to Correct and Motion for Attorney Fees and Costs" dated August 18, 2008 – which resulted in an award of approximately $3.8 million on GAM's breach of contract *and* insurance bad faith claims.

It was CalFarm in opposition to the petition, not GAM in the petition itself, that produced the "Stipulation to Binding Arbitration" filed with the court on March 26, 2008, which referred to the parties' stipulation to have the breach of contract *and* bad faith claims submitted to arbitration. This stipulation, too, was executed only by counsel -- Law for GAM, Sturm for CalFarm -- and although CalFarm conceded that it had agreed to arbitrate those claims, it produced undisputed evidence that its consent to arbitration was conditioned on a $500,000 cap on its potential liability, and that it did not authorize Sturm to consent to arbitration without such a cap.

The March 2008 stipulation did not purport to be the complete agreement between the parties. It referred to "terms and conditions [of the arbitration agreement] which are more fully outlined in separate documents," and informed the court that the "confidential terms of the actual Stipulation between the parties

are not included herein." According to Sturm's declaration, he negotiated with Law for, and believed he obtained, a cap as set forth in the final proposed stipulation for signature by the parties, under which, regardless of the amount of the arbitration award, CalFarm would not be liable to pay more than $500,000 ("Regardless of the nature and amount of the award of the arbitrator, the parties agree that in the event an award is issued in favor of [GAM], [CalFarm] shall pay the award up to $500,000.00, and all recoverable costs will be waived by Plaintiff").

Sturm's declaration detailed his negotiations with Law. Law initially proposed a floor of zero and a cap of $1,000,000. In later negotiations, she proposed a cap of $500,000. Sturm communicated this proposal to CalFarm. By email from its litigation manager, Cheryl Henkel, CalFarm authorized Sturm "to agree to 0 low and high of 500K." Sturm prepared a letter to Law accepting her proposal of a $500,000 cap, and a formal stipulation to be signed by the parties and counsel setting forth their agreement. Thereafter, on CalFarm's behalf, Sturm acted in the belief that the arbitration was subject to CalFarm's potential liability being capped at $500,000. He informed Law that because of the cap, he would stipulate to the lower of the two valuations stated in the report of GAM's appraiser. Not until GAM sought *Brandt* attorney fees, after the initial damage award, did Sturm realize that GAM was seeking to violate the cap, and therefore he raised the issue in opposition to GAM's attorney fees motion.

This evidence showed that CalFarm authorized Sturm to agree to arbitration subject to a cap of $500,000. It did not authorize him to agree to an arbitration unrestricted by such a cap, and Sturm never believed or represented that he had such authority.

Moreover, CalFarm's evidence strongly suggested that GAM's attorney, Law, knew that Sturm, on CalFarm's behalf, had stipulated to arbitration only subject to a $500,000 cap, and had not stipulated to arbitration without such a cap. The whole point of Law's negotiations with Sturm was to reach agreement on a cap. It was Law who initially proposed a $1,000,000 cap, and who later proposed a $500,000 cap. Sturm told Law that he would stipulate to her expert's valuation in the arbitration because of the $500,000 cap. Thus, CalFarm's evidence proved that Law could have had no illusions that CalFarm had consented to arbitration without a cap. In any event, at the very least, Law and GAM assumed the risk that Sturm did not have CalFarm's consent to agree to such an arbitration. (See *Blanton, supra,* 38 Cal.3d at p. 406.)

In light of this record, substantial evidence does not support the trial court's confirmation of the arbitration award. GAM did not prove the existence of a valid arbitration agreement that would permit the court to confirm the award GAM sought to have confirmed. To the contrary, CalFarm's evidence tended to prove that such a valid agreement did not exist – that is, that CalFarm consented to arbitration conditioned on a cap under which, regardless of the amount of any award to GAM, CalFarm would be liable to pay no more than $500,000. Thus, the trial court's ruling confirming the arbitration award and the judgment requiring CalFarm to pay $4,665,073.02 must be reversed.

GAM's contentions in support of the trial court's ruling are either unsupported by the record or legally incorrect.

GAM contends that the trial court *ordered* the case to arbitration pursuant to the March 2007 and March 2008 stipulations *with no limit on damages*. Not so. As is clear from the court's orders, summarized above, nothing in these orders reflected a judicial mandate that arbitration occur, much less that it occur with no

limit on damages. The court simply noted, in substance, that it had been presented with stipulations by counsel to arbitrate, and it set dates for an order to show cause re: completion of arbitration.

GAM characterizes the March 2007 and March 2008 stipulations filed with the court as agreements to submit to arbitration with no limit on damages, and argues that CalFarm ratified them by participating in the arbitration through the testimony of its adjuster, Paul Blanchard, in the arbitration proceeding. We disagree. On their face, the stipulations do not purport to set forth the material terms of the parties' purported agreement to arbitrate. Without an explanation of those terms (which, according to CalFarm, included a cap on damages), the stipulations cannot reasonably be characterized as agreements to arbitrate *without* a cap on damages.

Moreover, even if the stipulations could be so characterized, CalFarm's participation in the arbitration proceedings falls far short of meeting GAM's burden to show that CalFarm ratified the supposed agreement to arbitrate without a cap. As stated in *Toal, supra,* 178 Cal.App.4th at page 1222, "[a] client . . . does not necessarily ratify an attorney's unauthorized arbitration stipulation simply by allowing the arbitration to proceed to an award." (*Ibid.*) Under standard agency law, "[s]ubsequent ratification of an agent's act by a principal requires that the principal ratify with full knowledge [of the material facts]." (*Lindsay-Field v. Friendly* (1995) 36 Cal.App.4th 1728, 1736; see Civ. Code, § 2314.)

Here, the material fact at issue is the purported stipulation by CalFarm's counsel to arbitrate without a damage cap. But Sturm declared that he participated in the arbitration on CalFarm's behalf in the belief that there *was* a cap, and he did not know that GAM was actually seeking more than the cap until it moved for *Brandt* attorney fees. At that point, he opposed such fees on the ground that it

would violate the $500,000 cap. Nothing suggests that CalFarm participated in the arbitration with any different understanding of the material facts. Indeed, the email to Sturm from CalFarm's litigation manager, Cheryl Henkle, which gave Sturm authority to agree to a $500,000 cap, strongly suggests that CalFarm believed that the arbitration would be conducted subject to a $500,000 cap on its liability. The evidence further strongly suggests that GAM's attorney, Law, knew that CalFarm intended to arbitrate only if a cap were in place. In short, on this record, there is no evidence that CalFarm participated in the arbitration with knowledge that its counsel had purportedly agreed that there would be no cap on damages, and no evidence that CalFarm ratified such an agreement by participating in the arbitration.

GAM argues that CalFarm is bound by the arbitrator's determination in his final award that the agreement to arbitrate contained no cap on damages. GAM is mistaken. "In cases involving private arbitration, '[t]he scope of arbitration is . . . a matter of agreement between the parties' [citation], and '"[t]he powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission."' [Citation.]" (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 8.) Unless the parties "clearly and unmistakably" provide that the arbitrator will decide the scope of his authority, it is the court, not the arbitrator, who decides the issue. (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 553.) The purported arbitration agreements on which GAM relies here – the March 2007 and March 2008 stipulations filed with the court – do not purport to give the arbitrator the authority to decide the scope of his powers. Moreover, "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, i.e., a willingness to be effectively bound by the arbitrator's

decision on that point." (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 946.)

Further, the cap on CalFarm's liability, as portrayed by CalFarm's evidence, did not limit the amount of the damages the arbitrator might *award*; it limited the amount of damages that CalFarm was required to *pay*. As envisioned by CalFarm in the proposed stipulation drafted by Sturm, the cap provided that "[r]egardless of the nature and amount of the award of the arbitrator, the parties agree that in the event an award is issued in favor of [GAM], [CalFarm] shall pay the award up to $500,000.00, and all recoverable costs will be waived by Plaintiff." Further, the existence of the cap was "not [to] be provided to the arbitrator at any time before the arbitrator issues his final and binding arbitration award." Nothing in the evidence suggests that CalFarm agreed that the *arbitrator* was empowered to expand the *court's authority* to impose a judgment requiring CalFarm to pay more than the $500,000 cap.[4]

GAM's reliance on *Caro v. Smith* (1997) 59 Cal.App.4th 725 is misplaced. In *Caro*, the plaintiff suffered injuries during the course of her employment. Because her employer had no worker's compensation insurance, she sued the employer in tort. The employer's attorney executed a stipulation to binding arbitration on the employer's behalf. At the arbitration, the employer affirmed that

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[4] We note that there is no bar to parties agreeing to limit the amount of the judgment a court can enter on an arbitration award. Arbitration agreements expanding judicial review of an arbitration award to include review for errors of law – review not typically available in proceedings to confirm or vacate arbitration awards – are enforceable. (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1364.) By analogy, therefore, parties to an arbitration agreement are free to stipulate to a restriction on the court's authority, such as the type of cap on liability asserted by CalFarm in the present case. That cap, as set forth in the final proposed stipulation drafted by Sturm, limited the amount of damages the court could order CalFarm to pay in issuing a judgment confirming an arbitration award in GAM's favor.

she understood that the arbitration would be binding and non-appealable. (*Id.* at p. 729.) The arbitrator found for the plaintiff and, in addition to damages, awarded plaintiff statutorily mandated attorney fees under Labor Code section 3709, based on the employer's failure to provide worker's compensation insurance. (*Id.* at pp. 729-730.)

Believing that the award of attorney fees fell outside the agreement to arbitrate, the employer's attorney opposed the petition to confirm the arbitration award, arguing that the stipulation to arbitration was invalid because he was not authorized to stipulate to arbitration and the stipulation itself was not signed by his client. (*Caro, supra,* 59 Cal.App.4th at p. 730.) The employer herself filed no declaration repudiating her oral agreement to arbitrate as expressed at the arbitration hearing. (*Ibid.*) The trial court concluded that the defendant had actual knowledge that the arbitration was binding, and confirmed the arbitration award. (*Ibid.*)

The Court of Appeal affirmed. According to the court, the record established that the employer had authorized her attorney to stipulate to binding arbitration, and had later ratified the stipulation at the arbitration. Thus, the stipulation to arbitrate was binding, even without the employer's signature. (*Caro, supra*, 59 Cal.App.4th at pp. 732-733.) The court also rejected the claim that the arbitrator exceeded his authority by awarding statutorily mandated attorney fees. The stipulation was to binding arbitration, and stated that "'[a]ll issues of liability, as well as damages'" would be litigated. (*Id.* at p. 734.) The court held that the parties had given the arbitrator the authority to construe the agreement, and the arbitrator's ruling that the stipulation included the authority to award statutorily mandated attorney fees was reasonable. (*Id.* at p. 734-735.)

The present case is clearly distinguishable from *Caro.* Here, CalFarm produced evidence, through Sturm's declaration and its supporting exhibits, that Sturm was authorized only to stipulate to arbitration if there was a cap of $500,000. While it is true that no CalFarm representative filed a declaration stating that Sturm had no authority to stipulate without a cap, the absence of such a declaration is not fatal to CalFarm's challenge to confirmation of the arbitration award. CalFarm's evidence of Sturm's negotiations with Law over a cap, and the email of CalFarm's litigation manager Henkel giving Sturm authority to stipulate to arbitration with a cap of $500,000, are certainly sufficient to prove, absent any contrary evidence, that Sturm did not have the authority to agree to arbitration without a cap. Moreover, unlike the client in *Caro,* CalFarm did not ratify the challenged stipulation at the arbitration, and, as we have stated, the parties did not give the arbitrator the authority to construe their arbitration agreement in a manner that would permit the arbitrator to impose liability on CalFarm in excess of $500,000. Thus, *Caro* has no application to the present case.

Finally, we discuss the proper remedy. In *Toal,* because it appeared that the trial court had not decided whether defendants had consented to arbitration, the appellate court remanded the matter for a hearing on the plaintiff's petition to confirm the corrected arbitration award. We conclude that the same remedy applies here. *Toal* had not been decided when the hearing on GAM's petition to confirm the arbitration award was held. Thus, GAM may not have understood that it was required to prove that a valid arbitration agreement existed so as to permit confirmation of the full arbitration award. This may explain GAM's failure to produce evidence at the hearing. Further, the court was unaware that it was required to determine that issue. Thus, we believe the proper remedy, as in *Toal,* is to remand the case for the court to hold an evidentiary hearing to determine

whether a valid arbitration agreement exists between GAM and CalFarm, and, if so, whether that agreement permits confirmation of the arbitration award in full or only subject to a $500,000 cap on CalFarm's liability. As stated in *Toal*, the trial court must hear the petition to confirm "'in a summary way in the manner and upon the notice provided by law for the making and hearing of motions.' [Citation.] Although 'the facts are to be proven by affidavit or declaration and documentary evidence, with oral testimony taken only in the court's discretion' [citation], where 'the enforceability of an arbitration clause may depend upon which of two sharply conflicting factual accounts is to be believed, the better course would normally be for the trial court to hear oral testimony and allow the parties the opportunity for cross-examination' [citation]. The question of a party's consent 'deserve[s] a careful factual inquiry. . . .' [Citation.]" (*Toal*, *supra*, 178 Cal.App.4th at p. 1223.)

DISPOSITION

The judgment is reversed. The case is remanded to the trial court for a new evidentiary hearing on GAM's petition to confirm the arbitration award. The trial court shall determine whether a valid arbitration agreement exists between GAM and CalFarm, and, if so, whether it permits confirmation of the arbitration award in full or only subject to a $500,000 cap on CalFarm's liability. CalFarm shall recover its costs on appeal.[5]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J. SUZUKAWA, J.

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[5] The trial court's judgment purported to award prejudgment interest to GAM under Civil Code section 3291. GAM concedes that section 3291 does not authorize prejudgment in insurance bad faith actions. (*Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, 123-124.) On appeal, GAM argues that prejudgment interest was authorized under Civil Code section 3287. GAM did not seek interest on that ground in the trial court. Because we reverse the judgment, we express no opinion on whether section 3287 applies to the arbitration award.