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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JAMES O. DAVIS, Plaintiff, Cross-defendant and Appellant, v. MARY JO OLSON, Defendant, Cross-complainant and Respondent.	A154503 (San Francisco City & County Super. Ct. No. CGC-17-561803)

Plaintiff and cross-defendant James O. Davis appeals from the trial court's denial of his motion to compel arbitration. Davis, a registered investment advisor, sued his former client, Mary Jo Olson, to recover compensation for financial services he provided. Olson cross-complained against Davis, alleging, among other things, fraud and negligent misrepresentation in connection with Davis's financial advice, breach of fiduciary duty, and unfair billing practices. Shortly after Olson filed her cross-complaint, Davis moved to compel arbitration. The trial court denied his motion, concluding the claims in Olson's cross-complaint arose out of the parties' financial planning agreement, which lacked a covenant to arbitrate. We affirm.

I. BACKGROUND

Olson hired Davis, doing business as The Financial Advisory Group, to provide financial planning and investment advisory services on a fixed fee basis. The parties signed a financial planning agreement (FPA) in April or May 2014. Under the FPA, The

Financial Advisory Group would: "Provide assistance and furnish recommendations as to the allocation of present financial resources among different types of assets including investments, savings, and insurance with a view toward better correlating the assets with the Client's financial planning objectives," and "[p]rovide assistance to [Client] in defining personal financial planning goals and objectives to be pursued [in a variety of areas], and to supply analysis and recommendations as to the actions and investment strategies necessary to attain these goals and objectives." The two-page FPA does not contain an arbitration clause. It also notes "The Financial Advisory Group's associated person is also a registered representative with Centaurus Financial, Inc. (CFI), a registered broker/dealer, member FINRA and SIPC[1]" and an agent for various insurance companies.

In late May 2014, Olson completed a new account application and client agreement to open an IRA account with Centaurus Financial, Inc. (CFI) (hereafter CFI application). Davis signed the application as a registered representative. The CFI application contains an arbitration provision stating, in relevant part: "THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE. CLIENT(S) AGREES THAT ANY AND ALL CONTROVERSIES OR CLAIMS BETWEEN CLIENT(S) AND CENTAURUS FINANCIAL, INC. (CENTAURUS) SHALL BE SUBMITTED TO AND DETERMINED BY FINRA ARBITRATION."

In October 2017, Davis filed a complaint in San Francisco Superior Court alleging Olson owed him $32,396 under the FPA for financial planning services.[2] Olson filed an answer and cross-complaint, asserting seven causes of action against Davis arising out of alleged misrepresentations and omissions related to his financial planning services and unfair billing practices. In January 2018, Davis answered the cross-complaint, and in late February, he filed a motion to compel arbitration.

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[1] Financial Industry Regulatory Authority (FINRA) and Securities Investor Program Corporation.

[2] Davis also asserted a common counts cause of action, seeking the same damages asserted in his breach of contract cause of action.

The trial court denied Davis's motion to compel arbitration, reasoning: "Olson's cross-complaint is based on the fee structure of the [FPA], which lacks a covenant to arbitrate. The [FPA] does not incorporate by reference the arbitration clause in the CFI application. In addition, that arbitration clause relates to 'ANY AND ALL CONTROVERSIES OR CLAIMS BETWEEN CLIENT(S) [Olson] AND [CFI].' Olson is not suing CFI nor does she name Davis as an agent of CFI. The cross-complaint is unrelated to the CFI IRA and the arbitration clause does not apply. The [FPA] and the CFI application were not closely connected in purpose, did not incorporate one another's terms, and were not executed at the same time." The court also observed "it was Davis who elected to bring this dispute with Olson to court rather than arbitration in the first instance," and noted "Olson has incurred costs defending Davis's claims and propounding discovery." Davis timely appealed.

II. DISCUSSION

"A motion to compel arbitration is essentially a request for specific performance of a contractual agreement. [Citation.] The party seeking to compel arbitration bears the burden of proving by a preponderance of the evidence the existence of an arbitration agreement." (*Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 239.) There is a strong policy in favor of arbitration under both California and federal law, but "this policy does not override ordinary principles of contract interpretation. '[T]he contractual terms themselves must be carefully examined before the parties to the contract can be ordered to arbitration: "Although '[t]he law favors contracts for arbitration of disputes between parties' [citation], ' "there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate . . . ." ' " (*Rice v. Downs* (2016) 248 Cal.App.4th 175, 185.) " '[T]he terms of the specific arbitration clause under consideration must reasonably cover the dispute as to which arbitration is requested.' " (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 705.)

In deciding whether the parties agreed to arbitrate their dispute, we apply state law principles of contract interpretation to evaluate whether they objectively intended to

submit the issue to arbitration. (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944; *Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 890.) "When conflicting extrinsic evidence was not offered below, we apply a de novo, or independent, standard of review on appeal from a trial court's determination of whether an arbitration agreement applies to a particular controversy." (*Aanderud*, at p. 890.) Olson argues we must apply a substantial evidence standard of review, but she does not identify any disputed issue of fact the trial court resolved in denying the motion. Because there is no dispute as to the language of the agreements, nor any conflicting extrinsic evidence regarding their terms, our review is de novo. (*Rice v. Downs, supra,* 248 Cal.App.4th at p. 185.)

Davis contends the arbitration provision in the CFI application "clearly encompass[es] the Plaintiffs' claims," because it provides "CLIENT(S) AGREES THAT ANY AND ALL CONTROVERSIES OR CLAIMS BETWEEN CLIENTS AND CENTAURUS FINANCIAL, INC. (CENTAURUS) SHALL BE SUBMITTED TO AND DETERMINED BY FINRA ARBITRATION." Davis argues he "is, and at all relevant times was, a 'registered representative' " of CFI, and accordingly he was entitled to invoke the arbitration provision in the CFI application. He also contends because Olson's claims have their "roots" in the relationship established by the agreement containing the arbitration provision, they are subject to arbitration.

We disagree. Under the CFI application's arbitration provision, Olson agreed to arbitrate any claims she has against CFI. Her cross-complaint, however, does not allege any claims against CFI, any claims against Davis as an agent of CFI, or any claims regarding the IRA account she opened with CFI. Rather, the cross-complaint alleges James O. Davis, as an individual "doing business under the common name of THE FINANCIAL ADVISORY GROUP," made a series of representations to Olson about his financial planning services and billing practices to induce her to enter the FPA, which she did in reliance on Davis's representations. Under the FPA, Davis was to provide services consistent with Olson's "current financial and tax status, financial goals, investment attitudes, and risk/reward parameters . . . to be billed on a fixed fee basis." Olson alleges

Davis later changed his billing structure from a fixed fee to hourly rate arrangement without disclosing he was doing so, charged excessive and unreasonable fees, and placed her assets in investments that were unsuitable for her needs despite knowing she wanted a "balanced portfolio and not a growth portfolio based upon her age and desire for security and stability." The cross-complaint attaches a copy of the FPA. The allegations of the cross-complaint make clear that each of Olson's causes of action arise out of the FPA and the relationship it created between Davis as a financial services advisor and Olson as his client.

For this reason, *Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830 (*Ronay*) and *Thomas v. Westlake* (2012) 204 Cal.App.4th 605 (*Thomas*), relied on by Davis, are distinguishable. In *Ronay*, the plaintiff's claims arose out of a financial adviser's provision of advice concerning plaintiff's purchase of investments offered by CapWest Securities, Inc. (CapWest). (*Ronay*, at p. 834.) To open the plaintiff's account, the plaintiff and the defendant, as CapWest's registered representative, filled out a new account form and signed an account agreement and disclosure statement. The agreement contained an arbitration clause, which required that " 'any controversy arising out of or related to my (our) accounts, the transactions with [CapWest], its officers, directors, agents, registered representatives and/or employees for me (us), or related to this agreement or breach thereof' " be submitted to FINRA arbitration. (*Id.* at p. 835.) Unlike the situation in this case, the parties in *Ronay* agreed the claims asserted by the plaintiff arose out of or related to the plaintiff's " 'transactions with [CapWest], its . . . agents, . . . [or] registered representatives, and therefore involve subject matter that falls within the scope of the applicable arbitration clause.' " (*Id.* at p. 836.) Here, by contrast, Olson's claims are not based on her transactions with CFI or actions taken by Davis as an agent of CFI.

In *Thomas*, the plaintiff, successor trustee to a family trust, sued an investment advisor and related defendants for mismanagement of three investment accounts his mother had opened with a financial services company. (*Thomas, supra,* 204 Cal.App.4th at pp. 609–610.) Even though the only party to the account agreements containing the

arbitration provision was the financial services company, the appellate court concluded the nonsignatory defendants could compel arbitration because the financial services company was a party to the arbitration agreement and the complaint alleged all defendants were acting as agents of one another. (*Id.* at pp. 613–614.) In this case, however, Olson has not sued the only party to the arbitration agreement (CFI), nor does she allege Davis was acting as an agent of CFI.

Here, the FPA—which established Olson's relationship with Davis—does not contain an arbitration provision, nor does it reference or incorporate the CFI application or its arbitration provision. (See *Marsch v. Williams* (1994) 23 Cal.App.4th 250, 253, 255–256 [plaintiff could not be compelled to arbitrate claims against his business partner arising out of partnership agreement that lacked arbitration clause, even though separate partnership agreement between same parties concerning a different venture contained an arbitration clause].) As in *Marsch*, the FPA and CFI application in this case "were not closely connected in purpose, did not incorporate one another's terms, were not executed at the same time, and the breach of [one] agreement did not necessarily lead to the breach of the [other] agreement[ ]." (*Id.* at p. 256.) Davis argues *Marsch* is distinguishable from this case because here it is undisputed there was "a single commercial relationship between Davis and Olson," but Davis fails to acknowledge his relationship with Olson was created by the FPA and is not referenced in the CFI application.

Because the only agreement between the parties to this lawsuit (the FPA) did not have an arbitration clause, and Olson's claims do not relate to the CFI application or Davis's actions as an agent for CFI, we conclude the parties did not agree to arbitrate the claims at issue in the cross-complaint. Accordingly, we need not reach the merits of Davis's contention that the trial court erred in finding he had waived his right to arbitration.

Olson's motion for sanctions pursuant to Code of Civil Procedure section 907 and California Rules of Court, rule 8.276 for filing a frivolous appeal is denied.

III. DISPOSITION

The order denying the motion to compel arbitration is affirmed. Olson is entitled to costs on appeal.

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Margulies, J.

We concur:

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Humes, P. J.

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Kelly, J.[*]

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[*] Judge of the Superior Court of the City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.