Filed 1/28/10

CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

ZARI MANSOURI, Petitioner, v. THE SUPERIOR COURT OF PLACER COUNTY, Respondent; FLEUR DU LAC ESTATES ASSOCIATION, Real Party in Interest.	C062366 (Super. Ct. No. TCV1479)

ORIGINAL PROCEEDINGS: Petition for Writ of Mandate. Granted.

Manatt, Phelps & Phillips, LLP, Andrew A. Bassak, Benjamin G. Shatz, for Petitioner.

No appearance for Respondent.

Sproul Trost LLP, Thomas G. Trost, Gregory L. Maxim, Jason M. Sherman, for Real Party in Interest.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of the Background and sections I and II of the Discussion.

A dispute arose between petitioner Zari Mansouri and her homeowners' association, the Fleur du Lac Estates Association (Association), after Mansouri remodeled her condominium's patio. The Association obtained a court order compelling arbitration of the dispute under an arbitration provision contained in the Second Restated Declaration of Covenants, Conditions and Restrictions for the Association (CC&R's). The trial court awarded attorney fees to the Association for its expense in bringing the petition to compel arbitration. We granted an alternative writ in this mandamus proceeding to consider (1) whether the arbitration provision in the CC&R's is unenforceable and unconscionable; (2) if the arbitration provision is valid, whether this dispute falls outside of the scope of the arbitration provision; and (3) whether the Association complied with the applicable statutory requirements for a petition to compel arbitration. We conclude the arbitration provision is enforceable, is not unconscionable, and is applicable. However, in the published portion of this opinion, we conclude a party seeking to compel arbitration under Code of Civil Procedure section 1281.2 (section 1281.2) must establish it demanded arbitration under the parties' arbitration agreement and that the other party refused to arbitrate under the agreement before it is entitled to an order granting a petition to compel such arbitration. As the Association here failed to show it requested Mansouri to arbitrate under the arbitration provision of the CC&R's and that Mansouri refused to arbitrate under such provision, its petition to compel such arbitration should have

been denied. We will issue a writ of mandate requiring the trial court to vacate its order compelling arbitration and awarding attorney fees and to enter a new order denying the Association's petition.

BACKGROUND

Mansouri is the owner of a condominium unit within the Fleur du Lac Estates, located by Lake Tahoe in Homewood, California. She is also a member of the Association. In December 2006, Mansouri submitted an "Architectural Control Improvement Plan Application" (Application) to the Association's Architectural Control Committee (ACC) seeking to remodel several areas of the interior of her condominium, add two skylights, enclose an existing covered porch, add a fire pit to the patio and add a masonry barbeque to the existing patio. Mansouri's Application was approved by the ACC and by two-thirds of the membership of the Association as required by the CC&R's.

The Association contends Mansouri submitted plans with her Application that showed the location of both the proposed barbeque and fire pit to be within the existing patio footprint. The Association contends a tarp concealed some of Mansouri's subsequent construction work and that it later learned Mansouri had extended the coverage of her patio by more than 200 square feet beyond the approximately 500 square feet approved and had failed to locate the fire pit and barbeque within the previously existing patio footprint. The Association claims Mansouri's new patio creates new land coverage without approval of the Tahoe Regional Planning Agency (TRPA) or the Association's Board of

Directors, encroaches and obstructs the common area of the condominiums in violation of the CC&R's, interferes with a drainage channel constructed by the Association, interferes with the privacy of neighboring condominium units, and fails to use approved construction materials.

Mansouri denies she submitted any plans with her Application. She claims that after the approval of her Application, she developed specific plans for her remodeling based on numerous discussions between her, her architect, her designer, the Association's then General Manager, Rob Evans, and the Property Manager for the Association, Daryl Partridge. She subsequently submitted detailed plans for her proposed work in early June 2007 to Evans.

Evans responded to Mansouri's submittal of plans by e-mail informing Mansouri the fire pit approved by the ACC was to be completely within her existing patio, that no additional patio coverage was approved, that her submitted plan showed an extension of her patio to include a fire pit, which was not approved, and that the maximum patio size was 518 square feet. Mansouri replied that she had been in contact with Evans and Partridge and had been told there was room for additional coverage. Through a series of several more e-mails, Mansouri and Evans agreed to meet at her condominium the next day to discuss the matter.

Mansouri claims that when Evans and Partridge met with her, her contractor, and her architect the next day, they agreed to a location for her fire pit outside the existing patio footprint

by spray painting its proposed location on the ground. She also claims Partridge told her she was permitted a little more coverage than already existed and that he measured and staked out the additional boundaries of the allowable patio coverage. Partridge told her he would work with her and monitor her construction to ensure it was within the coverage limits. Mansouri contends Evans told her it would not be necessary to submit another application to the ACC.

Mansouri claims that Evans and/or Partridge inspected her construction work thereafter on at least a weekly basis, communicated and met with her, her contractor, and architect regarding the construction on numerous occasions, and provided her specific directions for the work, which she followed. Mansouri denies any concealment of her patio construction work. She claims neither Evans, Partridge nor anyone else acting on behalf of the Association communicated to her before the completion of her patio improvements that she would have to resubmit plans for her patio improvements to the ACC for approval or that she was in violation of the coverage limits.

In July 2008, the Association, through its attorney, notified Mansouri that her completed patio improvements did not conform to the plans approved by the ACC. The letter requested Mansouri remove her patio improvements and conform the patio to the plan approved by the ACC or submit a revised plan for ACC review and approval.

Mansouri's attorney responded that Mansouri's patio improvements were constructed as approved by the Association.[1] He also asserted both estoppel and waiver were applicable if the improvements were noncompliant with the Association's approval. More specifically he argued that: (1) the Association's approval of Mansouri's Application was sufficient to approve her patio as built, (2) the patio as built substantially conformed to her June drawings, which the Association was deemed to have approved under section 9.2 of the CC&R's, (3) the patio as built was approved by the Association's authorized agents, (4) the Association was estopped from enforcing the maximum allowable patio coverage and remedying any noncompliance between what it formally approved and what was built, and (5) the Association waived its right to enforce the maximum patio coverage.

In September 2008, counsel for the Association wrote to Mansouri's counsel, requesting Mansouri agree to submit the dispute to binding arbitration before a single arbitrator, unilaterally pre-selected by the Association. The letter indicated that if Mansouri did not agree, the Association would file "a court action for injunctive and declaratory relief and attorneys fees to enforce [her] compliance." Mansouri refused the Association's request and offered to mediate the dispute instead. The Association rejected mediation unless Mansouri

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[1] Both Mansouri and her attorney responded to the Association's letter.

would agree to submit to binding arbitration if the mediation proved unsuccessful. Mansouri did not agree.

When no agreement was reached, the Association filed a petition in the trial court to compel Mansouri to arbitrate the dispute under section 16.10 of the CC&R's. Section 16.10 provides: "If the Association and one or more Owners are unable to agree on the meaning or effect of any part of [the CC&R's], such dispute shall be conclusively settled by arbitration pursuant to the commercial arbitration rules of the American Arbitration Association. The Association shall name one arbitrator, the Owner shall name a second arbitrator, the two arbitrators so named shall name a third; and the three arbitrators so chosen shall resolve the dispute. The decision of the arbitrators shall be binding and conclusive upon the Owners and the Association." The Association's petition to compel arbitration sought attorney fees pursuant to section 16.9 of the CC&R's and Civil Code section 1354.

The trial court granted the Association's petition to compel arbitration and awarded the Association $8,283.50 in attorney fees.

DISCUSSION

I.

THE CC&R'S ARBITRATION SECTION 16.10 IS ENFORCEABLE AND NOT UNCONSCIONABLE IN THIS SITUATION

A. *General Principles*

"Although California has a strong policy favoring arbitration [citations], our courts also recognize that the

right to pursue claims in a judicial forum is a substantial right and one not lightly to be deemed waived. [Citations.] Because the parties to an arbitration clause surrender this substantial right, the general policy favoring arbitration cannot replace an agreement to arbitrate. [Citations.] Thus, the right to compel arbitration depends upon the contract between the parties, [citations], and a party can be compelled to submit a dispute to arbitration only where he has agreed in writing to do so. [Citation.]" (*Marsch v. Williams* (1994) 23 Cal.App.4th 250, 254-255.)

Code of Civil Procedure section 1281 (section 1281) provides: "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."

We apply an independent standard of review to the question of whether an arbitration agreement is legally enforceable, applying general principles of California contract law. (*Thompson v. Toll Dublin, LLC* (2008) 165 Cal.App.4th 1360, 1369 (*Thompson*); *Kleveland v. Chicago Title Ins. Co.* (2006) 141 Cal.App.4th 761, 764.) "Unconscionability is a question of law subject to de novo review, 'although factual issues may bear on that determination. [Citations.]' [Citations.]" (*Thompson, supra,* at p. 1369.)

B. *Whether There Is A Written Agreement (Contract) To Arbitrate - Treo @ Kettner Homeowners Assn. v. Superior Court*

Mansouri contends the arbitration provision in the CC&R's (section 16.10) is unenforceable under *Treo @ Kettner Homeowners Assn. v. Superior Court* (2008) 166 Cal.App.4th 1055 (*Treo*). We disagree.

In *Treo, supra,* 166 Cal.App.4th 1055, a homeowners' association sued the developer of the condominium project for construction defects. (*Id.* at p. 1059.) A provision of the association's CC&R's required all disputes between it and the developer be decided by a general judicial reference pursuant to Code of Civil Procedure section 638 (section 638).[2] (*Treo, supra,* at p. 1059.) The court concluded the equitable servitudes created by the association's CC&R's were "not the situation the Legislature contemplated when it enacted section 638 to allow parties to waive by contract the 'inviolate' constitutional right to trial by jury." (*Id.* at p. 1067.) The court held "a developer-written requirement in an association's CC&R's that all disputes between owners and the developer and disputes between the association and the developer be decided by a general judicial reference is not a written contract as the Legislature contemplated the term in the context of section 638." (*Ibid.*)

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[2] Section 638 states, in pertinent part: "A referee may be appointed . . . upon the motion of a party to a written contract . . . that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties . . . ."

In the course of its analysis, the *Treo* court reviewed another case called *Villa Milano Homeowners Assn. v. Il Davorge* (2000) 84 Cal.App.4th 819 (*Villa Milano*). In *Villa Milano,* the court considered whether a developer could use a binding arbitration provision in CC&R's to preclude the homeowners and the homeowners' association from bringing a court action against the developer for construction or design defect damages. (*Id.* at p. 822.) The court in *Villa Milano* determined the arbitration clause in the CC&R's was a sufficient agreement to arbitrate within the meaning of sections 1281 and 1281.2. (*Villa Milano, supra,* at pp. 825-826.) It reasoned that "[i]ndividual condominium unit owners 'are deemed to intend and agree to be bound by' the written and recorded CC&R's, inasmuch as they have constructive notice of the CC&R's when they purchase their homes. [Citation.] CC&R's have thus been construed as contracts in various circumstances. (See, e.g., *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 512-513 [229 Cal.Rptr. 456, 723 P.2d 573, 59 A.L.R.4th 447] [CC&R's as contract between homeowner and homeowners' association with respect to installation of common area lighting]; *Barrett v. Dawson* (1998) 61 Cal.App.4th 1048, 1054 [71 Cal.Rptr.2d 899] [CC&R's as contract between neighboring property owners prohibiting use of residential property for business activities]; and *Franklin v. Marie Antoinette Condominium Owners Assn.* (1993) 19 Cal.App.4th 824, 828, 833-834 [23 Cal.Rptr.2d 744] [CC&R's as contract between homeowner and homeowners' association with respect to homeowners'

association's obligation to maintain and repair common area plumbing].) The arbitration clause, as a provision of the Villa Milano CC&R's, is therefore a part of the contract between the parties." (*Villa Milano, supra,* at pp. 825-826, fn. omitted.) The *Villa Milano* court, however, found the agreement unconscionable and therefore unenforceable to the extent it applied to construction and design defect claims. (*Id.* at p. 835.)

The court in *Treo, supra,* 166 Cal.App.4th at page 1066, "agree[d] with *Villa Milano* insofar as it h[e]ld[] that CC&R's can reasonably be 'construed as a contract' and provide a means for analyzing a controversy arising under the CC&R's when the issue involved is the operation or governance of the association or the relationships between owners and between owners and the association[.]" It "d[id] not believe, however, they suffice as a contract when the issue is the waiver pursuant to section 638 of the constitutional right to trial by jury." (*Ibid.*)

In this case, we are not dealing with section 638. We are dealing with an agreement to arbitrate under section 1281 and a petition to compel arbitration of the agreement under section 1281.2. We are not dealing with a dispute between the developer and the homeowners and/or homeowners' association over construction or design defects, but a dispute between a homeowner and her homeowners' association regarding changes she has made to her property allegedly in violation of the CC&R's. For purposes of such a dispute, it appears even the court in *Treo, supra,* 166 Cal.App.4th 1055, would recognize an

arbitration provision in CC&R's can be considered an agreement or contract to arbitrate. Consistent with *Treo* and *Villa Milano*, we conclude section 16.10 of the CC&R's is properly construed as an agreement or contract to arbitrate within the meaning of section 1281 and 1281.2 in this situation.[3]

C. *Unconscionability*

If section 16.10 is construed as a contract, Mansouri argues it is unconscionable and should not be enforced. The Association urges us to disregard the issue, claiming Mansouri forfeited[4] the claim by failing to brief it in her opposition to its petition to compel arbitration. Mansouri contends she adequately raised the issue by asserting it as one of her affirmative defenses to the petition, by stating in her declaration that she did not recall ever signing or voting to

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[3] Mansouri cites us to a number of secondary sources that touch on the interpretation of CC&R's as contracts and whether alternative dispute resolution provisions in CC&R's may be unconscionable. (See, e.g., 8 Miller & Starr, Cal. Real Estate (3d ed. 2009) § 24:26, pp. 24-102 to 24-103; 4 Cal. Forms of Pleading & Practice (2009) § 32.21[3][b][iii], p. 32-42; Sproul & Rosenberry, Advising Cal. Common Interest Communities (Cont.Ed.Bar 2009) §§ 4.74-4.76, pp. 272-276; Bush, *Beware the Associations: How Homeowners' Associations Control You and Infringe Upon Your Inalienable Rights!!* (2003) 30 W.St.U.L.Rev. 1; Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability* (2003) 70 U.Chi.L.Rev. 1203.) None of these sources persuade us that section 16.10 is not a contract for the purposes of this case.

[4] The Association claims Mansouri "waived" the claim. The correct legal term for loss of a right based on failure to assert it in a timely fashion is forfeiture, not waiver. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

approve the CC&R's, by arguing in her opposition that section 16.10 was unenforceable under *Treo, supra,* 166 Cal.App.4th 1055, by arguing unconscionability to the trial court at the hearing on the Association's petition, and by offering to provide supplemental briefing on the point. In any event, she points out unconscionability is a question of law and as such it may be raised for the first time on appeal. (*Thompson, supra,* 165 Cal.App.4th at pp. 1369, 1371; *Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1709.) Mansouri has the better argument. We will reach the merits.

"In determining whether an arbitration clause is unconscionable, courts generally apply a two-prong test. [Citations.] They determine whether the clause is procedurally unconscionable and whether it is substantively unconscionable. [Citation.] Both procedural and substantive unconscionability must be present for a contract to be unenforceable. [Citation.]" (*Villa Milano, supra,* 84 Cal.App.4th at p. 828; see *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*).) However, while both elements must be present, they are viewed in tandem on a sliding scale such that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz, supra,* at p. 114; accord, *Pardee Construction Co. Superior Court* (2002) 100 Cal.App.4th 1081, 1088 (*Pardee*); *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329.)

We turn first to the question of procedural unconscionability.

"'"Procedural unconscionability" concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. [Citation.] It focuses on factors of oppression and surprise. [Citation.] The oppression component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party. [Citations.]' [Citation.] The surprise component comes into play when 'the terms to which the party supposedly agreed [are] hidden in a prolix printed form drafted by the party seeking to enforce them. [Citations.]' [Citation.]" (*Villa Milano, supra,* 84 Cal.App.4th at p. 828.)

A number of courts have concluded arbitration or judicial reference provisions in CC&R's or related real estate purchase documents are procedurally unconscionable. For example, the court in *Villa Milano* found obvious procedural unconscionability where the CC&R's were drafted completely by the developer, recorded years before the purchasers came to buy, were not negotiable, and where the arbitration clause was buried in the CC&R's, which themselves were provided to buyers with a thick stack of other documents. (*Villa Milano, supra,* 84 Cal.App.4th at pp. 828-829.) The court in *Pardee* concluded judicial reference provisions in real estate purchase documents were procedurally unconscionable where the developer had superior bargaining power to the potential purchasers of entry-level

homes, who had no meaningful choice whether to accept the provisions, and where the provisions were difficult to read, misleading, failed to mention who would pay the referee's fees, and were buried in the form contracts drafted by the developer (*Pardee, supra,* 100 Cal.App.4th at pp. 1088-1090.) The court in *Thompson* found procedural unconscionability where the arbitration provisions were part of a contract of adhesion[5] and were buried in approximately 800 pages of documents given to the buyers. (*Thompson, supra,* 165 Cal.App.4th at pp. 1372-1373.) The court in *Treo* noted: "CC&R's are notoriously lengthy, are adhesive in nature, are written by developers perhaps years before many owners buy, and often, as here with regard to the waiver of trial by jury, cannot be modified by the association." (*Treo, supra,* 166 Cal.App.4th at p. 1067.)

Similarly, we conclude section 16.10 is procedurally unconscionable. The provision is at the end of 40 pages of CC&R's. It is not highlighted by any special notice, capitalization, print size, font or type. (Cf. Code Civ. Proc., § 1298; see *Villa Milano, supra,* 84 Cal.App.4th at pp. 829-830.) The CC&R's were executed before Mansouri purchased her condominium. She does not recall signing them or voting to approve them. There is nothing in the record to suggest she was

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[5] An adhesion contract is a standardized contract drafted and imposed by the party with superior bargaining strength, providing the other party only the opportunity to adhere to the contract or reject it. (*Armendariz, supra,* 24 Cal.4th at p. 113; *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 743.)

able to negotiate the terms of the CC&R's when she bought her property.

But, procedural unconscionability is not sufficient alone to render section 16.10 unenforceable. There must be both procedural and substantive unconscionability before an arbitration provision will not be enforceable because of unconscionability. (*Villa Milano, supra,* 84 Cal.App.4th at p. 828; *Armendariz, supra,* 24 Cal.4th at p. 114.) Procedural unconscionability must be weighed with any substantive unconscionability. (*Armendariz, supra,* at p. 114; *Pardee, supra,* 100 Cal.App.4th at p. 1088.)

"'Substantive unconscionability focuses on the actual terms of the agreement . . . .' [Citation.] 'While courts have defined the substantive element in various ways, it traditionally involves contract terms that are so one-sided as to "shock the conscience," or that impose harsh or oppressive terms.' [Citations.] Oppression is present when an agreement includes terms serving to limit the obligations or liability of the stronger party. [Citation.]" (*Pardee, supra,* 100 Cal.App.4th at pp. 1090-1091; accord *Villa Milano, supra,* 84 Cal.App.4th at p. 829; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.)

We conclude substantive unconscionability is not present in this case. Neither the Association nor Mansouri drafted the CC&R's. Both are bound by it and section 16.10 applies equally to the Association and homeowners. It does not serve to limit the obligations or liability of either side. Moreover, although

Mansouri complains of the forced arbitration, she benefits from streamlined and cost-effective dispute resolution both as a member of the Association who is responsible for the Association's costs through assessments and as an individual homeowner. "[T]he purpose of arbitration is to voluntarily resolve private disputes in an expeditious and efficient manner. [Citations.] Parties to arbitration voluntarily trade the formal procedures and the opportunity for greater discovery and appellate review for '"the simplicity, informality, and expedition of arbitration."' [Citations.]" (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1080.) Section 16.10 is also limited in scope, applying only when "the Association and one or more Owners are unable to agree on the meaning or effect of any part of [the CC&R's]." Finally, if homeowners become convinced the provision is not in their best interest, the CC&R's may be modified to amend or delete the section by a two-thirds vote of the Association's members eligible to vote. Section 16.10 is not substantively unconscionable--it is not one-sided, harsh or oppressive; its terms do not shock the conscience. (*Pardee, supra,* 100 Cal.App.4th at p. 1091.)

Under these circumstances, section 16.10 is enforceable and not unconscionable.

II.

SECTION 16.10 IS APPLICABLE TO THE DISPUTE BETWEEN THE ASSOCIATION AND MANSOURI

If we conclude, as we have, that section 16.10 is enforceable and not unconscionable, Mansouri urges us to find it

inapplicable to her dispute with the Association. Mansouri notes section 16.10 provides for arbitration when "the Association and one or more Owners are unable to agree on the *meaning or effect* of any part of [the CC&R's.]" (Italics added.) She claims the dispute here is not about "the meaning or effect" of any part of the CC&R's, but whether factually her patio improvements conform with prior approvals of the Association or with her submitted plans.

Once the existence of a valid arbitration agreement has been established, "[t]he burden is on 'the party opposing arbitration to demonstrate that an arbitration clause *cannot* be interpreted to require arbitration of the dispute.' [Citation.] Any doubt on the issue must be resolved in favor of arbitration. [Citation.]" (*Buckhorn v. St. Jude Heritage Medical Group* (2004) 121 Cal.App.4th 1401, 1406.) Mansouri has not met her burden.

A review of the CC&R's convinces us that not all potential disputes involving the Association and its members come within the scope of section 16.10, but this dispute does.

The CC&R's authorize the Association to enforce its provisions through a number of methods. For example, section 9.8, subdivision (a), expressly provides the Association with "enforcement rights with respect to any matters required to be submitted to the ACC and approved by it" and authorizes the Association to "enforce such architectural control *by any proceeding at law or in equity*." (Italics added.) As another example, section 15.1 states: "Except for the nonpayment of any

Assessment, it is hereby expressly declared and agreed that the remedy at law to recover damages for the . . . violation of any of the covenants, conditions, restrictions, . . . contained in this Declaration are inadequate and that the failure of any Owner, . . . , to comply with any provision of the Governing Documents may be *enjoined by appropriate legal proceedings* . . . ." (Italics added.) Section 15.2 expressly declares a violation of the CC&R's to be a nuisance for which every remedy against nuisance is applicable. According to section 15.5.1, the Association may enforce the obligations of owners through the use of such remedies as it deems appropriate, including not only actions in law or in equity, but through the use of fines, monetary penalties or suspension of the owner's membership rights. The rights and remedies provided by the CC&R's or by law are cumulative according to section 15.3.

It is in this context that section 16.10 provides for binding arbitration of disputes between the Association and one or more owners when the dispute involves "the meaning or effect" of any part of the CC&R's. Clearly section 16.10 addresses a subcategory of the possible disputes that might arise between owners and the Association.

Although the CC&R's do not define what is meant by the words "meaning" and "effect," there is no indication in the CC&R's that the words have a special meaning. Therefore, we apply the standard principle that the words of a contract are to be understood in their "ordinary and popular sense." (Civ. Code, § 1644; see *Muzzi v. Bel Air Mart* (2009) 171 Cal.App.4th

456, 465.) "Meaning" is "the thing one intends to convey" or "that is conveyed" by language. (Merriam-Webster's Collegiate Dict. (11th Ed. 2006) p. 769, col. 1.) When parties dispute the "meaning" of a term or provision in a document such as the CC&R's, they are commonly disputing its definition. The word "effect" as used here references the "result" of those terms or provisions. (See *id.*, at p. 397, col. 1.) It asks the question--what is required and/or allowed under the terms and provisions of the CC&R's?

If all that was at issue in this case was the factual dispute whether Mansouri's patio differed from the patio improvements approved by the Association, for example, whether the patio covers more area than was approved, there would be no dispute regarding the "meaning" or "effect" of the CC&R's. However, the parties' letters to each other reflect the nature of the dispute is not so limited.

In July 2008, counsel for the Association sent Mansouri a letter claiming her constructed patio deviated from the plans she submitted with her Application. The Association contended Mansouri's construction (1) did not have the required approval of TRPA or the Association; (2) encroached on common areas and interfered with a drainage channel constructed by the Association; (3) interfered with the privacy rights of neighboring condominiums; and (4) used unapproved construction materials. The letter requested Mansouri remove her patio improvements and conform the patio to the plan approved by the ACC or submit a revised plan for ACC review and approval.

Mansouri responded, through a letter by her attorney, that the Association's approval of her Application, which was conceptual in nature, was broad enough to cover her actual patio improvements. Mansouri's counsel also argued Mansouri's patio substantially conformed to her June drawings, which were "deemed approved" under section 9.2 of the CC&R's, the section governing architectural and design approval, when the ACC or the Board of Directors of the Association failed to approve or disapprove the plans within 60 days of their receipt by Evans. Additionally, counsel contended the patio was approved as built by Partridge and Evans as authorized agents for the Association.

The evaluation of these claims, especially those asserted by Mansouri, requires the consideration of what is meant by the term "approval" in the CC&R's. It plainly requires consideration of the language of section 9.2 of the CC&R's to determine what specifically is required by the CC&R's for owner improvements to their property, i.e., what kind of approval, of what documents, by whom. Both the "meaning" and "effect" of the CC&R's are at issue.

Section 16.10 is applicable to the dispute between the Association and Mansouri.

III.

THE ASSOCIATION FAILED TO COMPLY WITH THE APPLICABLE STATUTORY REQUIREMENTS FOR A PETITION TO COMPEL ARBITRATION

Prior to filing the petition to compel arbitration, the Association wrote Mansouri requesting that she agree to submit the dispute to binding arbitration before a single arbitrator,

unilaterally pre-selected by the Association. The letter indicated that if Mansouri did not agree, the Association would file "a *court action for injunctive and declaratory relief* and attorneys fees to enforce [her] compliance." (Italics added.) The letter made no reference to the arbitration provision of the CC&R's (section 16.10), did not offer the three person form of arbitration set forth in section 16.10, and did not inform Mansouri that a petition to compel arbitration would be filed if she refused.

Mansouri claims the trial court erred in granting the Association's motion to compel arbitration because the Association failed to properly satisfy its obligation under Civil Code section 1369.520 (section 1369.520), subdivision (a), to endeavor to submit the dispute to alternative dispute resolution before it filed its petition to compel arbitration. Mansouri contends section 1369.520 requires the Association to offer her the kind of arbitration (three person) specified under the arbitration provision of the CC&R's as a prerequisite to filing the petition to compel arbitration. The Association claims substantial evidence supports the trial court's finding that it did "in good faith endeavor[] to submit this dispute to alternative dispute resolution before the filing of this court action[]" as required by section 1369.520.

Section 1369.520, subdivision (a), reads: "An association or an owner or a member of a common interest development may not file an enforcement action in the superior court unless the parties have endeavored to submit their dispute to alternative

dispute resolution pursuant to this article." Subdivision (b) of section 1369.520, however, limits the application of the section "to an enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of the jurisdictional limits stated in Sections 116.220 and 116.221 of the Code of Civil Procedure."

Section 1369.520, subdivision (a) does not apply to this case; the Association did not file "an enforcement action" as defined by section 1369.520. (§ 1369.520, subd. (b).) Although the Association threatened to file a court action for injunctive and declaratory relief in its letter to Mansouri offering arbitration, it subsequently took the position that the dispute fell within the binding arbitration provisions of the CC&R's, section 16.10, and filed the petition to compel arbitration that is the subject of this writ. The applicable statutory provision for the Association's petition to compel arbitration is not section 1369.520, but section 1281.2.

Subject to exceptions not applicable here, section 1281.2 provides that: "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[.]" (Italics added.)

We requested and received supplemental briefs from the parties addressing whether a demand for arbitration under the parties' agreement to arbitrate and a party's refusal to arbitrate under the agreement are preconditions of a petition to compel arbitration under section 1281.2.

The Association filed a supplemental brief that fails to address whether section 1281.2 requires a demand and refusal under the agreement before a petition to compel arbitration under the agreement is appropriate. Instead, the Association argues the CC&R's do not contain such a prerequisite; Mansouri forfeited her right to assert the claim that the Association failed to satisfy section 1281.2 when she failed to raise the issue before the trial court; and that Mansouri's conduct waived and/or excused the Association of any requirement that it demand arbitration under the terms of section 16.10 prior to filing its petition to compel arbitration.

Before we consider whether section 1281.2 contains a statutory prerequisite of a prior demand and refusal to arbitrate under the agreement,[6] we consider whether Mansouri's failure to argue section 1281.2 to the trial court forfeits the issue here. In support of its argument for such result, the Association cites case law expressing the well-settled rule that "'[a] party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so

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[6] If the statute contains such a requirement, it is irrelevant that the CC&R's do not.

would not only be unfair to the trial court, but manifestly unjust to the opposing litigant. [Citation.]'" (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874, quoting *Ernst v. Searle* (1933) 218 Cal. 233, 240-241; see *Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780; *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 78, fn. 4; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 407, pp. 466-468.)

However, this rule is discretionary with the reviewing court and subject to several exceptions. (*Watson v. Department of Transportation* (1998) 68 Cal.App.4th 885, 890.) First, "[t]he general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.' [Citation.]" (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) Consequently, "an appellate court may allow an appellant to assert a new theory of the case on appeal where the facts were clearly put at issue at trial and are undisputed on appeal." (*Richmond v. Dart Industries, Inc.*, *supra,* 196 Cal.App.3d at p. 879.) Second, a "'court may refuse to follow the doctrine where the error is too fundamental to be ignored, e.g., in cases of illegality, unclean hands, complete *failure to state a cause of action*, or variance so fundamental as to constitute "departure" or failure of proof. [Citations.]'" (*Watson v. Department of Transportation,*

supra, at p. 890, italics added.) Both of these exceptions appear applicable here.

In the trial court, Mansouri opposed the petition to compel arbitration on the ground, inter alia, that the Association did not in good faith endeavor to submit this dispute to alternative dispute resolution under section 1369.520. In making this argument, Mansouri specifically contended the Association's offer of binding arbitration by a single arbitrator contradicted her right under the CC&R's to a panel of three arbitrators. This argument placed at issue the facts surrounding the Association's request for arbitration and its subsequent communications and negotiations with Mansouri regarding possible arbitration. The Association was on notice from that point that Mansouri claimed the Association improperly offered her arbitration only by a pre-selected single arbitrator. In its reply to Mansouri's opposition, however, the Association never asserted it had in fact offered arbitration with a panel of three arbitrators under the terms of section 16.10. The Association never submitted the supplemental evidence, which it now claims it has, that would show Mansouri and/or her counsel believed the Association's letter demanding arbitration before a pre-selected single arbitrator "represented the Association's intent to submit the dispute to a three-arbitrator panel for resolution" or that it otherwise "informed Mansouri of its willingness to arbitrate either through a three-person panel or through a single arbitrator[.]" Given the plain relevance of such evidence to Mansouri's claim, we discount the Association's

belated effort here to suggest in a footnote in its supplemental brief that the factual situation surrounding its request for arbitration is disputed and that it somehow had no opportunity to fully present its evidence to the trial court. On this record, the facts were clearly put at issue at trial and are undisputed here.

In any event, if proof of a demand and refusal to arbitrate under the agreement is a necessary prerequisite to a petition to compel arbitration under section 1281.2, the failure to prove such demand and refusal is a failure to state a cause of action--a fundamental error that permits us to review the issue despite a party's failure to raise the theory in the trial court. (*Watson v. Department of Transportation, supra,* 68 Cal.App.4th at p. 890.)

We turn to the merits of the issue and conclude section 1281.2 does require a party seeking to compel arbitration to plead and prove a prior demand for arbitration under the parties' arbitration agreement and a refusal to arbitrate under the agreement.

We reach this conclusion by construing section 1281.2 under established principles of statutory interpretation. "When construing statutes, our goal is '"to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law."' [Citation.] We first examine the words of the statute, 'giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the

most reliable indicator of legislative intent.' [Citation.] If the statutory language is ambiguous and susceptible of differing constructions, we may reasonably infer that the legislators intended an interpretation producing practical and workable results rather than one resulting in mischief or absurdity. [Citation.] It is a fundamental tenet of statutory construction that we must give the statute a *reasonable* construction conforming to legislative intent. [Citation.]" (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919.)

Section 1281.2 expressly requires a petition to compel arbitration to allege "the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy[.]" The necessary implication of this language is that a request or demand for arbitration under the written agreement to arbitrate has been made and refused. Such demand and refusal is what requires and justifies the intervention of the court to order arbitration under the agreement. It makes no sense for this language to be read to allow a petitioner to compel arbitration[7] on allegations and proof of a written agreement to arbitrate the controversy, but with allegations and proof that arbitration under some other statutory scheme or contract was offered and refused. The

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[7] Section 1281.2 provides "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" one of the statutory exceptions applies. (Italics added.)

Legislature plainly intended section 1281.2 to provide a procedural device for enforcing the parties' written arbitration agreement if one or more of the parties would not agree to such arbitration. The only reasonable construction of the statutory language that conforms to such intent, is to require for a petition to compel arbitration the pleading and proof of (1) the parties' written agreement to arbitrate a controversy (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413); (2) a request or demand by one party to the other party or parties for arbitration of such controversy *pursuant to and under the terms of their written arbitration agreement*; and (3) the refusal of the other party or parties to arbitrate such controversy *pursuant to and under the terms of their written arbitration agreement*.

Our interpretation of the language of section 1281.2 is supported by consideration of the nature of the relief being granted. Our Supreme Court has made it clear that a petition to compel arbitration under section 1281.2 "'"is in essence a suit in equity to compel specific performance of a contract."'" (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 29; *Rosenthal v. Great Western Fin. Securities Corp., supra,* 14 Cal.4th at p. 411.) The elements of a cause of action for specific performance of a contract include not only the contract (*Roth v. Malson* (1998) 67 Cal.App.4th 552, 557), but defendant's breach of the contract. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 785, pp. 203-204.) Where no time is specified for performance, there is no breach of a

contractual promise to perform an act in the future by a party who has the ability to perform where there has been no demand for performance and refusal to perform. (*Leonard v. Rose* (1967) 65 Cal.2d 589, 592-593 [rule is subject to exceptions not at issue here].) So too, there is no breach of an agreement to arbitrate unless there has been a demand to arbitrate and a refusal to arbitrate under the agreement. Without a breach, there is no cause of action for specific performance of the arbitration agreement and therefore, no basis for a petition to compel under section 1281.2.

The Association nevertheless asks us to find "that Mansouri's conduct in these proceedings operates as a waiver to this requirement and/or excuses [the] Association from complying with any such preconditions." According to the Association, Mansouri unmistakably demonstrated her unwillingness to submit the dispute to any form of binding arbitration in her responses to the Association's requests to arbitrate. We have reviewed the referenced letter and e-mail exchanges between the parties regarding arbitration and mediation. In our opinion, Mansouri's expressed desire in those communications for the matter to be litigated in court and not submitted to binding arbitration must be understood in context as a preference for a judicial forum over the single pre-selected arbitrator offered by the Association. We do not view it as evidence of Mansouri's "unequivocal intent . . . to reject any form of binding arbitration." We are not convinced by these communications that Mansouri would have rejected arbitration under section 16.10 of

the CC&R's if arbitration pursuant to the terms of such provision had been offered prior to the filing of the petition to compel arbitration. The Association's failure to offer and request arbitration pursuant to section 16.10 is not waived or excused.

As the Association failed to show it requested Mansouri arbitrate pursuant to and under the terms of section 16.10 of the CC&R's and that Mansouri refused to arbitrate under such provision, its petition to compel such arbitration should have been denied.

DISPOSITION

Let a peremptory writ of mandate issue, directing the trial court to vacate its order granting the Association's petition to compel arbitration and awarding attorney fees and to enter a new and different order denying the petition. Petitioner is awarded costs in this writ proceeding. (Cal. Rules of Court, rule 8.493(a)(1)(A).)

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P. J.

RAYE, J.