

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KIRSTEN BURTON,

Plaintiff and Appellant,

v.

JOSEPH T. CRUISE et al.,

Defendants and Respondents.

G041835

(Super. Ct. No. 30-2008-00104716)

ORDER MODIFYING OPINION
AND DENYING REHEARING;
(NO CHANGE IN JUDGMENT)

The opinion filed December 8, 2010, is hereby modified as follows:

1. On page 10, add a new paragraph, following the fifth full paragraph, after the sentence ending “(*Adolph, supra*, 184 Cal.App.4th at p. 1452.)”

California public policy strongly favors arbitration clauses precisely to respect contractual choices to avoid the inherent delays and ever increasing costs of litigation. By litigating rather than arbitrating until the time of trial, Burton has circumvented the expected benefits to be achieved from a speedy and relatively inexpensive arbitral forum. Depriving a party of the benefits of his or her bargain is the epitome of prejudice. Here, arbitration delayed is arbitration denied.

2. At the end of the first full paragraph on page 11, after the sentence ending “therefore supports the trial court’s decision to deny Burton’s arbitration provision,” add the following two paragraphs:

In her petition for rehearing, Burton takes us to task for confusing speculation with evidence. We understand the distinction, but can only speculate why appellant has overlooked it. In a declaration filed with the trial court (and hence part of the factual record on appeal), Cruise’s trial counsel flatly declared: “[T]he defendants and defense counsel selected their expert witnesses very specifically with an eye towards presentation in a superior court trial as opposed to a binding arbitration. As a practical and strategic matter, that same panel of expert witnesses *would not have been selected* for this case had it been known that the case was proceeding in binding arbitration rather than superior court trial before a jury.” (Italics added.)

This is neither speculation nor mere attorney argument, but actual evidence. We know of no more unequivocal way in which Cruise’s trial counsel, who was the decision maker who designated the experts, could have described the resulting prejudice to his client.”

Appellant's petition for rehearing is DENIED. There is no change in judgment.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.