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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

ENGEL & ENGEL, LLP, Plaintiff and Respondent, v. JOHN DELONG et al., Defendants and Appellants.	B279576 (Los Angeles County Super. Ct. No. BS152124)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael J. Raphael, Judge. Affirmed.

Chad Biggins for Plaintiff and Respondent.

Randall S. Wair for Defendants and Appellants.

John and Judith DeLong (appellants) appeal from a judgment entered after the trial court confirmed an arbitration award arising out of binding arbitration between them and Engel & Engel, LLP, an accounting firm (respondent). The arbitrator initially awarded respondent $27,100.13 on the merits of respondent's claim, plus undetermined interest and costs. The arbitrator then awarded respondent costs and attorney fees in connection with the arbitration. The trial court granted respondent's petition to confirm the incrementally-entered arbitration award with an additional award of costs and fees incurred in the trial court. The trial court entered judgment against appellants for a total sum of $75,949.02.

Appellant argues that the arbitrator exceeded the scope of her power in making the additional fee and cost awards and that the trial court erred in awarding fees and costs in connection with the petition for confirmation. We affirm.

BACKGROUND

Petition to compel arbitration

On October 23, 2014, respondent petitioned the trial court to compel binding arbitration pursuant to a written fee agreement. The petition alleged that pursuant to the agreement, respondent provided accounting services to appellants, and appellants failed to pay for such services. Respondent alleged breach of contract, account stated, quantum meruit, and promissory fraud. In response, appellants argued that the contract was not enforceable.

The entire contract between the parties was attached to the petition to compel arbitration. The following provision relates to arbitration:

> "It is hereby agreed that should any dispute, controversy or claim arise in connection with the services to be provided under this agreement, or the charges incurred thereby, same shall be decided by

> binding arbitration, before the Alternative Dispute Resolution Centers in Los Angeles, California, pursuant to said associations' Rules in effect at the time the Demand for Arbitration is filed. In further consideration of this agreement, attorney Randall S. Waier agrees to accept service of any lawsuit/demand for arbitration on behalf of the client. In the event an arbitration or litigation (including but not limited to any proceeding to compel arbitration) is initiated to resolve or settle any dispute or claim between the parties, the prevailing party shall be entitled to recover from the nonprevailing party or parties its costs incurred, including but not limited to attorney's fees, expert fees, court and arbitration fees, and fees of E&E incurred in connection with the arbitration or litigation."

On March 5, 2015, the trial court ordered the parties to binding arbitration.

Arbitration and awards

The arbitration was held on May 14, 2015; June 4, 2015; September 22, 2015; and February 4, 2016. On March 15, 2016, the arbitrator issued a binding arbitration award. The arbitrator determined that the contract at issue was invalid as there was no meeting of the minds between the parties. However, the arbitrator found in favor of respondent on its claim of unjust enrichment. The arbitrator specified: "The arbitrator finds in favor of the [respondent] and against the [appellants] in the amount of $27,100.13 plus interest and costs."

Following briefing by the parties, on June 8, 2016, the arbitrator issued an order for costs. The arbitrator denied prejudgment interest as "it is not properly awardable in a quantum meruit action." Post judgment interest was granted. The arbitrator further found that the applicability of the agreement's arbitration clause was previously determined by the

trial court and that appellants waived any objection to that ruling. "Since the arbitration clause was found valid and because it provides a provision for fees and costs, [respondent's] request for arbitration fees, court reporter fees, court fees, and service of process fees" was granted.

The arbitrator awarded respondent $15,213.89 in arbitration costs.[1] Following further briefing by the parties, on August 12, 2016, the arbitrator awarded respondent $28,000 as attorney fees. The arbitrator denied the additional $26,460 in fees that respondent requested.

Confirmation

On September 28, 2016, respondent filed a motion to confirm the arbitration award and for entry of judgment. Respondent also sought attorney fees and costs incurred in connection with the motion to confirm.

Appellants objected to the motion to confirm, and on October 14, 2016, petitioned for an order vacating the arbitration award. Appellants argued that the arbitrator exceeded her power in making the award. In particular, appellants took the position that the fee and cost awards were predicated on contract provisions that the arbitrator deemed invalid, thus were in excess of the arbitrator's power. Appellants contended that neither the trial court nor the arbitrator could make or confirm a binding arbitration award since the contract as a whole was

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[1] The record does not contain an award denominating the monetary amount of costs awarded to respondent. However, at the time that the arbitrator granted respondent's request for costs, respondent's requested amount was $15,213.89. Appellants did not object to confirmation of the arbitration award on the ground that that no specific monetary award for costs was issued. Thus the trial court did not err in including the full $15,213.89 in requested costs as part of the final judgment.

unenforceable. Further, appellants argued that the quantum meruit award in favor of respondent was tantamount to an improper remaking of the retention agreement.

On October 27, 2016, the trial court granted respondent's motion to confirm the arbitration award. The court concluded that the motion was timely. The merits of the arbitration award were not challenged. In response to appellants' arguments, the court explained that "the validity of the arbitration award was determined separately from that of the contract as a whole, and was determined by the Court as a threshold matter, on March 5, 2015." At that time, the court pointed out, appellants did not challenge the validity of the arbitration clause. The court reasoned that appellants' present challenge to the validity of the arbitration clause was "an improper motion for reconsideration." Under the same rationale, the trial court found the fee award to be valid, since it was "premised on the fee provision in the arbitration clause, which was found valid by this Court."

The trial court awarded respondent additional costs and fees in connection with the motion to confirm, for a total judgment of $75,949.02.

Judgment was entered on October 27, 2016, and on December 15, 2016, appellants filed their notice of appeal.

DISCUSSION

I. Standard of review

"'On appeal from an order confirming an arbitration award, we review the trial court's order (not the arbitration award) under a de novo standard. [Citations.] To the extent that the trial court's ruling rests upon a determination of disputed factual issues, we apply the substantial evidence test to those issues.'" [Citation.] (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1217.)

We keep in mind the standards governing confirmation of an arbitration award. A party may petition the trial court to

"confirm, correct or vacate" an arbitration award. (Code Civ. Proc., § 1285.)[2] "[I]t is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11 (*Moncharsh*).) Under section 1286.2, the trial court may vacate the award only under "'very limited circumstances.'" (*Roehl v. Ritchie* (2007) 147 Cal.App.4th 338, 347 (*Roehl*).) Neither the trial court, nor the appellate court, may "review the merits of the dispute, the sufficiency of the evidence, or the arbitrator's reasoning, nor may we correct or review an award because of an arbitrator's legal or factual error, even if it appears on the award's face. Instead, we restrict our review to whether the award should be vacated under the grounds listed in section 1286.2 [Citations.]"[3] (*Ibid.*)

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[2] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

[3] Pursuant to section 1286.2, a court may vacate an arbitration award if the court determines any of the following:

"(1) The award was procured by corruption, fraud or other undue means.

"(2) There was corruption in any of the arbitrators.

"(3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.

"(4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

"(5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

II. The trial court did not err in confirming the entire arbitration award

A. The arbitrator did not exceed her power by awarding fees and costs

1. Appellants did not contest the trial court's initial determination that the arbitration provision was enforceable

Appellants first argue that the arbitrator exceeded her powers in "supplementing" her original award to include monetary awards of attorney fees, costs, and arbitral expenses to respondent. Appellants' argument is based on their position that because the contract was largely declared invalid, the Arbitration Resolution Centers Arbitration Rules (ARC Rules) applied. Under ARC Rule 22, arbitrants shall pay their own attorney fees, costs, and arbitral expenses unless there is a valid contractual provision to the contrary.

The trial court addressed this argument in its ruling, citing *Hayes Children Leasing Co. v. NCR Corp.* (1995) 37 Cal.App.4th 775, 782 (*Hayes*) for the proposition that an attack on "the contract as a whole do[es] not raise the issue that the agreement to arbitrate, although contained in that contract, is invalid. [Citation.]" The court held that the validity of the arbitration agreement, including the fee-shifting provision, was determined as a threshold matter by the trial court prior to arbitration. Appellants did not oppose the petition to compel arbitration at

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"(6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision."

the time, therefore they forfeited any argument that the arbitration clause was unenforceable.

We find no error in the trial court's ruling. The trial court properly determined the validity of the arbitration clause when it ordered the matter to arbitration on March 5, 2015. (*Hayes, supra*, 37 Cal.App.4th at p. 782 ["the question of the validity of an arbitration provision should be determined separately from the validity of the contract as a whole"].) Appellants did not object to the enforceability of the arbitration provision nor did they oppose the trial court's ruling. Thus, they forfeited any challenge to the validity of the arbitration provision. (*Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 219 (*Condee*) ["Once the petitioners had alleged that the agreement [to arbitrate] exists, the burden shifted to respondents to prove the falsity of the purported agreement"].)

The arbitrator specified that her determination that the contract was invalid did not include the arbitration clause. She commented that respondent was entitled to fees and costs because "the arbitration clause was found valid and . . . [it] provides . . . for fees and costs." The record supports the trial court's identical ruling. The trial court properly found that appellants' argument that the arbitration provision was invalid constituted an improper motion for reconsideration. (See § 1008[4].)

2. The arbitrator was permitted to issue incremental awards

Further, the arbitrator's fee and cost award is not properly described as a supplemental award. We reject appellants' suggestion that the arbitrator improperly reweighed or

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[4] A motion for reconsideration must be filed within 10 days after service of entry of the order in question. (§ 1008.)

reconsidered the merits of her initial award. (See, *Elliot & Ten Eyck Partnership v. City of Long Beach* (1997) 57 Cal.App.4th 495, 501-504 [explaining that arbitrators have no power to amend, modify or correct a decision].) Instead, the fee and cost awards were incremental, or successive awards. Such awards are properly used in arbitration when a determination of costs and fees is reserved for later decision. (*Hightower v. Superior Court* (2001) 86 Cal.App.4th 1415, 1434; *EHM Productions, Inc. v. Starline Tours of Hollywood, Inc.* (2018) 21 Cal.App.5th 1058, 1065-1066.) Here, the initial arbitration award presented the following language: "The arbitrator finds in favor of [respondent] and against the [appellants] in the amount of $27,100.13 plus interest and costs." Thus, the award was an interim award, with an implicit reservation of jurisdiction to determine the interest and cost award. As such, it was well within the arbitrator's authority.[5]

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[5] Because the fee and cost awards are properly characterized as incremental, or successive, awards, *Cooper v. Lavely & Singer Professional Corp.* (2014) 230 Cal.App.4th 1 (*Cooper*) is irrelevant. In *Cooper*, the arbitrator denied a request for attorney fees in his final award, then subsequently modified that award and issued a revised final award which included an award of attorney fees. While the *Cooper* court acknowledged an arbitrator's power to use incremental or successive awards to resolve all submitted issues, it found that in that case, the arbitrator exceeded his power by reconsidering the merits of an issue he had previously considered and ruled upon. (*Id.* at pp. 13-16.) Further, because the fee and cost awards were not corrections or amendments to the initial award, the time limits set forth in section 1284 are inapplicable. Section 1284 provides that "[t]he arbitrators, upon written application of a party to the arbitration, may correct the award . . . not later than 30 days after service of a signed copy of the award on the applicant," and that "[a]pplication for such correction shall be made not later

Appellants' citation to *Roehl*, *supra,* 147 Cal.App.4th at page 354, does them no help. Appellants cite to a portion of that opinion suggesting that an arbitrator may not amend his or her award if such amendment is inconsistent with other findings on the merits of the controversy. Here, the arbitrator's fee and cost awards were based on the arbitration clause, which was found valid and enforceable following an uncontested trial court petition. Thus, the arbitrator's fee and cost awards were not inconsistent with her ruling on the merits that the remainder of the contract was invalid.

3. The arbitration clause included a fee-shifting provision

Nor do we accept appellants' argument that the arbitration provision consisted of only a single sentence -- specifically, the first sentence of the entire arbitration provision -- and did not include the remainder of the paragraph, which provides that the "prevailing party shall be entitled to recover from the nonprevailing party or parties its costs incurred, including but not limited to attorney's fees, expert fees, court and arbitration fees . . . ." Appellants argue that pursuant to California Rules of Court, rule 3.1330, a party must "recite the governing provision" in its petition. Appellants appear to make the argument that because respondent only quoted the first sentence of the arbitration provision in respondent's petition to compel arbitration, respondent somehow renounced the existence of the remainder of the paragraph. Appellants cite no authority for such a rule.

Further, the entire sentence from the quoted Rule of Court states: "The provisions must be stated verbatim or a copy must

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than 10 days after service of a signed copy of the award on the applicant." We reject appellants' arguments suggesting that the fee and cost awards were "corrections" subject to such time limits.

be physically or electronically attached to the petition and incorporated by reference." (Cal. Rules Court, rule 3.1330; see also *Condee, supra*, 88 Cal.App.4th at p. 219 ["A petitioner must attach a copy of the agreement to the petition, *or* its 'provisions . . . shall be set forth' in the petition"].) The petition filed by respondent attached and incorporated by reference a copy of the entire contract. Thus, the trial court was notified of the complete arbitration provision, and did not indicate that its ruling as to the validity of that provision was limited to the first sentence.[6]

4. The arbitrator's interpretation of the fee-shifting provision is not reviewable

Appellants argue that even if the entire arbitration provision were valid and enforceable, including the portion providing for fees and costs, that no such fees and costs should

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[6] We also reject appellants' suggestion that respondent made a judicial admission to the trial court that the arbitration agreement consisted only of the single sentence recited verbatim in respondent's petition to compel arbitration. First, as explained above, because the entire agreement was attached to the petition, respondent was not required to write out the complete arbitration provision in the petition itself. Further, even if respondent only provided to the court the single sentence contained in the petition, such action did not constitute a judicial admission as to the scope of the arbitration provision. Judicial admissions """"are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her."""" (*Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446, 451-452.) Such admissions may be made in pleadings, by stipulation, or in response to requests for admission. (*Ibid.*) Appellants have not cited any law suggesting that contentions made in a petition to compel arbitration constitute binding judicial admissions. Nor does judicial estoppel apply, as respondent never asserted that the arbitration provision consisted of only one sentence and not the entire paragraph.

have been awarded because respondent did not prevail on any claim "under the [written] agreement." Instead, appellants argue, the award was in quantum meruit.

Preliminarily, we note that we may not review the arbitrator's interpretation or application of the fee-shifting language of the arbitration agreement. (*Moncharsh, supra*, 3 Cal.4th at p. 11 [arbitrator's decision cannot be reviewed for errors of fact or law]). Further, as set forth above, the arbitration provision, which was held to be enforceable by the trial court, provided that: "In the event an arbitration or litigation (including but not limited to any proceeding to compel arbitration) is initiated to resolve or settle *any dispute or claim between the parties*, the prevailing party shall be entitled to recover from the nonprevailing party or parties its costs incurred, including but not limited to attorney's fees, expert fees, court and arbitration fees, and fees of [respondent] incurred in connection with the arbitration or litigation." (Italics added.) Thus, the provision is not limited to awards based on a contract theory, but instead applies to any dispute between the parties.

Moshonov v. Walsh (2000) 22 Cal.4th 771, is not helpful to appellants. There, an arbitrator found in favor of the defendants in a real estate matter. Although the real estate purchase agreement contained a clause providing for reasonable attorney fees to the prevailing party in any arbitration brought to enforce the terms of the contract, the arbitrator reasoned that the contractual attorney fees clause was not broad enough to encompass the claims against the defendants, which the arbitrator found were noncontractual claims. Thus, the arbitrator denied an award of attorney fees. (*Id.* at p. 775.) The Supreme Court concluded that, because the issue of interpretation of the attorney fee clause was committed to final adjudication by the arbitrator, the courts could not consider the

merits of the issue. (*Id.* at p. 779.) *Moshonov* does not suggest that attorney fees were inappropriate here. As *Moshonov* instructs, where interpretation of the attorney fee clause is committed to the arbitrator, it is not our place to reconsider the arbitrator's interpretation. Furthermore, we note that the language of the contractual fee-shifting provision in this matter is significantly broader than the clause at issue in *Moshonov*.

In sum, the trial court did not err in confirming the entire arbitration award, including costs and fees, as the award did not exceed the arbitrator's powers.[7]

B. The arbitrator did not exceed her power in designating the prevailing party

Appellants next complain that the arbitrator did not expressly designate respondent, or appellants for that matter, to

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[7] Appellants further argue that the arbitrator erred in awarding respondent its trial court attorney fees in initially compelling arbitration. Appellants cite *Turner v. Schultz* (2009) 175 Cal.App.4th 974, 981 and *Roberts v. Packard, Packard & Johnson* (2013) 217 Cal.App.4th 822, 833 to support their claim that only the trial court, not the arbitrator, has the authority to award such fees. The cited cases discuss whether attorney fees incurred in connection with trial court proceedings may be awarded independent of the outcome of the related arbitration. However, appellants fail to provide citations to the record showing that the arbitrator awarded respondent any trial court fees. In fact, the record shows that the arbitrator declined to award respondent nearly half respondent's requested fees. Due to appellants' failure to provide a citation to the record identifying the precise fees challenged, and failure to point to an objection on this ground below, we find that appellants have forfeited this argument. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 ["'[i]f a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to be have been waived. [Citation.]' [Citations.]")

be the prevailing party. Appellants argue that they, in fact, prevailed on their defense to respondent's contractual claim. Thus, appellants argue, the arbitrator exceeded her power in finding them liable for respondent's fees and costs.

The language of the arbitrator's initial award undermines appellants' position. The award stated specifically that it was "in favor of" respondent and "against" appellants. Thus, respondent was specifically designated the prevailing party, and thus was entitled to fees and costs. The trial court did not err in declining to find an act in excess of power on this ground.

The cases discussed by the parties support this conclusion. Appellants cite *Moore v. First Bank of San Luis Obispo* (2000) 22 Cal.4th 782, 788 (*Moore*). In *Moore,* the arbitrator did not designate a prevailing party and did not issue an award of attorney fees, instead determining that each party should pay its own fees. (*Id.* at pp. 787-788.) The court concluded that the arbitrators' failure to designate the plaintiffs as the prevailing party was "at most . . . an error of law on a submitted issue, which does not exceed the arbitrators' powers." (*Id.* at p. 788.) Here, unlike *Moore,* the arbitrator designated a prevailing party, and, as *Moore* illustrates, her choice is not reviewable.

DiMarco v. Chaney (1995) 31 Cal.App.4th 1809 (*DiMarco*), also supports the judgment here. In *DiMarco*, a contractual arbitration ended favorably to the defendant. Although the contract contained an attorney fee provision, the arbitrator denied the defendant's request for attorney fees. The defendant filed a motion to correct and affirm the award, which the trial court granted, adding an award for $19,575 in costs and fees that the defendant incurred in the arbitration. (*Id.* at pp. 1812-1813.) The arbitrator exceeded his powers because, notwithstanding his finding that the defendant was the prevailing party, the arbitrator declined to make an award of attorney fees. Having

made the finding that defendant was the prevailing party, the arbitrator was compelled by the terms of the agreement to award the defendant fees and costs. (*Id.* at p. 1815.) Such error was subject to correction under section 1286.6, subdivision (b). (*Ibid.*) *DiMarco* thus suggests that the arbitrator in this matter acted appropriately in awarding fees and costs to respondent, the prevailing party.

In sum, the trial court did not err in declining to find an act in excess of power on the ground that the arbitrator did not sufficiently designate a prevailing party.[8]

III. The trial court did not err in awarding attorney fees and costs in connection with confirmation

Appellants next challenge the trial court's decision to award respondent its attorney fees and costs in seeking

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[8] We decline to address appellants' arguments regarding the alleged untimeliness of the arbitrator's cost and fee awards under ARC Rule 14. In their opening brief, appellants state in a footnote, "As an aside, the supplemental award violated ARC Rule 14, which required the arbitrator to render her award . . . not more than 45 days from the date of the closing of the hearing." Despite characterizing this as an "aside," appellants proceed to criticize respondent for failing to address this argument. We decline to address the argument because appellants have not provided a citation to the record showing that appellants raised this argument before the arbitrator or objected to confirmation of the award on this ground below. Further, appellants provide no legal authority as to how the rule applies in the context of interim, or successive, awards, as occurred here. Thus, we consider the argument forfeited. (*Nwosu v. Uba, supra,* 122 Cal.App.4th at p. 1246.) *Rusnak v. General Controls Co.* (1960) 183 Cal.App.2d 583 is distinguishable, as the appellant in that matter had specifically petitioned the trial court to vacate the award on the ground that the decision was untimely under the terms of the collective bargaining agreement at issue.

confirmation. Appellants argue that the award contravened the arbitrator's express finding that the retention contract, other than the arbitration provision, was invalid and unenforceable.

For the same reasons that the arbitrator properly awarded costs and fees, the trial court properly awarded costs and fees. The arbitration provision was found to be enforceable. Appellants did not challenge this initial determination by the trial court. The arbitration provision expressly included language stating that the prevailing party in any arbitration or litigation shall be entitled to recover from the other party its costs and attorney fees. The trial court did not commit error in following the enforceable directives set forth in the contract.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST