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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CHANDU PATEL,

Plaintiff and Appellant,

v.

NEEL CHAPATWALA et al.,

Defendants and Respondents.

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AND RELATED CROSS-ACTION.

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B272200

(Los Angeles County  
Super. Ct. No. BC573034)

APPEAL from an order of the Superior Court of Los Angeles County, Susan Bryant-Deason, Judge. Affirmed.

Gutman Law, Alan S. Gutman and John Juenger for Plaintiff, Cross-defendant and Appellant Chandu Patel.

Dan Hogue for Defendant, Cross-complainant and Respondent Neel Chapatwala.

Steven W. Kerekes for Defendants and Respondents Praful Patel, Rajesh Patel, Varsha Patel and Navin Patel.

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Plaintiff, cross-defendant and appellant Chandu Patel (Chandu)<sup>1</sup> appeals an order of the superior court granting a preliminary injunction in conformity with an arbitrator's interim award.

We affirm, concluding Chandu has failed to show any grounds for vacating the award that was the basis for the superior court's order granting a preliminary injunction.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *1. Chandu's complaint.*

On February 20, 2015, Chandu filed suit against Neel Chapatwala, Navin Patel, Hasmukh Patel,<sup>2</sup> Varsha Patel, Praful Patel, and Rajesh Patel (collectively, Defendants). The complaint set forth numerous causes of action, including promissory fraud, intentional and negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty. Chandu alleged in relevant part:

He formed Hotel Chico, LLC as a single-member limited liability company to acquire and operate a hotel in Los Angeles. He subsequently filed a certificate of amendment, adding the six Defendants as members and retaining a 27.275 percent interest for himself. Under the LLC's operating agreement, Chandu was the manager of both the LLC and the hotel property. On September 24, 2014, Chapatwala and the other nonmanaging

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<sup>1</sup> Because appellant and five of the Defendants share the same last name, for clarity we refer to appellant by his first name. No disrespect is intended. (*In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1.)

<sup>2</sup> Hasmukh Patel is not a party to this appeal.

members of the LLC conducted a meeting to oust Chandu as manager. The meeting concluded with Chandu remaining the sole managing member.

On February 6, 2015, Chandu was notified of a special meeting set for February 23, 2015, to again consider whether to oust Chandu based on his alleged failure to comply with resolutions passed at the September 24, 2014 meeting.

On February 20, 2015, shortly before the upcoming meeting, Chandu commenced this action, seeking damages and an injunction to prohibit Defendants from interfering with his operation of the hotel and the LLC.<sup>3</sup>

*2. The February 24, 2015 meeting terminating Chandu as managing member.*

The meeting was conducted on February 24, 2015, at which time the other members voted to terminate Chandu as the managing member and to appoint Chapatwala as the new managing member, effective immediately.

*3. Chapatwala's cross-complaint.*

On or about March 25, 2015, Chapatwala filed a cross-complaint for provisional injunctive relief pending completion of contractual arbitration. The cross-complaint indicated that the LLC's operating agreement included an arbitration clause, and that it was Chapatwala's intention to compel Chandu to arbitrate his claims. However, Chapatwala urged the provisional remedy of a preliminary injunction was necessary to prevent any arbitration award from being rendered ineffective. Chapatwala requested, inter alia, an order removing Chandu and appointing

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<sup>3</sup> Chandu later filed a first amended complaint, seeking essentially the same relief.

Chapatwala as the new managing member, and an order compelling turnover of all keys, passwords, accounts, books, records and contracts of the LLC.

4. *The motion to compel Chandu to arbitrate.*

On or about March 25, 2015, four of the Defendants (later joined by Chapatwala) filed a motion to compel arbitration, on the grounds that on August 1, 2001, the parties entered into a written operating agreement for the LLC. Said agreement contained an arbitration clause requiring the parties to arbitrate all claims and disputes relating to any action or inaction of any member, as well as any controversy or dispute arising out of the operating agreement.

Five of the Defendants submitted identical declarations stating: “The August 1, 2001 Operating Agreement attached hereto as Exhibit ‘A’ is a true and correct copy of the draft that was given to me by Chandu Patel on or near the date it bears. Once I received it, I signed it and returned it to Chandu Patel. I either did not keep a copy of my signature page or else it has been lost. To the best of my knowledge, it was signed by all the other members as well. I do not recall ever receiving back a fully executed copy of this document from Chandu Patel. I have always believed that this is the governing Operating Agreement for Hotel Chico, LLC and have never been told otherwise by Chandu Patel or anyone else.”

5. *The motion for a preliminary injunction.*

On May 6, 2015, Chapatwala (later joined by other Defendants) filed a motion for a preliminary injunction, “to prevent the dissipation and loss of the assets” because Chandu had refused to surrender operational control and/or access to the business facilities, bank accounts and records of the LLC despite

resolutions passed by the other members and a demand that he do so.

6. *Chandu's opposition to the motion to compel arbitration.*

Chandu argued the motion to compel should be denied because it was based on an unsigned draft version of the LLC operating agreement that never became effective. According to Chandu, the only *signed* version of the operating agreement was dated February 5, 2001. This signed agreement did not include an arbitration clause, so Defendants were incapable of establishing the existence of an agreement to arbitrate.<sup>4</sup>

Chandu also submitted deposition testimony from three of the five declarants to call into question the declarations filed in support of the motion to compel. For example, Navin Patel testified he did not remember signing and returning the August 1, 2001 operating agreement to Chandu.

7. *Order granting motion to compel arbitration.*

On June 12, 2015, the trial court granted the motion to compel arbitration, stating “the moving Defendants met their burden of demonstrating that there exists a valid, binding arbitration agreement between the parties to this action and that the claims herein are covered by the arbitration agreement.” The trial court found the moving declarations were credible, and were bolstered by Chandu’s judicial admissions in his original complaint, wherein he cited to various provisions of the August 1, 2001 operating agreement. “By these judicial admissions, the court finds that Plaintiff concedes that the parties conducted the

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<sup>4</sup> Contrary to the February 5, 2001 date asserted in Chandu’s opposition to the motion to compel, in his original complaint he pled the operating agreement was entered into on August 1, 2001.

business of the LLC pursuant to the August 1, 2001 Operating Agreement, and Plaintiff is not permitted to simply omit these judicial admissions by filing a first amended complaint.”

The trial court ruled “the August 1, 2001 Operating Agreement is the effective agreement governing the parties’ LLC relationship, and it contains a valid arbitration provision. As such, the court orders the parties to arbitrate their dispute as required by the August 1, 2001 Operating Agreement. Pursuant to CCP § 1281.4, this action is stayed pending completion of arbitration.”<sup>5</sup>

The trial court took the hearing on the accompanying motion for preliminary injunction off calendar due to the binding nature of the arbitration agreement, and found the arbitrator was capable of managing an election procedure under the Corporations Code.

8. *Arbitration proceedings, leading up to issuance of the interim award granting a preliminary injunction.*

The matter proceeded to arbitration before the American Arbitration Association (AAA). On February 8, 2016, at a

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<sup>5</sup> Unlike an order denying a motion to compel arbitration, an order *granting* a motion to compel arbitration is not directly appealable. (Code Civ. Proc., § 1294, subd. (a); *Reyes v. Macy’s Inc.* (2011) 202 Cal.App.4th 1119, 1122.) On July 20, 2015, Chandu filed a petition for writ of mandate, seeking writ review of the order granting the motion to compel arbitration. On August 27, 2015, this court summarily denied the petition. We decline the renewed request, made at oral argument, that we treat the matter as a petition for writ of mandate.

All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

preliminary hearing relating to the request for a preliminary injunction, Chandu asserted that an amended operating agreement dated *October 3, 2007* was controlling.

The arbitrator directed the parties to make written submissions; thereafter the “arbitrator will review the pleadings and decide whether there will be live testimony and/or oral argument regarding the preliminary injunction request.” The parties then filed written materials, including declarations and exhibits, which the arbitrator reviewed.

On February 15, 2016, the arbitrator issued an order stating he had reviewed the preliminary injunction documents and decided that live testimony and/or oral argument regarding the preliminary injunction request were not required. The arbitrator reasoned that the superior court, in its June 12, 2015 order compelling arbitration, already had decided the August 1, 2001 operating agreement was the effective agreement.

The arbitrator concluded that because live testimony and oral argument were unnecessary, and the majority of the membership interests had voted to remove Chandu as managing member of the LLC, the motion for a preliminary injunction should be granted. Chandu was directed to refrain from interfering with Chapatwala’s assumption of management duties, and was ordered to turn over all keys, passwords, accounts, books, records and contracts of the LLC to Chapatwala.

9. *Superior court proceedings to confirm the interim award.*

On or about March 28, 2016, five of the Defendants filed a petition for an order confirming the interim award and the issuance of a preliminary injunction in conformity therewith.

In opposition, Chandu argued the interim award, which did not resolve all the issues before the arbitrator, was not subject to

confirmation. Alternatively, Chandu contended that any preliminary injunction should be stayed pending appeal.

On May 13, 2016, after a hearing on the matter, the trial court entered an order granting the petition to confirm the interim award and issuing a preliminary injunction in conformity with the award. The order enjoins Chandu from interfering with Chapatwala's assumption of management duties, and directs Chandu to turn over all keys, passwords, accounts, books, records and contracts of the LLC to Chapatwala.<sup>6</sup> This timely appeal by Chandu followed.<sup>7</sup>

### **CONTENTIONS**

Chandu contends: there is no competent evidence that the version of the operating agreement on which respondents rely was executed, and the arbitrator refused to follow the AAA's own rules regarding objections to the existence of an agreement to arbitrate; in addition, the trial court's order confirming the award must be reversed because the arbitrator refused to consider material evidence.

Respondents contend that no appeal lies from the order confirming the arbitrator's interim award, requiring dismissal of the appeal. Alternatively, if the merits are considered, the order should be affirmed.

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<sup>6</sup> In addition, the order provided that "[t]he arbitration may proceed as to the remaining issues not yet decided."

<sup>7</sup> Chandu filed a petition for writ of supersedeas, which was summarily denied on June 21, 2016.



## DISCUSSION

### 1. *Appealability.*

a. *The order confirming the interim award is not appealable as a judgment confirming an award pursuant to section 1294, subdivision (d).*

Section 1294 specifies which orders are appealable in arbitration proceedings.<sup>8</sup> Chandu contends the order confirming the interim award is appealable under subdivision (d) of the statute. Not so.

Section 1287.4 provides that if an award is confirmed, judgment shall be entered in conformity therewith, and such judgment is appealable under section 1294, subdivision (d). However, an order confirming an arbitration award under section 1287.4 is not appealable if the merits of any of the claims remain to be resolved in the arbitration. (*Rubin v. Western Mutual Ins. Co.* (1999) 71 Cal.App.4th 1539, 1547–1548 (*Rubin*); *Judge v. Nijjar Realty, Inc.* (2014) 232 Cal.App.4th 619, 633.) The *Rubin* court noted that section 1287.4 provides that, “[i]f an award is confirmed, judgment shall be entered in conformity therewith,” and the “judgment so entered . . . is subject to *all* the provisions of law relating to a judgment in a civil action . . . .” (*Rubin, supra*, 71 Cal.App.4th p. 1547.) *Rubin* reasoned that “[t]he express language of section 1287.4 requires that a judgment

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<sup>8</sup> Section 1294 states: “An aggrieved party may appeal from: [¶] (a) An order dismissing or denying a petition to compel arbitration. [¶] (b) An order dismissing a petition to confirm, correct or vacate an award. [¶] (c) An order vacating an award unless a rehearing in arbitration is ordered. [¶] (d) *A judgment entered pursuant to this title.* [¶] (e) A special order after final judgment.” (Italics added.)

imposed after confirmation of an arbitration award be treated as one in an ordinary civil action; as a result, the finality requirement before an appeal may proceed is applicable . . . .” (*Ibid.*) In *Rubin*, the merits of four causes of action remained unresolved, so that the “judgment” in that case purporting to confirm an arbitration award was not sufficiently final to confer appellate jurisdiction. (*Id.* at pp. 1541, 1544, 1548.)

Here, the interim award entered on February 15, 2016 merely granted a preliminary injunction, leaving for another day the resolution of the merits of the controversy. Therefore, the May 13, 2016 order confirming the interim award is not appealable as a judgment under section 1294, subdivision (d).

b. *Because the May 13, 2016 order confirming the award is not appealable, the underlying order granting the motion to compel arbitration is not reviewable at this juncture.*

Chandu’s primary contention on appeal is that the trial court’s order compelling arbitration should be reversed because the only agreement signed by all the parties does not include an arbitration clause. Recognizing that the order compelling arbitration is not directly appealable (see fn. 5, *ante*), Chandu asserts the order compelling arbitration is now reviewable pursuant to section 1294.2. The argument fails.

Section 1294.2 states that “[u]pon an appeal from any order or judgment under this title, the court may review the decision *and any intermediate ruling, proceeding, order or decision* which involves the merits or necessarily affects the order or judgment appealed from, or which substantially affects the rights of a party.” (*Italics added.*)

Section 1294.2 is of no assistance to Chandu. Because there is no appealable judgment under section 1294,

subdivision (d), the underlying order granting the motion to compel arbitration likewise is not reviewable at this juncture. (§ 1294.2.)

*c. An appeal lies from the May 13, 2016 order, insofar as the trial court granted a preliminary injunction pursuant to the award.*

Although sections 1294 and 1294.2 are unavailing to Chandu, that does not entirely resolve the issue of appealability. Pursuant to section 904.1, subdivision (a)(6), an appeal may be taken “[f]rom an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.” (See, e.g. *Socialist Workers etc. Committee v. Brown* (1975) 53 Cal.App.3d 879, 885, fn. 5 [order granting preliminary injunction is appealable].)

Therefore, the order granting a preliminary injunction is appealable and reviewable at this juncture. Our review is confined to the preliminary injunction which the trial court issued in conformity with the interim award.

*2. Chandu invokes section 1286.2, subdivision (a)(5), as statutory basis for attacking the issuance of the preliminary injunction; record reflects Chandu did not raise the issue of arbitrator’s exclusion of evidence in opposing the petition to confirm the interim award.*

The preliminary injunction originated with the arbitrator’s award. The superior court then confirmed the interim award and issued injunctive relief in conformity with the award. Accordingly, as Chandu acknowledges, our review is governed by section 1286.2, which sets forth the limited grounds for vacating an arbitration award.

Chandu contends the trial court’s order issuing an injunction pursuant to the award must be reversed pursuant to

section 1286.2, subdivision (a)(5). That subdivision provides for vacation of an award where “[t]he rights of the party were substantially prejudiced by . . . *the refusal of the arbitrators to hear evidence material to the controversy . . .*” (Italics added.)

We note that in opposing Defendants’ petition to confirm the award, Chandu did not invoke section 1286.2, subdivision (a)(5). Rather, Chandu argued the interim award was not subject to confirmation, but if it were confirmed, any preliminary injunction should be stayed pending appeal.

It is settled that, in order for a party to raise an issue on appeal, the issue must have been first raised in the trial court. (See, e.g., *Nemarnik v. Los Angeles Kings Hockey Club* (2002) 103 Cal.App.4th 631, 639, fn. 3 [party’s failure to raise an issue below constitutes a waiver]; *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847 [same].)

However, even assuming Chandu’s contention that the arbitrator prejudicially refused to hear material evidence is properly before us, the contention is meritless, as discussed below.

3. *No merit to Chandu’s contention his rights were substantially prejudiced by the arbitrator’s refusal to hear evidence material to the controversy.*

a. *Evidence relating to the operating agreement.*

Chandu contends the arbitrator refused to consider material evidence with respect to the lack of an arbitration agreement, and/or evidence of a subsequent operating agreement in 2007 that specifically excluded the AAA from hearing this dispute.

This argument is unavailing because this aspect of the interim arbitration award, relating to the existence of an

agreement to arbitrate, is not reviewable at this juncture. Once a final judgment is entered on the award, these underlying issues will be reviewable. (§ 1294, subd. (d), § 1294.2.)

b. *Evidence relating to the issuance of the preliminary injunction.*

Chandu's remaining arguments relate to the grant of injunctive relief, which is presently reviewable.

Chandu contends he requested, but was denied, a live hearing in connection with the motion for a preliminary injunction. He asserts that "at the live hearing, [he] intended to show that Chapatwala was unable to demonstrate any irreparable injury to support his motion for preliminary injunction."<sup>9</sup>

However, Chandu has not shown that he made an offer of proof to the arbitrator as to how he would negate Chapatwala's claim that irreparable harm would occur if the arbitrator were to deny Chapatwala's request for a preliminary injunction.

The opening brief asserts that Chandu would have presented evidence that he has a long track record as a successful hotel operator. However, in support, the opening brief cites a declaration that Chandu filed in June 2016—*after* the preliminary injunction already had been granted by the arbitrator and confirmed by the court—in support of an ex parte application for an order to require Defendants to post an

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<sup>9</sup> A party seeking a preliminary injunction bears the burden of demonstrating both likely success on the merits and the occurrence of irreparable harm before a final judgment could be entered. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286; *Savage v. Tramell Crow Co.* (1990) 223 Cal.App.3d 1562, 1571.)

undertaking in connection with the preliminary injunction. Chandu has not shown that he proffered this evidence to the arbitrator or that the arbitrator refused to hear it.

We also note that before deciding whether to receive live testimony and oral argument regarding the preliminary injunction request, the arbitrator received and reviewed written submissions from the parties, including declarations and exhibits. Those written materials are not included in the record on appeal. Thus, Chandu has not shown he actually requested a live hearing for the purpose of presenting oral testimony and to cross-examine witnesses on the issue of irreparable harm, nor can we assess what evidence the arbitrator considered in determining the issue of irreparable harm.

In sum, Chandu has not demonstrated that his rights were substantially prejudiced by the arbitrator's refusal to hear material evidence with respect to the issue of irreparable harm. (§ 1286.2, subd. (a)(5).) Therefore, Chandu has not shown grounds for vacating the arbitrator's grant of injunctive relief, which was the basis for the superior court's grant of a preliminary injunction.

**DISPOSITION**

The order issuing a preliminary injunction is affirmed.  
Respondents shall recover their costs on appeal.

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EDMON, P. J.

We concur:

LAVIN, J.

BACHNER, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.