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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

SHIRLEY PELTIER, Plaintiff and Respondent, v. JAMES MICHAEL ROBERTS, Defendant and Appellant.	B285298 (Los Angeles County Super. Ct. No. BS166161)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Law Offices of Michael Jay Berger and Michael Jay Berger for Defendant and Appellant.

Shirley Peltier, in pro. pro.; and Stacy Joel Safion, for Plaintiff and Respondent.

The trial court granted Shirley Peltier's petition to confirm a FINRA[1] arbitration award. Appellant James M. Roberts, formerly an investment advisor with Cullum & Burks Securities, Inc., appeals from the ensuing judgment. Relying on Code of Civil Procedure section 1286.2, subdivision (a)(4) and (5),[2] Roberts argues reversal is required because Peltier's claim was barred by the FINRA "statute of limitations," he was not a FINRA member when the arbitration was conducted and did not consent to proceeding in that forum, and the arbitrators prejudicially erred in refusing to grant his request to postpone the arbitration hearing. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Peltier contacted Roberts in August 2008 for investment advice after hearing him on a radio show. At the time, Roberts was a broker with Cullum & Burks. Roberts determined Peltier was an "accredited investor."[3] By October 2008, and on Roberts'

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[1] FINRA is the acronym for Financial Industry Regulatory Authority. "FINRA is the self-regulatory organization for securities brokers and brokerage firms and is . . . responsible for regulatory oversight of all securities brokers and firms that do business with the public[, as well as] arbitration and mediation of disputes." (*Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830, 834, fn. 1 (*Ronay*).)

[2] All undesignated statutory references that follow are to the Code of Civil Procedure.

[3] An individual with a net worth in excess of $1 million—without consideration of the fair market value of her primary residence or secured debt that does not exceed the residence's fair market value—or with an annual income in excess

advice, Peltier made three separate investments available only to accredited investors pursuant to private placement memoranda.

Alleging she was an unsophisticated investor duped by Roberts into making risky investments, Peltier initiated a customer complaint with FINRA six years and two months later, in December 2014. She named Roberts, Cullum & Burks, and an entity called Trust Solutions[4] in her complaint and claimed she lost her principal in two of the investments and the third was a Ponzi scheme.

Neither Cullum & Burks nor Roberts signed agreements to submit Peltier's claim to arbitration. Only Cullum & Burks filed an answer; there, it cited Rule 12206 in FINRA's Code of Arbitration Procedure for Customer Disputes (FINRA Rule 12206), which requires claims to be filed within six years "from the occurrence or event giving rise to the claim," but did not file a written motion to dismiss Peltier's claim on that ground.

The arbitration hearing on Peltier's claim was conducted on November 9, 2015. Only Peltier and her attorney appeared. The arbitrators determined Roberts was properly served. As former FINRA members, Cullum & Burks and Roberts were "required to submit to arbitration pursuant to the Code of Arbitration Procedure ('Code') and [were] bound by the determination of the

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of $200,000 is generally considered to be an "accredited investor." (17 C.F.R. § 230.501(a)(5), (a)(6) (2017).)

[4] Trust Solutions did not appear in the FINRA arbitration proceedings. The arbitration panel determined that entity had never been "a member of FINRA and did not voluntarily submit to arbitration. Therefore, the [arbitration] [p]anel made no determination with respect to [Peltier's] claims against Trust Solutions."

[arbitration] [p]anel on all issues submitted." After the hearing, a divided FINRA arbitration panel awarded plaintiff Shirley Peltier $275,987.45 in damages, plus prejudgment interest, jointly and severally against Roberts and Cullum & Burks.[5] Although the arbitration award was dated November 27, 2015, there is no proof of service on any party.

No one challenged the award in a subsequent FINRA proceeding or in the superior court.[6] One year later, Peltier filed a superior court petition to confirm the award. She attached a copy of the arbitration award to her petition. Roberts opposed it, contending the award should be vacated. He argued the decision was obtained through fraud, the arbitrators exceeded their powers, and he was substantially prejudiced because the arbitrators refused to postpone the hearing after he advised them his health did not permit him to participate. (§ 1286.2, subd. (a)(1), (4) & (5).)

Roberts's declaration advised he suffered a debilitating stroke, for which he was hospitalized, in May 2015. On August 1, 2015, while still under medical supervision for the stroke, Roberts received Peltier's arbitration demand. He was "informed and believe[d] that the original scheduled date for the

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[5] The dissenting panel member concluded Peltier's claim was not filed within six years of her making the investments and was barred by FINRA Rule 12206.

[6] A request to vacate an arbitration award—whether initiated by an aggrieved party or in response to the prevailing party's petition to confirm the award—must be filed within 100 days after the parties are served with the arbitration award. (§§ 1288, 1288.2.)

arbitration" was in August 2015.[7] He contacted FINRA and Peltier's attorney to let them know his health would not permit him to participate in an August 2015 arbitration.

Roberts further averred he heard nothing "until days prior to the rescheduled hearing on Monday, November 9, 2015." He then started to prepare for the arbitration, but "suffer[ed] further medical issues associated with [his] stroke." On an unspecified date he "once again contacted both FINRA and [Peltier's] counsel via telephone. Unfortunately, this time, neither . . . gave [him] any indication that they were willing to further postpone the arbitration."

On November 9, 2015, the date of the arbitration hearing, Roberts "sought medical attention." His physician "forbid" him from attending the arbitration and created a letter to that effect. The doctor's letter "was sent" to FINRA and Peltier's attorney on the date of the arbitration hearing.[8] He never heard anything further until he was served with Peltier's petition to confirm the arbitration award.

In her reply, Peltier contended Roberts's request to vacate the arbitration award was untimely pursuant to section 1288.2 (fn. 6, *ante*). She also addressed the merits and submitted a declaration from the lawyer who represented her in the arbitration proceedings. Counsel denied ever receiving any telephone calls from Roberts concerning the latter's health or inability to participate in the arbitration. He never saw the

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[7] Other evidence demonstrated November 9, 2015 was always the scheduled arbitration date, with a pre-arbitration conference set in August 2015.

[8] Roberts attached the physician's letter to his declaration.

physician's letter until it was attached to Roberts's declaration in opposition to the petition to confirm the arbitration award.

Peltier also filed a statement by FINRA's case administrator. Although labeled a "declaration" and containing what would have been useful evidence, the statement was not dated, was not affirmatively made on personal knowledge, and did not include the requisite "under penalty of perjury" certification. (§ 2015.5.)

The trial court conducted three hearings on Peltier's petition. It continued the matter twice for additional information. At the final hearing, on June 27, 2017, the trial court announced the arbitration award was confirmed. The trial court provided the parties with a written ruling the following week.[9]

The judgment in Peltier's favor was entered July 28, 2017. Roberts timely appealed.

DISCUSSION

I. Standard of Review/Applicable Law

When a trial court confirms an arbitration award, the Court of Appeal reviews the ensuing judgment de novo. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376, fn. 9; *Nemecek & Cole v. Horn* (2012) 208 Cal.App.4th 641, 647.) Even though our review is de novo, it "is extremely limited.

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[9] The trial court's ruling is primarily devoted to a discussion of the lack of admissible evidence in the parties' supplemental submissions. The trial court rejected Peltier's assertion that Roberts's request to vacate the award was untimely. It also reasonably inferred from Roberts's evidence that he could not have sent the physician's letter until after the arbitration hearing had already commenced.

As the California Supreme Court explained in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 6 [10 Cal.Rptr.2d 183, 832 P.2d 899] (*Moncharsh*), 'an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties.' This is because parties who enter into arbitration agreements are presumed to know the arbitrator's decision will be final and binding; 'arbitral finality is a core component of the parties' agreement to submit to arbitration.' (*Id.* at p. 10.) Courts do not review the validity of an arbitrator's reasoning, and, while . . . sections 1286.2 and 1286.6 set forth grounds for vacating or correcting an arbitration award, ' "[a]n error of law is not one of [those] grounds." ' " (*SingerLewak LLP v. Gantman* (2015) 241 Cal.App.4th 610, 615-616.)

The statutory grounds for vacating an arbitration award are set forth in section 1286.2. These grounds are "exception[s] to the general rule precluding judicial review." (*SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1196 (*SWAB Financial*).) Roberts's appeal implicates two of the statutory grounds: the arbitrators exceeded their powers and his rights were substantially prejudiced because the arbitrators refused to continue the hearing in light of his medical condition.[10]

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[10] Roberts no longer contends the arbitration award was procured by fraud.

Peltier renews the contention she made in the trial court that Roberts's request to vacate the arbitration award was untimely and should not be considered on the merits. The trial court rejected this argument, as must we.

The only proof of service of a copy of the arbitration award on Roberts was Peltier's petition to confirm it. The case administrator's statement, which did not qualify as a declaration,

(§ 1286.2, subd. (a)(4), (5).) We address Roberts's contentions in turn.

II. The Arbitrators Did Not Exceed Their Powers

Roberts asserts the arbitrators exceeded their powers in two respects: (1) they decided Peltier's claim even though it was filed more than six years after she made her investments, i.e., the "occurrence" that gave rise to her claim; and (2) the arbitrators never acquired jurisdiction over Roberts, who was no longer a member of FINRA when the claim was filed and did not sign an agreement to be bound by the arbitration award. (§ 1286.2, subd. (a)(4).) Roberts asserted only the first argument in the trial court. Neither has merit.

A. Any Error in Finding Peltier's Claim Timely Was One of Fact or Law and Beyond the Reach of This Court

As mentioned, FINRA Rule 12206(a) requires customer claims to be filed within six years "from the occurrence or event giving rise to" it. The arbitration panel determines whether a claim is timely. FINRA Rule 12206(b) adds that a dismissal motion must be in writing and may be granted only upon a unanimous decision by the arbitrators. If the motion is granted and the claim dismissed, the arbitrators must provide a written explanation for their decision. (FINRA Rule 12206(b)(5).)

Roberts did not file a written motion to dismiss based on FINRA Rule 12206. Cullum & Burks did not, either; but the

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was insufficient. The arbitration award itself did not include a proof of service. Roberts asked to vacate the arbitration award in response to Peltier's petition. The response was filed within 30 days of Peltier's service of her petition, well within the 100-day time limit after the arbitration award was served. (§§ 1288, 1288.2.)

arbitrators deemed its answer as a written motion to dismiss and resolved it on the merits by a two-to-one vote. FINRA rules expressly give the arbitration panel the power to decide the motion to dismiss, and it did so, as reflected in the arbitration award. Because Cullum & Burks' motion was denied, the arbitrators were not required to explain their rationale.

Assuming, without deciding, that the Cullum & Burks' motion preserved the issue for Roberts, this court nevertheless cannot review it. Roberts cited numerous nonbinding federal decisions, but did not attempt to demonstrate the claimed error in this case fell within one of the "limited exceptions to [the] general rule" that precludes judicial review. (*Moncharsh, supra,* 3 Cal.4th at p. 6.)

Jordan v. Department of Motor Vehicles (2002) 100 Cal.App.4th 431, the California decision Roberts relied upon, does not change the result. *Jordan* identified a number of decisions where appellate courts determined the arbitrators' conduct fell within one of the limited exceptions to the general rule that errors of law or fact are not reviewable (e.g., the arbitrators lacked subject matter jurisdiction, rewrote the parties' contract, upheld an illegal contract, or violated public policy). (*Id.* at p. 443.) Again, Roberts made no effort to establish that this case fell within any such exception. Instead, Roberts concluded "it is substantially unfair to confirm this arbitration award when an absolute defense exits." But unfairness is not the standard. (*Moncharsh, supra,* 3 Cal.4th at p. 6 [an error of law or fact, even if "causes substantial injustice to the parties" is not subject to judicial review].)

B. FINRA Properly Exercised Jurisdiction Over Roberts

Roberts next contends the arbitrators never acquired jurisdiction over him because he was no longer a member of FINRA when Peltier filed her claim and never signed an agreement to be bound by the arbitration award. We would normally find the issue forfeited, as Roberts did not raise it in the trial court. (*Gray1 CPB, LLC v. SCC Acquisitions, Inc*. (2015) 233 Cal.App.4th 882, 897.) However, Roberts's assertion that Peltier's claim was, for those reasons, " 'ineligible for arbitration' " constitutes such a misinterpretation of clear authority to the contrary, it requires comment. (See Bus. & Prof. Code, § 6068, subd. (d); Rules Prof. Conduct, rule 5–200(B).)

FINRA Rule 12202 provides that a claim involving a former FINRA member "is ineligible for arbitration under [FINRA rules] unless the customer agrees in writing to arbitrate after the claim arises." FINRA Rule 12202 does not give the former member a reciprocal right to avoid arbitration, nor does it require the former member to formally agree in writing to arbitration before he can be bound by the arbitration decision. Roberts asserts otherwise, but cites no FINRA rule or any state or federal authority for his contention that he needed to sign a "Submission Agreement" before the arbitrator panel could acquire jurisdiction over him.

Ronay, supra, 216 Cal.App.4th 830, the decision upon which Roberts relies, has no application to the facts here. In *Ronay*, a disgruntled investment client initiated a superior court action against several defendants. Two defendants who had never been FINRA members attempted to invoke FINRA Rule 12202 to compel the plaintiff to participate in a FINRA arbitration over the plaintiff's objection. The defendants' effort

failed based on FINRA Rule 12202, which applies only to claims by or against former FINRA members. (*Id.* at p. 842.) Roberts, as a former FINRA member, is bound by FINRA Rule 12202. And here, unlike the situation in *Ronay*, the customer initiated the FINRA proceeding. No more was required for FINRA to assume jurisdiction over Roberts to resolve Peltier's claim.

III. There Was No Evidence the Arbitration Panel Received a Request by Roberts to Continue the Hearing

Citing section 1286.2, subdivision (a)(5),[11] Roberts's final challenge to the arbitration award is that the arbitrators "refus[ed] to postpone the arbitration after receiving [the] doctor's note." Section 1286.2, subdivision (a)(5) is "a safety valve in private arbitration that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case." (*Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 439.) But it is up to Roberts to demonstrate he made a timely request for a continuance, the arbitrators abused their discretion in denying it, and he was substantially prejudiced as a result. (*SWAB Financial, supra,* 150 Cal.App.4th at p. 1198.) Roberts did not meet this burden.

Roberts presented no evidence that the physician's letter was ever sent to, or received by, FINRA or Peltier's attorney. The letter itself is insufficient to permit an inference that it was sent. It is addressed "To Whom It May Concern" and does not include

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[11] An arbitration award will be vacated if "[t]he rights of the [complaining] party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor . . . ." (§ 1286.2, subd. (a)(5).)

the name or postal or e-mail address of any recipient. The letter does not indicate a delivery method (e.g., post, e-mail, or fax) and is not accompanied by a proof of service under penalty of perjury.

Declarations submitted by Roberts do not provide the necessary details. The physician stated in his declaration only that he "dictated and signed" the letter. Roberts's first declaration stated the letter "was sent to both the FINRA Arbitrators and [Peltier's] counsel on November 9, 2015," but did not advise by whom or the manner in which it was transmitted. Roberts's second declaration was silent as to the physician's letter. This declaration did, however, attach Roberts's personal telephone call log, which indicates he telephoned FINRA at 10:00 a.m. on November 9, 2015, even though the arbitration hearing began at 9:30 a.m.

There is no credible evidence that Roberts communicated a timely request to the arbitrators to postpone the FINRA hearing. The award may not be vacated on this basis.

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

DUNNING, J.*

We concur:

BIGELOW, P. J. RUBIN, J.

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