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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

AMPERSAND PUBLISHING LLC,

Plaintiff and Appellant,

v.

JERRY ROBERTS,

Defendant and Respondent.

2d Civil No. B223467
(Super. Ct. No. 1304805)
(Santa Barbara County)

Here we decide who decides when an arbitration is over. Here, the arbitrator reopened the hearing within 30 days of making an interim award. The rules governing the arbitration allowed the arbitrator to reopen the hearing and to decide the question concerning the arbitrator's own jurisdiction. We affirm the court's order confirming an arbitration award.

FACTS

Ampersand Publishing LLC (Ampersand) owns a daily newspaper, the Santa Barbara News-Press (News-Press). Jerry Roberts was employed as the newspaper's managing editor. His employment contract contained a clause requiring arbitration of all disputes arising out of his employment. The clause required the arbitration to be conducted according to the rules of the American Arbitration Association (AAA).

A dispute arose between Ampersand and Roberts over the control of news content. Roberts resigned, followed by other newsroom personnel. Stories on the incident appeared in a local weekly newspaper, the Independent, and the Los Angeles Times. Ampersand believed that Roberts was a source for the unfavorable stories.

On July 31, 2006, Ampersand filed an arbitration demand against Roberts seeking \$25 million in damages for defamation, breach of contract, and breach of fiduciary duty. Roberts filed a counterclaim for breach of contract, defamation and intentional and negligent misrepresentation. The matter proceeded to arbitration before Deborah Rothman. An evidentiary hearing was concluded in December 2007.

On April 10, 2008, Rothman issued an order requesting additional briefing on six issues. The order included a tentative ruling stating that Rothman is inclined to award Ampersand damages for breach of fiduciary duty or defamation. The tentative ruling also stated that Rothman is inclined to award damages to Roberts for defamation.

On June 25, 2008, Rothman issued an "Interim Award." The award stated that Ampersand would take nothing on its claims and Roberts would take nothing on his counterclaims. Rothman also found Roberts was the prevailing party, and entitled to an award of attorney fees.

In June 27, 2008, Ampersand filed an objection to the interim award. Ampersand objected that the interim award reversed without explanation Rothman's tentative ruling that Ampersand was entitled to damages. On July 14, 2008, Ampersand gave notice that it intended to file a written submission requesting modification of the interim award.

On July 14, 2008, Rothman ordered briefing on fees and costs to be completed by July 22. The parties stipulated to extend the time to complete briefing to July 24, 2008. In the order Rothman denied Ampersand's request to submit briefing on modification of the interim order.

On August 20, 2008, AAA wrote to the parties stating that the arbitrator declared the hearing closed on August 20, 2008, and that the arbitrator will have 30 days from that date to render the award.

On September 18, 2008, Rothman issued an order finding Roberts to be the prevailing party. The order requested additional briefing on the amount of fees and costs to be filed by October 15, 2008.

On September 30, 2008, Ampersand filed an objection to AAA's further jurisdiction and the arbitrator's further participation in the matter. Ampersand argues that under AAA rule 39, the arbitrator must make an award within 30 days of the filing of the final brief. Ampersand claimed the final brief was filed on July 24, 2008. Ampersand concluded the arbitrator had until August 23, 2008, to issue her final award. Ampersand stated that after August 23, 2008, the arbitrator lost jurisdiction.

On October 16, 2008, AAA's case manager denied Ampersand's objections, and determined that AAA and Rothman retained jurisdiction over the matter.

On October 28, 2008, the parties stipulated that the final briefs would be due November 20, 2008.

On November 6, 2008, AAA wrote to Ampersand stating that it had not received Ampersand's deposit of \$48,600 to cover Rothman's compensation and expenses. On November 7, 2008, Ampersand responded requesting a detailed accounting. On November 12, 2008, Rothman suspended arbitration for failure to pay her fees.

On December 29, 2008, Ampersand filed in the superior court a petition to dismiss the arbitration and remove the arbitrator for failing to act. The petition was based on the theory that under AAA rule 39 Rothman lost jurisdiction when she failed to issue a final award by August 26, 2008. In the petition Ampersand claimed it did not pay Rothman's fee because it is inflated and not supported by a proper accounting.

Roberts opposed Ampersand's petition, and made his own motion to compel arbitration and for an order requiring Ampersand to pay Rothman's fees.

On February 11, 2009, the court denied Ampersand's petition and granted Roberts's motion. The court found that under AAA rule 34, the arbitrator has the discretion to reopen the hearing on her own motion for any reason. The arbitrator's order of September 18, 2008, required the final brief be submitted by October 15, 2008. The

final award was due 30 days from that date on November 15, 2008. By then, however, the arbitration had been suspended because Ampersand failed to pay Rothman's fees. The court found Ampersand is estopped from claiming the arbitrator lost jurisdiction.

The trial court ordered Ampersand to pay AAA's demand for fees. The order was without prejudice to any right Ampersand may have to seek reimbursement.

Instead of paying the fees, Ampersand appealed the order. While the appeal was pending, Roberts reached an agreement with AAA. Roberts paid AAA \$25,000, and the arbitration resumed. We dismissed the appeal as moot.

On October 27, 2009, Rothman issued the final award. Neither Ampersand nor Roberts would take anything by their claims or counterclaims. Roberts was awarded \$629,643.63 for attorney fees and \$93,320 for costs. Ampersand was ordered to reimburse Roberts for \$25,320 paid to AAA.

Ampersand moved to vacate the award and Roberts moved to confirm it. The trial court confirmed the award and awarded \$5,608 in attorney fees expended in the motion to confirm.

DISCUSSION

I

Ampersand contends the arbitrator lost jurisdiction by failing to enter an award by August 26, 2008.

Code of Civil Procedure section 1283.8 provides in part that an arbitration award shall be made within the time fixed by the agreement. Here the employment agreement provides that the arbitration shall be governed by AAA's rules.

Ampersand relies on AAA rule 39 (a), which provides in part: "The award shall be made promptly by the arbitrator and . . . no later than 30 days from the date of closing of the hearing Three additional days are provided if briefs are to be filed"

Ampersand argues the hearing closed on July 24, 2008, the date the parties stipulated for the submission of briefs on costs and fees. Ampersand claims Rothman had 33 days thereafter, until August 26, 2008, to issue the award. Ampersand points out

that the provisions of an agreement requiring an arbitrator to issue an award within a specified period are jurisdictional. (Citing *Rusnack v. General Controls Co.* (1960) 183 Cal.App.2d 583, 584.) An award issued after time has expired is a nullity, and must be vacated by the court. (*Ibid.*)

The flaw in Ampersand's argument is AAA rule 34. AAA rule 34 provides: "Reopening of Hearing [¶] The hearing may be reopened by the arbitrator upon the arbitrator's initiative, or upon application of a party for good cause shown, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contract, the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award."

Here no specific date for making the award is fixed in the contract. Thus under AAA rule 34 Rothman had the unilateral authority to reopen the hearing. Assuming the hearing had closed on July 24, 2008, AAA's letter of August 20, 2008, stating that the hearing was considered closed as of that date, was sufficient to notify the parties that the hearing had been reopened.

Ampersand argues that the August 20 letter does not purport to reopen the hearing. It is true the letter does not expressly state that the hearing has been reopened. But that is the only reasonable interpretation of the letter. Ampersand points to no rule requiring the arbitrator to make a formal declaration that the hearing has been reopened.

Ampersand points out that the August 20 letter does not request further briefing. It argues that without a request for further briefing, the hearing cannot be considered reopened. It posits that without further briefing, reopening the hearing would be a sham to avoid the prohibition in AAA rule 37 on extending time for making the award.

But nothing in AAA rule 34 limits the arbitrator's reasons for reopening the hearing. Here it is clear Rothman did not believe she had all the information necessary to

make a decision. Her order of September 18, 2008, requests further briefing to be submitted by October 15, 2008. There is nothing to suggest Rothman's act in reopening the hearing was a sham to avoid making a timely award.

Rothman's order of September 18, 2008, again reopened the hearing. Nothing in AAA rule 34 limits the number of times the arbitrator may reopen the hearing.

Finally, as the trial court found, Ampersand is estopped from complaining that Rothman did not issue a final award by November 15, 2008. By then, AAA had suspended the proceedings due to Ampersand's failure to pay Rothman's fees. The facts support the trial court's findings.

In any event, AAA found that Rothman had not lost jurisdiction. AAA rule 6 (a) provides, "The arbitrator shall have the power to rule on his or her own jurisdiction" Similarly, the parties' arbitration agreement provides, "The neutral arbitrator shall decide any and all procedural . . . disputes . . . including but not limited to whether or not any issue constitutes a procedural . . . dispute"

Both the AAA rules and the parties' agreement place the question of jurisdiction squarely within the purview of the arbitrator's powers. A decision on matters within the arbitrator's powers is not subject to judicial review even if it is based on an error of law. (See *Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, 28.)

Ampersand relies on *Rusnack v. General Controls Co.*, *supra*, 183 Cal.App.2d, page 584, for the proposition that a determination whether an arbitrator has exceeded its jurisdiction is a judicial matter. There the court determined that an arbitration award issued after the arbitrator's jurisdiction had expired is a nullity. But whether the arbitrator had the power to decide jurisdiction was not an issue in the case. A case is not authority for issues it does not consider. (*Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 660.)

When the agreement gives the arbitrator the power to decide whether a particular dispute is arbitrable, the court must defer to the arbitrator's decision. (*Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 893.) If the court must defer

to the arbitrator's decision on initial jurisdiction, there is no reason why a different rule should apply to the arbitrator's decision on continuing jurisdiction.

Ampersand relies on *Baker*, for the proposition that the arbitration agreement must clearly and unmistakably provide for the arbitrator's authority to decide jurisdiction. It argues that the AAA rules are ambiguous. Ampersand points to AAA rule 12, which provides in part, "Neutral arbitrators serving under these rules shall have no personal or financial interest in the results of the proceeding in which they are appointed" Ampersand claims Rothman had a financial interest in determining she continued to have jurisdiction: the decision extends the amount of time in which she could continue to work on the case, and she could avoid liability for breach of contract for failing to issue a timely ruling.

But such financial conflicts are inherent in any arbitration. Every decision an arbitrator makes may affect her compensation. AAA rule 12 prohibits the arbitrator from having a personal or financial interest in the "results" of the proceeding. In context "results" means the final award. Here the AAA rules to which Ampersand agreed clearly and unmistakably give the arbitrator the authority to decide jurisdiction.

Ampersand argues that giving the arbitrator the power to decide jurisdiction violates its due process rights. The argument is based on the theory that the arbitrator has a financial interest in the decision. But the arbitrator's power to decide jurisdiction is purely the result of Ampersand's agreement to provide her with that power. (See *Baker v. Osborne Development Corp.*, *supra*, 159 Cal.App.4th at p. 893.) Ampersand fails to explain how an arbitrator acting under private contract, doing what Ampersand authorized her to do, could implicate the due process clause.

Rothman did not lose jurisdiction to issue the final award.

II

Ampersand contends Rothman had no jurisdiction to decide a dispute over her own fee.

The final award requires Ampersand to reimburse Roberts for the \$25,000 Roberts paid to AAA so that the arbitration could continue. Ampersand argues when a

dispute arises between an arbitrator and one of the parties concerning the arbitrator's fee, the remedy is to petition the court to resolve the dispute. (Citing *Burgess v. Kaiser Foundation Hospitals* (1993) 16 Cal.App.4th 1077, 1079.)

But Rothman did not purport to settle a dispute between her and one of the parties. She settled a dispute between Ampersand and Roberts concerning her fees. Ampersand remains free to undertake an action in court to resolve its fee dispute with the arbitrator. (See *Burgess v. Kaiser Foundation Hospitals*, *supra*, 16 Cal.App.4th at p. 1079.)

The judgment is affirmed. Costs are awarded to Roberts.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

James W. Brown, Judge
Superior Court County of Santa Barbara

O'Melveny & Myers, Framroze M. Virjee, Michael W. Garrison, Jr., Ryan
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