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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

INGE CHRISTIANSEN et al.,

Plaintiffs and Respondents,

v.

EDWARD GALLO, JR.,

Defendant and Appellant.

2d Civil No. B233861  
(Super. Ct. No. 56-200800327053-CU-PA-  
VTA)  
(Ventura County)

Edward Gallo, Jr., appeals the trial court's order granting the petition to confirm an arbitration award in favor of respondents Per and Inge Christiansen. Appellant contends (1) allowing the arbitrator to decide whether respondents' claims were barred by the applicable statute of limitations amounts to a violation of his due process rights; (2) respondents' claims were barred by the applicable statute of limitations; (3) the court lacks jurisdiction over him because he never entered a general appearance in the matter; and (4) the award of punitive damages was improper. We affirm.

**FACTS AND PROCEDURAL HISTORY**

In 1997, appellant purchased a hillside single family residence in Ventura (the property) for \$439,000. At the time of the purchase, the sellers disclosed the fact that a landslide had occurred on the property in 1995. Either in conjunction with or

subsequent to the sale, appellant also learned that the landslide had caused damage to the property's foundation and soil. As a result of that damage, the property's kitchen and TV room are moving laterally away from the foundation. Instead of attempting to repair the damage, appellant patched the cracks in the floors of the kitchen and TV room. He thereafter re-grouted the tile on the kitchen floor and re-carpeted the TV room.

In 2000, respondents purchased the property from appellant for \$645,000. In executing the standard form residential purchase agreement, both parties initialed the paragraph stating that any and all disputes arising between the parties as a result of the transaction are to be resolved through mediation and binding neutral arbitration in accordance with California law (the arbitration clause).

In completing the transfer disclosure statement, appellant failed to disclose either the 1995 landslide or resulting damage to the property. In 2002, cracks began appearing in the floor, walls, and exterior hardscape. In or around April 2004, a geotechnical engineer informed respondents that there were cracks in the property's slab foundation. The investigation also revealed that appellant had done corrective work on the property.

On July 20, 2004, counsel for respondents sent a letter to appellant notifying him of their discovery and requesting mediation as provided in the arbitration clause. Appellant did not respond. On July 29, 2004, respondents sent another letter demanding arbitration. In his initial response to the demand, appellant falsely asserted that he had not initialed the arbitration clause. Appellant refused to participate in arbitration.

On May 12, 2006, respondents served their demand for arbitration before Judicial Arbitration and Mediation Services (JAMS). Appellant failed to respond. On September 12, 2008, respondents filed a petition to compel arbitration pursuant to Code of Civil Procedure<sup>1</sup> section 1281.2. On November 7, 2008, appellant filed a "special appearance and objections" to the petition in which he claimed that (1) he had not been

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<sup>1</sup> All further undesignated statutory references are to the Code of Civil Procedure.

properly served with the petition; (2) venue was improper; and (3) respondents' claims were barred by the applicable statutes of limitations. Appellant asked the court to deny the petition and also sought to recover his attorney fees and costs as sanctions.

On November 17, 2008, the court granted the petition to compel arbitration. The matter thereafter proceeded through arbitration before Retired Judge David D. Perez. At the outset of the arbitration, appellant moved to dismiss the matter on the ground that respondents' claims were barred by the statutes of limitations. The motion was denied. The arbitrator then proceeded to hear oral testimony and accept documentary evidence. At the conclusion of the hearing, the arbitrator granted appellant's motion for reconsideration of the statute of limitations defense issue.

On February 28, 2011, the arbitrator issued a final award in favor of respondents. The arbitrator found that appellant had violated a contractual duty to disclose known defects in the property and the existence of the landslide that caused them. The arbitrator further found by clear and convincing evidence that appellant's failure to disclose and his attempts to conceal the defects amounted to fraud. The arbitrator also reiterated his prior finding that respondents' claims were not barred by the applicable statutes of limitations, reasoning that "[t]he evidence shows that [respondents] sought their remedy through arbitration within the four years required for a breach of contract claim and within the three years for a fraud claim." Appellant was ordered to pay respondents \$600,285 in compensatory damages, \$81,041.65 in attorney fees, \$35,424.62 in costs, and \$250,000 in punitive damages.

Respondents timely filed a petition to confirm the arbitration award. Appellant filed an untimely response<sup>2</sup> that, again, purported to be a special appearance. Appellant's sole contention was that the petition should be dismissed because he had never entered a general appearance in the case and had never been served with a summons and complaint. On April 11, 2011, the court issued an order granting

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<sup>2</sup> Respondents filed and served their petition by mail on March 14, 2011. Any response to the petition had to be filed within 15 days of service, i.e., by March 29, 2011. (§§ 1013, 1290.6.) Appellant's response was filed on April 6, 2011.

respondents' petition. In rejecting appellant's claim that he had never entered a general appearance in the case, the court stated: "[Respondents] originally moved to compel the arbitration. [Appellant] objected. [Appellant] asserted the court lacked jurisdiction over him. Implicit in the court's order granting the petition is a finding that the court had jurisdiction over [appellant]." The court further reasoned that appellant had entered a general appearance "[b]y opposing the motion to compel on grounds in addition to the lack of jurisdiction over the person." On April 25, 2011, the court entered a judgment ordering appellant to pay respondents \$966,751.18, with annual interest of 10 percent beginning February 28, 2011, plus \$58,817.91 for costs incurred in filing and litigating the petition.

On May 5, 2011, appellant filed a petition to vacate the arbitration award. In addition to reiterating his contention that respondents' claims were barred by the statutes of limitations, appellant also asserted for the first time that the arbitration clause did not authorize the arbitrator to award punitive damages.<sup>3</sup> The court dismissed the petition as untimely, noting that "[t]he time to raise these issues was when the other side moved to confirm the arbitration award."

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<sup>3</sup> Appellant claimed that he "became aware of various and sundry fraud, corruption and . . . misconduct of the arbitrator" after the award was issued. Appellant had previously notified JAMS of these alleged improprieties in seeking Judge Perez's recusal shortly after he issued his award in favor of respondents. Appellant essentially complained that one day of the arbitration hearing was held at the property, during which respondents provided Subway sandwiches and drinks for lunch. Appellant also claimed that respondents had "staged" the property by, among other things, hanging a "God Bless America" sign on the front door. Appellant also claimed that the arbitrator had engaged in a conversation with Per Christiansen and his expert witness. Appellant, who was not at the hearing that day, supported his claims with a declaration from his assistant, who was present. A neutral hearing officer appointed by JAMS to adjudicate the claims found no merit in any of them. His findings and recommendations states among other things that "[t]he Hearing Officer concludes on the basis of common sense that the consumption of a Subway sandwich provided by one party during a hearing on that party's property (assuming that the arbitrator did not bring his own lunch) does not create doubts as to the neutral's impartiality, a reasonable impression of bias, or an inference of favoritism." Though he refers to these claims in his brief, appellant declined to raise them on appeal.

Appellant timely appealed. Over appellant's objection, we granted respondents' motion for calendar preference in accordance with section 1291.2. We subsequently denied appellant's petition for a writ of supersedeas seeking to stay enforcement of the judgment.

### DISCUSSION

Appellant attacks the arbitration award in favor of respondents on four different grounds. First, he asserts for the first time on appeal that his due process rights were violated by allowing the arbitrator to adjudicate his statute of limitations defense. Second, he argues that respondents' claims were barred by the statutes of limitations. Third, he claims the court lacked jurisdiction to enter judgment against him because he never generally appeared in the case. Finally, he contends the arbitrator lacked the authority to award punitive damages because the arbitration clause does not allow such an award. Each of these claims is without merit.

Appellant effectively forfeited all four claims by failing to raise them in a timely response to respondents' petition to confirm the arbitration award. (§ 1290.)<sup>4</sup> The first claim was not raised below at all, so it is forfeited on that basis as well. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) In any event, appellant ignores Supreme Court authority compelling the conclusion that the arbitrator had the power to decide whether respondents' claims were barred by the statutes of limitations. (*Wagner Const. Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 25-26.) We are bound to follow that authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

The second claim, which challenges the arbitrator's finding of fact that the statute of limitations did not bar respondents' claims, is not reviewable on appeal.

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<sup>4</sup> Respondents' petition to confirm the arbitration was filed pursuant to section 1290, which provides in pertinent part that "[t]he allegations of a petition are deemed to be admitted by a respondent duly served therewith unless a response is duly served and filed." Appellant filed a response, but it was untimely. Moreover, the only argument included in his response was his oft-repeated claim that the court lacked jurisdiction over him because he never generally appeared in the case.

(*Department of Personnel Admin. v. California Correctional Peace Officers Assn.* (2007) 152 Cal.App.4th 1193, 1200.) “The scope of judicial review of arbitration awards is extremely narrow. Courts may not review the merits of the controversy, the sufficiency of the evidence supporting the award, or the validity of the arbitrator's reasoning. [Citations.] Indeed, with limited exceptions, ‘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.’ [Citations.]” (*Ibid.*) Appellant fails to show that any of the exceptions for review of errors of fact or law applies here.<sup>5</sup>

As to the third claim, it is irrelevant whether appellant ever entered a general appearance because he submitted to the court’s jurisdiction when he initialed the arbitration clause of the residential purchase agreement. (§ 1293.)<sup>6</sup> Moreover, the court correctly found that (1) a finding that the court had jurisdiction over appellant was implicit in the order granting respondents’ petition to compel arbitration; and (2) appellant effectively entered a general appearance in opposing the motion to compel by seeking affirmative relief. (*Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 53.)

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<sup>5</sup> Section 1286.2, subdivision (a), lists the following grounds for vacating an arbitration award: “(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. [¶] (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 . . . but failed upon receipt of timely demand to disqualify himself or herself . . . .”

<sup>6</sup> Section 1293 provides: “The making of an agreement in this State providing for arbitration to be had within this State shall be deemed a consent of the parties thereto to the jurisdiction of the courts of this State to enforce such agreement by the making of any orders provided for in this title and by entering of judgment on an award under the agreement.”

Finally, the claim that the arbitrator lacked the power to award punitive damages fails because (1) it was raised in an untimely petition to vacate the arbitration award; and (2) the arbitration clause's statement that the parties agreed to have "any dispute" decided by a neutral arbitrator is sufficient to include an award of punitive damages. (*Tate v. Saratoga Savings & Loan Assn.* (1989) 216 Cal.App.3d 843, 854-856, disapproved on other grounds by *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376-377.)

The judgment (order confirming arbitration award) is affirmed.  
Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Mark Borrell, Judge

Superior Court County of Ventura

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Law Offices of Jeffrey A. Holcomb and Jeffrey A. Holcomb for Appellant.

Norman Dowler, LLP, and Kathleen J. Smith for Respondents.