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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

TODD KEITH,

Plaintiff and Respondent,

v.

TRACY PORTER,

Defendant and Appellant.

B256524

(Los Angeles County
Super. Ct. No. BS145690)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

Daniel J. Koes for Defendant and Appellant.

Joseph E. Porter III; Michael J. Emling for Plaintiff and Respondent.

Defendant and appellant Tracy Porter (Porter) appeals a judgment granting a petition to confirm a contractual arbitration award in favor of plaintiff and respondent Todd Keith (Keith).¹

On appeal, Porter contends the trial court erred in confirming the award because the arbitrator exceeded his authority. (§ 1286.2, subd. (a)(4).) However, this theory was not raised below. At the trial court level, Porter's sole theory was that the award should be corrected based on an evident miscalculation of figures in the award. (§ 1286.6, subd. (a).) “ ‘A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.’ ” (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1351, fn. 12.) Because Porter's contention that the arbitrator exceeded his authority is not properly before this court and Porter has not shown the trial court erred in the ruling which it did make, the judgment confirming the award is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In 2005, Keith and Porter, as co-members, formed Premiere Automotive Partners, LLC, doing business as Elite Auto Network (Premiere). Premiere, a certified minority business enterprise, was in the business of brokering automobile purchases and leases for third parties. Premiere performed vehicle licensing and registration renewal services on vehicles that another entity provided to Pacific Gas & Electric (PG&E).

The Premiere LLC Operating Agreement included a mandatory arbitration provision, as well as a provision entitling the prevailing party to attorney fees.

¹ The judgment confirming the arbitration award is appealable. (Code Civ. Proc., § 1294, subd. (d); *Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1215, fn. 6.)

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

1. *The arbitration proceeding.*

The underlying arbitration proceeding involved claims by Keith against Porter for: (1) failure to account; (2) breach of contract; (3) mismanagement; (4) breach of fiduciary duty; and (5) fraud. The arbitration hearing was conducted on April 25 and 26, 2012.

On September 12, 2013, the arbitrator awarded Keith damages of \$405,000 as well as attorney fees and costs, for a total award of \$540,763. The \$405,000 in damages was based on the arbitrator's determination that in the calendar year 2009, Premiere earned \$810,000 in profit on the PG&E contract (9 percent profit margin on \$9 million in gross revenue), and that Keith, as a 50 percent owner of Premiere, was entitled to one half of that sum.²

The arbitrator explained that although the LLC Operating Agreement "did not call for a reasoned award, nor did any party timely request it," the amount of the award was based on the principle that where the fact of damages is certain, a "reasonable approximation of damages is proper where damages cannot be set with certainty due to the actions or inactions of Respondent [Porter]." Here, "some reasonable basis of computing damages exists, even though they may in part be an approximation, and this satisfied the legal requirements for [an] award particularly where wrongful acts of Respondent have created difficulty in proving the precise amount."

2. *Superior court proceedings.*

On October 29, 2013, Keith filed a petition to confirm the award.

Porter, in turn, filed a petition to correct the award, on the ground that "the amount of the award was not calculated correctly." (§ 1286, subd. (a) [correction of award based on an evident miscalculation of figures].) Porter argued that because Premiere's 2009 tax return showed no profit for that year, the award to Keith should be corrected to zero.

On March 27, 2014, the trial court entered judgment granting Keith's petition to confirm the award and denying Porter's petition to correct the award. In denying Porter's

² Porter's theory was that Premiere's 2009 federal tax return indicated Premiere did not earn a profit in 2009, so that the award to Keith should have been zero.

petition, the trial court rejected Porter's contention that "the amount of the award was not calculated correctly." Focusing on the statutory language that an award shall be corrected if the court determines "[t]here was an evident miscalculation of figures" (§ 1286.6, subd. (a)), the trial court found "[a]ny purported miscalculation is not 'evident.' As such, the court confirms Keith's arbitration award and denies Porter's petition to correct the award."

Porter filed a timely notice of appeal from the judgment.

CONTENTIONS

Porter contends: the arbitrator exceeded his authority in violation of the parties' written contractual agreement; the arbitrator exceeded his authority by authorizing impermissible damages that directly conflicted with express, unambiguous language in the parties' written contractual agreement; this court should correct the award by reducing the amount of damages to zero and then affirming the judgment as modified or, alternatively, this court should reverse the judgment with directions to vacate the award; and the award of attorney fees to Keith should also be set aside.

DISCUSSION

1. *Porter's contention that the arbitrator exceeded his powers was not raised below and therefore is not properly before this court.*

Porter's essential contention on appeal is that the award must be corrected or vacated because the arbitrator exceeded his authority in calculating Premiere's 2009 profit. Porter relies on language in the LLC Operating Agreement defining net profits and net losses as "the income, gain, loss, deductions, and credits of the Company in the aggregate or separately stated, as appropriate, *determined in accordance with the method of accounting at the close of each fiscal year employed on the Company's information tax return filed for federal income tax purposes.*" (Italics added.) Premiere's 2009 federal tax return showed Premiere had a net loss for that year. Based thereon, Porter contends the arbitrator lacked the authority to award anything other than zero damages to Keith.

a. *Porter's limited attack on the award in the court below; Porter solely requested a correction of the award based on an evident miscalculation of figures.*

The statutory scheme pertaining to confirmation, correction or vacation of an award provides: "A petition to correct or vacate an award, or a response requesting such relief, *shall set forth the grounds* on which the request for such relief is based." (§ 1285.8, italics added.)

The record reflects that at the trial court level, Porter sought correction of the award solely pursuant to section 1286.6, subdivision (a) (an evident miscalculation of figures). Porter did not invoke section 1286.6, subdivision (b) (arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted). Nor did Porter move to vacate the award under section 1286.2, subdivision (a)(4) (arbitrators exceeded their powers and award cannot be corrected without affecting the merits of the decision upon the controversy submitted).

Thus, Porter did not argue below that the arbitrator exceeded his authority. Instead, this ground for attacking the award is being raised for the first time at the appellate level. The scope of Porter's challenge below, which did not include a claim the arbitrator exceeded his authority, limits the issues which may be raised at this juncture.

b. *Appellate review of trial court's determination as to whether arbitrator exceeded his powers.*

By way of background, an arbitrator "has exceeded his or her powers if the arbitrator 'strayed beyond the scope of the parties' agreement by resolving issues the parties did not agree to arbitrate' (*Moncharsh v. Heily & Blase* (1992)) 3 Cal.4th [1,] 28), ordered an unauthorized remedy (*Advanced Micro Devices, Inc. v. Intel Corp.* [(1994)] 9 Cal.4th [362,] 375), or resolved non-arbitral issues (*Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 275-276)." (*City of Richmond v. Service Employees Internat. Union, Local 1021* (2010) 189 Cal.App.4th 663, 669-670.)

In determining "whether the arbitrator exceeded his powers . . . [the appellate court] review[s] the superior court's decision de novo, but . . . 'pay[s] substantial

deference to an arbitrator's determination of his own authority.' [Citation.] Any doubts about the arbitrator's power to decide these issues must be resolved in his favor.

[Citation.] As the Supreme Court has explained, 'arbitrators do not "exceed[] their powers" within the meaning of [former] section 1286.2, subdivision (d) [now § 1286.2, subd. (a)(4)] and section 1286.6, subdivision (b) merely by rendering an erroneous decision on a legal or factual issue, so long as the issue was within the scope of the controversy submitted to the arbitrators.' (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775.)" (*Roehl v. Ritchie* (2007) 147 Cal.App.4th 338, 347-348.)

On appeal from a trial court's decision refusing to vacate or correct an award, "[this court] review[s] the trial court's order (not the arbitration award) *under a de novo standard*. [Citation.] 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. [Citations.]" (*Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 55-56, italics added.)

Here, there is no trial court ruling as to whether the arbitrator exceeded his authority for us to review under a de novo standard. Because Porter did not argue below that the arbitrator exceeded his authority, the issue was not developed below by either Keith or Porter and the trial court did not scrutinize whether the arbitrator exceeded his authority. The belated injection of this issue at the appellate level renders this court unable to perform its reviewing function.

c. *No merit to Porter's argument that the issue is properly before this court.*

Porter's reply brief asserts Porter did raise the issue (i.e., the arbitrator exceeded his authority) below, in opposition to Keith's petition to confirm the award. Porter's argument is unsupported by the record. Porter's response to Keith's petition to confirm the award included a quote from section 1286.6, which enumerates the various grounds for correcting an award. However, Porter's responsive memorandum *did not* invoke the ground that the arbitrator exceeded his authority. Rather, Porter's response pinpointed

the issue as follows: “5. Respondent [Porter] opposes the confirmation of the award on the grounds that the amount of the award was not calculated correctly.”

Further, Porter’s reliance on *Jones v. Kvistad* (1971) 19 Cal.App.3d 836 (*Jones*) is misplaced. There, “Jones did not seek to vacate the award in the trial court but only to modify and correct it,” while on appeal, Jones “assert[ed] . . . a new claim for relief not made below, i.e., that the trial court should have vacated the award.” (*Id.* at pp. 841-842.) In approaching the issue, the appellate court stated: “Ordinarily a party is prohibited from asserting on appeal claims to relief not asserted or requested in the court below. [Citations.] [¶] Assuming, *arguendo*, that it may be said that Jones did seek such relief in the court below because she did tender to the trial court the question that an arbitrable issue had not been determined by the arbitrators and evidence to establish such failure was presented at the hearing, we proceed to determine Jones’ contention on its merits since relief by way of vacating the award was the proper remedy if Jones is correct in her contention.” (*Id.* at p. 842, italics added.)

Thus, in *Jones*, the reviewing court made the assumption that Jones duly tendered the issue to the trial court in the first instance. In contrast, as already discussed, Porter did not raise the issue of the arbitrator exceeding his authority at the trial court level.

Further, in *Jones* the substantive issue (i.e., the arbitrator’s failure to rule on an issue) was unchanged; only the requested remedy was different. In the lower court, Jones sought to modify and correct the award, while on appeal Jones argued the trial court should have vacated the award. (*Jones, supra*, 19 Cal.App.3d at pp. 841-842.) Here, Porter’s substantive argument on appeal (i.e., the arbitrator exceeded his authority) simply was not raised below.

To reiterate, a party “ ‘is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.’ ” (*Cable Connection, Inc. v. DIRECTV, Inc., supra*, 44 Cal.4th at p. 1351, fn. 12; accord, *Jones, supra*, 19 Cal.App.3d

at p. 842.) Porter's failure to seek vacation of the award below on the ground that the arbitrator exceeded his authority precludes Porter from raising this issue on appeal.

2. *Trial court properly rejected Porter's argument there was an evident miscalculation of figures.*

We now address the sole ground which Porter raised below in seeking correction of the award, i.e., that there was an evident miscalculation of figures within the meaning of section 1286.6, subdivision (a). As indicated, the trial court found "[a]ny purported miscalculation is not 'evident.' "

The "miscalculation, to be evident, must appear on the face of the award [citation] or be so readily apparent from the documentation in the case that explanation by proofs is not necessary." (*Severtson v. Williams Construction Co.* (1985) 173 Cal.App.3d 86, 94 (*Severtson*).) The *Severtson* court quoted with approval from *Carolina Va. Fash. Exhibitors v. Gunter* (1979) 41 N.C.App. 407, 255 S.E.2d 414, which stated: " 'In providing that awards could be modified or corrected for "evident miscalculation of figures," we think our legislature had reference only to mathematical errors committed by arbitrators which would be patently clear to a reviewing court.' (255 S.E.2d at p. 419.)" (*Severtson, supra*, 173 Cal.App.3d at p. 94.)

Porter's theory of "evident miscalculation" on the face of the award is that given the language of the LLC Operating Agreement which defined net profit as the amount shown on Premiere's federal income tax return, coupled with the fact that Premiere's 2009 tax return indicated no profit for that year, the damages awarded to Keith should have been zero, rather than \$405,000.

The issue is not as clear cut as Porter would have us conclude. The award reflects that the discrete issue addressed by the arbitrator was not Premiere's net profit in 2009, but rather, the profit earned on the PG&E contract in that calendar year. The 2009 tax return does not speak to that issue. Although Porter seeks to frame the issue as one of "evident miscalculation of figures," Porter is actually attacking the arbitrator's reasoning and the merits of the arbitrator's decision. However, "[w]e do not 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 . . . the [statutory] grounds" (*Roehl v. Ritchie*, *supra*, 147 Cal.App.4th at p. 347) for correcting an award. Because there was no evident miscalculation of figures, the trial court properly denied Porter's petition to correct the award and granted Keith's petition to confirm the award.

Finally, because the trial court properly granted Keith's petition to confirm the award, there is no basis to disturb the award of attorney fees to Keith.

DISPOSITION

The judgment is affirmed. Keith shall recover costs on appeal.

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EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.*

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