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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MATTHEW JON AUDETTE et al.,

Plaintiffs and Respondents,

v.

BENJAMIN H. KWON et al.,

Defendants and Appellants.

B268702

(Los Angeles County
Super. Ct. No. BS 154341)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Marc R. Marmaro, Judge. Affirmed.

Freilich & Popowitz, Robert H. Freilich and Neil M. Popowitz
for Defendants and Appellants.

Keesal, Young & Logan, Stephen Young and Ryan S. Lean for
Plaintiffs and Respondents.

Appellants Benjamin H. Kwon and Castle Eurasia Corporation challenge the trial court's order confirming an arbitration award in favor of respondents, E*TRADE Clearing LLC, E*TRADE Securities LLC, and several individuals employed by E*TRADE businesses.¹ Kwon filed claims in arbitration against E*TRADE claiming that E*TRADE had acted improperly in temporarily denying Kwon access to funds that he had deposited into an E*TRADE bank account. Kwon now contends that the arbitration panel lacked jurisdiction over the case, and that the trial court made errors of law in granting the petition to confirm the arbitration award. We affirm.

FACTS AND PROCEEDINGS BELOW

Kwon claims that, in March 2006, he opened an E*TRADE bank account in the name of his business, Castle Eurasia Corporation. According to Kwon, over the course of that month, he made six deposits in the account totaling \$1,506,967.83. Kwon alleged that on several occasions in April of 2006, he wrote checks on his E*TRADE account, only to have E*TRADE return the checks as unpayable. In a letter dated May 9, 2006, E*TRADE explained that it had delayed activating Kwon's account pending receipt of identification information required under the USA Patriot Act. E*TRADE stated that, after Kwon submitted that information, "the account was activated and check writing should have been enabled at that time. Unfortunately, the activation was not properly completed and as a result, the check writing feature on the account was not functioning and several checks were returned in error." Kwon alleges that he again lost access to the funds in his account on two more occasions for a total of seven days in

¹ For the sake of convenience, this opinion refers to appellants collectively as Kwon, and to respondents collectively as E*TRADE.

September 2007. Kwon claims that he lost out on several real estate transactions and suffered reputational damage as a result of the returned checks and lack of access to his account.

Kwon filed a petition for arbitration of claims against E*TRADE. Kwon's statement of claim alleged multiple causes of action against E*TRADE, including breach of contract, gross negligence, and breach of fiduciary duty. After a hearing, an arbitration panel of the Financial Industry Regulatory Authority (FINRA) denied Kwon's claims in their entirety. The trial court confirmed the arbitration award.

DISCUSSION

Kwon challenges the trial court's judgment confirming the arbitration award. He contends on several grounds that the arbitration panel lacked jurisdiction over the case. In addition, he contends that the arbitration panel erred by failing to disclose conflicts of interest of one of its members, and by denying his request for a continuance. We affirm.²

I. Subject-Matter Jurisdiction

Kwon raises several arguments for the first time on appeal. In the hope of escaping the conclusion that he forfeited these contentions, Kwon styles these claims as challenges to the subject-matter jurisdiction of the arbitration panel and the trial court. Unlike most other claims, which are subject to forfeiture,

² E*TRADE argues that Kwon forfeited any objection to the trial court's judgment because he failed to respond to E*TRADE's petition to confirm the arbitration award "within 10 days after service of the petition." (Code Civ. Proc., § 1290.6.) We agree that Kwon failed to meet the statutory deadline, but because we affirm the trial court's judgment on other grounds, we need not decide whether Kwon's failure to contest the arbitration award in a timely manner prevents him from challenging the award on appeal.

a party may make a challenge to subject-matter jurisdiction for the first time on appeal. (*Totten v. Hill* (2007) 154 Cal.App.4th 40, 46.)

Kwon argues on four grounds that the arbitration panel and the trial court lacked jurisdiction. First, he contends that the arbitration clause of the customer service agreement he signed with E*TRADE does not encompass the claims he raised. Next, he contends that the customer service agreement was illegal because it did not notify him of the identity verification requirements of federal law. Third, he contends that this case involved civil forfeiture to the federal government, and consequently, that the case could be brought only in federal court. Finally, he contends that the federal government was an indispensable party to the arbitration but was not joined. We find all of these contentions meritless.

A. Scope of Arbitration Agreement

Kwon argues that the “scope of the Arbitration Clause of the Customer Service Agreement does not expressly encompass arbitration of intentional tort claims and thus [it] becomes a matter of law for this Court to determine de novo . . . whether the Arbitration Panel or the [trial] [c]ourt had subject matter jurisdiction to hear the dispute.” This is essentially a challenge to the arbitrability of Kwon’s claims.

California law favors the resolution of disputes in arbitration “‘as a speedy and relatively inexpensive means of dispute resolution.’” (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (*Moncharsh*)). As a consequence, the grounds for challenging an arbitration award are limited: “[I]t is the general rule that, with narrow exceptions, an arbitrator’s decision cannot be reviewed for errors of fact or law.” (*Id.* at p. 11.) Section 1286.2 sets forth the exclusive grounds for vacating an arbitration award. One of these

statutory grounds provides that a court may vacate an award if “[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.” (§ 1286.2, subd. (a)(4).)

If a party believes a dispute is not properly subject to arbitration, that party must object to the arbitration in a timely manner. “Those who are aware of a basis for finding the arbitration process invalid must raise it at the outset or as soon as they learn of it so that prompt judicial resolution may take place before wasting the time of the adjudicator(s) and the parties.” (*Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321, 328–329.) If this rule did not exist, a party could litigate a dispute through arbitration and, if the outcome proved unfavorable, the party could then obtain a second bite at the apple by challenging the arbitrability of the dispute. (See *Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1372 [a “ ‘party who questions the validity of the arbitration agreement may not proceed with arbitration and preserve the issue for later consideration by the court after being unsuccessful in the arbitration’ ”], disapproved on another point by *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 382, fn. 6.)

Kwon did not object to the scope of the arbitration provision at any point prior to this appeal. Indeed, he voluntarily filed the case in arbitration rather than in the trial court. Even if Kwon is correct that his agreement with E*TRADE did not require arbitration of the dispute, “parties may submit for decision issues they were not contractually compelled to submit to arbitration. In such an event, courts look both to the contract and to the scope of the submissions to determine the arbitrator’s authority.” (*J.C. Gury Co. v. Nippon Carbide Industries (USA) Inc.* (2007) 152 Cal.App.4th 1300, 1305.) Thus, by filing his claim in arbitration, Kwon “impliedly agree[d] that the arbitrator’s decision [would] be both binding and final,” (*Moncharsh, supra*, 3 Cal.4th

at p. 9), at least with respect to the issues Kwon submitted to the arbitrator.

Kwon cites only one case in which the court held that the arbitrator and the trial court lacked subject-matter jurisdiction of an appeal: *Saffer v. JP Morgan Chase Bank, N.A.* (2014) 225 Cal.App.4th 1239. In that case, a former employee of Washington Mutual sued his former employer for wrongful termination and other claims. (*Id.* at p. 1244.) By the time he filed suit, Washington Mutual had failed, and JP Morgan Chase had acquired some of its assets. (*Ibid.*) JP Morgan Chase moved to compel arbitration, and the trial court granted the motion. (*Ibid.*) JP Morgan Chase then moved to dismiss the case for lack of subject-matter jurisdiction. (*Id.* at p. 1245.) The arbitrator granted the motion, ruling that the court and arbitrator lacked jurisdiction over the case because the plaintiff had failed to exhaust his administrative remedies as to his claims. (*Id.* at pp. 1244-1245.)

The Court of Appeal agreed with the arbitrator's assessment. (*Saffer v. JP Morgan Chase Bank, N.A.*, *supra*, 225 Cal.App.4th at p. 1246.) The court noted that federal law required parties with claims against failed banks to file certain claims with the Federal Deposit Insurance Company prior to pursuing those claims in court, and that a federal statute withdrew jurisdiction from courts to hear cases based on those claims if the plaintiff did not first exhaust his administrative remedies. (*Id.* at p. 1248-1249.) Because the exhaustion requirements set forth by statute were mandatory, and did not allow for waiver by consent, the court held that the plaintiff's failure to exhaust his administrative remedies deprived the court and the arbitrator of subject-matter jurisdiction. (*Id.* at pp. 1251-1252.)

This case, as Kwon presented it in the statement of claim he filed in arbitration, involved no such statutory restriction on jurisdiction. Kwon listed the following causes of action: breach of

contract, gross negligence, failure to supervise, breach of fiduciary duty, unauthorized transfer of funds and stocks, misappropriation of funds and stocks, misrepresentation, manipulation of material facts, forging documents, unauthorized trading, transferring funds or stocks into secret pseudo/shadow account/stealing, stealing disgorgement, defamation, invasion of privacy, unauthorized stock loan/margin, damage of emotional mental and psychological injury, and loss of opportunity. Although Kwon mentioned the USA Patriot Act in his statement of claim as the basis on which E*TRADE justified restricting Kwon's access to the money in his account, Kwon did not identify any cause of action arising from violations of that act. In his statement of claim, Kwon also cited federal securities laws. But at no point, either in his statement of claim, nor now on appeal, does Kwon argue that any such law applicable to E*TRADE's conduct withdrew jurisdiction of this case from arbitration.³ Consequently, his challenge to the subject-matter jurisdiction of the arbitrator and to the trial court fails.

B. Illegality of the Contract

Kwon contends that his customer agreement with E*TRADE, which contained a provision requiring arbitration of claims, was an illegal contract because E*TRADE failed to inform Kwon of federal laws and regulations pertaining to verification of a customer's identity.

This argument fails for several reasons. First, Kwon cites no case law in support of his contentions that this argument pertains

³ Kwon does contend that federal courts have sole jurisdiction over federal civil forfeiture claims. But as we explain below (see Discussion part I.C, *post*), Kwon did not allege in the arbitration that the federal government seized his assets. Consequently, civil forfeiture laws are not relevant to this case.

to the subject matter jurisdiction of the arbitrator and the trial court, nor that illegality of an arbitration provision may be raised for the first time on appeal.⁴ Next, although Kwon is correct that “if an otherwise enforceable arbitration agreement is contained in an illegal contract, a party may avoid arbitration altogether” (*Moncharsh, supra*, 3 Cal.4th at p. 29), in this case, Kwon implicitly assented to arbitration of the dispute by filing this case in arbitration at the outset. (See *id.* at p. 9; *J.C. Gury Co. v. Nippon Carbide Industries (USA) Inc., supra*, 152 Cal.App.4th at p. 1305.)

We hold that by failing to challenge the legality of the arbitration provision before the arbitrator, Kwon has forfeited this issue on appeal. As the Court reasoned in a slightly different context in *Moncharsh*, “[a]ny other conclusion is inconsistent with the basic purpose of private arbitration, which is to finally decide a dispute between the parties. Moreover, we cannot permit a party to sit on his rights, content in the knowledge that should he suffer an adverse decision, he could then raise the illegality issue in a motion to vacate the arbitrator’s award. A contrary rule would condone a level of ‘procedural gamesmanship’ that we have condemned as ‘undermining the advantages of arbitration.’ ” (*Moncharsh, supra*, 3 Cal.4th at p. 30.)

⁴ Kwon cites one case holding in another context that illegality may be raised for the first time on appeal “so long as the illegality is apparent on the face of the contract.” (*Kallen v. Delug* (1984) 157 Cal.App.3d 940, 948, fn. 2.) But even if we assume for the sake of argument that this rule applies to cases in arbitration, in this case Kwon has not shown illegality on the face of the customer agreement. Instead, Kwon alleges that E*TRADE committed misconduct in the way it implemented its agreement with Kwon.

C. Federal Forfeiture Claims

Kwon contends that by bringing his claim in arbitration, he sought to recover funds “either forfeited, converted and/or sequestered by E*T[RADE] acting under the direction and control of the [United States government], pursuant to the USA Patriot Act, or forfeited by the [United States].” Kwon argues that under federal law, United States District Courts have exclusive jurisdiction over forfeiture claims, and that consequently, the arbitrator and trial court lacked jurisdiction over his case.

This argument misrepresents the nature of Kwon’s case. In his 18-page statement of claim in arbitration, Kwon never mentioned the word forfeiture, nor did he allege that the United States government took any action to compel E*TRADE to deny Kwon’s access to his funds. Instead, Kwon alleged that E*TRADE improperly used the requirements of the USA Patriot Act as “an excuse” for denying Kwon’s access to his funds. Nor has Kwon cited any portion of the record to show that federal forfeiture law became an issue as the case progressed in arbitration. Kwon may not now reconstruct the nature of his claims against E*TRADE in the hope of escaping an unfavorable arbitration award.

D. United States Government as Indispensible Party

Kwon contends that the United States government was an indispensable party to this dispute, and that the arbitration panel and trial court lacked jurisdiction to proceed in its absence. This argument also fails. Even if it were true that the United States government was an indispensable party, “the absence of an indispensable party does not deprive the arbitrator of power to render a decision as to parties before it or the court the power to enforce the decision. [Citations.] ‘[F]ailure to join an “indispensable” party is not [a] “jurisdictional defect” in the

fundamental sense; even in the absence of an “indispensable” party, the court still has the power to render a decision as to the parties before it which will stand. [Citations.] It is for reasons of equity and convenience, and not because it is without the power to proceed, that the court should not proceed with a case where it determines that an “indispensable party” is absent and cannot be joined.’” (*Carpenters 46 Northern Cal. Counties Conf. Bd. v. Zweigle* (1982) 130 Cal.App.3d 337, 344.)

II. Arbitrator’s Alleged Failure to Disclose Conflicts

Kwon contends that the trial court erred by confirming the arbitration award because one of the arbitrators failed to disclose conflicts of interest with E*TRADE. Under Code of Civil Procedure section 1286.2, subdivision (a)(6)(A), an arbitrator’s “fail[ure] to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware” is a ground for vacating an award. Kwon alleges that Robert Sussin, one of the members of the arbitration panel, “never disclosed that he had been appointed by FINRA to multitudes of arbitrations involving E*T[RADE].”

Kwon cites no evidence in the record showing either that Sussin had been appointed to many arbitrations in which E*TRADE was a party, or that he made inadequate disclosures. For this reason alone, his argument fails. “It is axiomatic it is the appellant’s responsibility to provide an adequate record on appeal.” (*Lincoln Fountain Villas Homeowners Assn. v. State Farm Fire & Casualty Ins. Co.* (2006) 136 Cal.App.4th 999, 1003-1004, fn. 1.) “Failure to do so precludes an adequate review and results in affirmance of the trial court’s determination.” (*Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1.) Similarly, “[w]e may disregard a [party]’s statements of fact when those statements are unsupported by citations to the record. [Citation.] And we will not

scour the record on our own in search of supporting evidence.”
(*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1149.)

III. Denial of Motion to Postpone the Hearing

Kwon contends that the arbitration panel erred by denying his motion to postpone the hearing. We are not persuaded.

On November 18, 2014, approximately two weeks before the arbitration hearing was scheduled to begin, Kwon made a motion to postpone the hearing. He claimed that he was suffering from blurred vision and memory loss as a consequence of injuries he had suffered in a car accident five months earlier, on July 1. The arbitration panel denied the motion. The hearing proceeded as scheduled, and Kwon complained frequently during the proceedings about his faulty memory and poor vision.

Subdivision (a)(5) of section 1286.2 provides that an arbitration award may be vacated if “[t]he rights of [a] party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor.” We review the arbitrator’s decision regarding postponement for abuse of discretion. (*SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1198.) “The appropriate [appellate] test for abuse of discretion is whether the trial court exceeded the bounds of reason.’” (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1449.)

Under that standard, Kwon’s claim fails. There was ample evidence supporting the arbitrators’ decision to deny Kwon’s motion to postpone. In its judgment affirming the arbitration panel, the trial court noted that in the months after the accident, Kwon, who represented himself in the arbitration, “had actively participated in the prosecution of his case. He filed six motions or opposition briefs, prevailed on a prehearing motion to dismiss, filed a witness list and exhibit list, and served two sets of written

discovery responses.” In addition, the arbitrators had the chance to observe Kwon in several telephonic hearings prior to the arbitration hearing, and to see and hear him during opening statements. They could reasonably conclude that Kwon was capable of participating in the hearing, and that it was adequate to allow Kwon’s family members to attend every session of the hearing to provide silent assistance.

DISPOSITION

The judgment of the trial court is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.