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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

SHENOI KOES LLP, Plaintiff and Appellant, v. BANK OF AMERICA, NATIONAL ASSOCIATION et al., Defendants and Respondents.	B281756 (Los Angeles County Super. Ct. No. BC543708)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed.

The Arkin Law Firm and Sharon J. Arkin for Plaintiff and Appellant.

Law Offices of Carolyn C. Phillips, Carolyn C. Phillips; Ferguson Case Orr Paterson, Wendy C. Lascher and John A. Hribar for Defendant and Respondent Eileen Foster.

This appeal involves a dispute over attorney fees between the law firm of Shenoi Koes LLP (Shenoi Koes) and a former client, Eileen Foster (Foster). Foster retained Shenoi Koes to represent her during mediation with her former employer, Bank of America, after Foster filed a whistleblower complaint with the United States Department of Labor Occupational Safety and Health Administration (OSHA). The mediation did not result in a settlement, but Foster subsequently entered into a settlement with Bank of America. Shenoi Koes sued Foster, Bank of America, and other defendants for nonpayment of Shenoi Koes' attorney fee lien.[1] The matter went to arbitration, resulting in a decision in Foster's favor. Shenoi Koes appeals from the trial court's order denying its motion to vacate the arbitration award and granting Foster's petition to confirm the award. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Foster was fired by Bank of America in 2008 after reporting alleged fraud in the bank's lending division. She filed a whistleblower retaliation claim with OSHA, which began an investigation. Foster was represented in the OSHA proceedings by Matthew L. Tonkovich. During the investigation, Foster consulted with Shenoi Koes regarding the possibility of asserting a fraud cause of action in federal court, but

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[1] In a prior appeal, we affirmed the trial court's denial of Bank of America's special motion to strike under Code of Civil Procedure section 425.16. (*Shenoi Koes LLP v. Bank of America, National Association* (June 18, 2015, B259485) [nonpub. opn.].)

she decided against it after Shenoi Koes gave her a proposed contract estimating $40,000 in litigation costs.

In early October 2010, OSHA informed counsel for Bank of America that it had concluded its investigation and was likely to rule in Foster's favor. The parties decided to stay the OSHA proceedings until December 13, 2010 to participate in mediation.

On October 20, 2010, Foster entered into a contingency fee contract with Shenoi Koes to represent her against Bank of America "only in settlement negotiations and a mediation and any follow up sessions of that mediation." The contract provided that "[t]he scope of this retention is limited to just those tasks . . . and it is expressly agreed that [Shenoi Koes] will not need to substitute in to the pending OSHA administrative action . . . . If the matter does not settle, however, [Shenoi Koes'] time can be submitted by [Foster's] current lawyer in that OSHA proceeding, for purposes of increasing any award of attorneys' fees in the OSHA proceeding."

The fees section of the contract provided that Shenoi Koes "will be compensated at 25% of the value of the gross recovery," which was defined to "include[] the entire value of any settlement, if there is one." It further provided as follows: "If there is no settlement, then the gross recovery includes the value of any OSHA award, including any portion of the award to [Foster], as well as any award of attorneys' fees, but excludes the value of reinstatement if that is part of any OSHA award."

According to the arbitrators, Shenoi Koes "worked extensively with Foster over the next several weeks to prepare a brief for a December 1, 2010 mediation." Shenoi Koes also submitted a draft class

action complaint to Bank of America's counsel. After reviewing Foster's submissions, Bank of America concluded "the parties were too far apart to have a productive mediation," and the mediator declared an impasse after one-and-a-half hours. Shenoi Koes contacted the mediator to try to continue settlement discussions, but on January 3, 2011, Bank of America "informed OSHA that the mediation had concluded unsuccessfully."

Shenoi Koes proposed making another attempt to settle the case, but Foster did not want to resume the mediation. "On March 24, 2011, Foster picked up her file from [Shenoi Koes]."

On March 30, 2011, Foster informed Shenoi Koes that the OSHA investigator wanted a summary of her damages. Shenoi Koes submitted records showing expenses of $182,014.75. Shenoi Koes subsequently sent further invoices for Tonkovich to submit in the OSHA action.

After completing its investigation, OSHA awarded Foster back pay, compensatory damages and $229,364 in attorney fees. Bank of America objected to the decision and requested an evidentiary hearing before an Administrative Law Judge (ALJ). Foster retained new counsel to represent her in the ALJ proceedings.

On August 30, 2011, Shenoi Koes sent Foster a letter stating that, because Foster wanted to retain new counsel and did not want to resume mediation, Shenoi Koes served a notice of its attorney fee lien on Bank of America. Shenoi Koes served a notice of lien on counsel for Bank of America, with copies sent to Foster and Tonkovich. The lien stated that Shenoi Koes "hereby claims contractual and equitable liens

in presently unliquidated amounts on any sums or other consideration recovered in the OSHA or any related or other actions by Eileen Foster, whether by settlement or judgment. Said lien is for legal services rendered and costs and litigation expenses incurred by Shenoi Koes."

Foster and Bank of America entered into a settlement in late 2012 just before trial before the ALJ was to begin. In March 2014, Shenoi Koes emailed Tonkovich, reminding him that Shenoi Koes had served a lien on Bank of America, Foster, and Tonkovich, and asking for an update on the status of the case. Tonkovich referred Shenoi Koes to Foster's new counsel, who informed Shenoi Koes that Shenoi Koes did not have a meritorious lien.

Shenoi Koes sued Foster for breach of contract, conversion, quantum meruit, constructive trust, and unjust enrichment.[2] The trial court granted Foster's motion to compel arbitration and stayed the action pending arbitration.

The arbitration panel bifurcated the evidentiary hearing on liability and damages. Prior to Phase 1 of the arbitration hearing, Shenoi Koes filed a motion in limine seeking, as described in the pre-arbitration order re final status conference, to preclude Foster from giving testimony "that contradicts judicial admissions in her pleadings." The record before us does not contain the motion, and we have only the description of it by the arbitration panel. In its final status conference order, the panel denied the motion, stating, "Given that the meaning of

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[2] Shenoi Koes subsequently dismissed the other defendants named in the complaint.

the Fee Agreement is before the Panel and will be decided at Phase 1 of the hearing, it is premature to make any conclusion as to whether Foster's assertions are inconsistent."

In April 2016, the arbitration panel held Phase 1 of the hearing, which was "limited to determining whether [Shenoi Koes] was entitled to recover attorney fees based on all claims and defenses asserted in the pleadings." The arbitrators examined whether the term "any settlement" in the contingency fee contract meant a settlement reached during Shenoi Koes' representation of Foster or a settlement reached at any time in the future. They also examined whether the terms "OSHA award" and "OSHA proceedings" referred only to the OSHA investigation or included the proceedings before the ALJ. As stated in the arbitration award (we do not have the full record of the evidence presented at the arbitration hearing), "[b]oth sides introduced extrinsic evidence at the hearing, not to vary or contradict the terms of an integrated written instrument, but to support their respective interpretations of the ambiguous terms. The Panel's consideration of such extrinsic evidence, therefore, does not violate the parole evidence rule."

After considering that evidence, the arbitrators concluded "that the terms 'OSHA award' and 'OSHA proceedings' cannot reasonably be construed to refer to the [ALJ proceeding] and therefore [Shenoi Koes] would not have been entitled under the Agreement to recover a contingency fee arising out of an [ALJ] order. The Panel further concludes that the term 'any settlement' is limited to a settlement obtained by [Shenoi Koes] during or immediately after the mediation,

up until [Shenoi Koes] acknowledged on March 4 that its representation under the Agreement had ended. Therefore [Shenoi Koes] is not entitled to recover a contingency fee against the [ALJ] settlement."

Shenoi Koes filed a motion to correct and/or vacate the arbitration award in the trial court, and Foster filed a petition to confirm the award. Following a hearing, the trial court concluded that Shenoi Koes had failed to establish that the arbitrators failed to resolve all necessary issues. The court therefore denied Shenoi Koes' motion and granted Foster's. This appeal followed.

DISCUSSION

Although we find the argument at times difficult to follow, especially in the context of the arbitration proceeding as it actually occurred, we interpret Shenoi Koes' contention on appeal as follows: by denying its motion in limine to preclude Foster (based on purported judicial admissions) from testifying that the contingency fee agreement did not entitle Shenoi Koes to recover its attorney fees as part of the settlement in the ALJ proceeding, and thereafter ruling in Phase 1 that the contingency fee agreement could not reasonably be construed to entitle Shenoi Koes to recover those fees, the arbitrators failed, within the meaning of Code of Civil Procedure section 1283.4,[3] to decide an issue necessary to determine the controversy, thus requiring that the

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[3] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

arbitration award be vacated under section 1286.2, subdivision (a)(5). We disagree.

"'Title 9 of the Code of Civil Procedure, as enacted and periodically amended by the Legislature, represents a comprehensive statutory scheme regulating private arbitration in this state. ([Code Civ. Proc.,] § 1280 et seq.) Through this detailed statutory scheme, the Legislature has expressed a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." [Citations.]' [Citation.] Accordingly, 'it is the general rule that parties to a private arbitration impliedly agree that the arbitrator's decision will be both binding and final.' [Citation.] Likewise, 'it is the general rule that, "The merits of the controversy between the parties are not subject to judicial review." [Citations.] More specifically, courts will not review the validity of the arbitrator's reasoning. [Citations.] Further, a court may not review the sufficiency of the evidence supporting an arbitrator's award. [Citations.] [¶] Thus, it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law.' [Citation.]" (*Royal Alliance Associates, Inc. v. Liebhaber* (2016) 2 Cal.App.5th 1092, 1104–1105 (*Royal Alliance*).)

As we have noted, Phase 1 of the arbitration hearing was expressly "limited to determining whether [Shenoi Koes] was entitled to recover attorney fees based on all claims and defenses asserted in the pleadings." In deciding that question, the arbitrators construed: (1) the meaning of the term "any settlement" in the contingency fee contract, and in particular, whether it referred to a settlement reached during Shenoi Koes' representation of Foster in the OSHA proceedings alone,

or a settlement reached at any time in the future; and (2) whether the terms "OSHA award" and "OSHA proceedings" referred only to the OSHA investigation or included the proceedings before the ALJ. In that contract interpretation analysis, the arbitrators considered the extrinsic evidence introduced by the parties, and concluded that the term "any settlement" referred only to the settlement negotiations in which Shenoi Koes represented Foster, and that the terms "OSHA award" and "OSHA proceedings" referred only to the OSHA investigation, not the ALJ proceedings. Thus, Shenoi Koes was not entitled to attorney fees under the terms of the contingency fee contract because the settlement arose out of the ALJ proceedings, not the OSHA proceedings.

Of course, Shenoi Koes cannot attack the validity of this reasoning or the sufficiency of the evidence to support the arbitrators' conclusion. However, there are narrow exceptions to the general rule insulating arbitration awards from judicial review. "[S]ection 1286.2 . . . enumerates 'grounds which will justify vacating an arbitration award.' [Citation.]" (*Royal Alliance, supra,* 2 Cal.App.5th at p. 1105.) "The party seeking to vacate an arbitration award bears the burden of establishing that one of the six grounds listed in section 1286.2 applies and that the party was prejudiced by the arbitrator's error. [Citation.]" (*Id.* at p. 1106.)

Here, Shenoi Koes relies on subdivision (a)(5) of section 1286.2, which provides in relevant part that a court "shall vacate" an arbitration award if "[t]he rights of the party were substantially prejudiced 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." (Italics added.) Section 1283.4 requires that an arbitration award "shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." (§ 1283.4.) Thus, "where the record shows that an issue has been submitted to an arbitrator and that he totally failed to consider it, such failure may constitute 'other conduct of the arbitrators contrary to the provisions of this title' justifying vacation of the award under section 1286.2." (*Rodrigues v. Keller* (1980) 113 Cal.App.3d 838, 841; see *Mossman v. City of Oakdale* (2009) 170 Cal.App.4th 83, 88 ["failure to decide an issue submitted to an arbitrator provides a valid ground for vacating the award"].)

As we have noted, the record reflects that before the arbitration hearing, Shenoi Koes filed a motion in limine seeking to preclude Foster from giving testimony "that contradicts judicial admissions in her pleadings." However, the motion is not in the record before us, and thus, other than the arbitrators' description of the motion, we do not know precisely how Shenoi Koes framed this issue to the arbitration panel. (See *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483 [citing "appellants' obligation to provide an adequate record to demonstrate error as well as our obligation to presume that the decision of the trial court is correct absent a showing of error on the record"].) The arbitration panel denied the motion, stating, "Given that the meaning of the Fee Agreement is before the Panel and will be decided at Phase 1 of the hearing, it is premature to make any conclusion as to whether Foster's assertions are inconsistent."

Shenoi Koes contends that in denying the motion in limine to preclude any testimony by Foster contradicting her purported judicial admissions, and then construing the contingency fee agreement in Phase 1 of the arbitration so as to deprive Shenoi Koes the right to recover its fees, the arbitrators failed to consider an issue necessary to determine the controversy. On appeal, Shenoi Koes contends that these purported judicial admissions were made as follows: (1) in Foster's first amended complaint in the ALJ proceeding, in which she sought attorney fees that included the $229,364 already incurred in the OSHA proceedings; (2) in her testimony during the arbitration proceedings, in which she acknowledged that her request for the $229,364 in attorney fees in the ALJ proceeding included Shenoi Koes' fees, as awarded by the OSHA investigator; and (3) in her petition to confirm the arbitration award, in which she described the dispute subject to arbitration as follows (the language we italicize being the words Shenoi Koes relies upon to constitute a judicial admission): "Whether Respondent was entitled to attorney fees under the contingency Attorney–Client Fee Agreement, pursuant to which Petitioner retained Respondent to represent her against Bank of America in settlement negotiations and mediation only. Mediation did not result in a settlement. Respondent ended its representation of Petitioner. *Subsequently, Petitioner settled an administrative claim before OSHA.* Respondent sued Petitioner seeking recovery of its contingency fees against the OSHA settlement." (Italics added.)

As best we understand the reasoning interpreting these matters as judicial admissions that Shenoi Koes was entitled to recover its fees

in the settlement of the ALJ proceeding (thus showing that the arbitrators failed to decide a necessary issue in the arbitration and permitted Foster to contradict those admissions in Phase 1), it is this: (1) in the administrative proceeding before the ALJ, Foster, as she admitted in her testimony at the arbitration proceeding, "pursued and expected" the recovery of attorney fees for Shenoi Koes' work; (2) also, Foster described the ALJ settlement in her petition to compel arbitration as one regarding "an administrative claim before OSHA"; (3) the law defines recoverable attorney fees as fees that "a litigant actually pays or becomes liable to pay in exchange for legal representation" (*Trope v. Katz* (1995) 11 Cal.4th 274, 280); (4) therefore, by necessary inference from these facts, Foster admitted that she incurred and continued to owe fees to Shenoi Koes under the contingency fee contract; and (5) she therefore also admitted that Shenoi Koes was entitled to recover those fees.

However, this convoluted reasoning actually defeats the notion that Foster made any judicial admission precluding her from contending that the contingency fee agreement did not entitle Shenoi Koes to recover its fees as part of the settlement in the ALJ proceeding. "The admission of fact in a pleading is a 'judicial admission.' . . . '. . . [I]t is fundamentally different from evidence: It is a *waiver of proof* of a fact by conceding its truth, and it has the effect of removing the matter from the issues. . . .' [Citation.] [¶] . . . Because an admission in the pleadings forbids the consideration of contrary evidence, any discussion of such evidence is irrelevant and immaterial. [Citation.]" (*Valerio v.*

Andrew Youngquist Construction (2002) 103 Cal.App.4th 1264, 1271 (*Valerio*).)

A judicial admission occurs only when the factual admission is made in a pleading *in the current action*. (*Valerio*, *supra*, 103 Cal.App.4th at p. 1271 [admission in answer to cross-complaint in current action]; *Braverman v. Rosenthal* (1951) 102 Cal.App.2d 30, 32 (*Braverman*) [admission in answer in current case "forbids the consideration of evidence which tends to refute the admitted fact"].) By contrast, an admission in a pleading in a prior action is not a conclusive judicial admission that waives the right to present contrary evidence, but rather an evidentiary admission that may be explained away by other evidence. "A pleading in a prior civil proceeding may be offered as an evidentiary admission against the pleader. [Citations.] . . . 'It may be stated as a general rule that a pleading containing an admission is admissible against the pleader in a proceeding subsequent to the one in which the pleading is filed. [Citations.] This is true even on behalf of a stranger to the former action.' [Citation.] The pleading constitutes an evidentiary, rather than judicial admission, and 'it is always competent for the party against whom the pleading is offered to show that the statements were inadvertently made or were not authorized by him or made under mistake of fact.' [Citation.]" (*Magnolia Square Homeowners Assn. v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1061.)

Here, the fact that in her first amended complaint *in the ALJ proceeding* Foster sought attorney fees that included the $229,364 already incurred in the OSHA proceedings did not constitute a judicial

admission. The purported admission occurred in a pleading in the ALJ proceeding (a prior proceeding) not in the arbitration proceeding (the current proceeding in which a determination of a judicial admission was sought). Thus, as a matter of law, whatever factual admission might have been made in the request for attorney fees in the ALJ proceeding was not a judicial admission for purposes of the arbitration proceeding, and did not constitute a waiver of Foster's right in that proceeding to contest Shenoi Koes' entitlement to fees. Further, we note that, in any event, by seeking attorney fees in the ALJ proceeding that included Shenoi Koes' fees, Foster made no admission, as a factual matter, that a proper interpretation of the contingency fee contract as relevant to the dispute in arbitration would entitle Shenoi Koes to its fees.

As for Foster's acknowledgment *in her testimony* during the arbitration proceedings that her request for the $229,364 in attorney fees in the ALJ proceeding included Shenoi Koes' fees, as awarded by the OSHA investigator, that acknowledgment was not a judicial admission. To constitute a judicial admission, an admission of fact must be made in a pleading in the current action, not in testimony. (See *Braverman, supra,* 102 Cal.App.2d at p. 32 ["An admission in the pleadings forbids the consideration of evidence which tends to refute the admitted fact. Any discussion of the evidence is therefore irrelevant and immaterial."].)

Finally, Shenoi Koes contends that Foster made a judicial admission in her petition to confirm the arbitration award. Shenoi Koes focuses on an isolated statement in Foster's description of the dispute subject to arbitration, in which she referred to having settled "an

administrative claim before OSHA." Of course, any statement in the petition to confirm the arbitration award, which was made *after* the arbitration proceeding, can hardly be a judicial admission made in a pleading *during* the arbitration proceeding itself. Thus, it is irrelevant to deciding whether, in denying Shenoi Koes' motion in limine before Phase 1 of the arbitration, the arbitrators somehow failed under section 1283.4 to decide a "question[] submitted to the arbitrators the decision of which is necessary in order to determine the controversy." Moreover, it is difficult to discern how Foster's description of the dispute subject to arbitration, including her reference to settlement of "an administrative claim before OSHA" constitutes a factual admission that the contingency fee agreement entitled Shenoi Koes to its fees as part of the settlement in the ALJ proceeding.

In short, Foster made no judicial admissions in the arbitration proceeding that the contingency fee agreement entitled Shenoi Koes to recover its fees as part of the settlement in the ALJ proceeding. By denying Shenoi Koes' motion in limine based on the meritless claim that Foster had made such judicial admissions, and by allowing Foster to contest Shenoi Koes' right to recover its fees, the arbitrators did not fail to consider an issue necessary to resolve the dispute submitted to arbitration. To the contrary, they correctly allowed *both sides* to present extrinsic evidence to support their claims. There is thus no basis on which to set aside the arbitration award.

DISPOSITION

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

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.