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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

APPLEBARRY, INC. et al., Plaintiffs and Appellants, v. BIGWOOD FILMS, INC. et al., Defendants and Respondents.	B281327 (Los Angeles County Super. Ct. No. BS156310)

APPEAL from a judgment of the Superior Court of Los Angeles County, Debre Katz Weintraub, Judge. Affirmed.

Johnson & Johnson, Neville L. Johnson and Robert Paredes for Plaintiffs and Appellants.

Mitchell Silberberg & Knupp, William L. Cole, Lucia E. Coyoca and Christopher A. Elliott for Defendants and Respondents.

In this appeal from a judgment based on a final arbitration award, appellants challenge the denial of their petition to vacate the award. (Code Civ. Proc., § 1286.2, subd. (a)(5).)[1] We conclude the petition was properly denied.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Applebarry, Inc. is the loan-out corporation[2] of writer Barry O'Brien. Appellant Fresh Air Taxi Cab Company, Inc. is the loan-out corporation of writer Richard Correll. O'Brien, Correll, and Michael Poryes (who is not a party to this litigation) are the co-creators of the cable television series *Hannah Montana.*

Appellants contend they are owed additional contingent compensation based on net profits received by respondents as producers and distributors of *Hannah Montana.* Respondents are Bigwood Films, Inc., Fuss Budget Films, Inc., Silver Creek Pictures, Inc., It's a Laugh Productions, Inc., Walt Disney Pictures, Inc., and ABC Cable Networks Group.

Between 2003 and 2005, appellants (but not Poryes) entered three contracts ("Deal Memorandum," "Executive Producer Agreement," and "Settlement Agreement") with respondents to render writing and producing services for *Hannah Montana*. The Settlement Agreement provided that to the extent appellants received "Created by" credit for *Hannah Montana*,

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[1] All further statutory references are to this code.

[2] Loan-out corporations are commonly used in the entertainment industry to contract out the services of the company's sole owner and sole employee. (See *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal.App.4th 881, 885.)

they would become eligible to participate in various forms of compensation under the Deal Memorandum, including a Contingent Bonus as discussed in paragraph 7 of that memorandum. O'Brien, Correll, and Poryes received "Created by" credit for *Hannah Montana* in September 2005.

Appellants sought a full accounting of respondents' financial records for *Hannah Montana*, claiming they were owed additional amounts of Contingent Bonus.[3] The dispute involved the controlling definition, calculation, and payment of the bonus. Paragraph 7 of the Deal Memorandum stated that "Contingent Bonus" was "defined, calculated and payable pursuant to [Bigwood Films'] standard definition." Respondents asserted the "standard definition" was provided in a document called CB-NST,[4] and the parties had incorporated CB-NST as part of their agreement. Appellants denied this assertion.

Appellants filed a lawsuit seeking additional amounts of Contingent Bonus and a full accounting of respondents' financial records for *Hannah Montana*.[5] (*Applebarry Inc. v. Bigwood Films* (L.A. County Super. Court, No. BC435519).) Respondents conceded that appellants were entitled to an accounting, and agreed to produce certain financial records. The parties reserved their right to arbitrate any disputes that remained after the accounting. During the accounting, disputes arose over discovery

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[3] Poryes, who negotiated separately with respondents, also was eligible to receive a Contingent Bonus.

[4] CB-NST is the acronym for "Contingent Bonus–Non-Standard Television."

[5] Poryes pursued a separate action against respondents based on similar issues.

matters and the controlling definitions to be used in the calculation of the Contingent Bonus. As a result of these disputes, the accounting was not completed.

In July 2012, appellants requested arbitration before the American Arbitration Association (AAA). The parties stipulated to a three-phase arbitration hearing before AAA arbitrator Martin Olinick.[6] During phase I, the parties presented evidence concerning the definitions and accounting methods to be used in calculating appellants' Contingent Bonus. Although Olinick granted appellants' request to call Poryes and his transactional attorneys as witnesses (Poryes was engaged in a separate arbitration with respondents concerning his own contingent compensation issues), appellants chose not to present their testimony during phase I.

In the arbitrator's phase I interim order, Olinick ruled the parties had incorporated CB-NST as part of their agreement. He rejected appellants' contentions that CB-NST, which included only four sources of revenue within the definition of "Defined

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[6] The parties agreed that during phase I, Olinick would determine the appropriate definitions and accounting methods to be used in determining the Contingent Bonus. In phase II, Olinick would order the production of financial information necessary to provide an updated audit. Using the definitions and accounting methods established by Olinick, the auditor would examine the financial information and prepare the updated audit. In the final phase, Olinick would resolve the parties' disputes based on the updated audit.

Receipts," constituted a contract of adhesion and was so one-sided as to be unconscionable and illusory.[7]

Following phase I, appellants sought to compel disclosure of the financial information that respondents had produced during the Poryes arbitration, and to call Poryes and his transactional attorneys as witnesses in phase II.[8] Olinick denied these requests, reasoning that appellants' contracts should be construed based on the language contained in the agreements themselves. Appellants revisited these requests several times during phase II, but to no avail.[9]

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[7] Page 1 of CB-NST contained a disclaimer that "there is no guarantee whatsoever, and it is unlikely, that any Contingent Bonus will become payable to lender, regardless of the level of income, revenues, profits and/or receipts, if any that [Disney Channel], affiliates or Related Parties, or any distributor or exhibitor realizes from the exploitation of the Program(s)."

[8] Around this time, respondents entered a confidential settlement agreement with Poryes, and obtained a protective order prohibiting the disclosure of confidential financial information produced in the Poryes arbitration.

[9] In his December 15, 2014 order denying appellants' motion to compel, Olinick quoted from his previous denial of July 30, 2014: "'The Poryes case, although similar to this matter and arising out of the creation of a common show, presents its own facts and I will explore only the request for Materials that are germane to the case I am arbitrating. This Arbitration and the Poryes' Arbitration are being heard by separate arbitrators and deal with factual and contractual issues that have not been joined with this matter. The contractual negotiations were handled by different representatives at different times. It is my obligation as an Arbitrator to consider the contractual and other issues that

During phase II, the parties submitted a joint statement identifying the discovery matters that remained at issue. Respondents produced some additional financial information for the completion of the audit.

In the arbitrator's phase II interim award, Olinick found that CB-NST constituted a valid and enforceable agreement by the parties. Olinick rejected appellants' contentions that CB-NST was unfair, unconscionable, and violated the implied covenant of good faith and fair dealing. He found appellants "were not of the caliber of writers to require Respondents to treat them as more established writers might have been treated," and the decision whether to offer a renegotiation "after the Program has become very successful is up to the Respondents. The lack of an offer of renegotiation does not render the deal that was negotiated with the aid of agents and lawyers" unenforceable.

As to the substantive issues, the phase II interim order adopted respondents' interpretation of the CB-NST. Olinick agreed, for example, with respondents' position that

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are presented to me within the context of the agreement which has been submitted to me.'" He further stated: "For me to allow the Poryes case (a case separately filed, between different parties, and heard by a different tribunal) to enter into my consideration of this case would be a disservice to deciding the issues presented to me that are relevant and material to the proper conclusion of this Arbitration. The denial of the presentation of materials and/or testimony by Mr. Poryes . . . will not serve to impair or prejudice Claimants['] appropriate presentation of their case in kind. In fact, any such presentation will inhibit the fair and proper consideration of the issue already raised by the parties. Therefore, I find no violation of Claimants['] ability to present relevant and material evidence germane to this case without the aforesaid materials or testimony by Poryes[.]"

merchandising, film, and concert revenues were excluded from the definition of "Defined Receipts."

Appellants petitioned the superior court to vacate the phase II interim order. Citing subdivision (a)(5) of section 1286.2, appellants argued the denial of their motion to compel production of the Poryes arbitration materials constituted a refusal to consider material evidence. (No. BS156310.) At the August 31, 2015 hearing before Judge Weintraub, respondents defended the exclusion of the Poryes arbitration materials, arguing the Poryes arbitration involved different contractual rights. Reasoning that Poryes was not a party to the Settlement Agreement that formed the basis of appellants' contingent participation rights, respondents contended the excluded Poryes materials were not materially relevant to this case. The superior court denied the petition.

Following this ruling, appellants sought to dismiss phase III of the arbitration without prejudice.[10] Olinick denied the motion and issued deadlines for the upcoming phase III hearing. The parties were ordered to provide an updated audit report that identified all remaining claims, designate and depose expert witnesses, provide exhibit and witness lists, and file pre-hearing briefs.

Appellants participated in the phase III hearing in only a limited fashion. They did not provide an updated audit report, designate witnesses, or pay their share of the phase III arbitration fee. Because appellants did not sign a retainer

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[10] In a July 30, 2015 email, counsel for appellants notified Olinick that in light of the phase II rulings, appellants would not be able to recover any damages and no longer wished to proceed with phase III.

agreement for an independent auditor, the phase III hearing was conducted without one. Appellants cross-examined respondents' witnesses, but presented no evidence or testimony on their own behalf.

At the conclusion of the phase III hearing, Olinick issued a final award in favor of respondents. The arbitrator found there was no evidence to support appellants' allegations of breach of contract, uncompensated damages, or unpaid contingent compensation.

Appellants petitioned to vacate the arbitrator's final award under section 1286.2, subdivision (a)(5). (No. BS156310.) On June 7, 2016, appellants argued before Judge Weintraub that they were substantially prejudiced by the exclusion of the Poryes arbitration materials: "[I]f you've got two creators of this very same project and one is being treated completely differently, that's really materially relevant. Why is he being treated differently, if that's the case? And we are confident that that is exactly what has happened." Appellants submitted a declaration by Michele Gentille, an accountant in the Poryes arbitration who was familiar with the financial information produced in that case. Gentille stated that the excluded materials were relevant to the audit in appellants' case, but their use was prohibited by the protective order issued in the Poryes arbitration.

The superior court denied the petition to vacate the final award, finding appellants had not made the requisite showing of substantial prejudice. Deferring to the arbitrator's factual and legal rulings, the court found that because appellants had been provided an opportunity to submit evidence of their own intent at the time they entered their agreements, they were not substantially prejudiced by the exclusion of the Poryes materials.

The court also found that because the Poryes arbitration involved separate agreements, the excluded materials were not materially relevant to this case. As to the Gentille declaration, the court found it did not compel a different result. The declaration contained no representation that had Olinick considered the omitted Poryes arbitration materials, a different ruling would have resulted in favor of appellants.[11]

The superior court granted a petition to confirm the arbitrator's final award, and entered judgment for respondents. Appellants filed a timely appeal from the judgment.

DISCUSSION

As the Supreme Court explained in *Moncharsh*, judicial review of an arbitrator's award is confined to statutory grounds. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 28.) "Section 1286.2, subdivision (d), provides for vacation of an arbitration award when 'The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.'" (*Moncharsh*, at p. 28.) "It is well settled that 'arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision.' [Citations.] A contrary holding would permit the exception to swallow the rule of limited judicial review; a litigant could always contend the arbitrator erred and thus exceeded his powers." (*Ibid.*)

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[11] Appellants filed a notice of appeal from the denial of their motion to vacate the arbitrator's final award. We granted respondents' motion to dismiss on the ground that the appeal was not taken from an appealable order.

In their petition to vacate the final award, appellants relied on section 1286.2, subdivision (a)(5). This provision allows a court to vacate an 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." On appeal, we independently review the denial of a request to vacate an arbitration award. (*Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1364–1365; *SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1196.) We find no error in the trial court's ruling.

Because we defer to the arbitrator's legal findings (*Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 439), we do not reexamine the findings that CB-NST excludes designated revenues from "Defined Receipts," or that the success of the *Hannah Montana* program imposes no legal obligation on respondents to renegotiate their deal with appellants. Accepting these findings at face value, it is appellants' burden to demonstrate they were substantially prejudiced by the arbitrator's refusal to hear material evidence.

Appellants argue the arbitrator's exclusion of evidence of "tens of millions of dollars" of *Hannah Montana* profits deprived them of a fair hearing and requires us to vacate the award. They contend it is reasonably probable a different outcome would have resulted had the arbitrator considered the confidential Poryes materials and the non-confidential *Hannah Montana* financial records, which demonstrate the existence of additional revenues. Respondents argue there is no basis to vacate the award because the additional revenues do not qualify as "Defined Receipts," and

thus would not support an award of additional contingent compensation.

We find no evidence (or offer of proof) in the record that suggests consideration of the omitted evidence is reasonably likely to lead to an increase in *Hannah Montana's* "Defined Receipts." Unless there is a reasonable likelihood of an increase in "Defined Receipts," appellants have failed to establish they were substantially prejudiced by the arbitrator's refusal to consider the omitted evidence.

Appellants rely on *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524 and *Emerald Aero, LLC v. Kaplan* (2017) 9 Cal.App.5th 1125. Both are distinguishable because they involved errors that deprived the appellant of a fair arbitration proceeding. In *Burlage*, the petitioner's rights were substantially prejudiced by the arbitrator's refusal to hear evidence that would have provided a complete defense to the claim. In *Emerald Aero*, because notice that punitive damages were being sought was provided less than 24 hours before the arbitration hearing, the defendant did not have fair notice and the arbitrator exceeded his authority by awarding punitive damages. No comparable error occurred in this case.

Because the record fails to demonstrate there is a reasonable probability that consideration of the omitted evidence would have led to a different result, appellants are not entitled to relief under section 1286.2, subdivision (a)(5). (See *In re Brown* (1998) 17 Cal.4th 873, 903 [evidence is material if it is reasonably probable its disclosure would have led to different outcome].)

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.