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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FOOTHILL INDEPENDENT BANK, Plaintiff and Respondent, v. HENRY MAURISS III, Defendant and Appellant.	B255811 (Los Angeles County Super. Ct. No. KC015946)

APPEAL from an order of the Superior Court of Los Angeles County, R. Bruce Minto (Ret.), Judge. Affirmed.

Straggas & Associates and George D. Straggas for Defendant and Appellant.

Hemar, Rousso & Heald and Jeannine Del Monte Kowal for Plaintiff and Respondent.

In 1996, judgment was entered against Henry Mauriss III (Mauriss) and in favor of Foothill Independent Bank (Foothill) and American Express Travel Related Services Company (American Express) following an arbitration. In 2013, Mauriss filed a motion to vacate the judgment in favor of Foothill, contending he had never agreed to arbitrate the dispute and the arbitration award had not been "properly" confirmed. In support of his motion, Mauriss filed a declaration claiming he had "never received any notice" of the judgment until 2013. In opposition, Foothill submitted evidence that Mauriss had been personally served with notice of the dispute and had participated through two different attorneys. The court denied the motion, finding Mauriss had ratified the arbitration award and was "estopped to contest it." Mauriss appealed and argues that the judgment is void. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The 1994 Action*

In 1994, Foothill sued Mauriss, Allied Adjustment Bureau (Allied), and American Express for "money due on dishonored checks." Foothill alleged Mauriss had opened a checking account in his capacity as president of Allied and deposited unauthorized "American Express money transfer checks." Foothill filed a proof of service showing that Mauriss had been personally served with the summons and complaint.

American Express cross-complained against Mauriss and Allied for breach of contract and fraud based on the cross-defendants' alleged fraudulent conversion of American Express checks. American Express also filed a proof of service stating that Mauriss had been personally served with the cross-complaint.

Attorney Rory Clark filed an answer to Foothill's complaint on behalf of Mauriss and Allied. Another attorney, Stephen Chesney, then filed a motion to strike and a demurrer to American Express's cross-complaint on behalf of Mauriss and Allied. About two months later, Chesney's firm withdrew as counsel for Mauriss and Allied because these defendants had not paid their legal fees and had refused to cooperate and to communicate.

In 1995, Clark -- as counsel for Mauriss and Allied -- signed a stipulation to arbitrate the dispute with Foothill and American Express. The court entered a minute order noting that the parties had stipulated to binding arbitration and the "[c]ase [was] considered settled, without judge's participation."[1] The arbitration took place in November 1995 before a retired Court of Appeal justice, Howard B. Wiener. An "award of arbitrator" was filed with the court in February 1996 and judgment was entered against Mauriss in the amount of $32,166.46 in favor of Foothill (Foothill Judgment) and $62,470.41 in favor of American Express.

In 2006 Foothill applied to renew its judgment. The court clerk sent the notice of renewal of judgment to Mauriss. Foothill's lawyer also sent the notice to Mauriss at two addresses.

2. *The 2013 Motion To Vacate*

Mauriss was attempting to sell his residence in September 2013 when his broker notified him of an abstract of judgment recorded against the property by Foothill. On November 12, 2013, Mauriss filed a motion to vacate the Foothill Judgment under Code of Civil Procedure section 473, subdivision (d).[2] Mauriss argued the judgment was void because he never had agreed to arbitrate the dispute. He also argued that the arbitration award was not "properly submitted for confirmation" because the record did not contain a petition for confirmation. In support of the motion, Mauriss submitted a declaration stating that "[he] never received any notice from anyone regarding a lawsuit filed against [him] by either Foothill [] or American Express," he never authorized Clark to represent him in the lawsuit, and "the first time [he] ever heard anything about this lawsuit was in late September[] 2013."

In opposition, Foothill submitted evidence that Mauriss had been both personally served and served by mail with notice of the underlying lawsuit, and that two separate

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[1] The reference to settlement was apparently a mistake as the parties had agreed only to arbitrate the matter.

[2] Mauriss did not challenge the judgment in favor of American Express, apparently because American Express had not renewed its judgment.

lawyers had participated in the case on his behalf. Foothill also argued that the motion to vacate was untimely and that Mauriss had ratified the judgment.

In his reply, Mauriss did not respond to the evidence he had been served with notice of the action and represented by more than one attorney, but argued that the judgment was void and "there [was] no evidence [he had] ratified the void judgment."

The court denied the motion on the grounds that Mauriss had "ratified the arbitration award" and was "estopped to contest it because of the many notices sent to him or his other attorney at several addresses. He knew or should have known of the judgment and took no action for many years." Mauriss timely appealed.

CONTENTIONS

Mauriss contends the court erred in denying the motion to vacate. He asserts the Foothill Judgment was void because he never agreed to arbitrate the dispute and the arbitration award was not properly confirmed.

DISCUSSION

Code of Civil Procedure section 473, subdivision (d) allows a court to set aside a void judgment. "A trial court has no statutory power under section 473, subdivision (d) to set aside a judgment that is not void." (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495-496.) A judgment is void "[w]hen a court lacks jurisdiction in a fundamental sense." (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660 (*American Contractors*).)

" 'Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.' [Citation.]" (*American Contractors, supra,* 33 Cal.4th at p. 660.) By contrast, "[w]hen a court has fundamental jurisdiction, but acts *in excess of its* jurisdiction, its act or judgment is merely *voidable*. [Citations.]" (*Id.* at p. 661 [emphasis added.]) A judgment that is "not void, but [only] voidable, [is] not subject to being set aside beyond the six-month time limit of section 473, [subdivision (b)]." (*Lee v. An* (2008) 168 Cal.App.4th 558, 563.) A void judgment, on the other hand, is " '[] vulnerable to direct or collateral attack at any time.' [Citation.]" (*Ibid*.)

Here, Mauriss moved to set aside the Foothill Judgment under section 473, subdivision (d) on the sole ground that the judgment was void. However, Mauriss does not dispute that the trial court in the 1994 action had fundamental jurisdiction to enter judgment. Rather, he contends that the Foothill Judgment is void because the trial court acted in excess of its jurisdiction when it found that Mauriss had agreed to arbitrate and "settle" the dispute and when it confirmed the arbitration award without following the proper procedure.

In support of his argument, Mauriss cites cases holding that a trial court's actions "in excess of" its jurisdiction are void, rather than merely voidable. (See *Selma Auto Mall II v. Appellate Department* (1996) 44 Cal.App.4th 1672; *Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228.) Those cases in effect have been disapproved on this point by the California Supreme Court's later opinion in *American Contractors*. As noted above, in *American Contractors*, the Supreme Court held that a judgment is void only when the trial court lacks subject matter or personal jurisdiction; actions taken by the trial court *in excess of* its jurisdiction are merely voidable. (*American Contractors, supra,* 33 Cal.4th 653 at p. 660.) Here, Mauriss failed to show that the Foothill Judgment was void rather than merely voidable and, thus, he was not entitled to relief under section 473, subdivision (d).

Mauriss also relies on *Blanton v. Womancare* (1985) 38 Cal.3d 396 (*Womancare*) and *Toal v. Tardif* (2009) 178 Cal.App.4th 1208 (*Toal*). Those cases help Foothill, not Mauriss. *Womancare* was a medical malpractice case arising from a botched abortion. Blanton's attorney spoke with her about arbitrating the case. Blanton told her lawyer she would arbitrate but only if the arbitration were nonbinding and she could elect a trial de novo afterward. Without his client's consent and contrary to her express instructions, Blanton's lawyer then stipulated with counsel for the clinic and its doctors to binding arbitration, a damages cap, and the clinic's unilateral choice of arbitrators. Less than three months later, Blanton learned what her lawyer had done. She immediately fired him and hired another lawyer, who moved to vacate the stipulation. The court denied the motion and the arbitration went forward.

The Supreme Court reversed. The Court discussed the law of agency and an attorney's authority generally to act on behalf of his client. But here, the Court said, Blanton's lawyer "in signing the arbitration agreement, acted not only without his client's express authority but contrary to her express instructions." (*Womancare*, *supra*, 38 Cal.3d at p. 403.) The Court concluded, "[A]n attorney, merely by virtue of his employment as such, has no apparent authority to bind his client to an agreement for arbitration." (*Id.* at p. 407.) The Court noted that "unauthorized acts of an attorney may be binding upon his client through ratification" but that no ratification appeared in that case. (*Id.* at p. 408.)

Toal was a fight between two couples over the sale of a house. Each couple's attorney signed a stipulation to arbitrate the case. After the arbitration, the plaintiffs petitioned the court to confirm the arbitration award in their favor. The defendants moved to vacate the award, asserting they did not know about the stipulation their lawyer had signed. (*Toal, supra,* 178 Cal.App.4th at p. 1217.) The trial court denied the defendants' motion to vacate and confirmed the award.

The Court of Appeal reversed, finding the trial court had "erred by granting plaintiffs' petition to confirm the award without determining whether defendants consented to or ratified the arbitration agreement." (*Id.* at p. 1223.) The Court said, "Based on the reporter's transcript of the hearing, it does not appear the court ever considered the issue. Because the court failed to consider and rule on the question of defendant's consent, we remand the matter to the court for a hearing on the issue." [Citations.] (*Ibid.*)

Neither *Womancare* nor *Toal* held that an award issued in an arbitration that a lawyer agreed to without the client's consent is void as opposed to voidable.[3]

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[3] Mauriss's counsel contended at oral argument that *Toal* so held, asserting that the defendants in that case had been present at and participated in the arbitration. Counsel is mistaken. Notably, the court of appeal in *Toal* remanded the case for the trial court to determine whether the defendant couple had agreed to arbitrate. The court stated the arbitration award did "not reveal whether defendants were present or testified at the arbitration hearing." (*Toal, supra,* 178 Cal.App.4th at p. 1213.)

Moreover, both cases say -- consistent with the general law of agency -- that a client may ratify his or her lawyer's agreement to arbitrate even if the client did not consent in advance. (*Womancare*, *supra*, 38 Cal.3d at p. 408; *Toal*, *supra*, 178 Cal.App.4th at p. 1223.) Again, because the Foothill Judgment was voidable but not void, Mauriss's failure to challenge it within the time limit section 473(b) sets forth is fatal to his lawsuit.

Finally, Mauriss also has failed properly to address the trial court's grounds for denying his motion: that he ratified the Foothill Judgment and was estopped to contest it.[4] Accordingly, on this ground as well, he has not met his burden as the appellant of affirmatively establishing that the trial court erred. (See *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 [the appellant bears the burden of affirmatively establishing error].)

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[4] Mauriss does argue -- for the first time in his reply brief filed on appeal -- that there was no evidence he ratified the judgment. However, it is well settled law that " '[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.' [Citation.]" (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

DISPOSITION

The order is affirmed. Costs on appeal to the respondent.

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EGERTON, J.*

WE CONCUR:

EDMON, P. J.

KITCHING, J.

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