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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

ROLAND HANSALIK, Plaintiff and Respondent, v. WELLS FARGO ADVISORS, LLC, Defendant and Appellant.	B232151 (Los Angeles County Super. Ct. No. BS128947)

APPEAL from an order of the Superior Court of Los Angeles County. Rita J. Miller, Judge. Affirmed.

Albert & Will and Mitchell J. Albert for Defendant and Appellant.

Valle Makoff, Jeffrey B. Valle and Katherine P. Balatbat for Plaintiff and Respondent.

Wells Fargo Advisors, LLC (Wells Fargo) appeals the order vacating its arbitration award against respondent Roland Hansalik (Hansalik). We find no error and therefore affirm.

FACTS

Wells Fargo[1] and Hansalik entered into a promissory note that contained an arbitration clause. They agreed that any arbitration "shall be brought before the arbitration facility of the Financial Industry Regulatory Authority [(FINRA)] to the exclusion of all others." In 2009, Hansalik moved from California to Switzerland. Subsequently, Wells Fargo initiated arbitration against Hansalik with FINRA to collect the unpaid balance of $1,239,044.16 due on the promissory note as well as interest, attorney fees and costs.

FINRA rule 13301(a) provides that the "[d]irector will serve the initial statement of claim on an associated person directly at the person's residential address or usual place of abode. If service cannot be completed at the person's residential address or usual place of abode, the [d]irector will serve the initial statement of claim on the associated person at the person's business address."[2] Pursuant to this rule, FINRA mailed Wells Fargo's statement of claim to Hansalik's prior residential address in California. Other notices were sent there, too. The Post Office notified FINRA that Hansalik's forwarding address was "8005 Zurich Switzerland." Also, Wells Fargo informed FINRA that Hansalik was working at LB(Swiss) PrivatBank, Ltd., a business located at Borsenstrasse, 16, Postfach, Zurich, Switzerland. Wells Fargo represented that it had sent the initial statement of claim to Hansalik's new place of work by Federal Express and e-mail. Nonetheless, despite the knowledge that Hansalik had moved out of the United States, FINRA persisted in mailing various arbitration notices to Hansalik's former residential

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[1] At the time the promissory note was executed, Wells Fargo was known as Wachovia Securities, LLC.

[2] FINRA's Web site represents that each FINRA district office has a director. (<http://www.finra.org/Industry/Contacts/p085520> [as of Apr. 25, 2012].)

address in California. On at least one occasion, the Post Office returned the mail to FINRA as undelivered.[3]

In April 2010, FINRA issued a default award against Hansalik for the principal sum of $1,297,694.14 plus interest, costs and attorney fees. The award stated: "The Arbitrator determined that [Hansalik] was properly served notice of the Statement of Claim and Notification of the Arbitrator," and "that [Hansalik] is required to submit to arbitration pursuant to the [FINRA rules] and is bound by the determination of the Arbitrator on all issues submitted."

Wells Fargo hired a Swiss attorney. That attorney sent a letter to Hansalik's Swiss residential address and demanded payment.

Hansalik immediately filed a petition to vacate the arbitration award under the provisions of Code of Civil Procedure section 1286.2, subdivision (a). He claimed that he never received notice. The trial court granted the petition on the grounds that Hansalik was not properly served under the FINRA rules, and that he was denied due process. Wells Fargo's cross-petition to confirm the arbitration award was dismissed.

This timely appeal followed.

DISCUSSION

Wells Fargo contends that the trial court's order vacating the arbitration award must be reversed because: (1) the arbitrator found that service complied with the FINRA rules; (2) Hansalik was not denied due process; and (3) there was substantial evidence that Hansalik received actual notice of the arbitration. As we discuss below, these contentions lack merit.

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[3] In a letter to Hansalik dated November 16, 2009, FINRA wrote: "On November 13, 2009, FINRA received a return mail dated October 20, 2009[,] regarding the arbitration selection process addressed to Roland Hansalik [at his former residence in California]. A courtesy copy will be sent to the forwarding address at 8005 Zurich Switzerland. This address was provided by the Post Office." The purported forwarding address, on its face, is incomplete because it does not refer to a street or a post office box. It is neither a residential nor a business address. As a result, the suggestion by FINRA that it was planning to send a courtesy copy of a particular letter to 8005 Zurich Switzerland does not establish notice to Hansalik.

I. Standard of review.

We review an order vacating an arbitration award on an independent basis. (*SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1196.) "However, we apply the substantial evidence test to the trial court's ruling to the extent it rests upon a determination of disputed factual issues. [Citations.]" (*Ibid*.) Under the substantial evidence standard of review, we must "presume in favor of the judgment all *reasonable* inferences." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632–1633.) Where two or more different inferences can reasonably be drawn from the evidence, a reviewing court "'is without power to substitute its own inferences for those of the trial court.'" (*Escobar v. Flores* (2010) 183 Cal.App.4th 737, 752.)

Because this case implicates fairness concerns that borrow heavily from the concept of due process, there is a mixed question of law and fact. Selection of the standard of review for mixed questions is based on policy. If the policy concerns make it more appropriate for a trial court to determine whether the established facts fall within a particular legal definition, the trial court's factual determination is given deferential review. But if there are policy concerns regarding judicial administration, an appellate court will employ de novo review. Generally speaking, mixed questions of fact and law are reviewed de novo. The exception is when the applicable legal standard provides for a strictly factual test, such as state of mind. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 386.)

II. Grounds for vacating an arbitration award.

The limited grounds for vacating an arbitration award include instances when an arbitrator exceeds his authority by denying a litigant a fair hearing. (Code Civ. Proc. § 1286.2, subd. (a)(4); *Hoso Foods, Inc. v. Columbus Club, Inc.* (2010) 190 Cal.App.4th 881, 888 (*Hoso*) ["arbitration procedures that interfere with a party's right to a fair hearing are reviewable on appeal"]; *Smith v. Campbell & Facciolla, Inc.* (1962) 202 Cal.App.2d 134, 135 (*Smith*) ["We have concluded that the order confirming the award must be reversed because the arbitrator did not give appellant notice of any hearing, nor did he give it any opportunity to be heard"].) The court in *Stockwell v. Equitable Fire &*

Marine Ins. Co. (1933) 134 Cal.App. 534, 541 explained, "'It may be stated as a general proposition[] that parties are always entitled to a hearing before the arbitrators, and, although arbitrators are not bound by strict rules of evidence, they cannot transgress that fundamental principle of justice which declares that no man shall be condemned without the opportunity of being heard. The parties are entitled to a hearing upon all the matters submitted. "The injustice is the same, and the injury as great, to deprive one of a right without a hearing before arbitrators as before a court."'"

III. The arbitrator's finding as to service is not dispositive.

Citing *Moncharsh v. Heily and Blase* (1992) 3 Cal.4th 1 (*Moncharsh*), Wells Fargo contends that arbitrator's factual finding that Hansalik was properly served cannot be second guessed and therefore the trial court's order vacating the arbitration award must be reversed. We disagree.

Moncharsh reiterated the general rule "that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law." (*Moncharsh*, *supra*, 3 Cal.4th at p. 11.) This rule would apply if Hansalik had challenged the arbitrator's decision on the merits as to whether Hansalik owed Wells Fargo money. But Hansalik did not challenge the decision on the merits. Rather, he challenged the fundamental fairness of the entire arbitration because he was not provided with notice and an opportunity to be heard. Nothing in *Moncharsh* prohibited this challenge. Moreover, cases such as *Hoso* and *Smith* establish that trial courts are obligated to ensure that arbitration procedures are fair. Thus, even if FINRA rule 13301(a) permitted FINRA to provide notice to Hansalik at his last known residential address in the United States rather than at his known business address in Zurich, Switzerland, the trial court was not powerless to intercede.

Wells Fargo asks us to consider the impact of FINRA rule 13413. That rule provides in part: "The panel has the authority to interpret and determine the applicability of all provisions under the [FINRA rules]. Such interpretations are final and binding upon the parties." Based on this rule, Wells Fargo contends that "the arbitrator had the power to interpret the [notice rule] to determine if service was, in fact, proper under

FINRA's rules. Whether the arbitrator's finding was a finding of fact, a conclusion of law or a mixed finding of fact and law, the arbitrator's award should not be overturned based on a mistake of fact or law." This argument misses the salient point. This appeal is concerned with the fairness of the arbitration, not the interpretation of FINRA rule 13301(a). Moreover, the arbitrator did not explain why he determined that notice was proper, so there is no indication in the arbitration award the notice rule was ever interpreted.

Next, Wells Fargo argues that even if the arbitrator's finding of proper service is reviewable, it should be given great deference. And in giving deference to the finding of proper service, Wells Fargo posits that we must defer to an inference that Hansalik received due process and therefore a fair hearing. To backstop this argument, it cites *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362 (*Advanced Micro Devices*). In that case, the court held "that, in the absence of more specific restrictions in the arbitration agreement, the submission or the rules of arbitration, the remedy an arbitrator fashions does not exceed his or her powers if it bears a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator and to the breach of contract found, expressly or impliedly, by the arbitrator." (*Id*. at p. 367.) But Wells Fargo cites *Advanced Micro Devices* for its more general acknowledgement that past "decisions teach that courts should generally defer to an arbitrator's finding that determination of a particular question is within the scope of his or her contractual authority." (*Id*. at p. 372.) *Advanced Micro Devices* has no application herein. It did not hold or even suggest that fairness and the adequacy of notice lies beyond the purview of the courts.

What Wells Fargo is truly advocating is this: If the arbitrator has the contractual authority to determine the sufficiency of notice to a party, then the arbitrator's finding of adequate notice cannot be overturned *even if the arbitration was unfair and a party was denied notice and an opportunity to be heard*. We reject the suggestion as antithetical to justice and the expectation of the parties. Though judicial review of arbitration awards is minimal, it is not wholly toothless.

IV. The arbitrator exceeded its authority by denying Hansalik a fair hearing; the arbitration award was properly vacated.

FINRA rule 13301(a) prompted the director to serve the initial statement of claim on Hansalik's residential address or usual place of abode. If that was not possible, the director was supposed to serve Hansalik at his place of business. Despite the clarity of these provisions, FINRA's director did not heed them upon discovering that Hansalik had left the United States and moved to Zurich, Switzerland. The director made no attempt to serve the initial statement of claim on Hansalik at his new business address. Rather, all subsequent notices were sent to an old residential address. Moreover, Hansalik provided a declaration in support of his petition to vacate in which he stated: "I did not receive any mail relating to the arbitration initiated by Wells Fargo that was supposedly sent to my former residence." Thus, substantial evidence established that FINRA did not give Hansalik notice and an opportunity to be heard because it knowingly sent notices to an old residential address when it could have easily directed correspondence to a current business address.

At this juncture, there is a mixed question of law and fact. Did FINRA deprive Hansalik a fair hearing when it denied him notice and an opportunity to be heard? The trial court answered this question in the affirmative. We do too. No concept is more vital to our legal system than adequate notice.

Even if FINRA's notice was not reasonably calculated to reach Hansalik, Wells Fargo claims that Hansalik received a fair hearing because Wells Fargo provided him with actual notice of the arbitration when it sent the initial statement of claim to him by Federal Express and e-mail. We cannot accede. As a reviewing court, we must presume that a challenged order is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Further, we must adopt all intendments and inferences to affirm the order unless the record expressly contradicts them. (See *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583.) And when applying the substantial evidence rule, we accept all implied findings that are supported by the record. (*Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 Cal.App.4th 594, 601.) Below, the trial court impliedly found that Hansalik did not

receive actual notice of the initial statement of claim from any source. This implied finding is supported by Hansalik's declaration denying he had notice. We therefore reject the suggestion that Hansalik had actual notice that cured the defect in FINRA's procedure. Even if he did have actual notice of the initial statement of claim from Wells Fargo, Hansalik was entitled to notice from FINRA. Furthermore, there is no evidence that Wells Fargo sent Hansalik subsequent notices regarding the time, date and location of the arbitration.

In light of FINRA's unfair procedure and Hansalik's lack of actual notice, the trial court properly vacated the arbitration award.

To defend the arbitration award, Wells Fargo offers an argument that has some intellectual appeal. We take as true its representation that Hansalik failed to notify FINRA of his change of address as required by a notice sent to all members of FINRA's predecessor, the National Association of Securities Dealers. Thus, it could be argued that it was fair to serve notice of the statement of claim at Hansalik's residential address of record. The problem, however, is that FINRA rule 13301(a) provides for service on a business address if service on a residential address cannot be accomplished. FINRA knew Hansalik's business address and did not use it. Based on the unique facts of this case, FINRA's procedure was unfair.

DISPOSITION

The order is affirmed.

Hansalik is entitled to his costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ