Filed 5/22/17 Wells Fargo Bank v. Revah CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WELLS FARGO BANK, N.A., Plaintiff and Respondent, v. HAIM REVAH, et al., Defendants and Appellants.	B276839 (Los Angeles County Super. Ct. No. BC549244)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Susan Bryant-Deason, Judge. Affirmed.

Novian & Novian, LLP, Farhad Novian and William R. H. Mosher, for Defendants and Appellants.

Cox, Castle, & Nicholson LLP, Randy P. Orlik and Susan B. Davis, for Plaintiff and Respondent.

The superior court confirmed an arbitration award under the California Arbitration Act (CAA)[1] and entered judgment for plaintiff. In a cascade of issues, defendants begin by challenging the superior court's subject matter jurisdiction, arguing the Federal Arbitration Act (FAA)[2] preempted state court enforcement of the arbitration award. They then fault the superior court for not applying the FAA's procedural provisions and for refusing to review the arbitrator's errors of law and fact. Should these arguments fail, defendants finally contend the arbitrator exceeded his powers under the CAA.

We hold the FAA does not preempt enforcement of the arbitration award in state court. Defendants forfeited the federal preemption choice-of-law claim by failing to raise it in the superior court; but in any event, the superior court properly applied CAA procedural provisions rather than those under the FAA. The superior court appropriately declined to review alleged errors of law or fact and interpreted section 1286.2 of the CAA to conclude the arbitrator did not exceed his powers based on the sole ground raised below. Defendants forfeited their remaining claims by failing to present them to the trial judge. Accordingly, we affirm the judgment.

---

[1] Code of Civil Procedure section 1280 et seq. All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

[2] Title 9 U.S.C. section 1 et seq.

FACTUAL AND PROCEDURAL BACKGROUND

Wachovia Bank originated a $6 million commercial loan to defendants Haim Revah and Revah Holdings, Inc. (defendants) in August 2008. Wachovia Bank merged into Wells Fargo Bank, N.A. (Wells Fargo) in March 2010. Several months later, defendants entered into a loan modification agreement with Wells Fargo and signed a new promissory note in its favor.

Defendants defaulted on the loan. In June 2014, Wells Fargo initiated this action. Upon Wells Fargo's application, the superior court issued a right to attach order.

The Wells Fargo/Revah documents contained arbitration provisions,[3] and Wells Fargo moved under the CAA to compel

---

[3] Each provision provided, in pertinent part: "ARBITRATION. The parties hereto agree, upon demand by any party, to submit to binding arbitration all claim, disputes and controversies between or among them (and their respective employees, officers, directors, attorneys, and other agents), whether in tort, contract or otherwise arising out of or relating to in any way (i) the loan and related loan and security documents which are the subject of this Note and the Loan Agreement and its negotiation, execution, collaterialization, administration, repayment, modification, extension, substitution, formation, inducement, enforcement, default or termination; or (ii) request for additional credits. [¶] i. Governing Rules. Any arbitration proceeding will (i) proceed in a location in California selected by the American Arbitration Association ('AAA'); (ii) be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any conflicting choice of law provision in any of the documents between the parties; and (iii) be conducted by the AAA, or such other administrator as the parties shall mutually agree upon, in accordance with the AAA's commercial dispute resolution procedures, unless the claim or counterclaim is at least $1,000,000.00 exclusive of claimed interest, arbitration fees and

"the parties to arbitrate the claims alleged in this action." Although defendants acknowledged the arbitration agreements and asserted in the 24th affirmative defense that "the claims raised [in the complaint] are subject to a binding arbitration agreement," they opposed the motion, arguing Wells Fargo waived the right to arbitrate by filing the complaint and obtaining the right to attach order. Defendants did not raise any federal preemption issues at that time. The superior court granted Wells Fargo's motion, ordered the parties to arbitration, and stayed proceedings in the superior court.

The arbitration was conducted pursuant to the Commercial Arbitration Rules of the American Arbitration Association (AAA). After hearing, the arbitrator issued a detailed interim award, setting forth the factual and legal bases for the award in favor of Wells Fargo. The interim award included references to a document that had not been received into evidence. Upon defendants' application, the arbitrator deleted references to the document, but denied their request for a further hearing. On

---

costs in which case the arbitration shall be conducted in accordance with the AAA's optional procedures for large, complex commercial disputes (the commercial dispute resolution procedures or the optional procedures for large, complex commercial disputes to be referred to, as applicable, as the 'Rules'). If there is any inconsistency between the terms hereof and the Rules, the terms and procedures set forth herein shall control. Any party who fails or refuses to submit to arbitration following a demand by any other party shall bear all costs and expenses incurred by such other party in compelling arbitration of any dispute. Nothing contained herein shall be deemed to be a waiver by any party that is a bank of the protection afforded to it under 12 U.S.C. § 91 or any similar applicable state law.

April 8, 2016, the arbitrator issued the final award in favor of Wells Fargo in the sum of $2,686,374.65, plus attorney fees, costs, and arbitration expenses.

The arbitrator found the following to be true: Wells Fargo was the successor to Wachovia Bank. "The overwhelming weight of the evidence support[ed] Wells Fargo's position that it was the assignee of the original loan made to Wachovia and that this was well known to [defendant Haim] Revah." Wells Fargo agreed to modify the loan and extended the maturity date. As part of that transaction, Haim Revah signed the "Amended and Restated Promissory Note in the amount of $5,850,000.00 in favor of Wells Fargo." Defendants made interest payments on the Wells Fargo note for three years before defaulting. Haim Revah admitted he signed the loan modification and promissory note on behalf of himself and Revah Holdings, Inc. He understood the promissory note meant "'I owe this money.'"

Wells Fargo returned to the superior court in May 2016 to confirm the arbitration award under the CAA (§ 1285). Defendants countered with their own petition to vacate the arbitration award pursuant to sections 1285 and 1286.2, subdivision (a)(4) of the CAA "or, alternatively, if this court deem it applicable, 9 U.S.[C. section] 10(a)(4)." In that filing, defendants argued only that Wells Fargo failed to demonstrate it was the assignee of the Wachovia note or otherwise entitled to enforce the loan obligation.

In June 2016, after a hearing on the respective petitions, the superior court confirmed the award and entered judgment in favor of Wells Fargo.[4] Defendants timely appealed.

DISCUSSION

A. Federal Preemption—Subject Matter Jurisdiction

The parties agreed the arbitration proceedings would "be governed by the [FAA] (Title 9 of the United States Code)." (See fn. 3, *ante*.) Defendants maintain this provision divests any state court of subject matter jurisdiction to enforce the arbitration award. This federal preemption claim is made for the first time on appeal. (*National Union Fire Ins. Co. v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1724.) It fails, however.

"The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." (*Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, 477 [109 S.Ct. 1248, 1255]; see also *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 385.) State courts have concurrent jurisdiction with federal courts to enforce the FAA. (*Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 25.) *Moses H. Cone* adds, "The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question juris-

---

[4] The superior court also entered an order canceling the May 20, 2010, promissory note.

diction . . . . [E]nforcement of the Act is left in large part to the state courts . . . ." (*Id.* at p. 25, fn. 32.)

The superior court properly exercised jurisdiction over the postarbitration proceedings

B. Federal Preemption—Choice of Law

Defendants proffer a lesser aspect of federal preemption, this one implicating the superior court's choice of California law (CAA) over federal law (FAA) to confirm the arbitration award, rather than its jurisdiction to act. (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1236.) Defendants also raise this claim for the first time on appeal.

In the postarbitration proceedings, defendants did not argue the superior court was required to apply federal law. In fact, they urged the court to vacate the award under section 1286.2, subdivision (a)(4) [arbitrator exceeded his powers] and look to federal law only "if this court deem it applicable." While a federal preemption claim based on lack of subject matter jurisdiction may be made for the first time on appeal, a federal preemption claim based on the state court's choice of law may not. (*Karlsson v. Ford Motor Co., supra,* 140 Cal.App.4th at p. 1236.) Defendants forfeited this issue on appeal.

In any event, when this choice-of-law question is properly raised on appeal, Courts of Appeal reject it. Both federal and state statutes for the enforcement of arbitration awards are "procedural." Defendants' assertion that the FAA's procedural provisions govern enforcement of an arbitration *award* misconstrues well-established principles that the FAA's substantive provisions govern enforcement of an arbitration

agreement. (See, e.g., *Perry v. Thomas* (1987) 482 U.S. 483, 489 [96 L.Ed.2d 426, 107 S.Ct. 2520].)

State law is preempted if it interferes with arbitrability under the FAA. But once a dispute is arbitrated, courts look to state law for enforcement of the award. As we previously observed, "Nothing in the legislative reports and debates evidences a congressional intention that postaward and state court litigation rules be preempted so long as the basic policy upholding the enforceability of arbitration agreements remained in full force and effect." (*Siegel v. Prudential Ins. Co. of America* (1998) 67 Cal.App.4th 1270, 1289; see also *Judge v. Nijjar Realty, Inc.* (2014) 232 Cal.App.4th 619, 631 ["the FAA's *procedural* provisions . . . do not apply unless the contract contains a choice-of-law clause expressly incorporating them"']; *Swissmex–Rapid S.A. de C.V. v. SP Systems, LLC* (2012) 212 Cal.App.4th 539, 541 ["[w]e conclude section 9 is procedural, not substantive, and therefore does not apply in state court proceedings"].)

C. Standard of Review

Having determined the superior court possessed subject matter jurisdiction and appropriately considered the postarbitration motions under the CAA, we now turn to the merits of the appeal.

While our review of the judgment entered after confirmation of an arbitration award is de novo (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376, fn. 9), the statutory grounds upon which a party may challenge the award

(§ 1286.2, subd. (a))[5] are narrowly construed. "Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive *because the parties have agreed that it be so.* By ensuring that an arbitrator's decision is final and binding, courts simply assure that the parties receive the benefit of their bargain. [Fn. omitted.]" (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10.)

---

[5] Section 1286.2, subdivision (a) provides in pertinent part: "Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following: [¶] (1) The award was procured by corruption, fraud or other undue means. [¶] (2) There was corruption in any of the arbitrators. [¶] (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. [¶] (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. [¶] (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or 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. [¶] (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. . . ."

D. The Arbitrator Did Not Exceed His Powers Under the CAA

Defendants' remaining claims of error are all couched in terms of the arbitrator's exceeding his powers. In this category, they reprise the sole argument set forth in the petition to vacate the award, i.e., Wells Fargo did not prove it was the assignee of the Wachovia loan, and proffer several others not presented to the superior court.

1. The Superior Court Properly Refused to Consider Asserted Errors of Law and Fact

Defendants seek reversal on the basis the arbitrator exceeded his powers by erroneously finding Wells Fargo was the assignee of the Wachovia loan. This was the only ground raised below, and the superior court rejected it.

Defendants reiterate the issue here and, in a companion argument, also frame it as a lack of standing. These characterizations are not apt, however; the claim is more appropriately viewed as a challenge to the sufficiency of the evidence or an attempt to seek judicial review for errors of fact or law. Neither provides a basis for vacating an arbitration award. (§ 1286.2, subd. (a); *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1340 ["'in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute'"]; *Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 11 [10 Cal.Rptr.2d 183, 832 P.2d 899] ["a court may not review the sufficiency of the evidence supporting an arbitrator's award"].)

A further dimension to this argument concerns the superior court's reference at the confirmation hearing to *Pearson Dental Supplies v. Superior Court* (2010) 48 Cal.4th 665 (*Pearson*). Defendants relied on that decision in their petition to vacate the award, arguing "the arbitrator has clearly exceeded his powers by allowing Wells Fargo to coast and obtain a multi-million dollar arbitration award without offering any actual evidence that Wells Fargo was duly assigned the Wachovia loan. The California Supreme Court has recognized that Code of Civil Procedure [section] 1286[.2, subdivision] (a)(4) should be utilized to vacate an arbitration award where there has been such egregious error. *Pearson*[*, supra,*] 48 Cal.4th [at p.] 680 . . . ."

The superior court addressed the argument at the hearing, distinguished the facts in *Pearson, supra,* 48 Cal.4th 665 from those in this case, and found the cited decision was not relevant to the analysis: "[T]he arbitration agreement . . . covers the issue of whether or not defendants are in default and the plaintiff's right to collect. As this case does not concern unwaivable statutory rights under FEHA, the court finds the defendant[s'] receiving [sic][6] it is inapposite. *Pearson*[*, supra*]*,* 48 Cal.4th 665. Therefore, the defendant[s'] petition [to vacate] is denied."

The superior court was correct. In *Pearson*, *supra,* 48 Cal.4th 665, the Supreme Court noted, "We have emphasized in our case law the limited nature of judicial review of contractual arbitration awards, concluding that, generally speaking, a court is not permitted to vacate an arbitration award when the award

---

6 The context of the superior court's comments distinguishing *Pearson, supra,* 48 Cal 4th 665 suggests the court was referring to the defendants' "reliance on" the *Pearson* case, which the court deemed inapposite.

is based on errors of law. [Citation.] We also have indicated that the scope of judicial review may be somewhat greater in the case of a mandatory employment arbitration agreement that encompasses an employee's unwaivable statutory rights." (*Id.* at p. 669.) Because *Pearson*, unlike this case, involved an employee's unwaivable statutory rights, the Supreme Court "further conclude[d] that under the particular circumstances of this case, in which a clear error of law by an arbitrator means that an employee subject to a mandatory arbitration agreement will be deprived of a hearing on the merits of an unwaivable statutory employment claim, the trial court did not err in vacating the award." (*Id.* at pp. 669-670.)

2. The Remaining Challenges Are Forfeited for Failing to Raise Them in the Superior Court

Defendants also argue the arbitrator exceeded his powers by (1) basing the award in part on agreements that did not contain arbitration provisions; (2) proceeding with arbitration even though no "complaint in arbitration" had been filed; and (3) basing the award on an exhibit that was not received into evidence.

Defendants never raised these issues in the superior court. The forfeiture doctrine precludes their being raised for the first time on appeal. (*Keener v. Jeld-Wen, Inc. (*2009) 46 Cal.4th 247, 264-266 [the purpose of the forfeiture rule is to encourage parties to bring errors to the attention of the superior court "so that they may be corrected or avoided and a fair trial had"].)

Because neither party briefed the forfeiture issue, we invited supplemental letter briefs. Defendants' brief does not persuade us to consider the three discrete issues identified above.

In the superior court, defendants limited their challenge to the arbitration award to the "exceeded [his] powers" factor (§ 1286.2, subd. (a)(4)), based on an alleged failure to find an assignment of the loan to Wells Fargo. Defendants still rely on the "exceeded [his] powers" legal theory, but attempt to present new and disputed facts to support it. This they may not do.

While a defendant may object at any time to a complaint on the basis it "does not state facts sufficient to constitute a cause of action" (§ 430.80, subd. (a)), defendants' belated objection here is not to the complaint, but to the pleading Wells Fargo submitted to the arbitrator. That issue is governed by AAA's Commercial Rules, not the Code of Civil Procedure.

Moreover, the issues defendants would have this court consider are based on disputed facts. They do not present pure questions of law that otherwise may be raised for the first time on appeal. Accordingly, we decline defendants' invitation to exercise our discretion to address them now and instead deem the issues forfeited.

Defendants sum up their argument by concluding their due process rights were violated. We disagree. As noted above, Haim Revah admitted he signed the loan modification and promissory note on behalf of himself and Revah Holdings, Inc. He understood the promissory note meant "'I owe this money.'" The evidence was undisputed that defendants failed to repay the loan in full. They had the opportunity to contest Wells Fargo's claim at arbitration, but offered no defense other than the assignment issue. The arbitrator awarded Wells Fargo the unpaid balance, plus interest, attorney fees, costs, and arbitration expenses. As the Supreme Court has recognized, "the remedy an arbitrator fashions does not exceed his or her powers if it bears a rational

relationship to the underlying contract . . . and to the breach of contract found . . . by the arbitrator. The remedy fashioned by the arbitrator here was within the scope of his authority as measured by that standard." (*Advanced Micro Devices, Inc. v. Intel Corp., supra,* 9 Cal.4th at p. 367.) So it is here.

DISPOSITION

The judgment is affirmed. Wells Fargo is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

---

* Judge of the Orange Superior Court, appointed by the Chief Justice pursuant to article VI, section 6, of the California Constitution.