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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

HCR MOORPARK INVESTORS, LLC, Plaintiff and Respondent, v. NORTH PARK COMMUNITIES, LLC, et al., Defendants and Appellants.	B240046 (Los Angeles County Super. Ct. No. BS135115)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ralph A. Dau, Judge. Affirmed.

Gatzke Dillon & Ballance, Mark J. Dillon, Stephen A. Sunseri and Aarti S. Kewalramani, for North Park Communities, LLC and Forstar, LLC, Defendants and Respondents.

Nemecek & Cole, Jonathan B. Cole, Frank W. Nemecek, Michael W. Feenberg and Susan S. Baker, for Plaintiff and Respondent.

North Park Communities, LLC and Forstar, LLC appeal from the judgment confirming a $26.8 million arbitration award in favor of HCR Moorpark Investors, LLC (HCR) and denying their petition to vacate the award, which resolved the parties' disputes following a failed real estate investment transaction. North Park and Forstar contend the arbitrator exceeded his powers by failing to decide certain issues they had submitted, improperly deciding an issue that had not been submitted, failing to provide them with a fair hearing and arbitrarily remaking the parties' agreements. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Option Agreement*

In 2003 HCR and North Park, then known as Phoenix Communities LLC, entered into an option/purchase agreement for North Park to acquire from HCR approximately 1,000 acres of land in Ventura County adjacent to the City of Moorpark. Forstar agreed to guaranty certain of North Park's obligations under the option agreement. HCR and Phoenix negotiated a first amendment to their agreement effective January 1, 2005, and HCR and North Park agreed to a second amendment on August 10, 2005. The parties' agreement provided for arbitration of any dispute or claim in law or equity in accordance with the commercial rules of the American Arbitration Association.

The voters of the City of Moorpark rejected North Park's proposed residential and commercial development of the HCR property at a special election on February 28, 2006. North Park sent HCR written notice of its voluntary termination of the option agreement on March 15, 2006. Notwithstanding that notice, North Park contended the option agreement had terminated automatically (that is, by its own terms) on March 30, 2006, 30 days after the defeat of its proposal at the February 28, 2006 election. HCR asserted North Park had continuing obligations under the option agreement and breached those obligations by failing to make certain contractual payments. North Park denied any payments were due.

2. *The Arbitration Proceedings*

HCR and North Park submitted their dispute to arbitration. After several other arbitrators selected by the parties had been recused, Alexander H. Williams III, a retired judge of the Los Angeles Superior Court, was appointed as the arbitrator in December 2009. HCR and North Park agreed to bifurcate the proceedings with the issue of North Park's liability under the option agreement and its amendments determined first. All issues of damages were excluded.

The arbitrator determined extrinsic evidence was not necessary to interpret the parties' option agreement. Accordingly, the hearing held on phase one on January 28, 2011, was limited to submission of written briefs and oral argument of counsel. HCR contended North Park's notice of voluntary termination, which it submitted on March 15, 2006, had an effective date of April 1, 2006 and was not operative unless North Park made all payments due through that date; North Park failed to make deferred payments due on March 31, 2006 ($500,000) and April 1, 2006 ($150,000) and separately failed to make a payment due under the agreement on March 30, 2006 (approximately $1.9 million); because North Park's attempted voluntary termination of the option agreement was not effective, it remained fully obligated under the parties' agreement. North Park responded, because the agreement automatically terminated on March 30, 2006 under section 5.0 of the second amendment to the option agreement, there was no voluntary termination and it had no responsibility for any of the payment obligations relating to a voluntary termination.

On February 25, 2011 the arbitrator issued an interim award on the liability issues in favor of HCR. The arbitrator agreed with HCR that the "entitlement cut-off date," triggered by the voters' rejection of the development proposal for the HCR property, did not terminate North Park's payment obligations under the option agreement, which had been deferred to a later date by the parties' amendments to their agreement. Rather, the separate voluntary termination provision permitted North Park to limit (but not entirely eliminate) those obligations. "Respondent [North Park] breached the Option Agreement

and Amendments by failing to make these payments. Moreover, Respondent, in choosing not to perfect a Voluntary Termination, forfeited an opportunity to limit some (but not all) of its contractual future payment obligations."

On March 28, 2011 counsel for HCR wrote counsel for North Park to "delineate HCR's damages against North Park, including those that are guaranteed by Forstar." HCR emphasized that, in its view, under the liability award "North Park is liable for **all** payment obligations set forth in the Option Agreement and Second Amendment." Specifically, HCR claimed it was entitled to the principal sum of $1,935,563.91 due on March 30, 2006, known as the Curci interest savings payment—one of the three items HCR had identified in the liability phase—plus interest at an annual rate of 12 percent ($1,161,974.90 as of March 30, 2011). In addition, because North Park had failed to perfect a voluntary termination under the parties' agreement, HCR's letter identified a "second additional payment" of $1,138,230 due March 30, 2006 and seven "price adjustments" due on January 4, 2005, April 5, 2005, July 5, 2005, October 5, 2005, January 5, 2006, April 5, 2006 and June 5, 2006, totaling $8.68 million, plus 12 percent interest on all of those obligations from the date each was allegedly due. Finally, HCR indicated it was seeking a termination payment of $6 million "[u]nless you can provide us with a reason it is not due, under section 2.5 of the Option Agreement." The total amount HCR claimed North Park owed as of March 30, 2011 was $24,078,945.72 (with Forstar jointly and severally liable to HCR in the sum of $21,005,151.81), plus attorney fees and costs.[1] HCR invited North Park to informally request, without the need for discovery, any information or documents it needed to analyze HCR's damages.

North Park objected to HCR's greatly expanded damage demand, arguing HCR had waived its new claims by failing to identify them earlier and should be precluded from asserting them after the liability phase of the arbitration proceedings had closed. In

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[1] HCR apparently abandoned its damage claim as to two of the nonpayments—one due on March 31, 2006 ($500,000); the second on April 1, 2006 ($150,000)—that had been found to be breaches by North Park in the liability phase of the arbitration.

addition, as to the $6 million termination payment, North Park stressed that HCR had admitted in verified discovery responses that it was not owed, creating a particularly compelling case for estoppel. HCR responded it had consistently asserted it would seek damages for all payments that had not been made when due because North Park had failed to effect a voluntary termination of the option agreement.

The parties submitted briefs on the issue of damages, and the arbitration hearing on that issue was conducted on June 20, 2011. At North Park's request the arbitrator permitted supplemental, post-hearing briefing. The arbitrator then proposed reopening the hearing to again address the scope of HCR's damages request. In an email sent on Sunday evening, July 17, 2011, the arbitrator stated he had become "concerned about one central issue" while working on the award and felt strongly "further analysis/discussion/ briefing/argument" may be required on "[t]he issue whether the damages being sought are supported by the prayer and the findings in the liability phase." Both sides consented, and a further telephonic hearing was conducted on July 26, 2011. As reported in the arbitrator's final award, "At the hearing, the Arbitrator invited further argument on the topic of damages. After brief discussion, both sides indicated a willingness to do whatever the Arbitrator requested in the way of argument, but eventually took the position that no further evidence or argument was needed. Specifically, counsel for Respondents [North Park and Forstar] argued that his side went 'all in' in their opposition brief and that they were ready for the matter to be decided." The matter was once again closed on July 26, 2011.

On August 25, 2011 the arbitrator issued an interim award on the damages phase in excess of $16 million, plus interest, in favor of HCR. At the outset, with respect to HCR's expanded damages claim the arbitrator observed, "[t]his is an important due process issue," and explained, "the downstream failures to pay that are being presented for the first time as damages could have, and in the view of the Arbitrator, should have been asserted as breaches in the liability phase. [Citation.] However, the question of whether the failure to do so is fatal to the damages claims is more problematic. The issue

presented is one of due process: did [North Park and Forstar] have fair notice of, and opportunity to defend against, the scope and scale of damages that [HCR] is seeking in Phase Two?" After reviewing the pleadings and arguments previously presented, the arbitrator concluded, "although the 'claim' was vague at the start, as the arbitration process went forward it became clearer that the three alleged non-payments in March and April, 2006, asserted as breaches of the contract, were not all that [HCR] was seeking as damages. By the end of the hearing on liability, the Arbitrator and [North Park and Forstar] were on notice that [HCR] was asserting that these non-payments meant that there was no Voluntary Termination (and no other termination) of [North Park's] liabilities for subsequent payments under the Option Agreement and its amendments. This determination is bolstered by the fact that both parties were and are sophisticated businessmen who negotiated complicated contractual provisions and have employed eminent counsel to assist in their interpretation." The arbitrator concluded North Park not only had fair notice of HCR's full damage claims but also had more than adequate opportunity to defend against those claims.

As to the $6 million termination payment HCR had disclaimed in its discovery response, the arbitrator reasoned, "as a matter of contract interpretation, the Termination Payment is due. It would not be unlawful to impose this obligation on [North Park] in this Damages Phase. But would it be unfair?" The arbitrator answered his own question by concluding North Park's repudiation of its obligations under the option agreement was both unlawful and unfair. Accordingly, "[n]ot to hold [North Park and Forstar] to their full obligations at this point would also be unfair."

North Park moved to modify the damage award, identifying what it argued where serious computational errors resulting in a miscalculation of HCR's damages by nearly $14 million. North Park also asserted the award omitted material facts regarding the due process issue: North Park had consented to reopening the damages hearing because the arbitrator's July 17, 2011 email stated the arbitrator had questions about the scope of HCR's damage request. Yet at the telephonic hearing, he asked no questions. North Park

then argued, "With this correction, the record does not support the Arbitrator's conclusion that [North Park and Forstar] had fair notice of the scope of [HCR's] asserted damages and fair opportunity to defend against them." After briefing by both sides, the motion was heard on October 18, 2011. The arbitrator made several minor typographical corrections but otherwise denied the motion.

HCR moved for fees and costs and an updated award of interest. A further hearing was conducted on November 21, 2011 after additional briefing. On December 5, 2011 the arbitrator issued his final award, which in addition to the aggregate $16 million principal due, included nearly $10 million in interest, and $862,502.20 in fees and costs.

3. *Proceedings in the Trial Court*

HCR petitioned to confirm the arbitration award. North Park and Forstar filed a cross-petition to vacate the award under Code of Civil Procedure section 1286.2, subdivision (a),[2] on the grounds the arbitrator exceeded his powers and the award was procured by fraud or other undue means. Specifically, North Park and Forstar contended the arbitrator exceed his powers by deciding the unsubmitted issue of due process and failing to decide the submitted issues of waiver and estoppel. They also argued it was extrinsic fraud or other "undue means" to decide the unsubmitted due process issue and to reopen the damages hearing based on "concern" about a "central issue" without mentioning the due process issue.

The court heard both petitions on February 5, 2012. The court granted the petition to confirm the award, denied the petition to vacate it and entered a judgment confirming the award on March 1, 2012 (amended on March 5, 2012). North Park and Forstar filed a timely notice of appeal.

CONTENTIONS

North Park and Forstar contend the arbitrator exceeded his powers by raising and deciding the unsubmitted due process issue in place of the submitted issues of waiver and

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[2] Statutory references are to the Code of Civil Procedure.

estoppel, the award in favor of HCR was procured by extrinsic fraud or undue means because the damages hearing was reopened to address specific questions that were never provided to the parties and then decided on an unsubmitted ground, the arbitrator failed to decide other questions submitted and necessary to determine the entire controversy and the arbitrator exceeded his powers by remaking the parties' agreement.

DISCUSSION

1. *Grounds for Vacating an Arbitration Award and Standard of Review*

When parties agree to private arbitration, the scope of judicial review is strictly limited to give effect to the parties' intent "to bypass the judicial system and thus avoid potential delays at the trial and appellate levels . . . ." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10 (*Moncharsh*).) Generally, a court may not review the merits of the controversy between the parties, the validity of the arbitrator's reasoning or the sufficiency of the evidence supporting the arbitration award. (*Ibid.*) "'[I]t is within the power of the arbitrator to make a mistake either legally or factually. When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like judges, are fallible.'" (*Id.* at p. 12; accord, *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1340 (*Cable Connection*) ["the California Legislature 'adopt[ed] the position taken in case law . . . that is, "that 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"'"].)

Judicial review of an arbitration award is limited to "circumstances involving serious problems with the award itself, or with the fairness of the arbitration process." (*Moncharsh*, *supra*, 3 Cal.4th at p. 12.) The only grounds on which a court may vacate an award are enumerated in section 1286.2, subdivision (a).[3] "[C]ourts are authorized to

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[3] Section 1286.2, subdivision (a), provides, "[T]he 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

vacate an award if it was (1) procured by corruption, fraud, or undue means; (2) issued by corrupt arbitrators; (3) affected by prejudicial misconduct on the part of the arbitrators; or (4) in excess of the arbitrators' powers." (*Cable Connection, supra*, 44 Cal.4th at p. 1344.) "There is a presumption favoring the validity of the award, and [the party challenging the award] bears the burden of establishing [a] claim of invalidity." (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 923.)

We review de novo a trial court's order confirming an arbitration award, including a determination whether the arbitrator exceeded his or her powers in granting relief and thus whether the award should have been vacated on that basis. (*Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 55; *Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1365 ["whether the award was made in excess of the arbitrators' contractual powers" is a question of law], disapproved on another ground in *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 382, fn. 6; see *Kahn v. Chetcuti* (2002) 101 Cal.App.4th 61, 65.) However, to the extent the superior court's decision to grant the petition to confirm and deny the petition to vacate the award rests on its determination of disputed factual issues, we review the court's orders under the substantial evidence standard. (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1217; *Malek*, at pp. 55-56.)

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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. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives."

2. *The Arbitrator Did Not Exceed His Powers in Making the Damages Award*

As the arbitrator expressly recognized in both his interim damages award and final award, North Park's principal objection to HCR's claim for damages was that all but one of the items had been omitted from HCR's theories of liability tried in the initial phase of the arbitration proceeding. North Park insisted HCR's damages were limited to the breach issues litigated in phase one and HCR was estopped to assert and/or had waived the right to claim those additional items of damage. Confronting this basic issue head-on, the arbitrator addressed at length in his awards the proper scope of damages and their relationship to HCR's theories of liability and his own findings in phase one of the arbitration proceedings. Nonetheless, in the trial court and again on appeal North Park contends the arbitrator exceeded his powers by substituting and deciding his own question of due process, rather than resolving the estoppel[4] and waiver issues it had presented.

North Park's argument, although phrased in terms found in section 1286.2, subdivision (4), is in reality a quarrel with the arbitrator's reasoning and conclusion—improper grounds for reversing the trial court's order affirming the award. North Park consistently asserted, as stated in the first heading in the argument section of its June 7, 2011 brief in opposition to HCR's letter brief on phase two damages, "HCR is prohibited from raising (and seeking damages for) claims not adjudicated in the liability phase." The arbitrator responded directly to that argument and rejected it.

To be sure, evaluating the technical applicability of the equitable defenses proffered by North Park differs slightly from due process analysis, but in this case the fundamental thrust is the same. Judicial estoppel precludes a party from gaining an advantage by successfully taking one position in a judicial proceeding and then taking a contrary position in a subsequent proceeding when the first position was not the result of

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[4] When addressing "estoppel" in its briefs in this court, North Park at some points cites and discusses cases relating to the concept of judicial estoppel and at other times cases involving equitable estoppel without distinguishing between the two distinct doctrines.

ignorance, fraud or mistake. (See *People v. Castillo* (2010) 49 Cal.4th 145, 155 [doctrine of judicial estoppel applies when "'"(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud or mistake"'"]; *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987 [same]; see also *Tiffin Motorhomes, Inc. v. Superior Court* (2011) 202 Cal.App.4th 24, 32 ["the principle of judicial estoppel does not apply to a party who merely *advocates* inconsistent positions, but only to one who *successfully* asserts one position and later attempts to benefit from asserting an inconsistent position"].)

Equitable estoppel, in contrast, requires "a representation or concealment of material facts; (b) made with knowledge, actual or virtual, of the facts; (c) to a party ignorant, actually and permissibly, of the truth; (d) with the intention, actual or virtual, that the ignorant party act on it; and (e) that party was induced to act on it. [Citation.] There can be no estoppel if one of these elements is missing." (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 584.) Finally, "'a waiver is the intentional relinquishment of a known right.'" (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 211; accord, *Neubauer v. Goldfarb* (2003) 108 Cal.App.4th 47, 57 [waiver requires "the knowing and intelligent relinquishment of a right"].)

North Park's defenses, however phrased, raised the issue whether HCR's specific claims regarding North Park's breach of contract in the liability phase precluded it from subsequently seeking to recover additional damages under the option agreement—because it had knowingly abandoned those new theories of damages (waiver), had misrepresented the nature of its claims and caused North Park to rely to its detriment on that misrepresentation (equitable estoppel) or had successfully asserted a limited theory of liability in phase one and then presented an inconsistent damages theory in phase two (judicial estoppel). In responding with a "due process" analysis—did North Park have

adequate notice of the nature of HCR's damages claims and a fair opportunity to respond to those claims—the arbitrator addressed and rejected each of the possible bases for these defenses.

As discussed, after closely examining the positions taken in various filings prior to the phase one interim award on liability, the arbitrator concluded HCR's position "became clearer" that the three nonpayments in March and April 2006 asserted as breaches of contract were not the only damage items HCR would be seeking. Moreover, by the end of the hearing on liability, both he and North Park were on notice that HCR asserted North Park remained liable for all remaining payments under the option agreement because there had been no voluntary termination. Neither the arbitrator nor North Park was misled, an essential element of estoppel (whether judicial or equitable); the arbitrator's finding of adequate notice precludes the defense of waiver. Finally, as to the $6 million termination payment, although HCR had stated in an earlier discovery response it was not claiming it was entitled to that payment, the arbitrator concluded it would be unfair to preclude HCR from seeking it. It certainly would have been reasonable for the arbitrator to hold HCR to its initial position; the contrary conclusion, however, based on equitable principles of fundamental fairness, was well within his powers. (See generally *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 388 ["parties who submit their disputes to arbitration '"'may expect not only to reap the advantages that flow from the use of that nontechnical, summary procedure, but also to find themselves bound by an award reached by paths neither marked nor traceable and not subject to judicial review'"'"]; *Hacienda Hotel v. Culinary Workers Union* (1985) 175 Cal.App.3d 1127, 1133, fn. 3 ["'[a]rbitrators may apply both legal and equitable principles in deciding the ultimate issue submitted to them [citation], and unless specifically required to act in conformity with rules of law may base their decision upon broad principles of justice and equity [citation]'"].) Although North Park disagrees with the arbitrator, it is disingenuous to contend he decided an issue that had not been

submitted to arbitration or failed to resolve an issue that was submitted and was essential to the award he made.

North Park's reliance on *Delta Lines, Inc. v. International Brotherhood of Teamsters* (1977) 66 Cal.App.3d 960 and *Pacific Crown Distributors v. Brotherhood of Teamsters* (1986) 183 Cal.App.3d 1138 (*Pacific Crown*) to support its argument the arbitrator exceeded his powers is entirely misplaced. In *Delta Lines* the parties had expressly limited the issue submitted for arbitration to whether the company had just cause under the terms of a collective bargaining agreement to discharge a former employee—a driver who was found in a hotel room in a comatose condition from which he could not be aroused at approximately the time he was required to report for work. (*Delta Lines*, at pp. 963-964.) Without reaching that issue, the arbitrator ordered the former employee reinstated because, in responding to the situation, his employer had summoned the police, who arrested the former employee on drug charges, thereby, in the view of the arbitrator, violating the former employee's right of privacy. (*Id*. at pp. 966-967.) The Court of Appeal, reversing the trial court order confirming the award, held the arbitrator's award must be vacated because the award exceeded his powers: "[I]nstead of determining the single issue that he was called upon to resolve, the arbitrator decided an issue that was entirely outside the scope of the submission agreement. Indeed, from the face of the arbitration proceeding the only reasonable conclusion is that the arbitrator would have found that there was just cause for the discharge if he had decided that issue." (*Id*. at p. 969.)

Similarly, in *Pacific Crown*, *supra*, 183 Cal.App.3d 1138 the only issues to be decided by the arbitrator were whether the discharge of a former employee based on his record of absenteeism was in accordance with the governing collective bargaining agreement and, if not, what the proper remedy was. (*Id*. at p. 1144.) The arbitrator found the discharge was proper under the agreement. (*Ibid*.) However, the arbitrator also found the employer had violated a different provision of the collective bargaining agreement (section 9.2(1)) that permitted an employee to remain on the job until the grievance

procedure had been completed; she awarded the employee back pay. (*Id.* at pp. 1142-1143.) The Court of Appeal agreed with the trial court the back pay award must be vacated as exceeding the arbitrator's powers: The question of remedy was to be addressed only if the discharge was not in accord with the governing agreement; a potential violation of section 9.2(1) was not submitted for decision by the arbitrator, and consideration of that provision was not necessary for disposition of the issue submitted. (*Id*. at p. 1145.)

Here, the issues submitted to the arbitrator in phase two were the amount of damages suffered by HCR as a result of North Park's breach of the option agreement, as determined in the liability phase of the proceedings, and the propriety of HCR asserting damages claims based on alleged breaches (nonpayments) that had not been raised in that first phase. Notwithstanding the arbitrator's election to evaluate HCR's expanded damages claims in the language of due process rather than estoppel or waiver, his award was not based on an issue that had not been submitted for decision; and he did not fail to decide any significant issue that had been submitted. The final award did not exceed the arbitrator's powers.

3. *The Award Was Not Procured by Extrinsic Fraud or Undue Means*

"Extrinsic fraud" in the context of an arbitration decision includes conduct that deprives one of the parties of "'a fair and impartial hearing to their substantial prejudice.'" (*Pacific Crown, supra*, 183 Cal.App.3d at p. 1147; see *Comerica Bank v. Howsam* (2012) 208 Cal.App.4th 790, 825 ["Fraud, as that term is used in section 1286.2, subdivision (a)(1), is that perpetrated by the arbitrator or a party. Only extrinsic fraud which denies a party a fair hearing may serve as a basis for vacating an award."].) By deciding the case on unsubmitted due process grounds, North Park argues, the arbitrator committed extrinsic fraud. However, as just discussed, whether equitable considerations precluded HCR from asserting its expanded damages claims was expressly submitted for decision; and the arbitrator's evaluation of that issue in terms of adequacy of notice and a fair opportunity to respond did not in any way prejudice North Park.

North Park also contends the arbitrator committed extrinsic fraud by obtaining its consent to reopen the hearing under false pretenses. That is, North Park complains the arbitrator asked the parties to participate in a telephone conference to help him resolve his concern whether HCR's damages were supported by the prayer and the findings in the liability phase, but then never indicated he was evaluating that issue under the rubric of "due process," rather than waiver and estoppel. According to North Park, "If the Arbitrator had timely raised his due process questions, Appellants would have argued and briefed those questions prior to a final decision." In effect, North Park accuses the arbitrator of holding a further hearing at which nothing happened. While that may be true—without further guidance from the arbitrator both parties ultimately agreed they had nothing further to present regarding the scope of damages being sought by HCR—because the arbitrator did not determine an unsubmitted issue, this nonevent did not prejudice North Park and cannot constitute extrinsic fraud.

4. *The Arbitrator Did Not Fail To Decide Issues Necessary To Resolve the Controversy Between the Parties*

The failure to determine all issues necessary to resolve the dispute submitted as required by section 1283.4[5] is a ground for vacating an arbitration award under section 1286.2, subdivision (a), as an act in excess of the arbitrator's jurisdiction. (See *Mossman v. City of Oakdale* (2009) 170 Cal.App.4th 83, 88; *Cothron v. Interinsurance Exchange* (1980) 103 Cal.App.3d 853, 859-860; *Banks v. Milwaukee Ins. Co*. (1966) 247 Cal.App.2d 34, 38-39.) "Such failure to find does not refer to a factual finding accompanying the award; it refers to the determination of each issue that is necessary for the ultimate decision of the arbitrator." (*Cothron*, at p. 859.) "An award is valid if it settles the entire controversy and there is no general rule that an arbitrator must either find facts [citations], detail the process by which the result was reached [citation] or give

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[5] Code of Civil Procedure section 1283.4 provides, "The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy."

reasons behind the award. [Citation.] It is not the finding on issues that is required; it is the determination thereof when 'necessary in order to determine the controversy.'" (*Id*. at p. 860.)

In addition to its overarching defense of waiver/estoppel, North Park contested HCR's damages claims on a variety of bases, arguing, for example, allowing certain damages would result in a double recovery, other damages had not yet accrued and the parties' second amendment to the option agreement limited HCR's damages recovery. North Park asserts the final award should have been vacated by the trial court because the arbitrator never resolved these issues. It is, however, "for the arbitrator to determine which issues are actually 'necessary' to the ultimate decision." (*City of Oakland v. United Public Employees* (1986) 179 Cal.App.3d 356, 365, citing *Morris v. Zuckerman* (1968) 69 Cal.2d 686, 669.) The arbitrator resolved the entire controversy between the parties—did North Park breach the option agreement and, if so, what were HCR's damages—rejecting, either expressly or by implication, North Park's various legal and factual arguments against the specific items of damage claimed. That is sufficient to insulate the award from judicial review. As North Park readily acknowledges, we may not review the validity of the arbitrator's reasoning or the sufficiency of the evidence supporting the arbitration award. (See *Moncharsh*, *supra*, 3 Cal.4th at p. 10; *O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1090 ["'an arbitrator's decision is not generally reviewable for errors of fact or law, even if the error appears on the face of the award and causes substantial injustice'"].) Yet to reverse the trial court's order confirming the award because we disagree with the arbitrator's implicit rejection of North Park's substantive arguments concerning the proper interpretation of the option agreement or the appropriate measure of damages would do just that, ignoring our obligation to indulge every intendment to give effect to the arbitration proceedings and the final award. (*O'Flaherty*, at p. 1091.)

5. *The Arbitrator Did Not Remake the Parties' Agreement*

In a final challenge to the arbitration award North Park contends the arbitrator "arbitrarily remade the parties' agreements" by substituting the word "unless" for the word "until" in the language defining one of its payment obligations.[6] North Park contends, as written, it had no obligation to make any payment until an event occurred (payment of $1.75 million on the "Curci senior note"). As "rewritten" by the arbitrator, North Park asserts, it was obligated to pay HCR whether or not the event occurred.

North Park is disputing the arbitrator's interpretation of the contract language. The arbitrator's restatement of the provision was just that, a restatement of somewhat complex language in a dense paragraph. The arbitrator did not misread the language; he certainly did not rewrite it; indeed, we do not even believe he misinterpreted it—but if he did, under *Moncharsh* and its progeny that is not a basis for reversing the trial court's order confirming the final arbitration award.

DISPOSITION

The judgment is affirmed. HCR is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J. ZELON, J.

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[6] The paragraph at issue is section 9.24 of the option agreement: "Curci has agreed to reduce the interest rate on the Curci Senior Note by Three Percent (3%) p.a. effective as of July 1, 2003. Buyer shall pay Seller an amount equal to the Three Percent (3%) p.a. interest savings (the 'Curci Interest Savings') accruing from July 1, 2003 until the date Buyer pays Curci a principal payment of One Million Seven Hundred Fifty Thousand Dollars ($1,750,000) (the 'Curci $1,750,000 Payment') on the Curci Senior Note not later than (i) the date the Curci Senior Note has been paid in full, or (ii) the Second Payment Date, whichever is first to occur. . . ." In describing North Park's obligation under this paragraph the arbitrator explained that North Park was required to pay HCR an amount equal to its 3 percent per annum interest savings on the Curci senior note, accruing from July 1, 2003, "unless the Option Holder [North Park] paid Curci a principal payment of $1,750,000."