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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BREATHE-EZ, LTD.,

Plaintiff and Respondent,

v.

NALANDA GROUP, INC. et al.,

Defendants and Appellants.

A139669

(Alameda County
Super. Ct. No. RG13678315)

I.

INTRODUCTION

This appeal follows an order and judgment confirming an arbitration award in favor of respondent Breathe-EZ, Ltd. Appellants Nalanda Group, Inc. and G.S. (Sam) Satya contend the arbitrator exceeded his authority under the controlling arbitration agreement because he committed legal error, and based the award on a legal conclusion that differed from that previously made by the superior court during the course of the litigation. We affirm.

II.

PROCEDURAL AND FACTUAL BACKGROUNDS

Appellants are the successor licensees to a 1986 license agreement originally entered into between respondent and appellants' predecessor Autosense Corporation (Autosense) (the License Agreement). The license related to the development and sales of an ignition interlock device installed in vehicles to prevent intoxicated drivers from starting their vehicles. Among other things, the License Agreement required appellants

to make an annual accounting to respondent, and to calculate and pay quarterly royalties to respondent. Apparently, no disputes arose concerning the royalty payments through 2006.

The record on appeal begins chronologically with an order entered on August 4, 2005, in Alameda County Superior Court Case No. RG05214955, by then-superior court Judge James Richman compelling arbitration in connection with the wind-down of Autosense's business, including a determination of whether any royalties were then due and owing. The arbitration was ordered consolidated with another pending arbitration proceeding in Case No. RG05218477.

The consolidated arbitration resulted in three confirming orders by the superior court. The first, entered by Judge Winifred Smith, was filed on January 29, 2007, and was titled "Interim Arbitration Award Phase I." The second was entered by Judge Frank Roesch on August 20, 2008, and was titled "Arbitration Award II." Judge Roesch's order required the parties, among other things, to pay the appointed accountant, Berger Lewis Accountancy Corporation (Berger Lewis), and to pay all royalties due and owing for 2007, and thereafter. A further stipulated order was entered by Judge Roesch on November 24, 2009, requiring appellant to pay due and owing royalties for 2006 and 2007, and to provide for regular accountings by appellants relating to future revenues from the ignition interlock device.

Several months later, respondent applied for an order to show cause re contempt against appellants in Case No. RG05214955, alleging that they had failed to comply with the three extant orders referenced above. That petition resulted in a further order to show cause by Judge Roesch, who, after arraigning appellants, referred the matter to then-Judge Paul Fogel for trial on the contempt charges.

Judge Fogel conducted a trial on May 27, 28, and November 15, 2010. There were seven counts of contempt specified, one of which was duplicative, and dismissed. As to the remaining six counts, Judge Fogel filed a 27-page order on January 21, 2011. The most pertinent of these, Count Six, related to appellants' alleged failure to account to respondent for revenues earned by appellants' sublicensees, as agreed in Judge Roesch's

stipulated order. As to Count Six, Judge Fogel described the controversy in this way: “[Respondent] claims that both of these orders and the License Agreement required [appellants] to report royalties for its sublicensees. ([Respondent] clarified at the January 3 hearing that this Count involves solely the failure to provide accountings (as opposed to pay royalties) for its sublicensees. (1/3/11 RT 20:24-22:24)) [Respondent] claims that the Assignment Agreement granted it the right to such information regarding end users who were exploiting BE’s technology.

“[Appellants] counter that they have already provided all accounting information in their possession regarding potential royalty payments. They argue that the financial documents given [respondent] in late 2009 contained all gross sales information and receipts for all income [appellants] received from all sources, including sublicensees, and that [appellants] had no obligation to collect information from its sublicensees’ end users regarding whether and to what extent those users exploited the technology.

“The License Agreement, which is the source of the obligations recited in the Assignment Order and Stipulated Order, requires an accounting of [appellants’] (1) ‘gross receipts’—which includes the ‘gross sales price of all Technology-based products sold by [appellants], plus all receipts from the sublicense, transfer, or other commercial exploitation of the Technology’ [Ex. 1 ¶ (c)(1)] and (2) ‘gross sales, or of [sic] sublicense, transfer, or other fees or receipts, or of any combination of these that [appellants have] received’ [*Id.* ¶ (c)(2)]. From this, [appellants] argue that they were required to provide an accounting of only what they received from sublicensees, and not what sums sublicensees may have received from end users. They note that they receive from sublicensees an ‘up-front’ flat fee to use the technology and do not receive any information regarding, much less payment for, end users’ exploitation of the technology.”

Judge Fogel went on to conclude that appellants were not guilty of Count Six: “The Court agrees with [appellants’] interpretation of the License Agreement. And although the Agreement’s plain language supports this interpretation, if it is ambiguous

on this point, [appellants] are entitled to the benefit of the doubt. (*In re Marcus* [(2006)] 138 Cal.App.4th [1009,] 1014-1015; *In re Berry* [(1968)] 68 Cal.2d [137,] 156-157.)”¹

Following Judge Fogel’s order, the disputed issues between the parties under the License Agreement returned to arbitration before retired Judge James Trembath. Judge Trembath found that appellants had breached the License Agreement and owed respondents a total of \$318,478.41, due and owing up to July 1, 2009, as calculated in the 2007 and 2008 accounting reports of Berger Lewis. Judge Trembath also awarded respondent attorney fees and costs totaling \$88,169.88; for a total arbitration award of \$406,648.29.

A new civil action to confirm Judge Trembath’s arbitration award was filed by respondent on May 6, 2013, and assigned a new case number RG13678315. An opposition was filed by appellants, raising a number of objections to the petition, including that the arbitration award included royalties, and interest on royalties, based on income of sublicensees not earned or received by appellants. They argued that Judge Fogel’s decision in the civil contempt proceedings constituted collateral estoppel barring the award of these royalties and interest in the subsequent arbitration.

In its reply, respondent contended, among other things, that the superior court could not refuse to confirm Judge Trembath’s award because there was no legally cognizable basis for doing so under Code of Civil Procedure section 1286.2. It asserted that the award of royalties was correct and within the discretion of the arbitrator. It also argued that the royalties as calculated by Berger Lewis and set forth in its reports had

¹ Although this proceeding is referred to as a “civil contempt proceeding,” it is criminal in nature because of the potential penalties—five days in county jail or a fine of up to \$1,000 or both for each contempt. (Code Civ. Proc., § 1218, subd. (a); *In re Witherspoon* (1984) 162 Cal.App.3d 1000, 1001.) As a result, most of the constitutional protections available in a criminal case must be applied in civil contempt proceedings, including the presumption of innocence, and as most relevant here, the reasonable doubt burden of proof. (Code Civ. Proc., § 1218; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2013) §§ 9:718–9:721, pp. 9(II)–48.13 to 9(II)-48.14 (rev. #1 2013).)

been submitted to the parties some four years earlier, and appellants could not now attack those calculations in an arbitration held in 2012.

The petition to confirm the arbitration award was heard on July 9, 2013. As to the issue raised on appeal, Judge Evelio Grillo concluded: “The arbitration award cannot be challenged on the ground that the arbitrator made an error of law or [a] mistake of fact. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11-12 [*Moncharsh*].) This would also bar [appellants] from challenging the arbitration award on the ground that it was inconsistent with an interlocutory court order in a different case.”

Judgment in favor of respondents was entered for \$422,579.92,² with interest set at \$111.92 per day thereafter, and a further award of attorney fees and costs of \$11,877.45.

III.

DISCUSSION

Appellants makes two separate claims of error on appeal: (1) The initiation and litigation of the contempt proceeding in Case No. RG05214955 constituted either a waiver by respondent to have an arbitrator decide the issue of whether appellants owed royalties based on sums they did not receive from sublicensees, or constituted an amendment of the arbitration agreement to have that matter submitted to arbitration; (2) Judge Trembath exceeded his authority as arbitrator within the meaning of Code of Civil Procedure section 1286.2, subdivision (a)(4), because he was bound by the doctrines of res judicata and collateral estoppel to follow Judge Fogel’s determination that such royalties on sublicense revenues were not owed under the License Agreement.

As to appellants’ first contention, no legal authority is cited in their briefs supporting the position that the initiation of the civil contempt proceedings by respondent acted to waive any entitlement to have the sublicensee royalty issue submitted to arbitration, or that it somehow amended the arbitration clause in the License Agreement.

² This total included the full amount of Judge Trembath’s arbitration award plus accrued interest on that award up to the time judgment was entered by the superior court.

“Appellate briefs must provide argument and legal authority for the positions taken. ‘When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.’ [Citation.]” (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.) “We are not bound to develop appellants’ arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived. [Citations.]” (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830; see also *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.) Therefore, we deem this unsupported proposition advanced by appellants to be waived.

We turn, then, to appellants’ rather more ingenuous contention that Judge Trembath exceeded his authority as an arbitrator in not following Judge Fogel’s “finding” in his contempt order that appellants owed no royalties based on sublicensee revenues not actually received by appellants. We start with the proposition, generally conceded by appellants, that the arbitration clause contained in the applicable License Agreement is broad enough to encompass the issues determined by Judge Trembath. Indeed, that provision states:

“G. GENERAL PROVISIONS

“This Agreement shall be construed and interpreted according to the laws of the State of California; shall, in the event of dispute concerning *its proper performance or interpretation*, be subject to arbitration under the rules of the American Arbitration Association; . . .” (Italics added.)

There is no doubt that the matter of whether the License Agreement required appellants to pay all sums determined to be due and owing as reported in the Berger Lewis reports, including amounts from sublicensees not actually received by appellants, was a determination going to the “performance or interpretation” of the License Agreement. Accordingly, that issue fell within the arbitration clause and the concomitant authority of Judge Trembath to decide it. That being incontrovertibly so, the circumstances under which the trial court, or this court, may vacate a final arbitration

award on the ground that the arbitrator “exceeded his or her powers” are limited. Most significantly, an arbitrator does not exceed his or her powers when he or she renders a decision that is based on errors of fact or law. (*Moncharsh, supra*, 3 Cal.4th at p. 11; *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 381.) “Courts do not review arbitration awards for factual or legal errors [citation], including sufficiency of the evidence or reasoning of the arbitrator [citation].” (*Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 157, accord, *Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775-776.)

Therefore, even if Judge Trembath committed legal error by not binding himself to the finding contained in Judge Fogel’s contempt order relating to these amounts, we are constrained from reviewing it. In reaching this same conclusion, Judge Grillo did not err in confirming Judge Trembath’s arbitration award in respondent’s favor.

Moreover, although we are not compelled to reach the issue, we disagree with appellants that the doctrine of collateral estoppel required Judge Trembath to conclude that the License Agreement did not require the payment of royalties based on sums not actually received by them. The California Supreme Court set forth the elements of collateral estoppel in *Lucido v. Superior Court* (1990) 51 Cal.3d 335: “Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations].” (*Id.* at p. 341, fn. omitted.)

The issue decided by Judge Trembath was not identical to that resolved by Judge Fogel in the civil contempt proceeding, nor was it actually litigated before Judge Fogel, or necessarily decided by him. The issue in Count Six was solely the failure to provide

accountings as to the earnings of its sublicensees, as opposed to *paying royalties* for appellants' sublicensees: “[Respondent] clarified at the January 3 hearing that this Court involves *solely* the failure to provide accountings (as opposed to pay royalties) for its sublicensees. (1/3/11 RT 20:24-22:24)” (Italics added.) This limited finding led Judge Fogel to make the following equally limited ruling: “Accordingly, the Court concludes that [appellants] did not fail *to account* for the receipts of sublicensees and are not guilty of contempt on Count 6.” (Italics added.)

More importantly, collateral estoppel does not apply where the two proceedings at issue have different burdens of proof (*In re Sylvia R.* (1997) 55 Cal.App.4th 559, 563; *In re Nathaniel P.* (1989) 211 Cal.App.3d 660, 670.)

“Civil contempt proceedings are quasi criminal because of the penalties which may be imposed. (*In re Martin* (1977) 71 Cal.App.3d 472) Certain procedural safeguards extended to criminal defendants must therefore be extended to the contemnor. For example [the contemnor] is entitled to a formal hearing as a matter of right where he may call and cross-examine witnesses and introduce evidence in defense of the charge. (Code Civ. Proc., § 1217; *Sheldon v. Superior Court* (1967) 257 Cal.App.2d 541) He is entitled to a presumption of innocence. (*In re Martin, supra*, 71 Cal.App.3d at p. 480, citing *Bennett v. Superior Court* (1946) 73 Cal.App.2d 203, 224) He cannot be compelled to testify. (*In re Martin, supra*, 71 Cal.App.3d at p. 480.) And the contempt *must be proved beyond a reasonable doubt.* (*In re Coleman* (1974) 12 Cal.3d 568)” (*Farace v. Superior Court* (1983) 148 Cal.App.3d 915, 917, italics added.)

The court in *In re Nathaniel P.* held that a finding of child abuse made at a jurisdictional hearing could not be given collateral estoppel effect at a later hearing to determine whether to terminate parental rights because the finding at the jurisdictional hearing was by the preponderance of the evidence, and termination findings require clear and convincing evidence. (211 Cal.App.3d at pp. 670, 672, citing *People v. Sims* (1982) 32 Cal.3d 468, 485.) The difference in burdens was dispositive even though the court was to address the same factual question. (Accord, *Wimsatt v. Beverly Hills Weight etc.*

Internat., Inc. (1995) 32 Cal.App.4th 1511, 1523 [no collateral estoppel effect where burden was on plaintiffs in earlier proceeding and on defendant in subsequent litigation].)

Similarly here, the contempt proceeding before Judge Fogel required respondent to prove each element of contempt against appellants by proof beyond a reasonable doubt. On the other hand, the arbitration involved “[c]ontroversies existing between [appellants and respondent] in accordance with the provisions of the [License Agreement] and royalties due thereunder.” It hardly needs saying that the burden of proof in such civil contract actions involves a lower standard—by a preponderance of evidence. (Evid. Code, § 115; *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 483 [“ [i]ssues of fact in civil cases are determined by a preponderance of testimony’ ”]; CACI No. 200.)

Therefore, even if the issue of whether appellants should be held to pay (not simply to account) to respondent the full amount of royalties calculated by Berger Lewis was fully before Judge Fogel in the contempt proceeding, respondent in that instance would have been required to prove the affirmative by proof beyond a reasonable doubt, a considerably higher burden of proof than applicable to the issue facing Judge Trembath.

Finally, we note that Judge Trembath was particularly persuaded by the failure of appellants to raise any objections to the reports and calculations of Berger Lewis for approximately four years: “The issue of overdue royalties has long since been determined and this issue cannot be seriously disputed. The Arbitrator allowed additional briefing, but [appellants] chose not to do so. On April 23, 2008, the Arbitrator sent an email to Counsel stating that the back royalty calculations prepared by Berger Lewis in its December 14, 2007 report would be adopted and that the only issue was the interest calculations.”

Given this state of affairs, Judge Trembath was fully justified in treating the issue as waived by appellants. Our high court has recognized the inherent power of private arbitrators to do justice and equity when circumstances warrant it: “Moreover, [a]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly

or impliedly reject a claim that a party might successfully have asserted in a judicial action.’ [Citations.] As early as 1852, this court recognized that, ‘The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].’ [Citation.] ‘As a consequence, arbitration awards are generally immune from judicial review. “Parties who stipulate in an agreement that controversies that may arise out of it shall be settled by 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.” [Citation.]’ [Citation.]”

“Thus, both because it vindicates the intentions of the parties that the award be final, and because an arbitrator is not ordinarily constrained to decide according to the rule of law, it is the general rule that, ‘The merits of the controversy between the parties are not subject to judicial review.’ [Citations.] More specifically, courts will not review the validity of the arbitrator’s reasoning. [Citations.] Further, a court may not review the sufficiency of the evidence supporting an arbitrator’s award. [Citations.]” (*Moncharsh, supra*, 3 Cal.4th at pp. 10-11.)

These principles apply with full force and applicability to Judge Trembath’s determination that, given the long passage of time without complaint, even after invited to voice such, any objections by appellants to the royalty calculations made by Berger Lewis were waived. We certainly find no abuse of authority in so ruling.

IV.
DISPOSITION

The order confirming the arbitration award is affirmed. Costs on appeal are awarded to respondent.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.