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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

EDITIONS LIMITED WEST, INC.,

Plaintiff and Appellant,

v.

SOMERSET STUDIOS, INC., et al.,

Defendants and Respondents.

A145320

(City & County of San Francisco
Super. Ct. No. CPF-14-513835)

Plaintiff Editions Limited West, Inc. (Editions Limited) appeals from a judgment confirming an arbitration award. It contends the trial court erred by refusing to consider its petition to correct the award and by concluding that the arbitrator did not exceed her authority in declining to award attorney fees and costs to Editions Limited. We affirm the judgment.

PROCEDURAL BACKGROUND

The record before this court is extremely limited. It consists of the court’s judgment confirming an arbitration award (which is attached to the judgment), the notice of entry of judgment, the trial court’s register of actions, and the transcript of the hearing at which the court considered a motion to confirm the arbitration award. We also have, by way of an augmented record provided to us by respondents, the arbitrator’s “partial final award” and the trial court’s order granting the motion to confirm the arbitration award, upon which the judgment was based. Consequently, our review is largely confined to what appears in the court’s judgment and the arbitrator’s partial and final awards.

The final arbitration award reflects that Editions Limited engaged in an arbitration with defendants Somerset Studios, Inc. and Stephen West (collectively, Somerset Studios) in March 2014. Editions Limited is described in the arbitration award as a claimant and counterclaim respondent, whereas Somerset Studios is described as a respondent and counterclaimant. In a partial final award issued in April 2014, the arbitrator found in favor of Somerset Studios on Editions Limited's claim, and in favor of Editions Limited on Somerset Studios' counterclaim. In other words, the arbitrator rejected both the claim and the counterclaim. The partial final award reflects that the "parties' agreement provides that the prevailing party shall be entitled to its reasonable attorneys' fees and costs." The arbitrator directed each party to submit a proposed allocation of attorney fees between the claim and the counterclaim. The partial final award does not expressly state whether Editions Limited or Somerset Studios is considered the prevailing party.

The arbitrator issued a final award in June 2014 limited to the issue of attorney fees and costs. The arbitrator awarded a total of \$168,640.50 in attorney fees and \$22,291.62 in costs to counterclaimant Somerset Studios. The arbitrator declined to award attorney fees and costs to claimant Editions Limited and ordered its fees and costs to be "borne as incurred." The arbitrator explained the ruling as follows: "As [Editions Limited] provided no allocation of fees and costs between its affirmative claim, as to which it did not prevail, and [Somerset Studios'] counterclaim, as to which it did prevail, the Arbitrator is unable to make an award of fees and costs to [Editions Limited]. The Arbitrator considered [Editions Limited's] argument that the claim and counterclaim involved 'a common core of facts' or were 'based on related legal theories,' such that time spent on the claims was 'so inextricably intertwined that it would be impracticable or impossible' to make an allocation, but found that argument unpersuasive." The final award makes no reference to a prevailing party other than noting that Editions Limited did not prevail on its claim but did prevail on the counterclaim.

As reflected in the register of actions, in August 2014 Editions Limited filed a petition in the trial court seeking to confirm the arbitration award. Editions Limited

contends the register of actions is incorrect and that it actually filed a petition to *correct* the arbitration award. The register of actions also reflects that, in September 2014, Somerset Studios filed a petition to confirm the arbitration award as well as a response opposing Editions Limited's petition to correct the arbitration award. There is nothing in the record to indicate that Editions Limited filed any opposition to Somerset Studios' petition to confirm the arbitration award. The record on appeal does not include either of the competing petitions or any other briefs submitted to the trial court.

The court heard the competing motions on January 26, 2015. In a tentative ruling, the court granted Somerset Studios' motion to confirm the arbitration award because "no opposition was filed" and because there were no grounds to correct or vacate the award. The court tentatively denied the motion to correct and first noted that the motion was "not properly before the Court." The court also rejected the assertions made in the motion to correct, observing that "arbitrators do not exceed their powers by denying the party's request for fees, even where such a denial would be reversible error if made by a court in civil litigation." At the conclusion of argument, the court adopted its tentative rulings. The court entered an order that same day granting the motion to confirm the arbitration award.

The trial court entered judgment in favor of Somerset Studios in April 2015. The court adopted the arbitrator's final award as the judgment and awarded Somerset Studios the sum of \$190,932.12, representing the fees and costs awarded by the arbitrator, together with statutory pre- and post-judgment interest accruing from the date of the arbitrator's June 2014 final award. Editions Limited appealed the court's judgment.

DISCUSSION

1. *Dismissal of Petition to Correct Arbitration Award*

Editions Limited first argues that the court erred by dismissing its petition to correct the arbitration award. The court stated that Editions Limited's petition was not properly before it, but Editions Limited claims the petition was timely filed within 100

days after service of the arbitration award, in compliance with Code of Civil Procedure section 1288.¹

The problem with Editions Limited’s argument is that we lack a record sufficient to assess its claim. The record on appeal does not include a copy of its petition or, for that matter, any pleadings filed by the parties. Because the record does not include a copy of the petition, we cannot say whether it is adequate on its face to meet the requirements of section 1288. Further, because we do not have a copy of Somerset Studios’ opposition papers, we do not know the grounds on which it may have urged the trial court to dismiss the petition. Among other things, it is possible that Editions Limited failed to properly serve the petition. (See *Abers v. Rohrs* (2013) 217 Cal.App.4th 1199, 1202–1203 [petition to vacate properly dismissed even when filed within 100 days of service of award because service was improper].) All we know from the register of actions is that Editions Limited filed *something* within the 100-day time limit specified by section 1288. However, in the absence of a proper record we are in no position to assess whether the trial court erred in concluding that the petition was not properly before it.

On appeal, we presume the judgment to be correct and indulge all intendments and presumptions to support it regarding matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; accord, *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1415.) It is the appellant’s burden to overcome the presumption of correctness by providing an adequate record that affirmatively demonstrates error. (See *Defend Bayview Hunters Point Com. v. City and County of San Francisco* (2008) 167 Cal.App.4th 846, 859–860.) Inadequacy of the record may warrant dismissal of an appeal. (*In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498; *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 463 [“Where the appellant fails to provide the reviewing court with a record enabling it to review and correct alleged errors, the appeal will be dismissed.”].)

¹Further statutory references are to the Code of Civil Procedure unless otherwise specified.

Here, the record is inadequate to assess Editions Limited's claim that its petition complied with section 1288 and was properly before the court. We are thus compelled to reject Editions Limited's argument in the absence of a sufficient record.

2. *Claim that Arbitrator Exceeded Authority*

Editions Limited next contends the arbitrator exceeded her authority by refusing to award attorney fees and costs to Editions Limited as the prevailing party on the counterclaim asserted by Somerset Studios.² For the reasons that follow, we agree with the trial court that the issue is beyond the limited scope of judicial review of an arbitration award.

Section 1286.6, subdivision (b) authorizes a court to correct an arbitration award if the court determines that “[t]he arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted” Our power to correct an award is limited. “We do not review the merits of the dispute, the sufficiency of the evidence, or the arbitrator’s reasoning, nor may we correct or review an award because of an arbitrator’s legal or factual error, even if it appears on the award’s face.” (*Roehl v. Ritchie* (2007) 147 Cal.App.4th 338, 347.)

In the companion cases of *Moore v. First Bank of San Luis Obispo* (2000) 22 Cal.4th 782 (*Moore*) and *Moshonov v. Walsh* (2000) 22 Cal.4th 771 (*Moshonov*), our Supreme Court considered whether an “arbitration award may be judicially corrected to award a party attorney fees the arbitrator declined to provide.” (*Moore, supra*, 22 Cal.4th at p. 784.) In *Moore*, the arbitrators effectively awarded the plaintiffs all the relief they sought but did not make an express finding as to whether one party prevailed. The arbitrators directed each party to bear its own attorney fees. (*Ibid.*) The plaintiffs sought to correct the award to include attorney fees, claiming that they were entitled to fees as the prevailing parties under the contract. The Supreme Court upheld the decisions of

²This issue was raised by Editions Limited at the hearing where the court considered Somerset Studios’ motion to confirm the arbitration award. Consequently, although Editions Limited’s petition to correct may not have properly been before the court, and despite Editions Limited’s failure to file a written opposition to Somerset Studios’ motion to confirm, we will address the issue as if it is properly before us.

lower courts to deny the plaintiffs’ motion to correct, holding that “[w]here the entitlement of a party to attorney fees under Civil Code section 1717 is within the scope of the issues submitted for binding arbitration, the arbitrators do not ‘exceed[] their powers’ (§§ 1286.2, subd. (d), 1286.6, subd. (b)), as we have understood that narrow limitation on arbitral finality, by denying the party’s request for fees, *even where such a denial order would be reversible legal error if made by a court in civil litigation.*” (*Ibid.*, italics added.)

In *Moshonov*, *supra*, 22 Cal.4th at page 775, an arbitrator declined to award attorney fees to prevailing parties because the arbitrator reasoned that the attorney fee provision in the parties’ agreement was not broad enough to encompass the tort causes of action pleaded by the prevailing parties. The Supreme Court concluded the award was not subject to correction because the arbitrator based her decision on an interpretation of the contractual fees clause, and “such an interpretation could amount, at most, to an error of law on a submitted issue, which we have held is not in excess of the arbitrator’s powers” (*Id.* at p. 779.) According to the court, “[r]egardless of whether the arbitrator’s contractual interpretation and related ruling denying fees was legally correct, it was final and binding by agreement of the parties.” (*Ibid.*)

Here, just as in *Moore* and *Moshonov*, Editions Limited seeks to correct the arbitration award to include attorney fees on the ground it was a prevailing party. As an initial matter, there is some question about whether the arbitrator actually declared who prevailed on the contract. At most, the arbitrator’s decision states that Editions Limited prevailed on the counterclaim and did not prevail on its own claim. The parties to this appeal take the position that, for purposes of the contractual attorney fees clause, the arbitrator concluded that Editions Limited was the prevailing party as to the counterclaim and Somerset Studios was the prevailing party as to Editions Limited’s claim. This result would seem to violate the rule that there can only be one prevailing party in an action on a contract, even when the action involves cross-claims. (See *Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 531, 540–541.) The party that obtains greater relief is the prevailing party entitled to attorney fees, regardless of whether

another party obtained lesser relief. (*Id.* at p. 531.) For purposes of our analysis, we will assume that the arbitrator declared both Editions Limited and Somerset Studios as prevailing parties in the action on the contract, even though such a result appears to be legally erroneous.³ Insofar as the arbitrator may have committed legal error in designating each party to the arbitration as a prevailing party in some respect, that legal error is beyond the scope of judicial review. (See *Moshonov, supra*, 22 Cal.4th at p. 779.)

Turning to the circumstances under which the arbitrator denied Editions Limited's request for fees, we conclude the arbitrator's decision was based upon her legal interpretation of the parties' attorney fees clause, just as in *Moore* and *Moshonov*. The arbitrator interpreted the clause to allow for multiple prevailing parties, and concluded that each party had the burden under the attorney fee provision to identify and allocate the fees attributable to the claims on which that party prevailed. Somerset Studios apparently complied with the arbitrator's request and performed an allocation that was accepted. As reflected in the arbitrator's final award, Editions Limited did not comply but instead took the position that it was entitled to recover *all* of its attorney fees and costs on the theory that it would be impracticable or impossible to make an allocation. In other words, Editions Limited presented the arbitrator with an "all-or-nothing" choice. The arbitrator found the argument unpersuasive and declined to award attorney fees and costs to Editions Limited. These decisions were the product of the arbitrator's interpretation of the contractual language and her consideration of Editions Limited's factual contentions. These factual and legal decisions made by the arbitrator are not subject to judicial correction even if they would constitute legal error if made by a court.⁴ (*Moore, supra*, 22 Cal.4th at p. 784.)

³We cannot say for certain whether the arbitrator erred in declaring more than one prevailing party because the record on appeal does not include the language of the attorney fee clause that presumably defines who may be considered a prevailing party.

⁴We observe that the arbitrator may have been legally required to apportion fees and that the failure to do so could be considered an abuse of discretion. (See *Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 443–444 [court erred in declining

Editions Limited contends that reliance on *Moore* and *Moshonov* is misplaced, and that the appellate court’s decision in *DiMarco v. Chaney* (1995) 31 Cal.App.4th 1809 (*DiMarco*) allows for correction of an arbitration award under the circumstances presented here. On a superficial level, *DiMarco* appears to be on point, but its holding and persuasive value are limited. In *DiMarco*, the arbitrator declared one party to be the prevailing party but declined to award attorney fees. The arbitrator believed he had the discretion to deny the request for attorney fees. (*Id.* at p. 1812.) The Court of Appeal concluded the award was subject to correction. According to the court, unlike an issue concerning the *amount* of fees and costs to be awarded, which is properly a matter for the arbitrator to decide, the arbitrator in *DiMarco* was compelled by the parties’ agreement to award reasonable attorney fees to the prevailing party and lacked discretion to do otherwise. (*Id.* at p. 1817.)

The reasoning in *DiMarco* has been criticized as inconsistent with the general rule that a legally incorrect decision by an arbitrator is immune from judicial review. (See *Safari Associates v. Superior Court* (2014) 231 Cal.App.4th 1400, 1413–1414.) Indeed, even the appellate court that decided *DiMarco* has declined to apply its reasoning in light of the Supreme Court’s “expressed ambivalence” about the case. (*Century City Medical Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 Cal.App.4th 865, 881.) While the Supreme Court in *Moore* and *Moshonov* did not expressly overrule *DiMarco*, it distinguished the facts of *DiMarco* and clarified that it was not deciding whether the reasoning in *DiMarco* was valid. (See *Moshonov, supra*, 22 Cal.4th at p. 779; *Moore, supra*, 22 Cal.4th at pp. 788–789.) In distinguishing *DiMarco*, the Supreme Court focused on the fact that the arbitrator’s refusal to award attorney fees to the prevailing party in *DiMarco* was not based upon any legal interpretation of the fees clause but was

to make any contractual fee award to prevailing party due to court’s rejection of proposed apportionment; court was required to exercise its discretion to determine reasonable fees even if it rejected proposed apportionment[.] While such legal error would likely be subject to reversal if committed by a court, it is not subject to judicial review in a challenge to an arbitrator’s decision. (*Moore, supra*, 22 Cal.4th at p. 784.)

instead based simply upon the arbitrator's belief that he had discretion to do so, in direct conflict with the terms of the parties' agreement. (*Moshonov, supra*, at p. 779.)

Insofar as *DiMarco* can be read to give a court the power to correct an arbitration award that denies an attorney fee award to a prevailing party, irrespective of the circumstances, we decline to follow its reasoning. If the arbitrator's decision is the result of a legal interpretation of the contract containing the attorney fee clause, that legal decision—whether erroneous or not—is not subject to correction by a court. (*Safari Associates v. Superior Court, supra*, 231 Cal.App.4th at p. 1413.)

Further, even assuming *DiMarco* was decided correctly on the facts of that case, the decision is distinguishable. In *DiMarco*, the arbitrator simply ignored the mandatory language of the attorney fee provision; there was no express or implied interpretation of the provision that supported the arbitrator's decision. (See *Moshonov, supra*, 22 Cal.4th at p. 779.) Here, by contrast, the arbitrator interpreted the attorney fee clause in a manner that placed the burden on the prevailing party to justify an apportionment of fees as reasonable. The arbitrator declined to award fees and costs to Editions Limited because it failed to comply with the terms of the attorney fee clause as the arbitrator interpreted it. Although Editions Limited may disagree with the arbitrator's reasoning and interpretation of the attorney fee clause, it cannot deny that the arbitrator's decision rests on a legal interpretation of that provision. (See *ibid.* [arbitrator's decision not subject to judicial review when based on *interpretation* of attorney fee clause].) Unlike in *DiMarco*, the arbitrator here did not simply choose to ignore the attorney fee provision. Rather, the arbitrator applied the provision in a manner that resulted in a denial of Editions Limited's fee request.

Accordingly, we conclude that the arbitrator's decision directing Editions Limited to bear its own costs and fees is not subject to judicial review. We affirm the decision without considering its merits.

DISPOSITION

The judgment confirming the arbitration award is affirmed. Respondents shall recover their costs on appeal.

McGuiness, P.J.

We concur:

Pollak, J.

Jenkins, J.

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