

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

AMERICAN STATE UNIVERSITY et al.,

Plaintiffs, Cross-Defendants
and Respondents,

v.

KENNETH KIEMM et al.,

Defendants, Cross-Complainants
and Appellants.

B242766

(Los Angeles County
Super. Ct. No. BC449839)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark Mooney, Judge. Affirmed.

Law Offices of Andrew K. Kim and Andrew K. Kim, for Defendants, Cross-Complainants and Appellants.

Law Offices of Benjamin Koo, Benjamin Koo and Cynthia M. Reed, for Plaintiffs, Cross-Defendants and Respondents.

I. INTRODUCTION

Defendants, Kenneth Kiemm and Jane Kiemm, appeal from a judgment confirming an arbitration award in favor of plaintiffs, American State University, Inc., GI Duck Lee, Jong Dae Lee, Angela Yi and Hee Jung Woo. We affirm.

II. BACKGROUND

Plaintiffs filed a complaint against the Kiemms and several other parties concerning the 2010 purchase of shares of stock of American State University. Plaintiffs alleged the Kiemms, as sellers, failed to perform a number of obligations required by the purchase agreement. The complaint further alleged the Kiemms violated the agreement by among other things: continuing to act as owners; operating competing universities; failing to provide documents and information; making misrepresentations; providing false documents; and converting student tuition. The complaint contained causes of action for breach of contract, slander of title, trade libel, fraud and deceit, conspiracy, conversion, and declaratory and injunctive relief. The Kiemms cross-complained against plaintiffs on various contract and misrepresentation theories as well as claims for conversion, malicious prosecution and defamation. The Kiemms also requested injunctive and declaratory relief and imposition of a constructive trust.

On May 24, 2011, the trial court granted a co-defendant's petition to compel arbitration. Prior to the arbitration hearing, which was scheduled for November 15, 2011, the Kiemms' former counsel filed a motion to be relieved as counsel in August 2011. The trial court granted counsel's motion on October 4, 2011. At a conference on October 12, 2011, the Kiemms requested a continuance of the November 15, 2011 hearing. The arbitrator denied the continuance request. The Kiemms hired new counsel two weeks before the five-day arbitration.

On December 20, 2011, the arbitrator found in plaintiffs favor on both the complaint and cross-complaint including the declaratory and injunctive relief claims.

The arbitrator awarded plaintiffs \$900,000 in compensatory damages, \$500,000 in punitive damages and \$50,000 in attorney fees.

In January 2012, the plaintiffs petitioned to confirm the arbitration award. The Kiemms responded by filing a petition to vacate the arbitration award. The Kiemms asserted the petition should be vacated on the grounds of: corruption, fraud, or other unfair means; arbitrator misconduct; refusal to postpone the hearing or hear settlement evidence; and failure to disclose a known ground for disqualification.

In opposition to the petition to confirm the arbitration award, the Kiemms reargued the merits of both their defenses to the complaint and cross-complaint. The Kiemms also made the following arguments. The award should not be confirmed because the arbitrator improperly refused to continue the November 15, 2011 arbitration hearing. The arbitrator improperly refused to respond to or hear evidence concerning attempts to finalize a settlement. The arbitrator failed to disclose a connection with plaintiffs' counsel through two Korean based bar associations. The arbitrator's admission of declarations and deposition transcripts deprived them of an opportunity to cross-examine witnesses. The admission of declarations written in the Korean language violated Evidence Code section 753. The arbitrator's punitive damages award of \$500,000 was erroneous because no evidence was presented on the Kiemms' net worth, which is only \$400,000.

On July 10, 2012, after briefing and a hearing, the trial court entered an order confirming the arbitration award and a judgment in favor of plaintiffs on July 10, 2012. The Kiemms filed a timely notice of appeal from the judgment.

III. DISCUSSION

A. Judicial Review of the Arbitration Award

Generally, judicial review of an arbitration award is limited to determining whether there are grounds to vacate or correct the award. (Code Civ. Proc., ¹ §§ 1286, 1286.2, ² 1286.6³; *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 366; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 26-28.) The general rule is that an

¹ All further statutory references are to the Code of Civil Procedure.

² Section 1286.2 provides: “(a) 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. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives. [¶] (b) Petitions to vacate an arbitration award pursuant to Section 1285 are subject to the provisions of Section 128.7.”

³ Section 1286.6 provides: “Subject to Section 1286.8, the court, unless it vacates the award pursuant to Section 1286.2, shall correct the award and confirm it as corrected if the court determines that: [¶] (a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; [¶] (b) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or [¶] (c) The award is imperfect in a matter of form, not affecting the merits of the controversy.”

arbitrator does not exceed his or her powers simply by erroneously deciding issues of law or fact. (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1184; *Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775-777.) “An arbitrator exceeds his powers when he acts without subject matter jurisdiction [citation], decides an issue that was not submitted to arbitration [citation], arbitrarily remakes the contract [citation], upholds an illegal contract [citation], issues an award that violates a well-defined public policy [citation], issues an award that violates a statutory right [citation], fashions a remedy that is not rationally related to the contract [citation], or selects a remedy not authorized by law [citation]. In other words, an arbitrator exceeds his powers when he acts in a manner not authorized by the contract or by law.” (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443; see also *Shahinian v. Cedars-Sinai Medical Center* (2011) 194 Cal.App.4th 987, 1000.)

In addition to the limited nature of review of any arbitration award, review of the judgment in this case must be based on standards applicable to the adequacy of an appellate record. The Kiemms, as the appellants, have an affirmative obligation to provide an adequate record so that we may assess whether the trial court erred. We never presume error and a presumption of correctness must be accorded to the trial court’s ruling. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 88.) ““A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent’ [Citation.]” (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712, orig. italics; see *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447.)

This court twice asked the parties to address the sufficiency of the appellate record. The first request was in regard to a missing reporter’s transcript. The second concerned numerous moving and opposition papers. In response to our letter concerning missing documents, the Kiemms filed a Supplemental Appendix with the missing documents. But, the Kiemms chose not to file a reporter’s transcript. The Kiemms’s failure to provide this court with a reporter’s transcript of the hearing on the petitions to

compel and vacate the arbitration award provides a sufficient basis to affirm the judgment. (See *Wetsel v. Garibaldi* (1958) 159 Cal.App.2d 4, 10 [order confirming arbitration award]; see also *Walker v. Superior Court* (1991) 53 Cal.3d 257, 273-274 *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [attorney fee motion hearing].)

Nonetheless, we address the Kiemms' contentions as to why the judgment confirming the arbitration award should be reversed.

The Kiemms assert the arbitrator did not consider evidence of a proposed settlement. (§ 1286.2, subd. (a)(5).) Due to the limited nature of review of arbitration awards, when a claim is made that an arbitrator refused to consider evidence, the trial court considers whether the exclusion prevented the complaining party from fairly presenting its case. (*Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 438-439.) The court should focus on whether the exclusion was prejudicial, not whether the evidence was material. (*Id.* at p. 439.) The record on appeal does not contain any basis to demonstrate prejudicial error.

The Kiemms also claim the award should be vacated because the arbitrator denied their continuance request. The party challenging the denial of a continuance request must first show the arbitrator abused its discretion upon a good cause showing. (*SWAB Financial v. E*Trade Securities* (2007) 150 Cal.App.4th 1181, 1198.) If there is an abuse of discretion, the party must then demonstrate prejudice as a result of the denial. (*SWAB Financial v. E*Trade Securities, supra*, 150 Cal.App.4th at p. 1198; *Hall v. Superior Court, supra*, 18 Cal.App.4th at pp. 438-439.) The record does not establish what, if anything, could have been or was not done because the arbitrator did not grant a continuance. The record does show that the Kiemms obtained new counsel before the arbitration. But, the record does not address whether or not new counsel was unable to present evidence because of the delay. In fact, the record is silent as to what occurred after new counsel was hired. In short, the Kiemms have not demonstrated either an abuse of discretion or prejudice.

Furthermore, with respect to the punitive damages issue, judicial review of a punitive damages award is not available in a private arbitration. (*Shahinian v. Cedars-*

Sinai Medical Center, supra, 194 Cal.App.4th at pp. 1007-1008; *Rifkind & Sterling, Inc. v. Rifkind* (1994) 28 Cal.App.4th 1282, 1291.) The rationale of this rule is that punitive damages awards in judicial proceedings are limited by the due process clause of the Fourteenth Amendment of the United States Constitution, which limits state action. (*Rifkind & Sterling, Inc. v. Rifkind, supra*, 28 Cal.App.4th at p. 1290.) But, private arbitration, which occurs by voluntary agreement, does not involve state action. *Shahinian v. Cedars-Sinai Medical Center, supra*, 194 Cal.App.4th at pp. 1007-1008; *Rifkind & Sterling, Inc. v. Rifkind, supra*, 28 Cal.App.4th at p. 1291.) Furthermore, the statutory grounds under sections 1286.2 and 1286.6 for correcting and vacating an award require appellants to demonstrate that the arbitrator exceeded his powers, which determination does not extend to sufficiency of evidence claims. (*Moncharsh v. Heily & Blase, supra*, 3 Cal.4th at pp. 6, 10-11, 28; *Rifkind & Sterling, Inc. v. Rifkind, supra*, 28 Cal.App.4th at p. 1290.) Thus, the punitive damages issue lacks merit.

Accordingly, the Kiemms have not shown any basis for setting aside the judgment confirming the arbitration award.

B. Plaintiffs' Attorney Fees Request

Plaintiffs' request an award of costs including attorney fees pursuant to section 1293.2. Section 1293.2 provides: "The court shall award costs upon any judicial proceeding under this title as provided in Chapter 6 (commencing with Section 1021) of Title 14 of Part 2 of this code." Section 1033.5, subdivision (a)(10)(A) provides that attorney fees when authorized by a contract are recoverable as costs. Section 1293.2 requires the court to award costs including attorney fees if they are authorized by contract. (*Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 707; *Carole Ring & Associates v. Nicastro* (2001) 87 Cal.App.4th 253, 260.)

Paragraph 7.7 of the Stock Purchase Agreement contains an attorney fee provision. It states: "In the event of any litigation or arbitration action as a result of a dispute involving this Agreement, the prevailing party in such action shall be entitled to

recover from the other party all reasonable attorneys' fees and court and/or arbitration fees, costs and expenses incurred by the prevailing party. Any judgment or order entered in such action shall contain a specific provision providing for the recovery of attorney fees and costs incurred in enforcing such judgment.”

Here, as the prevailing party on appeal, plaintiffs are entitled to their costs on appeal, including attorney fees, the amount of which should be determined by the trial court. (Cal. Rules of Court, rule 8.278(c); *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1267; *Corona v. Amherst Partners, supra*, 107 Cal.App.4th at p. 707.)

IV. DISPOSITION

The judgment confirming the arbitration award is affirmed. Plaintiffs are awarded their costs and attorney fees on appeal from defendants, Kenneth Kiemm and Jane Kiemm.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

O'NEILL, J.*

We concur:

TURNER, P. J.

MOSK, J.

* Judge of the Ventura County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.