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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

MARC GERSTEL et al.,

Plaintiffs and Respondents,

v.

D.R. HORTON LOS ANGELES
HOLDING COMPANY, INC.,

Defendant and Appellant.

2d Civil No. B258673
(Super. Ct. No. 56-2013-00431883-CU-
CD-VTA)
(Ventura County)

In this construction defect case, D.R. Horton Los Angeles Holding Company, Inc., appeals from a judgment confirming an arbitration award in favor of Marc Gerstel and Clarice Gerstel, respondents. Appellant contends that the arbitrator exceeded her powers in basing the award on structural defects for which respondents had failed to give notice as required by the arbitration agreement and section 910 of the Right to Repair Act. (Civ.Code, § 895 et seq.)¹ Appellant also contends that the arbitrator abused her discretion in denying its motion to postpone the arbitration hearing. Respondents filed a motion to dismiss the appeal on the ground that the parties had waived their right to appeal. We deny the motion to dismiss and affirm the judgment.

¹ "The Act was not given an official name. Other cases have referred to it as the Right to Repair Act [citations]." (*Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1223, fn. 5.)

Factual and Procedural Background

In May 2006 the parties entered into a written "Purchase Agreement and Escrow Instructions" (Purchase Agreement). Appellant agreed to sell to respondents a newly constructed residence in Oxnard (the property). The Purchase Agreement includes an arbitration agreement for disputes arising after the close of escrow. Escrow closed in September 2006.

In August 2012 respondents mailed to appellant what they considered to be a "Notice of Construction Defect Claims as required pursuant to California Civil Code § 910" (notice of claim).² Respondents stated that they were commencing "the *Civil Code* § 910-938 prelitigation process." The notice of claim alleged violations of various residential construction standards listed in section 896. It did not mention section 896, subdivision (b), hereafter 896(b), which concerns "structural issues." (*Ibid.*) Under section 897, the notice claimed that there were "[e]xcessive drywall cracks," including "[c]racking on structural beams and arches."

After receiving respondents' notice of claim, appellant inspected the property. The arbitrator found that the inspection was done "in a fairly cursory manner." In October 2012 appellant's counsel wrote a letter to respondents stating that appellant would not repair most of the alleged defects, including the excessive cracking.

Respondents filed a complaint against appellant alleging that it had violated residential construction standards as set forth in their earlier notice of claim. Respondents subsequently petitioned to stay litigation and compel arbitration of their claim. The trial court granted the petition.

In September 2013 respondents filed their claim in arbitration. In December 2013 respondents informed appellant that, after completing "extensive destructive testing and inspection," they had discovered serious structural problems on the property. Respondents provided to appellant a contractor's estimate that the cost of repairing the structural problems would be \$138,286.32.

² All statutory references are to the Civil Code unless otherwise stated.

In June 2014 the arbitrator rendered her decision. She found that "the only possible source" of the damage to the property "is defective framing workmanship, per [section] 896(b)(1)." The arbitrator awarded respondents \$132,235.40 plus investigative costs of \$32,648.09.

Respondents' Motion to Dismiss the Appeal

Respondents contend that appellant waived its right to appeal from the trial court's judgment confirming the arbitration award. An aggrieved party has a statutory right to appeal from such a judgment. (Code Civ. Proc., § 1294, subd. (d).) "It is well-settled . . . that a party *can waive* the right to appeal. [Citations.] The Courts of Appeal have held, however, that any waiver of the right to appeal must be *clear and express* Moreover, any doubt will be resolved against a waiver of the right to appeal. [Citations.]" (*Guseinov v. Burns* (2006) 145 Cal.App.4th 944, 952-953, first italics in original, second italics added.)

A provision in the Purchase Agreement purports to waive the right to appeal as to claims asserted after the close of escrow. The provision states, "BY INITIALING IN THE SPACE BELOW BUYER AND SELLER ARE GIVING UP THEIR RESPECTIVE *JUDICIAL* RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THIS PURCHASE AGREEMENT." (Bold omitted and italics added.)

This provision does not constitute a "clear and express" waiver of the right to appeal from a judgment confirming an arbitration award. The right is a statutory, not a "judicial" right. (Code Civ. Proc., § 1294, subd. (d).) Moreover, instead of being "clear and express," the provision requires a party to construe the lengthy, minutely printed Purchase Agreement to ascertain whether it "specifically" includes the right to appeal from a judgment confirming an arbitration award.

Our interpretation of the provision is supported by *Reisman v. Shahverdian* (1984) 153 Cal.App.3d 1074. There, the arbitration agreement provided, " 'No appeal or further proceedings will be possible after the arbitration award is made.' " (*Id.*, at p. 1082, italics omitted.) The court held that this language was insufficient to waive a party's statutory

right to appeal from a judgment confirming an arbitration award: "[I]t seems uncertain whether parties checking the box form for binding arbitration would understand that they were waiving 'appeal' which included review of judicial action regarding an award as distinguished from the actions of the arbitrators. Without greater specificity in the waiver agreement language, we hold it was not effective to waive rights to appeal trial court judicial action which was expressly provided for by [statute]." (*Id.*, at pp. 1088-1089.)

Pratt v. Gurse, Schneider & Co. (2000) 80 Cal.App.4th 1105, is distinguishable. There, the arbitration agreement provided that "the right to appeal from the arbitrator's award or any judgment thereby entered or any order made is expressly waived." (*Id.*, at p. 1107.) The defendants appealed from a judgment confirming an arbitration award. The court granted the plaintiff's motion to dismiss the appeal because "there has been an express waiver of the right to appeal any judgment or order." (*Id.*, at p. 1111.) In contrast to *Pratt*, no such express waiver exists here.

We reject respondents' contention that the appeal should be dismissed because it "is purely for delay and is a sham." The record and briefs do not support the contention.

*The Arbitrator Did Not Exceed Her Powers in Basing the
Award on a Violation of Section 896(b) of the Right to Repair Act*

"The powers of an arbitrator derive from, and are limited by, the agreement to arbitrate. [Citation.] . . . [T]he courts retain the ultimate authority to overturn awards as beyond the arbitrator's powers, whether for an unauthorized remedy or decision on an unsubmitted issue." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 375.) Code of Civil Procedure section 1286.2, subdivision (a)(4) provides that an arbitration award shall be vacated if "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." "On issues concerning whether the arbitrator exceeded his powers, we review the trial court's decision de novo, but we must give substantial deference to the arbitrator's own assessment of his contractual authority. [Citations.]" (*Alexander v. Blue Cross of California* (2001) 88 Cal.App.4th 1082, 1087.)

Appellant argues that the arbitrator exceeded her powers in basing the award on a violation of section 896(b), which pertains to structural issues, because respondents' "original, and only, notice of claim . . . did not contain any reference to section 896(b)." Section 910, subdivision (a) provides that, prior to filing an action for a violation of residential construction standards, the claimant must "provide written notice . . . that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896)" of the Right to Repair Act. The notice "shall describe the claim in reasonable detail sufficient to determine the nature and location, to the extent known, of the claimed violation." (*Ibid.*)

The notice of claim commences "a nonadversarial procedure . . . which, if the procedure does not resolve the dispute between the parties, may result in a subsequent action to enforce" the claimant's right to relief. (§ 914, subd. (a).) Section 8.8 of the Purchase Agreement provides: "Seller has elected to use the 'non-adversarial procedures' which are set forth in the Statute at Sections 910 through 938." If the nonadversarial procedures are unsuccessful, "disputes will be resolved through mediation and, if that is not successful, then arbitration as provided in this Purchase Agreement."

In their notice of claim, respondents said that the property had "excessive drywall cracks," including "cracking on structural beams and arches." As authority for this specific claim, respondents cited section 897, which provides, "To the extent that a function or component of a structure is not addressed by these standards [the standards in section 896], it shall be actionable if it causes damage." Appellant investigated the excessive cracking claim. In a letter dated October 24, 2012, appellant's counsel informed respondents, "No repair is being offered because the identified issue has not resulted in any damage and the homeowners failed to follow commonly accepted homeowner maintenance obligations."

The arbitrator found that, because respondents were "[u]nable to determine what system was causing the cracking," they had cited section 897 instead of section 896(b) in their notice of claim. The arbitrator stated: Appellant "made no effort to determine what was actually causing the damage, as they concluded there was no damage. They left it to

[respondents] to do destructive testing. After doing so, [respondents'] experts determined the cause of the damage was framing that did not meet the standards of Civil Code [section] 896(b)."

We reiterate that section 910, subdivision (a) provides that the notice of claim "shall describe the claim in reasonable detail sufficient to determine the nature and location, to the extent known, of the claimed violation." The arbitrator concluded that appellant's objection that "the 'correct' statutory cite [section 896(b)] was not originally given is misplaced" because "[i]t received the statutorily required notice - *sufficient to inform it of the nature and location of the complaint* - and made no effort to determine the ultimate cause." (Italics added.) The arbitrator was referring to the notice of claim's reference to "[c]racking on structural beams and arches." The arbitrator found that "the only possible source" of the damage to the property "is defective framing workmanship, per [section] 896(b)(1)," which provides, "Foundations, load bearing components [e.g., structural beams], and slabs, shall not contain significant cracks" The arbitrator noted, "The actual damage is clearly concentrated around the inadequate support beam directly under the loft and surrounding areas."

The arbitrator's finding that respondents' notice of claim was sufficient to determine the nature and location of their structural claim is not reviewable on appeal. "[I]t is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law. . . . 'In other words, it 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.' [Citation.]" (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11-12.) "Generally, courts cannot review arbitration awards for errors of fact or law, even when those errors appear on the face of the award or cause substantial injustice to the parties. [Citation.]" (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 916.)

The question remains whether the arbitrator exceeded her powers because the notice of claim did not specifically refer to section 896(b). Section 910 does not provide that a claim of violation of a construction standard is waived unless the notice of claim

identifies the applicable subdivision of section 896. The notice passes legal muster where, as here, it is "sufficient to determine the nature and location, to the extent known, of the claimed violation." (§ 910, subd. (a).) Thus, the arbitrator did not exceed her powers in ruling that respondents' structural claim was subject to arbitration even though the notice of claim did not expressly refer to section 896(b). The judge who confirmed the arbitration award reached the same conclusion: "I don't think there's any authority that requires a specific statute to be cited. I think the notice is sufficient here."

Appellant protests that "[t]he claim for damages based upon a violation of section 896(b) was never ordered to arbitration" because respondents' complaint did not specifically refer to section 896(b). Like the notice of claim, the complaint cited section 897 and alleged that the property had "[e]xcessive drywall cracks," including "[c]racking on structural beams and arches." Thus, the allegations in the complaint were sufficient to include the structural claim.

Arbitrator's Refusal to Postpone the Arbitration Hearing

Appellant argues that the arbitrator abused her discretion in denying its motion to postpone the arbitration hearing. The ruling allegedly resulted in substantial prejudice to appellant because it "was never afforded the opportunity to repair the alleged structural violation" and thereby "avoid the expense of the arbitration and a significant judgment."

"On request of a party to the arbitration for good cause, or upon his own determination, the neutral arbitrator may postpone the hearing to a time not later than the date fixed by the agreement for making the award, or to a later date if the parties to the arbitration consent thereto." (Code Civ. Proc., § 1282.2, subd. (b).) The court shall vacate the arbitration award if "[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor" (*Id.*, § 1286.2, subd. (a)(5).)

We review the arbitrator's ruling for abuse of discretion. (*SWAB Financial. v. E*Trade Securities* (2007) 150 Cal.App.4th 1181, 1198.) "Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse

of discretion" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) If the arbitrator abused her discretion, we must determine whether the denial of a postponement substantially prejudiced appellant. (*SWAB Financial. v. E*Trade Securities, supra*, 150 Cal.App.4th at p. 1198.)

Appellant has failed to carry its burden of establishing that the arbitrator abused her discretion in refusing to postpone the arbitration hearing. Appellant notes that, "[i]f the claimant does not conform with the requirements of [the Right to Repair Act], the builder may bring a motion to stay a subsequent court action or other proceeding [e.g., arbitration proceeding] until the requirements of the [Right to Repair Act] have been satisfied." (§ 930, subd. (b).) But, as discussed in the preceding part of this opinion, respondents complied with the Right to Repair Act.

In any event, it is pure speculation that, if the arbitrator had postponed the hearing, appellant would have repaired the structural defects. Appellant has therefore not shown that it was substantially prejudiced by the denial of a postponement.

Disposition

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Tari Cody, Judge

Superior Court County of Ventura

Wood, Smith, Henning & Berman; Stephe J. Henning, Stacey F. Blank and
Amy K. Pennington, for Appellant

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