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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

VICTOR CLARKE et al.,

Plaintiffs and Appellants,

v.

JOHN KILPATRICK,

Defendant and Respondent.

C071313

(Super. Ct. No. 161207)

Plaintiffs Victor Clarke and Steve Hoppes appeal from a judgment confirming an arbitration award in favor of defendant John Kilpatrick. Plaintiffs contend the trial court was required to vacate the arbitration award because the arbitrator committed numerous legal errors in making his determination. We shall conclude that the trial court properly declined to consider whether the arbitrator committed any legal errors because the parties expressly agreed that “judicial review of any such legal error by the arbitrator shall proceed . . . from a final judgment . . . entered in the Superior Court . . .” We shall further conclude that plaintiffs have failed to show that the arbitrator erred in determining plaintiffs did not tender payment within a reasonable amount of time, and thus, plaintiffs cannot establish the arbitrator erred in ruling for defendant. Finally, we shall reject

plaintiffs' assertion that the arbitrator relied on extrinsic evidence to contradict the implied in law term that payment was to be tendered within a reasonable time. Accordingly, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND¹

The parties have known each other and worked together for approximately three decades. Defendant started Redding Aero Enterprises (Redding Aero) in 1987, and within two or three years employed plaintiffs. As part of the consideration for plaintiffs' employment, defendant agreed to incorporate and provide plaintiffs each with a 10 percent ownership interest in Redding Aero within five years. Defendant incorporated in 1993, and plaintiffs each were issued 10 percent of the shares, with defendant retaining 80 percent. Defendant is older than plaintiffs, and over the years they often discussed plaintiffs' eventual purchase of defendant's shares of the business. These discussions never reached fruition because plaintiffs were unable to fund such a purchase.

In 2005, Lynn Robestelli, a purported attorney, offered to facilitate a purchase/sale of Redding Aero for a \$10,000 fee. Robestelli said that (1) she represented an undisclosed Native American Tribe and an unnamed wealthy investor from San Diego, (2) the Native American Tribe would arrange financing if defendant sold to plaintiffs, and (3) there existed the "possibility that [p]laintiffs would then in some way gain the mantle of a Native American Entity." Shortly after receiving the \$10,000 fee, Robestelli vanished and could not be contacted.

Before vanishing, Robestelli drafted a document entitled, "Term Sheet: REDDING AERO ENTERPRISES," which was executed by the parties on July 22, 2005 (term sheet). The term sheet is roughly one page in length and sets forth what it describes as seven "deal points that were established between [defendant] and [plaintiffs] on July

¹ The facts are taken from the award in arbitration and plaintiffs' verified complaint.

22, 2005, and represented to the funders and other key parties to this buy-out.” The “deal points” included the following:

- “1) Lump-Sum Cash Payment: \$750,000.00
- “2) Pay Down Notes Payable to John Kilpatrick: \$140,000.00
- “3) Prepaid Accounts receivable balance: \$ 21,844.73”

In August 2007, plaintiffs sued defendant in Shasta County Superior Court for specific performance and damages. Plaintiffs alleged inter alia that (1) by executing the July 22, 2005, term sheet, the parties agreed that defendant would sell and plaintiffs would purchase defendant’s stock in Redding Aero for \$771,844.73, (2) within a reasonable time after executing the term sheet, plaintiffs tendered \$771,844.73 to defendant and demanded defendant deliver his shares in Redding Aero to plaintiffs, and (3) defendant rejected plaintiffs’ tender and refused to deliver the shares pursuant to the agreement.

In June 2011, the parties entered into an arbitration agreement in which they agreed to resolve the matters raised in the pending lawsuit through binding arbitration before retired Tehama County Superior Court Judge Noel Watkins. As relevant here, paragraph 9 of the arbitration agreement provides: “The parties agree that each party will retain his right to appeal from any judgment entered based on the arbitrator[’]s decision on the basis that the arbitrator committed legal error in making his decision and therefore that the arbitrator exceeded the scope of his authority under this Arbitration Agreement, which requires the arbitrator to follow California law in making his decision. The parties specifically agree that judicial review of any such legal error by the arbitrator shall proceed according to California Rules of Procedure for appeal from a final judgment and the appeal shall be made from the judgment entered in the Superior Court based on the arbitrator[’]s decision.”

Following a hearing, the matter was submitted to the arbitrator on the pre and post hearing briefs, testimony, and exhibits. In a four-page written decision filed on

December 2, 2011, the arbitrator denied plaintiffs' request to specifically enforce the term sheet and entered an award in favor of defendant. Among other things, the arbitrator found that neither plaintiff Clarke nor defendant thought the term sheet "was anything more than just points to be addressed in future negotiations," the term sheet "could not be a binding agreement due to the matters left either unaddressed or substantially uncertain," "[t]here is no agreement present that is of sufficient specificity either as to time, guarantees, amount or method of performance as to be enforceable," and plaintiffs failed to "execute" the term sheet within a reasonable time.

Defendant filed a petition to confirm the arbitration award in the trial court, and plaintiffs filed a petition to vacate the same. Plaintiffs argued the award should be vacated because "the arbitrator exceeded his authority by committing errors of law, which was strictly prohibited under the Arbitration Agreement." The trial court declined to address the merits of the arbitrator's decision and confirmed the award. At the hearing on the petitions, the trial court explained, "I reviewed paragraph nine of the arbitration agreement and it appears to me that that's controlling and that my only role would be to confirm the arbitration award as judgment and leave [a review of the merits of the arbitrator's decision] up to the Third District Court of Appeal" Judgment was entered in defendant's favor.

DISCUSSION

I

The Trial Court Did Not Err in Declining to Consider Whether the Arbitrator Committed Legal Error

Plaintiffs contend that the trial court erred in confirming the arbitration award without considering plaintiffs' claim that the arbitrator committed legal error in making his determination. We disagree.

The California Arbitration Act (Code Civ. Proc., § 1280 et seq.)² provides “only limited grounds for judicial review of an arbitration award.” (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1344 (*Cable Connection*); see § 1286.2.)³ “In cases involving private arbitration ‘[t]he scope of arbitration is . . . a matter of agreement between the parties’ [citation], and ‘ “[t]he powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission.” ’ [Citation.]” (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 8-9 (*Moncharsh*)). “[B]ecause 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.]” (*Id.* at p. 11.) “[P]arties may[, however,] obtain judicial review of the merits by express agreement.” (*Cable Connection, supra*, 44 Cal.4th at p. 1340.) A provision simply requiring the arbitrators to follow the rule of law is insufficient because it “leaves open the possibility that they are empowered to apply it ‘wrongly as well as rightly.’ ” (*Id.* at p. 1360.) “[T]o take themselves out of the general rule that the merits of the award are

² Further undesignated statutory references are to the Code of Civil Procedure.

³ Section 1286.2, subdivision (a) provides: “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.”

not subject to judicial review, *the parties must clearly agree that legal errors are an excess of arbitral authority that is reviewable by the courts.*” (*Id.* at p. 1361, italics added.) In *Cable Connection*, our Supreme Court held that the parties had so agreed by including the following provision in their arbitration agreement: “ ‘The arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.’ ” (*Id.* at pp. 1361, fn. 20, 1340, 1364.)

Here, the parties likewise agreed that legal errors are subject to judicial review. Defendant does not contend otherwise, rather, he asserts that the agreement “expressly contemplates judicial review of a final judgment by a Court of Appeal only, and not by the trial court.” The trial court agreed, and so do we.

As previously discussed, the general rule is that the merits of an arbitration award are not subject to judicial review. (*Moncharsh, supra*, 3 Cal.4th at p. 11.) Rather, to obtain judicial review of the merits, the parties must expressly agree to such. (*Cable Connection, supra*, 44 Cal.4th at p. 1340.) While the parties in this case expressly agreed to retain their rights to judicial review, they “specifically agree[d] that judicial review of any . . . legal error by the arbitrator shall proceed . . . *from a final judgment and the appeal shall be made from the judgment entered in the Superior Court based on the arbitrator[']s decision.*” (Italics added.) In other words, the parties agreed that judicial review of the arbitrator’s award on the basis of legal error would be in the Court of Appeal, and not the trial court. The parties are bound by their agreement. Thus, the trial court correctly declined to consider whether the arbitrator committed legal error.

II

Plaintiffs Failed to Demonstrate the Arbitrator Committed Legal Error in Determining Plaintiffs Failed to Tender Payment Within a Reasonable Period of Time

In accordance with the parties' arbitration agreement, we address plaintiffs' claim that "the arbitrator erred in finding that the delay in obtaining financing was unreasonable" and conclude that it lacks merit.

The July 2005 term sheet is silent as to the time of payment.

"If no time is specified for the performance of an act required to be performed, a reasonable time is allowed." (Civ. Code, § 1657.) " 'The question of what constitutes a reasonable time is always a fact question. [Citations.] In determining what period of time would be reasonable, the situation of the parties, the nature of the transaction, and the facts of the particular case should all be considered.' [Citation.]" (*Marshall & Co. v. Weisel* (1966) 242 Cal.App.2d 191, 195 (*Marshall*)). We review a determination of what constitutes a reasonable time for substantial evidence. (*Ibid.*)

Here, the arbitrator found that "a 'reasonable time' to execute a contract when there is no date specified must be determined by all the surrounding circumstances and the contract's background. After the Robestelli, et al[.] fiasco the parties were back dealing where they had been for years, i.e., if [p]laintiffs could get financing would [d]efendant sell? [¶] This was a new effort on a then old series of discussions and conversations but not based on the July, 2005 [term sheet]. Financial considerations had changed and [p]laintiffs could not rationally believe for tax purposes or otherwise that [d]efendant would follow through on the obviously incomplete negotiations of some 11 months prior."

The award in arbitration reflects that the arbitrator considered " 'the situation of the parties, the nature of the transaction, and the facts of the particular case' " (*Marshall, supra*, 242 Cal.App.2d at p. 195) in determining plaintiffs failed to act within a reasonable amount of time. Plaintiffs do not contend otherwise; rather, they assert that

the arbitrator impermissibly relied on extrinsic evidence to contradict the implied in law term that payment was to be tendered within a reasonable time. In particular, plaintiffs point to “[defendant’s] testimony that the lump sum payment was supposed to be made within 30-60 days,” and argue that such testimony “is not supported by the terms of the contract and is therefore inadmissible parol evidence.” There are a number of problems with plaintiffs’ contention.

First, there is no indication in the record that defendant so testified, much less that the arbitrator relied on any such testimony in making his determination. As plaintiffs acknowledge, there is no reporter’s transcript of the arbitration proceeding. Thus, the only record of the evidence and testimony presented at the arbitration hearing is the written award in arbitration, and it does not reference the challenged testimony. Second, there is no indication in the award in arbitration that the arbitrator determined that plaintiffs were required to tender payment in anything other than a “ ‘reasonable time.’ ” Third, the award in arbitration reflects that the arbitrator properly considered extrinsic evidence as to the circumstances surrounding the making of the term sheet in making his determination. (See *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37, 40.)

Finally, we reject plaintiffs’ assertion that the arbitrator erred in concluding that plaintiffs’ “delay in obtaining financing was unreasonable.” As previously discussed, the determination of what constitutes a reasonable time is a question of fact that we review for substantial evidence. (*Marshall, supra*, 242 Cal.App.2d at p. 195.) Assuming for argument’s sake that judicial review of an arbitration award for legal error includes reviewing the sufficiency of the evidence supporting the award, in the absence of a record of evidence received at the hearing, we must presume “the trial court acted duly and regularly and received substantial evidence to support its findings.” (*Stevens v. Stevens* (1954) 129 Cal.App.2d 19, 20; see also *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003.)

For all the foregoing reasons, we find the arbitrator properly concluded that plaintiffs failed to tender payment within a reasonable time, and thus, defendant was under no obligation to deliver his shares.⁴

DISPOSITION

The judgment is affirmed. Defendant shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

MAURO, J.

⁴ Because we presume the arbitrator correctly determined that plaintiffs failed to tender payment within a reasonable time, we need not consider plaintiffs' remaining claims.