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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FUJIAN PEAK GROUP, INC.,

Plaintiff and Respondent,

v.

DAVID HUANG,

Defendant and Appellant.

D059264

(Super. Ct. No. 37-2010-00088762-
CU-PA-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Richard S. Whitney, Judge. Reversed and remanded with directions.

This appeal has an extensive procedural history and arises out of a judgment confirming an arbitration award. (Code Civ. Proc.,¹ § 1286.) Plaintiff and respondent Fujian Peak Group, Inc. (Fujian Peak), a corporation formed and existing under the laws of the Peoples' Republic of China, brought a civil action in Texas against D&R Holdings,

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

Inc. (D&R), a California corporation. In the Texas action, Fujian Peak sought damages arising out of two contracts formed in 2005 and 2006, respectively. After filing the action, Fujian Peak submitted a demand for contractual arbitration against D&R, which was accepted on its behalf by its chief executive officer (CEO), appellant and defendant David Huang.

Contractual arbitration on the D&R contract commenced in 2009 in Texas. The arbitrator awarded damages of \$586,000 jointly and severally against both D&R and Huang in his individual capacity for attorney fees and costs of \$106,573.45.

In 2010, Fujian Peak filed a petition to confirm the arbitration award in San Diego Superior Court. After one continuance and with no opposition on file, the court confirmed the award and ordered D&R, the contracting party, and its CEO Huang, in his individual capacity, to pay the awarded damages as well as attorney fees and costs.

Huang alone appeals, contending that the court had no personal jurisdiction over him as an individual to enforce the judgment, since he never consented to join the Texas arbitration as an individual party. Huang also objects to the imposition of damages for fraud, pointing out that fraud damages were not part of the final arbitration award. Finally, Huang argues that all attorney fees and costs should have been awarded severally against D&R, not jointly and severally against him individually.

Where a single appellant of a judgment issued against several defendants appeals part of the judgment, only the challenged portion is brought up for review. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 57, p. 115; *ReadyLink Healthcare v. Cotton*

(2005) 126 Cal.App.4th 1006, 1015.) Therefore, the judgment against D&R, which does not appeal, is final.

However, we agree with Huang that the record before us does not currently demonstrate that the superior court had personal jurisdiction over him as an individual. We also agree that the judgment erroneously awarded fraud damages against him, since they were not included in the final arbitration award. The issue as to whether attorney fees and expenses were awarded jointly and severally is rendered moot by the reversal on the jurisdiction issue. As to Huang individually, the matter is remanded to superior court for further proceedings to determine whether it has jurisdiction to confirm the arbitration award against him pursuant to California procedural law.

Fujian Peak concedes an additional correction must be made; namely, the trial court must modify the judgment to remove all references to Robert Schrier (co-owner of D&R). No damages were awarded against him individually in the final arbitration award, and he should not have been added to the judgment. The trial court will be directed, *inter alia*, to issue a modified and corrected judgment accordingly. (§ 1286.)

FACTUAL AND PROCEDURAL HISTORY

A. Contract Between Fujian Peak and D&R

Fujian Peak and D&R entered into two contracts with one another in 2005 and 2006. Fujian Peak asserts that both contracts were breached in this case. A petition for arbitration must attach the contract containing the arbitration provision to prove that such an agreement exists. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) Huang has only provided a copy of the 2006 contract in the record before us.

The January 2006 contract between Fujian Peak and D&R provides for D&R to supply advertising services for Fujian Peak for the 2006-2007 Houston Rockets basketball season, including radio mentions and courtside signage. Huang signed the contract on D&R's behalf, in his capacity as its CEO. Schrier, a shareholder and co-owner of D&R, did not sign the contract in any capacity. The base contract price for the 2006-2007 season was \$380,000. According to the final arbitration award, the base price for the earlier 2005 contract was \$280,000.

The 2006 contract contained an arbitration clause: "Any controversy or claim arising out of or relating to this Agreement or its alleged breach shall be settled by binding confidential arbitration in Houston, Texas in accordance with the Commercial Arbitration Rules of the American Arbitration Association ('AAA') and judgment on the award rendered by the Arbitrator may be entered by any court having jurisdiction thereof." The contract also contained a choice of laws provision: "Agreement shall be governed by and construed in accordance with the laws of the State of Texas, without regard to principles of conflicts of laws."

B. Texas Lawsuit Filed By Fujian Peak Against D&R; Arbitration Proceedings

A dispute arose between Fujian Peak and D&R, Huang, and Schrier. In 2007, Fujian filed an action in Harris County, Texas against D&R, seeking damages and injunctive relief. Although the record does not contain a copy of the Texas pleading, it appears from the final arbitration award that Fujian Peak pursued claims against D&R for breach of fiduciary duty, breach of contract, breach of the duty of good faith and fair dealing, and fraud. Fujian Peak also sought to impose individual liability on the

principals Huang and Schrier, based on their individual actions, for damages naturally flowing from those claims.

Specifically, Fujian Peak alleged that D&R breached its duty to Fujian by overreaching and taking a disproportionate commission for work done. Even though the base contract price for the 2006 contract was \$380,000, Fujian Peak contended that the actual cost was closer to \$140,000. Likewise, D&R charged Fujian Peak \$280,000 for the 2005 contract, even though Fujian Peak argued that the actual cost to D&R was closer to \$70,000.

D&R and Schrier, through their California attorney Christopher Olmsted, made a demand upon Fujian Peak to submit the matter to binding arbitration in Texas pursuant to the contract arbitration clauses. The demand for arbitration identified D&R as the sole respondent in the action.

C. Texas Lawsuit and Arbitration Against Huang; Current State of the Record

At some point after the Texas lawsuit was filed against D&R, Fujian Peak apparently filed a separate lawsuit in Texas against Huang. The record before us does not include a copy of the complaint against Huang. As such, we are unable to determine the nature of the claims against Huang and whether he was served individually or in his corporate capacity in that lawsuit.

In 2009, two years after D&R filed its demand for arbitration and about two weeks before those proceedings were due to commence, Fujian Peak's attorney in Texas, Paul Rosen, sent a letter to D&R's attorney in California, Olmsted. The letter stated that, pursuant to a telephone conversation between counsel, the claims against Huang would

be added to the D&R arbitration, and that Huang would be joined as a party individually. This letter from Rosen to Olmsted about joining Huang referenced "the same series of transactions and occurrences [that] made the basis of [Fujian] Peak's claim against D&R Holdings and Robert Schrier." For purposes of analysis, we presume that the claims against Huang are similar, if not identical, to those against D&R.

The next day, Olmsted responded that Huang would join the arbitration according to the letter's terms by returning the letter to Rosen with his signature, now identifying himself as attorney for D&R, Schrier, and Huang:

"Pursuant to our multiple telephone conversations and emails, this letter memorializes our agreement wherein the Parties agree and stipulate that the lawsuit filed against David Wei Huang shall be submitted to binding arbitration in lieu of this Court proceeding. Additionally, we have agreed that David Wei Huang will be added to the existing arbitration pertaining to D&R Holdings and Robert Schrier . . . in as much as the claims are essentially identical and emanate out of the same series of transactions and occurrences made the basis of [Fujian] Peak's claim against D&R Holdings and Robert Schrier."²

Neither Huang nor Schrier was served with a demand for arbitration individually, nor does the record show either signed any document personally consenting to the arbitration in their individual capacities.

D. Final Arbitration Award

Arbitration took place in Texas in December 2009. In March 2010, the arbitrator issued the final arbitration award (award). In the award, the arbitrator stated: "It is

² According to Fujian Peak's reply brief, Huang is separately suing Olmsted for legal malpractice regarding these activities.

evident to this Arbitrator that Mr. Huang is an integral party to this case and therefore he is being added, individually, as a Respondent. . . . D&R Holdings, Inc. and Mr. David Huang, in his individual capacity, are responsible for these acts and omissions detrimental to Claimant [Fujian Peak]."

On the merits, the arbitrator found that D&R had breached its duties to Fujian Peak by overreaching and taking a disproportionate commission for work done, and was entitled to damages naturally flowing from the breaches concerning the contract:

"IT IS, THEREFORE, ORDERED and AWARDED that Respondents, D&R HOLDINGS, INC. and DAVID HUANG, in his individual capacity, jointly & severally, shall pay to the Claimant FUJIAN PEAK GROUP, INC. the following: 1) Damages in the amount of \$586,000.00, of which \$140,000.00 is escrowed and shall be made available for immediate release to Claimant. 2) Attorneys' fees and expenses in the amount of \$106,573.45."

Separately, the arbitrator ordered D&R to pay all fees and costs associated with the arbitration itself, such as expenses of \$6,300 to the International Center for Dispute Resolution and \$9,521.40 to the arbitrator. D&R was also ordered to reimburse Fujian Peak for its portion of the costs already paid. The award was stated to be the full and final settlement of all claims by Fujian against D&R and Huang, and all claims not expressly granted in the award were denied.

E. Status of Record: Schrier

The award did not expressly address any claims against Schrier individually. However, because the award denied all claims not expressly granted, all claims against him were apparently denied and he did not become a judgment debtor. He has not appealed. However, Fujian Peak concedes in its reply brief that Schrier was not a party

to the arbitration and that the arbitrator did not make any award against him jointly or severally, although the judgment appears to include him. Such a modification will be directed on remand.

F. California Proceedings for Confirmation of Arbitration Award

In March 2010, Fujian Peak filed a petition in San Diego Superior Court to confirm the arbitration award pursuant to section 1285. In the petition, Fujian Peak named as respondents both Huang individually and D&R, while specifying that Schrier was absolved of any liability. Service was made on D&R, Huang individually, and Schrier individually via their attorney Olmsted by mail.³

At the first hearing on the petition, the trial court (Judge Francis M. Devaney) expressed concern regarding its jurisdiction over an arbitration conducted in Texas. Specifically, the court was concerned over a lack of proof of service and whether Huang and D&R had been properly served. Fujian Peak had served the petition by mail, and the court was concerned about the lack of personal service. The court asked that Fujian Peak present a copy of an agreement that allowed for service by mail in this arbitration. Absent that showing, the court stated that personal service would be required: "Any time you file an original lawsuit it's got to be personal service unless you claim it's a continuing saga of the arbitration, which allows for mailing."

³ According to its reply brief, Fujian Peak sought confirmation of the award in San Diego, where Huang resides, for convenience in executing the judgment against him and D&R.

Judge Devaney then continued the case for 30 days to give Fujian Peak the opportunity to provide a copy of the arbitration agreement providing for mail service, as well as points and authorities to support jurisdiction over the case in California.

Neither Huang nor D&R filed any opposition to the petition nor appeared at any hearings. In the memorandum of points and authorities provided at the continued hearing 30 days later, held before Judge Richard S. Whitney, Fujian Peak relied on the arbitration clause in the 2006 contract that stated that any controversy would be settled in accordance with the AAA rules for commercial arbitration.

Regarding the adequacy of the service, Fujian Peak provided a copy of AAA rule R-39, which generally provides for mail service in proceedings for the entry of judgment on any award, provided that the parties have been granted a reasonable opportunity to be heard with regard to the dispute. (AAA, Commercial Arbitration Rules and Mediation Procedures (2009) Rule R-39(a).) Therefore, Fujian argued, the arbitration agreement provided for service by mail. The court accepted this explanation and granted the petition to confirm the award.

Fujian provided the court with a proposed judgment, which the court signed and entered as its judgment. The judgment confirmed the award provisions, which included: (1) damages of \$586,000; (2) interest at a rate of 10 percent per year from the date of the award; (3) attorney fees and costs of \$106,573.45; (4) arbitration costs of \$9,521.40 severally against D&R; (5) attorney fees for the motion to confirm the award of \$2,500; and (6) immediate release of \$140,000 plus interest held in escrow.

Despite the uncertainties outlined above, judgment was entered against D&R, Huang, and Schrier jointly and severally. Only Huang appeals.

DISCUSSION

We first discuss Huang's individual challenges to the judgment confirming the arbitration award. We reiterate that D&R did not appeal, so its judgment was not brought up for review on its behalf and is final. (9 Witkin, Cal. Procedure, *supra*, § 57, p. 115; *ReadyLink Healthcare v. Cotton, supra*, 126 Cal.App.4th at p. 1015.)

However, as will be discussed in part II, on remand, the trial court will be directed to modify and adjust the judgment by removing all references to Schrier as outside the terms of the arbitration award.

I

ISSUES REGARDING PERSONAL JURISDICTION OVER HUANG TO CONFIRM THE AWARD

A. Introduction

A judgment confirming an award must be based on both a proper showing of personal jurisdiction by the California courts and the binding nature of the arbitration contract. Huang contends that the trial court could not confirm the arbitration award against him because it did not have jurisdiction over him personally. Specifically, he argues that he was never added as a party in his individual capacity to either the underlying contract or arbitration agreement and that he did not expressly consent to join the arbitration. Under California law, even though he did not file opposition below, the court could not exercise jurisdiction over him regarding the award.

Fujian Peak counters that, under Texas law, he was appropriately added to the arbitration individually by authority of his attorney, and therefore the San Diego Superior Court has personal jurisdiction over him.

We agree with Huang that California procedural law applies in this case, since confirmation of the award is sought in California courts. As we will explain, we are unable to determine from the record before us whether Huang was individually subject as a party to either the arbitration or underlying contract. We will remand the case to superior court to determine whether it has personal jurisdiction over Huang as an individual for purposes of confirming the award against him.

B. Applicable Standards

Our review of an arbitration award requires us to extend to it every intendment of validity and the party claiming error has the burden of supporting his contention. (*Cobler v. Stanley, Barber, Southard, Brown & Associates* (1990) 217 Cal.App.3d 518, 526.)

The main issue presented here is whether the arbitrator obtained personal jurisdiction over Huang that should be recognized in California courts. As an arbitration award, once confirmed, leads to a judgment, which has the same force and effect as a judgment in a civil action, jurisdiction must exist over every person against whom an award is to be enforced. (*Ikerd v. Warren T. Merrill & Sons* (1992) 9 Cal.App.4th 1833, 1842 (*Ikerd*)). Therefore, we examine all findings made by the trial court regarding the existence of jurisdictional facts to determine if they are supported by substantial evidence. (*Ibid.*)

Once a petition to confirm, correct, or vacate an arbitration award is filed, the superior court has only four choices: "(1) confirm the award, (2) correct the award and confirm it as corrected, (3) vacate the award, or (4) dismiss the proceedings." (*Sunnyvale Unified School Dist. v. Jacobs* (2009) 171 Cal.App.4th 168, 175.) The court must confirm the award as made, unless it corrects it and confirms it as corrected. (*Devonwood Condominium Owners Ass'n. v. Farmers Ins. Exchange* (2008) 162 Cal.App.4th 1498, 1505.) Absent a correction, the award as drafted by the arbitrator controls. (*Ibid.*)

C. California Procedural Law Applies

The underlying contract between D&R and Fujian Peak contains a choice of law provision that requires the contract to be construed under Texas law. The petition to confirm the award was filed in California.

A demand for arbitration is a pleading analogous to a complaint in a civil action, and a party must be served the same way as in a civil action. (*Ikerd, supra*, 9 Cal.App.4th at p. 1844, fn. 10.) For confirmation of an arbitration award, a party must have been properly served in the underlying arbitration in accordance with California procedural law, even if the arbitration occurred out of state and the underlying contract included a choice of laws provision. (*Klussman v. Cross Country Bank* (2005) 134 Cal.App.4th 1283, 1291-1292 ["If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy."].) For confirmation of an arbitration award in California, California courts

require that the petitioning party must properly serve the other party in accordance with California law principles.

Therefore, we evaluate this appeal under California procedural law.

D. The Record Before Us is Unclear as to Whether the Superior Court had Jurisdiction to Confirm the Award as a Whole Against Huang

We next examine Huang's contention that the court had no jurisdiction over him personally because he never consented to join the arbitration against D&R as an individual.⁴ Fujian Peak counters that Huang was added by the authority of his attorney, that such an agreement is binding on the client under Texas law, and therefore the California court must have had jurisdiction to confirm the arbitration award against him.

Personal jurisdiction requires both due process -- including notice and an opportunity to be heard -- and compliance with the statutory jurisdictional requirements of process. (2 Witkin, Cal. Procedure, *supra*, Jurisdiction, § 106, p. 681.) In other words, personal jurisdiction requires both due process and service. There must be a reasonable method of notice and a reasonable opportunity to be heard; actual knowledge of the proceedings alone is not enough. (*Ikerd, supra*, 9 Cal.App.4th at p. 1842.) In order for a judgment to be entered against a person, that person must be made a party to the proceeding. (*Ibid.*)

⁴ In his opening brief, Huang argues that the court lacks subject matter jurisdiction over the arbitration because he never consented to join individually and Olmsted's confirmation in the 2009 letter is not binding against him. However, his contention that he was never a party to this case individually is not a claim of a lack of subject matter jurisdiction but rather personal jurisdiction. His reply brief clarifies this theory and argues that the court lacks personal jurisdiction over him. Both issues are presented on appeal.

Under California law, a demand for arbitration must be served on the other party. (*Ikerd, supra*, 9 Cal.App.4th at p. 1842.) When a person is sought to be joined as a party as both an agent of a corporation and in his or her individual capacity, service must be made on both the corporation and the individual. Absent an alter ego relationship, service on the corporation does not constitute service on the individual shareholder or officer. (*Id.* at p. 1843.)

The record shows Huang consented to binding arbitration in his capacity as CEO of D&R. However, he contends that he never consented to be joined as a party to the arbitration individually, and never authorized his attorney to bind him individually. Accordingly, he challenges the enforceability of any judgment confirming the award against him as an individual.

Absent express authority, an attorney has no implied plenary authority to enter into contracts on behalf of his or her client under California law. (*Toal v. Tardiff* (2009) 178 Cal.App.4th 1208, 1222.) An attorney, merely by virtue of his or her employment as such, has no apparent authority to bind his or her client to an agreement for arbitration. (*Id.* at p. 1221.) Additionally, a client does not necessarily ratify an attorney's unauthorized arbitration stipulation simply by allowing the arbitration to proceed to an award. (*Id.* at p. 1222.) A person seeking judicial enforcement of a private arbitration award does not meet the burden of proving the existence of a valid arbitration contract simply by submitting a copy of the contract signed by a party's attorney; the party must personally sign the agreement. (*Id.* at p. 1223.) In other words, a party is only subject to binding arbitration in California by express consent or ratification.

The record does not include any document signed by Huang in his individual capacity with regard to the arbitration. The record includes the 2009 letter from Rosen to Olmsted in which Olmsted confirmed that Huang would join the arbitration. In the March 2010 award, the arbitrator states that he is adding Huang individually as a party, indicating that this may have been the point at which Huang was added to the arbitration. This alone is not sufficient to show that Huang was properly joined as a party to the contractual arbitration, without Huang's signature on the stipulation.

We cannot determine from the record whether Huang ever consented to have Olmsted, who represented D&R and Schrier at the time, add him individually to the arbitration at any point. Huang merely contends that he did not consent, but he provides no support for that contention. Nothing in the record contradicts Olmsted's statements to Rosen that Huang would be joined as a party to the arbitration. There is also no record provided regarding the underlying Texas civil action or arbitration, except for the award itself.

Nothing in the record before us indicates if or when Huang was served personally in the underlying arbitration. As it is unclear from the record whether Huang ever consented to binding arbitration, it is also unclear whether the superior court had personal jurisdiction over him to confirm the resulting award. Consequently, we do not have enough information on the subject to determine whether Huang submitted to the arbitration proceedings individually. The superior court must allow appropriate further proceedings to determine whether Huang was ever properly joined as a party individually at the arbitration stage, thus supporting enforcement of the award under California law.

E. Attorney Fees Were Awarded Jointly and Severally Against Huang and D&R

The award clearly and unambiguously states, as a component of the award: "It is, THEREFORE, ORDERED and AWARDED that Respondents, D&R HOLDINGS, INC. and DAVID HUANG, in his individual capacity, jointly & severally, shall pay to the Claimant FUJIAN PEAK GROUP, INC. . . . [a]ttorneys' fees and expenses in the amount of \$106,573.45." Although D&R was separately ordered to bear the administrative fees and costs of the arbitrator, attorney fees were clearly awarded jointly and severally against both Huang and D&R.

However, if the superior court determines on remand that the entire award does not bind Huang individually, the issue of his joint liability for fees and costs becomes moot, and judgment may only be enforced against D&R. Alternatively, if the court determines the award can be confirmed based on a showing of proper exercise of personal jurisdiction over Huang individually, the judgment matches the award, and his joint liability for attorney fees would proper. The judgment should be adjusted in this respect upon remand.

F. Fraud Issues

Next, Huang contends that the judgment against him cannot be enforced as to damages for fraud because fraud damages were never included in the final arbitration award. We agree.

In the award, the arbitrator awarded Fujian Peak "damages naturally flowing" from D&R "breach[ing] its duty to Fujian Peak, Inc. concerning the . . . contract when it overreached and took a disproportionate commission for the work done on behalf of

Claimant." The arbitrator went on to say that the "[a]ward is in full and final settlement of all claims and counterclaims submitted to this Arbitrator. All claims not expressly granted herein are hereby, DENIED."

The court did not make any corrections to the award, but rather confirmed it as made by the arbitrator. Fujian provided a proposed judgment to the court, and the court signed it without making any modifications. This proposed judgment contained damages for fraud. However, that component is inconsistent with the final arbitration award, which awards damages flowing from breaches of duty concerning the contract. A judgment for traditional fraud damages is inconsistent with the award, because it did not expressly grant relief for fraud; rather, it expressly denied all claims not specifically granted.

Accordingly, subject to the personal jurisdiction inquiry ordered above, we direct the trial court to correct any judgment that is ultimately issued against Huang by removing all references to fraud as outside the terms of the award.

II

THE JUDGMENT IS INCORRECT AS TO SCHRIER

Schrier neither appealed the judgment nor filed any opposition to it in superior court. He was not named as a judgment debtor in either the final arbitration award or the petition for confirmation of the award. Nevertheless, he was included by name as a judgment debtor in the proposed judgment prepared by Fujian Peak and signed by the court. Since he was never a judgment debtor, there is no basis for his inclusion in the judgment. Fujian Peak concedes that Schrier was erroneously included in the judgment

and does not object to the judgment being corrected to remove him as a judgment debtor. The superior court must issue an amended judgment regarding D&R, not Schrier, in addition to resolving the other issues set forth above. (§ 1286.6, subd. (a) [". . . [T]he 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."].)

DISPOSITION

The judgment against Huang individually is reversed and remanded to superior court for further proceedings to determine whether the court has jurisdiction to confirm the award as to Huang pursuant to California procedural law. Subsequent to any such determination, the superior court is separately directed to issue an amended and corrected judgment that removes all references to Schrier, while leaving D&R in place as a judgment debtor. Costs are awarded to the appellant.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.