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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

RAY BERGMAN,

Plaintiff and Respondent,

v.

VICTOR PASNICK,

Defendant and Appellant.

F068559

(Super. Ct. No. 07CECG04281)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Kristi C. Kapetan, Judge.

Law Offices of Randolph Krbechek and Randolph Krbechek for Defendant and Appellant.

Sinsheimer Juhnke McIvor & Stroh, David A. Juhnke and David S. Hamilton for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Kane, J. and Franson, J.

Defendant Victor Pasnick appeals from the trial court's judgment confirming a binding arbitration award against him. The arbitrator awarded monetary damages to plaintiff Ray Bergman based on findings that defendant committed constructive fraud in connection with a loan program operated by defendant. In the instant appeal, defendant has failed to establish any basis for challenging the arbitration award. Additionally, defendant failed to make a timely request to vacate the arbitration award in the trial court, which was tantamount to an admission of all the allegations in the petition to confirm the award. For these reasons, we affirm the trial court's judgment.

FACTS AND PROCEDURAL HISTORY

On November 4, 2010, plaintiff filed his third amended complaint (the complaint) against defendant, which was the operative pleading below.¹ The complaint alleged that defendant was a licensed real estate broker and mortgage loan broker who operated a special "loan program" whereby he would solicit and find nontraditional lenders (such as plaintiff) to loan monies to individuals and, in the process, defendant would earn a fee or commission on each loan. Each loan was to be secured by a trust deed on the borrower's real property, and defendant gave assurances to plaintiff that he would evaluate the risk of each loan in accordance with the oral understanding between plaintiff and defendant. Allegedly, in reliance on the promises, representations and expertise of defendant, plaintiff agreed to lend money through defendant's loan program. Plaintiff provided funding for a number of such loans, but the borrowers failed to repay the loans when due. Plaintiff then sued defendant under causes of action that included breach of contract, fraud, breach of fiduciary duty and constructive fraud.

On November 2, 2012, the parties entered into a written stipulation to have their entire dispute resolved by binding arbitration. The stipulation unequivocally submitted "all claims, disputes, counterclaims and defenses in this action to binding arbitration." It

¹ The complaint names others persons who are not parties to this appeal.

stated that the arbitrator “shall enter a binding and final Order which shall be entered as a Judgment and enforceable as a Judgment.” Russell D. Cook was subsequently selected as the arbitrator.

Arbitration commenced on February 25, 2013, and lasted three to four days. On April 18, 2013, the arbitrator issued his decision—the arbitration award—in favor of plaintiff and against defendant in the total amount of \$1,037,658.57. The arbitration award included the arbitrator’s statement of his factual findings and conclusions of law. In describing the facts of the case, the arbitrator found that the parties met at an investment club in Fresno, and afterwards they discussed defendant’s “loan program,” which was “to loan borrowers in distress money at high interest and points and then list the property for sale.” During that same time period, defendant was placing advertisements and otherwise actively soliciting lenders, representing rates of return of 10 to 25 percent, with said returns having a “100% guarantee.” Plaintiff and defendant discussed the matter and plaintiff agreed to loan money under defendant’s loan program: “The evidence was that loans to these individuals were based upon the equity in the properties. Both [plaintiff] and [defendant] agreed that the loans were to be of 60-65% loan to value after [plaintiff’s] loan was placed. The properties were listed for sale through [defendant] for immediate sale. [Defendant] claimed that if the programs were followed, that the loan program would guarantee that the investor would get his money back.” The arbitrator considered the nature of the parties’ relationship and found that defendant owed fiduciary duties to plaintiff. The arbitrator then reviewed 24 loan transactions one at a time and determined the instances in which defendant breached his duties to plaintiff. The breaches resulting in damages were frequently based on the fact that, as to the particular loans under consideration, the agreed 60 to 65 percent loan-to-value ratio was exceeded. The legal theory on which liability was based was constructive fraud.

As previously noted, the arbitration award found in favor of plaintiff and against defendant in the total sum of \$1,037,658.57. On May 3, 2013, plaintiff filed a petition in the trial court to confirm the arbitration award. On July 3, 2013, defendant filed an opposition to confirmation and requested that the trial court vacate the award.

On July 17, 2013, the trial court granted the petition to confirm the arbitration award. On August 20, 2013, judgment was entered based on the arbitration award. With the inclusion of additional prejudgment interest, the total judgment was in the amount of \$1,054,254.07. Notice of entry of judgment was served on September 13, 2012. Defendant's timely notice of appeal followed.

DISCUSSION

I. No Basis Shown to Vacate Arbitration Award

Defendant's appeal contends that the arbitrator erred or exceeded his powers in concluding that (1) the loan-to-value ratio on the subject loans had to be 65 percent and (2) defendant committed constructive fraud. As will be seen, defendant's objections are, in substance, ordinary factual and legal challenges that are not grounds for judicial review of an arbitration award, and defendant has failed to establish any statutory basis for vacating the award.

"[A]n award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in [Code of Civil Procedure] sections 1286.2 (to vacate) and 1286.6 (for correction)." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 33.)² Thus, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law, the validity of the arbitrator's reasoning, or the sufficiency of the evidence supporting the arbitrator's award. (*Id.* at p. 11) Even where an error of law is apparent on the face of the award and causes substantial

² Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

injustice, it does not provide grounds for judicial review. (*Id.* at p. 33; accord, *Oaktree Capital Management, L.P. v. Bernard* (2010) 182 Cal.App.4th 60, 68 (*Oaktree*) [“Because courts review neither the award for legal error nor the merits of the controversy itself, a party to an arbitration may not challenge the award for insufficiency of the evidence or flaws in the arbitrator’s reasoning.”].)

To succeed on a request to vacate an arbitration award, a petitioner must show the existence of one of the grounds set forth in section 1286.2. (*Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.* (2008) 44 Cal.4th 528, 534, fn. 2.) The only such ground asserted by defendant in the instant appeal is that the arbitrator exceeded his powers. (§ 1286.2, subd. (a)(4).) Defendant argues the arbitrator exceeded his powers because, allegedly, the arbitrator’s decision was “so utterly irrational that it amount[ed] to an arbitrary remaking of the contract,” quoting from *Southern Cal. Rapid Transit Dist. v. United Transportation Union* (1992) 5 Cal.App.4th 416, 423. In determining whether an arbitrator exceeded his or her powers, we review the matter de novo. (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443.)

We reject defendant’s contention that the arbitrator exceeded his powers in this case. Nothing in the arbitrator’s decision has been shown to be irrational or arbitrary, much less “so utterly irrational that it amount[ed] to an arbitrary remaking of the contract.” Findings were made based on the evidence before the arbitrator that the parties agreed to a particular loan-to-value ratio for the subject loans and also that defendant’s relationship to plaintiff was fiduciary in character under all of the circumstances. Defendant now asserts, in substance, that the evidence did not support these findings of fact and legal conclusions. Additionally, defendant asserts the arbitrator erred in defining the elements of constructive fraud and in concluding the elements of constructive fraud were fully satisfied (such as nondisclosure and/or intent to deceive). However, as the above case authorities make abundantly clear, we do not judicially review an arbitration

award on the ground of insufficiency of evidence, or for errors of fact or law.³ Defendant has failed to present or establish any ground for vacating the award.

II. Defendant Failed to Timely Challenge the Award

When a party has petitioned the trial court to confirm an arbitration award, as was the case here, the opposing party may seek vacation of the award by way of response only if he serves and files a response within 10 days after service of the petition to confirm. (§ 1290.6; *Oaktree, supra*, 182 Cal.App.4th at pp. 64–67; *Coordinated Construction, Inc. v. Canoga Big “A,” Inc.* (1965) 238 Cal.App.2d 313, 318.) Unless the response is timely served and filed, the allegations of the petition are deemed to be admitted. (§ 1290; *Oaktree, supra*, at p. 64.) In this case, defendant did not seek to vacate the award until some two months after plaintiff filed his petition to confirm. Accordingly, defendant’s request to vacate was untimely and the allegations in the petition to confirm were admitted. This provides an additional basis for upholding the trial court’s judgment confirming the arbitration award.

DISPOSITION

The judgment of the trial court is affirmed. Costs on appeal are awarded to plaintiff.

³ Additionally, as pointed out by plaintiff, defendant may not challenge the sufficiency of evidence when there is no transcript of the oral proceedings or copies of the evidentiary exhibits. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.)