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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NEWPORT HARBOR OFFICES &
MARINA, LLC,

Plaintiff and Appellant,

v.

KENT A. MCNAUGHTON,

Defendant and Appellant;

PAUL D. COPENBARGER,

Respondent.

NEWPORT HARBOR OFFICES &
MARINA, LLC,

Plaintiff and Respondent,

v.

KENT A. MCNAUGHTON,

Defendant and Appellant.

G047424

(Super. Ct. No. 30-2008-00068364)

O P I N I O N

G048095

(Super. Ct. No. 30-2008-00069568)

Appeal from a judgment of the Superior Court of Orange County, Sheila
Fell, Judge. Affirmed as modified.

Alston, Alston & Diebold and Elaine B. Alston for Plaintiff and Appellant Newport Harbor Offices & Marina.

Prevonost, Normandin, Berch & Dawe, Michael G. Dawe, Paula M. Harrelson and Kristin F. Godeke for Defendant and Appellant Kent A. McNaughton.

HamptonHolley, George L. Hampton IV and Colin C. Holley for Respondent Paul D. Copenbarger.

* * *

This case is the result of a business relationship gone so bad that the arbitrator likened it to “a highly contested family law dissolution replete with acrimony, significant monetary loss, lack of trust and ‘hard ball’ tactics” Consistent with that assessment, both sides challenge the judgment rendered below.

Kent McNaughton and Paul Copenbarger were equal owners of Newport Harbor Offices and Marina, LLC (NHOM). McNaughton was also a tenant of the building owned by NHOM. When the parties’ relationship soured, McNaughton stopped paying rent and NHOM filed an unlawful detainer action against him (the lease dispute). McNaughton vacated the premises and initiated an arbitration action against Copenbarger, intending to establish that NHOM could not properly file any lawsuit against McNaughton – a 50 percent owner – unless *he* agreed to it. McNaughton then successfully moved to compel arbitration of the lease dispute as well, and that case was ordered stayed in the trial court so it could be resolved in conjunction with McNaughton’s pending arbitration against Copenbarger. Copenbarger filed his own cross-claim in the arbitration, seeking damages arising from McNaughton’s alleged self-dealing and mismanagement of NHOM and enforcement of a “Buy/Sell” provision. At the conclusion of the arbitration, the arbitrator found McNaughton had breached his lease with NHOM, but left the determination of damages flowing from that breach to the trial

court presiding over the (still pending) lease dispute case. The arbitrator also concluded McNaughton had been overpaid by NHOM for property management, and awarded attorney fees and costs to Copenbarger as prevailing party.

The trial court granted Copenbarger's petition to confirm the arbitration award and then assessed damages against McNaughton in the lease dispute case. However, the court did not award the amount of damages that NHOM and Copenbarger would have liked, and thus all parties are unhappy with the outcome of that case. Specifically, McNaughton challenges the arbitrator's determination that Copenbarger could unilaterally authorize NHOM's filing of an unlawful detainer action against him, and claims the outcome of the lease dispute is rendered moot when we recognize the arbitrator erred in reaching that conclusion. He also argues the arbitrator was precluded from allowing Copenbarger to pursue any claim belonging to NHOM derivatively, unless Copenbarger had complied with the statutory prerequisites for doing so in court. And finally, McNaughton argues there was insufficient evidence to support the court's award of any damages against him.

On the other hand, NHOM (along with Copenbarger, who is not technically a party to the lease dispute nor a cross-appellant) argues the court erroneously concluded McNaughton had successfully invoked a 90-day cancellation provision in the lease prior to vacating the leased premises, which improperly limited his liability for the damages caused by his breach of the lease.

None of these contentions has merit.

McNaughton's assertion that the arbitrator "exceeded his jurisdiction" borders on the specious. It was *McNaughton himself* who originally sought arbitration, with the explicit goal of addressing whether Copenbarger could unilaterally authorize NHOM's filing of the lease dispute case. It was also McNaughton who successfully petitioned to compel arbitration of the lease dispute and McNaughton who asked the arbitrator to address the merits of that dispute in his closing brief. McNaughton cannot

now reverse course, and contest the arbitrator's jurisdiction, simply because he dislikes the ruling. And McNaughton's claim that contractual limitations on the arbitrator's power prevented the arbitrator from resolving these disputes *in favor of Copenbarger* is likewise unavailing. We defer to the arbitrator's determination as to the scope of his contractual authority, and we have no difficulty concluding that his ruling was consistent with it here. Finally, McNaughton's attack on the sufficiency of the evidence to support the court's damage award is flawed because it focuses solely on the evidence supporting his position, while ignoring the arbitrator's findings.

And NHOM's challenge to the trial court's damage award in the lease dispute fails as well, because the court's finding that NHOM waived its right to challenge McNaughton's exercise of the 90-day cancellation provision is based on *different facts* than those previously relied upon by the arbitrator in rejecting what was a *different waiver claim*. Moreover, even if the court's finding of waiver were infirm, its finding of estoppel – which is legally and factually distinct from waiver – would still be sufficient to support its ruling.

McNaughton also claims the trial court erred procedurally by adding a provision to the judgment which allowed Copenbarger to recover *retroactive* interest on the arbitrator's fee and cost award. That contention does have merit. The retroactive interest provision was not part of the arbitrator's award, and while the court does have authority to add statutory prejudgment interest to a judgment which follows confirmation of an arbitrator's award, the retroactive interest award in this case went beyond that authority. Moreover, the award of retroactive interest was not even *requested* by Copenbarger in his petition to confirm the award. We consequently modify the judgment to reflect that prejudgment interest begins to accrue on the date of the arbitrator's award, in accordance with the request contained in Copenbarger's petition to confirm.

Finally, McNaughton also complains the court improperly issued an *ex parte* order which allowed Copenbarger to authorize NHOM's participation in a different

lawsuit. But as McNaughton admits, that order is collateral to this case; it is nowhere referenced in the judgment appealed from. Further, our record does not reflect that order was separately appealed. Consequently, we need not address it here.

FACTS

Copenbarger and McNaughton formed NHOM as a limited liability company in 2004, with themselves as its only members. Somewhat confusingly, NHOM's operating agreement gave *each of them* "full, complete *and exclusive* authority, power, and discretion to manage and control [its] business," (italics added) but then clarified the situation somewhat by also specifying that Copenbarger delegated to McNaughton "management of the day-to-day operations of the commercial real property owned by the Company," while McNaughton delegated to Copenbarger "management and handling of all legal affairs of the Company." These delegated powers were subject to written revocation in accordance with the terms of the agreement.

In 2008, after several apparently successful years in business together, Copenbarger and McNaughton could no longer agree on the amount of compensation McNaughton should be paid for running the day-to-day operations of NHOM. As a consequence of that disagreement, Copenbarger formally revoked McNaughton's delegated authority to manage NHOM's day-to-day operations. And McNaughton, who was also a tenant in the building owned by NHOM, ceased making payments for his leased space in February 2008.

Copenbarger responded to McNaughton's rent strike by informing McNaughton in March that if he "wish[ed] to exercise the 90 [day] termination privilege which you gave yourself in the lease, I will not contest that" However, when the parties had not yet resolved their dispute by May, things devolved quickly. NHOM's property manager, Pacific West Management Corporation (Pacific West), served

McNaughton with a 3-day notice to pay rent or quit, and while McNaughton responded to that notice by promptly making rent payments to Pacific West (which Pacific West accepted), the payments were accompanied by a “remind[er]” that Pacific West could not initiate any legal action on NHOM’s behalf without McNaughton’s own consent.

McNaughton then notified Pacific West that he was exercising his 90-day lease termination privilege and would vacate the premises on August 12, while NHOM, as authorized by Pacific West and Copenbarger, filed the lease dispute as an unlawful detainer action. McNaughton vigorously objected to the filing, reiterating his claim that because he was a 50 percent member of NHOM, it could not initiate any litigation (including litigation against him) without his consent. This vigor has continued on appeal – indeed, in his opening brief McNaughton goes so far as to characterize the group which facilitated NHOM’s pursuit of the lease dispute against him (including Copenbarger, Pacific West, and Elaine Alston, the attorney hired to represent NHOM in the lease dispute) as a “*Cabal*,” in an apparent effort to suggest they acted not only erroneously, but *nefariously*. The suggestion is neither legally significant nor analytically helpful.

In June, McNaughton formally revoked Copenbarger’s delegated right to manage NHOM’s legal affairs. When NHOM did not immediately abandon the lease dispute, McNaughton countered by filing a claim against Copenbarger for binding arbitration in accordance with the arbitration provision contained in NHOM’s operating agreement. McNaughton sought a declaration that NHOM could not validly pursue the lease dispute against him, or any other litigation, without his express consent.

McNaughton also requested a finding that Copenbarger had breached his fiduciary duty to McNaughton by causing NHOM to file the lease dispute against him.

In July of 2009, McNaughton filed a motion to compel the lease dispute into the arbitration as well. The trial court granted the motion, reasoning that the lease dispute boiled down to a disagreement between Copenbarger and McNaughton, and it would thus be most efficiently resolved in conjunction with the arbitration already

pending between them: “The management company . . . has to be getting their marching orders from one of the two principals. And if the two principals aren’t agreeing on that, one is telling them to stop and one to go ahead. There is the dispute right there. There should be arbitration. [¶] So I am going to move it into arbitration. . . . I think there is an arbitration date already; is there not?” The court then ordered the lease dispute stayed in the trial court, pending the outcome of the arbitration.

In the wake of the court’s order, the arbitrator issued a ruling acknowledging the court had compelled arbitration of the lease dispute, and allowing both McNaughton and Copenbarger to file counter claims to any of the issues and claims arising out of that dispute. The arbitrator determined “that the pending and potential new claims and counter claims between the [p]arties hereto will resolve the pending issues in the litigation involving the lease disputes and the rights and obligations of the two members of NHOM.” Copenbarger’s amended cross-claim incorporated the issues encompassed by the lease dispute, as well as additional claims asserting McNaughton had devalued NHOM (and consequently Copenbarger’s interest therein) by failing to cooperate in the management of NHOM’s commercial property.

The arbitration finally commenced in May 2010 and proceeded slowly. In June 2010, while the arbitration was in progress, McNaughton moved to dismiss the lease dispute in the trial court, arguing it was not being prosecuted diligently by NHOM. Specifically, McNaughton argued that while he and Copenbarger were arbitrating *the claims they had against each other* as members of NHOM, *NHOM itself* had failed to make any appearance in that arbitration and had never asserted the lease dispute claims *on its own behalf*. The court denied the motion, but implicitly lifted the stay on proceedings in the trial court by setting the lease dispute case for trial.

Meanwhile, the parties completed their presentation of claims in the arbitration, and the matter was submitted for decision in November 2010. In his closing brief, McNaughton asked the arbitrator not only to determine whether NHOM could

pursue litigation against him without his consent, but also to *address the merits of the lease dispute filed by NHOM*. Specifically, McNaughton expressly requested the arbitrator declare that his “tender of rent on May 9, 2008, was both timely and in the correct amount.” He otherwise objected to Copenbarger’s pursuit of any claim which he viewed as technically belonging to NHOM itself.

For his part, Copenbarger argued McNaughton was estopped from relying on the fact NHOM had not separately appeared as a party in the arbitration as a basis for defending any claim. As Copenbarger pointed out, it was McNaughton himself who had originally elected to disregard NHOM’s separate entity status for purposes of arbitration, when he filed the first claim challenging *NHOM’s authority* to pursue the lease dispute, without including NHOM itself as a party. Having chosen to posture the arbitration in that less formal way – as a dispute *about* NHOM between its two equal members – McNaughton could not later complain when Copenbarger acceded to his choice. Copenbarger also argued he was entitled to pursue a derivative claim against McNaughton in any case, because it would have been futile to demand that NHOM the entity (controlled equally by the two members after McNaughton revoked Copenbarger’s delegated authority over legal affairs) pursue that claim itself.

The arbitrator issued his interim award, addressing the merits of the dispute, in February 2011. He found primarily in Copenbarger’s favor, specifically determining NHOM’s pursuit of the lease dispute action against McNaughton had been appropriate despite McNaughton’s objection. The arbitrator noted that McNaughton’s status as NHOM’s tenant meant Copenbarger was the sole “disinterested” member with respect to any dispute involving that tenancy. The arbitrator also concluded that the provision in NHOM’s operating agreement by which McNaughton had delegated responsibility for handling NHOM’s legal affairs to Copenbarger, governed decisions to initiate litigation.

On the merits of the lease dispute, the arbitrator found McNaughton defaulted on his lease obligations and that his subsequent tender of payment was not sufficient to satisfy the additional penalties and financial obligations triggered by that initial breach. He also found that Pacific West's acceptance of McNaughton's payment in May 2008 did not operate as a waiver of NHOM's rights to enforce those additional penalties and obligations, noting that "[o]wner approval was required for any such general release." The arbitrator expressly declined to assess the amount of damages to be awarded as a consequence of McNaughton's breach, and instead expressly reserved that issue for determination by the court presiding over the lease dispute case. The arbitrator also declined to address whether McNaughton had properly invoked the 90-day termination provision in the lease, stating the issue of "[w]hether . . . McNaughton vacated the subject suites voluntarily or properly is a question of fact for the pending . . . action in civil court."

As to the remaining claims asserted, the arbitrator concluded McNaughton had been overcompensated by \$12,500 for his management services, and ordered that amount reimbursed. However, he rejected Copenbarger's claim that McNaughton had also breached a "Buy/Sell" provision of NHOM's operating agreement, as well as his claim that McNaughton had improperly removed "sunshades and valances" from NHOM's premises. The arbitrator then declared Copenbarger to be the "[m]ost [p]revailing [p]arty" and allowed him to submit an application for an award of attorney fees and costs.

After Copenbarger submitted his application for fees and costs, the arbitrator issued his final award in April 2011. The final award incorporated the terms of the interim award without change and included a total award of \$133,713.58 in attorney fees and costs to Copenbarger.

In May 2011, Copenbarger filed a petition to confirm the arbitration award with the court presiding over the lease dispute, and that petition was granted. However,

the court expressly refused to enter a separate judgment on the confirmed award, on the ground that overlapping claims between NHOM and McNaughton in the unlawful detainer case remained unresolved.

The court then conducted a trial to determine the damages to be awarded in the unlawful detainer case. After considering the evidence submitted by the parties, it ruled McNaughton was liable to NHOM for damages in the amount of \$14,283.24. The court found McNaughton had successfully exercised the 90-day termination provision in his lease, and NHOM had either waived any objection to that exercise or was estopped from objecting to it. These findings prevented NHOM from holding McNaughton liable for the future rent accruing during the balance of McNaughton's original 10-year lease term, which it estimated to be in excess of \$300,000.

In July 2012, the court entered a judgment encompassing both the confirmed arbitration award and the court's award of damages arising from the lease dispute.

DISCUSSION

1. Standard of Review

The judgment in this case encompasses an order confirming an arbitration award between Copenbarger and McNaughton, as well as the court's own resolution of the lease dispute between NHOM and McNaughton. The standards we employ in reviewing those decisions are different.

Although our review of an order confirming an arbitration award is *de novo* (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376, fn. 9), the grounds upon which a party can challenge such an award are quite restricted. "Judicial intervention in the private arbitration process is strictly limited because the parties have agreed to 'bypass the judicial system' [citation] and submit their dispute to 'nonjudicial

resolution by an independent third person or persons' [citation]. By agreeing to arbitration, parties anticipate a relatively speedy, inexpensive and final resolution, one that may be based on "broad principles of justice," rather than strictly the rule of law. [Citation.] Consequently, 'as a general rule courts will indulge every reasonable intendment to give effect to arbitration proceedings.'" (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1218.) Thus, under California law, an arbitrator's decision must be confirmed by the court unless: (1) the award was procured by fraud or one or more arbitrators was corrupt; (2) the rights of a party were prejudiced by an arbitrator's misconduct, the denial of a requested postponement, or the arbitrator's refusal to hear material evidence; (3) the arbitrator failed to disclose a ground for disqualification or was subject to disqualification; or (4) the arbitrator exceeded his power and the award cannot be corrected without affecting the merits of the decision on the controversy submitted to arbitration. (Code Civ. Proc., §§ 1286, 1286.2, subd. (a).)

Only the last of these grounds was raised by McNaughton in his opposition to Copenbarger's petition to confirm the arbitration award. And on that point it is well-established that "courts should generally defer to an arbitrator's finding that determination of a particular question is within the scope of his or her contractual authority." (*Advanced Micro Devices, Inc. v. Intel Corp.*, *supra*, 9 Cal.4th at p. 372.) Significantly, we do not review the substance of an arbitrator's award or assess whether the decision represents a correct application of the law. (*Hoso Foods, Inc. v. Columbus Club, Inc.* (2010) 190 Cal.App.4th 881, 887 ["Typically, an arbitrator's errors of fact or law are not reviewable"].)

By contrast, we review the trial court's own rulings in connection with the lease dispute for both factual and legal error. "To the extent that the lower court's order is based on a finding of material fact, we adopt a substantial evidence standard. [Citation.] On the other hand, questions of law, including the legal effect of the

undisputed contract language, are reviewed de novo.” (*Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1127.)

2. *McNaughton’s Challenge to Arbitrator’s Ruling that NHOM Could Pursue the Lease Dispute Without his Consent*

McNaughton’s primary contention on appeal boils down to this: he insists that because NHOM is a distinct legal entity, of which he owned 50 percent, it could not pursue litigation – against him or anyone else – without his consent. (See generally, Corp. Code, § 17701.01, et seq. [addressing the formation and management of limited liability companies]; *Sealand Inv. Corp. v. Emprise, Inc.* (1961) 190 Cal.App.2d 305, 309 [holding that owners of 50 percent of the shares of a corporation, who controlled 50 percent of its board, could not authorize the corporation to file suit against the owners of its other 50 percent of shares].) Thus, in McNaughton’s view, NHOM’s purported initiation of the lease dispute against him necessarily amounted to a disguised *derivative action* by Copenbarger, which was filed without complying with the statutory prerequisites for pursuing such an action. McNaughton then argues that Copenbarger’s failure to fulfill the statutory prerequisites for a derivative action deprived the trial court of jurisdiction to even entertain the lease dispute and effectively renders the entire judgment moot.

But however effective that legal analysis might be in the abstract, or in the context of some other case, it is not effective here. Because instead of presenting that argument to the trial court, and pursuing it to judgment *in that forum*, McNaughton chose instead to submit the issue of whether NHOM could pursue the lease dispute without his consent to arbitration – a forum which is distinguished by its preference for the equitable resolution of disputes, rather than the enforcement of technical legal requirements. He lost. And because arbitration does not require adherence to legal technicalities, McNaughton cannot directly challenge the arbitrator’s ruling on that basis. Instead, he is

relegated to crafting an argument that the arbitrator's ruling – on issues he submitted for decision – nonetheless exceeded the arbitrator's power.

And while McNaughton does make that argument, it is unpersuasive. McNaughton's argument centers on the arbitration provision in NHOM's operating agreement (the provision authorizing this binding arbitration), which states "[t]he arbitrator shall not have any power to alter, amend, modify, or change any of the terms of this Agreement nor to grant any remedy which is either prohibited by the terms of this Agreement or not available in a court of law." According to McNaughton, the arbitrator's conclusion that Copenbarger, acting alone, could authorize NHOM to file the lease dispute case against him, violated *both* of these limitations on his power: First, because it *effectively* altered the terms of the operating agreement, which otherwise gave McNaughton and Copenbarber *equal* control of NHOM; and second, because it allowed Copenbarger to *proceed derivatively* on NHOM's claim, even though he had not complied with the statutory prerequisites that would have allowed him to pursue such a claim in court. In McNaughton's view, this amounted to the arbitrator providing Copenbarger a remedy that was not available in a court of law.

McNaughton's argument is fundamentally flawed in several respects. Most significantly, it presumes the broadest conceivable interpretation of the provision restricting the arbitrator's powers, which is inconsistent with our obligation to defer to the arbitrator's own assessment of that issue. The arbitration provision, read literally, merely prohibits the arbitrator from (1) *actually* altering, amending, modifying, or changing the terms of the operating agreement – in other words, *rewriting* the agreement; and (2) fashioning a remedy which would not be an "available" option in court. It does not prohibit the arbitrator from "effectively" modifying the agreement (as McNaughton complains happened here) by simply *interpreting* its terms in a manner the losing party disagrees with. That is all the arbitrator did in this case.

Similarly, the arbitration provision merely restricts the arbitrator from fashioning a remedy that is not “available” in court. What that refers to is the grant of a remedy which is precluded *under California law* for the claimed wrong. (*O’Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1057-1061 [vacating arbitrator’s ruling that a partner had *forfeited* his entire capital account because of wrongdoing; forfeiture was not a remedy available under California law for such wrongdoing].) The provision does not, however, restrict the arbitrator’s discretion to choose among legal remedies that are available in court – including the discretion to grant a particular remedy in circumstances where a court itself might not have done so. Perhaps more significantly, it would not preclude the arbitrator from granting an “available” remedy *erroneously*. Here, McNaughton’s complaint is really that the arbitrator allowed Copenbarger to pursue *an available remedy under California law* – a derivative claim – in circumstances where a court would not have allowed it. While that might constitute *legal error*, which we do not review, it does not exceed the arbitrator’s power.

In any event, McNaughton’s portrayal of the arbitrator’s decision as one which effectively “neuter[ed] the equal ownership rights provisions of the [o]perating [a]greement” simply ignores the particulars of that ruling. As the arbitrator explained, while the general provisions of the NHOM operating agreement gave the two men equal control over its management, those provisions were modified by the more specific provision delegating to Copenbarger exclusive authority to handle NHOM’s “legal affairs.” NHOM’s choice to pursue litigation – against McNaughton or anyone else – falls squarely within that authority and thus the arbitrator properly concluded Copenbarger had “both the duty and responsibility to initiate and prosecute an action against a delinquent tenant” And of course, the fact this delegated authority over legal affairs was *revocable* changes nothing, since McNaughton failed to actually revoke it until *after* NHOM had already filed the lease dispute. At that point, the revocation could accomplish nothing more than to ensure that any *future* changes in NHOM’s

litigation strategy – such as a decision to dismiss or settle the case – would likely have required the consent of *both* Copenbarger and McNaughton.

Hence, even if we assumed the arbitrator had been restricted from issuing any ruling which effectively contravened the basic balance of power struck between Copenbarger and McNaughton in the NHOM operating agreement, we would still conclude that this ruling, which recognized Copenbarger’s delegated power to authorize NHOM’s filing of the lease dispute, did not contravene that restriction. Consequently, the arbitrator did not exceed his powers by issuing it.

And finally, the arbitrator’s determination that Copenbarger could unilaterally approve NHOM’s filing and pursuit of the lease dispute necessarily disposes of McNaughton’s contention that the court lacked fundamental subject matter jurisdiction over that dispute. The arbitrator’s ruling established that NHOM itself, the owner of the lease claim, was the actual plaintiff in that action – and thus that the lease dispute was properly before the court. Moreover, the arbitrator’s ruling also necessarily implied Copenbarger had the authority to approve the selection of counsel to represent NHOM in that dispute. Thus, McNaughton’s attack on the court’s subject matter jurisdiction, as well as his contention that attorney Alston “was never effectively engaged by NHOM to sue [him]” need not be separately addressed.

3. McNaughton’s Challenge to Arbitrator’s Jurisdiction Over the Lease Dispute

McNaughton also contends – by way of various arguments sprinkled throughout his opening brief – that the arbitrator *also* lacked subject matter jurisdiction over the merits of the lease dispute, because (1) the dispute was at all times the subject of a case pending in the superior court; (2) NHOM itself never filed any claim in the arbitration; and (3) Copenbarger never fulfilled the requirements for pursuing NHOM’s claims derivatively and could not have been excused from doing so.

However, the pendency of a court case certainly does not deprive the arbitrator of jurisdiction to rule on whatever issues are placed before him. Instead, Code of Civil Procedure section 1281.4 provides for a *stay of proceedings* in a court case which has been ordered into arbitration, if requested by a party. And in the absence of a stay request, the dispute could even *proceed simultaneously* in both forums. Neither the court nor the arbitrator exercises exclusive jurisdiction. (See *Mave Enterprises, Inc. v. Travelers Indemnity Co.* (2013) 219 Cal.App.4th 1408, 1427 [“although the superior court enforced the parties’ stipulation to arbitrate their disputes, it did not lose jurisdiction of the matter”].)

Because arbitration is a matter of contract (*Sparks v. Vista Del Mar Child & Family Services*. (2012) 207 Cal.App.4th 1511, 1517-1518), what determines the arbitrator’s general “subject matter” jurisdiction is the parties’ *agreement* to submit their dispute to arbitration. (*Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 543 [“The powers of an arbitrator derive from, and are limited by, the agreement to arbitrate”].) Moreover, “[t]he parties may submit for decision issues they were not contractually compelled to submit to arbitration. In such event, courts look both to the contract *and* to the scope of the submissions to determine the arbitrator’s authority.” (*Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1438.)

In this case, it was McNaughton himself who submitted the lease dispute to the arbitrator for a ruling. Not only did he petition the court to order that dispute into arbitration, but he specifically asked the arbitrator, in his closing brief, to declare he had fulfilled his obligations under the lease when he tendered a rent payment on May 9, 2008, as NHOM could not “as a matter of law” have asserted a valid claim for “future rent” as of that date. Having submitted that issue to the arbitrator for a decision, McNaughton cannot credibly contend the arbitrator lacked jurisdiction to decide the merits of the lease dispute.

Nor does it matter that NHOM itself never appeared *as a separate party* in the arbitration. While it is true that NHOM is a distinct legal entity, apart from either Copenbarger or McNaughton (Corp. Code, § 17001.04), it is also clear that NHOM itself had no independent interest in the outcome of the proceeding. More to the point, because NHOM was jointly controlled by Copenbarger and McNaughton following the revocation of Copenbarger's authority over its legal affairs, it had no ability to stake out any distinct position in the arbitration. What this means is that NHOM was not so much *a player* in the arbitration as it was *the turf*. That posture was created by McNaughton, who consistently challenged NHOM's ability to take *any action* without the approval of both himself and Copenbarger, and who chose to pursue his initial arbitration claim, challenging the validity of *NHOM's* court filing, in a proceeding against *Copenbarger only*. Clearly, McNaughton viewed the disputed issue of *NHOM's rights* as a matter to be resolved between himself and Copenbarger.

And when McNaughton later petitioned the court to order the lease dispute into arbitration as well, he could not have contemplated that NHOM itself would meaningfully participate in the arbitration as a separate party; to the contrary, it is clear he would have objected to any such attempt. And in fact, NHOM itself is not even bound by the arbitration provision in the operating agreement – the only “parties” to that agreement are Copenbarger and McNaughton. It is also clear that the court which granted McNaughton's petition viewed the lease dispute as primarily a dispute between the two men; indeed, it brushed off NHOM's otherwise pertinent objection that there was also no arbitration provision in its lease agreement with McNaughton by explaining that “Mr. Copenbarger and Mr. McNaughton have parted their ways, and this case is already in arbitration [so] in the interest of settlement and getting this resolved, and since all matters are pertinent to the original [NHOM operating] agreement, I feel that it really should go to arbitration.”

Having benefitted from the court's acceptance of his contention that NHOM's claims in the lease dispute should be resolved as part of the arbitration between himself and Copenbarger, McNaughton cannot now complain that it was inappropriate to resolve those claims in that fashion. (See *Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 121 [setting forth the elements of judicial estoppel].)

But finally, even if we believed the arbitrator could not have addressed NHOM's claims in the lease dispute unless its interests were formally represented in the proceeding, we would still reject McNaughton's challenge to this aspect of the arbitrator's decision. As McNaughton otherwise concedes, California law does allow for a member of a limited liability company to pursue its claims derivatively, and Copenbarger's cross-claim did incorporate the contentions asserted by NHOM in the lease dispute. Thus, NHOM's claims were formally placed at issue, in what amounts to a derivative fashion. At most, then, McNaughton could argue the arbitrator committed *legal error* when he, in effect, allowed Copenbarger to pursue NHOM's claims derivatively, without first requiring adherence to all statutory procedures associated with such a claim. However, because legal error is not a proper basis for challenging an arbitrator's decision, that argument would fail. We consequently reject McNaughton's contention that the arbitrator's ruling on the merits of the lease dispute must be vacated.

And having rejected that contention, we necessarily reject as well McNaughton's claim that the court erred by foregoing a "full trial" on the merits of the lease dispute. Once the court confirmed the arbitrator's award, which included his determination that McNaughton had breached his lease with NHOM, and left only the issue of damages for the court to address, there was no reason for the court to hold its own trial on that same issue.

4. *Challenges to the Court's Assessment of Damages in the Lease Dispute*

Both sides challenge the amount of damages awarded by the court against McNaughton in the lease dispute. McNaughton contends the evidence is insufficient to support any award of damages, while NHOM argues the award is far too low because the court erred in finding that McNaughton had successfully invoked the lease's 90-day termination provision.

a. McNaughton's challenge

McNaughton contends the court erred by assessing any damages against him, because the undisputed evidence presented to the court shows he (a) fully paid all money due under the lease on May 9, 2008, and (b) later paid all money due as of the final termination of the lease on August 12, 2008. Both assertions are squarely inconsistent with the arbitrator's ruling and are thus unavailing.

McNaughton's first assertion, that he paid all money due on May 9, contravenes the arbitrator's explicit determination that when McNaughton chose to breach his lease with NHOM by withholding rent, he triggered additional financial penalties provided for in the lease. The arbitrator noted that while such penalty provisions were "oppressive," they were also typical, and were enforceable. Thus, McNaughton's subsequent tender of a sum equal to the rent that *would have been due absent his breach*, was not sufficient to satisfy his obligations or to cure that initial breach. Of course, that confirmed ruling was binding on McNaughton for purposes of the court's damage assessment, and we consequently reject his first challenge to the court's damage.

McNaughton's second assertion, that he also paid the total amount due under the lease as of August 12, when he vacated the premises, is not well developed. However, it appears he is arguing the undisputed evidence before the court demonstrated that Pacific West, NHOM's property manager, had calculated an amount it represented to

be the “[t]otal [d]ue” under the lease through August 12, and that he paid that calculated amount. Significantly, McNaughton does not contend the undisputed evidence also shows that Pacific West’s calculation *accurately reflected his total liability under the lease*; and in fact, NHOM contends the evidence before the court demonstrated the amount was incorrect, because it failed to account for NHOM’s right to collect “rent at the holdover rate, or late charges, interest, court costs and attorneys fees.”

Rather than establishing the factual accuracy of Pacific West’s number, McNaughton seems to be assuming *NHOM was automatically bound by it* and thus could not assert any additional claims for damages under the lease. But here again, the arbitrator expressly ruled to the contrary, finding that Pacific West’s conduct in August 2008 – i.e., it’s “acceptance of the rental payments and more” – “did not constitute a waiver of any rights or remedies that NHOM could assert against . . . McNaughton.” Instead, the arbitrator concluded “[o]wner approval was required for any such release.” In light of that ruling, McNaughton could not simply rely on *Pacific West’s* conduct in August 2008 as a basis for asserting *NHOM* had waived its right to seek payment of whatever additional amounts were still owing under the lease on account of his breach. Because that is all McNaughton appears to be doing, we reject his challenge to the damage award on this second ground as well.

b. NHOM’s challenge

NHOM’s contends the trial court’s damage award must be reversed for different reasons. Instead of disregarding the arbitrator’s ruling as McNaughton has, NHOM claims it was the trial court that ignored one of the arbitrator’s key findings. Specifically, NHOM complains the court’s determination that it either waived its objection to McNaughton’s exercise of his 90-day cancellation provision in the lease, or was estopped from asserting that objection, was itself inconsistent with the arbitrator’s

earlier finding that NHOM had not waived its rights and remedies under the lease. But the two findings are based on wholly separate facts and are thus not inconsistent.

The arbitrator's "no waiver" finding focused on *Pacific West's* conduct in August 2008, and concluded that nothing *it had done* during that period was sufficient to effect a "general release" of NHOM's rights and remedies under the lease. The arbitrator opined that "[o]wner approval was required for any such general release." However, the arbitrator did not rule out the possibility that NHOM itself might have waived its rights under the lease through its own conduct. And significantly, the arbitrator expressly refused to opine on the specific question of whether "McNaughton vacated the subject suites voluntarily or properly," stating instead that issue would be a "question of fact for the pending unlawful detainer action in civil court."

By contrast, the court's waiver finding was based on NHOM's own conduct, rather than anything Pacific West did or did not do in August 2008. The court pointed to Copenbarger's own letter, written in March 2008 while he was still in charge of NHOM's legal affairs, which plainly and explicitly offered McNaughton the opportunity to take advantage of the 90-day termination provision.

Further, because Copenbarger's offer, which was never revoked, was made at a time when *McNaughton was already in breach of the lease*, there is no merit to NHOM's contention that McNaughton's uncured breach of the lease prevented his exercise of the termination provision. Clearly, this is just the sort of "objection" the court's waiver ruling precludes.

And even if the court's finding of waiver were infirm, its finding of estoppel would be sufficient to justify its ruling. The doctrines of waiver and estoppel, while similar, are based on different factual inquiries. The validity of a waiver focuses solely on the intent (express or implied) of the party waiving a right (see *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 521, fn. 3 "[w]aiver is the ""intentional relinquishment or abandonment of a known right"""), whereas estoppel focuses primarily on whether that

party's conduct induced *another party* into detrimental reliance. (See *In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1061[estoppel requires that “the party intended his conduct would be acted upon, or acted in a manner that the party asserting the estoppel had a right to believe it so intended; and . . . the other party relied upon the conduct to his injury”].)

In this case, the distinction means that even if there were no basis to conclude NHOM *intended* to waive any of its rights under the lease – including its right to object to McNaughton's exercise of the 90-day termination provision – the court could still find NHOM was estopped from asserting such an objection, because Copenbarger's letter gave McNaughton a reasonable belief that NHOM would acquiesce in the termination, and he then relied on that belief in deciding to vacate the premises on August 12. And that is clearly what the court did find. The court's estoppel finding referenced both Copenbarger's written offer and the fact Pacific West later responded to McNaughton's announced plan to terminate his tenancy in 90 days by simply calculating the pro-rated amount of rent that would be due as of the termination date. As the court concluded, that conduct served to confirm McNaughton's understanding that NHOM was in agreement with his decision to terminate the lease.

Based on our own review of Copenbarger's letter, combined with the dearth of any evidence that NHOM (either directly or through Pacific West) subsequently objected to McNaughton's stated plan to vacate the premises at the end of 90 days, we conclude the court's finding of estoppel was proper. Consequently, the court did not err by rejecting NHOM's effort to hold McNaughton liable for “future rent” under the lease for the period after August 12, 2008.

5. The Addition of Retroactive Prejudgment Interest on the Arbitrator's Award was Improper.

The final issue presented on appeal is McNaughton's challenge to a provision in the judgment awarding Copenbarger four years worth of *retroactive* prejudgment interest, commencing from the date McNaughton filed his first petition to arbitrate in June of 2008, at a rate of 10 percent per year. McNaughton attempted to challenge this provision at the trial court level, but only after he had already filed an appeal from the judgment. The court ruled it had lost jurisdiction to alter or amend the judgment while the appeal was pending, and did not address the merits of McNaughton's argument.

McNaughton argues the court erred by adding this retroactive interest provision into the judgment because it is nowhere mentioned in the arbitration award the court ordered confirmed. We agree. While Copenbarger argues the retroactive interest award was justified, citing a provision in the NHOM operating agreement which specifies that the reasonable attorney fees and costs incurred by the prevailing party in any dispute "shall be deemed to have accrued upon the commencement of such action," we need not address that substantive argument.

Even assuming Copenbarger was theoretically entitled to claim such an award under the contract, the problem is he never actually did so. He failed to include any such claim in his motion for fees and costs before the arbitrator; it is thus not surprising that the arbitrator omitted it from his award. Perhaps more significantly, he also failed to request it from the court as part of his petition to confirm the award. Instead, Copenbarger's petition included a very specific request that the court award prejudgment interest *from "the date of the arbitration award, April 18, 2011."* (Italics added.) This request comports with the general rule establishing that interest begins to run upon entry of the order or judgment setting the amount of fees awarded. (*Lucky United Properties, Investment, Inc. v. Lee* (2010) 185 Cal.App.4th 125, 137-138.)

Because Copenbarger's petition to confirm the arbitrator's award included a very specific request that prejudgment interest should accrue on that award commencing on April 18, 2011, and it was *that petition* the court granted and incorporated into the judgment, the court could not thereafter simply alter the prejudgment interest provision to reflect a different accrual date. It erred by doing so.

DISPOSITION

The judgment is modified to reflect that prejudgment interest accrues from April 18, 2011, on the arbitrator's award rendered in favor of Copenbarger. In all other respects the judgment is affirmed. In the interests of justice, all parties are to bear their own costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.