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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL G. FLOWER,

Plaintiff and Respondent,

v.

SCOTT SEWELL,

Defendant and Appellant.

G047729

(Super. Ct. No. 30-2010-00335082)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Luis A. Rodriguez, Judge. Affirmed.

Esner, Chang & Boyer, Andrew N. Chang and Holly N. Boyer for Defendant and Appellant.

Law Offices of Roxanne Huddleston and Roxanne Huddleston for Plaintiff and Respondent.

* * *

Defendant Scott Sewell appeals from an order confirming an arbitration award. He raises two issues. First, he contends the arbitrator failed to disclose a material professional relationship with plaintiff Michael Flower's counsel. In particular, Flower's counsel was a board member of the Orange County Trial Lawyers Association (OCTLA), which, after the arbitration matter had been opened, awarded the arbitrator their "Top Gun" award for the best business litigation trial attorney in 2011. As a board member, plaintiff's counsel was one of 25 people who voted on the award. Second, based on certain pretrial rulings and alleged ex parte communications, Sewell claims the arbitrator was biased against him. We affirm, finding no evidence the arbitrator was aware of Flower's counsel's role, and finding no evidence of bias.

FACTS

Plaintiff Michael Flower owns MDM Construction Services (MDM). In 2008 Flower hired Sewell as president of MDM. Prior to joining MDM, Sewell had been involved in a lawsuit with a former employer and owed approximately \$200,000 to his attorneys. Flower agreed to loan \$200,000 to Sewell. In November of 2009, Flower terminated Sewell and demanded full payment on the loan. Sewell refused to pay. Sewell claimed he was a 49 percent owner of MDM and that sufficient distributions were made during the relevant period which were assigned to Flower, to satisfy the obligation under the loan.

Flower filed suit in January of 2010, alleging breach of contract, fraud, and a common count for money owed. Upon Sewell's motion, the matter was stayed and sent to arbitration. The arbitrator found for Flower, awarding him the full amount of the loan.

Sewell petitioned to vacate the award, and Flower to confirm it. The court confirmed the award, from which Sewell timely appealed. He raises two issues on appeal: that the arbitrator failed to disclose a fact creating a reasonable impression of

arbitrator bias, and that the arbitrator was actually biased. The facts specific to these contentions are set forth in the discussion below.

DISCUSSION

The Arbitrator's Disclosures Were Adequate

Sewell first contends the arbitrator failed to disclose the fact that he was awarded the “Top Gun” business litigation trial lawyer of the year award by the OCTLA while the arbitration was pending. This fact should have been disclosed, Sewell argues, because Flower’s attorney, Gregory Brown, was a board member of the OCTLA and one of only 25 people to vote on the winner of the award. The record contains the following relevant facts.

The arbitration was initiated in May of 2011. The arbitrator submitted a disclosure statement in June of 2011, stating he had no personal or professional relationship with any of the parties or attorneys. He had no interest in, or knowledge of, the dispute, and he was not aware of any facts that would create a reasonable doubt about his ability to be impartial. Brown declared that he had only spoken to the arbitrator one time outside of the arbitration hearing, which was a brief introduction at an OCTLA event resulting in a conversation among four people that lasted only a couple of minutes.

The arbitrator was nominated for the Top Gun award in July of 2011. Brown was also nominated, though, for unexplained reasons, he did not make it to the final round of nominees. The winners were announced prior to the award ceremony, which was in November of 2011. Brown’s firm was listed as a sponsor of the event because Brown, who is a named partner, ran the video system. Brown did not speak to the arbitrator at the awards ceremony.

The arbitration hearing took place in February of 2012. The arbitrator issued his interim award in May of 2012. In its statement of decision confirming the

award, the court addressed the nondisclosure issue, stating, “Defendant failed to establish that the Arbitrator’s receipt of the OCTLA Top Gun Award constituted a ‘significant personal relationship’ that required disclosure.”

“It is well established that the grounds for vacating an arbitration award are exceedingly limited, confined generally to the bases specified in Code of Civil Procedure section 1286.2.” (*Grill v. Hunt* (1992) 6 Cal.App.4th 73, 77.) One basis to vacate an award is if the arbitrator “failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware.” (Code Civ. Proc., § 1286.2, subd. (a)(6).) Arbitrators are required to disclose “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.” (Code Civ. Proc., § 1281.9, subd. (a).) This is an objective test, based on a reasonable observer. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 385-386 (*Haworth*).) This disclosure obligation is ongoing. (Cal. Rules of Court, Ethics Stds. for Neutral Arbitrators in Contractual Arbitration, std. 7(f).) “Under the applicable California statute, an arbitrator’s failure to make a required disclosure requires vacation of the award, without a showing of prejudice.” (*Haworth*, at p. 394.) The burden is on the moving party to establish grounds for vacating the award. (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 923.)

Both parties cite *Haworth*, for the proposition that we review the trial court’s ruling de novo. (*Haworth, supra*, 50 Cal.4th. at pp. 385-386.) In *Haworth*, however, the facts were not in dispute. In that context, whether the arbitrator failed to disclose a fact casting reasonable doubt on the arbitrator’s impartiality was a mixed question of law and fact subject to de novo review. As that court explained, however, predominantly factual issues are reviewed under the substantial-evidence test. (*Id.* at p. 384.) Where the judgment turns on disputed facts, “We must accept the trial court’s resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its

judgment, and defer to its determination of credibility of the witnesses and the weight of the evidence.” (*Betz v. Pankow, supra*, 16 Cal.App.4th at p. 923.)

We need not decide whether Brown’s role in voting for the Top Gun award was a fact that should have been disclosed, because there was no substantial evidence in the record that the arbitrator knew about Brown’s role in the process. The duty of disclosure is limited to facts “of which the arbitrator was then aware.” (Code Civ. Proc., § 1286.2, subd. (a)(6).) “[T]his requirement of scienter is a deliberate expression of the Legislature’s intent to prevent the undoing of an arbitration award based upon an arbitrator’s unknowing failure to disclose information.” (*Casden Park La Brea Retail LLC v. Ross Dress For Less, Inc.* (2008) 162 Cal.App.4th 468, 477.) It is supported by the sound consideration that an arbitrator could not be biased by a fact he was unaware of.

Sewell points to various pieces of evidence to try to prove the arbitrator knew of Brown’s role. First, Sewell notes that the arbitrator had written articles for the OCTLA newsletter, which lists the board members’ names in the margin near the table of contents. But we do not know when the arbitrator wrote those articles, and thus do not know whether Brown was a board member at that time. We also do not know whether the arbitrator bothered to read the names of the board members (assuming they were even listed when the articles were published). Second, Sewell notes that the OCTLA newsletter published after the Top Gun award ceremony featured pictures identifying all of the board members. But again, this assumes, without foundation, that the arbitrator read the newsletter. Third, Sewell notes that the arbitrator was a prior board member of the OCTLA. But what Sewell omits is *when*: 1983 through 1986. The fact that he was a board member 30 years ago does not prove he knew the current board members. Sewell’s argument is simply speculation.

Even if there had been evidence that the arbitrator knew Brown was a board member, there is no evidence the arbitrator knew how the Top Gun awards were voted

on. Sewell responds that the arbitrator was a board member 30 years ago, but there is no evidence that the award even existed 30 years ago, much less that the voting procedures were the same in 2011.

Thus Sewell did not carry his burden of proving the arbitrator failed to disclose a material fact of which he was aware.

The Arbitrator Was Not Biased

Next Sewell contends the arbitrator was actually biased. “California law provides that arbitrator bias is grounds for vacating an arbitration award.” (*Stasz v. Schwab* (2004) 121 Cal.App.4th 420, 439; see Code Civ. Proc., § 1286.2, subds. (a)(1)-(3).) The court found no bias. Sewell contends we should review the court’s ruling de novo; Flower contends we review for substantial evidence. Neither party cited a case on point, and we were not able to locate one in our own research. We need not decide the issue, however, because, even assuming review is de novo, we are not persuaded the arbitrator was biased. Sewell points to three events allegedly demonstrating bias.

First, he sees bias in the arbitrator’s decision to proceed under the commercial arbitration rules as opposed to the employment rules. The importance of this decision was that, under the employment rules, Sewell’s obligation to pay the fees and costs associated with the arbitration was limited. Under the commercial rules, Sewell was required to pay a greater share. Sewell contends the employment rules were proper because the employment agreement containing the arbitration provision specifically provided that the employment rules would apply, and the court’s order compelling arbitration provided that arbitration should proceed pursuant to the employment agreement. Flower filed the arbitration matter as a commercial matter, but the American Arbitration Association (AAA) unilaterally reclassified the matter as an employment matter. Flower raised the issue at a case management conference, where Sewell did not object to using the commercial rules. Afterwards, noting the discrepancy, the arbitrator

asked for briefing on the issue of whether the commercial or employment rules should apply, and Sewell apparently failed to file a brief. The arbitrator reclassified the matter as a commercial matter.

This is obviously not evidence of bias. Sewell had notice and an opportunity to be heard, yet decided not to object. Further, the arbitration concerned a promissory note and turned on whether Sewell owned a portion of MDM, not on any rights unique to employees. The arbitrator acted in good faith.

Second, Sewell points to an ex parte e-mail from Brown's office to the arbitrator as evidence of bias. The e-mail was from an attorney at Brown's office to the arbitrator's case manager. It sought to clarify that Brown's office had not requested alternative dates for a conference call to discuss an extension of some sort requested by Sewell. The e-mail states, "This request for an extension is extremely important to us, and we would like the Arbitrator to know that we have made ourselves available at both times offered by the Arbitrator for a conference call, as well as at any time today, because of the importance of this request. [¶] Thus, we request that you inform the Arbitrator that our office did not request additional dates and times and was, in fact, willing to attend a conference call at all times possible. *Our client uses AAA frequently* and would like to make sure that AAA is accurately representing our position on significant issues such as Respondent's request for an extension." (Italics added.) This e-mail was sent in June of 2012. Opposing counsel was not copied on the e-mail.

We agree with Sewell that the e-mail is troubling, as it could be read as an implied threat to take MDM's business elsewhere. Nonetheless, in context we do not believe it evidenced bias. The e-mail was sent two months after the arbitrator issued the interim award, and thus it cannot have impacted the outcome of the arbitration on the merits. Also, since neither party has explained the context or importance of whatever request was at issue, we can only assume it was relatively insignificant in the grand scheme of things. Additionally, we are not even told whether the request at issue was

granted or denied. If it was granted, obviously there would be no bias evident. Finally, we note that at oral argument on the petition to confirm the award, Sewell's counsel explicitly acknowledged the e-mail had no impact on the outcome: "I was shocked by Ms. Flower's quite honestly getting caught in the act of an indirect communication with the arbitrator; that was shocking. But do you know what, I'm going to admit something. It doesn't affect the outcome and I never said it did." We agree. The e-mail did not result in actual bias.

Third, and finally, Sewell blames bias for the arbitrator's denial of his request for a continuance of the arbitration hearing. Sewell argues that 9,000 pages of crucial financial documents were produced just nine days before the hearing, justifying a continuance.¹ Some procedural history is necessary to understand the context.

The arbitration was initiated in May of 2011. On August 9, 2011, the arbitrator held a case management conference and set the arbitration hearing dates of February 6 through February 9, 2012. No discovery had occurred up to that point. Eight days later, Brown sent a letter to Roger Buffington, Sewell's counsel, offering several dates for Flower's deposition, and requesting dates for Sewell's deposition in return. Buffington did not respond.

In October of 2011, Brown sent another letter to Buffington noting that no discovery had been conducted to date. Brown again offered to make dates available for Flower's deposition. This time Buffington responded with a curt letter stating that his calendar had been "extremely heavy" and that discovery would be forthcoming "in good time." He provided no deposition dates.

¹ Code of Civil Procedure section 1286.2, subdivision (a)(5), provides that, in certain circumstances, failure to grant a continuance is an independent basis for vacating an arbitration award. Sewell does not argue this section applies on appeal. His sole argument with respect to the denied continuance is that it evidences bias.

Eleven days later, Brown sent another letter accompanied by a notice of Sewell's deposition for November 16, 2011, and discovery requests, again observing that no discovery had been received and no deposition dates provided. Three days later, on October 31, 2011, Buffington served his first set of requests for documents. Notably, these requests did not include any request for the financial documents Sewell claims were produced late.

On November 7, 2011, Buffington notified Brown that Sewell was only available for a deposition December 19 through 21, 2011, requesting to take Flower's deposition at that time also. Brown responded with a letter agreeing to postpone Sewell's deposition, provided Sewell agreed to a 30 day discovery extension for any follow-up discovery necessitated by the deposition. Brown commented that they were unsure if Flower could make those dates "but suggest that you are waiting a long time to take our client's deposition and urge you to take it sooner. If you ask for a continuance based on the late deposition date, we will object to it." Buffington responded by denying needing a continuance and rejecting Brown's request for a discovery extension.

On December 15, 2011, Buffington notified Brown that they needed to postpone Flower's deposition until January 4, 2012 (just over a month before the arbitration hearing was to commence). Brown responded on December 20, 2011, by agreeing to make Flower available on January 4, 2012, but urging Buffington to take Flower's deposition sooner. That letter also referred to an e-mail of that same date, not contained in the record, in which Buffington complained to the arbitrator that Flower had not adequately responded to discovery requests. The letter noted that Brown had not received any sort of meet and confer concerning the alleged inadequate requests, and reiterated that Flower would not agree to a continuance of the arbitration hearing.

On December 7, 2011, Sewell served a second set of document requests, this time requesting the financial documents at issue. Responses were due January 11, 2012, less than one month before the hearing was to commence. On December 16, 2011, Sewell served an amended notice of Flower's deposition, requesting 47 categories of documents, which included the financial documents, and which appears to have consolidated the previous two rounds of document requests.

Flower objected to the financial discovery on the ground that MDM, the target of most of the requests, was not a party to the litigation, that the documents sought were irrelevant, overbroad, burdensome, and in violation of MDM and Flower's right to privacy. At Flower's deposition on January 4, 2012, Brown offered to produce the requested documents subject to a protective order. Nonetheless, on that same day Sewell filed a motion to compel responses to the discovery requests. Two days later, Brown served a proposed protective order. Three days later, on January 9, 2012, Buffington responded with proposed amendments to the protective order.

On January 16, 2012, the arbitrator heard the motion to compel and granted it in part, ordering Flower to produce four categories of documents by the end of the day. The arbitrator ordered the parties to meet and confer on a protective order to be in place at or before the time of production. Apparently, Buffington did not execute and serve the protective order until 4:51 p.m. on January 20, and even then made unilateral handwritten alterations to the protective order. On January 23, Brown informed Sewell's counsel that he did not agree to the unilateral alterations and that he would produce the documents as soon as Sewell's counsel executed an unaltered version of the protective order previously agreed to.

That same day, Sewell's counsel sent an e-mail to the arbitration case manager requesting a hearing with the arbitrator on January 25 "regarding [Flower's] failure to agree to a protective order and produce documents pursuant to the Arbitrator's recent ruling Respondent requests a ruling on the matter, the issuance of monetary and issue sanctions against [Flower], and a one month continuance of the Arbitration date due to the Claimant's refusal to produce such." Sewell's counsel did not elaborate on why a continuance was justified.

The hearing was held on January 27, after which the arbitrator issued his own protective order, ordered the documents produced, and further ordered "[t]hat the arbitration shall take place on schedule on February 6 and 7, 2012. Either party may, in the good faith belief that a continuance is necessary, arrange for a telephonic hearing to move for such a continuance." Sewell never took up the arbitrator's invitation to request a continuance. Sewell's counsel declared that the arbitrator made clear at the hearing that he had a big matter after the scheduled arbitration date and thus had no intention of moving the arbitration date.

Nothing about the foregoing facts suggests the arbitrator was biased. Arbitrations are meant to be speedy. Sewell had six months to conduct discovery, but did not serve requests for the crucial financial discovery until just over one and one-half months before the hearing. Experienced litigators know that, for better or worse, discovery rarely proceeds without objections, particularly financial discovery. Sewell's delay in serving discovery requests left only one month between the earliest production date — Flower's deposition — and the arbitration hearing. Rather than bias, it is far more likely the arbitrator denied the continuance because Sewell had not established good cause. The trial court shall also determine whether Flower is entitled to attorney fees on appeal and, if so

DISPOSITION

The judgment is affirmed. Flower shall recover his costs on appeal, to be determined by the trial court. The trial court shall also determine whether Flower is entitled to attorney fees on appeal and, if so, the amount thereof.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.