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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DUANE CHAPMAN et al.,

Plaintiffs and Appellants,

v.

WILLIAM BOLLARD et al.,

Defendants and Respondents.

G049579

(Super. Ct. No. 30-2008-00107743)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory Munoz, Judge. Affirmed.

The Arkin Law Firm and Sharon J. Arkin; Eisenberg & Associates and Lawrence S. Eisenberg for Plaintiffs and Appellants.

Murchison & Cumming, B. Casey Yim and Scott R. Jackman for Defendants and Respondents.

This is an appeal from a judgment entered after confirmation of an arbitration award in a legal malpractice action and a cross-claim for unpaid attorney fees. The arbitrator, retired Judge James Alfano, determined there was no legal malpractice and awarded the prevailing party attorney fees, costs, and post-award interest in the amount of \$659,047. The arbitrator also found in favor of the cross-claim and awarded \$96,813 for unpaid attorney fees plus attorney fees, costs, and interest (for a total award of \$227,420 on the cross-claim). The sole issue on appeal is whether the arbitration award must be vacated because it was based on an illegal attorney fee agreement. We find no reason to disturb the arbitration award and, therefore, affirm the judgment entered after the trial court confirmed the award.

FACTUAL BACKGROUND

The facts underlying this appeal are much more interesting than most facts we see on appeal. The case arose in 2003 when the principals in the reality television show *Dog the Bounty Hunter* were arrested in Mexico. Duane “Dog” Chapman, his wife Alice Elizabeth “Beth” Chapman, and two of Duane’s employees (Tim and Leland Chapman),¹ traveled to Mexico to capture a fugitive rapist, Andrew Luster. They successfully found and captured Luster, and filmed the entire event. However, all did not proceed as planned. Bounty hunting is illegal in Mexico, and the Mexican authorities arrested the Chapmans for kidnapping and other crimes.

In June 2003 the Chapmans retained William Bollard and his firm, Julander, Brown & Bollard (collectively referred to as Bollard), to represent them.

¹ We will refer to the parties collectively as the Chapmans, but when the context requires otherwise, we will refer to them by their first names for the sake of clarity. (E.g., *In re Marriage of Witherspoon* (2007) 155 Cal.App.4th 963, 967, fn. 2 [“We refer to the parties by their first names for clarity and ease of reference, and intend no disrespect”].)

Bollard retained the services of Enrique Gandara Zepeda (Gandara),² an attorney licensed to practice law in Mexico. Bollard, Gandara, and the Chapmans did not enter into a written fee agreement.

The arbitration award contains a concise and undisputed summary of what occurred next. “[F]rom 2003 to 2006 [the Chapmans] hired [Bollard] and a local Mexican Counsel [Gandara] to provide legal monitoring services for the Chapmans regarding criminal charges filed in Puerto Vallarta, Mexico. . . . During the above time frame, [Bollard and Gandara] engaged in communications and negotiations with the Mexican court officials and administrators on an ongoing basis during this period of time. On three separate occasions, December 4, 2003, January 19, 2004, and February 23, 2005, [Bollard and Gandara] made arrangements with the Mexican authorities for the Chapmans to resolve the Mexican criminal case by pleading to lesser charges, pay a small fine with no jail time and guaranteed safe transit back and forth from the USA to Mexico The Chapmans rejected each offer[,] refusing to return to Mexico to resolve their criminal matter. Consequently extradition procedures were ultimately initiated by the Mexican government and as a result thereof the [Chapmans] were arrested on extradition warrants in Hawaii on September 14, 2006[,] and released on bail pending the outcome of the extradition hearing. The Chapmans engaged separate counsel . . . to represent them in connection with the extradition proceedings. They also rehired [Bollard and Gandara], entering into a separate fee agreement”

The arbitrator concluded the parties entered into a legally binding fee agreement “to memorialize their relationship to actively defend the criminal charges in Mexico for hourly compensation.” Bollard and Gandara performed the following legal services: “[I]n November 2006 [they] filed an ‘Ampara Petition’ that was denied but appealed . . . to the ‘Amparo Collegiado’ court. Several defenses were raised in the

² We will refer to Enrique Gandara Zepeda as Gandara, the abbreviation used by both parties in the briefing, for consistency and to avoid confusion.

Amparo and Collegiado proceedings, including a violation of the [s]tatute of [l]imitations to the Mexican criminal charges which was eventually sustained in 2008.” The arbitrator noted Bollard and Gandara were formally relieved and substituted out as counsel of record in June 2007. The arbitrator concluded, “Up to the date that [Bollard and Gandara were] substituted out by new counsel, [they] successfully accomplished the goal [of delaying the extradition hearing] which allowed the Chapmans to remain free on bail.” Moreover, were it not for the negotiation efforts from 2003 to 2006, “the Mexican Authorities would have executed an arrest warrant in 2003 rather than wait until 2006. Hence the passage of this extended time constituted a [v]iolation of the [s]tatute of [l]imitation[s]. A . . . better and final result could not have been obtained.”

PROCEDURAL BACKGROUND

The Chapmans initiated this legal action. In 2008 they filed a complaint alleging legal malpractice, breach of contract, breach of fiduciary duty, invasion of privacy, and negligent infliction of emotional distress.³ Within a few months, the Chapmans filed a petition to compel arbitration “based on the existence of a ‘valid, enforceable[,] and irrevocable’ binding arbitration clause contained in the applicable [fee agreement] dated September 18, 2006” (hereafter September Agreement).

In December 2008 the court granted the Chapmans’ petition to compel arbitration. The arbitration proceedings stretched out for over four years, during which the Chapmans amended their complaint three times, and Bollard filed a cross-claim seeking an additional \$96,813 in owed attorney fees. In 2011 and 2012 the arbitrator considered and ruled on three motions for summary adjudication and a motion for summary judgment filed by Bollard. The arbitrator’s rulings on these motions had the effect of dismissing all the Chapmans’ claims against Bollard. In 2013, the court ruled

³ Gandara was named in the complaint, but he was not served. He did not appear in the action below, and he is not a party to this appeal.

Bollard was the prevailing party as to all the Chapmans' claims and awarded Bollard attorney fees and costs.

The arbitrator held a two-day hearing (on January 24 and 25, 2013) on the sole remaining issue, i.e., the cross claim for unpaid fees. On the last day of the hearing, the Chapmans filed a motion for directed verdict arguing that based on the evidence submitted by both parties, Bollard had “not substantiated [his] burden of proof on [his] alleged claim for fees owed.” The Chapmans raised the following four arguments: (1) there was insufficient evidence legal services were rendered in Mexico; (2) the total fees charged were unconscionable, excessive, and unreasonable in violation of the California Rules of Professional Conduct, Rule 4-200; (3) the billing procedures violated Business and Professions Code section 6148⁴ and, therefore, the September Agreement was “void in its entirety”; and (4) Duane paid Bollard \$342,500 which was sufficient compensation “in light of the fact that no positive results were obtained for the Chapmans”

With respect to the third argument, the Chapmans submitted evidence acknowledging Bollard's billing generally complied with the statutory requirements because the bills included the amount, rate, and basis for calculation. (§ 6148, subd. (b).) However, there was a problem with one billing sheet that Bollard gave the Chapmans relating to Gandara's work in Mexico. The Chapmans explained they received a copy of the bill after they questioned the high expenses. Bollard wrote an e-mail stating he was attaching a one-page accounting from Gandara's office, which was a list of all the professionals who received a portion of the \$266,694 wired to Gandara's office. The Chapmans asserted the one-page accounting violated the minimum requirements set forth in section 6148.

⁴ All further statutory references are to the Business and Professions Code, unless otherwise indicated.

In February 2013 the arbitrator signed a final arbitration award concluding the Chapmans owed Bollard \$96,813 for work performed under the September Agreement. The arbitrator concluded Bollard was entitled to fees and costs as the prevailing party in the arbitration. The arbitrator denied the motion for directed verdict due to “the triable issues” discussed in the award. In April and June 2013, the arbitrator prepared notice of rulings concerning Bollard’s right to attorney fees and costs as the prevailing party, and regarding the Chapmans’ motion to tax costs. On July 23, 2013, he entered the final arbitration award, and on August 2, 2013, he entered the final award on attorney fees and costs.

A few days later, Bollard filed a petition to confirm the award and for entry of the judgment. The Chapmans filed a petition to vacate the award. Both matters were heard by the superior court on November 18, 2013. The court granted the motion to confirm the award and denied the motion to vacate.

LEGAL DISCUSSION

A. Section 6148 Governs Attorney Contracts and Billings

Section 6148, subdivisions (a) and (b), describe what information should be included in fee agreements and billing statements, respectively. Section 6148, subdivision (a), provides the rules for what must be included in a contract for attorney services based on a hourly rate, rather than a contingency rate (those rules can be found in section 6147). If it is reasonably foreseeable the expense will exceed \$1,000, the contract must be in writing and contain all of the following: “(1) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case. [¶] (2) The general nature of the legal services to be provided to the client. [¶] (3) The respective responsibilities of the attorney and the client as to the performance of the contract.” (§ 6148, subd (a).)

Subdivision (b) of section 6148 adds, “All bills rendered by an attorney to a client shall clearly state the basis thereof. Bills for the fee portion of the bill shall include

the amount, rate, basis for calculation, or other method of determination of the attorney's fees and costs. Bills for the cost and expense portion of the bill shall clearly identify the costs and expenses incurred and the amount of the costs and expenses. . . .”

The statute also provides a penalty for any violation of the above rules. “Failure to comply with any provision of this section renders the agreement *voidable* at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee.” (§ 6148, subd. (c), italics added.)

In this case, the Chapmans recognize the September Agreement, containing the arbitration clause, complied with all the requirements of section 6148, subdivision (a). Moreover, the majority of billing from Bollard complied with the requirements of section 6148, subdivision (b). At issue was whether Gandara's practice of lump sum billing for his services in Mexico violated section 6148, subdivision (b). Simply stated, the purported violation does not concern a term of the attorney services contract but rather with *performance* of that contract.

B. The Chapmans Elected to Enforce the September Agreement

We can assume for the sake of argument, without deciding, that Gandara was required to comply with California law and the terms of Bollard's September Agreement. We can also assume, without deciding, that Gandara's billing statement violated section 6148 and rendered the September Agreement voidable. Despite these assumptions we nevertheless conclude the Chapmans cannot prevail on the theory the entire contract is illegal and, therefore, not subject to arbitration.⁵

⁵ For this reason, there is no need to address Bollard's contention the billing did not violate the statutory scheme because of the section 6148, subdivision (d), exception to the rule, or alternatively, the statutory scheme should not apply to an attorney practicing law in Mexico.

As mentioned above, the statutory scheme about attorney billing practices specifies the failure to comply with its provisions renders the attorney fee contract “voidable at the [client’s] option,” but the attorney is still entitled to collect a reasonable fee. (§ 6148, subd. (c), italics added.) The contract is not void, but voidable.

We noticed that throughout the Chapmans’ briefing on appeal, they use the terms void, voidable, and illegal interchangeably. This is incorrect. The terms have distinct legal definitions. A void contract “is no contract at all; it binds no one and is a mere nullity. [Citation.] Consequently, such a contract cannot be enforced. [Citation.] [Citation.]” (*Fergus v. Songer* (2007) 150 Cal.App.4th 552, 573.) On the other hand, a voidable contract, “is void as to the wrongdoer but not void as to the wronged party,” unless that party elects to have a court declare it void. (*White Dragon Productions, Inc. v. Performance Guarantees, Inc.* (1987) 196 Cal.App.3d 163, 172 (*White Dragon*)). A voidable contract can be enforced. (E.g., Civ. Code, § 1588 [ratification].) And finally, “[T]he doctrine of illegality considers whether *the object* of the contract is illegal.” (*McIntosh v. Mills* (2004) 121 Cal.App.4th 333, 346, italics added.) Because an illegal contract is void, not voidable, “it cannot be ratified by any subsequent act, and no person can be estopped to deny its validity. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 432, p. 473, italics omitted.)

Consequently, when an attorney fee agreement is voidable at the client’s election pursuant to section 6147, if the client does not elect to avoid it, the contract is enforceable. Simply stated another way, if the wronged party does not seek to have a court set aside a voidable contract, the “agreement remains in full legal force and effect.” (*Depner v. Joseph Zukin Blouses* (1936) 13 Cal.App.2d 124, 128 (*Depner*); *White Dragon, supra*, 196 Cal.App.3d at p. 172.)

At the time the Chapmans filed their complaint alleging breach of contract and petitioned to compel arbitration based on the agreed terms of arbitration, they were clearly electing to treat the September Agreement as enforceable. An essential element

of a breach of contract claim is an enforceable contract. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 515, p. 648.) Moreover, “A motion to compel arbitration is, in essence, a request for specific performance of a contractual agreement.” (*Fittante v. Palm Springs Motors* (2003) 105 Cal.App.4th 708, 713.) By their actions the Chapmans clearly sought to enforce both the arbitration provisions and the contractual duty to provide adequate legal services.

A voidable contract will take its full and proper legal effect unless and until it is set aside by judicial adjudication or the client otherwise declares the agreement void. (*Depner, supra*, 13 Cal.App.2d at pp. 127-128.) We found no authority, and the Chapmans cite to none, holding a client can expressly elect to enforce a voidable contract until such time as they receive an adverse ruling. We conclude the Chapmans, by their affirmative action to enforce the contract, gave it full legal force and effect.

Consequently, the arbitrator had authority to enforce the contract and issue the award. And as we will now explain, there is no legal basis for this court to review this arbitration award.

D. Limited Review of Arbitration Award

When parties agree to private arbitration, the scope of judicial review is strictly limited to give effect to the parties’ intent “to bypass the judicial system and thus avoid potential delays at the trial and appellate levels” (*Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, 10 (*Moncharsh*)). A court may not review the merits of the controversy between the parties, the validity of the arbitrator’s reasoning or the sufficiency of the evidence supporting the arbitration award. (*Ibid.*) “[I]t is within the power of the arbitrator to make a mistake either legally or factually. When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like judges, are fallible.” (*Id.* at p. 12.)

An arbitrator's decision is generally not reviewable for errors of fact or law. (*Moncharsh, supra*, 3 Cal.4th at p. 6.) Code of Civil Procedure section 1286.2 provides limited exceptions to this general rule, including when "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (Code Civ. Proc., § 1286.2, subd. (a)(4).) "[W]hether the arbitrator exceeded his or her powers . . . and thus whether the award should have been vacated on that basis, is reviewed on appeal de novo." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 918, fn. 1.) One of the ways an arbitrator exceeds its powers is by enforcing an illegal contract. (*Moncharsh, supra*, 3 Cal.4th at p. 31.) However, there is no similar or analogous rule for when the underlying contract is voidable, especially when the wronged party has elected to enforce the contract.

E. This Voidable Contract is not an Illegal Contract

In their opening brief, the Chapmans assert they elected to void the voidable contract and, therefore, the arbitration award must be vacated because the arbitrator exceeded his power by enforcing the contract. To support this theory, they cite numerous opinions concerning judicial review of an arbitration award based on enforcement of either an illegal contract or an illegal provision in the contract. (*Moncharsh, supra*, 3 Cal.4th at pp. 29, 32 [illegal provision]; *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 614 (*Loving & Evans*) [entire contract illegal because contractor unlicensed in violation of code]; *South Bay Radiology Medical Associates v. Asher* (1990) 220 Cal.App.3d 1074, 1080 [illegal restraint on trade agreement void and cannot be ratified]; *All Points Traders, Inc. v. Barrington Associates* (1989) 211 Cal.App.3d 723, 727-728 [entire contract illegal because defendant lacked real estate broker's license].) These cases clearly establish a trial court may review an arbitration award if the subject matter of the underlying agreement was illegal.

The Chapmans fail to explain why their voidable contract must be treated the same as an illegal one. They cite to no legal authority, and we found none, holding voidable contracts are always illegal contracts. As stated above, the terms are not analogous. Voidable contracts may be legally enforced in some circumstances, whereas an illegal contract can never be enforced under any circumstances (including ratification). Illegal contracts are void, never voidable. We find nothing illegal about the subject matter of the September Agreement for attorney services. It is undisputed the terms of this agreement fully complied with section 6148, subdivision (a). Having a clearly written agreement for attorney services serves the purpose of the statute and public policy.

For this reason, we conclude the Chapmans' case authority and lengthy discussion concerning judicial review of arbitration awards involving illegal provisions and illegal contracts is inapt. We found no authority, and the Chapmans cite to none, holding an arbitrator exceeds his authority to consider a voidable contract the parties have elected to enforce.

F. Waiver

The Chapmans' arguments on appeal are based on the false premise that they timely elected to void the September Agreement. They repeatedly assert the agreement was "rendered void at the client's option." The record does not support this contention. Rather, the record shows the Chapmans did not try to void the September Agreement until *after* they received the adverse arbitration award and moved to vacate it.

Code of Civil Procedure section 1281 provides that "[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, *save upon such grounds as exist for the revocation of any contract.*" (Italics added.) Similarly, Code of Civil Procedure section 1281.2 provides that the court shall order arbitration pursuant to an arbitration agreement, unless it determines "[g]rounds exist for the revocation of the agreement." (Code Civ. Proc.,

§ 1281.2, subd. (b).) Such grounds would exist if the Chapmans had elected to void the contract in superior court pursuant to section 6148, subdivisions (b) and (c). However, they did not. To the contrary, as stated earlier, it was the Chapmans who elected *to enforce* the arbitration provisions in the September Agreement by moving to compel arbitration.

The Chapmans suggest they could make a timely election to void the agreement during the arbitration process. We do not need to decide if opting to wait until the end of arbitration to void the agreement was timely because we found no evidence to support their claim that such an election was made. The record shows that the first time the Chapmans asserted section 6148 may have been violated was in their motion for directed verdict. They waited until after four years of arbitration proceedings during which all of their claims had been dismissed, and after they had presented their evidence opposing the cross-claim, to assert for the first time that additional fees were not recoverable because the agreement was void. Contrary to their contentions on appeal, the Chapmans did not seek to declare the September Agreement void, or request adjudication of the issue in their directed verdict motion. Rather, they boldly but mistakenly argued the contract had been automatically rendered void due to Gandara's single billing statement. The arbitrator reasonably rejected this argument as misstating the law. As explained in greater detail above, a violation of section 6148 renders the agreement voidable, not automatically void.

In their briefing on appeal, the Chapmans suggest they timely exercised their option to void the agreement at other times during the arbitration process. The Chapmans assert evidence of this can be found in volume 2 of the appellants' appendix, pages "9-12." However, volume 2 begins on page 202 and contains only documents filed after the arbitration award. Pages 9-12 contained in volume 1 relate to the original complaint filed in superior court. Specifically, those pages relate to the invasion of privacy and emotional distress causes of action. They contain no discussion of an

election to void the agreement. To the contrary, the complaint seeks damages based on the alleged breach of an enforceable attorney services agreement.

On page 22 of the opening brief, the Chapmans state they elected to void the agreement but provide no supporting record references. On page 36 of the opening brief, the Chapmans stated they formally voided the agreement on January 2013 but again provide no supporting record references. Because the directed verdict motion was filed in January 2013, we assume they are referring to argument raised in the motion. But as explained previously, the argument mistakenly assumed the agreement was automatically rendered void and cannot be construed as a new request to void the agreement. In summary, the Chapmans did not timely elect to void the agreement before or anytime during the lengthy arbitration process.

We conclude that after the Chapmans elected to give full force and effect to the September Agreement and compel arbitration and seek damages under contract terms, they could not wait until after an adverse ruling to blindsides the arbitrator and the opposing party by opting to declare the agreement void. Failure to make the election before submitting to arbitration waives the claim for future judicial review. As aptly stated in *Moncharsh, supra*, 3 Cal.4th at page 30 (albeit in the context of waiver of an illegal contract provision), “Any other conclusion is inconsistent with the basic purpose of private arbitration, which is to finally decide a dispute between the parties. Moreover, we cannot permit a party to sit on his rights, content in the knowledge that should he suffer an adverse decision, he could then raise the illegality issue in a motion to vacate the arbitrator’s award. A contrary rule would condone a level of ‘procedural gamesmanship’ that we have condemned as ‘undermining the advantages of arbitration.’ [Citations.] Such a waste of arbitral and judicial time and resources should not be permitted.” (*Ibid.*)

DISPOSITION

The order confirming the arbitration award is affirmed. Respondents shall recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.