Filed 2/28/17 Acquire II, Ltd. v. Colton Real Estate Group CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ACQUIRE II, LTD, et al., Plaintiffs and Respondents, v. COLTON REAL ESTATE GROUP et al., Defendants and Appellants.	G052353 (Super. Ct. No. 30-2011-00462521) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Motion to dismiss appeal granted. Requests for judicial notice denied. Appeal dismissed.

O'Melveny & Myers, Michael G. Yoder and Adam G. Levine for Defendants and Appellants.

Callahan & Blaine, Daniel J. Callahan, Michael J. Sachs, Jill A. Thomas; Cadden & Fuller, Thomas H. Cadden and John B. Taylor for Plaintiffs and Respondents.

* * *

Defendants and appellants[1] appeal from a judgment the trial court entered confirming an arbitration award on one of 27 causes of action plaintiffs and respondents[2] brought against Defendants in this investor lawsuit. Plaintiffs move to dismiss the appeal on the ground we lack jurisdiction because the trial court's judgment is not a final, appealable judgment. We agree and therefore dismiss the appeal.

Defendants acknowledge the judgment is not final because it fails to resolve all claims and issues between the parties. Defendants nonetheless contend the judgment is appealable under the collateral order doctrine because it conclusively resolves a collateral matter in the lawsuit. The judgment, however, did not dispose of a collateral matter because some of the same conduct underlying the cause of action that is the subject of the arbitrator's award also underlies many of Plaintiffs' other pending causes of action. Consequently, the collateral order doctrine does not apply because the arbitrator's award is not distinct and severable from the general subject of the litigation.

I

FACTS AND PROCEDURAL HISTORY

Defendants are in the business of purchasing and managing commercial real property. During the 1990's and early 2000's they created several "funds" as limited liability companies to solicit investors and take title to each portfolio of commercial office buildings they purchased. One of Defendants served as managing member for

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[1] Defendants and appellants are Colton Real Estate Group doing business as The Colton Company, Colton Capital Corporation, Colton Properties, Inc., and David A. Colton, individually and as trustee of the Colton Family Trust, dated September 17, 1991. We collectively refer to all defendants and appellants as Defendants.

[2] There are more than 200 individual plaintiffs and respondents who we collectively refer to as Plaintiffs.

each fund and managed the portfolio of properties held by the fund. The same or a different Defendant served as the property manager for each property.

Plaintiffs comprise more than 200 investors in these funds. In March 2011, they filed this action alleging numerous claims against Defendants based on their conduct in soliciting investors and managing the properties held by the funds. Plaintiffs and Defendants stipulated to arbitrate the claims of the investors who signed an arbitration agreement. The parties also agreed to litigate the claims of the investors who did not sign an arbitration agreement.

In September 2013, Plaintiffs called a shareholder meeting for each of the funds to vote on whether to remove Defendants as fund manager and replace them with a new manager. At these meetings, the management representative declined to call the meetings to order, claiming a quorum did not exist because Defendants owned a majority of the shares and they refused to attend the meetings. Claiming Defendants held only an economic interest in the funds without any voting rights, Plaintiffs nonetheless voted to remove Defendants as fund manager and replace them with a new manager.

In October 2013, Plaintiffs filed their statement of claims in the arbitration. The statement asserts 27 causes of action against Defendants, including multiple claims for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, fraud, unfair business practices, accounting, declaratory relief, and elder abuse. According to Plaintiffs, Defendants paid themselves unauthorized commissions and fees, improperly commingled and mismanaged the funds' moneys, refused to provide Plaintiffs access to fund records, failed to provide annual reports, withheld distributions, and improperly purchased membership shares from other members without giving Plaintiffs notice, obtaining Plaintiffs' approval, or acknowledging Plaintiffs' rights of first refusal. Plaintiffs' statement of claims also added a new claim for injunctive relief based on the shareholder meetings conducted in September 2013. This claim alleged a quorum was present at those meetings and

properly voted to replace Defendants as the fund manager. Based on those votes, Plaintiffs sought an injunction requiring Defendants to turn over management of the funds to the new manager Plaintiffs elected.

Plaintiffs filed numerous motions to buttress their injunctive relief claim. First, Plaintiffs filed a motion asking the arbitrator to confirm that a quorum was present at the September shareholder meetings and the participants voted to replace Defendants as the funds' manager. In February 2014, the arbitrator construed the motion as a motion for summary disposition based on the injunctive relief cause of action. The arbitrator granted the motion in part, finding a quorum was present at the September meetings because the shares Defendants held did not count toward calculating a quorum. The arbitrator explained Defendants held only an economic interest in their shares without any voting rights because Defendants failed to give the other members notice or obtain their approval before purchasing the shares as the funds' governing documents required. The arbitrator nonetheless declined to remove Defendants as the funds' manager, concluding Plaintiffs did not properly conduct the vote to remove Defendants even though a quorum was present. Instead, the arbitrator instructed Plaintiffs to convene a new meeting if they wanted to replace the managing Defendants.

Following this ruling, the parties asked the arbitrator to clarify who held the right to vote the shares Defendants owned. According to Defendants, the members from whom they purchased the shares must have retained the voting rights if Defendants did not acquire them, and therefore Defendants could obtain proxies from these former members and cast votes for them. In an April 2014 ruling, the arbitrator rejected Defendants' contention and concluded no one had the right to vote the shares Defendants purchased because the funds' governing documents provided a share's voting rights were extinguished if the owner transferred the share without giving proper notice and following the proper procedure to obtain approval.

Defendants responded by filing a petition with the trial court asking it to vacate both the arbitrator's February and April 2014 rulings. The trial court denied Defendants' petition, and instead entered an order confirming the arbitrator's rulings. Defendants appealed. In an unpublished opinion, we dismissed Defendants' appeal, explaining the trial court's order was not appealable because it addressed only one of 27 causes of action and therefore was not a final, appealable judgment or order. (*Acquired II, Ltd. v. Colton Real Estate Group* (June 19, 2015, G050745) [nonpub. opn.].)

While the appeal was pending, Plaintiffs convened another round of shareholder meetings and again voted to remove and replace Defendants as the funds' manager. Plaintiffs then filed a new motion asking the arbitrator to confirm a quorum was present at these new meetings and the members validly voted to remove Defendants as manager. In February 2015, the arbitrator treated the motion as seeking summary disposition on the injunctive relief cause of action and denied the motion because a triable issue existed on whether Plaintiffs had cause to remove Defendants as manager.

Two weeks later, the arbitrator sent all parties an e-mail cancelling the upcoming arbitration hearing and explaining he would be recusing himself because a family member had a medical emergency that prevented him from committing the time required to preside over the lengthy arbitration hearing. The next day, Plaintiffs sent an e-mail asking the arbitrator to reconsider his ruling denying their recent summary disposition motion before he recused himself. Defendants objected, but the arbitrator stated he would take the request under submission and provide a ruling because he had not yet recused himself.

In March 2015, the arbitrator issued the "Partial Final Award: Ruling and Order on Request to Confirm Shareholders' Votes." In the award, the arbitrator reconsidered and granted Plaintiffs' motion, confirmed that a quorum voted at the most recent shareholder meetings to replace Defendants as the funds' manager, and ordered

Defendants to cooperate in turning over management and all books and records to the new manager Plaintiffs elected. The arbitrator explained he originally denied the motion because he heard it on the eve of the arbitration hearing and he preferred to decide the issue after hearing all of the evidence, but the change in circumstances requiring him to cancel the arbitration hearing also lead him to reexamine whether a genuine triable issue existed that justified denying the motion. Finding none, he decided to grant the motion before he recused himself.

Defendants filed an ex parte application asking the trial court to remove the entire case from arbitration and declare the arbitrator's recent ruling void because he made it after acknowledging grounds for his recusal existed. The trial court set the application for hearing as a noticed motion, explaining it would treat the application as cross-requests to vacate and confirm the arbitrator's ruling. In April 2015, the trial court issued its ruling rejecting Defendants' challenges and confirming the arbitrator's ruling. The court entered the "Interlocutory Judgment Regarding Arbitrator's March 9, 2015 'Partial Final Award: Ruling and Order on Request to Confirm Shareholders' Votes." This appeal followed.

II

DISCUSSION

A. *The Interlocutory Judgment is Not an Appealable Judgment or Order*

Plaintiffs move to dismiss Defendants' appeal on the ground the trial court's judgment is not an appealable judgment or order, and therefore we lack jurisdiction to hear Defendants' appeal.[3] We agree.

[3] Plaintiffs also filed a motion to augment the record with various declarations they submitted to the arbitrator and trial court concerning the motions to confirm the shareholder votes and the motion to vacate the arbitrator's rulings. We grant the unopposed motion to augment because the declarations were before the arbitrator and trial court when they made the rulings that are the subject of this appeal.

In California, "the right to appeal is strictly statutory. [Citations.] Therefore '"'[n]o appeal can be taken except from an appealable order or judgment, as defined in the statutes and developed by the case law . . . .'"'" (*Judge v. Nijjar Realty, Inc.* (2014) 232 Cal.App.4th 619, 629 (*Judge*).) "In the absence of a statute authorizing an appeal, we lack jurisdiction to review a case even by consent, waiver, or estoppel." (*Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1083 (*Smith*).)

Code of Civil Procedure section 904.1 governs the right to appeal in a civil action.[4] (*Vivid Video, Inc. v. Playboy Entertainment Group, Inc.* (2007) 147 Cal.App.4th 434, 442 (*Vivid Video*).) It effectively codifies the "'one final judgment rule'" by authorizing parties to appeal only from a final judgment, or an order specifically made appealable by section 904.1 or another statute. (*Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 803 (*Otay River*).) "'"An appeal from a judgment that is not final violates the one final judgment rule and must therefore be dismissed."'" (*Vivid Video*, at p. 441.)

"'"In its most fundamental sense, 'finality' is an attribute of every judgment at the moment it is rendered; indeed, if a judicial determination is not immediately 'final' in this sense it is not a judgment, no matter what it is denominated. The Legislature has incorporated this meaning of finality into the very definition of a judgment: 'A judgment is the *final* determination of the rights of the parties in an action or proceeding.' . . . 'A judgment is final "when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined."' [Citations.] [¶] Finality in this sense not only makes a judicial determination a judgment, it also makes that judgment appealable. As we recently observed, 'A judgment that leaves no issue to be determined except the fact of compliance with its terms is appealable.'"'" (*Vivid Video*, *supra*, 147 Cal.App.4th at

[4] All statutory references are to the Code of Civil Procedure.

p. 441.) "In determining whether a judgment is final, its substance governs, not its label or form." (*Rubin v. Western Mutual Ins. Co.* (1999) 71 Cal.App.4th 1539, 1546 (*Rubin*).)

"Appeals in arbitration matters are governed by section 1294: 'An aggrieved party may appeal from: [¶] (a) An order dismissing or denying a petition to compel arbitration. [¶] (b) An order dismissing a petition to confirm, correct or vacate an award. [¶] (c) An order vacating an award unless a rehearing in arbitration is ordered. [¶] (d) *A judgment entered pursuant to this title.* [¶] (e) A special order after final judgment.'" (*Vivid Video, supra,* 147 Cal.App.4th at p. 442, quoting § 1294, italics added; see *Judge, supra,* 232 Cal.App.4th at pp. 630-631; *Otay River, supra,* 158 Cal.App.4th at p. 802.)

Like section 904.1, section 1294 only authorizes appeals from arbitration judgments or orders that are final. (*Judge, supra,* 232 Cal.App.4th at pp. 633-635; *Otay River, supra,* 158 Cal.App.4th at p. 803 ["Under section 1294, appealable arbitration orders also require finality and this requirement is consistent with the language of section 1294 and the general prohibition of appeals from interlocutory nonfinal judgments in section 904.1, subdivision (a)"]; *Vivid Video, supra,* 147 Cal.App.4th at p. 442.) "An intermediate ruling in an arbitration dispute that contemplates further proceedings *in arbitration* is not appealable." (*Vivid Video,* at p. 442.)

For example, in *Rubin,* the Court of Appeal dismissed an appeal from a judgment the trial court entered confirming an arbitration award because the judgment did not resolve all causes of action between the parties and therefore was not a final judgment. (*Rubin, supra,* 71 Cal.App.4th at pp. 1540-1541.) There, the plaintiff sued her insurer alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and emotional distress based on the insurer's failure to pay for damages to her home suffered in an earthquake. The defendant insurer successfully moved to compel arbitration under an appraisal provision in the insurance policy that required the parties to arbitrate any dispute about the actual cash value or

amount of a loss. The arbitrator issued an award establishing the amount of damage to the plaintiff's home, and the trial court entered a judgment confirming the award. (*Id*. at pp. 1541-1543.) The Court of Appeal dismissed the defendant insurer's appeal from the judgment, explaining the judgment was not final because the arbitrator's award only decided the amount of damage that the plaintiff's home suffered without resolving any of the four causes of action the plaintiff alleged against the defendant insurer. (*Id*. at p. 1547.)

Here, neither the arbitrator's award nor the judgment the trial court entered on that award are final for the same reason. The arbitrator's award was a summary disposition—the arbitration equivalent of a summary adjudication—on just one of 27 causes of action. Neither the arbitrator nor the court has decided the other 26 causes of action, and therefore the award and judgment are not final. Indeed, the title the arbitrator gave his award ("Partial Final Award"), and the title the trial court gave to its judgment ("Interlocutory Judgment"), betray any contention that they are final. (See *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1101 ["'A judgment that disposes of *fewer* than all of the causes of action framed by the pleadings . . . is necessarily "interlocutory" [citation], and not yet final, as to any parties between whom another cause of action remains pending'"]; *State ex rel. Wilson v. Superior Court* (2014) 227 Cal.App.4th 579, 591 ["An order granting summary adjudication is appealable only after entry of final judgment"]; *Judge*, *supra*, 232 Cal.App.4th at pp. 634-635 [no appeal lies from interim arbitration order or award when similar order would not be appealable in nonarbitration case, such as order granting summary adjudication].)

Defendants acknowledge the arbitrator's award and the trial court's judgment are not final, but they nonetheless contend they are appealable under the collateral order doctrine. We disagree because the award and judgment fail to satisfy that doctrine's requirements.

"'[O]ne exception to the "one final judgment" rule . . . is the so-called collateral order doctrine. Where the trial court's ruling on a collateral issue "is substantially the same as a final judgment in an independent proceeding" [citation], in that it leaves the court no further action to take on "a matter which . . . is severable from the general subject of the litigation" [citation], an appeal will lie from that collateral order even though other matters in the case remain to be determined.'" (*Smith, supra*, 208 Cal.App.4th at p. 1084; see *Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1545 (*Koshak*).)

"To qualify as appealable under the collateral order doctrine, the interlocutory order must (1) be a final determination (2) of a collateral matter (3) and direct the payment of money or performance of an act." (*Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1016 (*Apex*); see *Koshak, supra*, 200 Cal.App.4th at p. 1545.)

"'In determining whether an order is collateral, "the test is whether an order is 'important and essential to the correct determination of the main issue.' If the order is 'a necessary step to that end,' it is not collateral."'" (*Smith, supra*, 208 Cal.App.4th at p. 1084; see *Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 903.) "Thus, the essence of the collateral order doctrine is that the matter concluded by the order should be truly 'distinct and severable from the general subject of the litigation.'" (*Muller*, at p. 904; see *Koshak, supra*, 200 Cal.App.4th at p. 1545.)

Defendants contend the arbitrator's award is a collateral matter because the determinations he made in deciding Plaintiffs' injunctive relief cause of action do not relate to the issues presented by any of Plaintiffs' other causes of action, and are not a necessary step to the correct determination of the main issues in this case. According to Defendants, the arbitrator's award merely decided a quorum attended each of the shareholder meetings, those quorums voted to replace Defendants as the funds' manager,

and Defendants therefore must turn over management of the funds to the new manager Plaintiffs elected. Defendants contend those determinations "have nothing to do with" Plaintiffs' other "causes of action for, *inter alia*, breaches of contract, breaches of the implied covenant of good faith and fair dealing, breaches of fiduciary duty, fraud, elder abuse, and unfair business practices related to Defendants' management of the Funds and acquisition of shares in the Funds." Defendants misconstrue the basis for the arbitrator's decision on the injunctive relief cause of action and Plaintiffs' other causes of action.

Although Defendants held a majority of the membership shares in each fund and did not attend the shareholder meetings, the arbitrator concluded a quorum existed at each meeting because Defendants' shares had no voting rights and therefore did not count toward determining whether a quorum existed. The arbitrator explained Defendants' shares provided them with only an economic interest in the funds because the voting rights associated with those shares were extinguished under the funds' governing documents when Defendants purchased the shares without first giving notice or obtaining approval from Plaintiffs and the other fund members.

Plaintiffs' other causes of action allege Defendants breached the funds' governing documents, breached their fiduciary duties, violated several statutes, and committed multiple torts through a laundry list of misconduct, including improperly making distributions, commingling funds and property, taking unauthorized commissions and other payments, and failing to maintain proper records. As Defendants acknowledge, however, the alleged misconduct also includes "[i]gnor[ing] contractual requirements regarding the purchase and sale of investor interests."

All of Plaintiffs' causes of action, including their injunctive relief cause of action, therefore depend on the allegation that Defendants purchased membership shares in the funds without following the required procedures in the funds' governing documents for the purchase and sale of shares. The injunctive relief cause of action alleges this as the basis for establishing the validity of a later vote to remove Defendants

as the funds' manager, but other causes of action also allege this as a basis for establishing liability for the damages allegedly caused by this conduct. Thus, the decision maker must make the same determination on all of Plaintiffs' causes of action, and therefore the arbitrator's award on the injunctive relief cause of action cannot be considered distinct and severable from the subject matter of the litigation.[5]

In dismissing Defendants' appeal, we express no opinion on the merits of Defendants' challenges to the arbitrator's award. Rather, we dismiss because the judgment the trial court entered on the award is not an appealable judgment, and therefore we lack jurisdiction to hear this appeal. Our decision also should not be construed as a determination the trial court had jurisdiction to enter a judgment on the arbitrator's award because our lack of jurisdiction prevents us from reaching that issue. (*Judge*, *supra*, 232 Cal.App.4th at p. 634, fn. 12.) We simply note section 1287.4 authorizes a trial court to enter judgment if an arbitration "award" is confirmed, and section 1283.4 requires an award to "include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." If an arbitrator's award does not determine all of the questions presented it "does not qualify as an 'award' under section 1283.4." (*Judge*, at p. 633; see *Cinel v. Christopher* (2012) 203 Cal.App.4th 759, 767 ["Before confirming an award, the trial court has a duty, in order to follow the dictates of section 1283.4, to ensure that the arbitrator's 'award' is an 'award' within the meaning of that statute"].)[6]

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[5] Because we conclude the arbitrator's award was not collateral, we need not decide whether the award satisfied the collateral order doctrine's other requirements—the award was a final determination and directed the payment of money or performance of an act. (*Apex*, *supra*, 222 Cal.App.4th at p. 1016.)

[6] The parties have filed separate requests asking us to judicially notice certain documents. Plaintiffs ask that we judicially notice the fourth amended complaint they filed in the trial court. We deny the request because Plaintiffs filed that complaint after they filed the statement of claims in the arbitration and it is not relevant to whether the trial court's judgment is appealable. (See *Building Industry Assn. of the Bay Area v. City*

III

DISPOSITION

The motion to dismiss is granted and the appeal is dismissed. Plaintiffs shall recover their costs on appeal.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.

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of San Ramon (2016) 4 Cal.App.5th 62, 73, fn. 11 ["denying request where judicial notice is neither necessary, helpful, or relevant"].) Defendants ask that we judicially notice an interim award the replacement arbitrator made while this appeal was pending. We likewise deny this request because it is not relevant to whether the trial court's judgment is appealable. (*Ibid.*)