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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

DORADO PASION,

Plaintiff and Appellant,

v.

STEC, INC.,

Defendant and Respondent.

H036844

(Santa Clara County
Super. Ct. No. CV120345)

I. INTRODUCTION

Plaintiff Dorado Pasion brought a civil action in superior court against his former employer, defendant STEC, Inc. (“STEC”). STEC filed a motion to compel arbitration, which the court granted. Plaintiff unsuccessfully pursued claims in arbitration against STEC, Inc. and STEC International Holdings, Inc.,¹ and he thereafter filed a motion in court to vacate the arbitrator’s award only with respect to STEC, Inc. The court denied plaintiff’s motion and granted STEC’s request to confirm the arbitration award. On

¹ Plaintiff has appealed from a superior court order that pertains only to STEC, Inc. Plaintiff’s notice of appeal identifies “STEC, Inc., et al.” as “defendant/respondent,” and does not specifically identify STEC International Holdings, Inc. In his opening and reply briefs on appeal, plaintiff raises arguments only as to STEC, Inc. and does not mention STEC International Holdings, Inc.

appeal, plaintiff contends that the arbitration award should have been vacated because the arbitrator committed legal error. We will affirm the order.

II. FACTUAL AND PROCEDURAL BACKGROUND

In July 2005, plaintiff was hired as a “contract employee” and worked as a sales manager. In or about December 2005, he began full-time employment. His employment was terminated in early January 2007.

In 2008, plaintiff filed a civil complaint in superior court.² STEC filed a motion to compel arbitration, which the court granted.

In the subsequent arbitration proceeding, plaintiff’s claims against STEC, Inc. and STEC International Holdings, Inc. were for 1) wrongful termination in violation of public policy, 2) breach of written contract, 3) breach of the implied covenant of good faith and fair dealing, 4) negligent supervision and retention, 5) intentional infliction of emotional distress, and 6) violation of Business and Professions Code section 17200 et seq. Plaintiff’s claims were based on allegations that the STEC entities wrongfully terminated his employment after he complained to STEC management about illegal conduct by the STEC entities, including violating, according to plaintiff, “the United States International Trade in Arms Restrictions, (‘ITAR’) a federal law which prohibits or restricts foreign nationals from having access to defense articles or technical data.”³ Plaintiff also alleged that the STEC entities failed to inform him about a time period during which employees were allowed to exercise their vested options and sell stock. He further alleged that the STEC entities failed to properly account for and pay sales commissions to which he was entitled.

² The record on appeal does not contain a copy of the complaint filed in superior court.

³ See International Traffic in Arms Regulations, 22 C.F.R. § 120.1 et seq.

Following an arbitration hearing, the arbitrator issued a written award denying all of plaintiff's claims. The arbitrator found that plaintiff's employment was terminated for "his inadequate sales performance and for his insubordinate failure to adhere to, and sometimes rude and abrasive complaints to his supervisors about, the STEC sales structure and system." Plaintiff also "did not prove a nexus between his whistle-blowing activities and his termination." With respect to the issue of stock options, plaintiff admitted at the arbitration hearing that "he had been informed of the open stock window," and he "offered no other evidence that he was denied the opportunity to exercise his stock options" The arbitrator further found that plaintiff "failed to prove his claim that he was not appropriately credited and compensated for his sales at STEC." He also failed to prove that STEC had violated ITAR.

Plaintiff subsequently filed a petition in superior court seeking to vacate the arbitration award with respect to STEC, Inc. on the ground that the arbitrator exceeded his authority and the award could not be fairly corrected. In arguing that the arbitrator exceeded his authority, plaintiff contended that the parties' arbitration agreement required the arbitrator to follow applicable law, and that the arbitrator failed to follow the law regarding 1) spoliation of evidence and 2) attorney-client privilege. More specifically, plaintiff argued that the arbitrator should have granted plaintiff's motion concerning STEC's spoliation of evidence and imposed an issue sanction against STEC. Plaintiff also contended that STEC's expert witness, George Grammas, an attorney with whom STEC had consulted concerning compliance with ITAR, should not have been allowed to testify that STEC was in compliance with ITAR. Given Grammas's testimony, however, plaintiff argued that STEC had waived the attorney-client privilege, and the arbitrator should have allowed plaintiff to admit into evidence documents that STEC had claimed were privileged to show lack of legal compliance, allowed cross-examination of the expert regarding the documents, and allowed testimony by plaintiff about communications with STEC's legal department. Plaintiff further contended that the

arbitrator improperly disregarded the testimony of plaintiff's expert witness. According to plaintiff, the arbitrator "abrogated and transferred" to STEC's expert witness the arbitrator's own "obligation to make legal and factual findings."

STEC filed opposition to plaintiff's petition to vacate the arbitration award. STEC argued that an arbitrator's failure to follow the law is not a ground for vacating an arbitration award, that the parties did not contract for judicial review of the arbitration award on the merits, and that, in any event, the arbitrator did follow the law. STEC requested that the superior court confirm the arbitration award.

In reply, plaintiff argued that the parties' arbitration agreement allowed for judicial review of errors of law by the arbitrator.

On February 17, 2011, following a hearing on the matter, the superior court filed a written order denying plaintiff's petition to vacate the arbitration award, and granting STEC's petition to confirm the award.

According to an unsigned minute order regarding a case management conference held on February 22, 2011, plaintiff "requested to dismiss" and the superior court "ordered dismissal." The scope of the requested dismissal is not clear from the record on appeal. The minute order reflects that plaintiff's counsel was to prepare an order, but no such order was apparently filed.

On February 25, 2011, STEC served notice of entry of the superior court's order denying plaintiff's petition to vacate the arbitration award and granting STEC's petition to confirm the award. On April 26, 2011, plaintiff filed a notice of appeal regarding the February 17, 2011 order denying his petition to vacate the arbitration award.

III. DISCUSSION

Before considering the substance of plaintiff's contention that the superior court should have vacated the arbitration award because the arbitrator committed legal error, we first address the issue of appealability and then we set forth the standard and scope of review.

A. Appealability

STEC contends that the appeal should be dismissed because the superior court's February 17, 2011 order denying plaintiff's petition to vacate the arbitration award is not an appealable order. STEC argues that the order may be reviewed only in an appeal from a judgment confirming the arbitration award, and no such judgment has been entered in this case.

Plaintiff acknowledges that no document entitled "judgment" has been entered in this case. He contends, however, that the February 17, 2011 order "effectively was a final determination of all pending issues between all adverse parties, making it an appealable judgment." Plaintiff points to the dismissal ordered by the superior court, as reflected in the unsigned February 22, 2011 minute order. He further asserts that he "should not be prejudiced by virtue of [STEC's] failure to perfect its favorable judgment." Plaintiff alternatively argues that this court may amend the nonappealable order to make it a final appealable judgment and construe the notice of appeal as applying to that judgment, or that this court may treat the appeal as an application for an extraordinary writ.

At oral argument, STEC conceded that this court may treat the February 17, 2011 order as though it is an appealable judgment and reach the merits of the appeal.

"After arbitration has resulted in an award, the [California Arbitration Act (CAA; Code Civ. Proc., § 1280 et seq.)⁴] permits a party to petition 'the court to confirm, correct or vacate the award.' (§ 1285.) The opposing party may respond to such a petition by requesting 'the court to dismiss the petition or to confirm, correct or vacate the award.' (§ 1285.2; see § 1287.2.) . . . A court presented with such a petition or response is empowered only to confirm, correct, or vacate the award or to dismiss the proceeding. (§ 1286.) If the court confirms the award, it shall enter judgment accordingly.

⁴ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

(§ 1287.4.)” (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1220.) The resulting judgment is appealable pursuant to section 1294, subdivision (d), as are other orders identified in section 1294.⁵ (*Law Offices of David S. Karton v. Segreto* (2009) 176 Cal.App.4th 1, 9.)

In this case, the superior court’s February 17, 2011 order denying the petition to vacate the arbitration award, and granting the request to confirm the award, is not among those orders listed as appealable under section 1294. Although a judgment confirming the award is appealable (§ 1294, subd. (d); see also § 1287.4), such a judgment apparently has not been entered in this case. If this court dismissed the appeal, a judgment would likely be entered in superior court, followed by another appeal. In the interest of judicial economy and to avoid further delay, we will treat the February 17, 2011 order as appealable. (See *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 528 [appellate court deemed order sustaining a demurrer as incorporating a judgment of dismissal].)

B. The Standard of Review and the Scope of Review

Plaintiff contends that the superior court should have vacated the arbitration award, rather than confirmed the arbitration award, because the arbitrator committed legal error. STEC contends that an arbitrator’s award may not be reviewed for legal error by a court.

On appeal, a trial court’s order confirming an arbitration award is reviewed de novo. (*Gravillis v. Coldwell Banker Residential Brokerage Co.* (2010) 182 Cal.App.4th 503, 511 (*Gravillis*).)

⁵ Section 1294 states: “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.”

With respect to the scope of review concerning an arbitration award, the CAA provides “only limited grounds for judicial review of an arbitration award.” (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1344 (*Cable Connection*); see § 1286.2, subd. (a).) One of the grounds upon which an award may be vacated is if “[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.” (§ 1286.2, subd. (a)(4).) With respect to this ground for vacating an arbitration award, the California Supreme Court has observed: “ ‘When parties contract to resolve their disputes by private arbitration, their agreement ordinarily contemplates that the arbitrator will have the power to decide any question of contract interpretation, historical fact or general law necessary, in the arbitrator’s understanding of the case, to reach a decision. [Citations.] Inherent in that power is the possibility the arbitrator may err in deciding some aspect of the case. Arbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error, for “ ‘[t]he arbitrator’s resolution of these issues is what the parties bargained for in the arbitration agreement.’ ” [Citations.]’ [Citation.]” (*Cable Connection, supra*, 44 Cal.4th at pp. 1360-1361.)

The California Supreme Court has explained, however, that “parties may obtain judicial review of the merits [of an arbitration award] by express agreement.” (*Cable Connection, supra*, 44 Cal.4th at p. 1340.) In other words, parties may enter into “contracts limiting the arbitrators’ authority by subjecting their award to correction for legal error.” (*Id.* at p.1362.) In *Cable Connection*, the parties’ arbitration agreement expressly stated that “ ‘[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.’ ” (*Id.* at p. 1361, fn. 20.) The California Supreme Court explained that, “to take themselves out of the general rule that the merits

of the award are not subject to judicial review, the parties must clearly agree that legal errors are an excess of arbitral authority that is reviewable by the courts. Here, the parties expressly so agreed, depriving the arbitrators of the power to commit legal error. They also specifically provided for judicial review of such error.” (*Id.* at p. 1361, fn. omitted.) The California Supreme Court concluded that this contract provision in the parties’ arbitration agreement was enforceable. (*Id.* at pp. 1340, 1364.)

In reaching this conclusion, the California Supreme Court explained that the parties in the case before it had “expressly . . . agreed” that the arbitrators did not have the power to commit legal error *and* they had “specifically provided” for review by a court of such error. (*Cable Connection, supra*, 44 Cal.4th at p. 1361.) The court cautioned that it was not deciding “whether one or the other of these clauses alone, or some different formulation, would be sufficient to confer an expanded scope of review.” (*Ibid.*) However, the court “emphasize[d] that parties seeking to allow judicial review of the merits, and to avoid an additional dispute over the scope of review, would be well advised to provide for that review explicitly and unambiguously. [Citation.]” (*Ibid.*)

In this case, similar to the arbitration agreement in *Cable Connection*, the parties’ arbitration agreement states that “[t]he Arbitrator shall not have the power to commit errors of law or legal reasoning, or to grant relief, which would not be legally available in a California court.” In contrast to the agreement in *Cable Connection*, however, the parties’ agreement does not specifically provide for judicial review of such error.

STEC contends that the parties’ explicit agreement to “final and binding arbitration,” “coupled with” the agreement’s “silence as to judicial review, establishes that the parties intended to forgo expanded” judicial review of the arbitration award. STEC cites to several cases in which the appellate courts have determined that merits review was not authorized inferentially, by contract clauses stating that the arbitrator “ ‘shall apply California law’ ” and “ ‘shall be constrained by the rule of law’ ” (*Baize v. Eastridge Companies, LLC* (2006) 142 Cal.App.4th 293, 297), or that the arbitrator

“ ‘shall render an award in accordance with substantive California Law’ ” (*Gravillis, supra*, 182 Cal.App.4th at p. 508, italics omitted; see also *Christensen v. Smith* (2009) 171 Cal.App.4th 931, 937), or that the arbitrator “ ‘may grant any remedy or relief that would have been available to the parties had the matter been heard in court’ ” (*Shahinian v. Cedars-Sinai Medical Center* (2011) 194 Cal.App.4th 987, 1006).

Plaintiff replies that the parties’ arbitration agreement is distinguishable from the agreements in the cases cited by STEC because the parties’ agreement in the instant case specifically limits the arbitrator’s power to commit errors of law. Plaintiff also contends that, to the extent the parties’ agreement is vague on the issue of judicial review, it must be interpreted against STEC, as the drafter of the agreement. Plaintiff further refers to a declaration that he submitted to the superior court in which he states that it “was always assumed by” him based on the terms of the parties’ arbitration agreement that the arbitrator’s “failure to properly apply California law would provide a basis for appeal.” Plaintiff also argues that, in order to give meaning to the clause prohibiting the arbitrator from committing errors of law, the contract must be interpreted to allow judicial review of such errors.

In this case, we need not decide whether the parties’ arbitration agreement included the right to judicial review of errors of law by the arbitrator. Even assuming that the parties agreed to judicial review of such errors, we determine that plaintiff fails to establish that such errors were committed by the arbitrator in this case.

C. The Arbitration Award

Plaintiff contends the arbitrator committed legal error by (1) denying his motion for an issue sanction against STEC, and (2) relying on testimony by STEC’s expert witness Grammas. We consider each contention in turn.

1. The arbitrator’s denial of plaintiff’s motion to impose an issue sanction against STEC for spoliation of evidence

A few days before the arbitration hearing, plaintiff submitted to the arbitrator a written motion for sanctions against STEC for spoliation of evidence (hereafter “spoliation motion”). Plaintiff contended that STEC had failed to “honor” a “Legal Hold Demand” letter sent by his counsel. In the letter, plaintiff’s counsel demanded that STEC preserve documents related to plaintiff’s employment and his claims concerning his employment. According to plaintiff, STEC at some point thereafter destroyed sales purchase orders and invoices, which were “the most reliable source of tracking commissions.” Plaintiff asserted that although STEC produced computer printouts from its Customer Relationship Management (CRM) software, “[t]his secondary source is materially incomplete and highly subject to corruption, as it is merely a database on a software template which may be manipulated, altered, or redacted at will.” Plaintiff explained that STEC claimed to have terminated his employment for low sales, and he contended that its failure to produce the purchase orders “deprived” him of the ability to prove that he met sales quotas and that sales quotas were manipulated in order to terminate him for his “whistleblowing.” He also argued that the absence of the documents “inhibit[ed]” his ability to calculate his “earned but unpaid sales commissions.” Plaintiff contended that STEC “should, at a minimum, suffer the sanction of issue preclusion, barring evidence that Plaintiff had not met applicable sales quotas”

The arbitrator received opposition from STEC and apparently received a reply from plaintiff. STEC contended that it had produced all purchase orders related to plaintiff’s sales.

Following a hearing on plaintiff’s spoliation motion, the arbitrator denied the motion by written order. The order states in part: “The Arbitrator has carefully reviewed the declarations and evidence submitted in connection with the present motion. The

evidence presented does not compel the conclusion that [STEC] has destroyed any relevant documents, and does not compel the conclusion that [STEC] failed to preserve relevant documents, i.e., purchase orders relevant to [plaintiff's] claims, after receipt of [plaintiff's] Legal Hold Demand. With respect to the 24 boxes of recently discovered documents, the evidence presented does not compel the conclusion that all of the documents are responsive to [plaintiff's] requests. At *best* for [plaintiff], the evidence presented suggests that [STEC] has not produced complete copies of all documents responsive to the requests at issue, and that [STEC] *may* not have preserved all relevant purchase orders. [Plaintiff], however, has failed to establish that [STEC] destroyed or failed to preserve the allegedly missing documents. The possibility remains that [STEC] has produced all documents in its possession, custody or control, and that [STEC] did not fail to preserve documents. To the extent that [plaintiff] obtains evidence to the contrary, [plaintiff] may submit a new motion. Nonetheless, for purposes of the present motion, [plaintiff] has failed to establish any destruction of documents (or failure to preserve) by [STEC]. Accordingly, [plaintiff's] motion for spoliation sanctions is DENIED.”

At the arbitration hearing a few days later, plaintiff renewed his spoliation motion. He also apparently addressed the issue in his closing arbitration brief.

In the subsequent written arbitration award, the arbitrator denied the renewed spoliation motion. In denying the motion, the arbitrator referred to testimony by two STEC employees and by plaintiff. The arbitrator explained: “[Plaintiff] based his contentions on his fallacious assertion that sales commissions are generated from purchase orders. To the contrary, Mr. Tiomkin credibly testified that no sales person was eligible to receive credit for a sale until the product was invoiced, and a product is not invoiced until it is shipped. Both Mr. Tiomkin and Mr. Nilsson explained that credit is not received upon receipt of a purchase order because orders frequently change. For example, after sending a purchase order, a customer can cancel an order, revise an order, or request a later shipping date. That system has always been the same at STEC, which

never gives credit or pays commission based upon a purchase order. Other than his own unsubstantiated testimony, [plaintiff] presented no evidence to the contrary. Under the circumstances, the absence, if any, of original purchase orders and other source documents, though unfortunate in light of the legal hold diligently placed by [plaintiff's counsel] early in the litigation, is inconsequential. No prejudice has been shown and no sanctions are justified.” In a footnote, the arbitrator also made the following factual findings: “STEC produced documents reflecting computer images of STEC’s sales database, the CRM. These documents contain much of the same information as the purchase orders and were relied [upon] by STEC when accessing [plaintiff’s] sales. STEC’s sales and commissions at all relevant times herein were based entirely on invoices sent at the time product was shipped to customers, all of which were reflected in the CRM. STEC had every incentive to invoice and ship all product ordered by its customers; that is how it earned its revenues. The evidence clearly established that in order to accommodate the needs of its customers, STEC freely allowed them to change or cancel orders for which purchase orders had been submitted so long as the product had not yet been invoiced and shipped. Thus it is the CRM information, all of which has been produced, not the original purchase orders, which matters here The testimony of Eli Tiomkin was credible and persuasive on this point.”

On appeal, plaintiff argues that the arbitrator committed “egregious error” by failing to impose an issue sanction against STEC. Plaintiff contends that the original “sales purchase orders/invoices” were the “most reliable source of tracking commissions.” He also asserts that the “original source purchase orders” were “necessary to verify the accuracy of the CRM information,” and that he was “fatally prejudiced in his effort to demonstrate sufficient sales” against his quarterly sales quotas. According to plaintiff, STEC’s failure to produce the purchase orders “deprived” him of the ability to prove that he met sales quotas and that sales quotas were manipulated in order to terminate him for his “whistleblowing.” Plaintiff contends that STEC “should

have, at a minimum, suffered the sanction of issue preclusion, barring evidence that [plaintiff] had not met applicable sales quotas.” In response STEC argues, among other things, that in view of the arbitrator’s factual findings, plaintiff fails to establish legal error.

“Spoliation of evidence means the destruction or significant alteration of evidence or the failure to preserve evidence for another’s use in pending or future litigation. [Citations.] Such conduct is condemned because it ‘can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both.’ [Citation.] While there is no tort cause of action for the intentional destruction of evidence after litigation has commenced, it is a misuse of the discovery process that is subject to a broad range of punishment, including monetary, issue, evidentiary, and terminating sanctions. [Citations.] . . . [¶] Discovery sanctions are intended to remedy discovery abuse, not to punish the offending party. Accordingly, sanctions should be tailored to serve that remedial purpose, should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery, and should be proportionate to the offending party’s misconduct. [Citation.]” (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223 (*Williams*)). In considering whether a requested discovery sanction is appropriate and proportionate to the wrongdoer’s conduct, a court may consider the extent of the prejudice, if any, suffered by the other party as a result of the loss of evidence. (See *id.*, at p. 1227; *McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 213-214 (*McGinty*)).

In this case, plaintiff fails to demonstrate legal error by the arbitrator’s refusal to impose an issue sanction against STEC. The arbitrator determined, based on evidence presented at the arbitration hearing, that “the absence, if any, of original purchase orders

and other source documents” was “inconsequential” in view of STEC’s production of CRM information.

First, we understand plaintiff on appeal to dispute the factual basis for this determination by the arbitrator. Plaintiff admits, however, that at the arbitration hearing he “stipulated to proceed without a court reporter.” In the absence of a reporter’s transcript reflecting the evidence presented at the arbitration hearing, plaintiff’s assertions on appeal regarding the unreliability of CRM information and his accordant need for purchase orders are without sufficient support in the record on appeal. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 (*Ballard*); *Lopes v. Millsap* (1992) 6 Cal.App.4th 1679, 1685 (*Lopes*)). Further, even if conflicting factual inferences might be drawn from the evidence presented at the arbitration hearing concerning the reliability of CRM information and whether purchase orders were needed, it would not provide a basis for determining that the arbitrator committed *legal* error in resolving those factual inferences in STEC’s favor with respect to the renewed spoliation motion.

Second, regarding plaintiff’s contention that STEC’s failure to produce the purchase orders prevented him from proving that *sales quotas* were manipulated by STEC, plaintiff does not articulate how purchase order evidence would support a claim that STEC manipulated sales quotas. In the arbitration award, the arbitrator found that plaintiff’s sales goals for 2006 were set in February 2006, that the sales goals were “agreed to” by plaintiff and the individual to whom plaintiff reported, and that the sales goals “never changed.” In view of these factual findings by the arbitrator, plaintiff fails to establish prejudice based on the absence of any purchase orders with respect to his claim of sales quota manipulation.

Third, plaintiff fails to demonstrate that the arbitrator applied an incorrect legal standard in evaluating his spoliation motion. As we stated above, “[d]iscovery sanctions are intended to remedy discovery abuse, not to punish the offending party. Accordingly, sanctions . . . should be proportionate to the offending party’s misconduct. [Citation.]”

(*Williams, supra*, 167 Cal.App.4th at p. 1223.) In considering whether a requested discovery sanction is appropriate and proportionate to the wrongdoer's conduct, a court may consider the extent of the prejudice, if any, suffered by the other party as a result of the loss of evidence. (See *id.*, at p. 1227; *McGinty, supra*, 26 Cal.App.4th at pp. 213-214.) In this case, the arbitrator stated in denying plaintiff's renewed spoliation motion that "the absence, if any, of original purchase orders and other source documents, though unfortunate in light of the legal hold diligently placed by [plaintiff's counsel] early in the litigation, is inconsequential. No prejudice has been shown and no sanctions are justified." The consideration of prejudice by the arbitrator was proper. Plaintiff on appeal fails to identify anything in the record indicating that the arbitrator applied the wrong legal standard in evaluating his spoliation motion.

Accordingly, we determine that plaintiff fails to demonstrate legal error by the arbitrator's refusal to impose an issue sanction against STEC.

2. The arbitrator's reliance on testimony by STEC's expert witness Grammas

Prior to the arbitration hearing, plaintiff submitted a motion to the arbitrator seeking to compel further responses by STEC to certain requests for production of documents. Plaintiff contended, among other things, that STEC's objection to the requests on the ground of attorney-client privilege was without merit because STEC had waived the privilege. STEC submitted written opposition to the motion. Following a hearing on the motion, the arbitrator determined that plaintiff had failed to establish a waiver of the attorney-client privilege by STEC.

At the subsequent arbitration hearing, plaintiff sought to establish unfair competition by STEC in violation of Business and Professions Code section 17200 et seq. In denying relief on this claim, the arbitrator determined that plaintiff failed to prove several elements of the claim, including that STEC committed any act of unfair competition. The arbitrator explained as follows in the arbitration award: "[Plaintiff] claimed that STEC committed 'unfair competition' by allegedly violating ITAR. [¶]

However, neither [plaintiff] nor his expert, Hugh Schmittle, proved that . . . STEC violated ITAR. [¶] To determine whether a violation of ITAR has occurred, one must apply the law to the given set of facts. This is a legal analysis. Neither [plaintiff] nor his expert has a law degree or even any training in the law.^[6] In contrast, STEC’s ITAR expert, George Grammas, has been practicing law since 1988. Mr. Grammas is a partner in the firm of Squire Sanders; he leads the firm’s International Transaction Regulations, Export Controls and Customs Practice; he routinely advises companies on U.S. laws and regulations, including ITAR; and, he served as an advisor to the U.S. State Department’s Bureau of Political-Military Affairs. . . . Due to his significant credentials and legal experience, Mr. Grammas’[s] opinions regarding potential violations of ITAR were far more credible than any opinion by [plaintiff] or Mr. Schmittle. [¶] Mr. Grammas established the following through his testimony: the Landmark purchase order . . . did not demonstrate any violation of ITAR;^[7] [t]he release of Lockheed Martin data to VMETRO, a U.S. corporation, was not an ‘export’ of ‘ITAR-controlled technical data’ as [plaintiff] claimed; and ITAR does not require any specific compliance measures that a company must adopt or implement in order to be in compliance; and mere ‘access’ to ITAR-controlled technical data, without actually accessing the material, is not a violation.” (Italics omitted.)

On appeal, plaintiff contends that STEC’s expert witness regarding ITAR, Grammas, “provided opinions at arbitration regarding [STEC’s] regulatory compliance,” that these opinions “necessarily involved communications” that were claimed to be

⁶ “Mr. Schmittle provided vague explanations as to why STEC was allegedly in violation of ITAR. However, Mr. Schmittle admitted that he could not provide a legal opinion as to whether STEC was or was not in violation of ITAR because he is not a lawyer. In fact, Mr. Schmittle admitted that he relies on the advice of legal counsel in his practice as an export compliance consultant.”

⁷ “Mr. Tiomkin established through his testimony that the sale to Landmark was the sale of a commercial off-the-shelf product, not an ITAR-protected product. . . .”

protected under the attorney-client privilege by STEC, and that because he was not allowed “discovery of the fact and context of those communications,” Grammas’s testimony of STEC’s “legal compliance was improper.” Plaintiff also argues that he was “denied the opportunity to even cross-examine [Grammas] at arbitration as to the ‘privileged’ communications, while [Grammas] was himself allowed to testify regarding the fact of ITAR compliance by STEC and to minimize [STEC’s] ITAR compliance issues, over [plaintiff’s] objections.” According to plaintiff, Grammas’s testimony “regarding his communications with STEC, including its regulatory compliance strategies,” constituted a waiver of the attorney-client privilege, and the arbitrator consequently should have allowed plaintiff to admit into evidence “previously privileged documents to show a lack of ITAR compliance, allowed cross-examination of [Grammas] regarding same, and allowed [plaintiff] to testify regarding communications he received and provided to the STEC Legal Department” Plaintiff further contends that the arbitrator “relied entirely on the opinions” of Grammas regarding STEC’s legal compliance, “dismissed the conflicting opinions” of plaintiff’s expert Schmittle, and that this “deference” to Grammas “was a complete abrogation” of the arbitrator’s “fact- and legal-finding duties.”

STEC contends that plaintiff offers no “evidence” that Grammas testified at the arbitration regarding privileged communications, and that Grammas in fact did *not* testify regarding his legal advice to STEC. STEC further argues that the arbitrator did not abrogate his duty to make findings of fact and law.

We determine that plaintiff fails to demonstrate legal error by the arbitrator. First, the record on appeal is inadequate to assess plaintiff’s assertion on appeal that Grammas’s testimony at the arbitration hearing involved privileged attorney-client communications. In conducting our appellate review, we are guided by “the familiar rule that the decision under review is presumed correct on matters where the record is silent.” (*Cable Connection, supra*, 44 Cal.4th at p. 1362; see *Lopes, supra*, 6 Cal.App.4th at

p. 1685.) The appellant “has the burden of showing reversible error by an adequate record.” (*Ballard, supra*, 41 Cal.3d at p. 574.) “ ‘A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.’ [Citations.]” (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) Thus, where the appellant fails to provide an adequate record as to any issue the appellant has raised on appeal, the issue must be resolved against the appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) In this case, there is no reporter’s transcript of the arbitration hearing. In the absence of an adequate record showing that Grammas’s testimony at the arbitration hearing involved privileged attorney-client communications, plaintiff fails to demonstrate that the arbitrator erred by allowing opinion testimony by Grammas, or by not determining that the attorney-client privilege had been waived and allowing plaintiff to admit into evidence privileged documents, allowing cross-examination of Grammas regarding those documents or other privileged communications, or allowing plaintiff to testify about certain privileged communications.

Second, plaintiff fails to cite any legal authority to support the proposition that it was legal error for the arbitrator to rely on Grammas’s expert opinion testimony rather than, as plaintiff describes it, the “conflicting opinions” of his own expert Schmittle. Moreover, plaintiff has not affirmatively shown that the arbitrator avoided his responsibility to make findings of fact or conclusions of law on the issue of whether STEC violated ITAR and, ultimately, the issue of whether STEC engaged in unfair competition in violation of Business and Professions Code section 17200. The arbitration award reflects that the arbitrator made several determinations, factual and legal, to support his ultimate conclusion that plaintiff had not established a claim for violation of Business and Professions Code section 17200. Although the arbitrator in the award generally referred to the testimony of Grammas, nothing in the award suggests that the

arbitrator “defer[red]” to Grammas and “abrogat[ed]” a responsibility to make factual findings and conclusions of law.

Accordingly, we determine that the superior court did not err in denying plaintiff’s petition to vacate the arbitration award and granting STEC’s request to confirm the award.

IV. DISPOSITION

The February 17, 2011 order is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

DUFFY, J.*

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.