Filed 3/22/22 Crowder v. Freeman, Freeman & Smiley CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROBERT S. CROWDER, Petitioner and Appellant, v. FREEMAN, FREEMAN & SMILEY LLP, Respondent.	B309001 (Los Angeles County Super. Ct. No. BS171615)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard J. Burdge, Judge. Reversed.

Arent Fox, Malcolm S. McNeil and David Bayles for Petitioner and Appellant.

Robie & Matthai, Kyle Kveton for Respondent.

Robert Crowder, an attorney, and Freeman, Freeman & Smiley LLP (Freeman), his former law firm, disputed the payment due Crowder upon his withdrawal from the partnership. Pursuant to a partnership agreement, the dispute proceeded to arbitration, resulting in an award in favor of Freeman for damages and attorney fees. Crowder petitioned the superior court to vacate the award and Freeman moved to confirm it. The trial court denied Crowder's petition and confirmed the award, and we affirmed the resulting judgment. (*Crowder v. Freeman* (July 1, 2021, B303397) [nonpub. opn.].)

The arbitration agreement provided that " '[t]he arbitrator may award reasonable attorneys' fees and arbitration costs to the prevailing party."

Freeman moved in superior court for attorneys' fees, including fees incurred in court proceedings to confirm the award. The court awarded Freeman attorney fees in the amount of $34,455. (Freeman also sought and the court awarded pre-judgment interest, which Crowder does not appeal.) The court subsequently amended the judgment to confirm the final award.

Crowder appeals from the amended judgment, contending the arbitration agreement's attorney fees provision permitted Freeman to recover fees only from the arbitrator, not the court. We agree, and therefore reverse.

BACKGROUND

A. Arbitration

The facts of the dispute between Crowder and Freeman, which we related in our prior opinion, have no bearing on this appeal.

The dispute proceeded to arbitration pursuant to an agreement that provided: "The arbitrator may award reasonable attorneys' fees and arbitration costs to the prevailing party."

After considerable law and motion practice, on August 14, 2017, a Judicial Arbitration & Mediation Service (JAMS) arbitrator issued a final award, declaring that Freeman owed Crowder nothing and Crowder owed Freeman $13,260.60 (without interest) plus "reasonable expenses (attorney fees) and costs" in the amount of $78,936.99.

Regarding attorney fees and costs, the arbitrator found that Crowder "significantly increased the expenses and costs of the arbitration by making a meritless motion to disqualify [Freeman's] counsel and a meritless cross-motion for summary adjudication on the Cross-Complaint. It is fair to say that [Freeman's] attorney fees and the JAMS fees or costs, both of which are fairly substantial, would have been significantly less except for Mr. Crowder's litigation strategy. Although Mr. Crowder characterizes himself as a 'victim' in his Opposition, that simply is not so. His claim that he tried to settle the case ignores the fact that he initially – and continuing through the summary adjudication stage – insisted that [Freeman] owed him a substantial amount of money (approximately $120,000); and his post-summary adjudication settlement offers did not include the substantial attorney fees and JAMS costs [Freeman] had incurred by the end of the summary adjudication process."

B. Litigation

On November 22, 2017, Crowder petitioned the superior court to vacate the arbitration award, and Freeman filed a cross-petition to confirm it.

On October 25, 2019, the trial court denied Crowder's petition and granted Freeman's petition. Crowder appealed from the resulting judgment, which we affirmed.

On December 4, 2019, Freeman moved in superior court for attorney fees incurred in the court proceedings.

At the hearing on August 5, 2020, the court issued a tentative ruling denying Freeman's motion, but took the matter under submission and subsequently granted the motion, awarding Freeman $34,455. The court thereafter entered an amended judgment, from which Crowder appeals.

DISCUSSION

Crowder contends the arbitration agreement permitted the parties to seek attorney fees only from the arbitrator, not the court. The court therefore had no authority to award fees. We agree.

We review de novo the legal basis for an attorney fee award. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.)

"Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . ." (Code Civ. Proc., § 1021.)

"Under the 'American rule,' followed in California, 'each party to a lawsuit ordinarily must pay his or her own attorney fees. [Citations.]' [Citation.] An exception to this rule exists where the parties have agreed to 'the measure and mode of compensation of attorneys.' [Citation.] For example, a contract may contain a provision providing for attorney fees in enforcing the contract. Where a contract contains such a provision, the court must fix reasonable attorney fees as an element of the costs

of the lawsuit." (*Gray1 CPB, LLC v. SCC Acquisitions, Inc*. (2015) 233 Cal.App.4th 882, 889-890.)

The objective intent of contracting parties is a legal question determined solely by reference to the contract's terms, if possible. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1125-1126.)

Here, the contract at issue provided that "[t]he arbitrator may award reasonable attorneys' fees and arbitration costs to the prevailing party." The agreement said nothing about a court awarding attorney fees. Therefore, absent some extra-contractual authority, for example a statute or rule, the trial court had no authority to award fees.

Freeman argues *Ajida Technologies, Inc. v. Roos Instruments, Inc*. (2001) 87 Cal.App.4th 534 (*Ajida*) authorizes a trial court to award attorney fees pursuant to an agreement that empowers only an arbitrator to award the fees.

In *Ajida*, the parties submitted their dispute to arbitration pursuant to an agreement that empowered the arbitrator to award attorney fees. The arbitrator awarded fees to the prevailing party, which then petitioned the superior court to confirm the final award. The trial court did so and an appeal followed. On appeal, the prevailing party sought attorneys fees on appeal pursuant to the arbitration agreement. Our colleagues in the Sixth District held that "a contract provision that permits the recovery of fees in arbitration is broad enough to include fees in related judicial proceedings, including an appeal from the judgment confirming the award." (*Ajida*, *supra*, 87 Cal.App.4th at p. 552.)

We cannot agree. " 'The basic goal of interpretation is to give effect to the parties' mutual intent at the time of

contracting.' " (*In re Marriage of Simundza* (2004) 121 Cal.App.4th 1513, 1518.) " 'When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible,' " construing the words in their ordinary and popular sense. (*Ibid.*) " ' "If [the] language is clear and explicit, it governs." ' " (*In re Marriage of Hibbard* (2013) 212 Cal.App.4th 1007, 1013.)

Here, the attorney fee provision could not be clearer or more explicit: "The arbitrator may award reasonable attorneys' fees." In its ordinary and popular sense, "arbitrator" does not mean "court," and power granted to the former does not thereby flow to the latter.

Freeman argues that where parties agree to have fee-shifting rules applied to the arbitration of their dispute, post-arbitration proceedings to confer finality on the resolution of that dispute should also be subject to the fee shifting provisions of the underlying agreement. We disagree. Pursuant to well-established principles of contract interpretation, a fee-shifting agreement should be interpreted according to its plain meaning, not according to principles of completeness or finality.

Freeman similarly argues that under Crowder's interpretation, a party that lost in arbitration could force the prevailing party to incur thousands of dollars in attorney fees in defending the arbitrator's final award, which, it argues, "should not be the case." But we interpret an agreement according to what the parties said, not what they should have said. Freeman, which drafted the arbitration agreement and obligated its partners to accept it, could easily have empowered a court to award attorney fees to the prevailing party. That it did not do so

indicates it did not intend to do so. We cannot repair a contract simply because it turned out to be short-sighted.

Freeman argues the fee award was supported by Code of Civil Procedure section 1293.2, which provides for costs in judicial proceedings to confirm an arbitration award, such costs to include attorney fees when specified by contract. But here no contract specified that attorney fees would constitute costs in any judicial proceedings.

DISPOSITION

The judgment is reversed to the extent it awarded Respondent post-arbitration attorney fees. Appellant is to recover his costs on appeal.

NOT TO BE PUBLISHED

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

CRANDALL, J.*

---

* Judge of the San Luis Obispo County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.