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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

WILLIAM SHIRK et al.,

Plaintiffs and Respondents,

v.

CHICAGO TITLE INSURANCE CO.,

Defendant and Appellant.

2d Civil No. B222195
(Super. Ct. No. CIV247295)
(Ventura County)

Homeowners were involved in a dispute with the City of Ventura (City) over the precise nature of the title they acquired when they purchased condominiums in an "affordable housing development." Homeowners filed complaints against the City and the City filed cross-complaints against the homeowners. Realizing that their property rights may be substantially impacted by the litigation, the homeowners demanded that appellant Chicago Title Insurance Co. (Chicago Title) undertake defense of the action and indemnify them. Its refusal to do so resulted in a lengthy and contentious arbitration proceeding, which occurred during the same period that the City and the homeowners were engaged in mediation and settlement discussions. The arbitrator found Chicago Title had a duty to defend, had breached its contract of title

insurance and duty of good faith and fair dealing, and awarded the homeowners $1,007,417.11 in attorney fees, costs and prejudgment interest.

Chicago Title appeals from the order confirming the arbitration award. It contends the award must be vacated because (1) the homeowners failed to inform it and the arbitrator that the City's agreement to purchase one of the condominium units had not been completed, and (2) the arbitrator reserved jurisdiction to determine future indemnity claims.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondents William and Julie Shirk and David and Mary Williamson purchased condominium units in Seneca Highlands in 1999. Seneca Highlands is an affordable housing condominium complex in Ventura developed pursuant to an agreement between the City and a private developer. Among other restrictions, condominiums in the development are subject to restraints on alienation imposed by the development agreement and amended Covenants, Conditions and Restrictions (CC&Rs), including limitations on the income levels of purchasers of the units and the price sellers can charge for the units. At the time the Shirks and Williamsons purchased their condominiums, the developer did not inform them that Seneca Highlands was an affordable housing development or that the units were subject to affordable housing restrictions.

The Shirks and Williamsons were issued policies of title insurance by Chicago Title in connection with the purchase of their condominiums. The policies are identical and, as relevant here, contain an endorsement providing additional coverage against loss or damage sustained by the insured in the event of "the removal of the residential structure or interference with use thereof for ordinary residential purposes as the result of a final court order or judgment, based upon the existence at [d]ate of [p]olicy of . . . any violation on the land of enforceable covenants, conditions or restrictions[.]"

In 2006, respondents became aware that the City was imposing sale, use and rental restrictions on their properties pursuant to the CCRs. In February and March of 2006, they filed lawsuits against the City alleging fraud, negligence, negligent misrepresentation, quiet title, declaratory relief and breach of contract, and seeking to remove the restrictions imposed on the units.

The City filed cross-complaints against respondents alleging causes of action for breach of written contract-CC&Rs and declaratory relief.[1] The declaratory relief cause of action sought a declaration that "[p]laintiffs' unit is subject to the AHP (affordable housing policy) as a moderate income unit" and "[a]ny subsequent resale of [p]laintiffs' unit is similarly subject to the AHP as a moderate-income unit." The cross-complaints attached and incorporated by reference the development agreement and CC&Rs for the Seneca Highlands development.

Respondents made a demand on Chicago Title for defense and indemnity of the cross-complaints on July 21, 2006, and again on November 15, 2006. On January 19, 2007, Chicago Title refused coverage and denied it had a duty to defend or indemnify.

On March 19, 2007, respondents filed a complaint against Chicago Title alleging breach of contract, breach of the covenant of good faith and fair dealing, and violation of Business and Professions Code section 17200 based on its denial of the duty to defend and indemnify.

Pursuant to the arbitration provision in the title policies, the parties entered into a stipulation to arbitrate. The stipulation states in part: "The parties wish to submit the matters at issue in this lawsuit to binding arbitration pursuant to a mutual agreement to arbitrate entered into on July 23, 1999[.]" The parties agreed to an arbitrator associated with Judicial Arbitration and Mediation Services (JAMS).

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[1] The cross-complaint also contains claims against the developer. These claims are not at issue in this appeal.

Prior to the arbitration, in early 2009, after lengthy mediation and settlement negotiations, respondents and the City agreed that the City would exercise its preemptive right, given it by the CC&Rs, to purchase respondents' condominium units. A stipulated judgment, purchase agreement and related documents were drafted. The sale of the Williamsons's condominium was completed. However, the City determined it did not have sufficient funds to purchase the Shirks's unit.

The arbitration occurred on June 25-29, 2009. On October 30, 2009, the arbitrator issued an "amended partial award" concluding that Chicago Title had a duty to defend and had breached that duty. The arbitrator awarded $1,007,417.11 to respondents for attorney fees, costs and prejudgment interest. On November 23, 2009, respondents filed a petition to confirm the award. On or about December 3, 2009, Chicago Title filed objections and a motion to vacate the award, asserting the award was procured by fraud and undue means and that the arbitrator exceeded his powers by reserving jurisdiction to decide future indemnity claims.

After a hearing on December 18, 2009, the trial court confirmed the award and denied Chicago Title's motion to vacate. The order states in part: "Chicago Title has not established by a preponderance of the evidence, or by clear and convincing evidence that the arbitration was procured by fraud or other undue means. Chicago Title has not demonstrated that the arbitrator exceeded his powers or authority. Chicago Title has not demonstrated that the arbitrator refused to hear evidence. [¶] Chicago Title is obviously disappointed that they did not prevail in this case. A reading of the award issued by the arbitrator, however, confirms that the arbitrator had a thorough understanding of all of the issues, including that of the [Shirks's] efforts to settle their case with the City[.] It is a huge leap to contend that the arbitrator's decision was due to irregularities in the proceedings. Chicago Title does not come close to establishing what is necessary to vacate an arbitration award."

On appeal, respondents filed a motion for sanctions asserting the appeal is frivolous and was brought in bad faith.

DISCUSSION

Standard and Scope of Review

Any party to an arbitration in which an award has been made may petition the court to confirm, correct, or vacate the award. (Code Civ. Proc., § 1285.)[2] The exclusive grounds for vacating an arbitration award are those listed in section 1286.2.[3] (*Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, 12-13, 33; *Harris v. Sandro* (2002) 96 Cal.App.4th 1310, 1312.) The party seeking to vacate the award bears the burden of proving at least one of the statutory grounds. (*Marsch v. Williams* (1994) 23 Cal.App.4th 238, 243-244.) A trial court's order confirming an arbitration award is reviewed de novo. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376, fn. 9; *Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 892, fn. 7.)

No Grounds Exist to Vacate the Award

1. The Arbitrator Properly Disregarded Circumstances Occurring After the Duty to Defend Arose

Chicago Title asserts the trial court erred in confirming the award because it was obtained by fraud and undue means and its rights were substantially

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[2] All statutory references are to the Code of Civil Procedure unless otherwise stated.

[3] Section 1286.2, subdivision (a), states that an award may be vacated only if: "(1) The award was procured by corruption, fraud or other undue means. [¶] (2) There was corruption in any of the arbitrators. [¶] (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. [¶] (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision. [¶] (5) The rights of the party were substantially prejudiced by the refusal of the arbitrator to hear evidence material to the controversy[.] [¶] (6) An arbitrator making the award either: (A) failed to disclose . . . a ground for disqualification . . .; or (B) was subject to disqualification[.]"

prejudiced by the arbitrator's refusal to reopen the arbitration to consider new evidence. (§1286.2, subd. (a)(1)(5).)

The basis for Chicago Title's assertion of fraud and undue means is respondents' purported failure to inform Chicago Title and the arbitrator that the Shirks's settlement with the City had not been consummated. It asserts that respondents withheld information from it and the arbitrator concerning the status of the Shirks's settlement negotiations with the City. Chicago Title also asserts the arbitrator erred when it refused to reopen the arbitration to consider documents showing that the sale had never been finalized.

The sole issue before the arbitrator was whether Chicago Title had a duty to defend the lawsuits between respondents and the City. It is well established that the duty to defend is determined by the information possessed by the insurer at the time it refuses to defend, not by information obtained subsequently. (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1115.) As the insurer's duty is determined by the facts that existed on the date the insurer rejected the defense, the rejection cannot be justified by subsequent events. (*Rosen v. Nations Title Ins. Co.* (1997) 56 Cal.App.4th 1489, 1501.)

We quote a leading treatise: "§ 7:197 **When duty to defend arises** [¶] **The duty to defend is determined at the time the claim is filed.** While the duty to indemnify is not determined until there is a final resolution of the claim, whether there is a duty to defend must be determined at the time the insured tenders the defense to the insurer [fn. omitted] based on the facts and information available at the time the insurer accepts or rejects the tender. [Fn. omitted.] [¶] . . . [¶] **The duty to defend does not arise by subsequent events.** The duty to defend is determined by the information possessed by the insurer at the time it refuses to defend, not by information obtained subsequently. (Fn. omitted.]" (7 Miller & Starr, Cal. Real Estate (3d ed. 2005) § 7:197, pp. 7-407, 7-408 & 7-416, emphasis in original.)

Chicago Title refused respondents' demand for a defense on January 19, 2007. The agreement between the City and the Shirks to purchase the Shirks's condominium did not occur until 2009, fully two years later. Therefore, the City's failure to purchase the condominium has no relevance at all to the issue submitted to the arbitrator for decision.

Chicago Title's assertion that the arbitrator based his decision on the respondents' purported misrepresentation that the sale had occurred has no support in the record. Chicago Title relies on two of seventy-four findings contained in the amended partial award, which state as follows: "58. [T]he facts and evidence established that Ventura's [c]ross-[c]omplaints sought to enforce its right under the Amended CC&Rs to cure the alleged violations. [¶] 59. [O]ne of the remedies available to Ventura in asserting its rights under the Amended CC&Rs is provided for in Section XI, which states that "any transfer or attempt to transfer any production home or any part thereof, in violation of this declaration, in addition to any other remedies available to city, shall be void." (Emphasis deleted.)

These findings cannot be construed as demonstrating that the arbitrator based his decision that Chicago Title had a duty to defend on a mistaken belief that the City had, in fact, exercised its preemptive right to purchase the Shirks's condominium. The clear language of the findings demonstrates that the arbitrator correctly based his decision on the Amended CC&Rs which were incorporated by reference into the City's cross-complaints against respondents and the facts as they existed on the date Chicago Title rejected respondents' tender of defense. For these reasons, its related contention that the arbitrator erred in refusing to reopen the arbitration to receive evidence concerning the failure to complete the sale of the Shirks's condominium is without merit.

2. The Arbitrator Properly Reserved Jurisdiction to Decide the Issue of Indemnity

Chicago Title's second assignment of error - that the arbitrator exceeded his authority by reserving jurisdiction to decide future indemnity issues - is equally without merit.

Arbitrators "exceed[] their powers" by, among other things, deciding an issue that was not submitted to arbitration. (§ 1286.2, subd. (a)(4).) """. . . "In determining whether an arbitrator exceeded his powers, we review the trial court's decision de novo, but we must give substantial deference to the arbitrator's own assessment of his contractual authority."" [Citations.]" (*Greenspan v. LADT, LLC.* (2010) 185 Cal.App.4th 1413, 1437.)

Arbitration is a matter of contract, and the parties may freely delineate the area of its application. Doubts regarding the scope of arbitrable issues must be resolved in favor of arbitration. (*Kennedy, Cabot & Co. v. National Assn. of Securities Dealers, Inc.* (1996) 41 Cal.App.4th 1167, 1175.) The stipulation to arbitrate between Chicago Title and respondents states: "The parties wish to submit *matters at issue in this lawsuit* to binding arbitration pursuant to a mutual agreement to arbitrate entered into on July 23, 1999." (Italics added.) This arbitration provision is very broad and the agreement contains no restrictions limiting the issues to be determined by the arbitrator. (See *Greenspan v. LADT, LLC.*, *supra*, 185 Cal.App.4th at p. 1437 [in determining whether the arbitrators exceeded the scope of their powers, we first look to the parties' agreement to see whether it placed any limitations on the arbitrators' authority].)

JAMS Comprehensive Arbitration Rules and Procedures, state: "If a matter has been submitted for Arbitration after litigation has been commenced in court regarding the same claim or dispute, the pleadings in the court case, including the complaint and answer (with affirmative defenses and counterclaims), may be filed

with JAMS . . ., and if so filed, will be considered part of the record of the Arbitration. It will be assumed that the existence of such pleadings constitutes appropriate notice to the Parties of such claims, remedies sought, counterclaims and affirmative defenses." (JAMS Rule 9(a); *Greenspan v. LADT, LLC.*, *supra*, 185 Cal.App.4th at p. 1439.)

The matters at issue in the lawsuit are thus defined by the pleadings. Respondents' complaints against Chicago Title are based on rights arising from the title insurance policy issued by Chicago Title. The complaints allege both a duty to defend and a duty to indemnify. (See 7 Miller & Starr, Cal. Real Estate, *supra*, § 7:4, p. 7-22 ["A policy of title insurance is a contract of indemnity by which the title insurer promises to indemnify the insured against losses resulting from defects in the title or from liens and encumbrances affecting the title as described in the policy generally at the time the policy was issued"].) Thus, the issue of Chicago Title's duty to indemnify was clearly a "matter[] at issue in this lawsuit."

Chicago Title's assertion that respondents waived arbitration of the indemnity issue is not supported by the record. At the arbitration hearing, counsel for the parties merely agreed that the duty to defend was limited to defense of the cross-complaints filed by the City against respondents, and not defense of respondents' complaints against the City. Nothing in the record suggests that respondents' counsel intended to or did waive future proceedings regarding the issue of indemnity.

Chicago Title's contention that the arbitrator did not have the authority to issue an "amended partial award" also is without merit. The power of an arbitrator to decide all issues placed before him and to make partial awards is well established. Section 1283.4 states in part: "The award shall . . . include a determination of all questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy."

The courts have consistently construed this section as not precluding an arbitrator from making a final disposition of a submitted matter in more than one

award. (See *Mossman v. City of Oakdale* (2009) 170 Cal.App.4th 83, 91 ["the principle of arbitral finality does not preclude the arbitrator from making a final disposition of a submitted matter in more than one award . . . [n]or does section 1283.4 compel this result"]; see also, *Roehl v. Ritchie* (2007) 147 Cal.App.4th 338, 352 ["[a]rbitration awards may contemplate future proceedings"] and see *Hightower v. Superior Court* (2001) 86 Cal.App.4th 1415, 1434 [arbitrator's broad power to fashion remedies includes power to utilize multiple incremental or successive award process].)

In *Roehl*, the court concisely summarized the law regarding partial arbitration awards: "In *Hightower*. . ., the Court of Appeal rejected a very similar contention that section 1283.4 required a single final award that resolves *all* issues placed in dispute by the parties. *Hightower* relied heavily on the Supreme Court's decision in *Intel* and its deference to the arbitrator's choice of remedies. *Hightower* specifically affirmed an arbitrator's ability to use 'a multiple incremental or successive award process as a means, *in an appropriate case,* of finally deciding *all* submitted issues.' [Citation.] [¶] We recognize, as did *Hightower*, that there are limitations to such incremental awards, and that an arbitrator has no power to use the incremental award process to correct or modify the terms of an original award. [Citations.] As we discussed above, the arbitrator's reservation of jurisdiction to issue a second arbitration award did not result in a correction or modification of the terms and provisions of the first arbitration award." (*Roehl v. Ritchie, supra,* 147 Cal.App.4th at p. 351.)

Here the parties agreed to submit "matters at issue in this lawsuit" to arbitration. The arbitration agreement did not limit the scope of the arbitrator's authority to decide the issues raised by the pleadings. The arbitrator's reservation of jurisdiction in this case was well within his powers.

DISPOSITION

The order confirming the award and denying the motion to vacate is affirmed. The motion for sanctions is denied.

Respondents shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Henry J. Walsh, Judge

Superior Court County of Ventura

Miller Starr Regalia, Amy Matthew, Adam M. Starr for Defendant and Appellant.

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