Filed 2/24/11 O'Dowd v. Hardy CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BRIAN O'DOWD,

Plaintiff, Cross-defendant and Appellant,

v.

KEVIN HARDY,

Defendant and Respondent;

HARDY INSURANCE SERVICES, INC.,

Defendant, Cross-complainant and Respondent.

G043038

(Super. Ct. No. 05CC13296)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Beth Eagleson, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Kevin E. Monson for Plaintiff, Cross-defendant and Appellant.

Jamison & Associates, Guy E. Jamison; Law Office of Michael J. Coppess and Michael J. Coppess for Defendant and Respondent and for Defendant, Cross-complainant and Respondent.

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INTRODUCTION

Plaintiff Brian O'Dowd appeals from a judgment entered after the trial court confirmed a contractual arbitration award in favor of defendants Kevin Hardy and Hardy Insurance Services, Inc. (collectively, defendants). Plaintiff contends the judgment should be reversed because the trial court erred by failing to grant his motion to disqualify the arbitrator.

Before the arbitration hearing, plaintiff failed to pay his share of the arbitration fees and the hearing was taken off calendar. Defendants' counsel sent a letter to the arbitrator (a copy of which was sent to plaintiff's counsel), requesting the equivalent of a default prove-up hearing. The letter also contained negative statements about plaintiff. Plaintiff contends the arbitrator's receipt of the letter was a ground for the disqualification of the arbitrator under Code of Civil Procedure section 1281.91, subdivision (d) because "[a] person aware of the facts might reasonably entertain a doubt" that the arbitrator "would be able to be impartial" within the meaning of Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii). (All further statutory references are to the Code of Civil Procedure.)

We affirm. The arbitrator's receipt of negative information from one party's attorney about the opposing party, under the circumstances of this case, does not constitute a ground to disqualify the arbitrator within the meaning of section 1281.91, subdivision (d) and section 170.1, subdivision (a)(6)(A)(iii).

BACKGROUND

Plaintiff filed a complaint alleging claims against defendants for breach of oral contract and fraud by false promise, based on allegations defendants failed to pay the

agreed-upon purchase price for plaintiff's interest in certain insurance accounts. Defendant Hardy Insurance Services, Inc., filed a cross-complaint against plaintiff and two entities who are not parties to this appeal (Annex, Inc., and Customer's Choice Insurance Agency, Inc.) for breach of contract, fraud and deceit, negligent misrepresentation, express indemnity, equitable indemnity, and declaratory relief.

In February 2007, the trial court ordered the matter to binding arbitration. In December 2007, the parties selected retired Superior Court Judge Richard Lyman, Jr., of ADR Services, Inc. (ADR), to serve as arbitrator in the case. The arbitration hearing was scheduled for September 8, 2008. On August 8, while plaintiff's attorney was out of town on vacation, ADR notified the parties that the September 8, 2008 hearing date had been taken off calendar due to plaintiff's failure to pay his share of the arbitration fees.

Defendants' attorney contacted ADR case manager Terry Shea to inquire about proceeding with the arbitration following plaintiff's default. Shea advised defendants' counsel to send the arbitrator a letter requesting a default prove-up hearing. Defendants' counsel sent a letter dated August 14, 2008, requesting that a default prove-up hearing be scheduled in the matter (the August 14, 2008 letter). He sent a copy of the August 14, 2008 letter to plaintiff's counsel who received it on August 15.

In addition to requesting that a default prove-up hearing be scheduled, the August 14, 2008 letter reiterated, as defendants' counsel explained, his concern about plaintiff's "latest delay and the fact that, over the last four years, [plaintiff] has used nearly every conceivable means by which to delay the conclusion of his claims," causing defendants to "incur[] an unreasonable amount of fees, costs and disruption." In the August 14, 2008 letter, defendants' counsel (1) stated that in preparing for the arbitration hearing, defendants incurred costs by serving subpoenas on witnesses who were difficult to locate and on one witness who was "deathly afraid" of plaintiff and "very reluctant to testify"; (2) provided a summary of the procedural history of plaintiff's prosecution of various claims against defendants and defendants' counsel's opinion that plaintiff's

conduct has been “outrageous” and constitutes an abuse of the system; (3) stated that in a prior lawsuit in which plaintiff asserted similar claims as those asserted in the instant case, he successfully sought the disqualification of the arbitrator immediately after that arbitrator announced a tentative decision in favor of defendants; (4) opined that plaintiff filed a bankruptcy petition to avoid having to go to trial; (5) stated plaintiff “direct[ed] vile obscenities” toward defendant Kevin Hardy during his deposition, and engaged in various forms of intimidating conduct; (6) asserted plaintiff had “pulled a gun” and threatened bodily injury against Darci Kinney and another individual with whom plaintiff had entered into a contract “over the sale of many of the same insurance accounts that are the subject of this litigation,” the two individuals sued plaintiff in a separate lawsuit, and plaintiff subsequently pleaded no contest to some criminal charges that arose out of the incident; and (7) stated he had been contacted by investigators for the Department of Insurance, regarding numerous consumer complaints alleging plaintiff embezzled his customers’ insurance premiums without providing coverage and that defendants “discovered numerous instances of embezzlement after taking possession of the accounts.”

Plaintiff’s counsel arranged for the payment of plaintiff’s share of the arbitration fees, which ADR accepted. He sent a letter dated August 16, 2008 to defendants’ counsel objecting to the August 14, 2008 letter. He also sent a letter, dated August 18, 2008, to the arbitrator, demanding that he disqualify himself as arbitrator in light of the contents of the August 14, 2008 letter. In a letter dated August 27, the arbitrator rejected plaintiff’s counsel’s demand and explained that his “judgment remains reserved pending the consideration of evidence relevant to the issues before [him], which is [his] duty.”

In September 2008, citing section 1281.91, subdivision (d), standard 10(a)(5) of the California Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Standards), and section 170.1,

subdivision (a)(6)(A)(iii), plaintiff filed a motion to disqualify the arbitrator on the ground the arbitrator's receipt of the August 14, 2008 letter, which plaintiff characterized as an "inappropriate ex-parte communication," had "create[d] a reasonable doubt that the arbitration referee would be able to be impartial." In opposing plaintiff's motion to disqualify the arbitrator, defendants' counsel explained the purpose of the contents of the August 14, 2008 letter by declaring: "I felt it important to reiterate for Judge Lyman the history behind my client's desire to bring this matter to a close"; he further stated that the information contained in the August 14, 2008 letter was true and had been previously communicated to the arbitrator on several occasions through various documents, including the initial status conference statement, defendants' motion for summary judgment, and the cross-complaint itself.

The trial court denied the motion and ordered the matter back to binding arbitration. In June 2009, the arbitrator issued his decision awarding defendants $7,126.74 in damages and $65,000 in attorney fees and costs.

Defendants filed a petition to confirm the arbitration award. In his opposition to the petition, plaintiff incorporated the arguments he made in support of his motion seeking to disqualify the arbitrator and argued the award is void as a matter of law because the arbitrator should have been disqualified.

The trial court granted the petition and entered judgment in favor of defendants in the amount of $7,126.74, plus interest since October 30, 2003, plus attorney fees and costs in the amount of $65,000. Plaintiff appealed.

DISCUSSION

Plaintiff solely contends the trial court erred in denying the motion seeking to disqualify the arbitrator. Defendants argue the trial court's order denying the disqualification motion is not reviewable on appeal under section 170.3, subdivision (d), which provides in part: "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the

appropriate court of appeal sought only by the parties to the proceeding" brought within 10 days "after service of written notice of entry of the court's order determining the question of disqualification." We do not need to decide whether section 170.3, subdivision (d) applies in the context of a motion seeking the disqualification of an arbitrator because plaintiff failed to show any basis to disqualify the arbitrator. Because the relevant facts are not in dispute, we review de novo the trial court's determination that a reasonable person with knowledge of the circumstances of this case would not doubt the arbitrator's ability to be impartial. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 383, 388.)

In support of his motion, plaintiff cited section 1281.91, subdivision (d), which provides in relevant part: "If any ground specified in Section 170.1 exists, a neutral arbitrator shall disqualify himself or herself upon the demand of any party made before the conclusion of the arbitration proceeding." Plaintiff also cited standard 10(a)(5) of the Standards, which similarly provides that an arbitrator is disqualified if "any ground specified in Code of Civil Procedure section 170.1 exists and the party makes a demand that the arbitrator disqualify himself or herself in the manner and within the time specified in Code of Civil Procedure section 1281.91[, subdivision](d)."

Plaintiff also asserted the ground contained in section 170.1, subdivision (a)(6)(A)(iii), which provides that a judge shall be disqualified if "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial," applies in this case. In *Guseinov v. Burns* (2006) 145 Cal.App.4th 944, 960, the appellate court explained: "The test for partiality [in section 170.1, subdivision (a)(6)(A)(iii)] is an objective one. [Citations.] Actual bias is not required: 'Where a reasonable person would entertain doubt whether the . . . arbitrator was impartial, the appellate courts are not required to speculate whether bias was actual or merely apparent, or whether impartial consideration of the evidence and dispassionate decision of the matter would have led to the same result.'"

Here, plaintiff offered no facts that would cause a reasonable person to entertain a doubt whether the arbitrator would be able to be impartial. Plaintiff does not contend the arbitrator failed to make any disclosure required by statute or by the Standards. Instead, he contends that the arbitrator's mere receipt of the August 14, 2008 letter containing negative statements about him would cause a reasonable person to doubt the impartiality of the arbitrator. Plaintiff has cited no case which holds that an arbitrator or a judge should be disqualified because he or she was provided negative information about one party by an opposing party's attorney in the heat of litigation. Unfortunately, disparaging comments about opposing parties, whether well founded or baseless, are often presented to arbitrators and judges who are regularly charged with the task of focusing on the relevant evidence in resolving the legal issues presented and disregarding irrelevant comments, however inflammatory. The application of the disqualification rule proposed by plaintiff would likely wreak havoc on the efficient administration of our judicial system by setting such a low threshold for disqualification.

In his letter rejecting plaintiff's demand to disqualify himself, the arbitrator explained the insignificance of plaintiff's counsel's negative comments in the August 14, 2008 letter, as follows: "Obviously, there are hard feelings between the parties and counsel regarding the prior proceedings and the current posture of this arbitration. I've been aware of [defendants' counsel]'s frustration with the procedural status of this case since we commenced this case. I was aware of it when I had to consider the motion for summary adjudication. [¶] While I am aware of, and understand [defendants' counsel]'s frustration with the procedural morass in which this case has wallowed, I have had to preside over many cases in which the parties or attorneys have expressed hard feelings for each other, and I have endeavored in all those cases to focus on the facts, as I can glean them from the evidence, in making the rulings I am called upon to make. I have done that and will continue to do that in this case. [¶] I can only assure both parties that, . . . while I am aware of the complaints that [defendants' counsel] has made against the

conduct of [plaintiff] in the past, my judgment remains reserved pending the consideration of evidence relevant to the issues before me, which is my duty. [¶] By this letter, I am informing both of you that I will not recuse myself as the arbitrator of this case based upon [plaintiff]'s unilateral request."

Furthermore, the arbitrator's reference in his letter to having already been aware of the information contained in the August 14, 2008 letter was supported by defendants' counsel's declaration filed in opposition to the motion to disqualify the arbitrator, which stated in part: "The facts set forth in the letter of August 14, 2008 are true. Moreover, I had previously communicated these facts to Judge Lyman on several occasions. The facts in my letter were set forth in the initial status conference statement I filed with ADR in January of this year. Further, the facts set forth regarding [plaintiff]'s prior dealings with Darci Kinney were specifically set forth in the documents in support of the Motion for Summary Judgment (The Complaint filed in the OCSC Case filed by Darci Kinney and her partners, Mrs. Kinney's declaration etc.) The issues of [plaintiff]'s prior embezzlement are clearly set forth in [defendant's] cross-complaint and specifically go to the evidence relating to his breach of the Agreement[.] ([Plaintiff] was repeatedly requested to indemnify Hardy Insurance Services pursuant to the indemnity provisions of the Agreement in regards to the Dep[artment] of Insurance's investigation relating to the accounts transferred in the sale.) This was specifically alleged in our fourth, fifth and sixth causes of action. Thus, the letter presented nothing new to Judge Lyman." Plaintiff did not dispute that the arbitrator had received the negative information prior to his receipt of the August 14, 2008 letter, and did not otherwise respond to defendants' argument on this point.

Plaintiff also argues the arbitrator's receipt of the August 14, 2008 letter could cause a reasonable person to entertain a doubt as to the arbitrator's impartiality because it constituted an improper ex parte communication. Significantly, plaintiff cites

no authority under the Standards, the Code of Civil Procedure, or any other authority which would consider the August 14, 2008 letter a prohibited ex parte communication.

After plaintiff failed to pay his share of the arbitration fees and the arbitration hearing was taken off calendar, defendants' counsel was advised by ADR case manager Shea to write a letter to the arbitrator to request a default prove-up hearing. In the August 14, 2008 letter, defendants' counsel requested a one-day default prove-up hearing as to defendants' claims against plaintiff. Plaintiff's counsel was provided a copy of the August 14, 2008 letter which he received on August 15 and to which he objected in letters dated August 16 and August 18. Rule 5-300 of the State Bar Rules of Professional Conduct permits attorneys to communicate in writing to a judge as long as the other side is provided with a copy of the document.[1] The arbitrator's receipt of the August 14, 2008 letter under these circumstances would not cause a person to reasonably doubt the arbitrator's impartiality.

Plaintiff further argues the appellate court decision in *Christie v. City of El Centro* (2006) 135 Cal.App.4th 767 (*Christie*) is "controlling authority" in this case. *Christie* is inapplicable. In that case, a judge granted a motion for nonsuit after he had discussed the case with a previously disqualified judge. (*Id.* at p. 769.) The trial court set aside the dismissal following the nonsuit motion as void and granted a new trial; the appellate court affirmed. (*Id.* at pp. 769-770.) *Christie* did not address the issue presented here—whether an arbitrator is rendered disqualified by his receipt of negative information about a party from an opposing party in a letter copied to counsel. In his reply brief, plaintiff argues *Christie* applies because it shows "[t]he communication to a

[1] Rule 5-300(B) of the State Bar Rules of Professional Conduct states: "A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, *except*: [¶] (1) In open court; or [¶] (2) With the consent of all other counsel in such matter; or [¶] (3) In the presence of all other counsel in such matter; or [¶] (4) *In writing with a copy thereof furnished to such other counsel*; or [¶] (5) In ex parte matters." (Italics added.)

current judge of the thoughts and intentions of a prior judge was sufficient to create a 'doubt' of the current judge's impartiality" and, here, the August 14, 2008 letter revealed the tentative decision of a prior arbitrator in an earlier case involving the same parties and similar claims. What disqualified the judge in *Christie* was not his knowledge of what a prior judge had done in the case, but his discussions about the case with that prior judge who had previously been disqualified from the case. *Christie* is therefore inapt.

Nothing in this opinion should be read as a comment on the tactics used in writing the August 14, 2008 letter. We are only deciding whether the receipt of the August 14, 2008 letter, on this record, disqualified the arbitrator as a matter of law. We find no error.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.