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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FUCHS & ASSOCIATES, INC., Plaintiff and Appellant, v. ELKE LESSO, Defendant and Respondent.	B239246 (Los Angeles County Super. Ct. No. BC441602)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Segal, Judge. Affirmed.

Fuchs & Associates, Inc., John R. Fuchs and Gail S. Gilfillan for Plaintiff and Appellant.

Law Office of Thomas H. Edwards and Thomas H. Edwards for Defendant and Respondent.

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Appellant Fuchs & Associates, Inc. (Fuchs) sued its former client, respondent Elke Lesso, for unpaid attorney fees of $647,688.13. The matter was submitted to binding arbitration. The arbitrator found that Fuchs was not entitled to recover any additional fees beyond those already paid and that its attorney fee lien was invalid. On appeal from the judgment confirming the arbitration award, Fuchs makes several contentions, including that the arbitrator exceeded his authority, the arbitration hearing should have been continued, and there was manifest disregard of the law. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Lesso, who is 62 years old, moved to the United States from Germany in 1976 and established a successful business designing, manufacturing and selling women's clothing. In 1991 she married Piotrek Andrzejewski, a Polish national living in the United States. In 2006 she sold her business and invested the proceeds in two warehouses in Glendale.

In September 2007, she commenced a marital dissolution action against Andrzejewski in Los Angeles Superior Court after discovering that he had embezzled money from her business, which he invested in the stock market and used to purchase properties in Poland. At the commencement of the proceedings, the community property in the United States consisted of the two warehouses in Glendale, worth approximately $1.7 million, and a residence in La Canada with equity of approximately $320,000. The community also consisted of two properties in Mexico with a combined equity of approximately $200,000.

On September 15, 2008 Lesso retained Fuchs to represent her in a separate lawsuit filed against her by Andrzejewski. At that time the dissolution action had been proceeding for nearly a year. On October 15, 2008 Lesso retained Fuchs to represent her in the dissolution action, and Fuchs later represented her in two other smaller actions related to the dissolution action.

Lesso and Fuchs executed two identical "Hourly Attorney Fee Agreements" (fee agreements) on September 15 and October 15, 2008. In paragraph 11, the fee agreements provided for binding arbitration of "[a]ny controversy between the parties regarding the

construction, application or performance of any services under this Agreement, and any claim arising out of or relating to this Agreement or its breach." In paragraph 9, the fee agreements contain the following lien provision: "Client hereby grants Attorney a lien on any and all claims or causes of action that are the subject of the representation under this Agreement. The lien will be for any sums owing to Attorney at the conclusion of services performed. *The lien will attach to any recovery* Client may obtain, whether by arbitration award, judgment, settlement or otherwise. The effect of such a lien is that Attorney may be able to compel payment of fees and costs from any such funds recovered on behalf of Client even if Attorney has been discharged before the end of the case. Because a lien may affect Client's property rights, Client may seek the advice of an independent lawyer of Client's choice before agreeing to such a lien. By initialing this paragraph, Client represents and agrees that Client has had a reasonable opportunity to consult such an independent lawyer and, whether or not Client has chosen to consult an independent lawyer, Client agrees that Attorney will have a lien as specified above," italics added.

When Lesso retained Fuchs to represent her in the dissolution action, she informed Fuchs that she wanted the issues pertaining to the division of community property in California and Mexico tried as quickly as possible and that she would separately pursue her share of the Polish properties in Poland. Fuchs insisted that Andrzejewski be required to make a full disclosure of the Polish assets in the dissolution action, and engaged in numerous discovery disputes with Andrzejewski's attorney on this issue.

Lesso paid Fuchs $408,000 during the first 10 months that it represented her, but was only able to pay a small portion of the bills after June 2009, which averaged more than $50,000 a month. Lesso repeatedly told Fuchs that she could not afford to pay the bills, but he told her not to be concerned because Andrzejewski would be required to pay her attorney fees at the end of the case. Fuchs ultimately billed Lesso more than a million dollars during the 22 months that it represented her, which was roughly half the value of the community property located in California and Mexico.

In April 2009 Fuchs filed a motion in the dissolution action seeking an order that Andrzejewski pay Lesso $200,000 in pendente lite attorney fees. Instead of ordering Andrzejewski to pay the sum directly, the court issued an order requiring him to obtain a loan to be secured by the two Glendale warehouses and authorizing each of the parties to receive $200,000 from the loan proceeds. Lesso told Fuchs that she did not want to proceed with the loan transaction and asked Fuchs to file a motion for reconsideration. Fuchs refused to do, and advised Lesso to sign the loan agreement procured by Andrzejewski in the amount of $450,000, which was due in one year. Fuchs did not advise Lesso to seek independent legal counsel before she signed the loan.

The loan came due on April 30, 2010, and the lender agreed to extend the loan for an additional year with an increased interest rate of 24 percent. Lesso could only make the interest payments for a few months and began trying to sell the two warehouses. In June 2010 she recorded six deeds of trust on the properties totaling $356,000, which represented loans made to her by family and friends during the dissolution action. When Fuchs learned about the deeds of trust, it insisted that Lesso pay $625,000. Lesso refused and fired Fuchs on June 23, 2010. On July 8, 2010, Fuchs recorded a "notice of attorney fee and cost lien in the amount of $625,000." Lesso eventually filed for bankruptcy protection in May 2011.

On July 14, 2010 Fuchs sued Lesso alleging six causes of action for breach of contract, quantum meruit, open book account, account stated, promissory fraud and enforcement of the lien. Fuchs sought compensatory damages of $647,688.16, plus punitive damages. The matter was submitted to binding arbitration and took place over two days in September 2011. Because John R. Fuchs had been suspended by the State Bar in August 2011 for sixty days, his law firm was represented at the arbitration by his associate.[1] Lesso was represented by new counsel.

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[1] At the time of the arbitration, Fuchs had been disciplined by the State Bar three times: In 2001 he was suspended for one year after stipulating that he maintained "an unjust action by pursuing a lawsuit against former clients for fees and costs, despite entering into a settlement and agreement releasing them from any further claim"; in 2006

The arbitrator issued his 13-page arbitration award on October 12, 2011. He concluded that (1) "Fuchs shall recover no additional attorney fees, costs or damages," (2) "The lien recorded by Fuchs is invalid and should be expunged," and (3) "Fuchs need not refund any of the $480,998.68 previously paid [by Lesso]."

Fuchs then filed a petition in the trial court to correct or vacate the award and Lesso filed a petition to confirm the award. In a detailed ruling, the trial court denied Fuchs' petition to vacate or correct the arbitration award, and confirmed the award. Judgment was entered and this appeal followed.

DISCUSSION

I. Contentions.

Fuchs contends the judgment must be reversed and the arbitration award vacated because the arbitrator exceeded his powers by rewriting the fee agreements, failing to decide all issues submitted to him and deciding issues that were not submitted. Fuchs also contends that it was prejudiced by the arbitrator's refusal to continue the arbitration hearing, and that the doctrine of manifest disregard of the law applies.

II. Applicable Law and Standard of Review.

It is well established that judicial review of an arbitration award is "'extremely narrow.'" (*Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 541.) Courts do not review an arbitrator's decision for errors of fact or law, or the validity of an arbitrator's reasoning, or the sufficiency of the evidence supporting an arbitrator's award. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11 (*Moncharsh*).) As our Supreme Court recognized as early as 1852, "'The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good

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he was suspended for six months for "two acts of misconduct by failing to promptly notify a client of his receipt of funds and representing clients with adverse interests"; and on August 13, 2011 he was suspended for 60 days after stipulating that he "improperly communicated with a judge about the merits of a case pending before the judge." (http://members.calbar.ca.gov/fal/Member/Detail/82032.)

conscience, and make their award *ex aequo et bono* [according to what is just and good].'" (*Ibid*., quoting *Muldrow v. Norris* (1852) 2 Cal. 74, 77.)

The grounds for vacating or correcting an arbitration award are strictly limited by statute. Under Code of Civil Procedure section 1286.2, the only grounds for vacating an award are the following: (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 the misconduct of a neutral arbitrator; (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause or by the refusal of the arbitrators to hear evidence material to the controversy; or (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. (Code Civ. Proc., § 1286.2, subd. (a)(1)-(6).) An arbitration award shall also be vacated when it does not "include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." (Code Civ. Proc., § 1283.4.)

Under Code of Civil Procedure section 1286.6 the only grounds for correcting an award are the following: (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or (3) The award is imperfect in a matter of form, not affecting the merits of the controversy. (Code Civ. Proc., § 1286.6, subds. (a)-(c).)

As summarized in *O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1055–1056, an arbitrator exceeds his powers when he acts without subject matter jurisdiction, decides an issue that was not submitted to arbitration, arbitrarily remakes the contract,

upholds an illegal contract, issues an award that violates a well-defined public policy or statutory right, fashions a remedy that is not rationally related to the contract or selects a remedy not authorized by law. "In other words, an arbitrator exceeds his powers when he acts in a manner not authorized by the contract or by law." (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443.)

We review the trial court's order de novo, while the arbitrator's award is entitled to deferential review. (*Ajida Technologies, Inc. v. Roos Instruments, Inc.*, *supra*, 87 Cal.App.4th at p. 541; *Advanced Micro Devices, Inc. v. Intel Corp*. (1994) 9 Cal.4th 362, 376, fn. 9.)

III. The Arbitrator Did Not Exceed His Powers.

A. Rewriting the Contracts

Fuchs argues that the arbitrator exceeded his powers by rewriting the fee agreements in two respects.

First, Fuchs argues that the arbitrator rewrote the fee agreements to allow a prohibited oral modification providing that Lesso would not have to pay any additional fees.[2] But there was no such finding by the arbitrator. The arbitrator found that Lesso was "credible in her testimony that she told Fuchs that she was not able to pay for the services and relied on his representation that the fees would be ordered to be paid by her husband, who clearly had the greater ability to pay." The arbitrator did not use this finding to conclude that the fee agreements had been modified. Rather, he used this finding to support his conclusion that Lesso had not committed fraud by allegedly promising to pay Fuchs's bills when she did not intend to do so.

Second, Fuchs argues that the arbitrator rewrote the lien provisions in the fee agreements by ruling that Fuchs's attorney fee lien in the amount of $625,000 was

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2 Paragraph 20 of the fee agreements provides: "This Agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them, or an oral agreement only to the extent that the parties carry it out." It is undisputed there was no written modification of the fee agreements.

invalid. Again, the arbitrator did not rewrite the fee agreements. The lien provisions clearly and unambiguously provide that "*The lien will attach to any recovery* Client may obtain, whether by arbitration award, judgment, settlement or otherwise," italics added. The arbitrator correctly found that Fuchs's position that it had a lien on all of her *assets*, including real property, is simply not supported by the contract language.

Moreover, the arbitrator found that Fuchs failed to comply with rule 3-300 of the Rules of Professional Conduct of the State Bar of California (rule 3-300), which prohibits an attorney from entering into a business transaction with a client or knowingly acquiring an interest adverse to a client unless the "transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client," rule 3-300(A). (*Fletcher v. Davis* (2004) 33 Cal.4th 61, 64 [concluding that "[w]hen an attorney wishes to secure payment of hourly legal fees and costs of litigation by obtaining a charging lien against a client's future recovery" rule 3-300 of the Rules of Professional Conduct of the State Bar of California applies].) Fuchs conceded that it did not inform Lesso that it would be taking the position that the lien would attach to all of her assets.

Furthermore, Family Code section 2033 requires an attorney representing a client in a dissolution proceeding to give notice to the opposing party's attorney before obtaining a lien on his client's interest in any community real property to secure payment of his fees. (Fam. Code, § 2033, subd. (b).) The statute refers to such a lien as a "'family law attorney's real property lien.'" (Fam. Code, § 2033, subd. (a).) The arbitrator noted that no such notice was given. Fuchs argues that it could not have obtained such a lien after it was fired by Lesso, but later asserts in its opening brief that such a lien would be valid.

B. Failing to Decide Issues Submitted

Fuchs argues that the arbitrator failed to decide three of the six causes of action alleged in the complaint—quantum meruit, open book account and account stated.

As noted above, Code of Civil Procedure section 1283.4 requires an arbitrator's 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." Here, the arbitrator did in fact determine the entire controversy between the parties. At the beginning of the "Findings" section in the arbitration award, the arbitrator listed all six causes of action alleged in the complaint. The arbitrator then found that "none of the alleged causes of action for additional payment of fees is supported by the evidence," and concluded that Fuchs was not entitled to recover any additional fees, costs or damages.

While the arbitrator did not provide a detailed explanation of his reasons for rejecting all of Fuchs's causes of action, it is settled that an arbitrator's failure to render express findings on a disputed issue does not invalidate the award so long as the award resolves the entire controversy. (*Luster v. Collins* (1993) 15 Cal.App.4th 1338, 1345; *Rodrigues v. Keller* (1980) 113 Cal.App.3d 838, 843; *Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1187 ["As the arbitration agreement did not require the arbitrator to support his award with written factual findings, however, he clearly did not exceed his powers by making the award without particular supportive findings"].)

C. Deciding Issues Not Submitted

Fuchs argues that the arbitrator decided two issues not submitted to him.

First, Fuchs asserts that the arbitrator accepted Lesso's defense that Fuchs agreed to an oral modification of the fee agreements. But we have already concluded that the arbitrator made no such finding.

Second, Fuchs asserts incongruously that "Lesso presented a cross-complaint in arbitration that had also never been submitted to the arbitrator, asserting that Fuchs had breached his fiduciary duty to Lesso." The arbitration award does not mention a cross-complaint, only that Lesso argued that Fuchs had unclean hands and breached its fiduciary duty with respect to the loan transaction. While the arbitrator found that the unclean hands defense did not apply, he did find that Fuchs breached its fiduciary duty to Lesso in connection with the loan agreement, stating: "Fuchs' interest was in conflict with his client because she might not have been able to support the payments after a year when the interest rate jumped, she would go into default, and when the building was sold

Fuchs would have been paid and the client may well have lost the equity," and there was no "writing explaining the potential consequences of this transaction."

The arbitration provisions in the fee agreements provided for arbitration of "[a]ny controversy between the parties regarding the construction, application or performance of any services under this Agreement, and any claim arising out of or relating to this Agreement or its breach." The arbitrator's award identified the two issues to be determined as "Fuchs' claim for money based on several legal and equitable theories, and Lesso's claim for a refund and a determination that the liens placed by Fuchs are invalid." All of the issues decided in the award were subject to arbitration under the fee agreements. We are satisfied that the arbitrator did not exceed his powers.

IV. Failure to Continue the Hearing Is Not a Basis for Vacating the Award Here.

Even when an arbitrator does not exceed his powers, an arbitration award may still be vacated based on a showing that "[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title." (Code Civ. Proc., § 1286.2, subd. (a)(5).) A party must show both sufficient cause for the continuance and that it was prejudiced by the denial of the continuance. (*SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1198.)

Fuchs argues that a continuance of the arbitration hearing was necessary because (1) there was a "significant amount of material evidence" that could not be presented within the allotted time period for the arbitration, (2) Fuchs had a "material witness" (Eugene Alkana) who could not appear on the allotted days and would have testified that he had provided legal services to Lesso in another matter for which he was not paid, and (3) Fuchs only had two more weeks left of his suspension from legal practice imposed by the State Bar and he should have been allowed to make the closing argument.

The parties dispute whether Fuchs ever asked the arbitrator to schedule an additional day of hearing for the presentation of either Alkana's testimony or additional

evidence. But even accepting Fuchs's version of events, Fuchs has failed to make the required showing of both sufficient cause for the continuance and prejudice. Except for Alkana's testimony, Fuchs has not identified what additional evidence it wished to present that it was precluded from presenting, and how it was prejudiced by the preclusion. The testimony by Alkana that Lesso had failed to pay her legal bill in another case was irrelevant and would probably have been excluded. And Fuchs does not explain why his associate, who had an hourly rate of $350 during the dissolution proceeding and who represented Fuchs during the arbitration hearing, could not give an adequate closing argument.

V. "Manifest Disregard of the Law" Doctrine Inapplicable.

Fuchs contends that a separate basis for reversing the judgment and vacating the arbitration award is application of the doctrine of "manifest disregard of the law," by which judicial review may be made in excess of the limited review permitted by Code of Civil Procedure section 1286.2. In making this contention, Fuchs relies on federal cases limited to proceedings under the Federal Arbitration Act, Title 9 United States Code sections 9–11. But our Supreme Court has stated: "[W]e need not and do not move in lockstep with the federal courts in matters of judicial review of arbitration awards . . . . We have also gone our own way in *Moncharsh*, articulating a strict review standard precluding vacatur for legal error that does not include a 'manifest disregard' exception, while at the same time leaving open the possibility of greater judicial review, as discussed above, in the case of rulings inconsistent with the protection of statutory rights." (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 679, fn. 3 (*Pearson*).)

Fuchs nevertheless argues there was a manifest disregard of the law because the arbitrator failed to apply the equitable doctrines of collateral and judicial estoppel and res judicata. Fuchs claims these theories were supported by findings made in the dissolution proceeding that its fees were necessary and reasonable and Lesso's declarations in that proceeding that she owed the fees. Fuchs's reliance on *Pearson* to

support its position is misplaced. *Pearson* involved the "limited and exceptional circumstances justifying judicial review of an arbitrator's decision," mentioned in *Moncharsh, supra*, 3 Cal.4th at page 32, when "'granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights.'" (*Pearson, supra*, 48 Cal.4th at p. 676.) The *Pearson* Court held that when "an employee subject to a mandatory employment arbitration agreement is unable to obtain a hearing on the merits of his FEHA claims, or claims based on other unwaivable statutory rights, because of an arbitration award based on legal error, the trial court does not err in vacating the award. Stated in other terms, construing the CAA [California Arbitration Act] in light of the Legislature's intent that employees be able to enforce their right to be free of unlawful discrimination under FEHA [Fair Employment and Housing Act, Gov. Code, § 12900 et seq.], an arbitrator whose legal error has barred an employee subject to a mandatory arbitration agreement from obtaining a hearing on the merits of a claim based on such right has exceeded his or her powers within the meaning of Code of Civil Procedure section 1286.2, subdivision (a)(4), and the arbitrator's award may properly be vacated." (*Pearson, supra,* at p. 680.)

In *Shahinian v. Cedars-Sinai Medical Center* (2011) 194 Cal.App.4th 987, which involved business disputes between a doctor and a hospital unrelated to the doctor's competence, the court stated at page 1005: "In this case, the arbitrator's award did not conflict with any statutory mandate or judicial prohibition. This was not a mandatory arbitration agreement, with an award that prevented plaintiff from vindicating his statutory rights in any forum, as in *Pearson*, nor is it one of those 'rare cases where "according finality to the arbitrator's decision would be incompatible with the protection of a statutory right" or where the award contravenes "an explicit legislative expression of public policy." [Citations.]' ([*City of*] *Palo Alto* [*v. Service Employees Internat. Union* (1999)] 77 Cal.App.4th [327,] 334.) It is instead the usual case where the arbitral award 'stand[s] immune from judicial scrutiny.' (*Moncharsh, supra*, 3 Cal.4th at p. 32.)"

Likewise here, we agree with the trial court's statement in its written ruling that "There is nothing that suggests that 'resolution by an arbitrator of what is essentially an

ordinary fee dispute would be inappropriate or would improperly protect the public interest,' making 'judicial review of the arbitrator's decision . . . unavailable. (*Moncharsh*, *supra*, 3 Cal.4th at 33.)" Fuchs has not cited any authority showing that an arbitrator's decision on a law firm's action for attorney fees has ever been reviewed on the merits by a trial court under the exceptional circumstances involving a statutory or public policy decision. As the trial court noted, "Even if Fuchs were correct that the arbitrator made a mistake of fact or law (which does not appear to be the case), Fuchs accepted that risk" in agreeing to arbitrate. (*Moncharsh, supra,* 3 Cal.4th at pp. 11, 33.) Fuchs has provided no basis for vacating or correcting the arbitration award.

DISPOSITION

The judgment is affirmed. Lesso is entitled to recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ