

FILED

ELECTRONICALLY

Dec 14, 2018

DANIEL P. POTTER, Clerk

T. JACKSON Deputy Clerk

Filed 12/14/18

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 FIVE

IN HEE SONG,

Plaintiff and Appellant,

v.

INLAND MEDICAL ENTERPRISES,
INC., et al.,

Defendants and Respondents.

B284104

(Los Angeles County
Super. Ct. No. BC496165)

APPEAL from an order of the Superior Court of Los Angeles County, treated as an original petition for writ of mandate, Howard L. Halm, Judge. Petition denied.

Law Offices of Andrew Kim and Andrew Kim for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Lann G. McIntyre, Scott M. Schoenwald, and Melissa T. Daugherty for Defendants and Respondents.

I. INTRODUCTION

Plaintiff In Hee Song appeals from an order denying her motion to vacate an arbitrator's dismissal of the arbitration for failure to prosecute with due diligence. While an order denying a motion to vacate an arbitrator's award is not appealable, we conclude that immediate review of the denial of her motion is appropriate and treat her appeal as a petition for writ of mandate. We deny the petition.

II. BACKGROUND

On November 21, 2012, plaintiff filed a complaint against defendants alleging various employment-related causes of action. Plaintiff also pursued a separate worker's compensation case, which is not part of this appeal. Defendants filed a motion to compel arbitration based on the parties' arbitration agreement, and the trial court granted the motion on May 14, 2013. The arbitration commenced on July 21, 2015, with a hearing set to begin on March 28, 2016.

Defendants claim that on February 11, 2016, the parties settled; plaintiff says they did not. The arbitrator found the parties had settled in February 2016 and finalized the settlement terms, which plaintiff then refused to sign on March 23, 2016. In any event, the March 28, 2016 arbitration hearing date was vacated. On May 2, 2016, plaintiff's counsel notified the arbitrator that he would be seeking to be relieved. On May 18, 2016, he submitted the request to be relieved. And on June 13, 2016, the arbitrator granted the request.

By July 19, 2016, plaintiff had found a new attorney, and on July 22, 2016, the arbitrator asked counsel to be available for a conference call in August. On July 29, 2016, the new attorney informed the arbitrator that plaintiff had not signed his retainer and it looked like plaintiff was “having personal issues.” On August 10, 2016, the attorney notified the arbitrator that plaintiff had changed her mind about hiring him. The arbitrator then informed the parties that their case file would be closed unless the arbitrator heard from plaintiff within five business days. Plaintiff waited almost six weeks, until September 29, 2016, before telling the arbitrator that she needed three more months to recover her health and search for an attorney. The arbitrator agreed to postpone scheduling the arbitration hearing until 2017.

On January 18, 2017, almost four months later, the arbitrator contacted the parties about scheduling a conference call. On January 27, 2017, plaintiff’s “legal document assistant” responded that plaintiff needed another year because she had not yet found an attorney and had anxiety.¹ The legal document assistant did not copy defendants on the communication with the arbitrator. Defendants state they did not know about the communication and that independent of any continuance request, on February 1, 2017, they submitted a request to dismiss plaintiff’s claims with prejudice. Two days later, the arbitrator ordered the parties to submit briefs on dismissal.

¹ Plaintiff now states that she did not know about this request for additional time but in her opposition to defendant’s motion to dismiss, plaintiff again requested a one-year extension, and in her motion to vacate the dismissal, she stated that she “followed the advice of an LDA.”

Defendants submitted their motion to dismiss on February 10, 2017. On February 24, 2017, plaintiff submitted an opposition contending the arbitrator should grant or reduce her request for a one-year extension but not dismiss her case. She explained that in the thirteen months since January 13, 2016, “her health condition was not good and it was hard to find a good and conscientious attorney,” but she did not provide any evidence supporting these assertions.

On March 9, 2017, plaintiff hired an attorney. On March 11, 2017 at 11:57 p.m., the new attorney faxed a supplemental opposition to the motion to dismiss saying plaintiff was “willing to go forward without further delay.” But earlier on March 11, the arbitrator granted defendants’ motion and ordered plaintiff’s claims dismissed without prejudice because she had “failed to prosecute the arbitration with reasonable diligence and now seeks to delay the action yet another year.” The arbitrator’s order was served on the parties by mail and e-mail on March 15, 2017. Plaintiff’s attorney requested reconsideration, which was denied.

On April 11, 2017, plaintiff filed a motion to vacate the dismissal order based on Code of Civil Procedure section 473, subdivision (b).² She argued that she had relied on the legal document assistant and that the arbitrator should have denied her request for a continuance instead of dismissing her claims. Defendants countered that section 1286.2 set forth the sole grounds for vacating an arbitrator’s award, and the arbitrator had properly exercised his discretion and acted within the scope of his powers in dismissing the claims. Defendants asked the trial court to confirm the award.

² All statutory references are to the Code of Civil Procedure.

The court denied the motion to vacate. The court concluded section 473, subdivision (b) does not apply to orders made by arbitrators, the arbitrator had not exceeded his powers in dismissing the arbitration because the arbitrator's decision "comports with public policy favoring expeditious resolution of arbitration," and plaintiff's rights were not substantially prejudiced because the "dismissal was caused by her own lack of prosecution of that case." The court did not address defendants' request to confirm the arbitration award.

Plaintiff noticed her appeal from the May 25, 2017 order denying the motion to vacate.

III. DISCUSSION

A. *Appealability*

Defendants contend the trial court's order denying the motion to vacate the arbitrator's order of dismissal is not appealable. Plaintiff counters it is a final order that leaves nothing to be decided. Section 1294 defines the arbitration orders that may be appealed: "(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." (§ 1294.) An order denying a motion to vacate an award is not on the list. (*Kaiser Foundation Health Plan, Inc. v. Superior Court* (2017) 13 Cal.App.5th 1125, 1138, fn. 9 (*Kaiser*) ["Section 1294's list of appealable orders does not

include orders denying petitions to confirm, correct, or vacate an award”].)

Case law explains why. When a party petitions to confirm, correct, or vacate an arbitration award, “the superior court has only four choices: It may (1) confirm the award, (2) correct the award and confirm it as corrected, (3) vacate the award, or (4) dismiss the proceedings.’ [Citation.]” (*Law Offices of David S. Karton v. Segreto* (2009) 176 Cal.App.4th 1, 8 (*Karton*); see also *Cinel v. Christopher* (2012) 203 Cal.App.4th 759, 765 (*Cinel*)). Confirming the award allows entry of judgment, which is then appealable, as are the orders vacating an award and dismissing the petition. (*Karton, supra*, 176 Cal.App.4th at p. 9; *Cinel, supra*, 203 Cal.App.4th at p. 765.) An order denying a petition to vacate an award is not contemplated in section 1294 and is generally not appealable. (*Ibid.*; *Kaiser, supra*, 13 Cal.App.5th at p. 1138, fn. 9 [“[O]rders dismissing [a petition to vacate an award], which are appealable under section 1294, subdivision (c), are not the same as orders denying them”].)³

An arbitrator’s order dismissing an arbitration for failure to prosecute is a “decision that [the plaintiffs] take nothing on their claims by reason of their dilatory prosecution,” and “is as much an ‘award’ as any other final resolution of the arbitration proceeding.” (*Young v. Ross-Loos Medical Group, Inc.* (1982) 135 Cal.App.3d 669, 673.) That award may then be confirmed, a judgment entered, and an appeal taken from the judgment; or the award may be vacated, which is an appealable order. (*Mid-*

³ A dismissal of a petition to vacate an award may be warranted when, for example, the trial court lacks jurisdiction to hear the petition, not the situation here. (*Maplebear, Inc. v. Busick* (2018) 26 Cal.App.5th 394, 400-401.)

Wilshire Associates v. O'Leary (1992) 7 Cal.App.4th 1450, 1454-1455; *Cinel, supra*, 203 Cal.App.4th at p. 766.)

In sum, the trial court's denial of the motion to vacate the award is not appealable. We may nonetheless deem the appeal from that order to be a petition for writ of mandate, provided that there are "unusual circumstances." (*Olson v. Cory* (1983) 35 Cal.3d 390, 401 (*Olson*)). Such circumstances exist here.

The denial of a motion to vacate an award ordinarily triggers the entry of an order confirming the award, followed by an appealable judgment. (*Karton, supra*, 176 Cal.App.4th at p. 9.) Although defendants requested an order confirming the award, the court did not respond to their request.⁴ Under the circumstances, requiring plaintiff to return to the trial court to obtain an appealable judgment would result in ""unnecessar[y] . . . and circuitous"" proceedings (*Olson, supra*, 35 Cal.3d at p. 401), as the essential facts are undisputed and the issues have been fully briefed. (See *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1098.) Accordingly, in the interest of justice and to avoid undue delay, we will treat the appeal as a petition for a writ of mandate.

B. *Vacating an Arbitration Decision of Dismissal*

Plaintiff asserts that the trial court erred in denying her motion to vacate the arbitrator's dismissal of the arbitration

⁴ When a trial court denies a petition to confirm an award, the denial should be construed as a dismissal of the petition, thereby allowing an appeal. (*Cinel, supra*, 203 Cal.App.4th at p. 766.) Here, the trial court did not deny the petition to confirm; it simply did not rule on it.

proceedings. Section 1286.2 sets forth the sole grounds for vacating an arbitrator's award. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 12.) Plaintiff contends she is entitled to relief under section 1286.2, subdivision (a)(4) because the arbitrator exceeded his powers in dismissing her case instead of setting a new arbitration hearing date. We review the trial court's decision whether an arbitrator exceeded his powers de novo. (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443-444.) Plaintiff also argues she is entitled to relief under section 1286.2, subdivision (a)(5) because the arbitrator's refusal to postpone the hearing upon sufficient cause substantially prejudiced her rights. We review a decision under section 1286.2, subdivision (a)(5) de novo, except "we apply the substantial evidence test to the trial court's ruling to the extent it rests upon a determination of disputed factual issues." (*SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1196 (*SWAB*).

"The powers of an arbitrator derive from, and are limited by, the agreement to arbitrate." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 375.) The arbitration agreement here does not limit the arbitrator's power to dismiss the arbitration. In the absence of limiting language in the agreement, an arbitrator has discretion to dismiss the matter for failure to proceed with reasonable diligence. (*Santangelo v. Allstate Ins. Co.* (1998) 65 Cal.App.4th 804, 813 ["contractual arbitrations may be dismissed for delay in prosecution"].) An arbitrator also has the discretion upon good cause to postpone the arbitration hearing date. (*SWAB, supra*, 150 Cal.App.4th at p. 1197; § 1282.2, subd. (b).)

Substantial evidence supports the trial court's decision not to vacate the dismissal order. The record reveals the arbitrator gave plaintiff the opportunity to hire attorneys and prepare her case, and only dismissed the proceedings after she consistently failed to act with diligence and prosecute her claims.⁵ Plaintiff's contentions that she was suffering from poor health and could not find a good lawyer were not supported by any evidence. In sum, plaintiff did not show the arbitrator abused his discretion or exceeded his powers in dismissing the matter instead of setting or postponing the hearing date.

IV. DISPOSITION

The petition for writ of mandate is denied. Defendants are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SEIGLE, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

⁵ Plaintiff contends without evidentiary support that two pregnancies of defendants' attorney delayed commencement of the arbitration hearing.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.