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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

AMY LEE HARTZLER p/k/a AMY LEE/EVANESCENCE, Plaintiff and Respondent, v. 110 MANAGEMENT, INC., Defendant and Appellant.	B290134 (Los Angeles County Super. Ct. No. BS171379)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Artiano Shinoff, Paul V. Carelli, IV for Defendant and Appellant.

McPherson Rane, Edwin F. McPherson and Tracy B. Rane for Plaintiff and Respondent.

INTRODUCTION

110 Management, Inc. (110 Management) appeals from a judgment entered after the trial court denied its motion to vacate an arbitration award and granted the petition of Amy Lee Hartzler p/k/a Amy Lee/Evanescence (Hartzler) to confirm the award. 110 Management contends the arbitrator exceeded his authority by: (1) considering Hartzler's Code of Civil Procedure section 998[1] settlement offer before issuing an award on the merits; (2) failing to make a final ruling on all issues; and (3) ordering 110 Management to pay attorneys' fees to a firm with an alleged conflict of interest. The trial court concluded 110 Management's contentions constituted challenges to the legal and factual findings of the arbitrator, which are beyond the permissible scope of a court's review. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Hartzler co-founded the rock band Evanescence. She hired 110 Management as her manager. They entered into a written management agreement, which contained a mandatory arbitration provision granting reasonable attorneys' fees and other costs to enforce the agreement to the prevailing party.

After Hartzler terminated 110 Management, it commenced arbitration proceedings against her before Judge Eli Chernow (Ret.). Before the arbitration hearing began, Hartzler served 110 Management with an offer to compromise for $100,000 pursuant to section 998. 110 Management did not respond to the offer. At the close of evidence, Hartzler argued the commissions 110 Management sought were either paid or never owed. She also

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[1] All further statutory references are to the Civil Procedure Code, unless otherwise indicated.

argued she should be deemed the prevailing party for purposes of an attorneys' fee award if the arbitrator found 110 Management was entitled to unpaid commissions in an amount less than $100,000 under section 998, subdivision (c)(1).[2]

Judge Chernow awarded 110 Management $4,833.66 on an interlocutory basis. He did not consider 110 Management the prevailing party, however, because "[v]irtually all of [its] claims have been denied. [It] has recovered only a tiny fraction of the amounts claimed." He also determined 110 Management could not be considered the prevailing party because the award was less than Hartzler's section 998 offer. Instead, he found Hartzler was the prevailing party, entitling her to reasonable attorneys' fees and costs under the parties' arbitration agreement. After Hartzler submitted her request for fees and costs, Judge Chernow issued a final award, ordering 110 Management to pay Hartzler $1,036,773.68 in fees and costs.

Hartzler filed a motion to confirm the arbitration award in the Los Angeles Superior Court. 110 Management opposed her motion and filed its own motion to vacate the arbitration award. 110 Management argued Judge Chernow's consideration of Hartzler's section 998 offer violated California law, he did not make a final ruling on all issues because he did not determine the amount of sunset payments owed (i.e., commissions owed to a manager after services are terminated), and he exceeded his power by awarding attorneys' fees to Manatt, Phelps & Phillips,

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[2] 110 Management failed to provide a reporter's transcript of the arbitration hearing or the hearing on the Motion to Vacate. Hartzler concedes this failure should not be dispositive of the appeal, however. We agree.

LLP (Manatt) because Manatt supposedly had a conflict of interest.[3]

The trial court granted Harztler's petition to confirm, denied 110 Management's motion to vacate, and entered judgment in favor of Hartzler. This timely appeal followed. [4]

DISCUSSION

I. Legal Principles and Standard of Review

We review the court's decision on a petition to confirm or vacate an arbitration award de novo. (*Advanced Micro Devices, Inc. v. Intel Corp*. (1994) 9 Cal.4th 362, 376, fn. 9.) To the extent the trial court made findings of fact in denying 110 Management's motion to vacate, we affirm those findings if they are supported by substantial evidence. (*Cooper v. Lavely & Singler Professional Corp.* (2014) 230 Cal.App.4th 1, 11-12.)

The scope of judicial review of arbitration awards is extremely narrow. "Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10.) "Generally, courts cannot review arbitration awards for errors of

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[3] 110 Management presented additional arguments below, but abandoned those arguments on appeal.

[4] We deny 110 Management's Supplemental Request for Judicial Notice. None of the documents is material to our resolution of the issues presented by this appeal because they were submitted to the trial court after it confirmed the arbitration award. (*See Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 713.)

fact or law, even when those errors appear on the face of the award or cause substantial injustice to the parties." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 916 (*Richey*).)

The California Arbitration Act (§ 1280 et seq.) provides limited exceptions to this general rule, including an exception where "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (§ 1286.2, subd. (a)(4).) An arbitrator exceeds his powers within the meaning of section 1286.2 by issuing an award that "violates a party's unwaivable statutory rights or that contravenes an explicit legislative expression of public policy." (*Richey, supra*, 60 Cal.4th at p. 916.) But, ""[a]rbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error. . . ."" (*Id.* at p. 917.)

Thus, "evaluating a challenge to an arbitration award is a two-step process—first the court must determine whether the award is reviewable, and only if review is appropriate does the court consider whether the award should be upheld." (*SingerLewak LLP v. Gantman* (2015) 241 Cal.App.4th 610, 622.)

II. The Trial Court Properly Denied 110 Management's Motion to Vacate the Arbitration Award

A. Arbitrator's Consideration of the Section 998 Offer

110 Management contends Judge Chernow contravened public policy and thereby exceeded his authority by considering Hartzler's section 998 offer before issuing the final award. We

conclude the crux of this argument is a challenge to the legal findings of the arbitrator, placing it beyond the permissible scope of our review.

Section 998 establishes a procedure for shifting costs upon a party's refusal to settle. (*Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 128.) If the party who prevailed at trial obtained a judgment less favorable than an unaccepted pretrial settlement offer submitted by the other party, then the prevailing party may not recover its own post-offer costs and must pay its opponent's post-offer costs. (*Ibid.*, § 998, subd. (c)(1).) Here, after the close of evidence but before Judge Chernow issued an award on the merits, Hartzler argued she should be considered the prevailing party in the arbitration if the arbitrator issued an award in an amount less than $100,000 (the amount of the section 998 offer) pursuant to section 998, subdivision (c)(1). Judge Chernow awarded 110 Management $4,833.66, which, he said, was an amount "not placed in contention by [110 Management]; it was simply uncovered when Hartzler's accountant/business manager reviewed the entire course of their financial dealings." Thus, Judge Chernow found it "difficult to classify this matter as [110 Management] prevailing on a claim." The interlocutory order further states: "Hartzler made a C.C.P. §998 offer to [110 Management] of $100,000. [¶] Thus [110 Management] can not [sic] be considered the prevailing party unless [it] obtained a recovery in excess of $100,000. Plainly Lurie[5] and 110 Management are not prevailing parties. Hartzler is the prevailing party."

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[5] Although Judge Chernow refers to "Lurie," the president of 110 Management, as a "party," the trial court correctly noted there is no indication that Mr. Lurie was a party to the arbitration.

The cost-shifting statute "encourage[s] settlement of lawsuits prior to trial . . . by punishing a party who fails to accept a *reasonable* offer from the other party." (*Westamerica, supra,* 158 Cal.App.4th at p. 129.) But just as Evidence Code section 1152 excludes evidence of other settlement offers at trial, the statute excludes evidence of a section 998 offer at trial. (§ 998, subd. (b)(2); *White v. Western Title Ins. Co*. (1985) 40 Cal.3d 870, 887-889).

110 Management contends Judge Chernow's award contravened public policy because "110 Management had proof that it was owed commissions by Hartzler . . . [b]ut the fact that the Arbitrator awarded 110 Management less than the $100,000 offer resulted in a wildly skewed decision that punished 110 Management by making it liable for over $1 million in Hartzler's costs and fees." But this contention directly targets an alleged error of law (i.e., that 110 Management should have been considered the "prevailing party")—taking it beyond the scope of our review.

Moreover, 110 Management does not explain how a policy in favor of settlement would militate against Judge Chernow's award. None of the cases 110 Management cites, where an arbitration award is vacated on public policy grounds, involves section 998. (*See e.g. Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 38 [holding that because Business and Professions Code section 7031 contained an "explicit legislative expression of public policy" regarding unlicensed contractors, failure of an arbitrator to enforce it was ground for review by the trial court]; *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 438 [holding the case was within "the limited and exceptional circumstances justifying judicial review of an

award that violates an explicit expression of public policy" because the award of over $88 million in public monies violated the public policy set forth in the California Constitution prohibiting gifts of public funds]; *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327, 338-340 [arbitrator's award required action directly conflicting with previous judicial order].)

In addition, 110 Management's reliance on *Heimlich v. Shivji* (2017) 12 Cal.App.5th 152, review granted August 23, 2017, S243029 (*Heimlich*) is misplaced. 110 Management primarily relies on dicta indicating a party should defer presenting evidence of a section 998 offer until after the arbitrator issues an award on the merits. (*Id*. at p. 174.) But, section 998, subdivision (b)(2) states: "If the offer is not accepted prior to trial or arbitration or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial or arbitration." As noted above, Hartzler disclosed the section 998 offer after the close of evidence, so the offer was not "given in evidence" and the statute was not violated. In any event, while this appeal was pending, our Supreme Court reversed the appellate court's judgment with directions to affirm the trial court's confirmation of the arbitration award and denial of costs. (*Heimlich v. Shivji* (May 30, 2019, S243029*)* __Cal. 5th ___ [2019 WL 2292828].) Accordingly, *Heimlich* is no longer good law.

110 Management also contends the award should be vacated because it violates its statutory rights. (*See e.g. Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 680 [holding "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 [an unwaivable statutory right, i.e., the right to be free from unlawful discrimination under FEHA] has exceeded his or her powers . . . and the arbitrator's award may properly be vacated"].) But 110 Management does not identify an "unwaivable statutory right" purportedly violated by the award.

Finally, 110 Management argues Judge Chernow's award exceeded his power under the American Arbitration Association (AAA) rules, rendering the arbitration "fundamentally unfair." In support of this argument, 110 Management relies on *Emerald Aero, LLC v. Kaplan* (2017) 9 Cal.App.5th 1125 (*Emerald Aero*). In *Emerald Aero*, the court held the arbitrator exceeded his authority by awarding punitive damages without adequate prior notice, in violation of the parties' arbitration agreement and fundamental procedural fairness principles. (*Id.* at p. 1129.) The AAA rules "restrict the available remedies to those of which the parties had reasonable notice." (*Id.* at p. 1140.) But nothing in the AAA rules precludes consideration of a section 998 offer prior to entry of a final order.

Accordingly, we conclude the arbitrator did not exceed his powers within the meaning of section 1286.2 by considering the section 998 offer before issuing a final award.

B. Attorneys' Fees Awarded to Manatt

Alternatively, 110 Management contends the court erred in confirming the portion of the award for Manatt's attorneys' fees because that firm allegedly has a conflict of interest. This contention is beyond the scope of our review. (*See Moncharsh, supra*, 3 Cal.4th at 16.)

Manatt represented Hartzler's business manager (Mozenter), a third party witness in the arbitration. The arbitrator awarded Hartzler $885,000 for attorneys' fees, $95,000 of which was for Manatt's representation of Mozenter. Manatt previously acted as 110 Management's counsel in connection with one of the contracts at issue in the arbitration. Based on their fee agreement and the California Rules of Professional Responsibility, 110 Management argues Manatt was barred from representing an adverse party in arbitration. Whether there was a conflict of interest, however, is an issue of law and fact. Accordingly, we decline 110 Management's invitation to review the correctness of this portion of the arbitrator's award. (*E.g., Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1184 [holding "[a]rbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error"].)

C. Finality of the Arbitration

110 Management also contends Judge Chernow "left the arbitration without finality" because he failed to hear evidence of estimated sunset payments. In the interlocutory award, Judge Chernow stated "[n]o evidence was presented at the hearing as to any failure on Hartzler's part to make [sunset] payments when and if they become due." 110 Management fails to point to any evidence in the record indicating otherwise. The disputed sunset payments were not due before the close of evidence. Thus, Judge Chernow did not need to decide any issues about future sunset

payments "in order to determine the controversy" submitted to him. (§ 1283.4.)[6]

110 Management further argues sunset payments should have been used to determine the prevailing party, and Judge Chernow should have maintained jurisdiction over the amount of sunset payments owed to ensure finality of the arbitration. These arguments are not grounds for vacating an arbitration award because they are not one of the specific grounds named under section 1286.2.

[6] 110 Management argues an issue in the arbitration was whether Hartzler would continue to properly pay the commissions owed under the sunset clause, but fails to provide record citation supporting that argument. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 [any point raised that lacks citation may be deemed waived].)

DISPOSITION

The judgment is affirmed. Hartzler is awarded her costs on appeal.

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CURREY, J.

WE CONCUR:

MANELLA, P. J.

WILLHITE, J.