Filed 10/25/12 Sanochkina v. Yuen CA1/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FIRST APPELLATE DISTRICT

DIVISION TWO

TATIANA SANOCHKINA et al.,
Plaintiffs and Appellants,
v.
RICHARD YUEN,
Defendant and Respondent.

A130482

(San Francisco County
Super. Ct. No. CGC-07-464022)

## I. INTRODUCTION

This is an appeal from a judgment confirming an arbitration award. Appellants seek to vacate the judgment on the ground that the arbitration award was procured by fraud. Respondent contends that appellants waived their right to appeal the judgment and that, in any event, the arbitration award was proper. We hold that appellants did not waive their right to appeal the judgment. However, appellants have failed to substantiate their claim that the arbitration award was procured by fraud and they have not identified any other proper basis for vacating the award. Therefore, we will affirm the judgment.

## II. STATEMENT OF FACTS

### A. *Background*

In 1991, respondent Richard Yuen and his wife Mabel Teng purchased a home on 16th Avenue in San Francisco. During the decade that followed, Yuen and Teng remodeled their home three times; the last remodel was completed in the summer of 2001. In 2005, Yuen and Teng separated and put their house on the market for sale.

In May 2005, appellant Gregory Finkelson made an offer to purchase Yuen and Teng's home. Finkelson made this offer as the "Attorney in Fact" for appellant Tatiana Sanochkina, a Russian businesswoman. Yuen and Teng accepted Finkelson's offer. The parties executed a California Residential Purchase Agreement (the Purchase Agreement). Finkelson initialed key provisions and signed the Purchase Agreement as the attorney in fact for Sanochkina.

Paragraph 17 of the Purchase Agreement is titled "Dispute Resolution" and contains three parts. Paragraph 17A contains an agreement that the parties will mediate any dispute or claim arising out of their agreement or the resulting transaction before resorting to arbitration or a court action and also provides that any party who "refuses to mediate after a request has been made . . . shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action."[1]

Paragraph 17B of the Purchase Agreement is titled "Arbitration of Disputes" and provides, in part: "(1) Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration . . . . The arbitrator shall be a retired judge or justice, or an attorney with at least 5 years of residential real estate Law experience, unless the parties mutually agree to a different arbitrator, who shall render an award in accordance with substantive California Law. The parties shall have the right to discovery in accordance with California Code of Civil Procedure § 1283.05. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part III of the California Code of Civil Procedure. Judgment upon the award of the arbitrator(s) may be entered into any court having jurisdiction. Interpretation of this agreement to arbitrate shall be governed by the Federal Arbitration Act."

---

[1] Paragraph 22 of the Purchase Agreement is titled "Attorney Fees," and states: "In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing buyer or seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller, except as provided in Paragraph 17A."

The third part of paragraph 17 of the Purchase Agreement consists of a "NOTICE" provision which states (in capital letters): "By initialing in the space below you are agreeing to have any dispute arising out of the matters included in the 'Arbitration of Disputes' provision decided by neutral arbitration as provided by California law and you are giving up any rights you might possess to have the dispute litigated in a court or jury trial. By initialing in the space below you are giving up your judicial rights to discovery and appeal, unless those rights are specifically included in the 'Arbitration of Disputes' provision. If you refuse to submit to arbitration after agreeing to this provision, you may be compelled to arbitrate under the authority of the California Code of Civil Procedure. Your agreement to this arbitration provision is voluntary."

In early July 2005, Finkelson took possession of the home as Sanochkina's tenant. Finkelson then made arrangements for renovations to construct an office and make repairs to address problems that had been disclosed prior to the sale. Thereafter, Finkelson allegedly discovered defects in the property and violations of the Building Code that were previously unknown to him which he believed the prior owners had concealed. Finkelson also claimed that he became ill from mold that was discovered in the walls.

**B. *The Complaint***

On June 6, 2007, Sanochkina "By and through" her attorney in fact, Finkelson, and Finkelson "Individually," filed a complaint for "Real Estate Misrepresentation and Personal Injury." The named defendants included Yuen, Teng, the Yuen-Teng Trust, realtors involved in the sale and individuals and companies allegedly involved in the 2001 remodel of the home. Plaintiffs alleged, or attempted to allege, seven distinct causes of action, each one of which was made by one plaintiff against one or more of the defendants. Although Yuen and other defendants were served with this complaint, appellants never served Teng.

Yuen was named in three causes of action: (1) Sanochkina's claim for intentional misrepresentation and breach of warranty; (2) Sanochkina's claim for conspiracy; and (3) Finkelson's claim for conspiracy. All three of these causes of action were supported by

factual allegations that Yuen and Teng knew of and intentionally failed to disclose defects and Building Code violations that resulted from the 2001 remodel.

**C.** ***The Arbitration***

In August 2007, Yuen filed a motion for an order compelling arbitration of all of appellants' claims against him, relying on paragraph 17B of the Purchase Agreement. Appellants opposed the motion, arguing that Yuen had waived the right to arbitrate by failing to respond to a demand for mediation and/or arbitration that they made before they filed their complaint.

On October 11, 2007, the superior court filed an order granting Yuen's motion for an order compelling arbitration. The court found that (1) Yuen had not waived his right to arbitration, (2) Finkelson, "as an agent for" Sanochkina, was bound by the arbitration provision in the Purchase Agreement and "therefore must arbitrate his individual claims against [Yuen]," and (3) the pending action would be stayed without prejudice.

In April 2009, the parties stipulated to the appointment of attorney Michael Carbone as the arbitrator in this case. During the year that followed, the arbitrator issued at least seven case management orders, the last of which established that liability issues would be bifurcated and resolved at a hearing in March 2010, and that issues relating to damages would be reserved for a further hearing.

In March 2010, the plaintiffs amended their complaint to allege additional causes of action against Yuen for declaratory relief and negligent misrepresentation.[2] Pursuant to the declaratory relief claim, both plaintiffs sought a determination of their rights and duties under the attorney fees provision of the Purchase Agreement. Specifically, they requested that the arbitrator make two declarations prior to the arbitration hearing: (1) that "defendants" are not entitled to attorney fees if they prevail in this action and (2) "that the plaintiffs would be entitled to attorney's fees and costs if they prevail in this litigation."

---

[2] Yuen contends that he objected to this amendment which was filed on the eve of the arbitration hearing. However, this assertion is not supported by the record references that Yuen provides.

The new negligent misrepresentation claim was alleged by Sanochkina; Finkelson was not a plaintiff as to that cause of action. Sanochkina alleged that Yuen made misrepresentations to Finkelson about the actual square footage of the home and other conditions pertaining to the property which were the proximate cause of damages that she sustained.

**D.** ***The Arbitration Award(s)***

**1.** ***The Partial Final Award***

A hearing on liability issues was conducted over several days in March 2010. During the hearing, the parties requested that the arbitrator make a ruling on the declaratory relief cause of action prior to the conclusion of the arbitration. Accordingly, the arbitrator found that Yuen would not be eligible for attorney fees were he to prevail in the arbitration because he had previously refused appellants' request to submit to mediation and, under paragraphs 17 and 22 of the Purchase Agreement, that refusal precluded Yuen from recovering attorney fees.

At the conclusion of the liability hearing, the arbitrator granted a motion by Yuen to dismiss the two conspiracy claims against him. Subsequently, on April 6, 2010, the arbitrator issued a "Partial Final Award" which contained his rulings on the remaining liability issues pertaining to Sanochkina's claims for intentional fraud and negligent misrepresentation.

The arbitrator divided the alleged misrepresentations into three categories: (1) inaccuracy regarding square footage of the home; (2) latent defects resulting from the 2001 remodel; and (3) mold exposure. He then concluded that there was insufficient evidence of either intentional or negligent misrepresentation by Yuen with respect to the square footage of the home or the potential existence of mold. The arbitrator also found there was insufficient evidence of any intentional misrepresentation pertaining to latent defects. However, the arbitrator found that Yuen (and Teng) did make negligent misrepresentations regarding latent defects in the home.

Specifically, the arbitrator found that both Yuen and Teng stated in writing that (1) they were not aware of any alterations to the property that had been made without

necessary permits or that were not in compliance with the building codes; (2) they had made alterations to the home which were supported by necessary permits; and (3) an inspector had approved the alterations in writing after they were completed. These representations were false because the evidence established that permits for the 2001 remodel were never signed by the building inspector, there were numerous code violations in the 2001 remodel, and neither Yuen nor Teng had any reasonable ground for believing that their representations about code and permit compliance were true.

**2. *The Final Award***

The hearing on damages was conducted over several days in April 2010. At the conclusion of the hearing, on April 16, the parties stipulated on the record that the arbitrator would "retain jurisdiction to rule on attorneys' fees and costs after the final award on the merits . . . ." On April 30, 2010, the arbitrator issued a "Final Award" which (1) incorporated the findings and statement of reasons set forth in the Partial Final Award, (2) resolved the damages claims, and (3) identified the prevailing party in this case.

To calculate Sanochkina's damages for negligent misrepresentation, the arbitrator applied the "out of pocket" rule codified in Civil Code section 3343. After summarizing the conflicting evidence regarding the value of the home, the arbitrator ultimately concluded that Sanochkina was not damaged by Yuen's negligent misrepresentations. Specifically, the arbitrator found as follows: "After consideration of all of the foregoing evidence, it is the Arbitrator's opinion that at the time of the purchase and sale transaction in 2005, Sanochkina did not sustain out-of-pocket damages. The value of the subject property at that time, after taking the lack of compliance with building codes and failures to obtain final inspections into account, was at least as much as the purchase price."

In the Final Award, the arbitrator rejected a claim by Finkelson that he was entitled to damages to compensate him for his loss of use of the property during renovations and for rent he paid or would have to pay for alternative accommodations while the home was unavailable to him. The arbitrator dismissed these specific claims

for "lack of jurisdiction," reasoning that they were not the proper subject of arbitration because the arbitration agreement was only between the buyer and seller.

Finally, the arbitrator found that Yuen was the prevailing party in this action. Although the arbitrator confirmed its prior ruling that Yuen was not entitled to contractual attorney fees, he found that Yuen was entitled to recover his costs as the prevailing party in this arbitration.

**3. *Supplemental Award***

On June 11, 2010, the arbitrator issued a Supplemental Award pursuant to the parties' prior stipulation at the arbitration hearing that the arbitrator would retain jurisdiction to adjudicate issues of attorney fees and costs. The arbitrator affirmed its prior rulings that Yuen is the prevailing party, and that Yuen is not entitled to attorney fees but that he may recover his costs. The arbitrator then denied an application by the plaintiffs to tax costs and awarded Yuen a total of $56,080.90 for his costs incurred in this action.

**E. *The Superior Court Order and Judgment***

On June 15, 2010, Yuen filed a petition in the superior court to confirm the arbitration award. On October 26, 2010, a hearing on the petition was conducted before the Honorable Charlotte Woolard. At the conclusion of the hearing, the court filed an order confirming both the Final Award dated April 30, 2010, and the Supplemental Award dated June 11, 2010.

That same day, the court filed a judgment confirming the arbitration award and adjudging that "petitioner Richard Yuen recover from respondents Tatiana Sanochkina and Gregory Finkelson jointly and severally, the sum of $56,080.90 together with interest thereon at the legal rate of 10%, and costs of this proceeding in the amount of $40.00."

## III. DISCUSSION

### **A**. *The Motion to Dismiss*

#### **1.** *Background and Issue Presented*

The notice of appeal was filed on December 6, 2010. Eight days later, Yuen filed a motion to dismiss this appeal which was supported by evidence attached to the declaration of one of his attorneys, Tanner D. Brink (the Brink declaration).

Exhibit 1 to the Brink declaration is a copy of the Purchase Agreement which is the subject of this action. Brink directs our attention to the following language in paragraph 17: "by initialing in the space below you are giving up your judicial rights to discovery and appeal . . . ."

Exhibit 2 to the Brink declaration consists of a single page titled "Arbitration Provision," which appears to be part of a larger document. According to the Brink declaration, Exhibit 2 is a "true and correct copy of the 'Arbitration Provision', submitted with the Appellants' Complaint, signed by Appellant Gregory Finkelson on February 9, 2007." Brink also states that the last sentence of the first paragraph of Exhibit 2 "contains the waiver of appeal provisions responsive to the subject Motion to Dismiss Appeal." That sentence states: "The arbitration shall be held before a single arbitrator and shall be binding with no right of appeal."

Respondent argues that this appeal must be dismissed because the waivers in Exhibits 1 and 2, when read as a whole, constitute a valid waiver of the right to appeal this judgment. Appellants oppose the motion to dismiss and request sanctions. They argue, among other things, that respondent failed to comply with rule 8.57 of the California Rules of Court which sets forth the requirements for filing a motion to dismiss before the record is filed in the reviewing court. In an order filed January 7, 2011, this court took this matter under submission and advised the parties that the motion would be decided with the merits of the appeal.

Respondent's reliance on Exhibit 2 to the Brink declaration is misleading and inappropriate. Contrary to Brink's representation to this court, Exhibit 2 is not "responsive" to this motion to dismiss because Yuen was not a party to that agreement.

Rather, that "Arbitration Provision" was part of an agreement between Finkelson and Sanochkina pursuant to which Sanochkina gave Finkelson her power of attorney. We are very troubled and concerned by respondent's counsel's failure to disclose this fact in a motion to dismiss that was filed *before* the record on appeal was filed in this court. As best we can determine, Exhibit 2 is irrelevant to this motion and we offer no opinion as to its meaning or import. Here, we focus exclusively on paragraph 17 of the Purchase Agreement.

**2. *Analysis***

In California, a party has a statutory right to appeal from a judgment on an arbitration award. (Code Civ. Proc., § 1294, subd. (d) ["An aggrieved party may appeal from . . . A judgment entered pursuant to this title."].) Case law establishes that a party can waive this right. (*Guseinov v. Burns* (2006) 145 Cal.App.4th 944, 952 (*Guseinov*), and authority collected therein.)

"The Courts of Appeal have held, however, that any waiver of the right to appeal must be clear and express . . . ." (*Guseinov, supra,* 145 Cal.App.4th at p. 952; see also *Reisman v. Shahverdian* (1984) 153 Cal.App.3d 1074 (*Reisman*).) For example, in *Pratt v. Gursey, Schneider & Co* (2000) 80 Cal.App.4th 1105 (*Pratt*) the parties entered into an arbitration agreement which stated that " '[t]he right to appeal from the arbitrator's award or any judgment thereby entered or any order made is expressly waived.' " (*Id*. at p. 1110.) The *Pratt* court held that "[t]he broad language utilized by the parties constitutes a waiver of the right to appeal from 'any judgment' or 'any order.' . . . [T]he right to appeal 'any judgment' or 'any order' has been expressly waived." (*Ibid*.)

Furthermore, the waiver of the right to appeal an arbitration award is not tantamount to a waiver of the right to appeal a judicial action on an arbitration award. (*Reisman, supra*, 153 Cal.App.3d 1074; *Guseinov, supra*, 145 Cal.App.4th at p. 952.) For example, in *Reisman, supra,* 153 Cal.App.3d 1074, the parties agreed " 'to enter into binding arbitration' " and that, " 'No appeal or further proceedings will be possible after the arbitration award is made.' " (*Id*. at p. 1082.) The *Reisman* court found that "the waiver agreements here are directed against a party seeking a trial de novo and against

any appeal directly from the award and within the arbitration proceeding itself as distinguished from an appeal of judicial action on the award." (*Id*. at p. 1088.) The court reasoned that the waiver agreement language lacked the necessary specificity to effectively "waive rights to appeal trial court judicial action which was expressly provided for by [statute]." (*Id*. at p. 1089.)

Similarly, in *Guseinov, supra*, 145 Cal.App.4th at page 947, the parties entered into an arbitration agreement which stated that " 'The Parties waive any right to appeal the arbitral award.' " (*Id*. at p. 954.) The *Guseinov* court found this provision was "insufficiently clear and express to constitute a waiver of [defendant's] right to appeal from the judgment entered on the arbitration award." (*Id*. at pp. 953-954.) The court outlined several circumstances which supported its conclusion. First, the arbitration agreement in that case also provided that the parties " 'retain[ed] the right to seek judicial assistance' which included the power to enforce any decision or award of the arbitrator.'" (*Id*. at p. 954.) Second, since the waiver did not prevent filing a motion or petition to secure a judgment on the arbitration award, the parties "clearly contemplated" that they would be permitted to file a petition to vacate or enforce the award. Third, the parties had "expressly agreed that California law would be controlling" and, the court emphasized, "California law explicitly provides a judgment entered upon an arbitration award is appealable. [Citations.]" (*Ibid*.) Ultimately, the court concluded that "[a]bsent greater specificity, the arbitration clause cannot be construed to waive an appeal from a judgment entered on an award. [Citations.]" (*Id*. at p. 955.)

Applying the principles outlined in these cases, we conclude that the arbitration clause in this case cannot be construed to waive an appeal from the judgment entered on an award. First, paragraph 17 of the Purchase Agreement does not contain language specifically waiving the right to appeal judicial action or a court judgment. Indeed, the subject of appeal rights is not directly addressed in the arbitration agreement itself. Rather that subject is addressed in the "Notice" provision, which states that, "by initialing in the space below you are giving up your judicial rights to discovery and appeal, unless those rights are specifically included in the 'Arbitration of Disputes' provision." This

notice provision is ambiguous, not just because it requires the parties to refer back to the arbitration agreement to determine its meaning, but also because it attempts to circumvent the legal requirement that a waiver of the right of appeal must be clear and express.

Second, paragraph 17 in the Purchase Agreement also states that the arbitration shall be conducted in accordance with California law. As discussed above, California law authorizes an appeal from a judgment confirming an arbitration award. (Code Civ. Proc., § 1294, subd. (d); *Guseinov, supra*, 145 Cal.App.4th at p. 954; *Reisman, supra*, 153 Cal.App.3d at p. 1089.)

Third, both the "Arbitration of Disputes" provision and the "Notice" provision of paragraph 17 contemplate that the parties can and will seek judicial assistance with respect to the enforcement of the arbitration agreement and any award made pursuant thereto. Indeed, the arbitration provision expressly states that "Judgment upon the award of the arbitrator(s) may be entered into any court having jurisdiction." By acknowledging that the arbitration award in this case would be supported by a court judgment, the parties also agreed that the judgment would be subject to appellate review as provided for by California law.

Respondent does not address or even acknowledge these relevant circumstances. Furthermore, his superficial analysis is premised on waiver language that does not appear in the agreement between the parties to this appeal. Therefore, the motion to dismiss is denied.

As noted above, appellants request that we impose monetary sanctions on respondent for filing a frivolous motion. Unfortunately, filing this motion is not the only potentially sanctionable conduct that occurred in this case. Thus, we will postpone the subject of sanctions until the end of our opinion.

**B. *Scope of Review***

"The principles governing review of an arbitration award are well established. An arbitration award is final and conclusive because the parties—as here—'have agreed that it be so.' [Citation.] Only limited judicial review is available; courts may not review the

merits of the controversy, the validity of the arbitrator's reasoning, or the sufficiency of the evidence supporting the award. [Citation.] Thus, with 'narrow exceptions,' an arbitrator's decision is not reviewable for errors of fact or law. [Citation.] This is so even if the error appears on the face of the award and causes substantial injustice. [Citation.]" (*Shahinian v. Cedars-Sinai Medical Center* (2011) 194 Cal.App.4th 987, 999-1000 (*Shahinian*); see also *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 6-11 (*Moncharsh*); *California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 943 (*California Faculty*).) This "[l]imited judicial review is a well-understood feature of private arbitration, inherent in the nature of the arbitral forum as an informal, expeditious, and efficient alternative means of dispute resolution." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 831.)

The grounds for vacating an arbitration award are limited to the circumstances set forth in Code of Civil Procedure section 1286.2, subdivision (a) which provides that a court "shall" vacate an arbitration award if it finds: "(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 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 being shown therefore 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. [¶] (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 [Code of Civil Procedure s]ection 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. . . ."

## C. *Issue Presented*

Appellants filed an Opening Brief and a Reply Brief that violated the requirements of rule 8.204 of the California Rules of Court (rule 8.204) and contained numerous hyperbolic opinions, sarcastic remarks and unsupported accusations about the arbitrator and the trial judge. We attempted to remedy these errors by striking appellants' briefs and affording them additional opportunities to make their case on appeal. Unfortunately, the "Second Revised Appellants' Opening Brief" does not comply with the letter or spirit of rule 8.204 and also contains numerous improper unprofessional remarks. Nevertheless, we exercise our discretion to resolve this appeal on the merits for the sake of expediency and in the interests of justice.

The appellants' brief is poorly written, poorly organized, and poorly reasoned. Despite these serious shortcomings, the ground for this appeal is clear: appellants contend that the arbitration award was procured by fraud. As discussed above, under California law, a court is required to vacate an arbitration award that was "procured by corruption, fraud or other undue means." (Code Civ. Proc., § 1286.2, subd. (a)(1).)[3] This ground for vacating an award "applies when 'fraud' is perpetrated by either the arbitrator or a party involved." (*Pacific Crown Distributors v. Brotherhood of Teamsters* (1986) 183 Cal.App.3d 1138, 1147 (*Pacific Crown Distributors*.) However, "[n]ot every incidence of fraud will be allowed a remedy; vacation of an award will lie only for occurrences of 'extrinsic' fraud and not for 'intrinsic' fraud. [Citation.] 'Extrinsic' fraud is that conduct which 'results in depriving either of the parties of a fair and impartial hearing to their substantial prejudice.' [Citation.]" (*Ibid.*)

---

[3] Appellants also rely on a provision of the Federal Arbitration Act which authorizes a federal court to vacate an arbitration award that was "procured by corruption, fraud, or undue means." (9 U.S.C. § 10, subd. (a)(1).) However, they do not make any discrete argument based on this federal law or explain how it might apply here. Appellants' counsel does request that this court take judicial notice of documents that he allegedly filed or intends to file in some type of federal action. However, his requests are denied because counsel fails to establish these documents are the proper subject of judicial notice or that they are relevant to the issue on appeal. (Evid. Code §§ 452 & 459; *People v. Galvan* (2008) 168 Cal.App.4th 846, 854, fn. 8.)

**D.** ***Analysis***

In their brief to this court, appellants purport to outline 10 distinct indicia of fraud and they ask us to "produce a detailed decision regarding all ten issues." We discern only three cognizable issues relating to appellants' fraud theory.

**1.** ***Defense Expert Testimony***

Appellants' first and primary theory is that the arbitration award was procured by fraud because it is based on the false testimony of two defense experts, Alan Posard and Walter Ricci. Posard is an architect and general contractor who provided expert testimony about the nature of the defects about which appellants' complained and the costs of repairing them. Ricci is a certified general appraiser who testified about the value of the subject property.

Appellants purport to document eight examples of allegedly fraudulent testimony by these defense experts, although they claim there are many more than that. Appellants then argue that the arbitration award was procured by fraud because both the arbitrator and the trial court knowingly relied on this false testimony.

As we noted at the outset of our discussion, the law governing review of an arbitration award precludes us from reviewing either the merits of the underlying controversy or the sufficiency of the evidence to support the arbitration award. (*Shahinian, supra,* 194 Cal.App.4th at pp. 999-1000.) After considering the eight examples of allegedly false testimony, we conclude that appellants' complaints are poorly disguised challenges to the sufficiency of the evidence.

Solely to illustrate our point, we will address appellants' first example of allegedly false testimony. Appellants contend that Posard testified that a shower pan in one of the bathrooms was an "open and obvious" defective condition because it measured only 32x32 inches, but then, "[a]fter three prior claims that the Pan measured only 32 inches, Posard back-tracked and inconsistently stated that that same shower pan actually measured a larger, and almost code compliant 36x36."

Appellants' characterization of Posard's testimony is not consistent with the evidence in this record. That evidence shows that, at some time prior to the arbitration

hearing, plaintiffs' expert told Posard that the shower pan measured 32x32 and Posard responded that such a condition would have been open and obvious to anyone who looked at it. Posard subsequently determined, and testified at the hearing, that the shower pan was not in fact 32x32 and, more importantly, that the 2001 remodel plans for that shower were expressly approved by the building inspector which made the entire matter a non-issue.

It appears to us that appellants have blatantly mischaracterized Posard's testimony to create the false impression that he lied in a misguided effort to obtain judicial review of the sufficiency of the evidence to support the award. However, they are not entitled to that type of review. (*Shahinian*, *supra*, 194 Cal.App.4th at pp. 999-1000; see also *Moncharsh, supra,* 3 Cal.4th at pp. 6-11 ["an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties."]; *California Faculty, supra,* 63 Cal.App.4th at p. 943 ["Courts may not review either the merits of the controversy or the sufficiency of the evidence supporting the award."].)

Furthermore, another essential premise of this fraud theory is that both the arbitrator and the trial court were fully apprised of the allegedly false testimony. To support this premise, appellants' take the position that plaintiffs' counsel proved the testimony was false during the arbitration proceeding. However, by taking this position, appellants admit that they had the opportunity to address, respond to, and indeed highlight the alleged flaws in the defense expert evidence during the arbitration. Thus, as a matter of law, the testimony of these defense experts is not evidence of *extrinsic* fraud that would entitle appellants to an order vacating the arbitration award. (*Pacific Crown Distributors, supra*, 183 Cal.App.3d at p. 1147; see also *Kachig v. Boothe* (1971) 22 Cal.App.3d 626, 632-634.)

Finally, appellants' assertion that the superior court participated in the allegedly fraudulent procurement of this arbitration award is not supported by any evidence in this record. Appellants were not entitled to judicial review of the sufficiency of the evidence

to support the arbitrator's decision and, therefore, the trial court's refusal to conduct that type of review is not evidence of fraud.

**2. *Consumer Rights***

Appellants' second attempt to prove that the arbitration award was procured by fraud rests on the following propositions: (1) the arbitrator violated Sanochkina's rights as a consumer by forcing her to pay costs in this arbitration; (2) plaintiffs proved to the trial court that the arbitrator violated Sanochkina's consumer rights; and, therefore, (3) the trial court participated in the fraud by refusing to strike the cost award. The first two propositions are not supported by evidence in the record or relevant case authority and appellants' attempt to use them as a ground for inferring fraud oversteps the bounds of reasonable advocacy.

During the arbitration, appellants did not allege or ever argue that Sanochkina was a consumer in the context of this proceeding or that her status as a consumer precluded the arbitrator from awarding Yuen his costs. To the contrary, pursuant to their declaratory relief claim, plaintiffs expressly alleged that the parties' rights and duties with respect to the payment of fees and costs were dictated by paragraphs 17 and 22 of the Purchase Agreement. Furthermore, after the arbitrator ruled on this claim, and found that Yuen waived his right to fees but could still be entitled to costs if he was the prevailing party, each party to this arbitration expressly stipulated on the record that the arbitrator would retain jurisdiction to make a determination regarding fees and costs.

These facts compel the conclusion that appellants waived the claim that Sanochkina could not be liable for a cost award because of her status as a consumer by failing to raise that issue at the arbitration. (*Moncharsh, supra*, 3 Cal.4th at pp. 30-31.) As our Supreme Court has recognized, applying the waiver doctrine in this context serves two important functions. First, "[a]ny other conclusion is inconsistent with the basic purpose of arbitration, which is to finally decide a dispute between the parties." (*Id*. at p. 30.) Second a party simply cannot wait to see if the arbitrator will rule against her knowing that, if he does, she can later challenge the legality of the contract provision in a motion to vacate the arbitrator's award. "A contrary rule would condone a level of

'procedural gamesmanship' that we have condemned as 'undermining the advantages of arbitration.' [Citation.]" (*Ibid.*)

Because this consumer rights claim was waived, the trial court was not required to consider it at all. Furthermore, even if the issue had not been waived, appellants failed to support their consumer rights theory during the proceedings on the petition to confirm the arbitration award. They did contend that Sanochkina was protected by section 1284.3 of the Code of Civil Procedure (section 1284.3) which states, in part: "No neutral arbitrator or private arbitration company shall administer a consumer arbitration under any agreement or rule requiring that a consumer who is a party to the arbitration pay the fees and costs incurred by an opposing party if the consumer does not prevail in the arbitration, including, but not limited to, the fees and costs of the arbitrator, provider organization, attorney, or witnesses." (§ 1284.3, subd. (a).) However, plaintiffs' failed to provide any relevant authority or sound reason for their assumption that section 1284.3 applies to Sanochkina under the circumstances of this case.

Beyond that, appellants have consistently ignored the following facts which are established by this record: (1) This case involves a private arbitration between individuals; (2) this arbitration was conducted pursuant to an express agreement between these individuals; (3) Sanochkina never alleged a cause of action for a consumer rights violation or claimed that she was a consumer in the context of her relationship with Yuen; (4) both Sanochkina and Finkelson alleged a cause of action for declaratory relief pursuant to which they admitted that the rights and obligations of the parties with respect to the payment of attorney fees and costs were governed by the terms of the Purchase Agreement. These facts support the conclusion that section 1284.3 does not apply in this case.

Finally, we reject appellants' claim that fraud can be inferred from the fact that a trial court rejected their argument. Appellants fail to provide any sound reason or legal authority justifying such an inference. Suffice to say the trial court did not err by

refusing to vacate the arbitration award pursuant to appellants' untimely and erroneous consumer rights theory.[4]

**3. *Jurisdiction***

Appellants' final contention is that fraud can be inferred from the fact that the judgment holds Finkelson personally liable for Yuen's costs. Appellants' theory is that (1) the arbitrator made an express finding divesting himself of jurisdiction over Finkelson; (2) appellants informed the superior court that "there was no jurisdiction over Attorney-in-Fact Finkelson"; and (3) nevertheless, the court held Finkelson jointly and severally liable for Yuen's costs.

First, the record before us does not establish that the arbitrator divested himself of personal jurisdiction over Finkelson. When the arbitrator issued the Final Award, he did find that he did not have jurisdiction to award Finkelson damages for his loss of the use of the subject property while it was being repaired. However, by that time, the arbitrator had already found that Finkelson's individual liability claims against Yuen were not supported by the evidence. Furthermore, the specific type of damages that Finkelson sought during the damages phase did not arise out of any alleged violation of the Purchase Agreement itself. Rather, since Finkelson was not the owner of the property, his right to use it necessarily depended on a separate agreement with Sanochkina. Thus the arbitrator's conclusion that he did not have jurisdiction to award this specific type of damages did not establish that he lacked personal jurisdiction over Finkelson.[5]

---

[4] Appellants attempt to develop and refine their consumer rights theory in their appellate brief by resorting to evidence outside of this record. We ignore this new argument which is a particularly egregious violation of rule 8.204. However, we also note that the attempt to go outside the record to find evidentiary support for an obviously weak legal theory is yet another indication that appellants have no colorable justification for accusing the trial court of fraud.

[5] Evidence of statements the arbitrator made after the Final Order was issued shed further light on the ruling regarding his jurisdiction over Finkelson. After the Final Order was issued, Finkelson submitted a motion to amend the complaint to "conform to proof" on behalf of Sanochkina pursuant to which he attempted to make a claim that Sanochkina be awarded "special damages" for having to compensate Finkelson for his loss of use of

Second, as best we can determine, appellants did not raise this jurisdictional issue in any written opposition to the motion to affirm the arbitration award. The attorney who previously represented Sanochkina did argue at the hearing on the motion to confirm, that the arbitrator divested himself of personal jurisdiction over Finkelson. However, as discussed above, such a broad and self-serving interpretation of the arbitrator's finding was not compelled by the evidence.

Furthermore, there was additional evidence before the court which affirmatively showed that the arbitrator did have personal jurisdiction over Finkelson. For example, there was an order compelling Finkelson to arbitrate his individual claims arising out of the Purchase Agreement. As best we can determine, that order has never been challenged and is now final. Furthermore, the record shows that Finkelson participated in the arbitration both as an individual plaintiff and as the attorney in fact for Sanochkina. Finkelson failed to substantiate his individual claims for damages, but he did obtain affirmative relief on his declaratory relief claim which directly put at issue his rights and obligations with respect to the payment of attorney fees and costs. Finally, the attorney who represented Finkelson in his individual capacity at the arbitration hearing expressly stipulated on the record that the arbitrator had jurisdiction over these parties to award fees and costs.

On this record, we cannot accept appellants' contention that the superior court was compelled to accept their theory that the arbitrator divested himself of personal jurisdiction over Finkelson. The record supports the conclusion that the arbitrator made a discrete finding that he did not have jurisdiction to award a specific type of damages to

---

the property. In denying that motion, the arbitrator found, among other things, that the proposed new claim was no different that the claim that Finkelson previously asserted in his own right that the arbitrator dismissed. The arbitrator then clarified that "Finkelson's claims in his own right for lack of use of the subject property were dismissed for lack of arbitral jurisdiction because he was not the buyer of the subject property." The arbitrator also found that there was no evidence that Finkelson actually sustained any loss of use damages and therefore, "[i]n addition to the lack of jurisdiction, the insufficiency of the evidence provided a further reason for dismissal of Finkelson's claim."

Finkelson. Furthermore, and in any event, the fact that this record contains some evidence to support the jurisdictional argument that Sanochkina's attorney made at the superior court hearing simply is not evidence of trial court fraud. We find nothing in the record before us to support appellants' ultimate conclusion that the lower court's resolution of this issue is evidence of fraud.

**E. *Requests for Sanctions***

Both parties have made requests for sanctions.[6] Appellants ask us to impose monetary sanctions on Yuen for filing a frivolous motion to dismiss this appeal. Yuen seeks monetary sanctions for appellants' unreasonable infractions of the rules governing appeals, unprofessional conduct, and abuse of the appellate process.

Appellants' motion to impose sanctions on respondent for filing a frivolous motion is denied. In a letter brief filed after oral argument before this court, respondent acknowledged that he erroneously relied on an irrelevant waiver agreement, but he maintained that he made a reasonable mistake. As discussed above, the decision to support respondent's motion to dismiss with an arbitration agreement that does not pertain to Yuen was patently unreasonable. Nevertheless, there is no direct evidence of bad faith. Furthermore, the irrelevant arbitration agreement was not a ground upon which appellants moved for sanctions; indeed appellants did not raise this issue in any of the multiple pleadings filed in this court prior to oral argument. Finally, although the motion to dismiss lacked merit, one of the waiver provisions used to support the respondent's motion was part of the arbitration agreement between these parties. Therefore, we cannot say that the motion to dismiss this appeal was frivolous as that term has been defined by the courts. (See *In re Marriage of Flaherty* (1992) 31 Cal.3d 637, 649.)

Respondent's request for monetary sanctions is also denied. "A party seeking sanctions on appeal must file a separate motion for sanctions that complies with the requirements of [the] Rules of Court . . . ." (*Kajima Engineering and Construction, Inc.*

---

[6] At oral argument, we notified the parties we were considering imposing sanctions and heard argument on the relevant issues. We also deferred submission of this case so that the parties could file additional briefs in support of their respective positions.

*v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402.) Here respondent requested sanctions for the first time in a supplemental brief filed very late in this protracted appellate proceeding. Thus, he failed to file any motion, not to mention the timely motion required by rule 8.276 of the California Rules of Court (rule 8.276). Furthermore, although respondent filed a declaration "in support" of his sanctions request, that pleading does not include sufficient evidence to determine the appropriate amount of a potential sanction award for work that was actually necessary to respond to this appeal, but instead addresses matters which reinforce our concern that the dysfunctional relationship between the attorneys involved in this case has unnecessarily increased the costs to the taxpayers to process this appeal. Despite this concern, however, there is no doubt that appellant's counsel must take the brunt of the blame for the procedural mess created by this appeal.

Appellants' counsel's violations of the rules of court are simply too extensive to recount here. Furthermore, the tone of appellants' briefs and the false accusations which drive those filings strongly suggest that appellants' counsel has lost sight of his duties, both to his clients and as an officer of this court. As discussed above, we afforded appellant's counsel numerous opportunities to remedy his errors, but he declined to do so. Of course, we have authority under rule 8.276 to impose sanctions on appellants' counsel pursuant to our own motion. However, a monetary sanction will not adequately address the fundamental problem, which is that appellants' counsel insists on continuing to press his unsupported accusation that the superior court judge committed fraud by confirming the final arbitration award in this case. It appears that the relentless pursuit of this false theory seriously impeded appellants' counsel's ability to advance colorable though ultimately meritless grounds for challenging this arbitration award. More fundamentally though, there is no doubt that appellants' counsel is committed to disparaging this trial court judge.

"Disparaging the trial judge is a tactic that is not taken lightly by a reviewing court. Counsel better make sure he or she has the facts right before venturing into such dangerous territory because it is contemptuous for an attorney to make the unsupported

assertion that the judge was ‘act[ing] out of bias toward a party.’ [Citation.]” (*In re S.C.* (2006) 138 Cal.App.4th 396, 422.) On this record, we have little doubt that appellant’s counsel is guilty of contempt. (*Ibid*.; see also *In re White* (2004) 121 Cal.App.4th 1453, 1477-1478.) Instead of instituting a contempt proceeding, we will refer this matter to the State Bar of California, so that it can take the appropriate action.

## IV. DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal. Upon issuance of the remittitur, the clerk of this court is directed to send a copy of this opinion to the State Bar of California.

____________________________
Haerle, J.

We concur:

____________________________
Kline, P.J.

____________________________
Lambden, J.