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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

TOM KELLY, Plaintiff and Respondent, v. RMI INSURANCE SERVICES, INC., Defendant and Appellant.	H030047 (Santa Cruz County Super. Ct. No. CV153134)

In this appeal RMI Insurance Services challenges the denial of its motion to vacate an order confirming an arbitration award. RMI contends that it should have been granted relief under Code of Civil Procedure section 473[1] because it had made an excusable mistake of law in failing to raise the issue of offset during the proceedings to confirm the arbitration award. We find no abuse of discretion and affirm the order.

Background

In August 2003 respondent Tom Kelly sold his insurance business to RMI, an insurance agency, under a written agreement. In a separate agreement, RMI employed Kelly to retain existing business, collect and remit premiums, and procure new business for the agency. Both agreements provided for arbitration of all disputes over the terms and nature of the parties' relationship. The employment agreement specifically stated that

[1] All further statutory references are to the Code of Civil Procedure.

any arbitration award to Kelly would be subject to a right of offset for any material violations by Kelly of either agreement.

Kelly was to retain his position at RMI for three years. However, in September 2004, after only one year, RMI terminated Kelly's employment. Kelly demanded arbitration, claiming wrongful termination. RMI denied the allegation and asserted that it had properly terminated Kelly for cause under the employment agreement. The agency further asserted several affirmative defenses, including offset.

In August 2005, following a four-day liability hearing and submission of post-hearing briefs, the arbitrator ruled in Kelly's favor. The arbitrator determined that Kelly had been terminated without cause, contrary to the terms of the employment agreement.[2] He rejected RMI's claims that Kelly had made representations amounting to fraud or dishonesty in either the sale agreement or the performance of his duties as employee. In a bifurcated hearing on damages in November 2005, RMI raised the question of its right to offset Kelly's recovery with amounts he allegedly owed RMI under the sale agreement. In support of this claim, RMI submitted the calculations of its expert, who had determined that Kelly owed RMI $222,043.29 resulting from "attrition of commission" as described in the sale agreement. The expert had concluded that Kelly owed RMI $188,115.28 after deducting amounts due him for commissions, bonus, and rent.

On November 21, 2005, the arbitrator issued his final decision. He awarded Kelly a total of $231,094, consisting of $148,428 in damages, $68,800 for attorney fees, and $13,866 in costs. He did not address the subject of offset in his decision.

[2] "Cause" for immediate termination of Kelly had been defined in the employment agreement as fraud or dishonesty, commission of a crime against RMI under state or federal law, conviction of a felony, or loss of his insurance license. In addition, cause for Kelly's termination with notice and arbitration was permitted for intentional injury to the agency, its customers, or its assets, or a material default in his promise not to compete.

In December 2005 Kelly filed a petition to confirm the arbitrator's award. RMI urged dismissal of the petition on procedural grounds, but it did not specifically mention the arbitrator's omission of the offset issue.[3] On January 18, 2006, the superior court filed its judgment confirming the award. On February 8, 2006, RMI filed a purported cross-complaint under the same case number, alleging entitlement to an offset against Kelly's recovery and requesting a stay of the judgment. RMI elaborated on its "pending offset claim" in its opposition to Kelly's motion for an assignment order pursuant to section 708.510.

On February 28, 2006, the superior court heard Kelly's assignment motion and RMI's arguments in opposition. In its ensuing order on March 6, 2006, the court explained that "the issue of the relevance, pertinence, and amount of the 'attrition set off' was submitted to the arbitrator," but that for reasons the court could not determine, the arbitrator had omitted this issue in its decision and award. Because a final judgment had already been entered in the matter, the court deemed RMI's cross-complaint to be moot and the issues raised in connection with the assignment motion to be beyond its subject matter jurisdiction.

RMI moved to set aside the judgment under section 473 on the ground of "excusable inadvertence and/or mistake." RMI explained that it had inferred both from the arbitrator's silence on the offset issue and from "significant legal authority" that it was "unnecessary, if not inappropriate," to assert its offset right until the entry of judgment. It was only when the judge at the assignment hearing "suggested that in fact it was arguably an error on the part of the Arbitrator to not have addressed RMI's right to offset" did RMI

[3] RMI did obliquely allude to the narrow grounds reached by the arbitrator by pointing out that "[t]he arbitrator's decision and award was [*sic*] limited to the disputes and [Kelly's] accounting as described herein."

realize that it should have requested a correction of the award rather than waiting until after entry of judgment.

In his opposition, Kelly contended that the setoff issue was res judicata because RMI's claims against Kelly arising out of the sale agreement had been squarely before the arbitrator. RMI had failed to ask the arbitrator to rule on the issue or to seek correction of the award under section 1284. Even the proceedings on the petition to confirm the award were too late: the only authority the court had at that time was to correct or vacate the award on the limited grounds specified in section 1286.2 and section 1286.4. At this point, Kelly argued, under *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, any mistake the arbitrator might have made was not reviewable.

After initially expressing sympathy for RMI's position, the superior court agreed with Kelly that counsel's mistake of law was not excusable. The court pointed out that the arbitration system was clearly and firmly established as a means of promoting efficiency in the resolution of disputes. Accordingly, it was long settled that "everything has to be submitted which is of controversy and parties who opt for arbitration are at their peril, presume to know that that's the case." On March 28, 2006, the court filed its order denying RMI's motion to set aside the judgment. This appeal followed.

Discussion

Section 473, subdivision (b), allows the trial court, "upon any terms as may be just," to grant relief from a judgment that was entered against a party "through his or her mistake, inadvertence, surprise, or excusable neglect." The superior court has broad discretion to decide whether one of these conditions excuses the error and justifies relief. (*Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1007; *Freeman v. Goldberg* (1961) 55 Cal.2d 622, 625.) "In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent *person* under the same or similar circumstances" might have made the same error.' [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from

attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' . . . 'Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.' " (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.) "The controlling factors in determining whether a mistake of law is excusable are the reasonableness of the misconception and the justifiability of the failure to determine the correct law." (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611.)

The parties agree that the denial of relief to RMI for its mistake of law is reviewed for abuse of discretion. (*Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1354.) Accordingly, the superior court's ruling may not be disturbed absent a clear showing of abuse. (*Ibid;* accord, *Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th at p. 257.) " 'Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. [Citations.] We have said that when two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court.' " (*State Farm Fire & Casualty Co. v. Pietak*, *supra*, 90 Cal.App.4th at p. 610, quoting *In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598.) "More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court. Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will yet not be reversed unless, as a matter of law, it is not supported by the record." (*Martin v. Johnson* (1979) 88 Cal.App.3d 595, 604.)

Given this standard, we find no abuse of discretion in the circumstances presented. An attorney's ignorance of the general law governing arbitration procedure is not the kind of mistake that will justify vacation of a judgment. (Cf. *State Farm Fire & Casualty Co.*

v. Pietak, supra, 90 Cal.App.4th at p. 611.) As the superior court observed, the law relating to review and correction of arbitration awards was neither new nor complex. No significant changes had been made since the 1992 *Moncharsh* decision, in which the Supreme Court clarified that an arbitrator's decision normally may not be reviewed for errors of fact or law. (*Moncharsh v. Heily & Blasé, supra*, 3 Cal.4th at p. 11.) The general rule, consistent with the intent expressed in the sale and employment agreements here, is that "parties to a private arbitration impliedly agree that the arbitrator's decision will be both binding and final."[4] (*Id*. at p. 9.) "The arbitrator's decision should be the end, not the beginning, of the dispute." (*Id*. at p. 10.) The same reasoning applies to RMI's strategy in this case, where it sought to achieve a judicial determination of its setoff rights after completion of the arbitral process.

There is nothing new in the rule that parties are not free to enter into arbitration and then move to a judicial forum for issues the arbitrator either might have or could have already considered. Indeed, in *Moncharsh* the Supreme Court referred to one of its earliest decisions in which it had stated, " 'When parties agree to leave their dispute to an arbitrator, they are presumed to know that his award will be final and conclusive . . . .' (*Montifiori v. Engels* (1853) 3 Cal. 431, 434.)" (*Moncharsh, supra,* 3 Cal.4th at p. 10; see also *Lehto v. Underground Constr. Co.* (1977) 69 Cal.App.3d 933, 939 ["Once a valid award is made by the arbitrator, it is conclusive on matters of fact and law and all matters in the award are thereafter res judicata"].) RMI's purported distinction between ignorance and mistake notwithstanding, it is clear that it failed to appreciate the importance of ensuring that all important issues in the controversy be decided by the arbitrator to obviate forfeiture. Instead, it waited until the time for correction of the award by the arbitrator (§ 1284) had passed, the time for judicial correction or vacation

[4] Both agreements provided that "*all* disputes" between the contracting parties were to be "settled and finally determined by arbitration . . . "

(§ 1286, et seq.) had passed, and judgment had been entered. The subsequent "cross-complaint" for the offset was properly deemed moot, and the denial of the request to set aside the judgment was within the bounds of the superior court's broad discretion.

Disposition

The order denying RMI's motion to vacate the judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.