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'Gamesmanship' Throughout Litigation May Raise Risk of Sanctions on Appeal

Tim Kowal *April 01, 2022*

Some recent cases have suggested appellate courts might be more receptive to challenges to arbitration awards than in the past. But the Second District Court of

Appeal swung hard in the other direction in *McQueen v. Zhen Guang Huang* (Mar. 4, 2022, B304645) 2022 Cal.App.Unpub. Lexis [nonpub. opn.]. The court sanctioned the appellant and his counsel over $38,000 for challenging an arbitrator's award for legal error. Mere legal error is not a ground to overturn an arbitration award, so the appeal was doomed from the start. The court also pointed to appellant's "gamesmanship" in the trial court.

The plaintiff-appellant sued defendants for a breach of a contract to sell real property to the appellant. The matter was arbitrated, though after a circuitous route, due to the appellant's many efforts to avoid arbitration. (He first sued in federal court; the federal court ordered arbitration; the appellant took an appeal from that order, but it was a nonappealable order; he then unsuccessfully moved to compel mediation; he later filed in Superior Court and, once there, moved to compel arbitration, claiming it was defendants who were refusing to arbitrate.)

The arbitrator found the contract was void and dismissed the appellant's complaint. The appellant claimed this ruling exceeded the arbitrator's powers because how can the arbitrator void the arbitration agreement without undermining his very authority to arbitrate the dispute?

The Court of Appeal not only rejected this argument, it sanctioned the appellant and his counsel over $38,000 for taking a frivolous appeal.

Why did the court impose such steep sanctions? After all, the appellant's argument seemed to have at least plausible merit: The trial court had found the arbitration agreement to be valid, but the arbitrator found the agreement not to be valid, so certainly something seems at least a little amiss.

The Court of Appeal did reject appellant's argument, but not so forcefully that sanctions would follow from this alone. Instead, the bad faith litigation tactics in the trial court seemed to play a large role in the imposition of appellate sanctions.

First, the court noted that the appellant had never raised the argument in the trial court, so it was forfeited on appeal. (See *Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1406 [" 'As a general rule, failure to raise a point in the trial court constitutes ... waiver and appellant is estopped to raise that objection on appeal.' "].) Failing to raise the argument first in the trial court was in violation of bedrock rules of appellate procedure. (*Mundy v. Lenc, supra,* 203 Cal.App.4th at p. 1406.)

Second, the court rejected the appellant's implicit argument that the arbitrator lacked the power to find the agreement unenforceable. The court did not cite authorities directly on point, but did cite *Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1184 for the general proposition that arbitrators "have the power to decide any question of contract interpretation, historical fact or general law necessary, in the arbitrator's understanding of the case, to reach a decision," and that ' "[t]he arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement." ' [Citations.]" And besides, even if the arbitrator had erred, "Inherent in [the arbitrator's] power is the possibility the arbitrator may err in deciding some aspect of the case. Arbitrators 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.*)

> **Comment:** Note that the court did not take up the appellant's argument directly here: What role does the trial court's finding of a valid enforceable agreement play in the arbitration? None at all? And doesn't the existence of conflicting rulings on this point create a challenge to the order compelling arbitration? The opinion does not indicate whether the appellant challenged that order.

But what really seemed to bother the court was the appellant's litigation conduct in the trial court. The court noted that "plaintiff and its counsel have repeatedly engaged in abusive litigation tactics over the course of the more than six years this simple real estate dispute has been litigated." The court pointed to the fact that the appellant would not agree to arbitration and forced the defendants to file a motion to compel arbitration; that the appellant appealed the order granting arbitration (an order that was nonappealable); then refused to arbitrate and instead moved to compel mediation; then did a turnabout and moved to compel arbitration, "disingenuously claiming it filed this lawsuit to compel defendants to participate in the arbitration"; and then when arbitration commenced, the appellant sought to disqualify the arbitrator it had selected. Finally, the night before oral argument in the appeal, the appellant's counsel sought a continuance on the basis of a trial in another matter, neglecting to inform the Court of Appeal that the trial had been set weeks earlier. Then, at oral argument, counsel misrepresented his participation in the litigation below, claiming he only became involved later, contrary to court records.

The court concluded: "We find the conduct over the course of this protracted litigation is particularly egregious, and therefore grant the motion for sanctions.

(See *Nat'l Secretarial Serv. v. Froehlich* (1989) 210 Cal.App.3d 510, 526–527.)"

The court imposed $38,411 in sanctions jointly and severally against the appellant and his counsel, and sent the opinion to the State Bar.

The Upshot: Appellate sanctions usually are a high hurdle, and on the quality of the appellate arguments alone, I would not have rated sanctions remotely likely. The lesson of this opinion, then, is that the appellant's conduct in the trial court can play an outsized role in the imposition of appellate sanctions. If the appellant's conduct in the trial court creates an impression that the unsuccessful appeal is part of a pattern of driving up the expense of the litigation, then this can be a grounds for sanctions almost by itself.

When evaluating an appeal, always take into consideration the possibility of sanctions.

This article was originally published on the website of Thomas Vogele & Associates, APC.

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