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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROBERT J. BEKKEN,

Plaintiff and Appellant,

v.

FISHER & PHILLIPS, LLP, et al.,

Defendants and Respondents.

G038566

(Super. Ct. No. 07CC00716)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Robert Monarch, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed and remanded.

Jensen & Associates, Paul Rolf Jensen; The Bekken Law Group, Robert J. Bekken for Plaintiff and Appellant.

Paul, Hastings, Janofsky & Walker, William S. Waldo, Paul W. Cane, Jr., Christopher M. Bissonette, and Stephen L. Berry for Defendants and Respondents.

Concurrent with the filing of this opinion, we have filed our unpublished opinion in Robert J. Bekken's appeal from the order confirming an arbitration award entered in favor of his prior law firm Fisher & Phillips, LLP¹ (*Fisher & Phillips v. Bekken* (April 27, 2009, G038358 & G038683) [nonpub. opn.].) We incorporate that opinion by reference into this opinion, and will only repeat or expand upon facts as necessary to address the issues raised in this appeal.

In short, an arbitrator issued an award in favor of Fisher & Phillips, and against its former partner, Bekken. The firm sought to confirm the award in the Orange County Superior Court, and Bekken opposed the petition invoking the arbitration agreement's specially drafted provision calling for judicial review of legal and factual errors. Bekken also separately filed a petition to correct or vacate the award. The trial court considered both petitions at the same time. It deemed the special judicial review provision was invalid, and severed it from the contract. It dismissed the petition to correct or vacate the award, which is the subject of this appeal. As noted above, we have reviewed the order granting the petition to confirm the award and order awarding attorney fees in our concurrently filed opinion (*Fisher & Phillips v. Bekken* (April 27, 2009, G038358 & G038683) [nonpub. opn.]).

Our two opinions arise from Bekken's three separate notices of appeal. He appealed the confirmation order (case No. G038358) and separately appealed the attorney fee order (case No. G038683). These two appeals were consolidated by this court in June 2007. However, Fisher and Phillips opposed Bekken's motion to also consolidate his appeal of the dismissal of his petition to vacate (case No. G038566). In June 2007, this court denied his motion to consolidate case Nos. G038566 and G038358.

¹ In addition to the law firm, respondents include partners Roger K. Quillen, Thomas P. Rebel, John E. Thompson, Douglas R. Sullenberger, John E. Donovan, James J. McDonald, Jr., John M. Polson, Warren L. Nelson, Robert Yonowitz, Karl R. Lindegren, and Theresa M. Gallion. Collectively, the respondents will be referred to "Fisher & Phillips" or "the firm."

We reverse and remand the trial court's order dismissing Bekken's motion to correct or vacate the award. In making its rulings, the trial court did not have the benefit of the recent California Supreme Court decision *Cable Connection, Inc. v. DIRECTV Inc.* (2008) 44 Cal.4th 1334 (*DIRECTV*), holding an arbitration agreement may expressly provide for judicial review of the arbitration award. In light of that well-reasoned and binding decision, we must reverse the trial court's order denying judicial review and the judgment confirming the arbitration award. Because our record is insufficient to review the claimed legal and factual errors, we remand to the trial court to review in the first instance the arbitration award.

I

As noted above, we have incorporated by reference, and need not repeat, the background and procedural facts discussed in *Fisher & Phillips v. Bekken* (April 27, 2009, G038358 & G038683) [nonpub. opn.] Bekken formerly was a legal partner in the firm Fisher & Phillips, and he executed a partnership agreement containing a lengthy arbitration provision. In this appeal, the parties dispute whether the trial court should have severed the clause expanding jurisdiction to review the arbitrator's factual and legal errors.

Fisher & Phillips contend the arbitration agreement at issue expressly provides all "enforcement proceedings" are to be governed by the FAA. It argues the case is therefore distinguishable from *DIRECTV* because the arbitration agreement provided only the conduct of arbitration itself, not post-arbitration enforcement proceedings were governed by the FAA. It concludes its agreement is governed by the FAA, which does not permit judicial review for errors of law, as recently decided by the United States Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.* (2008) 552 U.S. ___ [128 S.Ct.1396] (*Hall Street*). On the other hand, Bekken argues in his letter brief the *DIRECTV* case is dispositive in this case. He agrees the FAA was selected to govern any dispute, but argues the FAA's vacatur and confirmation procedures apply in

federal district court, not California state courts. He concludes the vacatur process is governed by state procedural law, and accordingly *DIRECTV* governs this case. He is correct.

A. Evolution of the California Rule

In *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 33 (*Moncharsh*), the California Supreme Court reaffirmed the general rule, also known as the California rule, that trial and appellate courts may only review an arbitrator's decision on the bases set forth by the California Arbitration Act (CAA) (Code Civ. Proc., § 1280 et seq.), even if the arbitrator award is erroneous on its face and results in substantial injustice.

In this case, the trial court, relying on *Crowell v. Downey Community Hospital Foundation* (2002) 95 Cal.App.4th 730 (*Crowell*), concluded it lacked jurisdiction to review the arbitration award for factual or legal error. The *Crowell* court also determined the judicial review provision in an arbitration agreement was invalid because in light of the Legislature's limitations on the court's jurisdiction to review arbitration awards "parties cannot expand that jurisdiction by contract to include a review on the merits." (*Id.* at p. 739.)

As noted above, while this appeal was pending, the California Supreme Court decided *DIRECTV, supra*, 44 Cal.4th 1334. Our Supreme Court disapproved *Crowell* and held "parties may limit the arbitrator[']s authority by providing for [judicial] review of the merits in the arbitration agreement." (*Id.* at p. 1364.) In other words, contracting parties can take themselves outside the California rule by clearly agreeing the dispute is to be determined according to the rule of law and that the parties intend the award is reviewable for legal error.

B. The FAA and CAA

Fisher & Phillips assert *DIRECTV* permits parties to expressly provide for judicial review of the arbitrator's award when the contract is governed solely by the CAA, but not when the arbitration agreement states it is to be "enforced" under the FAA

(citing *Hall Street, supra*, 552 U.S. ___ [128 S.Ct.1396]). As we will explain, this argument was rejected by the California Supreme Court in *DIRECTV, supra*, 44 Cal.4th at pages 1350-1351.

The United States Supreme Court decision in *Hall Street* addressed the question of “whether statutory grounds [under title 9 U.S.C. sections 9, 10, and 11 of the FAA (hereafter referred to as §§ 9, 10, 11)] for prompt vacatur and modification may be supplemented by contract.” (*Hall Street, supra*, 552 U.S. at p. ___ [128 S.Ct. at p. 1400].)² The arbitration agreement in *Hall Street* allowed for judicial review for legal error. The United States Supreme Court held §§ 10 and 11 provided the exclusive means of review for parties seeking expedited review under the FAA. The Court noted in its opinion that it was speaking “only to the scope of the expeditious judicial review under §§ 9, 10, and 11 [of the FAA], deciding nothing about other possible avenues for judicial

² “Under the terms of § 9, a court ‘must’ confirm an arbitration award ‘unless’ it is vacated, modified, or corrected ‘as prescribed’ in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one.” (*Hall Street, supra*, 128 S.Ct. at p. 1402, fn. omitted.)

Section 10(a) provides for an award to be vacated: [¶] “(1) where the award was procured by corruption, fraud, or undue means; [¶] (2) where there was evident partiality or corruption in the arbitrators, or either of them; [¶] (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or [¶] (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

Section 11 allows for the modification of an award “(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award. [¶] (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. [¶] (c) Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.”

enforcement of arbitration awards.” (*Hall Street, supra*, 552 U.S. at p. ___ [128 S.Ct. at p. 1406].)

The California Supreme Court in *DIRECTV*, before reaching the merits of the enforceability of the parties’ agreement for judicial review of legal error, addressed whether the issue was preempted under federal law. (*DIRECTV, supra*, 44 Cal.4th at pp. 1350-1352.) It framed the issue as follows: “The [plaintiffs] in this case urge us to follow the rationale of the *Hall Street* majority. They contend that any other construction of the CAA would result in its preemption by the FAA. Alternatively, they argue that *Hall Street* provides a persuasive analysis of the FAA that should be applied to the similar CAA provisions governing judicial review. We consider first the question of preemption, because if the dealers are correct on that point, it would be fruitless to consider alternate interpretations of state law.” (*Id.* at p. 1350, fn. omitted.)

Our Supreme Court rejected the preemption argument, explaining, “Section 2 of the FAA, declaring the enforceability of arbitration agreements, ‘create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.’ The FAA governs agreements in contracts involving interstate commerce, like those in this case. The United States Supreme Court has frequently held that state laws invalidating arbitration agreements on grounds applicable only to arbitration provisions contravene the policy of enforceability established by section 2 of the FAA, and are therefore preempted. [¶] However, ‘the United States Supreme Court does not read the FAA’s procedural provisions to apply to state court proceedings.’ Sections 3 and 4 of the FAA, governing stays of litigation and petitions to enforce arbitration agreements, do not apply in state court. As we have noted, the provisions for judicial review of arbitration awards in sections 10 and 11 of the FAA are directed to ‘the United States court in and for the district wherein the award was made.’ We have held that similar language in sections 3 and 4 of the FAA reflects Congress’s intent to limit the application of those provisions to federal courts.” (*DIRECTV, supra*, 44 Cal.4th at

pp. 1350-1351, internal citations omitted.)

Our Supreme Court noted several California Courts of Appeal “have rejected claims that the FAA grounds for reviewing arbitration awards preempt their CAA counterparts. [Citations.] [For example, the court in *Siegel v. Prudential Ins. Co.* (1998) 67 Cal.App.4th 1270, 1289], . . . after reviewing the legislative history of the FAA, noted that ‘[n]othing in the legislative reports and debates evidences a congressional intention that postaward and state court litigation rules be preempted so long as the basic policy upholding the enforceability of arbitration agreements remained in full force and effect.’ [Citation.] [¶] Thus, as [decided in the appellate courts], the FAA’s procedural provisions are not controlling, and the determinative question is whether CAA procedures conflict with the FAA policy favoring the enforcement of arbitration agreements. [Citations.]” (*DIRECTV, supra*, 44 Cal.4th at p. 1352, fn. omitted.)

With respect to the United States Supreme Court’s ruling in *Hall Street*, the California Supreme Court reasoned, “Before *Hall Street*, we would have had no difficulty concluding that enforcing agreements for judicial review on the merits is consistent with the fundamental purpose of the FAA. The high court has made it clear that the FAA does not ‘prevent[] the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA’s primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate [citation], so too may they specify by contract the rules under which that arbitration will be conducted. Where . . . the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA. . . . By permitting the courts to “rigorously enforce” such agreements according to their terms [citation], we

give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.’ [Citation].” (*DIRECTV, supra*, 44 Cal.4th at pp. 1352-1353, citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, 479.)

Our Supreme Court further elaborated, “The court has repeatedly ruled that the terms of the parties’ agreement are controlling over considerations of expediency in the dispute resolution process. ‘After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties’ wishes [citation], but to ensure that commercial arbitration agreements, like other contracts, ““are enforced according to their terms,”” [citations], and according to the intentions of the parties [citations].’ [Citations.] The court has viewed the federal policy served by the FAA as ‘at bottom a policy guaranteeing the enforcement of private contractual arrangements.’ [Citations.] [¶] The *Hall Street* majority, however, brushed aside policy considerations favoring the enforcement of contractual arbitration arrangements, concentrating instead on whether ‘the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.’ [Citation.] Underlying the FAA provisions governing judicial review, it discerned ‘a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.’ [Citation.]” (*DIRECTV, supra*, 44 Cal.4th at p. 1353, citing *Hall Street, supra*, 552 U.S. at p. __ [128 S.Ct. at p. 1405].)

The California Supreme Court concluded, “Nevertheless, we do not believe the *Hall Street* majority intended to declare a policy with preemptive effect in all cases involving interstate commerce. *Hall Street* was a federal case governed by federal law; the court considered no question of competing state law. It reviewed the application of FAA provisions for judicial review that speak only to the federal courts. The court unanimously left open other avenues for judicial review, including those provided by state statutory or common law. (*Hall Street, supra*, 552 U.S. at p. __ [128 S.Ct. at pp.

1406, 1410] (dis. opns. of Stevens, J., and Breyer, J.).) While the court, of course, *decided* nothing about the viability of these alternatives, their mention in the majority opinion indicates that *Hall Street's* holding on the effect of the FAA is a limited one.” (*DIRECTV, supra*, 44 Cal.4th at pp. 1353-1354, fn. omitted.)

In addition, our Supreme Court determined the disposition in *Hall Street* was limited, stating, “the *Hall Street* majority’s disposition of the case before it suggests that its interpretation of sections 10 and 11 of the FAA does not preclude other grounds for review. Rather than simply affirming the reversal of the judgment modifying the arbitrator’s award, the majority vacated and remanded for consideration of the trial court’s authority to approve the parties’ agreement as a matter of case management under the Federal Rules of Civil Procedure. Had the majority meant to impose a *uniform* national policy *requiring* judicial review solely on the grounds stated in the FAA, it would not have left open the possibility of trial court review under its ‘case management authority independent of the FAA.’ [Citation.]” (*DIRECTV, supra*, 44 Cal.4th at p. 1354.)

Based on the above legal analysis, the California Supreme Court concluded, “The *Hall Street* holding is restricted to proceedings to review arbitration awards under the FAA, and does not require state law to conform with its limitations. Furthermore, a reading of the CAA that permits the enforcement of agreements for merits review is fully consistent with the FAA ‘policy guaranteeing the enforcement of private contractual arrangements.’ [Citations.]” (*DIRECTV, supra*, 44 Cal.4th at p. 1354.)

We are of course bound by our California Supreme Court’s decision in *DIRECTV* and, as a result, must reject Fisher & Phillip’s argument the FAA preempts the parties’ express contractual agreement for judicial review of legal error by an arbitrator. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [state Supreme Court decisions binding on all other state courts in California].)

The arbitration agreement in the case before us provided: “Article XIV [the binding arbitration clause] and this Appendix [outlining the terms of dispute resolution] shall be enforced under the FAA.” We reject Fisher & Phillips’s contention that by this provision the parties intended to impose federal procedural provisions upon the state courts. As discussed in *DIRECTV*, section 2 of the FAA declares the *enforceability* of arbitration agreements, which certainly preempts any state law invalidating arbitration agreements. (*DIRECTV, supra*, 44 Cal.4th at pp. 1350-1351.) Here, the arbitration agreement was “enforced” because the parties in fact arbitrated their dispute.

As determined by our Supreme Court, the FAA’s procedural provisions for reviewing arbitration awards do *not preempt* their CAA counterparts. (*DIRECTV, supra*, 44 Cal.4th at p. 1351.)³ This would necessarily include California’s procedural provisions for *enforcing* or vacating awards post-arbitration (Code Civ. Proc., §§ 1285, 1285.4, 1286.2 (to vacate), 1286.6 (for correction)). The agreement does not expressly designate the FAA post-arbitration statutory provisions (9 U.S.C. §§ 10 & 12). By seeking to confirm the award in a California state court, and not federal court, the parties availed themselves of the CAA and this state’s procedural provisions.

³ Moreover, as noted by Bekken in his letter brief, the FAA procedural provisions are specific to the federal courts. “[T]he United States Supreme Court does not read the FAA’s procedural provisions to apply to state court proceedings. Sections 3 and 4 of the FAA, governing stays of litigation and petitions to enforce arbitration agreements, do not apply in state court. As we have noted, the provisions for judicial review of arbitration awards in sections 10 and 11 of the FAA are directed to ‘the United States court in and for the district where the award was made.’ We have held that similar language in sections 3 and 4 of the FAA reflects Congress’s intent to limit the application of those provisions to federal courts.” (*DIRECTV, supra*, 44 Cal.4th at p. 1351, internal citations and quotation marks omitted; see also *Siegel v. Prudential Ins. Co.* (1998) 67 Cal.App.4th 1270, 1290-1291 [§ 10 is procedural and by its terms applies only in federal district courts]; *Ovitz v. Schulman* (2005) 133 Cal.App.4th 830, 851-852 [“[The FAA’s] language strongly suggests that sections 10 and 12 apply only to federal district courts, not state trial courts[.]”].)

We conclude the matter must be remanded. The parties expressly agreed, “In any action to modify or vacate the Award, the reviewing court shall accord the Award of the Arbitrator such deference as a court of appeals would accord a judgment of a trial judge sitting without a jury, and the Arbitrator shall be deemed to have exceeded his authority if the Award is based on an error of law or a clearly erroneous finding of fact.” Because the trial court concluded this provision for judicial review was unenforceable, it did not reach any of Bekken’s arguments regarding the merits of the arbitration award. Our record is insufficient to review those issues on appeal and we remand to the trial court to review in the first instance the arbitration award for errors of law or “clearly erroneous findings of fact” under the Supreme Court’s decision in *DIRECTV*. (See *Daun v. USAA Casualty Ins. Co.* (2005) 125 Cal.App.4th 599, 610.)

II

We reverse the trial court’s order denying judicial review and denying Bekken’s petition to correct or vacate the arbitration award. We remand for consideration of Bekken’s challenges to the arbitration award. Appellant shall recover his costs on appeal.

O’LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.