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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JUNG H. BAE, et al., Plaintiffs and Respondents, v. NAM OH PARK, Defendant and Appellant.	B284995 (Los Angeles County Super. Ct. No. BC586911)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Raphael, Judge. Affirmed.

Martorell Law, Eduardo Martorell, Megan Atkinson and Jill Thomas for Defendant and Appellant.

Park & Lim, S. Young Lim, Jessie Y. Kim and Dennis McPhillips for Plaintiffs and Respondents.

INTRODUCTION

Nam Ho Park appeals from a judgment confirming an arbitration award in favor of Jung H. Bae, Eun Lee, and Young Oh (collectively, plaintiffs), arguing they procured the award by corruption, fraud, or other undue means. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

A. *Plaintiffs Sue Kang, Park, and Their Companies for Fraud and Other Causes of Action*

Plaintiffs filed this action against Chris Kang, Park, ZB Trading, Zenith Bridge, LLC (Nevada), and Zenith Bridge, LLC (California). Plaintiffs alleged Kang and Park were "partners" in and alter egos of the three entity defendants. Plaintiffs alleged that Kang made misrepresentations about investment in foreign currency trading and that, in reliance on those misrepresentations, they invested money with Kang and his companies and lost their investments. Plaintiffs alleged causes of action for money had and received, violation of California securities law, fraud in the sale of securities, fraud, breach of fiduciary duty, negligent misrepresentation, and conversion.

B. *Kang Settles, Park Arbitrates In Absentia*

The trial court ordered the parties to binding arbitration pursuant to a written agreement. Attorneys David Marh and Simon Langer represented Kang and Park in the arbitration.

According to Park, Marh called Park a few days before the arbitration and asked him to attend the hearing. Park told Marh he could not attend because he had booked a flight to Korea that left one day before the arbitration hearing. Because Park was

upset and uncomfortable not attending the arbitration, he met with Marh, Langer, and Kang before he left for Korea. Kang assured Park he would take care of the arbitration. Marh told Park that he would represent him in the arbitration and that Park did not need to attend the hearing. Park left for Korea and did not attend the arbitration hearing.

Marh and Langer filed an arbitration brief stating, among other things: "Defendant Nam Ho Park is alleged to be a partner of defendant Kang (however, he has nothing to do with these transactions, nor is he affiliated with ZB Trading). He was a former customer of ZB Trading as a trader. He also at one time signed a Memorandum of Understanding of possibly investing in the company, but that never happened. It is unclear why he is being sued."

At the arbitration hearing, plaintiffs presented evidence in support of their claims, after which the parties discussed settlement. Langer called Park in Korea and asked whether he wanted to settle, and Park said he did not. The parties, except Park, entered into a settlement in which Kang agreed to pay plaintiffs $70,000 by a certain date, followed by six monthly payments of $2,500, for a total of $85,000. The parties, other than Park, also agreed to a stipulated judgment in the amount of $230,000, which would be "tolled" (presumably meaning that plaintiffs would not file the stipulated judgment) so long as Kang made the specified payments. The settlement agreement provided the arbitration would resume against Park, but the arbitrator would hold the decision pending Kang's compliance with the settlement agreement. On written notice to the arbitrator that Kang had not made the promised payments, the

arbitrator within 10 days would render a written decision on the claims against Park. The arbitration then resumed as to Park.

Kang did not make the initial $70,000 payment on time. According to Park: "After the arbitration, . . . Kang told me he was going to pay $85,000 to settle the case and that I would have no liability. I believed he was going to pay. However, . . . Kang later said to me that he was sorry but he had no money."

On March 20, 2017, after plaintiffs notified the arbitrator Kang had defaulted, the arbitrator issued his award. The arbitrator found: "It was further established through his Counsel that Nam Ho Park had due notice of the arbitration order and hearing date and that he failed to appear." The arbitrator found Park "did act as partner to Defendant Chris Kang and did assist and take part in the frauds alleged to have been perpetrated against the Plaintiffs in connection with offers and sale of interests in the Defendant entities and the taking of funds from the Plaintiffs for the so called 'investment' in foreign exchange trading." The arbitrator further found that, "through the fraudulent acts alleged and proven by the testimony and documents provided by the parties at the arbitration," plaintiffs "suffered losses" and that Park was "responsible for those losses."

The arbitrator ordered Park to pay Bae $30,000, Lee $110,000, and Oh $78,000. The arbitrator ruled plaintiffs' claims against the other defendants were "resolved in their entirety by means of their consent to the stipulated judgment to be entered in the amount of $230,000.00."

C. *The Trial Court Confirms the Award*

Plaintiffs filed a petition to confirm the arbitration award. Park opposed the petition and filed a motion to vacate the award, but his opposition and moving papers were untimely. As a result, the court took Park's motion to vacate off calendar and stated that it would disregard Park's opposition to the petition to vacate. The court went on to rule, however, that even if the court were to consider Park's opposition, it would still confirm the award. The court found that "Park's declaration is internally inconsistent. While he argues on one hand that counsel somehow duped him into not being present at the arbitration hearing, he states that counsel actually requested his presence at arbitration. . . . Park declined to participate because he had booked a flight to Korea. . . . Further, Park admits that he was called by the attorney on the day of the arbitration to participate in the settlement discussions telephonically. . . . Park stated that he did not want to settle, and then states that his phone disconnected. . . . Park offers no explanation suggesting that counsel's representation that his presence was unnecessary was false." The court also ruled Park had failed to satisfy the elements of extrinsic fraud because he had not demonstrated he had a meritorious defense, he did not address the arbitrator's finding he had "aided and abetted or conspired with Kang sufficient[ly] to impute vicarious liability," and his excuse was unsatisfactory because he "knew about the arbitration, yet elected to travel instead." The court granted plaintiffs' petition to confirm the arbitration award and ordered them to submit a proposed judgment within 10 days.

Park filed a motion for reconsideration and a supporting declaration from his new attorney, Megan Atkinson. Atkinson,

who had represented Park at the hearing on the petition to confirm the arbitration award, stated: "Following the hearing, Mr. Langer and I spoke in the hallway . . . . Mr. Langer said that he learned for the first time during the arbitration that . . . Kang had changed the headers of documents he presented to Plaintiffs to reflect a company affiliated with . . . Park. He said Plaintiffs used those documents to establish . . . Park's liability. He also told me that the documents . . . Kang had produced before the arbitration had different headers on them."[1]

Two weeks later, without having ruled on Park's motion for reconsideration, the trial court entered the judgment confirming the arbitration award. The trial court subsequently ruled it did not have jurisdiction to rule on Park's motion for reconsideration because the court had entered judgment. The court took Park's motion for reconsideration off calendar. Park did not move to set aside the judgment to allow the court to hear his motion for reconsideration.[2] Instead, he filed a timely notice of appeal from the judgment.

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[1] Plaintiffs objected that Langer's alleged statements were inadmissible hearsay.

[2] Park argues for the first time in his reply brief that the trial court should not have entered the judgment while Park's motion for reconsideration was pending and that this court should remand the matter to allow the trial court to consider his motion. By failing without explanation to make this argument in his opening brief, Park forfeited it. (See *California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1050; *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 958, fn. 2; *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 789, fn. 10.)

DISCUSSION

A. *Applicable Law and Standard of Review*

"Generally, courts cannot review arbitration awards for errors of fact or law." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 916; see *Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775 [a court may not vacate or correct an arbitration award because of the arbitrator's legal or factual error].) There are, however, statutory exceptions to the general rule. (Code Civ. Proc., § 1286.2;[3] see *Baker Marquart LLP v. Kantor* (2018) 22 Cal.App.5th 729, 739 ["[t]here are statutory exceptions . . . to this general 'no review' rule"]; *Pour Le Bebe, Inc. v. Guess? Inc.* (2003) 112 Cal.App.4th 810, 825 (*Pour Le Bebe*) ["[t]he exclusive grounds for judicial review of arbitration awards are those found in the statutes governing arbitration"].) A court must vacate an arbitration award if, among other circumstances, the court determines that "[t]he award was procured by corruption, fraud or other undue means." (§ 1286.2, subd. (a)(1); see *Richey,* at p. 916 ["courts are authorized to vacate an award if it was . . . procured by corruption, fraud, or undue means"]; *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 676 [same].) Park relies on this statutory exception.

We review de novo the trial court's order confirming an arbitration award. (See *ECC Capital Corp. v. Manatt, Phelps & Phillips, LLP* (2017) 9 Cal.App.5th 885, 900 (*ECC Capital*) [""[o]n appeal from an order confirming an arbitration award, we review the trial court's order (not the arbitration award) under a de novo standard""]; *Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1217

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[3] Undesignated statutory references are to the Code of Civil Procedure.

[same].) But "'"[t]o the extent that the trial court's ruling rests upon a determination of disputed factual issues, we apply the substantial evidence test to those issues."'" (*ECC Capital*, at p. 900; accord, *Toal*, at p. 1217.) An appellate court must draw every reasonable inference to support a judgment confirming an arbitration award. (*Alexander v. Blue Cross of California* (2001) 88 Cal.App.4th 1082, 1087; *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 24.) "The party [challenging] an arbitration award bears the burden of establishing . . . that the party was prejudiced . . . ." (*Royal Alliance Associates, Inc. v. Liebhaber* (2016) 2 Cal.App.5th 1092, 1106; see *Comerica Bank v. Howsam* (2012) 208 Cal.App.4th 790, 826 [appellants "must show they were prejudiced by the alleged corruption, fraud or undue means"].)

B. *Park Did Not Show the Arbitration Award Was Secured by Undue Means*

An arbitration award may be secured by undue means within the meaning of section 1286.2, subdivision (a)(1), when counsel with a conflict of interest represents a party to the arbitration. (See *Comerica Bank v. Howsam, supra,* 208 Cal.App.4th at p. 825 ["[u]ndue means can include representation of a party where an attorney is operating under a conflict of interest"]; *Pour Le Bebe*, *supra*, 112 Cal.App.4th at pp. 825-837 [conflicted representation may constitute undue means and a ground for vacating an arbitration award].) The party challenging the arbitration award must show "by clear and convincing evidence that a conflict existed, and that [the conflict] had a substantial impact on the [arbitrator's] decision." (*Pour Le Bebe*, at p. 837; see *Maaso v. Signer* (2012) 203 Cal.App.4th

362, 374 ["'the moving party needs to demonstrate a nexus between the award and the alleged undue means used to attain it'"].)

Park argues the arbitration award was procured by undue means because Langer learned during the arbitration that Kang had falsified documents to implicate Park, that plaintiffs relied on those documents to establish Park's liability, and that Langer remained silent and protected Kang at Park's expense. Park concludes Langer had an actual conflict of interest, which had a substantial impact because the arbitrator's decision was "based on Kang's fraud."

Park has not shown by clear and convincing evidence, however, that Marh or Langer had a conflict of interest. Park relies on a statement in Atkinson's declaration that repeats what Langer told her: Kang falsified documents. Langer's statement was hearsay (to which plaintiffs objected), and Park does not argue in his opening brief that any exception to the hearsay rule applied. (Evid. Code, § 1200; see *In re I.C.* (2018) 4 Cal.5th 869, 884 ["[a]s a general rule, an out-of-court statement offered for the truth of its contents is inadmissible in evidence"]; *People v. Garton* (2018) 4 Cal.5th 485, 506 [out-of-court statements considered for their truth are hearsay]; *Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1266 [hearsay evidence is not admissible where no exception to the hearsay rule applies].)[4]

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[4] Park asserts in one sentence of his reply brief that Langer's statements was admissible under Evidence Code section 1230 as "an admission against interest." Assuming Park preserved this argument, however, Evidence Code section 1230 requires witness unavailability, and there is no evidence Langer was unavailable. (See *People v. Grimes* (2016) 1 Cal.5th 698, 741 [proponent of evidence under Evidence Code section 1230 "'must show that the

Moreover, even if Park could establish with admissible evidence that Langer had a conflict of interest, there is no clear and convincing evidence the conflict had a substantial, or even any, impact on the arbitrator's decision. Park suggests Langer allowed plaintiffs to introduce falsified documents to establish Park's liability because Langer had a conflict of interest. There is no record, however, of the evidence the arbitrator heard. There is no evidence that plaintiffs introduced falsified documents at the arbitration hearing or that the arbitrator relied on any falsified documents to find Park liable for fraud, let alone that the documents were, as Park asserts, "the entire basis" for the arbitrator's finding. We cannot presume fraudulent or falsified evidence was the sole (or any) basis for the arbitrator's findings against Park. Indeed, we must presume the contrary. (See *ECC Capital*, *supra*, 9 Cal.App.5th at p. 908 ["[i]n determining whether 'perjured evidence or evidence procured by undue means' affected an arbitration award, we must presume the arbitrator "'took a permissible route to the award where one exists'"'"]; *Pour Le Bebe*, *supra*, 112 Cal.App.4th at p. 831 [same].)

C. *Park Did Not Show the Arbitration Award Was Secured by Extrinsic Fraud*

"Fraud, as that term is used in section 1286.2, subdivision (a)(1), is that perpetrated by the arbitrator or a party. Only extrinsic fraud which denies a party a fair hearing may serve as a basis for vacating an award." (*Comerica Bank v. Howsam*, *supra*, 208 Cal.App.4th at p. 825; see *Pacific Crown Distributors v. Brotherhood of Teamsters* (1986) 183 Cal.App.3d 1138, 1147

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declarant is unavailable"'].) Indeed, Langer was in court with Atkinson at the hearing on the petition to confirm.

["'[e]xtrinsic' fraud is that conduct which 'results in depriving either of the parties of a fair and impartial hearing to their substantial prejudice'"].) Extrinsic fraud's "'essential characteristic is that it has the effect of preventing a fair adversary hearing, the aggrieved party being deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.'" (*Pour Le Bebe*, *supra*, 112 Cal.App.4th at p. 828; see *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290 [""'[e]xtrinsic fraud [sufficient to set aside a judgment] occurs when a party is deprived of the opportunity to present his claim or defense to the court; where he was kept ignorant or, other than from his own negligence, fraudulently prevented from fully participating in the proceeding"].) To vacate a judgment on the ground of extrinsic fraud, the party seeking such equitable relief "'must show three elements: (1) a meritorious defense (2) a satisfactory excuse for not presenting a defense in the first place; and (3) diligence in seeking to set aside the [judgment] once discovered." (*Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1025; accord, *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750.)

Putting aside that Park's attorneys were not arbitrators or parties to the arbitration (see *Comerica Bank v. Howsam*, *supra*, 208 Cal.App.4th at p. 825), Park has not shown the conduct of his attorneys amounted to extrinsic fraud that denied him a fair hearing. Park argues his attorneys "repeatedly put Kang's interests over Park's interests," prevented Park from attending the arbitration, and negotiated a settlement that left Park "open to huge exposure should [Kang] default." Park, however, has not demonstrated he has a meritorious defense. He cites assertions in the arbitration brief his attorneys prepared for the arbitration

that Park was not Kang's partner and was not involved in the transactions that gave raise to plaintiffs' claims. But Park did not present evidence in support of those assertions. (See *In re Marriage of Duris & Urbany* (2011) 193 Cal.App.4th 510, 515 ["[t]he allegations of a brief are not evidence and a brief is not a sworn document"]; *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 79 ["'[s]tatements of fact contained in . . . briefs which are not supported by the evidence in the record must be disregarded'"].)

Moreover, Park did not show he had a satisfactory excuse for not attending the arbitration and testifying in support of his defense. Park knew the arbitration was going to take place, and there was no evidence that anyone or anything prevented him from participating. Indeed, Park's attorneys asked him to attend the arbitration (albeit on short notice), but he chose to travel to Korea. Counsel told Park his presence at the arbitration was not required only after Park said he was not going to attend. Park also declined to participate telephonically in the settlement discussions.

Finally, Park did not display much diligence. His petition to vacate the award and his opposition to the petition to confirm the award were untimely, and the trial court found Park made no attempt to show good cause to allow the late opposition. (See § 1290.6 ["[t]he time [to respond] may be extended . . . for good cause, by order of the court"].)

DISPOSITION

The judgment is affirmed. Bae, Lee, and Oh are to recover their costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.