Supreme Court Case No. S243029

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ALAN HEIMLICH,

Plaintiff and Respondent,

vs.

SHIRAZ M. SHIVJI,

Defendant and Appellant

SUPREME COURT CASE NO. S243029

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL

SIXTH APPELLATE DISTRICT, CASE NO. H042641

HON. WILLIAM J ELFVING, SUP. CT. CASE NO. 112CV231939

REPLY BRIEF ON THE MERITS

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I. ARGUMENT

A. The AAA Rules Do Not Mirror the California Rules of Court and the Court Cannot Retroactively Require Them To.

In its Opinion, the Sixth District left open the question of "timeliness" of a post-final award request for costs, which Shivji attempts to correct by suggesting to this Court that it replace the AAA Rules with the California Rules of Court. In fact, Shivji's entire argument is that the mechanism by which parties may request costs after entry of judgment under the California Rules of Court should be retroactively applied to this case, which proceeded in Arbitration.

However, the AAA Rules differ in clear and significant ways from the California Rules of Court, including as to the timing of the apportionment of costs. As set forth in detail in the Opening Brief, the AAA Rules do not provide for post-award requests for costs.

Shivji is required to comply with the AAA Rules, and the existing case law (*Maaso v. Signer* (2012) 203 Cal. App. 4th 362 and *White v. Western Title Ins. Co.* (1985) 40 Cal. 3d 870) consistent with these rules. Shivji cannot petition to compel arbitration and then later require that the arbitrator follow the California Rules of Court. He is not permitted to re-write the AAA Rules, nor should the Sixth District have done so.

B. The AAA Rules Do Not Permit an After-Final Award.

The facts are undisputed: Shivji did not request costs, nor reserve the right to request costs, until after the Arbitrator issued a final award. The Arbitrator could not have been more clear: "Each side will bear their own

attorneys' fees and costs. This Award is intended to be a complete disposition of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied." (AA: Vol. 1, 125). The Arbitrator further clarified his intention that the final award be final, including as to costs, after Shivji made his untimely request for costs: "As discussed in the Award, whatever may have been the costs, fees, etc. associated with the Santa Clara litigation were to be borne by the parties ..." (AA: Vol. 1, 160)

In an attempt to garner support for his argument that the Court should re-write the AAA Rules and allow him costs in this case, Shivji has cited several cases holding that an arbitrator can issue a "supplemental" award after a final award. Shivji uses these cases to make the further leap that the Court should require the arbitrator to do so in this case.

However, these cases are easily distinguished: in each case, it was the arbitrator's decision to make such a partial or supplemental award, which the Court merely upheld. Here, Shivji is asking the Court to supplant the Arbitrator's authority, when it was Shivji's mistake, not the Arbitrator's, which Shivji would like to correct.

In *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 Cal. App. 4th 865 and *A.M. Classic Construction, Inc. v. Tri-Build Development Co.* (1999) 70 Cal. App. 4th 1470, after the arbitrator amended the arbitration award, the Court considered whether the arbitrator could properly do so. Finding that the arbitrator had such authority, the Second District Court held that "to deny arbitrators the authority to complete their task under such circumstances elevates form over substance." *Century* at 880 citing *A.M. Classic* at 1478.

In its decision, the *Century* Court cited *Moshonov v. Walsh* (2000) 22 Cal. 4th 771 and *Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1: "[The California Supreme Court] has rejected the view that a court may vacate or

correct the award because of the arbitrator's legal or factual error, even an error appearing on the face of the award. [A]rbitrators do not 'exceed their powers' within the meaning of section 1286.2, subdivision (d) and section 1286.6, subdivision (b) merely by rendering an erroneous decision on a legal or factual issue, so long as the issue was within the scope of the controversy submitted to the arbitrators. 'The arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement.' " *Moshonov v. Walsh* (2000) 22 Cal. 4th 771, 775-776, quoting *Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 8-28.

Shivji has also cited cases wherein the arbitrator reserved the authority to make supplemental awards. These are similarly irrelevant.

In *Hightower v. Superior Court* (2001) 86 Cal. App. 4th 1415, the Arbitrator issued a partial final award, reserving the right to make incremental awards as necessary pursuant to the reciprocal buy sell agreement. *Hightower* at 1419. Again, the Arbitrator made this crucial decision, not the Court, who merely upheld it.

In both *Britz, Inc. v. Alfa-Laval Food & Dairy Co.* (1995) 34 Cal. App. 4th 1085 and *Evans v. CenterStone Development Co.* (2005) 134 Cal. App. 4th 151, the Arbitrators provided that the prevailing party be awarded its attorneys fees and costs, to be made by supplemental award upon receipt and analysis of supporting documentation. Again, the Court upheld the arbitrator's right to make these interim and supplemental awards.

In each of these cases, the Arbitrator pre-determined that the Award was not final, and reserved the right to make additional rulings. In each of these cases, the Court upheld the Arbitrator's authority to reserve this right. None of these cases adjudicate whether an Arbitrator can make a supplemental ruling after issuing a final award, and none of these rulings overturn the final judgment of the Arbitrator and replace it with that of the Court. Thus, they are inapplicable.

C. *Maaso's* Clear Mandate Does Not Require Explicit Instructions to be Enforceable.

Maaso v. Signer (2012) 203 Cal. App. 4th 362, has been law since 2012. Until the Sixth District's Opinion in this case, the Second, Fourth, and even the Sixth District Court of Appeal (and possibly others) consistently upheld *Maaso*. Following *Maaso* (and prior to it), other litigants have somehow navigated this rule without a road map, and Shivji could have too. Statutory and case law need not provide detailed, step by step instructions on compliance to be enforceable. *Maaso* clearly put Shivji and his attorneys on notice that any request for costs must be made before a final award. Shivji should have followed the law articulated in *Maaso*. Instead, he chose inaction rather than one of the many options available to him to preserve his rights. His failure to comply with *Maaso* should not be permitted or rewarded.

D. *White* is Binding Precedent and Clearly Allows the Introduction of CCP § 998 Offers into Evidence Prior to a Final Award.

Shivji improperly attempts to limit this Court's own holding in *White v. Western Title Ins. Co.* to the specific facts of *White* (actions for breach of the covenant of good faith and fair dealing). *White v. Western Title Ins. Co.* (1985) 40 Cal. 3d 870.

In so doing, Shivji ignores the case law cited by *White* (*Flecher v. Western National Life Ins. Co.* (1970) 10 Cal. App. 3d 376, which does not allege a breach of the covenant of good faith and fair dealing) and the plain language of Evidence Code §1152 itself, which reads, "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has

sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it." Cal. Evid. Code § 1152 (emphasis added).

The clear intent of the legislature, and the Court, was not to create a bright line rule prohibiting evidence of settlement offers for any purpose, but rather to prohibit the introduction of such evidence to prove liability. The idea that a judge or arbitrator would be biased by the mere fact that an offer was made, particularly when the amount and circumstances of that offer are not disclosed, is speculative, insults the integrity of the judicial and arbitration system, and is not borne out in the clear language or legislative history of Cal. Evid. Code § 1152.

Thus, *White's* holding is analogous to our case, and should have yielded a different result in the Sixth District's Opinion. The limitation the Sixth District places on the holding in *White* is improper and should be reversed.

E. There are No Special Circumstances Here That Justify a Different Procedure or Result.

"The court makes the decisions about awarding CCP 998 costs connected with the case, while in cases that are arbitrated, those decisions belong to the arbitrator. It is not logical to read [CCP § 998] as inviting a procedure that permits a party to forum shop between the court and the arbitrator, and to bring the request to whichever forum that party believes is most likely to make a favorable award." *Maaso v. Signer* (2012) 203 Cal. App. 4th 362, 379.

Contrary to Shivji's argument, there are no special circumstances which require the court to determine the § 998 cost issue. The Arbitrator did not make a mistake, or refuse to hear evidence. Shivji did not present

his request for costs until after the final award. One cannot refuse to hear evidence that was never presented. The award was clear, disposed of all of the issues, including the issue of costs, and contained no errors. Thus, Shivji should not be permitted to "forum shop" to obtain a different result. "Unless a statutory basis for vacating or correcting an award exists, a reviewing court shall 'confirm the award as made.'" *Maaso* at 378, citing Code Civ. Proc. § 1286.

F. The Argument that the Sixth District Exceeded Its Authority is Both Relevant and Properly within this Court's Scope of Review.

Shivji erroneously cites the language on the California Supreme Court's website as the order of the Court, overlooking the website's clear caution that "the description set out above does not necessarily reflect the view of the court, or define the specific issues that will be addressed by the court." [1] The California Supreme Court's August 23, 2017 Order does not define the issues, but merely grants review: "The petition for review is granted. The application for stay is denied as moot. Werdegar, J., was absent and did not participate." [2]

Further, the detailed discussion of the Court's authority to review judicial arbitration awards in the Opening Brief is directly relevant to the issues and outcome of this case.

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[1] At the court's website: http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2210366&doc_no=S243029

[2] Upon review of Shivji's Answer Brief, Heimlich's counsel twice asked Shivji's counsel for clarification on this apparent error in writing, to which Shivji's counsel did not respond. On November 6, 2017, Heimlich's counsel confirmed with the Court clerk by telephone that no other Order had been issued in this case and that the order did not so limit the issues.

There is a fundamental difference between what an Arbitrator has authority to do and what the Court has authority to impose on the Arbitrator after the fact. Shivji attempts to argue that the Arbitrator could have recharacterized the final order. This authority, even if it were within the arbitrator's purview, is simply not within the Court's limited scope of review of matters of arbitration. Shivji may desire to omit this essential argument from the Court's analysis, but he has no grounds to do so.

II. CONCLUSION

To allow Shivji costs in this case would require the Court to re-write the rules of the American Arbitration Association, supplant the Arbitrator's authority, and overturn longstanding case law.

Instead, Mr. Heimlich requests that the Court allow the arbitrator's decision on the issue of CCP § 998 costs to stand, in accordance with *Maaso,* and as allowed under *White*. If this Court determines that more precision is needed regarding the manner and method by which a request for CCP § 998 costs be made prior to a final order, a clarification of the process, rather than an overhaul of the existing law, is more prudent.

Accordingly, Mr. Heimlich respectfully requests this Court reverse the Sixth District Court of Appeal's decision and affirm the Superior Court's ruling to uphold the Arbitrator's decision and make no award of costs for Mr. Shivji.

Respectfully submitted,

Dated: November 9, 2017

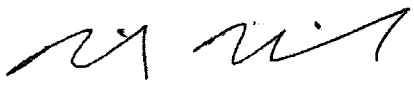
Law Offices of Nicholas D. Heimlich

Nick Heimlich

Attorney for Respondent

CERTIFICATION OF WORD COUNT

I, Nick Heimlich, Attorney for Respondent hereby certify that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed brief of Respondent is produced using 13 point Roman type font including footnotes and contains exactly 2527 words, as calculated by the computer program which produced said brief, which Counsel relies upon to determine the word count in this brief.



Date: 11/9/2017

Nicholas D. Heimlich
Attorney for Respondent, Alan Heimlich

CERTIFICATE OF SERVICE

I, the undersigned, under penalty of perjury, certify and declare: That I am a citizen of the United States, over 18 years of age, a resident of or employed in the County where the herein described mailing took place, and not a party to the within action.

That my business address is 5595 Winfield Blvd., Suite 110, San Jose, CA 95123. That on behalf of the Law Offices of Nicholas D. Heimlich, I served the foregoing document(s) described as: **REPLY BRIEF ON THE MERITS**, on November 9, 2017, on the following persons in this action, by placing a true and accurate copy thereof addressed as follows, in the ordinary course of business at Law Offices of Nicholas D. Heimlich, placed in that designated area is picked up that same day for delivery the following business day:

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Sixth Appellate District
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San Jose, CA 95113

Via Mail Service, Electronic Service and Email:
Omair Farooqui
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12 South First Street, Suite 600
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Via Mail Service and Court Filing:
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Via Electronic Submission and Original +8 copies via Courier:
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San Francisco, CA 94102-4797

I declare that the above service was made at the direction of a member of the bar of this Court.

Executed on November 9, 2017, at San Jose, California.

Nick Heimlich