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Court of Appeal, Fourth District, Division 2, California.

HUB INTERNATIONAL INSURANCE
SERVICES, Plaintiff and Appellant,

v.

John M. MORALES et al.,
Defendants and Respondents.

E067095

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Filed 6/14/2018

APPEAL from the Superior Court of Riverside County.
Daniel A. Ottolia and John P. Farrell, † Judges. Affirmed.
(Super.Ct.No. RIC1301043)

Attorneys and Law Firms

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Respondents.

OPINION

MILLER J.

*1 HUB International Insurance Services, Inc. (HUB) sued John M. Morales (Morales), Deanna de la Torre (de la Torre), and Patriot Risk and Insurance Services, Inc. (Patriot). HUB's complaint included causes of action for (1) breach of contract, (2) unfair competition (Bus. & Prof. Code, § 17200), (3) misappropriation of trade secrets, (4) breach of the duty of loyalty, and (5) intentional interference with economic relationships. The parties stipulated for the case to proceed through arbitration.

The arbitrator found (1) the liquidated damages clause, which pertained to Morales, was unenforceable (Civ. Code, § 1671, subd. (b)), and (2) HUB failed to prove actual damages

in relation to Morales, de la Torre, and Patriot (collectively defendants). Thus, the arbitrator found in favor of defendants. The arbitrator awarded Morales attorney fees in the amount of \$183,000. The trial court confirmed the arbitration award and entered judgment in favor of defendants. The trial court awarded postarbitration attorney fees to defendants in the amount of \$21,000.

HUB raises five issues on appeal. First, HUB contends the arbitrator exceeded his authority by finding the liquidated damages clause to be unenforceable. Second, HUB asserts the arbitrator manifestly disregarded the law by requiring evidence of lost profits. Third, HUB contends the arbitrator manifestly disregarded the law by not awarding nominal damages to HUB and declaring HUB to be the prevailing party. Fourth, HUB asserts the arbitrator manifestly disregarded the law by failing to allocate attorney fees. Fifth, HUB contends that if this court concludes the arbitrator exceeded his authority or disregarded the law, then the trial court erred by awarding postarbitration attorney fees to defendants. Defendants assert HUB's appeal should be dismissed because HUB waived its right to appeal. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. LIMITED RECORD

The arbitrator conducted an evidentiary hearing in the case over a three-day period—September 28, 29, and 30, 2015. A transcript of the arbitration proceedings is not included in the record on appeal. We presume a record was not created during the arbitration proceedings because, prior to the arbitration, the parties waived their right to appeal. Accordingly, it is unclear what evidence was presented during the arbitration proceedings.

B. COMPLAINT

We present the allegations from HUB's complaint. HUB is an insurance brokerage. Morales owned JMM Insurance Services, Inc. On or about October 1, 2007, Morales sold JMM Insurance Services, Inc. and his client list to HUB and became a HUB employee. In connection with the sale, Morales and HUB executed (1) an asset purchase contract, and (2) an employment agreement contract (Employment Contract).

In the Employment Contract, Morales agreed that, for a two-year period after leaving his employment with HUB, he would not interfere with HUB's client relationships or divert business away from HUB. Morales also agreed not to disclose HUB's confidential information or use HUB's confidential information to benefit any person or entity other than HUB. Further, Morales agreed not to recruit HUB employees for other employment. The Employment Contract provided for liquidated damages in the amount of twice the annual commissions, fees, and other gross revenues that are lost as a result of a breach. The Employment Contract also provided for an award of attorney fees.

*2 On October 31, 2012, Morales resigned from HUB and immediately became an employee of Patriot. Patriot is an insurance brokerage that competes with HUB. Multiple HUB clients switched to Patriot upon Morales's move to Patriot. Morales allegedly breached the Employment Contract by soliciting HUB clients to move to Patriot. Additionally, prior to leaving HUB, Morales allegedly gathered some of HUB's confidential documents and information for the purpose of soliciting HUB's clients.

De la Torre was a HUB employee. On November 2, 2012, de la Torre resigned and began working for Patriot. Morales allegedly recruited de la Torre to work for Patriot. De la Torre had signed a confidentiality contract with HUB (Confidentiality Contract). In the Confidentiality Contract, de la Torre agreed not to disclose HUB's confidential information to anyone outside of HUB and to not use HUB's confidential information for any purpose other than working for HUB. Further, in the Confidentiality Contract, de la Torre agreed not to interfere with HUB's business and not to divert business from HUB through use of HUB's confidential information.

Prior to resigning, de la Torre, allegedly at the direction of Morales, solicited business from HUB's clients on behalf of Patriot and she took HUB's confidential information for the purpose of competing with HUB. HUB further alleged that an officer, director, and/or managing agent of Patriot participated in the alleged wrongful acts of Morales and/or de la Torre.

HUB's first cause of action, for breach of contract against Morales, alleged that Morales breached the Employment Contract. HUB's second cause of action, against de la Torre, alleged that de la Torre breached the Confidentiality Contract. HUB's third cause of action, against defendants, alleged unfair competition due to HUB's confidential

information being used by defendants to solicit HUB's clients. HUB's fourth cause of action, against defendants, alleged misappropriation of trade secrets. In HUB's fifth cause of action, HUB alleged Morales and de la Torre breached their duty of loyalty to HUB. In HUB's sixth cause of action, HUB alleged defendants intentionally interfered in HUB's economic relationships with its employees and clients. HUB sought general damages, special damages, punitive damages, injunctions, costs, attorney fees, interest, and any other proper relief.

C. EMPLOYMENT CONTRACT

The Employment Contract was attached as an exhibit to HUB's complaint.

1. SECTION 6

Section 6 of the Employment Contract is titled "Non-Disclosure and Restrictions on Use of Confidential Information." Section 6 prohibits Morales from disclosing HUB's confidential information and from using HUB's confidential information to benefit anyone other than HUB.

2. SECTION 7

Section 7 of the Employment Contract is titled "Non-Solicitation." Section 7 prohibits Morales from soliciting HUB's clients while Morales is employed by HUB and for two years after working for HUB. Section seven also prohibits Morales from recruiting HUB's employees for other employment while Morales is employed by HUB and for one year after working for HUB.

3. SECTION 8

Section 8 of the Employment Contract is titled "Cumulative Remedies." Section 8 provides: "(a) If [Morales] engages in any activity with respect to any Client, Prospective Client or Hub Group Employee prohibited by any provision of Section 6 or Section 7, [Morales] shall pay to [HUB] damages in an amount equal to 2.0 times the annual commissions, fees and other gross revenues (as defined below) lost as a direct or indirect result of such prohibited activity, and in the case of the loss of employment of any Hub Group Employee, [Morales] also shall pay to [HUB] or other member of The

Hub Group any fees incurred by it in replacing any such Hub Group Employee. For purposes of this Section, the ‘annual commissions, fees and other gross revenues’ under the preceding sentence shall equal the greater of (i) the annual commissions, fees and other gross revenues generated by or attributable to any Client, Prospective Client or Hub Group Employee during the twelve month period ending on the date on which [Morales] first acted in violation of Section 6 or Section 7, or (ii) the annual commissions, fees and other gross revenues generated by or attributable to any Client, Prospective Client or Hub Group Employee during the twelve month period beginning on the date on which [Morales] first acted in violation of Section 6 or Section 7. The amount payable by [Morales] under this Section 8(a) shall be paid in cash as soon as it is determinable and may be set-off by [HUB] against any amount owing to [Morales].

*3 “(b) [Morales] acknowledges and agrees that (i) it would be extremely difficult, if not impossible, to determine the actual damages of [HUB] and the other members of The Hub Group in the event of a breach by [Morales] of any covenant contained in Section 6 or Section 7 and that the foregoing liquidated damages represent a reasonable attempt by the parties to calculate what the actual damages would be based on their experience and the standard of the insurance brokerage industry; and (ii) a breach by [Morales] of any covenant contained in Section 6 or Section 7 would result in ongoing damages to [HUB] and the other members of The Hub Group that may not be adequately compensated by the foregoing liquidated damages. Accordingly, [Morales] agrees that in the event of any actual or threatened breach of any covenant contained in Section 6 or Section 7, [HUB] and the other members of The Hub Group shall be entitled, in addition to all other rights and remedies existing in their favor at law, in equity or otherwise (including without limitation the remedies set forth in Section 8(a)), to obtain injunctive or other equitable relief (including without limitation a temporary restraining order, a preliminary injunction and a final injunction) against [Morales] to prevent any actual or threatened breach of any such covenant and to enforce all such covenants specifically, without the necessity of posting a bond or other security or of proving actual damages.

“(c) In addition, in the event that [Morales] breaches any of his obligations hereunder, [HUB] and the other members of The Hub Group shall be entitled to all reasonable costs and expenses (including without limitation reasonable attorneys’ and accountants’ fees) incurred by them arising out of such

breach and/or in connection with enforcing their rights hereunder.”

4. SECTION 11

Section 11 of the Employment Agreement is titled, “Dispute Resolution.” Section 11 provides, in relevant part, “Subject to, and without diminishing, the rights of the members of The Hub Group to seek and obtain injunctive or other equitable relief in accordance with the provisions of this Agreement, the parties agree to submit any dispute, claim or controversy arising out of or relating to this Agreement to arbitration in accordance with the procedures set forth in Schedule C attached hereto.”

5. SCHEDULE C

Schedule C provides, in relevant part, “The function of the arbitrator shall be to determine the interpretation and application of the specific provisions of this Agreement to the issues submitted to arbitration as well as to resolve any other statutory or common law claims. There shall be no right in arbitration to obtain, and no arbitrator shall have any authority to award or determine, any change in, addition to, or deduction from, any of the provisions of this Agreement.”

D. STIPULATION

HUB demanded arbitration. HUB and defendants stipulated to stay the proceedings in the trial court and proceed through arbitration. Part of the parties’ stipulation reads, “This entire matter is being submitted to binding arbitration.” Another portion of the stipulation provides, “The award ... shall include a determination of all questions submitted to the Arbitrator, the decision of which is necessary in order to determine the controversy. The Arbitrator shall have the power and discretion to award to the prevailing party all damages provided under the applicable law.”

Additionally, the stipulation reflects, “Each party hereto, and the attorney of record for each respective party, hereby waives any right which each may have to trial by judge, trial by jury, trial de novo, new trial, or appeal.” The trial court ordered the case to proceed through arbitration pursuant to the parties’ stipulation.

E. ARBITRATOR'S AWARD

The arbitrator issued a written award. The arbitrator explained, “Neither Ms. De La Torre nor Patriot is a party to the Employment [Contract] between Mr. Morales and HUB. Hence neither Ms. De La Torre nor Patriot is subject to the liquidated damages clause in Paragraph 8 of the Employment [Contract] between Mr. Morales and HUB. [¶] Thus in order to establish a claim for recovery of damages from either Ms. De La Torre or Patriot, HUB would have to satisfy the burden of proving actual damages caused by the wrongful conduct of Ms. De La Torre and/or Patriot.

“Actual damages in a commercial context such as this one would, in general and possibly subject to qualifications not implicated here, require proof of lost profits. HUB made no effort at the evidentiary hearing to prove actual lost profits. Moreover, during preparation of the case for evidentiary hearing, HUB consistently objected to requests for provision [*sic*] of documents and information on its profit margins by interposing objections that the requested information was not relevant, not reasonably calculated to lead to the discovery of admissible evidence, etc. In short, HUB consistently disclaimed the relevancy of profit margins and thus effectively disclaimed any intention of attempting to prove actual damages. HUB then presented its case consistently at the evidentiary hearing by not presenting evidence of actual damages.

*4 “Hence whatever HUB's theory of liability against Ms. De La Torre and/or Patriot, and even assuming merit to one or more of these theories, there was no proof that HUB suffered actual damage from the wrongful actions of either Ms. De La Torre or Patriot. Moreover, presentation of proof of lost profits by HUB would have been contrary to HUB's decision not to provide documentation of lost profits on the grounds that such documentation was irrelevant. This would have violated Ms. De La Torre's and Patriot's Due Process right to notice of the claims against them.

“Consequently, the award must be in favor of Ms. De La Torre and Patriot and against HUB due to lack of a showing of actual damages (lost profits) caused by a wrongful action by either Ms. De La Torre or Patriot, or both.

“Mr. Morales is in a different position due to the liquidated damages clause in his Employment [Contract] with HUB. [¶] Mr. Morales contended that the liquidated damage clause

in his Employment Agreement with HUB is unenforceable pursuant to Civil Code [section] 1671[, subdivision] (b).(See, e.g., pp. 10-13 of Respondents' Arbitration Brief.)

“[Civil Code s]ection 1671[, subdivision] (b) provides that (except with respect to ‘consumer’ contracts governed by [Civil Code section] 1671[, subdivision] (c)) a liquidated damage clause is unenforceable if the clause was ‘unreasonable under the circumstances existing at the time the contract was made.’ The ‘time’ in question was the time of formation of the Employment Contract between HUB and Morales. ... [¶] A liquidated damages clause will generally be considered unreasonable, and hence unenforceable under Civil Code [section] 1671[, subdivision] (b), if the damage amount it specifies bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach. [Citation.] ... [¶] In the absence of a reasonable relationship between the amount specified in a liquidated damage clause and the actual damage that might be sustained from a breach, a contractual clause purporting to predetermine damages must be construed as a penalty.”

The arbitrator found the liquidated damages clause in the Employment Contract was a penalty because (1) actual damages would be easily calculable because they would consist of HUB's lost profits, thus, there was no need for a liquidated damages provision due to the ease of calculating actual damages; and (2) there was no evidence indicating the liquidated damages bore any relation to the range of actual damages suffered by HUB because there was no evidence of actual damages. The arbitrator concluded that the liquidated damages clause was unenforceable.

DISCUSSION

A. DISMISSAL

Defendants contend HUB's appeal should be dismissed because HUB waived its right to appeal.

There are limited grounds for judicial review of an arbitration award. “[C]ourts are authorized to vacate an [arbitration] award if it was (1) procured by corruption, fraud, or undue means; (2) issued by corrupt arbitrators; (3) affected by prejudicial misconduct on the part of the arbitrators; or (4) in excess of the arbitrators' powers. [Citations.] An [arbitration] award may be corrected for (1) evident miscalculation or mistake; (2) excess of the arbitrators' powers; or (3)

imperfection in form.” (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1344 (*Cable*).)

“California courts enforce contractual provisions waiving a party's right to appeal a judgment on an arbitration award. [Citations.] But they do so only if the intent is ‘clear and explicit.’ ” (*Emerald Aero, LLC v. Kaplan* (2017) 9 Cal.App.5th 1125, 1144.) We apply the de novo standard of review. (*Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 202.)

*5 In the instant case, the waiver clause in the parties' stipulation to arbitrate provides: “Each party hereto, and the attorney of record for each respective party, hereby waives any right which each may have to trial by judge, trial by jury, trial de novo, new trial, or appeal.”

The waiver provision is clearly worded and expressly includes a waiver of the right to appeal. It appears to be a standard waiver acknowledging that the arbitrator's award cannot be reviewed on the merits. (See generally *Cable, supra*, 44 Cal.4th at p. 1358 [“ ‘the parties, simply by agreeing to arbitrate, are deemed to accept limited judicial review by implication’ ”].)

There is nothing in the waiver expressing an intent to expand or limit the parties' appellate rights beyond the standard arbitration appellate rights. The standard judicial authority to review an arbitrator's decision is set forth *ante*—limited judicial review for issues related to corruption and acts in excess of authority. (Code Civ. Proc., § 1286.2, subd. (a)(4); *Cable, supra*, 44 Cal.4th at p. 1344.)

The parties' waiver acknowledges there is no right to appeal, which we interpret as referring to the usual limits on judicial review of arbitrators' awards, but the waiver does not go further to expressly include a waiver of the normal issues that courts can review, e.g., corruption and acts in excess of authority. Therefore, we interpret the waiver as reflecting the standard appellate waiver that follows the submission to arbitration: The parties can only appeal based upon the limited grounds set forth *ante*, such as corruption and acts in excess of authority. All other issues have been waived. (Code Civ. Proc., § 1286.2, subd. (a)(4); *Cable, supra*, 44 Cal.4th at p. 1344.)

In HUB's appeal, it framed the issues as (1) the arbitrator having manifestly disregarded the law, or (2) the arbitrator exceeding the scope of the authority granted to the arbitrator

in the Employment Contract. As set forth *ante*, the arbitrator acting in excess of his authority is an issue that can be reviewed by a court. (Code Civ. Proc., § 1286.2, subd. (a) (4); *Cable, supra*, 44 Cal.4th at p. 1344.) It appears from the parties' waiver that they intended to permit an appeal on this ground. Accordingly, we will review the issues in which HUB contends the arbitrator acted in excess of the authority granted in the Employment Contract.

An appellate issue framed as the arbitrator having *manifestly disregarded the law* is a federal law basis for review of an arbitrator's decision. (*Pearson Dental Supplies, Inc.* (2010) 48 Cal.4th 665, 677, fn. 3; *Countrywide Financial Corp. v. Bundy* (2010) 187 Cal.App.4th 234, 250-252; *Siegel v. Prudential Ins. Co.* (1998) 67 Cal.App.4th 1270, 1290 (*Siegel*).) This basis for reviewing an arbitrator's decision does not apply in state court. (*Siegel*, at pp. 1280, 1290; *Comerica Bank v. Howsam* (2012) 208 Cal.App.4th 790, 830 (*Comerica*).)

Schedule C of the Employment Contract provides, “[A]ny dispute ... shall be settled by arbitration conducted in [____], California in accordance with the American Arbitration Association National Rules for the Resolution of Employment Disputes (the ‘Rules’) and the laws of California.” Because the parties chose to have California law apply, the “manifest disregard of the law” basis for judicial review is inapplicable. First, it is not a legal basis for review of an arbitrator's award applied by California courts. Second, the parties' waiver of their appellate rights reflects their intent to have the standard rules of limited appellate review apply to their arbitration. Therefore, we will not review HUB's contentions that assert the arbitrator manifestly disregarded the law.

B. LIQUIDATED DAMAGES

1. LAW AND STANDARD OF REVIEW

*6 Civil Code section 1671, subdivision (b), provides, “[A] provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.” “A liquidated damages clause will generally be considered unreasonable, and hence unenforceable under [Civil Code] section 1671[, subdivision] (b), if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from

a breach.” (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977.) We apply the de novo standard of review. (*Hoso Foods, Inc. v. Columbus Club, Inc.* (2010) 190 Cal.App.4th 881, 888.)

2. EVIDENCE

HUB contends, “[Defendants] presented no evidence, let alone sufficient evidence to meet their burden, to show that the liquidated damages clause was unreasonable at the time the contract was made. The Arbitrator thus manifestly disregarded the statutory law of [Civil Code section] 1671 by striking the liquidated damages clause. [¶] In addition, in contrast to [defendants’] lack of evidence, Hub submitted evidence to show that the amount of liquidated damages was reasonable at the time the contract was made.”

“Manifest disregard of the law” is not one of the limited state court grounds for appealing an arbitrator’s award. (*Siegel, supra*, 67 Cal.App.4th at pp. 1280, 1290; see *Comerica, supra*, 208 Cal.App.4th at p. 830.) The parties’ waiver of their appellate rights reflects an intent to have the standard state rules of limited appellate review apply. (Code Civ. Proc., § 1286.2, subd. (a)(4); *Cable, supra*, 44 Cal.4th at p. 1344.) Therefore, we cannot apply the federal “manifest disregard” rule to determine if the arbitrator erred. As a result, we do not address the merits of this issue.

3. UNENFORCEABLE PROVISION

HUB contends the arbitrator acted beyond the scope of his authority because the arbitrator was not permitted to change the Employment Contract by finding the liquidated damages clause to be invalid. (Civ. Code, § 1671, subd. (b).)

Schedule C of the Employment Contract provides, in relevant part: “The function of the arbitrator shall be to determine the interpretation and application of the specific provisions of this Agreement to the issues submitted to arbitration as well as to resolve any other statutory or common law claims. There shall be no right in arbitration to obtain, and no arbitrator shall have any authority to award or determine, any change in, addition to, or detract from, any of the provisions of this Agreement.” We understand this provision as providing that a party may not seek to have the Employment Contract altered by the arbitrator.

The record includes defendants’ August 7, 2013 answer to HUB’s complaint/demand for arbitration. The answer was submitted to the arbitrator. In the answer, defendants wrote, “The agreements alleged in Hub’s Demand for Arbitration are void and unenforceable, in whole or in part, because Hub seeks to enforce unlawful liquidated damages provisions.” Thus, in 2013, Morales raised an issue concerning the validity of the liquidated damages provision.

In defendants’ arbitration brief, which is dated, September 22, 2015, defendants wrote: “Accordingly, the liquidated damages penalty in the employment agreement is unenforceable under California law and against public policy.” This quote reflects that, in 2015 the liquidated damages issue was still part of the case.

The record includes a supplemental arbitration brief filed by HUB that begins, “[HUB] presents the following comment regarding liquidated damages in response to the October 7, 2015 invitation issued by [the arbitrator].” In the brief, HUB asserts that it “presented evidence showing that the liquidated damages provision was reasonable.” This quote reflects HUB presented evidence during the arbitration proceedings that the liquidated damages clause was valid and enforceable.

*7 In HUB’s appellants’ opening brief, it asserts that it “submitted evidence to show that the amount of liquidated damages was reasonable at the time the contract was made.” Thus, HUB affirms that it presented evidence concerning the validity of the liquidated damages provision.

With the limited record we have, it is unclear if (1) HUB conceded the arbitrator could decide the issue of whether the liquidated damages provision was valid (see *Porter v. Golden Eagle Ins. Co.* (1996) 43 Cal.App.4th 1282, 1291 [parties agreed to expand arbitrator’s authority]); (2) HUB objected to the arbitrator deciding the issue of the provision’s validity prior to or during the evidentiary hearing, the objection was overruled, and therefore HUB presented evidence on the issue; or (3) prior to or during the evidentiary hearing, HUB failed to make a concession or objection to the arbitrator deciding the issue of whether the liquidated damages provision was valid.¹

Due to (1) the lack of an adequate record, and (2) HUB’s assertions that HUB presented evidence on the issue of the validity of the liquidated damages clause, it is possible HUB conceded that the arbitrator could decide the issue of whether the liquidated damages provision is valid. If HUB conceded

that the arbitrator could decide the issue, then the arbitrator was acting within his authority. (*Porter v. Golden Eagle Ins. Co.*, *supra*, 43 Cal.App.4th at p. 1291.) As a result, due to the inadequate record, we must decide the issue against HUB. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

Defendants assert the arbitrator did not void the liquidated damages clause; rather, the arbitrator found the clause to be unenforceable given the circumstances of this particular case. We address this issue to explain why we have treated the arbitrator's decision as invalidating the liquidated damages clause. Defendants support their assertion by citing to the arbitrator's written decision on HUB's motion for reconsideration of the arbitrator's award. In that decision, the arbitrator wrote, "No change or alteration was made to the parties' contract. The liquidated damages clause remains as written. The conclusion was simply that, as written and pursuant to the applicable law in the circumstances presented, this clause could not be enforced against Mr. Morales."

We do not find defendants' position to be persuasive because the arbitrator found the liquidated damages provision was unenforceable pursuant to Civil Code section 1671, subdivision (b). The statutory language provides, "[A] provision in a contract liquidating the damages for the breach of the contract is *valid* unless the party seeking to *invalidate* the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." (Civ. Code, § 1671, subd. (b), italics added.) The law applied by the arbitrator concerns invalidating a liquidated damages provision. Thus, the arbitrator's finding means the provision in Morales's Employment Contract is invalid. Therefore, we have treated the arbitrator's decision as invalidating the liquidated damages provision in Morales's Employment Contract.

4. LOST PROFITS

*8 HUB contends that, by requiring proof of lost profits, the arbitrator altered the Employment Contract thus exceeding his authority.

The Employment Contract provides, "[I]t would be extremely difficult, if not impossible, to determine the actual damages of [HUB] and the other members of The Hub Group in the event of a breach by [Morales] of any covenant contained in Section 6 or Section 7 and that the foregoing liquidated damages

represent a reasonable attempt by the parties to calculate what the actual damages would be based on their experience and the standards of the insurance brokerage industry."

As explained *ante*, it is unclear what occurred at the arbitration proceedings. One could reasonably infer from the record that HUB agreed to the arbitrator deciding the validity of the liquidated damages clause because (1) the issue was raised in Morales's answer and arbitration brief, and (2) HUB asserts HUB presented evidence on the issue.

Because it is possible HUB agreed to the arbitrator deciding the validity of the liquidated damages clause, we cannot conclude the arbitrator exceeded his authority by (1) requiring proof of actual damages so as to evaluate whether the liquidated damages bore a rational relationship to the range of actual damages (*Ridgley v. Topa Thrift & Loan Assn.*, *supra*, 17 Cal.4th at p. 977), and (2) determining the liquidated damages provision was invalid and that evidence of actual damages was necessary to prove damages. In sum, due to the inadequate record, the issue must be resolved against HUB. (*Ballard v. Uribe*, *supra*, 41 Cal.3d at pp. 574-575; *Maria P. v. Riles*, *supra*, 43 Cal.3d at pp. 1295-1296.)

C. METHOD OF PROVING DAMAGES

HUB contends the arbitrator "manifestly disregarded [Civil Code section] 3300 and [Commercial Code section] 1305[, subdivision (a),] by choosing to award Hub no damages despite evidence of [defendants'] breach."² In particular, HUB contends the arbitrator disregarded the law by requiring actual damages be proven by evidence of lost profits, rather than by evidence of the lost accounts' fair market value.

"Manifest disregard of the law" is not one of the limited state court grounds for appealing an arbitrator's award. (*Siegel*, *supra*, 67 Cal.App.4th at pp. 1280, 1290; see *Comerica*, *supra*, 208 Cal.App.4th at p. 830.) The parties' waiver of their appellate rights reflects an intent to have the standard state rules of limited appellate review apply. (Code Civ. Proc., § 1286.2, subd. (a)(4); *Cable*, *supra*, 44 Cal.4th at p. 1344.) Therefore, we cannot apply the federal "manifest disregard" rule to determine if the arbitrator erred. As a result, we do not address the merits of this issue.

D. NOMINAL DAMAGES

HUB contends "the arbitrator manifestly disregarded the law by deciding that [defendants] were the prevailing parties

despite the fact that HUB proved that [defendants] were liable.”

*9 “Manifest disregard of the law” is not one of the limited state court grounds for appealing an arbitrator’s award. (*Siegel, supra*, 67 Cal.App.4th at pp. 1280, 1290; *Comerica, supra*, 208 Cal.App.4th at p. 830.) The parties’ waiver of their appellate rights reflects an intent to have the standard state rules of limited appellate review apply. (Code Civ. Proc., § 1286.2, subd. (a)(4); *Cable, supra*, 44 Cal.4th at p. 1344.) Therefore, we cannot apply the federal “manifest disregard” rule to determine if the arbitrator erred. As a result, we do not address the merits of this issue.

For the sake of clarity concerning the arbitrator’s award, we note that the arbitrator did not find that de la Torre breached the Confidentiality Contract. Rather, the arbitrator assumed a breach occurred for the sake of discussing damages. The arbitrator wrote, “Hence whatever HUB’s theory of liability against Ms. De La Torre and/or Patriot, and *even assuming merit* to one or more of these theories, there was no proof that HUB suffered actual damage from the wrongful actions of either Ms. De La Torre or Patriot.” (Italics added.)

In regard to Morales, the arbitrator wrote, “Yet the liquidated damages provision seeks to require a return approximating not the actual damages suffered by HUB from Mr. Morales’ *theoretical breach*” (Italics added.) The arbitrator did not find that Morales breached the Employment Contract. The arbitrator discussed damages under the assumption that Morales breached the Employment Contract.

E. ALLOCATION OF ATTORNEY FEES

1. PROCEDURAL HISTORY

In allocating attorney fees, the arbitrator wrote, “Due to the common nucleus of facts and overlapping nature of the claims against all three [defendants], some of the services provided in defense of the breach of contract case against Mr. Morales were also of use in the defense of the other claims against all three [defendants].

“This common usefulness does not mean that the fees for defending Mr. Morales on the breach of contract claim must be apportioned among the three [defendants]. Instead, the usual rule applies: if fees for certain services are recoverable, the fact that these services were also useful in defense of

claims on which fees are not recoverable does not render the fees non-recoverable. Instead, if certain services were reasonably necessary to the defense of the breach of contract action against Mr. Morales, those fees are recoverable notwithstanding that the corresponding services also helped defend against other claims.

“The financial realities tend to support HUB’s contention that HUB’s primary financial target was Patriot, since Patriot was the most likely solvent [defendant]. The cost of defense services that were provided to defend Patriot, but which were not reasonably necessary to defend Mr. Morales against the breach of contract claim, are not recoverable. Separating the two categories with precision might not be possible, but a fair allocation is called for. [¶] ... [¶]

“A review of the billing records coupled with sampling, sorting, drawing ratios, and other attempts to arrive at a fair apportionment, indicates that a large portion of the time expended was double-duty time bearing both upon the contract claim against Mr. Morales and upon other claims against either Mr. Morales or against the other two [defendants], or necessarily expended for common procedural matters.

“Taking these factors into account, attorneys’ fees are awarded in the amount of \$183,000.”

2. DISCUSSION

*10 HUB contends the arbitrator “manifestly disregarded the law by failing to allocate fees” between the Morales breach of contract cause of action and the other causes of action. HUB asserts, “[I]n fact, the [a]rbitrator never considered any allocation.”

“Manifest disregard of the law” is not one of the limited state court grounds for appealing an arbitrator’s award. (*Siegel, supra*, 67 Cal.App.4th at pp. 1280, 1290; *Comerica, supra*, 208 Cal.App.4th at p. 830.) The parties’ waiver of their appellate rights reflects an intent to have the standard state rules of limited appellate review apply. (Code Civ. Proc., § 1286.2, subd. (a)(4); *Cable, supra*, 44 Cal.4th at p. 1344.) Therefore, we cannot apply the federal “manifest disregard” rule to determine if the arbitrator erred. As a result, we do not address the merits of this issue.

F. POSTARBITRATION ATTORNEY FEES

HUB contends that if this court concludes the arbitrator exceeded his authority, then the trial court erred by awarding post-arbitration attorney fees to defendants. We have not concluded that the arbitrator erred. Accordingly, we conclude the trial court did not err.

Alternatively, HUB contends the trial court erred by not allocating the postarbitration attorney fees between the contract and noncontract claims. At the trial court, HUB asserted (1) defendants' attorney's billing rate was unreasonable; and (2) 50 hours of work was unreasonable given the work product. HUB did not argue in the trial court that the fees needed to be allocated based upon the postarbitration work pertaining only to the Morales breach of contract cause of action. Because HUB did not raise the issue in the trial court, the issue is forfeited. (*Golden State Water*

Co. v. Casitas Municipal Water Dist. (2015) 235 Cal.App.4th 1246, 1259.)

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

We concur:

RAMIREZ P. J.

McKINSTER J.

All Citations

Not Reported in Cal.Rptr., 2018 WL 2978262

Footnotes

- † Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
- 1 HUB objected to the arbitrator's preliminary award, in which the arbitrator tentatively found the liquidated damages clause to be invalid. In other words, HUB objected after the evidentiary hearing. What is missing from the record is how, at the evidentiary hearing, HUB came to present evidence on this issue given that HUB is asserting the issue should never have been part of the arbitration proceedings. It is unclear from the record if HUB objected prior to presenting evidence on the issue.
- 2 Civil Code section 3300 provides, "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."