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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

MED-LEGAL ASSOCIATES, INC., Plaintiff and Appellant, v. BRUCE E. FISHMAN et al., Defendants and Respondents.	B284731 (c/w B287030) (Los Angeles County Super. Ct. No. BS168126)

APPEAL from an order of the Superior Court of Los Angeles County. Richard L. Fruin, Jr., Judge. Affirmed.

Ronald D. Tym for Plaintiff and Appellant.

Law Offices of Howard A. Kapp and Howard A. Kapp for Defendants and Respondents.

Med-Legal Associates, Inc. (MLA) appeals from a trial court order denying its petition to vacate an arbitration award issued in favor of Bruce E. Fishman, M.D. (Dr. Fishman) and Bruce E. Fishman, M.D., F.I.C.S., Inc. (collectively Fishman). MLA contends that its petition should have been granted because (1) the arbitrator wrongfully prevented it from presenting its full case-in-chief; (2) the arbitrator erroneously found that MLA breached its contract with Fishman; and (3) the arbitrator's award of attorney fees and costs was based upon evidence withheld from MLA and seen only by the arbitrator in camera.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Factual Background*

A. The parties' contract

In 2008, Dr. Fishman entered into a relationship with Green Lien Collections, Inc., a company owned by Patrick Nazemi (Nazemi), which provided billing, collection, and enforcement services to medical providers in the workers' compensation field. In 2011, Nazemi formed MLA, "with the intent to provide management services to med-legal providers."

Effective November 1, 2012, MLA and Fishman entered into a management services agreement (MSA). Pursuant to the MSA, MLA performed certain management services for Fishman related to Dr. Fishman's appointment as a qualified medical

evaluator (QME) and agreed medical evaluator (AME) in the California workers' compensation system. As is relevant to the issues raised in this appeal, paragraph 2.d of the MSA provides that MLA would assist Fishman in arranging for advertising and marketing services, and that Fishman is responsible for paying the actual cost and expense of all advertising services. According to paragraph 6, the initial term of the MSA was one year, with automatic renewals, unless terminated, either without cause upon 60 days written notice or with cause. The MSA also contains an arbitration provision, providing for binding arbitration before JAMS, and an attorney fees clause.

B. The relationship between MLA and Fishman deteriorates, and the MSA is terminated

As the first year of the MSA progressed, Dr. Fishman became dissatisfied with MLA's services, specifically finding that the medical transcribers, physician assistants, and medical researchers were inadequate and underqualified. As a result, Dr. Fishman spent additional, uncompensated time completing work that he expected MLA's personnel to complete. Moreover, the advertising services were inadequate.

"Perhaps more toxic was the fact that the personal relationship between Dr. Fishman and Mr. Nazemi began to erode." "In early March 2014, Dr. Fishman and Mr. Nazemi met, and Dr. Fishman disclosed his intention to terminate the MSA

without cause." "Following the termination, the parties were still working together to reconcile outstanding account receivables on evaluations that occurred during the contractual period. In early August 2014, Dr. Fishman went to a meeting at Mr. Nazemi's office, presumably to discuss collection and disbursement on those accounts. Instead, Dr. Fishman testified that Mr. Nazemi attempted to extort him by threatening to expose an old felony conviction."

Specifically, in 2014, MLA learned that in 1983, Dr. Fishman had been convicted of a federal felony related to the practice of medicine during his medical residency in Michigan and had served a federal prison sentence. As a result, Dr. Fishman's medical license had been revoked in both California and Michigan. Although California ultimately restored Dr. Fishman's medical license in 1990, Michigan never did.

"A consequence of the felony conviction was that Dr. Fishman did not complete his residency in orthopedic surgery and did not obtain board certification in the field of orthopedic surgery. Instead, Dr. Fishman is board-certified by the American Board of Preventive Medicine (Occupational Medicine) and carries the initials 'F.I.C.S[.],' which stand for Fellow of the International College of Surgeons."

At the August 2014 meeting, Nazemi "presented Dr. Fishman with an 'Addendum' to the already terminated MSA which required Dr. Fishman to pay MLA $500,000. Mr. Nazemi reportedly told Dr. Fishman that if he did not sign the Addendum, he would tell everyone about Dr. Fishman's felony."

II. *Procedural Background*

A. Arbitration petition and cross-claim

On July 20, 2015, MLA filed with JAMS a petition for arbitration against Fishman for breach of contract and fraud. According to MLA, Dr. Fishman's failure to disclose the felony conviction prior to entering into the MSA was fraud. Had MLA known that Dr. Fishman was not a board certified orthopedic surgeon, it would never have entered into the MSA or introduced Dr. Fishman to its business contacts. MLA sought damages, stemming from Fishman's alleged failure to properly terminate the MSA and the concealment of Dr. Fishman's criminal background.

Fishman filed a cross-claim for breach of contract and intentional infliction of emotional distress.

B. Contentious litigation

The parties then proceeded to litigate this dispute. According to the arbitrator: "The procedural history of this case is extensive. The parties were contentious, which resulted in protracted discovery disputes, countless arguments over email,

multiple hearings and orders issued by the Arbitrator, all of which eventually culminated in the appointment of a Discovery Referee, Hon. Margaret A. Nagle (Ret.). Because relations between counsel often disintegrated into conflict, Judge Nagle attended and presided over the depositions of the parties. Judge Nagle also ruled on motions to compel and issued orders regarding the production of documents and other discovery matters."

C. Arbitration award

Following a five-day hearing, the parties submitted closing briefs. The arbitrator then issued his final award.

1. *MLA received a full and fair hearing*

The arbitrator first addressed MLA's contention that it was denied a full and fair hearing.

"As a preliminary matter, the Arbitrator notes that [MLA] argued extensively in its closing briefs that it was not permitted to present its full case or defend against the counterclaims, that the arbitration was not concluded, and that the Discovery Referee failed to issue and enforce necessary discovery orders.

"The procedural history and facts of this case speak for itself:

"Several months prior to the arbitration hearing, [MLA] stipulated to shorten the number of hearing days scheduled for this matter from nine to five;

"[MLA] spent the following four months litigating the claim and developing its case, yet counsel did not request additional hearing days prior to the commencement of the arbitration;

"[MLA] submitted a long witness list estimating 32.5 hours of total testimony prior to the hearing but knowing that only five days were scheduled, still did not request more hearing days until after the proceedings were already underway;

"When [MLA] first expressed a concern about time during the hearing, the Arbitrator requested, and [Fishman] agreed, that [MLA] could use 3.5 days (more than half) of the five days allotted for the hearing to present its case despite the fact that [Fishman] had counterclaims to establish;

"[Fishman] did not consent to extending the hearing by additional days, citing cost and calendaring concerns;

"The presentation of evidence was often interrupted by time consuming and argumentative attorney colloquy on both sides, even though both sides were aware of the time necessary to present their respective cases;

"The Arbitrator listened to all of the evidence presented during the five full days of testimony, reviewed and admitted exhibits, and provided the parties with an opportunity to file two lengthy closing briefs each;

"The parties each filed such briefs totaling over 500 pages of argument and exhibits, some of which was new;

"The Discovery Referee issued an order which denied [MLA's] requests for issue sanctions.

"In light of the above, which is supported by the transcribed record of the proceedings and other documentary evidence, the Arbitrator finds that the evidentiary aspect of the hearing was properly closed, and that [MLA] had a full and fair opportunity to present its case."

2. *MLA's affirmative claims*

The arbitrator found that MLA failed to prove all requisite elements of its breach of contract and fraud claims. As is relevant to the issues raised in this appeal, the arbitrator determined that MLA did not show actual, justifiable reliance upon Dr. Fishman's misrepresentation. Regarding both causes of action, MLA did not establish damages. In fact, "[t]here [was] a scarcity of specific evidence regarding damages, and [MLA's] request for relief [was] mostly based upon approximate calculations."

3. *Fishman's affirmative claims*

The arbitrator found "that MLA breached the MSA by not providing [Fishman] with adequate staffing and promotional services," as required by the MSA. In support, the arbitrator noted that MLA hired unqualified staff, forcing Dr. Fishman to either do certain work himself or hire employees and arrange

promotional meetings on his own. The arbitrator awarded Fishman $113,400.

4. *Attorney fees*

Because Fishman was the prevailing party, the arbitrator then ordered the parties to submit briefs on the issue of costs, attorney fees, and expenses.

Like everything else in this case, "[t]he briefing cycle was not without incident." Fishman filed its fee application, seeking over $1.2 million in attorney fees and $128,000 in costs. MLA objected[1] on the grounds that, inter alia, Fishman did not provide sufficient supporting documentation.

The arbitrator rejected MLA's objection. It found Fishman's counsel's evidence, including a spreadsheet of time records, sufficient to support the application for attorney fees. In so ruling, the arbitrator overruled MLA's objection to the spreadsheet on the grounds that it was only provided in camera. Fishman had "indicated that the time records had both work product and privileged matter," prompting the in camera review. "Nevertheless, [Fishman's] counsel offered to provide unredacted versions of the records to counsel for [MLA] provided that he agree to an 'attorney eyes only' arrangement. [Citation.] Counsel

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[1] "These objections incited another two months of contentious email battles and requests for intervention by the Arbitrator."

for [MLA] not only declined to do so, but failed to propose an alternative arrangement." Moreover, "at the same time as the Arbitrator ordered [Fishman] to produce the billings *in camera*, he also ordered [Fishman] to produce redacted records to [MLA], which courts have found to be a permissible solution. [Citation.]"

Ultimately, the arbitrator awarded Fishman one-third of what was requested in attorney fees: $418,257.

D. Petition to vacate final arbitration award

On February 14, 2017, MLA filed a petition to vacate final arbitration award. It argued that it was arbitrarily cut off from presenting its case-in-chief. Had it been given more time, MLA asserted that it would have presented more evidence in support of the elements of its fraud claim.

Furthermore, MLA argued that the arbitrator wrongfully awarded damages to Fishman on Fishman's breach of contract claim. According to MLA, Fishman was not entitled to compensation for certain functions because only Dr. Fishman, as the QME or AME, was legally permitted to perform the functions that he asserted MLA should have done for him. MLA would have been in violation of Labor Code section 4628, subdivision (a), if it had performed the tasks requested by Fishman.

Finally, MLA argued that the arbitrator exceeded his powers by awarding attorney fees to Fishman "based on evidence not provided to [MLA's] counsel." It was not permissible for the

arbitrator to review, in camera, unredacted attorney bills that were not provided to MLA's counsel.

E. Trial court order; judgment; appeal

On July 18, 2017, after reviewing the parties' written arguments and entertaining "extensive" oral argument, the trial court denied MLA's petition to vacate the arbitration award.

Regarding MLA's contention that the arbitrator refused to hear material evidence, the trial court noted that MLA did "not dispute that the parties agreed to a 5-day arbitration hearing." And, its challenges to the five-day schedule were unfounded. After all, for the four months after the parties agreed to the five-day schedule, MLA did not request additional hearing days; MLA submitted a witness list estimating "32.5 hours of testimony," but did not request additional hearing days; MLA was allowed three-and-a-half days to present its case; and the arbitrator allowed the parties to file lengthy closing briefs, which included evidence not presented at the hearing. Under these circumstances, MLA failed "to establish either that the arbitrator failed/refused to hear [MLA's] evidence, or that such refusal/failure, if it occurred, was prejudicial."

As for MLA's claim that the arbitrator committed errors of law, the trial court was not convinced. Although it found that it could review the alleged errors of law because the MSA so provided, it determined that the arbitrator did not commit any

legal errors. As summarized by the trial court, MLA was arguing that "the arbitrator committed a prejudicial error of law by awarding damages to [Fishman] based on the purported failure of [MLA] and its staff to provide services to [Fishman] that only [Fishman] could have legally have provided. . . . [MLA's] argument to the effect that it would have been 'illegal' for [it] to perform such services is conclusory only, and fails to take into account the fact that [MLA] had agreed to perform those services and would have been doing so as [Fishman's] agent."

Finally, the trial court rejected MLA's argument that the arbitrator exceeded his powers by awarding attorney fees and costs to Fishman based on evidence not provided to MLA or its counsel, "specifically, unredacted invoices examined by the arbitrator in camera." In so ruling, the trial court noted that MLA "was not denied an opportunity to respond to [Fishman's] evidence, and . . . [MLA] submitted a brief on that issue." In fact, MLA's "counsel was offered unredacted versions of the invoices subject to an 'attorney's eyes only' arrangement, but the offer was declined." Thus, the trial court agreed "with the arbitrator's finding that, '[h]aving failed to capitalize on the opportunity to obtain the billings in an unredacted form, [MLA] cannot now claim it was denied due process.'"

Judgment was entered in favor of Fishman, and this timely appeal ensued.

DISCUSSION

I. Standard of review

Although a Court of Appeal reviews an arbitration award deferentially, its review of a trial court's order on a Code of Civil Procedure section 1285 petition concerning the award is reviewed de novo. (*SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1196.) When the trial court's ruling includes a determination of disputed factual issues, we apply the substantial evidence test to those issues. (*Id*. at pp. 1196, 1198.)

II. The trial court properly denied MLA's petition to vacate the arbitration award

We reject MLA's challenge to the denial of its petition to vacate the arbitration award.

A. The arbitrator did not exceed his authority by limiting the arbitration proceeding to the agreed-upon five days

MLA first argues that the trial court erred in denying its petition on the grounds that the arbitrator exceeded his authority by limiting the arbitration hearing to five days.

"California's statutory scheme regulating private arbitration reflects a "'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.'" [Citations.]" (*Emerald Aero, LLC v. Kaplan* (2017) 9 Cal.App.5th 1125, 1137.) And, as MLA concedes, it is well-established that an arbitrator, like a trial court judge, is

inherently permitted to manage the pace of proceedings in front of him. (Code Civ. Proc., § 128, subd. (a).)

Keeping these two principles in mind, we conclude that the arbitrator did not exceed his authority in requiring the parties to adhere to their agreed-upon five-day hearing.[2] When MLA first expressed concern about having adequate time to present its case, the arbitrator asked Fishman whether it would agree to additional time. Although Fishman refused, on the grounds of cost and calendaring concerns, it did agree to give MLA the bulk of the reserved time (3.5 days out of 5) to present its case. And, the arbitrator allowed the parties to submit lengthy, cumbersome posthearing briefs.

In re Marriage of Carlsson (2008) 163 Cal.App.4th 281 is readily distinguishable. In that case, "[t]he trial court essentially ran the trial on a stopwatch, curtailing the parties' right to present evidence on all material disputed issues. Using the constant threat of a mistrial, [the trial judge] pressured [counsel] into rushing through her presentation and continuing without a

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[2] MLA asserts that it was unreasonable for the arbitrator "to expect counsel for MLA to quickly adjust his entire trial strategy on . . . short notice." MLA ignores the fact that it had four months from the time it agreed to the five-day hearing to the date the arbitration proceeding commenced to adjust its trial strategy and/or to request that the hearing be scheduled for more than five days, particularly given the fact that it intended to present 32.5 hours of witness testimony.

break. Despite his avowed compelling need for brevity, the judge himself frustrated the trial's progression with a sua sponte order that [one party] produce documents which, as the judge conceded, were not relevant to the issues before him. Most damning, the judge abruptly ended the trial in the middle of a witness's testimony, prior to the completion of one side's case and without giving the parties the opportunity to introduce or even propose additional evidence. This was reversible error." (*Id.* at p. 292.)

That is not what occurred here. In this case, the parties stipulated to a five-day arbitration proceeding.[3] Despite preparing for the arbitration for over four months after that agreement was reached, MLA never requested that the hearing be extended. When MLA first expressed a concern about the time during the hearing, the arbitrator requested, and Fishman agreed to give MLA the bulk of the time allotted (3.5 days out of 5) to present its case. And, consistent with how the attorneys behaved during the entirety of this litigation, "[th]e presentation of evidence was often interrupted by time consuming and argumentative attorney colloquy on both sides, even though both sides were aware of the time necessary to present their respective cases." Moreover, unlike *In re Marriage of Carlsson*, the

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[3] MLA does not dispute the fact that it stipulated to the five-day time frame. Thus, its contention that the five-day period was just a nonbinding time estimate is not well-taken.

arbitrator allowed the parties to file lengthy closing briefs each, totaling over 500 pages of argument and exhibits, some of which was new, which he read and considered before issuing his final decision.

It follows that we reject MLA's assertion that the arbitrator's refusal to grant it more time resulted in actual prejudice to MLA because it could not present all of its evidence in support of its fraud and breach of contract claims. The arbitrator did not prevent MLA from fairly presenting its case. (See *Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 439 [a court may intercede when an arbitrator has prevented a party from fairly presenting its case].) Rather MLA's litigation strategy (agreeing to five days; not requesting additional time until the proceedings began; presenting its case "sluggish[ly]") led to any alleged deficiencies at the hearing.

B. The arbitrator did not exceed his authority by finding that MLA breached the MSA with Fishman

Next MLA argues that the arbitrator erroneously found in favor of Fishman on its breach of contract claims. According to MLA, pursuant to Labor Code section 4628, subdivision (a), "it would have been unlawful for MLA to provide those services, and to hold MLA liable for breach violates public policy."

Labor Code section 4628, subdivision (a), provides, in relevant part: "[N]o person, other than the physician who signs

the medical legal report . . . shall . . . participate in the nonclerical preparation of the report." The statute "was enacted in 1989 as part of the overall reform package to ensure the reliability of the medical evaluation, which it hoped to achieve by controlling the quality of the medical-legal report. The Legislature referred to [Labor Code] section 4628 as an anti-ghostwriting statute. [Citations.] Its requirements were to ensure that the doctor who signed the report had actually examined the injured worker and had prepared the evaluation." (*Scheffield Medical Group, Inc. v. Workers' Comp. Appeals Bd.* (1999) 70 Cal.App.4th 868, 881.)

MLA offers no evidence in support of its claim that Fishman was inappropriately seeking damages from MLA for failing to prepare the medical-legal reports. Rather, Dr. Fishman sought damages for MLA's failure to provide adequate administrative support and to provide promotional services. And Dr. Fishman offered testimony to support those damages, including, for example, evidence that MLA's personnel had poor editing skills. Regarding promotional services, Dr. Fishman testified that even though MLA contractually agreed to market Dr. Fishman's practices in his Lancaster office, MLA "did very little promotion of the Lancaster office. [Citation.] In fact, Dr. Fishman stated that he had to separately hire a PR professional to attend promotional lunches in the Bakersfield area."

This evidence supports the award of $113,400 in contractual damages.

C. The arbitrator did not exceed his authority by awarding attorney fees to Fishman

Finally, MLA argues that the attorney fee award is improper because it was based upon evidence not provided to MLA.

Procedurally, MLA has forfeited this argument on appeal. As noted by both the arbitrator and the trial court, counsel offered to provide unredacted versions of the billing statements to MLA's counsel provided he agree to an "'attorney eyes only' arrangement." Counsel refused. MLA cannot now argue on appeal that the arbitrator erred by denying it the opportunity to review Fishman's attorney's unredacted billing statements. (*Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 706 [doctrine of invited error contemplates "affirmative conduct demonstrating a deliberate tactical choice on the part of the challenging party"]; *In re G.P.* (2014) 227 Cal.App.4th 1180, 1193 ["'Under the doctrine of invited error, when a party by its own conduct induces the commission of [of an alleged] error, it may not claim on appeal that the judgment should be reversed because of that [alleged] error'"]; *In re Jamie R.* (2001) 90 Cal.App.4th 766, 772 ["the doctrine of invited error applies where a party, for tactical reasons, persuades the trial court to follow a

particular procedure. The party is estopped from claiming that the procedure was unlawful"].)

Substantively, MLA has not shown that its due process rights were violated when the arbitrator based his attorney fee award "on evidence only reviewed in camera and not provided to MLA." First, in "California, an attorney need not submit contemporaneous time records in order to recover attorney fees." (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559.) "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees." (*Ibid.*) Thus, the evidence attached to Fishman's motion for attorney fees, which included redacted billing statements, was sufficient.

Second, we note that the arbitrator based his attorney fee award on more than what was contained in Fishman's motion; as the arbitrator expressly stated, the award was based in part upon his "familiarity with the case and his observation of the attorney services provided while handling the many issues brought to his attention." (See *Martino v. Denevi*, *supra*, 182 Cal.App.3d at p. 559 ["'In many cases the trial court will be aware of the nature and extent of the attorney's services from its observation of the trial proceedings and the pretrial and discovery proceedings reflected in the file'"].) Under these circumstances, we conclude that the arbitrator did not err in its award of attorney fees.

III. *Not a frivolous appeal*

In its respondent's brief, Fishman asks us "to make a specific finding of frivolousness and to order the payment of fees reimbursing the taxpayers for the expense attributable to this appeal." Even though we find no grounds to reverse the trial court order, we conclude that the appeal is not frivolous.

DISPOSITION

The order is affirmed. Fishman is entitled to attorney fees and costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT