

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Maaso v Signer

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CCP section 998; Binding Arbitration; Correction of Award

Plaintiff sued defendant for medical malpractice and the case was ordered to binding contractual arbitration before a panel of three arbitrators. An award was issued in favor of defendant, but the trial court vacated the award on the ground it was procured by “undue means,” based on ex parte contact between the defense party arbitrator and the neutral while the award was pending. The case was ordered back to arbitration before a different neutral arbitrator. The second arbitration resulted in an award in favor of plaintiff. The award exceeded a section 998 offer made by plaintiff and rejected by defendant before the first arbitration.

During the course of the arbitration, plaintiff’s counsel advised the arbitrators that he had previously served a 998 offer to compromise, which was rejected by defendant. Counsel did not request that the arbitrators rule on the issue of section 998 costs or seek to present evidence on the issue. The award found for plaintiff in the amount of \$594,243, plus “costs and fees in accordance with the arbitration agreement.” Plaintiff then petitioned the trial court to confirm the award and to grant section 998 costs and section 3291 prejudgment interest.

The court granted plaintiff’s petition to confirm the award and set the issue of costs for hearing based on the defense opposition. The trial court found that all costs associated with the arbitration, including 998 costs, were within the sole purview of the arbitrators and not the court. Plaintiff filed an amended cost memorandum limited to costs associated with the court proceedings, and the parties resolved the cost issue shortly thereafter. This appeal followed.

Plaintiff contends the trial court erred in refusing to award him section 998 costs and section 3291 interest as the prevailing party in the second arbitration. Defendant also appealed, contending that the first arbitration award should not have been vacated. The Second DCA sustained the trial court's finding on the first arbitration. Turning to plaintiff's appeal, the Justices explained that plaintiff put the arbitrators on notice that a section 998 offer had been made, but did not state the amount or seek to present evidence on the issue. With knowledge that the offer had been rejected by defendant and that plaintiff was the prevailing party, the arbitrators made no award of section 998 costs or section 3291 interest when issuing their final, binding award. Instead, their award was made for "costs and fees in accordance with the arbitration agreement," which provided that each party would pay its pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees, or other expense incurred by a party for such party's own benefit."

The parties had stipulated that the "claims and controversies alleged in this action" were submitted to "binding, contractual arbitration." Because the submission was not limited, it included the issue of costs and interest and where available, attorney fees. (*Corona v Amherst Partners* (2003) 107 Cal.App.4th 701) In *Corona*, the prevailing party in a contractual arbitration sought attorney fees and costs incurred in the arbitration from the superior court without having first sought them from the arbitrator. In affirming the trial court's denial of such costs, the reviewing court noted that because the parties' stipulation did not limit the issues to be resolved through arbitration, the issue of entitlement to attorney fees and costs was subject to determination in the arbitration proceedings. (*Corona*, at p. 706)

Where parties have agreed their dispute will be resolved by binding arbitration, judicial intervention is limited to reviewing the award to see if statutory grounds for vacating or correcting the award exist. (*Moshonov v Walsh* (2000) 22 Cal.4th 771) Under the statutory scheme, a party's failure to request the arbitrator to determine a particular issue within the scope of the arbitration is not a basis for vacating or correcting an award. (CCP section 1286.6; *Sapp v Barenfeld* (1949) 34 Cal.2d 515) As a general rule, parties to a private arbitration impliedly, if not expressly, agree that the arbitrator's decision will be both binding and final and

thus the arbitrator's decision "should be the end, not the beginning, of the dispute." Allowing a party to request that the trial court make an award that was within the scope of the arbitration but not pursued in that forum is inconsistent with the policies underlying the statutory private arbitration scheme.

Although plaintiff here styled his motion as one to confirm the award, he essentially sought "correction" of the award by asking the court to add costs and interest not awarded by the panel. [CCP 1286.6 sets forth the exclusive grounds for correction of an award, if the court determines that: \(a\) There was an evident miscalculation of figures ... \(b\) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision... or \(c\) the award is imperfect in a matter of form, not affecting the merits of the controversy.](#) None of these three statutory grounds exist here. Indeed, prejudgment interest is an element of damages, not a cost. (*North Oakland Medical Clinic v Rogers* (1998) 65 Cal.App.4th 824) Thus adding such interest is not a "mere recalculation, but a revision in substance, adding an element of damages not covered in the award as rendered." (*Severtson v Williams Construction Co.* (1985) 173 Cal.App.86)

Plaintiff argued that because the 998 statute uses the language the "court or arbitrator" either may award section 998 cost enhancements. The legislative intent is not in accord. The statute was merely extended to actions resolved by arbitration. (*Berg v Darden* (2004) 120 Cal.App.4th 721) As the trial court noted: what the court can do, the arbitrator can also do. The most logical way to read the statute is that in cases tried to the court, the court makes the decisions about awarding CCP section 998 costs connected with the case, while in cases that are arbitrated, those decisions belong to the arbitrator. It is not logical to read the statute as inviting a procedure that permits a party to forum shop between the court and the arbitrator, and to bring the request to whatever forum that party believes is most likely to make a favorable award.

Additionally, it makes sense that only the arbitrator decides section 998 costs incurred in arbitration because an award of expert witness costs, and the amount, is discretionary under section 998. It is the arbitrator who is best situated to determine the amount of reasonable attorney fees and costs to be awarded for the conduct of the arbitration proceeding. (*DiMarco v Chaney* (1995) 31 Cal.App.4th 1809) Plaintiff could provide no authority to give the trial court

an independent basis for a cost award to a prevailing party where those costs were not part of the arbitration award.

The Judgment is affirmed.