

 KeyCite Red Flag - Severe Negative Treatment  
Unpublished/noncitable

2009 WL 1020636

Not Officially Published

(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

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

ADVANCED NUTRIENTS, Plaintiff and Appellant,

v.

Robert HUNTER et al.,  
Defendants and Respondents.

No. A124294.

|  
(San Francisco County Super.  
Ct. No. CGC-08-470961).

|  
April 16, 2009.

#### Attorneys and Law Firms

[Robert Hirschman](#), Hirschman & Associates, Encino, CA, for Plaintiff and Appellant.

[David Michael Fried](#), San Leandro, CA, for Defendants and Respondents.

#### Opinion

[KLINE](#), P.J.

\*1 Respondents Robert Hunter and Black Tassle, Inc., dba Hunter Productions and Hunter Events, move this court for an order dismissing the appeal filed by appellant Advanced Nutrients, on the ground that appellant failed to move to vacate or correct the arbitration award in favor of respondents within the time allowed under [Code of Civil Procedure section 1288](#),<sup>1</sup> which is a prerequisite to an appeal. We grant the motion.

#### BACKGROUND

On October 4, 2007, respondents filed a demand for arbitration against appellant for breach of contract. On January 10, 2008, appellant filed a court action against respondents for breach of contract and tort claims. After the trial court found that a valid arbitration agreement existed between the parties and granted a petition to compel arbitration of all claims, an arbitration was conducted from June 18 to June 20, 2008. On October 6, 2008, the arbitrator issued a decision and final award, finding that appellant had breached its contract with respondents and awarding respondents damages, interest, attorney fees, and costs in the amount of \$222,248.35. The arbitrator further found that appellant had failed to carry its burden of proof on its claims. Also on October 6, 2008, the arbitration award was served on appellant.

On November 21, 2008, the trial court granted respondents' petition to confirm the arbitration award. On December 22, 2008, the trial court entered judgment on the award.

On February 19, 2009, appellant filed a notice of appeal from the judgment.

#### DISCUSSION

Respondents contend that appellant's failure to file a petition in the trial court to vacate or correct the arbitration award within 100 days of the date of service of the award waived any objections to the award and precludes this appeal.

[Section 1288](#) provides in relevant part: "A petition to vacate and award or correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on petitioner." Failure to comply with the requirements of [section 1288](#) preclude a subsequent appeal of the judgment entered on the award. (*Knass v. Blue Cross of California* (1991) 228 Cal.App.3d 390, 395-396 (*Knass*); accord, *Louise Gardens of Encino Homeowners' Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, 660.) As the court in *Knass* explained: "Although section 1287.4 allows an appeal from a judgment confirming an arbitrator's award, we find no indication that the section contemplates allowing a party to bypass the procedures which provide for limited review by the superior court.... [¶] The arbitration statute is clear. A party to an arbitration proceeding must

challenge an award under [section 1288](#) by a petition to vacate or correct the award within 100 days of service of the award. An appeal of the judgment confirming the award may not be used to circumvent the prescribed time allowed to petition for vacation or correction of an award.” (*Knass*, at pp. 395-396.)

\*2 In the present case, the arbitration award was served on appellant on October 6, 2008. Appellant did not file a petition to vacate or correct the order within 100 days of service of the award.<sup>2</sup> Accordingly, appellant has waived any challenge to the arbitration award and its appeal must be dismissed.

**DISPOSITION**

The appeal is dismissed. Respondents are awarded their costs on appeal.

We concur: [HAERLE](#) and [RICHMAN, JJ.](#)

**All Citations**

Not Reported in Cal.Rptr.3d, 2009 WL 1020636

**Footnotes**

- 1 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.
- 2 In its opposition to the motion to dismiss, appellant claims that its appeal is based solely on the trial court's refusal to grant a continuance at the time of the hearing on respondents' petition to confirm the arbitration award, and not on the award itself. According to appellant, the court's failure to give new counsel sufficient time to file an opposition to the petition constituted an abuse of discretion. Appellant acknowledges that its opposition would have been based on an ostensibly incorrect conclusion of the arbitrator. Putting aside the dubious merits of an appeal on such grounds, the court's refusal to grant a continuance cannot be used to circumvent the statutory requirement that a party must file a petition to correct or vacate an arbitration award within 100 days after service of the award. Appellant failed to do so and therefore is barred from challenging the award on appeal, even if the challenge is cloaked as an appeal of the court's failure to grant a continuance. (See [§ 1288](#); *Knass, supra*, 228 Cal.App.3d at pp. 395-396.)