

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY PERNA : CIVIL ACTION
and ANNA PERNA :
v. :
NICHOLAS BARBIERI :
and QUICK & REILLY, INC. : No. 97-5943

O R D E R

AND NOW, this 14th day of April, 1998, the pro se petition of plaintiffs Anthony Perna and Anna Perna to vacate the NASD arbitration award of June 30, 1997 against plaintiffs and in favor of defendants Nicholas Barbieri and Quick & Reilly, Inc. is denied. A memorandum is entered with this order.

Edmund V. Ludwig, J.

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M E M O R A N D U M

Ludwig, J.

April 14, 1998

This memorandum accompanies an order denying plaintiffs' pro se petition to vacate a National Association of Securities Dealers arbitration award entered against them on June 30, 1997.¹

Background

On September 12, 1981, plaintiffs Anthony Perna and Anna Perna opened a customer's account with defendant Quick & Reilly, Inc. and proceeded to deal with its employee representative, defendant Nicholas Barbieri. On June 27, 1996, plaintiffs filed a claim in NASD arbitration against defendants,² asserting that because of Barbieri's failure to execute an order according to

¹ Plaintiffs, who were represented at the arbitration, are now representing themselves.

² An amended claim was filed on May 7, 1997.

instructions in a letter written by plaintiff Anthony Perna dated October 28, 1995, they lost approximately \$37,000.³

This action is governed by the Federal Arbitration Act, 9 U.S.C. § 10.⁴ Section 10(a) sets forth four grounds for vacating an arbitration award that is subject to the Act:

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10(a).

³ The underlying dispute concerns whether or not defendants failed to execute a certain transaction requested by plaintiffs, which is alleged to have resulted in a series of losses. Defendants argue that the award was proper and supported by the facts. See defendants' motion and exhibits, which include the statement of plaintiffs' claim to the panel, defendants' reply brief, and a copy of the arbitrators' decision and award.

⁴ The Act includes contractual arbitrations, such as the one held in this case pursuant to the customer agreement between plaintiffs and the securities dealer defendant Quick & Reilly. 9 U.S.C. § 2 ("A written provision...in a contract...to settle by arbitration...shall be valid, irrevocable, and enforceable...").

Our Court of Appeals has made clear that the applicable standard of review of an arbitration award is "fairness of the proceeding as a whole." Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 600 (3d Cir.), cert. denied, 393 U.S. 954, 89 S. Ct. 378, 21 L. Ed.2d 365 (1968). If the arbitration proceeding in its entirety was fair, the award will not be set aside because of incidental errors. Id. Grounds for vacating an award have been construed narrowly.

The reason is that the parties chose to resolve outside the traditional court system any disputes that might arise between them. Part of their agreement was that an arbitration decision would be "final and binding" and not subject to the usual right of appeal that accompanies cases that originate in court. As expressed in the Act, Congress intended to authorize the vacating of a contractual arbitration award only where the arbitration was proven to be a mockery or sham or to have been conducted illegally or by corrupt arbitrators. See Newark Stereotypers' Union, 397 F.2d at 598-99. Strict enforcement has been the rule. As stated by the Court, the Act "establishes a federal policy favoring arbitration, requiring that we rigorously enforce agreements to arbitrate." Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 226, 107 S. Ct. 2332, 2337, 96 L. Ed.2d. 185 (1987) (citations omitted).

The law that applies to a petition to vacate an arbitration award under the Act has been summarized as follows:

[Arbitration awards are] presumed to be valid and arbitration proceedings need not meet procedural requirements; awards are not reviewable for errors or misinterpretations of fact or law, and arbitrators are not required to give reasons for their decisions; only those grounds specified in § 10 may be considered as a possible basis for vacating, and the burden of establishing such grounds is on the party seeking to upset the award.

Margaret Shulenberger, Construction and Application of § 10(a-d) of United States Arbitration Act of 1947, Providing Grounds for Vacating Arbitration Awards, 20 A.L.R. 295, *50 (1974 & supp. 1996).

In plaintiffs' petition, the bases asserted for vacating the arbitration award entered against them are "undue means," "partiality," and "arbitrators exceeded their powers." Each will be considered separately.

I - Undue Means

In order to show "corruption, fraud or undue means," a plaintiff must show an occurrence that so infected the arbitration process that the result was "immoral if not illegal." A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir. 1992), cert. denied, 113 S. Ct. 970 (1993). A procedural irregularity must be fundamental. See Teamsters Local 312 v. Matlack, Inc., 118 F.3d 985, 996 (3d Cir. 1997) (award should be vacated where arbitrator entered decision without notice and in violation of representation that there would be further opportunity to be heard).

Here, the irregularities alleged consist in part of defendants' late responses to discovery requests including missed deadlines.⁵ See petition to vacate, 10-12. Such violations are not fundamental unless they taint the outcome of the proceeding, which has not been shown to have occurred in this case.

It is also alleged, as "undue means," that the NASD's tape recording of the hearing itself was of such a poor quality as to frustrate plaintiffs' effort to review the proceeding. See plaintiffs' letter to Judge Ludwig of January 17, 1998 at 2-3.⁶ Plaintiffs have not demonstrated, however, how or in what manner this difficulty could amount to "undue means." Plaintiffs attended the arbitration hearing, and there is no specific claim or instance asserted by them of "undue means" as understood in the law.

II - Partiality

Plaintiffs also charge the arbitrators with "evident partiality" under 9 U.S.C. § 10(a)(2). Essentially, they point to two aspects of the hearing. First, the arbitrators asked a substantially larger number of questions of plaintiffs than of defendants or defendants' witnesses. See plaintiffs' petition at

⁵ Defendants' position is that no violations occurred. See defendants' motion to dismiss, 4-5 (permission obtained to extend deadlines).

⁶ Because plaintiff are pro se, their letters, although not a part of the record or a proper method of presenting argument, will be considered in order to set forth plaintiffs' position.

10 ("Obviously [the arbitrator] gave the impression that my testimony had to be restrengthened and Mr. Barbieri's evasive and non-documented testimony was just fine.").

Second, a corporate officer of Quick & Reilly was permitted to attend the arbitration hearing and to communicate with defendants' attorneys. Accordingly, plaintiffs conclude that the officer had a prior relationship with the chairperson of the arbitration panel. See plaintiffs' letter to Judge Ludwig of January 21, 1998 at 2.⁷

Neither of these contentions is supportable. Arbitrators, who sit in a judicial capacity, are permitted to ask questions in an effort to clarify a party's position. Moreover, a corporation acts through its officers and employees, and a representative of a corporate party is always allowed to be present during a hearing or other legal proceeding and to consult with counsel.⁸

III - Arbitrators Exceeded Their Powers

⁷ Defendants deny any prior relationship. See letter of plaintiffs to defendants' attorney, January 24, 1998 (attaching as an exhibit letter from defendants' attorney denying any acquaintance).

⁸ The law requires that a substantial personal relationship between an arbitrator and a party must be disclosed. See Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 150, 89 S. Ct. 337, 340, 21 L. Ed.2d. 301 (1968). There is no evidence that such a relationship existed in this arbitration - and the failure to reveal such a relationship would be at the party's and the arbitrator's peril.

In plaintiffs' view, the arbitration award was completely against the evidence. See plaintiffs' petition at 15. Plaintiffs' argument is that the arbitrators ignored the evidence and thereby exceeded their powers - which under 9 U.S.C. § 10(a)(4) is a ground for vacating an award.

However, as to evidentiary matters, the issue on a petition to vacate is not the sufficiency of the evidence but whether plaintiffs had a fair opportunity to be heard. See Newark Stereotypers' Union, 397 F.2d at 599 ("The statute cannot be read ... to intend that every failure to receive relevant evidence constitutes misconduct which will require the vacation of an arbitrator's award."). In other words, while it may be difficult for plaintiffs to understand or accept, the question is not whether the arbitration decision was right or wrong or even totally misguided. That is not what the Act means when it refers to arbitrators who "exceeded their powers." Again - it is a matter of whether plaintiffs were permitted to put on their case and to present their version of the facts. Here, plaintiffs do not urge that they were denied that opportunity - other than the arbitrators' refusal to consider a "case summary" submitted after the hearing. Whether or not such contention is accurate or inaccurate, a "case summary" is not evidence and does not constitute an essential part of the right to be heard.

In a similar way, plaintiffs' repeated requests for a judicial reexamination of the evidence unfortunately reflects a misunderstanding of the arbitration law under the federal Act. The

court's function is to preserve and enforce the arbitration decision unless there is proof that - aside from the evidence presented - the decision was arrived at illegally or irregularly. What plaintiffs in this case are requesting is that the Court consider whether the arbitrators, under the evidence, reached the wrong result. This the Court, under the applicable Act of Congress, has no power to do. Under the law, even if the Court were to disagree completely with the arbitrators' decision, it may not set aside the decision unless there is a specific statutory ground for doing so. These grounds do not include the correctness of the decision.

Edmund V. Ludwig, J.