

STATE OF MICHIGAN
COURT OF APPEALS

ROY ZURKOWSKI,

Plaintiff-Appellant,

V

EUGENE VALENTINE, JOHN BUSH, ERNEST
MOEGELIN, and MERRILL LYNCH, PIERCE,
FENNER AND SMITH, INC.,

Defendants-Appellees.

UNPUBLISHED

April 7, 2005

No. 251471

Oakland Circuit Court

LC No. 03-050200-AA

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order confirming an arbitration award and decision in favor of defendants, and denying plaintiff's petition to vacate the award. The award was rendered by a unanimous National Association of Security Dealers, Inc. (NASD), arbitration panel on May 12, 2003. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed suit, claiming that he lost a considerable sum of money he had invested with defendant Merrill Lynch as the result of the failure of Merrill Lynch's broker, defendant Eugene Valentine, to sell plaintiff's stock in Network Event Theater (NETS) when plaintiff ordered the stock sold. The value of the stock rose initially after plaintiff moved his investment accounts from Comerica Bank to Merrill Lynch in June of 1999. Valentine began to transmit Merrill Lynch's research reports on NETS to plaintiff, in what plaintiff maintains was an inducement to retain his NETS shares. However, the value of the stock ultimately declined to such an extent that plaintiff claimed losses of "in excess of \$10.6 million on the value of the stock itself and lost \$5.0 million in a tax loss carry forward plus interest." Initially, plaintiff maintained that his losses were due to the fact that defendants had failed to recommend that he sell his NETS holdings and had in effect misrepresented the value and potential of NETS to him, and that plaintiff had detrimentally relied on defendants' representations. Later, however, plaintiff maintained that his losses were due to Valentine's refusal to sell plaintiff's NETS stock when its total value reached \$9 million dollars, or approximately \$26.50 per share. Plaintiff maintained that Valentine knew that plaintiff wanted to sell the stock to finance a new home and \$1 million in gifts to family members but refused to sell the stock, instead repeatedly insisting to plaintiff that the stock price would eventually reach \$50 or \$60 per share. In fact, the total value of the stock did reach at least \$10.5 million dollars, before it later declined dramatically.

Plaintiff filed a Statement of Claim with the NASD on July 26, 2001. Following testimony and document submission by the parties, defendants moved to dismiss plaintiff's remaining claim¹ on the grounds that plaintiff had failed to present a prima facie case that he had ever given a definitive specific order to Valentine to sell the NETS stock and that Valentine had failed to comply with such an order. After reviewing the testimony and documentary evidence, the NASD panel denied plaintiff's claims and granted defendants' motion to dismiss. Neither the panel's oral nor written decisions contained distinct findings.

Plaintiff petitioned the circuit court to vacate the arbitration award. He argued that the arbitration panel lacked the authority to dismiss the case with prejudice under the NASD Code of Arbitration Procedure and had thus exceeded their authority. Plaintiff also maintained that the arbitration panel acted in "manifest disregard of the law" when it formed its decision without completely considering all of the documentary evidence presented by him in support of his claim. Plaintiff also alleged that, if the motion to dismiss were treated as a motion for summary disposition under MCR 2.116(C), the arbitration panel should not have dismissed the case because plaintiff created a question of fact concerning whether he explicitly told Valentine to sell the stock. The circuit court denied plaintiff's petition to vacate the award and confirmed the award.

On appeal, plaintiff presents similar, but not identical, arguments to the ones raised at the trial court. Plaintiff first argues that the arbitration panel's award must be vacated because it refused to review critical documentary evidence presented by him despite its express promise to do so. Plaintiff also argues that the award should be dismissed because his testimony established a prima facie case that Valentine disregarded a specific order to sell the NETS stock.

In general, judicial review of arbitration awards is very limited.² A court may not review an arbitrator's factual findings or decisions on the merits. *Byron Center Pub Schools Bd of Ed v Kent Co Ed Ass'n*, 186 Mich App 29, 31; 463 NW2d 112 (1990); *Donegan v Michigan Mutual Ins Co*, 151 Mich App 540, 549; 391 NW2d 403 (1986). A court may set aside an arbitration award only if it clearly appears on the face of the award or in the reasons for the decision that the arbitrator made an error of law and that, but for that error, a substantially different award must be made. *Gordon Sel-Way, Inc v Spence Bros*, 438 Mich 488, 497; 475 NW2d 704 (1991); *DAIIE v Gavin*, 416 Mich 407, 428-429, 443; 331 NW2d 418 (1982); *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996).

¹ Plaintiff had previously abandoned other claims against defendants relating to improprieties concerning the sale of other stock. Those claims are not at issue here.

² NASD arbitrations are governed by the Federal Arbitration Act (FAA), 9 USC §§ 1 et seq., because they involve interstate commerce. See e.g., *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 496; 591 NW2d 364 (1998). However, the circuit court and parties have analyzed the issues raised herein under Michigan Court Rule 3.602(J). The criteria for vacating or modifying an arbitration award under the FAA and MCR 3.602(J) are substantially similar (see footnote 3, *infra*). Therefore, we analyze the issues using Michigan case law.

The only circumstances in which a court can vacate an award are provided in MCR 3.602(J)(1):³

On application of a party, the court shall vacate an award if:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
- (c) the arbitrator exceeded his or her powers; or
- (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights. The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

In the instant case, plaintiff first argues that the arbitration panel committed clear misconduct when it failed to review all of the documentary evidence submitted by him in support of his claim, especially after it had explicitly promised to review this evidence. According to plaintiff, because the panel did not review this evidence thoroughly, its refusal to do so was an error of law and provided grounds to vacate the award under MCR 3.602(J)(1)(d) and 9 USC 10(c). Plaintiff bases this argument on the fact that the arbitration panel "could not possibly have reviewed, in any meaningful fashion, the 5,000 pages of documentary exhibits submitted by [plaintiff] during its 45 minute recess" before it ruled on defendants' motion.

³ The FAA equivalent of MCR 3.602(J)(1) is 9 USC 10, which states, in relevant part:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(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 of any other misbehavior by which the rights of any party have been prejudiced; or

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

Plaintiff's claim is without merit. Plaintiff correctly acknowledges that the panel did not refuse to consider his evidence. To the contrary, the panel stated early in the proceedings that it would review this evidence. Despite his characterization of this issue, the substance of plaintiff's argument is that the panel failed to give portions of his documentary evidence proper weight. However, while a refusal to hear material evidence is a basis for review, a refusal to give weight to evidence is not. *Belen v Allstate Ins Co*, 173 Mich App 641, 645-646; 434 NW2d 203 (1988). Moreover, plaintiff has not specifically pointed to anything in this material that directly supports his position on appeal.

Plaintiff next argues that the arbitration award must be vacated because the arbitrators improperly granted defendants' motion when there existed material questions of fact as to whether Valentine ignored plaintiff's sell order. Plaintiff compares the panel's decision on defendants' motion to a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) and argues that, because certain portions of plaintiff's testimony supports his assertion that he told Valentine to sell the stock, the panel could not have dismissed the case.

However, we find unpersuasive plaintiff's re-characterization of the panel's decision. As noted in *DAIE, supra*, 428-429, the lack of formality in arbitration proceedings render it somewhat difficult to discern what the panel actually meant by its decision.

Arbitration, by its very nature, restricts meaningful legal review in the traditional sense. As a general observation, courts will be reluctant to modify or vacate an award because of the difficulty or impossibility, without speculation, of determining what caused an arbitrator to rule as he did. The informal and sometimes unorthodox procedures of the arbitration hearings, combined with the absence of a verbatim record and formal findings of fact and conclusions of law, make it virtually impossible to discern the mental path leading to an award. Reviewing courts are usually left without a plainly recognizable basis for finding substantial legal error. It is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable, such as that involved in these cases. In many cases the arbitrator's alleged error will be as equally attributable to alleged "unwarranted" factfinding as to asserted "error of law". In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and the arbitrator's findings of fact are unreviewable.

See also *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 555, 557; 682 NW2d 542 (2004). Thus, contrary to plaintiff's assertion, the arbitration panel was not required to conform its rulings to the standards applicable to a ruling on a motion for summary disposition or to further explain its apparent decision to disbelieve plaintiff's assertions that he had given an order to sell. The panel reiterated the request of defendants to dismiss the case because plaintiff had "failed to state a claim" in the language of its decision. However, despite this phrasing, it is clear that the panel actually decided that plaintiff had failed to provide convincing evidence that Valentine ignored a specific order to sell the NETS stock.

Our review of the testimony supports this finding. Plaintiff's claim that he established a prima facie case by "unrebutted testimony" is overstated. During his testimony to the panel, plaintiff admitted that he never gave a definitive order to sell his NETS stock holdings. On

appeal, plaintiff points to isolated testimony that supports his assertion and uses it to contend that he created a question of fact. Plaintiff, however, may not create a genuine issue of material fact by offering contradictory statements concerning whether he gave an explicit order to sell. See *Schultz v Auto-Owners Ins Co*, 212 Mich App 199, 202; 536 NW2d 784 (1995).

In sum, we hold that plaintiff has not shown that the panel committed an error of law or exceeded its powers to decide his claims. The trial court thus did not err when it refused to vacate the arbitration panel's award.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ David H. Sawyer

/s/ Kurtis T. Wilder