

STATE OF MICHIGAN
COURT OF APPEALS

FIRST OF MICHIGAN CORPORATION,

Petitioner-Appellant,

v

RICHARD J. MANSOUR,

Respondent-Appellee.

UNPUBLISHED

May 17, 2002

No. 228521

Genesee Circuit Court

LC No. 00-067618-CZ

Before: Markey, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Petitioner First of Michigan Corporation (“FOM”) appeals as of right from a judgment confirming an arbitration award under MCR 3.602(I). We affirm.

I. Facts and Procedure

Respondent Richard Mansour (“Mansour”) opened a brokerage account with FOM in approximately March 1997, and converted it to a margin account on July 23, 1997. The firm assigned the account to Patrick Jordan.¹ When Mansour converted to a margin account, he signed the following arbitration agreement:

2. ARBITRATION DISCLOSURES AND AGREEMENT

(A) Arbitration is final and binding on the parties.

(B) The parties are waiving their right to seek remedies in court, including the right to a jury trial.

(C) Pre-arbitration discovery is generally more limited than and different from court proceedings.

¹Jordan was a party to the arbitration proceedings, but was not a party to the action to vacate or confirm the arbitration award.

(D) The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

(E) The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

Any controversy arising out of or relating to my (our) account, to your investment advice or recommendations, to transactions with me (us), to this agreement or the breach thereof, or to any other business between me (us) and [FOM] shall be settled by arbitration. Any arbitration under this agreement shall be conducted pursuant to the Federal Arbitration Act and the laws of the State of New York before . . . the National Association of Securities Dealers ("N.A.S.D.") . . . in accordance with the rules obtaining of the selected organization. . . . The award of the arbitrators, or of the majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction. . . .

Neither this arbitration agreement nor any provision thereof can be amended or waived except by a writing signed by [both parties].

Mansour requested arbitration to resolve three problems with his account: FOM's alleged failure to execute Mansour's order to purchase shares of Global Marine stock -- despite Jordan's oral and written assurances that the shares had been purchased; FOM's failure to purchase shares of Amazon.com stock; and FOM's sale of certain shares of Mansour's General Motors stock to pay a margin call. Mansour's claims were arbitrated and, on March 23, 2000, the panel awarded him damages, interest, attorney fees and costs. FOM filed this action to vacate the award. The trial court confirmed the arbitration award and this appeal followed.

II. Standard of Review

Petitioner argues that the circuit erred in refusing to vacate the arbitration award on the grounds that the arbitrators exceeded their authority, manifestly disregarded the law, and because the award was procured by undue means. We review de novo a trial court's decision to enforce, vacate or modify a statutory arbitration award. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496-497; 475 NW2d 704 (1991). The parties agreed that the arbitration proceedings would be conducted in accordance with the Federal Arbitration Act ("FAA"), 9 USC 1, *et seq*, New York law, and the rules of the National Association of Securities Dealers ("NASD"). The FAA carefully limits judicial intervention into arbitration awards. See *Robbins v Day*, 954 F2d 679, 682 (CA 11, 1992), overruled in part *First Options of Chicago, Inc v Kaplan*, 514 US 938; 115 S Ct 1920; 131 L Ed 2d 985 (1995). The FAA provides that an arbitration award may be vacated, *inter alia*, where the award was "procured by corruption, fraud, or *undue means*," and where the arbitrators "*exceeded their powers*[".]” 9 USC 10(a)(1) and (4) (emphasis added). It is also judicially recognized in some federal circuits that an arbitration award may be vacated

where the arbitrators exhibited a “manifest disregard” for the law. See *Carte Blanche (Singapore) Pte, Ltd v Carte Blanche Int’l, Ltd*, 888 F2d 260, 265 (CA 2, 1989).²

The phrase “exceeded their powers” is to be read narrowly. *Fahnestock & Co, Inc v Waltman*, 935 F2d 512, 515 (CA 2, 1991). An arbitration panel exceeds its powers when it “fail[s] to arbitrate the dispute according to the terms of the arbitration agreement.” *Western Employers Ins Co v Jefferies & Co, Inc*, 958 F2d 258, 262 (CA 9, 1992).

In order to establish that an award was “procured by undue means,” a party “must demonstrate that the improper behavior was (1) not discoverable by due diligence before or during the arbitration hearing, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence.” *In the Matter of Arbitration Between Trans Chem Ltd and China Nat’l Machinery Import and Export Corp*, 978 F Supp 266, 304 (SD Tex, 1997), aff’d 161 F3d 314 (CA 5, 1998). Additionally, many circuits have construed the term “undue means” as requiring proof of intentional misconduct. *E.g.*, *AG Edwards & Sons, Inc v McCollough*, 967 F2d 1401, 1403-1404 (CA 9, 1992).

Judicial review under the “manifest disregard” standard is limited. As the court explained in *Carte Blanche, supra* at 265, quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc v Bubker*, 808 F2d 930, 933-934 (CA 2, 1986):

The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term “disregard” implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. . . . To adopt a less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties. . . . Judicial inquiry under the “manifest disregard” standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel’s award because of an arguable difference regarding the meaning or applicability of laws urged upon it. [Citations omitted.]

III. Analysis

FOM argues that the arbitrators exceeded their powers, acted with manifest disregard of the law, and that the award was procured by undue means because Mansour was allowed to introduce a letter in which FOM agreed to make his account whole, and because Mansour was

² The FAA does not provide for the vacation of an arbitration award due to the arbitrators’ manifest disregard for the law. Thus, we seriously question whether the manifest disregard of the law is an appropriate basis on which to vacate an arbitration award under the FAA. We will nonetheless consider this standard in the present case because its application does not change the ultimate disposition of the case.

allowed to cross-examine FOM's General Counsel concerning allegedly privileged communications. FOM's position is without merit.

Pursuant to NASD rules, the rules of evidence did not apply to these proceedings. Therefore, in ruling on these evidentiary matters, the arbitrators did not exceed their powers, or act in manifest disregard of applicable law. See *Fahnestock & Co, Inc, supra* at 515; see also *Carte Blanche (Singapore) Pte, Ltd, supra* at 265. Because advocating an evidentiary position does not carry a "connotation of wrongfulness," these alleged errors do not show that the arbitration award was procured by undue means. *AG Edwards & Sons, Inc, supra* at 1403-1404. Further, having been resolved by the arbitrators, these evidentiary matters do not satisfy the requirement of "not [being] discoverable by due diligence before or during the arbitration hearing." *In the Matter of Arbitration Between Trans Chem Ltd and China Nat'l Machinery Import and Export Corp, supra* at 304.

FOM also argues that the arbitrators acted in manifest disregard of the law of reasonable reliance. FOM claims Mansour's reliance on Jordan's misrepresentations were unreasonable given the disclosures in Mansour's monthly statements. It is unclear whether FOM is addressing common law fraud or fraud under federal securities laws. We will nonetheless address both issues.

To prevail on a common law fraud (or negligent misrepresentation) claim under New York law, a claimant's reliance must be shown to be reasonable. See *IFD Const Corp v Corddy Carpenter Dietz & Zack*, 685 NYS2d 670, 673; 253 AD2d 89 (1999); *General Elec Capital Corp v United States Trust Co of New York*, 655 NYS2d 505, 505; 238 AD2d 144, 145 (1997); see also *Royal Am Mngrs, Inc v IRC Holding Corp*, 885 F2d 1011, 1016 (CA 2, 1989).

Whether a claimant's reliance was reasonable is a question of fact to be decided in light of all the circumstances, including the defendant's conduct. *Swersky, supra* at 37-38; see also *Dero v Gardner*, 700 NYS2d 507, 508-509; 267 AD2d 830 (1999); *IFD Const Corp, supra* at 673; *General Elec Capital Corp, supra* at 505. We must assume the arbitrators resolved this fact question in favor of Mansour, in the absence of strong evidence that the arbitrators disregarded the applicable law. Here, FOM has utterly failed to show that the arbitrators disregarded the principle of reasonable reliance. Instead, FOM merely argues the facts and suggests that a better finding would have been to conclude Mansour's reliance was not reasonable under the circumstances. Thus, a manifest disregard for the common law has not been established.

Reasonable reliance is not a necessary element to claims of securities fraud under 15 USC 78j(b) and the Securities & Exchange Commission's Rule 10b-5. Instead, Mansour needed only to show that he was not "reckless" in relying upon Jordan's alleged misrepresentations. See *Royal Am Mngrs, Inc, supra* at 1015-1016. Thus, a person claiming "fraud under the securities and commodities laws, . . . 'does not have a duty to investigate the truth of the statements made to him, but may ordinarily rely on the honesty of his account representative's representations.'" *Indosuez Carr Futures, Inc v Commodity Futures Trad Comm*, 27 F3d 1260, 1264 (CA 7, 1994) (citation omitted). Because Mansour was not required to show reasonable reliance in order to prevail on his claim of securities fraud, FOM has also failed to show that the arbitrators manifestly disregarded applicable federal securities laws. See *Carte Blanche (Singapore) Pte, Ltd, supra* at 265.

FOM also argues that the arbitrators showed manifest disregard for the law of ratification. FOM claims Mansour had an opportunity to object to unauthorized activity in his account that was disclosed in his monthly statements. Mansour's failure to object promptly upon receipt of his monthly statements, FOM argues, constitutes ratification of this unauthorized conduct.

By their terms, the monthly statements and order confirmation statements received by Mansour became conclusive if not timely challenged. However, "[i]t is settled law that '[f]ull knowledge of the unauthorized act, and of all material matters related to it, is an essential of a valid ratification.'" *Hill v Bache Halsey Stuart Shields, Inc*, 790 F2d 817, 827 (CA 10, 1986), quoting *Master Commodities, Inc v Texas Cattle Mngmt*, 586 F2d 1352, 1359-1360 (CA 10, 1978). Additionally, "[t]he principle of ratification . . . does not apply to cases in which a customer's consent is obtained through misrepresentations." *Eichler v SEC*, 757 F2d 1066, 1070 (CA 9, 1985). Thus, "a broker may be estopped from raising a defense based on the written notice clause if the broker's own assurances or deceptive acts forestall the customer's filing of the required written complaint." *Modern Settings, Inc v Prudential-Bache Securities, Inc*, 936 F2d 640, 646 (CA 2, 1991), on remand unpublished opinion of the United States District Court, Southern District of New York, issued January 31, 1992 (Docket No. 83 Civ. 6291).

Here, there was a question of fact concerning whether Jordan's deceptive acts should estop him and his employer from asserting a ratification defense to Mansour's claims. Further, there was a question of fact concerning whether application of the ratification requirement should be relaxed due to Mansour's alleged inexperience as a securities investor. See *Modern Settings, Inc, supra* at 646. Because the arbitrators reasonably could have resolved these issues in Mansour's favor, FOM has failed to show that the arbitrators acted with manifest disregard for the law of ratification. See *Carte Blanche, supra* at 265.

FOM also argues that the trial court improperly modified the arbitration award by enforcing the award against it and not against Jordan. We note that the firm could have made Jordan a party or compelled his joinder. Regardless, the arbitration award has been judicially enforced against Jordan in a separate proceeding. Therefore, this issue is moot.

Finally, we consider FOM's argument that the arbitrators exceeded their powers by awarding attorney fees to Mansour. We find no error in this aspect of the award. Both sides asked the arbitrators to award attorney fees. Mansour asked for attorney's fees in his statement of claim and FOM asked for attorney fees in its response to the statement of claim and in its arbitration brief. Moreover, nothing in the arbitration agreement precludes such an award. Thus, we conclude the arbitrators did not exceed their powers in awarding attorney fees to Mansour. See *Spector v Torenberg*, 852 F Supp 201, 210-211 (SD NY, 1994); see also *In the Matter of the Arbitration Between RAS Securities Corp and Williams*, 674 NYS2d 303, 303; 251 AD2d 98 (1998).

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Brian K. Zahra