IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-402

Filed: 6 March 2018

Wake County, No. 11-CVS-17551

JAMES and LARA BARNHILL, Plaintiffs,

v.

RICHARD W. FARRELL and THE FARRELL LAW GROUP, PC, Defendants.

Appeal by Defendants from Order entered 29 September 2016 by Judge Paul Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 17 October 2017.

Bryant & Ivie, PLLC, by John Walter Bryant and Amber J. Ivie, for plaintiffs-appellees.

Richard W. Farrell, pro se.

The Farrell Law Group, PC, by Richard W. Farrell, for defendant-appellant The Farrell Law Group, PC.

MURPHY, Judge.

When an arbitrator resolves a dispute within the scope of an arbitration agreement, the trial court must confirm the arbitrator's award unless one of the statutory grounds for vacating or modifying the award exists. *Carteret Cty. v. United*

Contractors of Kinston, Inc., 120 N.C. App. 336, 346, 462 S.E.2d 816, 823 (1995) (citation omitted). When a party appeals a trial court's confirmation of an arbitrator's award, our only inquiry is whether the trial court did so properly. *Carpenter v. Brooks*, 139 N.C. App. 745, 749, 534 S.E.2d 641, 645 (2000).

Richard W. Farrell (Farrell) and the Farrell Law Group, PC (collectively, "Defendants") appeal from the trial court's order denying Defendants' Motion to Vacate Arbitration Award and confirming the Award of the Arbitrator pursuant to N.C.G.S. § 1-569.23 (2017). On appeal, Defendants contend the trial court erred by denying the Motion to Vacate the Award and by confirming the Award. After a thorough review of the record, we affirm.

Background

Defendant Farrell is a licensed attorney in North Carolina. Farrell owns and operates Defendant Farrell Law Group. James and Lara Barnhill are former clients of Farrell. Farrell represented the Barnhills in various matters. The instant case concerns Farrell's representation of the Barnhills in a franchise dispute with Planet Beach Franchising Corporation ("Planet Beach") from 12 March 2010 until September 2011.

On 12 March 2010, Farrell and the Barnhills entered into a written fee agreement pertaining to this representation ("the Client Retainer"), which contained an arbitration clause. The Barnhills paid a $7,500 retainer. Throughout the

representation, the Barnhills were concerned with cost, and asked Farrell for estimates on the cost of the representation. On 4 October 2010, Farrell estimated it would cost an additional $73,600 to $74,000 plus costs assessed by the American Arbitration Association to complete the representation. On 28 April 2011, Farrell provided an updated estimate that it would cost an additional $44,500 to $58,750 to complete the arbitration process. Following this estimate, in May 2011, the Barnhills communicated that they could not pay fees in excess of $40,000.

In June 2011, Farrell offered to amend the Client Retainer. The Barnhills declined to sign the Amendment, but reiterated their budgetary limitations, and stated they would not pay for Farrell's associate to attend an upcoming hearing. The Barnhills continued to receive invoices as the representation proceeded. Despite the Barnhills declining to sign the Amendment, Farrell and the Barnhills referred thereafter to a $40,000 maximum for legal fees. In one email, Farrell explained: "After several emails back and forth re alternative proposals, [the Barnhills] have decided to stay with the present fee arrangement, *with a set max. of $40k available to cover legal fees including travel costs*." (Emphasis added).

In another email, sent to two employees of Farrell Law Group and Farrell, in July 2011, Jim Barnhill explained, in pertinent part:

> [Farrell] and I have an agreement that I will pay him a check this week in the amount of $26,283.91.
>
> That check will cover all expenses through the end of the

> hearing to include any current outstanding invoices, any future invoices resulting from the hearing, travel expenses, food, pre-hearing prep, prep-durring [sic] the hearing etc.
>
> My understanding is that we will not be responsible for any additional invoices even if that amount exceeds the $40k cap.
>
> Although you are more than welcome to continue to send the invoices so I have an idea of the costs . . . .

Farrell replied to this email, copying two other employees of Farrell Law Group: "Jim, [Farrell Law Group's Office Manager] is aware of the agreement."

On 29 August 2011, Planet Beach and the Barnhills reached a settlement, and Planet Beach paid the Barnhills $365,000. Thereafter, the Barnhills and Defendants disagreed about the Barnhills' financial obligation to Farrell Law Group. The Barnhills argued the Client Retainer had been "capped" at $40,000, and a maximum fee arrangement was in place. Defendants argued the Client Retainer remained unmodified. On 8 September 2011, the parties met to discuss the disputed fees. On 14 September 2011, Farrell Law Group disbursed $305,000 of the settlement to the Barnhills, and $54,023.21 to Farrell Law Group from the trust account without first receiving the Barnhills' authorization. Subsequently, the Barnhills received another $5,976.49 payment.

With the funds in dispute, the Barnhills filed suit against Defendants in Wake County Superior Court on 15 November 2011. Defendants filed a Motion to Dismiss Plaintiffs' Complaint or, in the Alternative, to Stay These Proceedings and to Compel

Arbitration on 13 December 2011. The trial court stayed the proceedings and compelled arbitration between the parties on 13 April 2012. The Barnhills appealed the order staying the proceedings and compelling arbitration on 30 April 2012. We dismissed the appeal pursuant to North Carolina Rule of Appellate Procedure 34. The Barnhills then filed a petition for writ of certiorari with our Supreme Court, which was denied on 12 December 2012.

On 22 October 2015, the Barnhills filed a claim with the American Arbitration Association, asserting that Defendants obtained fees in excess of the fee amount agreed to by the parties. An arbitration hearing was held on 6 April 2016. The Arbitrator entered an Award on 29 April 2016 determining, in pertinent part, that:

> [t]he retainer agreement was modified by the parties after March 12, 2010, in that prior to the settlement funds being paid to Respondent, the parties agreed that further fees and costs incurred were to be governed by a "cap" or limit which had been substantially exceeded by September 12, 2011. This modification was ratified by the parties' course of conduct. . . . Claimant is entitled to recover from Respondent the amount of $49,593.67 with interest from the date of this AWARD.
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> . . . .
>
> This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

On 22 July 2016, Defendants moved to vacate the arbitration award, arguing the Award exceeded the Arbitrator's powers in that: (1) the Arbitrator disregarded the parties' stipulations; (2) the stipulated facts compel that Defendants should have

prevailed at arbitration; (3) the Arbitrator improperly ignored the claims of waiver and laches; and (4) the Arbitrator manifestly disregarded the law with regard to (1) through (3). On 29 September 2016, the trial court denied Defendants' Motion to Vacate, and confirmed the Award pursuant to N.C.G.S. § 1-569.23, finding in relevant part:

> 4. The Arbitrator considered evidence material to the controversy;
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> 5. The Arbitrator did not exceed his authority;
>
> 6. The Arbitrator did not act in manifest disregard of the law . . . .

Defendants timely appealed.

Analysis

Defendants argue the trial court erred by denying the Motion to Vacate the Award, and by confirming the Award, because: (1) the Arbitrator exceeded his powers and acted in manifest disregard of law by improperly ignoring dispositive stipulated facts; (2) the Arbitrator exceeded his powers and acted in manifest disregard of law by ignoring Defendants' affirmative defenses; and (3) the Arbitrator exceeded his powers and acted in manifest disregard of law by imposing his own policy choice and refusing to heed a clearly defined legal principle. We disagree. The trial court did not err because no grounds for vacating the Award exists.

On appeal of a trial court's decision confirming an arbitration award, the issue before us is not whether the panel's award was correct, but whether the trial court properly vacated that award. *Carpenter*, 139 N.C. App. at 749, 534 S.E.2d at 645. "[W]e accept the trial court's findings of fact that are not clearly erroneous and review its conclusions of law *de novo*." *First Union Secs., Inc. v. Lorelli*, 168 N.C. App. 398, 400, 607 S.E.2d 674, 676 (2005).

If a dispute resolved by an arbitrator is within the scope of the parties' arbitration agreement, then a trial court "must confirm [an arbitration] award unless one of the statutory grounds for vacating or modifying the award exists[.]" *Carteret Cty.*, 120 N.C. App. at 346, 462 S.E.2d at 823 (citation omitted). N.C.G.S. § 1-569.23 lists the grounds for vacating an award:

> (1) The award was procured by corruption, fraud, or other undue means;
> (2) There was:
> a. Evident partiality by an arbitrator appointed as a neutral arbitrator;
> b. Corruption by an arbitrator; or
> c. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
> (3) An arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to G.S. 1-569.15 so as to prejudice substantially the rights of a party to the arbitration proceeding;
> (4) An arbitrator exceeded the arbitrator's powers;
> (5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under G.S. 1-569.15(c) no later than the

> beginning of the arbitration hearing; or
> (6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in G.S. 1-569.9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

A trial court is required to confirm an arbitration award "unless one of the statutory grounds for vacating or modifying the award exists[.]" *Carteret Cty.*, 120 N.C. App. at 344, 462 S.E.2d at 821. An arbitration award is presumed valid and a party seeking to set it aside "has the burden of demonstrating an objective basis to support its allegations of an arbitrator's improper conduct." *Id.* at 344, 462 S.E.2d at 821 (citation omitted).

An arbitrator exceeds its power when it acts "contrary to the express authority conferred on [it] by statute and by the language of the private arbitration agreement." *Faison & Gillespie v. Lorant*, 187 N.C. App. 567, 575, 654 S.E.2d 47, 52 (2007). An arbitrator does not exceed his powers by making a mistake as to law or fact. *See G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co.,* 85 N.C. App. 684, 686, 355 S.E.2d 815, 817 (1987).

> If an arbitrator makes a mistake, either as to law or fact, it is a misfortune of the party, and there is no help for it. There is no right of appeal, and the court has no power to revise the decisions of 'judges who are of the parties' own choosing'. . . . If a mistake be a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake of law or fact may be suggested by the dissatisfied party.

Id. at 686, 355 S.E.2d at 817 (citation omitted).

Our Court has not yet determined "the extent, if any, to which 'manifest disregard of law' remains a valid non-statutory basis for vacating an arbitration award" following the United States Supreme Court decision in *Hall Street Associates L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582, 170 L. E. 2d 254, 262 (2008). In *In re Fifth Third Bank National Ass'n*, we explained that:

> [a]ccording to the authorities that describe the manner in which the 'manifest disregard' standard should be applied, establishing the existence of such a deliberate disregard of the applicable law is a necessary component of the showing that must be made in order to justify vacating an arbitration award on the basis of this legal theory.

In re Fifth Third Bank, Nat. Ass'n, 216 N.C. App. 482, 491, 716 S.E.2d 850, 856-857. In *In re Fifth Third Bank, National Ass'n*, the appellant failed to demonstrate a meritorious basis that the arbitrator "manifestly disregarded the law," so we did not need to determine the extent, if any, to which "manifest disregard of law" remained a valid non-statutory basis for vacating an arbitration award. *Id.* at 488, 716 S.E.2d at 855. Similarly here, Defendants have not demonstrated a meritorious basis that the Arbitrator manifestly disregarded the law, so we need not determine the extent, if any, to which "manifest disregard of law" remains a valid non-statutory basis for vacating an arbitration award.

We note that, unlike in *In re Fifth Third Bank, National Ass'n*, our inquiry here is governed by North Carolina's Revised Uniform Arbitration Act, N.C.G.S. § 1-569.1-31, and the additional ground of "manifest disregard" for vacating has not been

recognized when arbitrating pursuant to N.C.G.S. § 1-569.1-31. Moreover, our Supreme Court has stated that our courts have very limited authority to vacate an arbitration award under the Revised Uniform Arbitration Act. *See Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 155, 423 S.E.2d 747, 751 (1992); *see also Cyclone Roofing Co., v. David M. LaFave Co.*, 312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984) ("[J]udicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for vacation of an award under the Uniform Arbitration Act.") (citation omitted).

I. Stipulation of Undisputed Facts

We first consider whether the Arbitrator exceeded his powers and acted in manifest disregard of law by failing to interpret the stipulations as dispositive. Defendants argue that the award was inconsistent with the factual stipulations, thus, the contractual arbitration process prescribed by the Arbitrator, and agreed to by the parties in accordance with their retainer agreement, was violated by the Arbitrator. Moreover, Defendants argue that trial court's determination that "the arbitrator considered evidence material to the controversy" is in error, also because the Arbitrator ignored stipulated facts.

Specifically, Defendants argue that the following stipulation bound the Arbitrator to rule in their favor:

> 11. On October 22, 2015, the Barnhills filed this arbitration demand, more than 4 years after:

> a. The meeting between the Barnhills and [Farrell Law Group] on September 8, 2011;
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> b. The confirmation of that meeting by [Farrell Law Group's] email of September 9, 2011;
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> c. [Farrell Law Group's] September 14, 2011, letter, and the disbursement of settlement funds, including payment of [Farrell Law Group's] fees/costs *pursuant to* the March 2010, retainer agreement.

(Emphasis added). Defendants argue the phrase "pursuant to" in stipulation 11 is certain and unambiguous, and requires a determination that Defendants correctly disbursed the settlement fees and costs because Defendants disbursed the funds pursuant to the Client Retainer. The Arbitrator was bound by stipulation 11, and, as such, Defendants argue, the Arbitrator not only exceeded his powers and acted in manifest disregard of law by determining that Defendants incorrectly disbursed the settlement funds at issue, but also could not have considered the evidence material to the controversy.

However, the Arbitrator determined that Defendants acted *pursuant to* the Client Retainer agreement *as modified by the parties*. As the Arbitrator explained:

> [t]he dispute arises out of a retainer agreement between the parties dated March 12, 2010. . . . The retainer agreement permitted [Farrell and Farrell Law Group] to reimburse himself [sic] the costs of the representation but it did not specifically cover the legal fees. The retainer agreement did not state that it could only be modified in writing. *The retainer agreement was modified by the parties after March 12, 2010*, in that prior to the settlement

> funds being paid to [Farrell and Farrell Law Group], the parties agreed that further fees and costs incurred were to be governed by a "cap" or limit which had been substantially exceeded by September 12, 2011. This modification was ratified by the parties' course of conduct.

(Emphasis added).

Given the consistency of the Arbitrator's reasoning with the stipulation, the Arbitrator did not disregard the parties' stipulations and it was within the Arbitrator's purview to determine that the Client Retainer had been so modified. Defendants have not demonstrated that the Arbitrator's decision exceeded his powers, or failed to consider evidence material to the controversy. There is no objective basis for considering whether the Arbitrator acted in manifest disregard of law. The trial court did not err by determining that this argument does not provide justification pursuant to N.C.G.S. § 1-569.23 for a decision vacating the Award.

II. Consideration of Affirmative Defenses

Next, we consider Defendants' argument that the Arbitrator exceeded his powers and acted in manifest disregard of law by ignoring Defendants' affirmative defenses of waiver and laches. Despite Defendants' contention, the Award specifically states: "[t]his Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied." Thus, the Arbitrator did not fail to consider these claims because the Award, on its face, belies Defendants' arguments. We do not address the merits of the waiver and laches

defenses because an arbitrator does not exceed his powers by making a mistake as to law or fact, *see G.L. Wilson Bldg. Co.*, 85 N.C. App. at 686, 355 S.E.2d at 817, and Defendants have not put forth any evidence that the Arbitrator manifestly disregarded the law underlying the doctrines of waiver or laches.

The trial court did not err by determining that this argument does not provide justification, pursuant to N.C.G.S. § 1-569.23, for a decision vacating the Award.

III. Applicable Law

Finally, Defendants ask us to consider whether the Arbitrator exceeded his powers by imposing his own policy choice rather than applying applicable law. Specifically, Defendants rely on federal case law, *Wachovia Securities, LLC v. Brand*, 671 F.3d 472 (4th Cir. 2012), and appear to argue that the Arbitrator proceeded "as if it had the authority of a common-law court to develop what the arbitrator viewed as the best rule" instead of "identifying the rule of law that governs." *Id.* at 482.

In claiming that the Arbitrator imposed his own policy choice instead of applying clearly defined legal principles, Defendants only present as examples (1) the failure to consider the stipulations; and (2) the failure to rule upon Defendants' waiver and laches claims. For reasons discussed *supra*, the Arbitrator did not fail to consider the stipulations or to rule upon the waiver or laches claims. Defendants did not demonstrate otherwise.

Although Defendants ask us to apply the 4th Circuit's test for determining whether a reviewing court should vacate the arbitration award for manifest disregard of law, they provide no controlling authority from a court of this state that has applied this proposed test. Our Court has not yet determined "the extent, if any, to which 'manifest disregard of law' remains a valid non-statutory basis for vacating an arbitration award," *In re Fifth Third Bank, Nat. Ass'n*, 216 N.C. App. at 488, 716 S.E.2d at 855, and we decline to do so now, as Defendants' failed to demonstrate a basis for their argument that the Arbitrator manifestly disregarded the law.

Conclusion

The trial court did not err in upholding the Award. The trial court properly confirmed the Arbitrator's Award and denied Defendants' Motion to Vacate the Arbitrator's Award because Defendants did not demonstrate that grounds for vacating or modifying the award exist.

AFFIRMED.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).