2016 IL App (1st) 151612-U

THIRD DIVISION
December 7, 2016
Modified Upon Denial of Rehearing

No. 1-15-1612

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAVID ABBOTT, JAMES ABBOTT, JR., and MICHAEL ABBOTT, Plaintiffs-Appellants, v. RBC DAIN RAUSCHER INCORPORATED, a foreign corporation, n/k/a RBC CAPITAL MARKETS CORPORATION, and CHARLES LANE, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 14 CH 8493 The Honorable LeRoy K. Martin Jr., Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court
Justices Fitzgerald Smith and Cobbs concurred in the judgment

ORDER

¶ 1 *Held*: Plaintiffs failed to provide a sufficient brief and record for this court to adequately address their contentions regarding vacatur of an arbitration award. The trial court's judgment was affirmed.

¶ 2 Plaintiffs-appellants David, James, and Michael Abbott (plaintiffs), filed a claim against defendants-appellees RBC Dain Rauscher Incorporated, now known as RBC Capital Markets Corporation, and Charles Lane (defendants) for violating various financial regulations, and the

claim went to arbitration. Plaintiffs now challenge the circuit court's judgment that confirmed the arbitration award, contending that the arbitrator did not properly consider certain evidence. In an order issued September 29, 2016, we affirmed the decision of the circuit court. Plaintiffs have filed a petition for rehearing, which we address at various points throughout. As before, we affirm.

¶ 3 BACKGROUND

¶ 4 The limited record on appeal reveals the following. Plaintiffs retained RBC and Lane as their family financial consultants. Around 2005, plaintiffs allegedly discovered "unsuitable trades," and in September 2008, filed a five-count "statement of claim" before the Financial Industry Regulatory Authority (FINRA), which provides oversight of the U.S. securities market. Plaintiffs asserted violations of federal securities laws, Illinois consumer laws, and various state common law claims. The matter went to arbitration before FINRA for over two years with hearings in Chicago spanning some 57 days. In 2014, a three-member arbitration panel awarded plaintiffs almost $200,000 in compensatory damages and issued $3,000 in sanctions against defendants. During that hearing, plaintiffs orally moved to submit two FINRA news releases (from 2009 and 2010) and also a "financial industry regulatory letter of acceptance, waiver, and consent," which is apparently akin to a FINRA settlement. Plaintiff supplied this court with only limited portions from the hearing transcript which reveal that counsel for plaintiffs briefly described the documents, outlined their contents, and argued they would buttress his expert's opinion testimony that defendants had violated various industry standards and that RBC failed to properly supervise its investor employees, including Lane. The presiding arbitrator held the documents did not relate directly to the case at hand and denied their formal admission as exhibits. The arbitrator nonetheless reserved the matter for the close of evidence. At the close of evidence, counsel for plaintiffs again moved to submit the documents. The arbitrator stated that

plaintiffs could attach the documents to their closing brief and that essentially the arbitrators may or may not review them. Plaintiffs, however, failed to even attach these documents to their closing brief.[1]

¶ 5 Plaintiffs subsequently moved to vacate the arbitration award in the Cook County circuit court, arguing the arbitrators refused to hear evidence material to the controversy, rendering their damages award insufficient. The circuit court denied their motion, holding the matter was within the arbitrators' discretion. Plaintiffs filed a motion to reconsider, which was denied. The court thereafter granted defendants' motion to confirm the arbitration award. This timely appeal followed.

¶ 6 ANALYSIS

¶ 7 Plaintiffs challenge the trial court's judgment denying their motion to vacate the arbitration award. As below, plaintiffs argue the arbitrators erred in declining to admit the news releases and settlement documents at the lengthy arbitration hearing. Plaintiffs argue that had these documents been admitted, plaintiffs would have been able to establish liability against RBC for failure to monitor employee activities (instead of proving only joint and several liability against RBC and Lane), enabling them to obtain punitive damages. Plaintiffs assert this case is controlled by the Federal Arbitration Act ((9 U.S.C. §1 *et seq*. (West 2016)) (FAA).

¶ 8 The FAA applies when a contract involving interstate commerce stipulates that any ensuing controversies be settled by arbitration, and such clauses may only be revoked "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2 (West 2016). The FAA was designed to place arbitration agreements on the same footing as other contracts. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Standford Junior University*, 489

[1] Defendants assert that the FINRA documents that are part of the record on appeal are not the same as those sought to be admitted during arbitration.

U.S. 468, 474 (1989). Enacted pursuant to the Commerce Clause, this body of substantive law is enforceable in both state and federal courts. *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Brown v. Delfre*, 2012 IL App (2d) 111086, ¶ 15. Plaintiffs, however, specifically cite as authority for vacating the arbitration award section 10(a)(3) of the FAA, which provides: "*** *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 *** where the arbitrators were guilty of misconduct *** in refusing to hear evidence pertinent and material to the controversy." (Emphasis added.) 9 U.S.C. §10(a)(3) (West 2016). In their appeal, plaintiffs chiefly rely on this provision in their effort to vacate the arbitration award and emphasized in their petition for rehearing that the FAA applies in this case.

¶ 9 Herein lies plaintiffs' first problem in their present appeal, for their application to vacate was made to the Illinois state circuit court of Cook County and not the federal district court wherein the award was made. We observe that the presence of interstate commerce is not sufficient to make the FAA's procedural provisions, including those pertaining to judicial review (9 U.S.C. §§ 10, 11), applicable in Illinois state courts. See *Mave Enterprises, Inc. v. Travelers Indemnity Company of Connecticut*, 162 Cal. Rptr. 3d 671, 687 (2013); see also *Atlantic Painting & Contracting Inc. v. Nashville Bridge Co.*, 670 S.W. 2d 841, 846 (1984) (procedural aspects of FAA are confined to federal courts); *Kim-C1, LLC v. Valent Biosciences Corporation*, 756 F. Supp. 2d 1258, 1262 (E.D. Cal. 2010) (noting strong presumption that FAA governs procedural rules, including for vacatur, where FAA controls arbitration). Rather, a state court typically applies its own procedural law unless otherwise specified. *Id.*; see also *Volt Information Sciences, Inc.*, 489 U.S. at 479 (parties generally free to structure their arbitration agreements as they see fit); *Italia Foods, Inc. v. Sun Tours, Inc.*, 2011 IL 110350, ¶ 24 (states may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted

by federal law). In fact, according to one California case, if a contract involves interstate commerce, the FAA's substantive provision applies to the arbitration, but the FAA's procedural provisions don't unless the contract contains a choice-of-law clause expressly incorporating them. *Mave Enterprises, Inc.*, 162 Cal. Rptr. 3d at 687. It is thus apparent that plaintiffs should have filed the motion to vacate in federal court rather than state court.

¶ 10 Moreover, for the Illinois Arbitration Act to confer jurisdiction to confirm such an award, as plaintiffs alternatively claim, the parties' written agreement must actually provide for arbitration *in Illinois*. See 710 ILCS 5/16 (West 2016); *Chicago Southshore and South Bend R.R. v. Northern Indiana Commuter Transportation District*, 184 Ill. 2d 151, 155-56 (1998). This is still the case even if the parties actually conduct the arbitration in Illinois. *Id*. at 158. Here, however, we have only one page of the contract, which appears to be its last page. It is signed by David Abbott, and probably by Charles Lane, but even that is not definitively apparent, as his name is not typed out underneath what we presume to be his signature. What's more, the right-side column of the typewritten and xeroxed contract page is cut-off in the copy provided to us. Where readable, this page of the contract states that arbitration "shall be conducted pursuant to the Federal Arbitration Act and the laws of the state designated in Sectio *** [incomplete] before the NYSE or the arbitration facility provided by any other *** [incomplete] exchange of which RBC Dain is a member, or the NASD or the Mun *** [incomplete] Securities Rulemaking Board, and in accordance with the rules *** [incomplete] of the selected organization." What's more, under section "16- Governing Law," this page of the contract provides that except in "Section 17, this agreement and its enforcement will be governed

by the substantive laws of the State of Minnesota without regard to principles of conflicts or choice of law."[2]

¶ 11 The contract does not state that arbitration must take place in Illinois, making it questionable as to whether Illinois was the proper tribunal for the plaintiffs' motion to vacate. See *Valent BioSciences Corp. v. Kim-C1, LLC*, 2011 IL App (1st) 102073, ¶ 26 ("Illinois courts have consistently construed section 16 of the Act (710 ILCS 5/16 (West 2008)) as conferring jurisdiction on Illinois courts where the parties' written agreement designates arbitration occur in Illinois."). Even assuming the plaintiffs properly moved to vacate the arbitration in the Illinois circuit court, the contract still does not make clear under what law we must operate since it states that the arbitration should proceed under both FAA rules and those of an unnamed state. *Cf. Johnson v. Gruma Corp.*, 614 F. 3d 1062, 1067 (2010) (where FAA rules control arbitration proceedings, a reviewing court must apply the FAA vacatur standard and vice versa). This makes a difference in what law we cite as precedent to substantively address plaintiffs' claims. While some of plaintiffs' representations in their petition for rehearing – such as assertions that the case is properly in state court and that we must apply FAA law – very well may be true, we cannot verify this from the record. That is, without the full agreement and a brief making clear via the record which substantive and procedural laws apply in this case, and whether plaintiffs rightly challenged their arbitration award in state court, we cannot adequately address plaintiffs' contentions on appeal and must presume the trial court was correct in its ruling denying their motion to vacate the arbitration award. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984); *Smolinski v. Vojta*, 363 Ill.App.3d 752, 757-58 (2006); *cf. Allied American Insurance Co v. Culp*,

[2] Section 17, which is entitled "Arbitration Disclosures" appears immediately below section 16 "Governing Law." Section 17 of the contract simply identifies how arbitration is binding and more limiting than seeking remedies in court. We can assume this is the same section 17 referenced in the previous section 16, but it is not entirely clear without seeing the full contract.

243 Ill. App. 3d 490, 494 (1993) (absent evidence showing arbitrator exceeded authority, court must assume no error).

¶ 12 We further note that even if we could address plaintiffs' arguments for vacatur under either section 10(a)(3) of the FAA or the equivalent Illinois act (see 710 ILCS 5/12(a)(4) (West 2016)), plaintiffs again have not demonstrated the evidentiary standards at play in this arbitration, nor provided this court with a sufficient record to conclude the arbitrators abused their discretion in declining to admit the evidence. See *International Chemical Workers Union v. Columbian Chemicals Co.*, 331 F. 3d 491, 497 (5th Cir. 2003) (arbitrators have broad discretion in making evidentiary rulings). Judicial review of an arbitrator's award is extremely limited, more limited than appellate review of a trial court's decision. *Everen Securities, Inc. v. A.G. Edwards & Sons, Inc.*, 308 Ill. App. 3d 268, 273 (1999); *Doral Financial Corporation v. Garcia-Velez*, 725 F. 3d 27, 31 (1st Cir. 2013) (review is exceedingly deferential such that arbitral awards are nearly impervious to judicial oversight). In fact, courts must construe an award so as to uphold its validity whenever possible. *Everen Securities, Inc., Inc.*, 308 Ill. App. 3d at 273. Courts will not overturn an arbitration decision for mere errors of judgment as to law or fact; rather it's only when a gross error of law or fact appears on the face of the award. *Everen Securities, Inc., Inc.*, 308 Ill. App. 3d at 273; *Johnson v. Baumgardt*, 216 Ill. App. 3d 550, 556 (1991) (same); *see also Flexible Manufacturing Systems v. Super Products Corporation*, 86 F. 3d 96, 100 (7th Cir. 1996) ("The fact that an arbitrator makes a mistake, by erroneously rejecting a valid, or even a dispositive legal defense, does not provide grounds for vacating an award unless the arbitrator deliberately disregarded what she knew to be the law."). Moreover, plaintiffs bear the burden of proving by clear and convincing evidence that the award was improper. *Galasso v. KNS Companies, Inc.*, 364 Ill. App. 3d 124, 131 (2006). Our review of the trial court's decision is *de novo*, which means we may affirm on any basis in the record. *Malinksi v. Grayslake*

Community High School District 127, 2014 IL App (2d) 130685, ¶ 6; *Rosenthal-Collins Group, L.P. v. Reiff*, 321 Ill. App. 3d 683, 687 (2001).

¶ 13 While plaintiffs assert their expert should have been allowed to testify about the news releases and settlement documents, they have not provided this court with the full transcripts of their expert's testimony, defendant's expert's testimony, or that of any other witness. Rather, they have only supplied this court with limited excerpts of testimony[3] and transcripts of their interchange with the arbitration court and opposing counsel, whereby they argued the evidence now at issue should have been admitted. Yet, according to plaintiffs' brief, their expert was apparently retained to testify about supervision practices, RBC's shortcomings, and damages. Even assuming plaintiffs had properly sought to admit the documents, without a record bearing the full hearing testimony, especially that of the competing experts, we cannot say those documents were so material to the matter at hand that without them the course of the case would have changed *vis a vis* RBC. *Doral*, 725 F. 3d at 33 (mere speculation insufficient to vacate arbitral award). The fact this arbitration was conducted over 57 days simply confirms this conclusion. A petitioner must demonstrate to the court that he has been prejudiced due to the arbitrator's actions, but the record in this case is demonstrably insufficient to find prejudice or to possibly conclude that plaintiffs were deprived of a fair arbitration hearing. See *Culp*, 243 Ill. App. 3d at 494; see also *Doral*, 725 F. 3d at 31-32 (vacatur appropriate only when exclusion of evidence deprives party of fair hearing); *Shachter v. City of Chicago*, 2011 IL App (1st) 103582, ¶ 80 (burden of proving evidentiary ruling prejudicial on party seeking reversal). Contrary to plaintiffs claims in their petition for rehearing, this means including a complete transcript of the arbitration hearing, even if voluminous. See *Airtite, a Division of Airtex Corp. v. DPR Limited*

[3] Some of the excerpts do not even identify by name which witness is testifying.

Partnership, 265 Ill. App. 3d 214, 218 (1994) (where record did not contain a compete transcript of arbitration proceeding, incompleteness resolved against appellant).

¶ 14 We further observe that the record before us demonstrates the arbitrators had some understanding of the contents of the documents sought to be admitted and yet still chose not to allow them into evidence, which is a discretionary matter we are not at liberty to disturb given the limited record. Since we have rejected plaintiffs' request for vacatur and remand, we also reject their request to revisit the remedies issued, an argument which is similarly unsupported by the record provided.

¶ 15 We also observe that plaintiffs' brief, like the record, is inadequate. Plaintiffs have not complied with Supreme Court Rule 341 in that their statement of facts contains argument and repeatedly cites to the appendix[4] rather than the record. See Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016); *Mead v. Board of Review of McHenry County*, 143 Ill. App. 3d 1088, 1092 (1986) (appellant's failure to substantially comply with procedural rules is grounds for dismissal). They inappropriately cite allegations taken from their pleadings as fact. Plaintiffs also reference technical terms without adequately defining them or making clear why they are relevant to the claims on appeal. See *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 610 (2007) (issue not clearly defined fails to satisfy Rule 341(h)(7) and is thus waived); *Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986) (appellate court is not a depository where appellant can dump burden of argument and research). For all of these reasons, plaintiffs' contentions on appeal fail.

¶ 16 CONCLUSION

[4] Defendants also inappropriately rely on their separate appendix. To the extent they have included any documents not part of the record, we cannot consider them. See Ill. S. Ct. R. 341(i)(6) (eff. Jan. 1, 2016); *Regal Package Liquor, Inc. v. J.R.D., Inc.*, 125 Ill. App. 3d 689, 691 (1984) (attachments to briefs not otherwise before the reviewing court cannot be used to supplement the record).

¶ 17 Based on the foregoing, we affirm the decision of the circuit court of Cook County.

¶ 18 Affirmed.