2017 IL App (1st) 153290-U

SIXTH DIVISION
MARCH 17, 2017

No. 1-15-3290

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JASPER OFAMA and JUDITH AMAZUBE,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees,	)	Cook County.
	)	
v.	)	No. 14 M1 301149
	)	
RAVEN BUTLER and BRANDON PERKINS,	)	Honorable
	)	Sheryl A. Pethers,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 Held: Trial court properly barred one defendant from rejecting arbitration award due to defendant's repeated failure to appear for deposition in personal injury case. The court's discovery sanction, which remained in effect at the time of the arbitration, precluded a finding that defendants participated in the arbitration in good faith. Order barring rejection by second defendant who owned vehicle involved in collision was vacated in light of arbitrators' award in favor of that defendant.

¶ 2 In this personal injury case, defendants Raven Butler and Brandon Perkins failed to appear for their depositions several times, which ultimately resulted in an order barring them from testifying at an arbitration hearing. Despite the bar order, the arbitrators allowed Perkins to

testify at the hearing. The arbitrators entered an award in favor of plaintiffs Jasper Ofama and Judith Amazube and against Perkins. The arbitrators also entered an award in favor of Butler and against plaintiffs. When Perkins sought to reject the award, plaintiffs filed a motion to bar, which the trial court granted. The trial court confirmed the award against Perkins and also, inexplicably, against Butler. They both appeal. We affirm in part and vacate in part.

¶ 3 BACKGROUND

¶ 4 On May 8, 2012, Ofama was driving a vehicle in which Amazube was a passenger when they were involved in a collision with a vehicle driven by Perkins. Butler was the owner of the vehicle Perkins was driving, but there is no allegation that she was present at the time of the accident.

¶ 5 Plaintiffs filed suit on May 6, 2014. They asserted negligence claims against Perkins and a negligent entrustment claim against Butler.

¶ 6 Plaintiffs noticed defendants' depositions for October 14, 2014, and November 5, 2014. Defendants failed to appear both times. On October 17, 2014, the trial court set a discovery cut-off date of January 30, 2015, and assigned the case to mandatory arbitration.

¶ 7 On October 24, 2014, plaintiffs filed a motion to compel defendants to respond to outstanding written discovery and to appear for their depositions. On November 5, 2014, the trial court granted the motion and directed defendants to respond to written discovery by December 5, 2014, and to appear for their deposition by December 17, 2014. The November 5, 2014 order contained the following language:

> "Failure to comply with the specific terms of this order will result in the defendant being barred from testifying and presenting any evidence at the arbitration and/or trial of this matter.

> The above stated sanction shall remain in effect until removed by Order of Court upon motion by the party against whom the sanction applies." (Emphasis in the original.)

¶ 8 Following entry of the order, plaintiffs again noticed defendants' depositions for December 16, 2014. For a third time they failed to appear.

¶ 9 Even after the expiration of the deadline set in the court's November 5, 2014 order, plaintiffs gave defendants an opportunity to comply with its terms. On January 15, 2015, plaintiffs noticed defendants' depositions for January 30, 2015, but, for the fourth time, they failed to appear.

¶ 10 The matter proceeded to arbitration on March 25, 2015. Although plaintiffs presented the arbitrators with a copy of the court's November 5, 2014 order, at Perkins' request and over plaintiffs' objection, he was permitted to testify. At the conclusion of the arbitration, the arbitrators entered an award in favor of Ofama and against Perkins in the amount of $17,500 and in favor of Amazube and against Perkins in the amount of $7,500. The arbitrators found in favor of Butler and against plaintiffs. As to both defendants, the arbitrators found that they participated in the arbitration in good faith.

¶ 11 On April 6, 2015, both Perkins and Butler filed a notice of rejection of the arbitration award. It is unclear why Butler joined in the notice as the award was in her favor.

¶ 12 On May 5, 2015, plaintiffs filed a motion to bar defendants from rejecting the award. After briefing and argument, the court granted plaintiffs' motion and confirmed the award against Perkins on June 25, 2015. No transcript or bystander's report of the hearing is in the record. The court's order also barred Butler from rejecting the award. While, as discussed below, the rationale for barring rejection by Perkins applies equally to Butler, given that the bar order

applied to her as well as Perkins, the arbitrators' award in favor of Butler, who owned, but was not in the car Perkins was driving, obviated the need for her to reject the award.

¶ 13 Defendants filed a post-judgment motion on July 24, 2015. Defendants' motion raised the same arguments they pursued in response to plaintiff's motion to bar. The court denied the post-judgment motion on October 22, 2015, and defendants timely appealed on November 18, 2015.

¶ 14 ANALYSIS

¶ 15 Illinois Supreme Court Rule 91(b) (eff. June 1, 1993) empowers a court to debar a party from rejecting an arbitration award if the party fails to participate in the hearing in good faith. We review the trial court's order barring defendants from rejecting the arbitration award for an abuse of discretion. *Coleman v. Akpakpan*, 402 Ill. App. 3d 822, 826 (2010); *Lopez v. Miller,* 363 Ill. App. 3d 773,777 (2006). Similarly, we review a sanction imposed for discovery violations pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002) under the same standard. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). A trial court abuses its discretion only when its decision is arbitrary, fanciful or unreasonable. *Lopez,* 363 Ill. App. 3d at 777; *Glover v. Barbosa,* 344 Ill. App. 3d 58, 61 (2003).

¶ 16 Although defendants correctly observe that when the propriety of a debarment sanction involves a question of law, *de novo* review is appropriate (*Campuzano v. Peritz,* 376 Ill. App. 3d 485, 487 (2007)), their brief identifies no such question of law involved in this appeal. Rather, all of defendants' arguments turn on the discretion exercised by the trial court in (i) entering the November 5, 2014 order that precluded them from testifying at the arbitration hearing and (ii) later barring them from rejecting the arbitration award. But under any standard of review, we would affirm the court's orders as to Perkins.

¶ 17 We first address the propriety of the court's order as it pertains to Butler. Plaintiffs' only claim against Butler was based on a theory of negligent entrustment. We have not been provided a transcript of the arbitration hearing, but plaintiffs do not contend that any evidence regarding Butler's conduct in entrusting the use of her vehicle to Perkins was presented. The arbitrators did find in favor of Butler and therefore we must assume the evidence supported that finding. See *Sloan Electric v. Professional Realty & Development Corp.*, 353 Ill. App. 3d 614, 623-24 (2004).

¶ 18 Further, although both defendants filed a notice to reject the arbitration award, as noted, there was no reason for Butler to reject the award as it was in her favor. Defendants' brief argues that the award should not have been confirmed against Butler, an argument that was not raised in the trial court. While such conduct would normally result in forfeiture, plaintiffs have not argued forfeiture and have not otherwise responded to this argument, except in passing. Because it was clear error to confirm the award against Butler given the arbitration ruling in her favor, we exercise our discretion to correct this error on appeal and vacate the confirmation order as it applies to Butler. Ill. S. Ct. R. 366(a) (eff. Feb. 1, 1994). Of course, vacating the judgment against Butler has no effect on the availability of her insurance to satisfy the judgment against Perkins who was, as far as the record shows, operating Butler's vehicle with her permission.

¶ 19 With respect to Perkins, he first argues that the November 5, 2014 order was not self-executing and that the arbitrators were free to decide whether he should be permitted to testify at the hearing. We disagree. The court's November 5, 2014 order was unambiguous: because of defendants' repeated failures to comply with discovery, including failing to appear for their depositions, they would, until further order of court, be barred from testifying or presenting evidence at the arbitration hearing unless, by the deadlines set forth in the order, they responded to written discovery by December 5, 2014, and presented themselves for deposition by

December 17, 2014. Although defendants did respond to written discovery by the first deadline, it is undisputed that they failed to present themselves for deposition by December 17, 2014. "The duty was on defendants to comply with all, not part, of the trial court's order." *Campuzano,* 376 Ill. App. 3d at 489. Defendants' suggestion that the court or plaintiffs were required to do more to impose the sanction is meritless.

¶ 20 Defendants failed to appear for their depositions by December 17, 2014, or seek relief from the November 5, 2014 order prior to the arbitration hearing. Moreover, even after the deadline in the court's order passed, plaintiffs still gave defendants an opportunity to appear for deposition, which they ignored. Thus, by its express terms, the order barring defendants from testifying remained in effect, and the arbitrators were not at liberty to disregard that order by permitting Perkins to testify. Notwithstanding Perkins' attempt on appeal to blame plaintiffs' counsel for failing to schedule his depositions on a date convenient to him, his inaction is fatal to his appeal. See *Lopez,* 363 Ill. App. 3d at 776-77 (rejecting defendant's attempt to blame plaintiff's counsel for the rescheduling of his deposition, citing undisputed fact that defendant failed to give his deposition by deadline set by the court or seek relief from the discovery sanction before the arbitration hearing).

¶ 21 This court has often held that a party's defiance of court orders regarding discovery is a sufficient basis upon which to bar that party from testifying or presenting evidence at an arbitration hearing. *Coleman,* 402 Ill. App. 3d at 827; *Campuzano,* 376 Ill. App. 3d at 488-89; *Lopez,* 363 Ill. App. at 779; *Glover,* 344 Ill. App. 3d at 62. Further, the party's failure to cooperate in discovery is often the precursor of a finding that the party failed to participate in the arbitration in good faith. This is so because "a litigant who fails to modify, vacate or comply with sanctions imposed due to a discovery violation that occurs outside of the arbitration hearing may

be incapable of participating in the arbitration in a meaningful manner." *Anderson v. Pineda*, 354 Ill. App. 3d 85, 89 (2004). A party's failure to seek relief from an order barring testimony at arbitration during the time between imposition of the sanction and the hearing indicates that the party never intended to participate in the arbitration hearing in good faith. *Glover,* 344 Ill. App. 3d at 62, citing *Eichler v. Record Copy Services,* 318 Ill. App. 3d 790, 792 (2000).

¶ 22 It is of no moment that the arbitrators permitted Perkins, in violation of the court's order, to testify at the hearing or that they made a finding that both Perkins and Butler participated in the hearing in good faith. In many of the cases cited above, arbitrators made similar findings based on the participation of the barred party's counsel in the hearing and the appearance of the party at the hearing. See *Coleman,* 402 Ill. App. 3d at 827 (collecting cases). But once a party has refused to participate in discovery and been sanctioned for that refusal by entry of an order prohibiting the party from testifying or presenting evidence at arbitration, no finding of good faith participation can stand. *Glover*, 344 Ill. App. 3d at 63 ("We have already determined that defendant's ability to ensure good faith compliance at the hearing was within her control at all times. Defendant chose not to exert that control and must now endure the consequences of that decision."); *Coleman*, 402 Ill. App. 3d at 827 (trial court properly rejected arbitrators' good faith finding where defendant took no action prior to the arbitration hearing to vacate sanctions order).

¶ 23 Perkins also argues that the order barring him from rejecting the arbitration award was too harsh a sanction, an argument that has likewise been rejected in many cases. *Campuzano*, 376 Ill. App. 3d at 490; *Anderson*, 354 Ill. App. 3d at 90; *Glover*, 344 Ill. App. 3d at 63. A litigant's continuous and deliberate disregard of a trial court's authority to order compliance with discovery is a sufficient basis upon which to bar that litigant from rejecting an arbitration award. As in *Glover,* Perkins here had the ability to cure his repeated failures to appear for deposition

prior to the arbitration hearing. Because he did nothing to either comply with discovery or vacate or modify the order barring him from testifying prior to the hearing, he was properly required to live with the consequences.

¶ 24 This case is unlike *Reyes v. Menard, Inc.*, 2012 IL App (1st) 112555, cited by defendants, where this court found that the discovery sanction barring plaintiff from testifying at the arbitration hearing was too harsh and, therefore, the order barring her from rejecting the award was erroneous as well. In *Reyes*, the plaintiff was one week late in responding to interrogatories and failed to seek leave to file her answers. *Id.* ¶ 7. We found that this relatively minor discovery violation was not a sufficient basis upon which to bar the plaintiff from testifying at the arbitration hearing. *Id.* ¶ 47 ("Plaintiff's attorney's sole discovery violation, which was to file written discovery one week late without leave of court, cannot be compared to 'defiance,' 'minimal participation' in, or 'blatant disregard' for the discovery and arbitration process."). There is simply no comparison between the plaintiff's conduct in *Reyes* and defendants' conduct here. Defendants had no fewer than four opportunities to appear for their depositions. The trial court was justified in imposing the sanction of barring them from testifying or presenting evidence at the arbitration based on their substantial disregard of their discovery obligations.

¶ 25 We note that in *Campuzano, Lopez, Anderson* and *Glover*, cases in which this court found that a bar order was appropriate, counsel for defendants in this case appeared as counsel for the appellants. Yet, not one of those cases is discussed in defendants' brief. And although defendants' table of authorities lists *Glover* and *Anderson*, review of the pages of defendants' brief where those cases are referenced reveals no mention of those authorities, much less any effort to distinguish them. Instead, without noting the criticism of *Amro v. Bellamy*, 337 Ill. App. 3d 369 (2003), in *Campuzano* and later cases, defendants, citing *Amro*, persist in arguing that

"this court has reversed debarment sanctions arising from discovery violations." But in *Campuzano,* we flatly rejected continued reliance on *Amro:* "In holding that open defiance of a court order entered to compel discovery in anticipation of an arbitration hearing cannot form the predicate for a debarment order, *Amro* stands alone." 376 Ill. App. 3d at 491. We further noted that *Amro's* rationale was rejected in *Eichler, Anderson, Lopez,* and *Glover. Id.*; see also, *Coleman,* 402 Ill. App 3d at 827 (rejecting reliance on *Amro*). While we understand that counsel may disagree with these authorities, counsel act at their peril when they ignore them. See Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994). See also Ill. R. Prof. Conduct 3.3(a)(2) ("A lawyer shall not knowingly *** fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

¶ 26 CONCLUSION

¶ 27 The trial court properly sanctioned defendants for their repeated failures to present themselves for deposition and because defendants never sought to vacate, modify or comply with the trial court's November 5, 2014 order prior to the arbitration hearing, they could not have participated in that hearing in good faith. Thus, as to Perkins, the trial court properly barred him from rejecting the award in plaintiffs' favor. As to Butler, we vacate the judgment against her given that the arbitration award was in her favor.

¶ 28 Affirmed in part; vacated in part.