

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK N. KAHN,
Appellant,
vs.
FREDERIC I. BERKLEY, ESQ.,
Respondent.

No. 37396

FILED

OCT 17 2002

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Berkley*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order confirming an arbitration award resolving an attorney fee dispute and the judgment entered on the award. We conclude that the matter must be remanded to the district court for further proceedings.

Attorney Frederic Berkley represented Frank Kahn in litigation concerning a family business dispute, which pitted Frank's brother Eric against Frank and their parents. Kahn and Berkley apparently agreed verbally that Berkley's fee would be \$250 per hour. Kahn apparently paid Berkley \$24,799.00 in attorney fees, but Berkley asserted that Kahn owed him an additional \$15,383.60 and withdrew from the representation. Kahn asserted that Berkley should refund the money already paid because he did not earn the fee. Kahn and Berkley each instituted proceedings to resolve the dispute—in different forums.

On June 7, 1999, Kahn executed and submitted to the State Bar of Nevada a Petitioner's Agreement for Arbitration by the State Bar's Fee Dispute Arbitration Committee, established under SCR 86(12). Kahn

requested mediation to resolve the dispute, with arbitration to follow if the mediation did not succeed.

On June 9, 1999, Berkley filed a district court complaint. Meanwhile, the Fee Dispute Arbitration Committee sent Berkley a copy of Kahn's application, and asked Berkley to respond. On June 25, 1999, Berkley signed the Respondent's Agreement for Arbitration, but he did not agree to mediation. On July 8, 1999, Berkley's lawsuit was dismissed voluntarily, without prejudice.

Because Berkley did not agree to mediation, the dispute was forwarded to a 3-person arbitration panel, and a hearing was set for October 11, 1999. When Kahn received notice that no mediation would be held and the matter had been set for arbitration, he notified the Fee Dispute Arbitration Committee that he was withdrawing his request for arbitration.

At the October 11, 1999 arbitration hearing, the arbitration panel's three members first considered whether they had jurisdiction to proceed, given Kahn's withdrawal. The arbitration decision explains:

Since no specific provision under the Fee Dispute Committee By-laws addresses this issue, the three members of the panel analogized to court proceedings, and the ability of a plaintiff to voluntarily withdraw a complaint after a response has been filed. Additionally, the panel members examined the history of the case, and the conduct of Mr. Kahn as well as that of Mr. Berkley, and after discussing the matter thoroughly, a vote was held, and a decision reached that jurisdiction was in fact appropriate, that Mr. Kahn was not in a

position of voluntarily withdrawing his petition at such a late date after an appearance had already been made by Mr. Berkley, that prejudice would enure to Mr. Berkley given that he had already voluntarily withdrawn without prejudice the law suit [sic] seeking attorney's fees, and that the arbitration would proceed forward. Two members of the panel concurred that jurisdiction was appropriate, while one member of the panel believed that jurisdiction was inappropriate.

The arbitration then proceeded without Kahn, and the arbitrators ultimately rendered a decision in Berkley's favor, awarding him \$15,664.35. The decision's last paragraph advises the parties:

Appeal. This decision is a final decision. Appeals of the decision are governed by Section G of the By-laws of the Fee Dispute Arbitration Committee and are limited to the grounds for appeal set forth in the By-laws. Any appeal must be filed with an office of the State Bar of Nevada within thirty (30) days of service of this Award.

Kahn timely filed an appeal with the State Bar of Nevada. He challenged the panel's jurisdiction, its decision to proceed without him, its procedure and its award. He asserted that the Fee Dispute Arbitration Committee coordinator had told him that he had an absolute right to withdraw from the arbitration and to seek other avenues of relief. He also alleged various procedural violations of the Committee's By-laws.

On August 10, 2000, the Fee Dispute Arbitration Committee Executive Council issued its order denying Kahn's appeal. According to the order:

It is the decision of the Executive Council that [Kahn's] appeal be denied on the grounds that the alleged procedural defects, raised on appeal, do not rise to the standard prescribed under Rule G(1)(b) and (c) of the By-laws of the Fee Dispute Arbitration Committee of the State Bar of Nevada.

Neither the arbitration decision nor the order denying Kahn's appeal makes any reference to further review in the district court; however, SCR 86(12), which authorizes the Fee Dispute Arbitration Committee's establishment, provides: "There shall be a right to de novo review in the district court of all awards arising out of any fee dispute system implemented pursuant to this rule." Kahn did not seek de novo review, and he did not pay Berkley.

On September 26, 2000, Berkley commenced an action in the district court by filing a motion for order confirming arbitration award under NRS 38.135 *et. seq.* Berkley did not provide the district court with copies of Kahn's or his agreement for arbitration by the Fee Dispute Arbitration Committee, or with a copy of the Committee's By-laws. Kahn opposed the motion, generally raising the same defenses he raised in his fee dispute appeal to the executive council.

On December 11, 2000, the district court entered a minute order granting Berkley's motion, based on a finding "that a valid agreement for binding arbitration existed between the parties in regard to the fee dispute. As a result, [] Berkley is entitled to have the matter entered as a judgment per NRS 38.165." No parties were present and

there was no hearing. At the court's direction, Berkley prepared an order, which was filed on January 2, 2000.

Kahn timely filed a notice of appeal. The appeal presents several issues that we cannot decide on the record before us. Without copies of the parties' agreement to arbitrate and the Fee Dispute Arbitration Committee By-laws, the district court found that Kahn and Berkley had "a valid agreement for binding arbitration," and concluded that Berkley "is entitled to have the matter entered as a judgment per NRS 38.165."

The district court may be correct, but if it did not review the parties' agreement, it could not determine whether there were grounds for its revocation. Assuming for the moment that NRS chapter 38 applies, NRS 38.035 provides that "[a] written agreement to submit any existing controversy to arbitration . . . is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." Kahn argued in his appeal to the Fee Dispute Arbitration Committee Executive Council that there was no meeting of the minds—he agreed to arbitration only if it was preceded by mediation, while Berkley refused to mediate and agreed only to arbitration—so there was no contract to arbitrate. Kahn argued in his Executive Council appeal and in his opposition to Berkley's district court motion for confirmation that the Fee Dispute Arbitration Committee coordinator told him that he had an absolute right to withdraw. These arguments may not provide grounds for revoking the arbitration agreement, but that determination cannot be

made without considering the agreement and its terms. The district court's order affirming the award is not supported by the record.

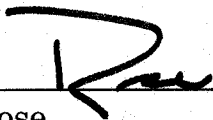
In addition, the district court could not resolve the jurisdictional issues without considering the express provisions of the State Bar Fee Dispute Arbitration Committee's By-laws. The Fee Dispute Arbitration Committee proceeds under its own rules, not under the arbitration procedures set forth in NRS 38.055 through 38.125. And since the rule that enabled the Fee Dispute Arbitration Committee's establishment, SCR 86(12), expressly provides a right to de novo review in the district court, it appears that NRS chapter 38 might not apply—the provisions of that chapter do not permit de novo review.¹ Also, since the parties did not arbitrate their dispute under NRS chapter 38, even if that chapter provides a mechanism for the winning party to obtain judicial confirmation of a Fee Dispute Arbitration Committee's award, there is a

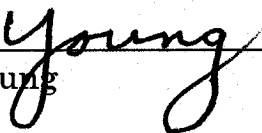
¹See NRS 38.145(1) (authorizing the court to vacate an arbitration award (a) if it was procured by corruption, fraud or other undue means; (b) for arbitrator corruption or misconduct, or for evident partiality of an arbitrator appointed as a neutral; (c) if the arbitrators exceeded their powers; (d) if the arbitrators refused to postpone the hearing for good cause or refused to hear material evidence or otherwise substantially prejudiced a party by violating statutory procedures; or (e) there was no arbitration agreement); City of Boulder v. General Sales Drivers, 101 Nev. 117, 694 P.2d 498 (1985) (holding that the legislature, by choosing to require submission of disputes governed by the Local Government Employee-Management Relations Act to final and binding arbitration, intended that the Uniform Arbitration Act, NRS chapter 38, including its limited standard of judicial review, should apply).

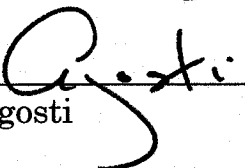
question whether the proceeding may be commenced by filing a motion under NRS 38.185 instead of a complaint under NRCP 3.

Accordingly, we reverse the district court's order and remand this case for the district court to determine whether the Fee Dispute Arbitration Committee panel had jurisdiction to proceed with the arbitration, whether Kahn was advised of his right to de novo review in the district court, whether the district court had jurisdiction to confirm the arbitration award under NRS chapter 38 upon the filing of a motion for confirmation and, if the committee and the court both had jurisdiction, whether Kahn and Berkley in fact had a valid, enforceable agreement for binding arbitration.

It is so ORDERED.


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. Joseph S. Pavlikowski, Senior Judge
Frank N. Kahn
Berkley, Gordon, Levine, Goldstein & Garfinkel
Clark County Clerk