IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREGORY O. GARMONG,
Appellant,
vs.
WESPAC; AND GREG CHRISTIAN,
Respondents.

No. 80376-COA

ORDER OF AFFIRMANCE

Gregory O. Garmong appeals a district court order confirming an arbitration award, and an order denying his motion to alter or amend the order. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

A few years before the 2008 Recession, Garmong contracted with WESPAC Advisors, LLC (Wespac) to receive professional investment advice and management of his retirement savings, anticipating that he would soon retire.[1] When Garmong signed the agreement, he gave express directions that his objective was to increase his investment value moderately, while minimizing his potential loss of capital. As an arbitrator later found, Garmong and Wespac's relationship went well for the most part, as the two "worked reasonably well together to advance Garmong's investment goals."

However, in 2007, Garmong decided to retire as he was going through a litigious divorce. He reevaluated his financial circumstances, consulted with Greg Christian, Garmong's main contact from Wespac, and authorized Wespac to handle his accounts completely. According to

[1]We do not recount the facts except as necessary to our disposition.

Garmong, he verbally told Wespac at the time that his new objective was to not lose capital, but Christian would later testify that this did not happen. Garmong would later claim that, shortly after the discussion, he sent a letter that memorialized his decision for Wespac to manage his accounts and the new objective, attaching eighteen pages of news articles describing the impending housing crisis. Wespac denied ever receiving this letter, and an arbitrator later found that Wespac never received the letter and that it seemed suspiciously prepared for litigation.

At the start of the 2008 Recession, Garmong's accounts suffered losses that steadily increased as the economy worsened. Specifically, Garmong alleged that he lost $580,649.82 from his capital accounts. In an email exchange at the end of October 2008, Garmong claimed that he had previously told Christian some time ago that the new objective was not losing any capital. Christian responded by denying that Garmong had said any such thing, and if Garmong had said his objective was truly not to lose any capital, then he would have recommended closing the investment account and shifting his assets to 100% cash. Garmong eventually ended the relationship with Wespac and Christian in 2009 and brought suit in district court.

In his operative complaint, Garmong asserted the following claims: (1) breach of contract, (2) breach of implied warranty in contract, (3) contractual breach of implied covenant of good faith and fair dealing, (4) tortious breach of implied covenant of good faith and fair dealing, (5) breach of Nevada Deceptive Trade Practices Act, (6) breach of fiduciary duty, (7) breach of fiduciary duty of full disclosure, (8) breach of agency, (9) negligence, (10) breach of NRS 628A.030, (11) intentional infliction of

emotional distress; (12) unjust enrichment, and (13) a request for doubling damages pursuant to NRS 41.1395.

After five years of litigation in the district court, the parties stipulated to proceed to binding arbitration pursuant to a mandatory arbitration clause in the investment management agreement. Early in the arbitration, the parties stipulated that various provisions of the Nevada Rules of Civil Procedure would govern the arbitration. The arbitrator formalized these stipulations in a discovery plan and scheduling order, but added that those rules would govern "unless the [a]rbitrator rules otherwise." Shortly afterward, Wespac and Christian made an offer of judgment pursuant to NRCP 68, which Garmong rejected.

Garmong then filed a motion for partial summary judgment, claiming that various undisputed material facts, supported by his affidavit, necessitated an award in his favor as a matter of law. The arbitrator denied the motion, determining that the motion and the opposition presented genuine issues of material fact.

Dissatisfied, Garmong filed a motion for reconsideration. The arbitrator denied the motion, stating:

> The exhaustive analysis provided in [Garmong's] original motion, and the voluminous declarations and exhibits attached thereto articulate [Garmong's] view of the evidence supporting his claims. Many of the facts relied upon by [Garmong] are indeed "undisputed." Viewed in context, however, the conclusion of the [a]rbitrator then, and now is that they do not entitle [Garmong] to judgment as a matter of law without first affording [Wespac and Christian] the opportunity to defend the claims at a merit hearing.

Thereafter, the arbitrator heard evidence from Garmong, Christian, and Bruce Cramer, an expert witness for Wespac. At the end of

the hearings, the arbitrator determined that Garmong failed to prove his claims. Moreover, after allowing the parties to brief the issue, the arbitrator awarded attorney fees and costs in the amount of $111,649.96 to Wespac and Christian.

Wespac and Christian then petitioned the district court to confirm the arbitration award. Garmong filed motions to (1) vacate the arbitrator's award (2) reconsider and grant Garmong's previously denied partial motion for summary judgment and (3) vacate the arbitrator's award of attorney fees and costs. The district court entered an order confirming the arbitration award and denying Garmong's various motions. In addition, the district court denied Garmong's subsequent motion to alter or amend. Garmong now appeals.

Standard of Review

We review a district court decision to confirm an arbitration award de novo. *See Thomas v. City of N. Las Vegas*, 122 Nev. 82, 97, 127 P.3d 1057, 1067 (2006). But the scope of the district court's review of an arbitration award (and, consequently, our own de novo review of the district court's decision) is limited, and is "nothing like the scope of an appellate court's review of a trial court's decision." *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 695, 100 P.3d 172, 176 (2004). "A reviewing court should not concern itself with the 'correctness' of an arbitration award and thus does not review the merits of the dispute." *Bohlmann v. Printz*, 120 Nev. 543, 547, 96 P.3d 1155, 1158 (2004) (quoting *Thompson v. Tega-Rand Int'l.*, 740 F.2d 762, 763 (9th Cir. 1984)), *overruled on other grounds by Bass-Davis v. Davis*, 122 Nev. 442, 452 n.32, 134 P.3d 103, 109 n.32 (2006).

Rather, courts give considerable deference to the arbitrator's decision. *Knickmeyer v. State ex rel. Eighth Judicial Dist. Court*, 133 Nev. 675, 676-77, 408 P.3d 161, 164 (Ct. App. 2017). "Judicial review is limited to inquiring only whether a petitioner has proven, clearly and convincingly, that one of the following is true: the arbitrator's actions were arbitrary, capricious, or unsupported by the agreement; the arbitrator manifestly disregarded the law; or one of the specific statutory grounds set forth in NRS 38.241(1) was met." *Id.*

Manifest Disregard of the Law

First, Garmong claims that the arbitrator manifestly disregarded the summary judgment standard by not mechanically delineating which material issues were in dispute, and failing to explain why the undisputed material facts did not entitle him to summary judgment. Moreover, Garmong argues that the arbitrator made impermissible credibility determinations when considering summary judgment, and ignored several critical facts regarding liability in its award.

Manifest disregard requires more than a mere error in the law or failure from the arbitrator to understand the law or apply it correctly. *See Bohlmann*, 120 Nev. at 545-47, 96 P.3d at 1156-58. Manifest disregard occurs only when an arbitrator ignores the law by "recogniz[ing] that the law absolutely requires a given result and nonetheless refuses to apply the law correctly." *Id.* at 545, 96 P.3d at 1156. Judicial inquiry under this standard is "extremely limited," *see id.* at 547, 96 P.3d at 1158, and "is a virtually insurmountable standard of review." *Id.* at 547 n.5, 96 P.3d at 1158 n.5.

Garmong has not shown that the arbitrator manifestly disregarded the law. To the contrary, his arguments expressly concede that

the arbitrator identified the proper summary judgment standard but merely applied it wrongly to the facts, and then failed to include detailed findings in its denial of summary judgment. Thus, Garmong essentially alleges that the arbitrator applied the correct law but reached the wrong result, not that it manifestly disregarded the law itself. Further, the record reveals that the arbitrator's decision was correct. Contrary to Garmong's position, Wespac and Christian disputed most of what Garmong characterized as "undisputed material facts," and they disputed whether the facts gave rise to liability.

The arbitrator correctly decided that the material facts centered on alleged verbal conversations between individuals who later disputed what was said, and that resolving those disputes required an assessment of witness credibility far beyond the scope of a motion for summary judgment. The arbitrator correctly concluded that it could only assess the credibility of the parties at a hearing on the merits with live testimony and cross-examination to determine which version of the events was more likely, (i.e., whether it was Wespac's investment decisions that caused a loss to Garmong's account or the 2008 Recession). Thus, rather than manifestly disregarding the law, the arbitrator correctly applied the law to the facts.

Garmong also argues that the arbitrator manifestly disregarded his various allegations that Wespac and Christian concealed information from him. We disagree. In its award, the arbitrator analyzed each of Garmong's theories of liability and discussed why each failed based on the evidence presented to the arbitrator. The arbitrator presented the correct legal standard and analyzed why each of Garmong's theories failed. Thus, the arbitrator did not manifestly disregard the law.

NRS 38.241

Garmong challenges the arbitrator's award under two statutory grounds: NRS 38.241(1)(a) and NRS 38.241(1)(e). He claims that Christian submitted three false affidavits to the arbitrator that provided a version of the confidential client profile that was missing the final two pages. Garmong claims that withholding this part of the confidential client profile proved that Wespac and Christian failed to produce an enforceable agreement to arbitrate.

NRS 38.241(a) provides that a court may vacate an award if "[t]he award was procured by corruption, fraud or other undue means." NRS 38.241(e) provides, in pertinent part, that a court may vacate an arbitration award if "[t]here was no agreement to arbitrate."

Garmong has not met his burden of showing that either provision applies. *See Knickmeyer*, 133 Nev. at 677, 408 P.3d at 164 (the party challenging an arbitration award has the burden to demonstrate, by clear and convincing evidence, that one of the statutory grounds under NRS 38.241 was met). First, Garmong alleges that Christian provided false information to the arbitrator, but in so doing he merely asserts that the arbitrator should have believed his evidence over Christian's, not that Christian's evidence was objectively false in some provable way. In other words, Garmong invites us to substitute our own assessment of the witness's credibility for that of the arbitrator, which would be improper. Second, Garmong seems to allege that there was no enforceable agreement to arbitrate because the only version of the document that Christian provided was supposedly missing some pages from a confidential client profile. But Garmong ignores that the matter was in arbitration in the first place because he stipulated that the contract required it. Moreover, the

arbitrator's written award makes clear that it relied upon the totality of evidence presented during the arbitration hearing, not the document that included the allegedly missing pages. Therefore, Garmong has not shown that the award was procured by undue means.

Furthermore, the record indicates that the confidential client profile was part of a separate prerequisite questionnaire that Wespac requires potential new clients to fill out before entering into the final agreement rather than the investment management agreement itself. At the very least, Garmong bears the burden to show that the missing pages were what he says they are rather than what the arbitrator found they were, and he has failed to meet his burden. Thus, Garmong has not demonstrated by clear and convincing evidence that we should vacate the arbitrator's award under statutory grounds.

Attorney Fees and Costs

Garmong claims that the arbitrator's award of attorney fees was not permitted by statute, rule, or contract. The arbitrator awarded fees pursuant to NRCP 68 based upon Garmong's failure to accept an offer of judgment, and Wespac and Christian's status as the prevailing parties in the arbitration.

NRCP 68 penalizes parties that reject, or do not timely accept, a reasonable pre-trial offer of judgment and fail to obtain a more favorable judgment, requiring that the offeree "pay the offeror's post-offer costs and expenses." NRCP 68(f)(1)(B). This court reviews an award of attorney fees after an arbitration under the same standard as an order confirming or vacating an arbitrator's award. *See WPH Architecture, Inc. v. Vegas VP, LP*, 131 Nev. 884, 887, 360 P.3d 1145, 1147 (2015). Nevada's Uniform Arbitration Act is deferential to an arbitrator's decision to grant attorney

fees, providing that: "[a]n arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitral proceeding." NRS 38.238(1). Additionally, under rule 24(g) of the "Comprehensive Arbitration Rules & Procedures" promulgated by Judicial Arbitration and Mediation Services, Inc. (JAMS), the arbitrator may award attorney fees and costs if allowed by the parties' agreement or by applicable law.

The record indicates that the parties agreed to conduct the arbitration under at least some of the provisions of the Nevada Rules of Civil Procedure. However, Garmong argues that NRCP 68 did not apply because, following a telephonic hearing, the arbitrator filed a scheduling order in which it formalized an agreement between the parties to only use certain Nevada Rules of Civil Procedure, not all of them. He argues that he mistakenly accepted and relied on the arbitrator's scheduling order in good faith and did not respond to the NRCP 68 offer of judgment because he interpreted the arbitrator's scheduling order to not encompass NRCP 68.

The scheduling order (to which Garmong never objected) lists a few procedural rules that would govern, but it also expressly reserves the right of the arbitrator to apply other rules, providing that various listed rules will govern "unless the [a]rbitrator rules otherwise." Thus, the scheduling order clearly and expressly confers authority on the arbitrator to decide which rules apply.

Notwithstanding this language, Garmong suggests that the arbitrator could not have applied NRCP 68 if the scheduling order did not specifically list it. But during the proceedings, both parties utilized and relied upon other provisions of the NRCP that are also not mentioned in the

scheduling order. For example, the scheduling order does not specifically mention either motions for summary judgment under NRCP 56 nor motions for reconsideration, yet Garmong filed both such motions himself, indicating that he clearly understood the scheduling order to encompass provisions of the NRCP not specifically listed. Indeed, Garmong never objected to the service of the offer of judgment as impermissible under the scheduling order, nor had he made any effort to seek a ruling from the arbitrator as to NRCP 68's applicability to the proceedings. Thus, the most reasonable interpretation of the scheduling order—an interpretation confirmed by the parties' subsequent mutual conduct during the proceedings—is that the arbitrator could apply all rules of the NRCP that he deemed appropriate, including NRCP 68.

In addition to the arbitrator's award of fees, respondents request that we award additional attorney fees and costs incurred during appeal arising from Garmong's failure to accept the offer of judgment pursuant to NRCP 68. The Nevada Supreme Court has held that the fee-shifting provision in NRCP 68 extends to fees incurred on and after appeal. *See In re Estate & Living Tr. of Rose Miller*, 125 Nev. 550, 555, 216 P.3d 239, 243 (2009). Thus, Garmong's failure to accept the offer of judgment may justify an award for attorney fees and costs incurred during and after appeal, but this issue should be presented to the district court or arbitrator in the first instance.[2] Accordingly, we affirm the judgment of the district court in its entirety.

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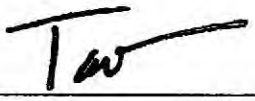
[2]Generally, "a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court." *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987). However, the district court maintains jurisdiction over issues that are collateral to the

Therefore, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



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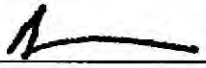

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cc: Hon. Lynne K. Simons, District Judge
Carl M. Hebert
Law Offices of Thomas C. Bradley
Washoe District Court Clerk

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issues raised on appeal, such as attorney fees and costs. *See Kantor v. Kantor*, 116 Nev. 886, 895, 8 P.3d 825, 829 (2000).