2016 IL App (1st) 151612-U

THIRD DIVISION
September 29, 2016

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 affirming the

arbitration award, contending that the arbitrator did not properly consider certain evidence. 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 the 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. Snippets from the hearing transcript reveal that counsel for plaintiffs briefly described the documents, outlining 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, did not attach the documents.[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 now 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), and then been able 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 U.S. 468, 474 (1989). Enacted pursuant to the Commerce Clause, this body of substantive law is

[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.

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).

¶ 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.

¶ 10 Plaintiffs also have not even provided this court with the actual contract showing that this dispute required binding arbitration under the FAA, Illinois law, or any other law. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984) (appellant bears burden of presenting sufficiently complete record to support claimed error); *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757 (2006) (same); *cf. Allied American Insurance Co v. Culp*, 243 Ill. App. 3d 490, 494 (1993) (absent evidence showing arbitrator exceeded authority, court must assume no error). For the Illinois Arbitration Act to confer jurisdiction here, as plaintiffs alternatively claim, the agreement must actually provide for arbitration *in Illinois*. See 710 ILCS 5/16 (West 2016). Without that particular 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*, 99 Ill. 2d at 391-92; *Smolinski*, 363 Ill. App. 3d at 757-58.

¶ 11 Finally, we 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).

¶ 12 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 snippets of testimony[2] and transcripts of their interchange with the 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). Because this case spanned

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

many days, that merely confirms our 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 woefully insufficient to find prejudice or 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). 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 would not be 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. Their argument as to the remedies is similarly unsupported by the record.

¶ 13 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[3] 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.*

[3] 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).

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.

¶ 14 CONCLUSION

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

¶ 16 Affirmed.