IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 1:17-cv-00122-RPM

MID ATLANTIC CAPITAL CORPORATION,

Petitioner and Cross-Defendant,

v.

BEVERLY BIEN and
DAVID H. WELLMAN,

Respondents and Cross-Claimants.

ORDER DENYING AMENDED MOTION TO VACATE OR MODIFY AND GRANTING CROSS-MOTION TO CONFIRM ARBITRATION AWARD

Petitioner Mid Atlantic Capital Corporation ("MACC") is a securities broker-dealer firm registered with the Financial Industry Regulatory Authority, Inc. ("FINRA"). Respondents Beverly Bien and David Wellman, husband and wife, invested in securities on the advice of Craig Hayward, one of the brokers employed by MACC. They have obtained an arbitration award that MACC seeks to vacate or modify in this proceeding filed on January 12, 2017. [Doc. 1; Doc. 10.] Respondents filed a cross-motion to confirm the award. [Doc. 14.] There is diversity jurisdiction, and the dispute is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 9, 10, and 11. The arbitration proceedings were conducted pursuant to the FINRA Code of Arbitration Procedure ("FINRA Code") and its rules.

Background Facts

FINRA is a self-regulatory organization that regulates member brokerage firms. It is the successor to the National Association of Securities Dealers, Inc. ("NASD"). Respondents' customer agreements with MACC contained an arbitration clause requiring that all disputes between them and MACC be determined by FINRA arbitration. Specifically, Respondents' customer agreements stated that "[a]ll controversies that may arise between you [and] us . . . shall be determined by arbitration in accordance with the rules then prevailing of the NASD, Inc." [Doc. 15-4 at 11, 22, 33.] Pursuant to that arbitration clause, on February 6, 2015 Respondents filed a Statement of Claim ("SoC") against MACC in accordance with the FINRA Code. Both sides signed a FINRA Arbitration Submission Agreement submitting the matter to arbitration "in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure." [Doc. 15-6; Doc. 16-2.]

On August 10, 2015, Respondents filed a First Amended Statement of Claim alleging that Mr. Hayward invested their money in highly speculative and aggressive investments that were unsuitable for their needs; that he misrepresented those investments as safe and conservative; that he failed to fully disclose the characteristics and risks of the investments; and that he was motivated to recommend the investments because of the extremely large commissions he generated by selling them. Respondents characterized their claims as breach of fiduciary duty, negligent misrepresentation, violation of Colorado's Securities Act, common law fraud, breach of contract, restitution, and negligent supervision.

On December 18, 2015, MACC filed a motion to dismiss pursuant to FINRA Code Rule 12206, arguing that Respondents' claims were ineligible for arbitration. Rule 12206 provides that "[n]o claim shall be eligible for submission to arbitration under the Code where

six years have elapsed from the occurrence or event giving rise to the claim." [Doc. 15-2 at 19.] MACC argued that the occurrence or event giving rise to Respondents' claims was their purchase of the investments in 2007 and 2008, more than six years before they filed their Statement of Claim in 2015.

In response, Respondents argued that Rule 12206 was subject to tolling, and that the arbitration panel was entitled to use a date other than the purchase date of the investments as the date of the occurrence or event giving rise to their claims. Citing various authorities interpreting Rule 12206, as well as Colorado case law applying the "discovery rule" to statutes of limitation,[1] Respondents argued that the panel could use "discovery [of the wrongdoing] or some other relevant date as the date from which the six year period runs." [Doc. 10-13 at 5-11.] Respondents asserted that "the very earliest [they] could have possibly discovered that something was wrong" with their investments was when the price of the investments showed a decline in value for the first time—in May 2011 for one investment and December 2009 for the other two investments—and that "[u]sing these dates . . . makes sense for eligibility purposes." [*Id.* at 8.] As such, Respondents contended that they filed within the six-year eligibility period.

On March 16, 2016, the arbitration panel heard oral argument on MACC's motion to dismiss. The parties agree that the only issue raised in MACC's motion to dismiss, addressed in the parties' associated briefing, and discussed at oral argument was the eligibility of

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[1] In Colorado, "[a] claim for relief does not accrue until the plaintiff knows, or should know, in the exercise of reasonable diligence, all material facts essential to show the elements of that cause of action." *Miller v. Armstrong World Indus., Inc.*, 817 P.2d 111, 113 (Colo. 1991).

Respondents' claims under FINRA Code Rule 12206. On March 23, 2016, the panel issued an order denying the motion to dismiss without comment. [Doc. 10-14.]

The arbitration proceeded to hearing on the merits, which was held in November and December 2016. During the hearing, Respondents presented testimony on measures of damages. They asserted "net out-of-pocket" losses of $292,411. Their expert witness testified that "market-adjusted damages" were appropriate. That is, that damages should be the difference between the actual return on these investments and what the return would have been if Respondents' money had been invested in a well-managed "benchmark" account. Respondents' expert suggested market-adjusted damages of $600,488; $607,711; $618,049; or $484,684, depending on whether the "benchmark" account was a diversified portfolio of real estate investment trusts, the S&P 500 Index Fund, the Wilshire 5,000 Index Fund, or a diversified portfolio of bonds. MACC did not call a witness to contradict this testimony.

At the close of Respondents' case-in-chief, MACC orally moved for a "directed verdict" based on Respondents' alleged failure to proffer evidence that their claims fell within the six-year eligibility period set forth in FINRA Code Rule 12206. MACC also moved for "directed verdict" contending that Respondents' claims were barred by the shorter three-year Colorado statutes of limitation, and that Respondents had failed to prove their claims with sufficient evidence. In response to MACC's assertions that their claims were time-barred, Respondents argued that (1) the first indication that their investments might have incurred substantial losses was in May 2012 at the earliest, within both the six-year FINRA eligibility period and the three-year Colorado statutes of limitation; and (2) the Colorado statutes of limitation should not apply in an arbitration. The arbitration panel

recessed to discuss MACC's motions in an off-the-record executive session, and then denied the motions on the record without comment.

The arbitration panel issued its decision on December 12, 2016. [Doc. 10-8.] The panel awarded Respondents $292,411 in "initial investment loss[es]" (equivalent to the net out-of-pocket losses presented by Respondents), plus $484,683 in "compensatory damages" (equivalent to one of the measures of market-adjusted damages presented by Respondents), for a total of $777,094 (nearly $160,000 more than the largest measure of damages Respondents presented at the hearing). In addition, the panel awarded pre- and post-award interest at a rate of 8% per year, attorneys' fees in the amount of $118,560, and costs in the amount of $26,813. The panel also ordered Respondents to reassign their investments back to MACC. The panel denied Respondents' request for punitive damages.

Analysis

Petitioner MACC asserts two grounds for vacatur of the arbitration award: (1) the arbitrators "exceeded their powers," a statutory ground for vacatur, 9 U.S.C. § 10(a)(4); and (2) the arbitrators "manifestly disregarded the law," a judicially created ground for vacatur.[2] To establish that the arbitrators exceeded their powers, MACC must show that the arbitrators acted outside the scope of authority delegated to them by the parties' arbitration agreement. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671-72, 682-84 (2010). To

[2] In its original petition, MACC also asserted a third ground for vacatur, arguing that the award should be vacated pursuant to 9 U.S.C. § 10(a)(2) and (3) because the arbitration panel showed evident partiality throughout the hearing by refusing to hear pertinent and material evidence proffered by MACC. [*See* Doc. 1 at ¶¶ 31-36.] However, in its amended motion to vacate, MACC relegated this argument to a footnote. [Doc. 10-2 at 14 n.14.] At oral argument, MACC confirmed that it has withdrawn this asserted ground for vacatur. [Doc. 33 at 5:2-3, 57:5-21.]

establish that the arbitrators manifestly disregarded the law,[3] MACC must show that the arbitrators acted with "willful inattentiveness to the governing law," *i.e.*, that they "knew the law and explicitly disregarded it." *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995); *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005).

MACC contends that the arbitration panel exceeded its powers and/or manifestly disregarded the law in two ways. First, MACC argues that the panel exceeded its powers by failing to decide the threshold question of whether Respondents' claims were eligible for arbitration. MACC further argues that if the panel did decide the eligibility issue, then it must have manifestly disregarded the law with respect to Colorado statutes of limitation. Second, MACC argues that the panel both exceeded its powers and manifestly disregarded the law by issuing a damages award that double-counts Respondents' lost principal, among other errors. As an alternative to vacating the award on this basis, MACC suggests that the Court may modify the award to correct the double-counting.

The arbitration panel did not make any findings of fact or conclusions of law in its order denying MACC's preliminary motion to dismiss, or in its final written award decision. The panel had no obligation to do so, but this Court can only infer the reasoning resulting in the panel's decisions.

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[3] It is unclear whether manifest disregard of the law remains a viable ground for vacatur in the wake of the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). Both the Supreme Court and the Tenth Circuit have declined to decide this issue. *See Stolt-Nielsen*, 559 U.S. at 672 n.3; *Abbott v. Law Office of Patrick J. Mulligan*, 440 F. App'x 612, 617-20 (10th Cir. 2011). Because it is ultimately inconsequential to the outcome of this case, the Court assumes without deciding that manifest disregard of the law remains an independent ground for vacatur following *Hall Street*.

Eligibility and Timeliness of Respondents' Claims

The written order denying MACC's motion to dismiss is a ruling on eligibility under FINRA Code Rule 12206 because that was the only issue raised in MACC's motion. [Doc. 10-14.] MACC's argument that the panel did not actually decide eligibility when it denied the motion to dismiss is based on what appears to be a misstatement in the final arbitration award. In summarizing the issues previously considered and decided, the award states that MACC "filed a Motion to Dismiss Pursuant to Rule 12206," and the panel denied the motion "because the claims are not barred by the Colorado statute of limitations, and Claimants presented a legally sufficient evidentiary basis to support the claims." [Doc. 10-8 at 2.] MACC contends that this statement indicates that the panel answered the wrong question when it denied MACC's motion to dismiss, *i.e.*, that the panel ignored the sole question presented by the motion (Rule 12206 eligibility) and instead decided a question not presented at the time (applicability of Colorado statutes of limitation). But even if that is assumed, MACC cannot escape the fact that the panel decided the eligibility question again when it denied MACC's motion for "directed verdict" at the arbitration hearing. The arbitration panel did not abdicate its responsibility to decide eligibility.

The panel did not manifestly disregard the law by finding that Respondents' claims were eligible for arbitration under Rule 12206. MACC acknowledges that a decision by the panel finding Rule 12206 subject to tolling is not reviewable by this Court. [Doc. 33 at 18:25-19:4 ("[I]f the panel had said, Yes, you can [toll Rule 12206], then this Court wouldn't have the ability to disturb that judgment.").]

MACC argues that if the panel accepted Respondents' tolling arguments with respect to Rule 12206, then it must have manifestly disregarded the law with respect to Colorado

statutes of limitation. Specifically, MACC notes that Respondents' opposition to the motion to dismiss identified December 2009 and May 2011 as "the very earliest [they] could have possibly discovered that something was wrong" with their investments. [Doc. 10-13 at 8.] MACC argues that this constitutes an admission that Respondents' claims accrued as of December 2009 and May 2011 for statute of limitations purposes, and that Respondents' February 2015 SoC was thus filed outside the applicable three-year limitations period. The Court disagrees.

While Respondents' opposition to MACC's motion to dismiss did argue that Colorado's "discovery rule" should apply to Rule 12206, nowhere in their brief did Respondents state or admit that they actually discovered, or in the exercise of reasonable diligence should have discovered, "all material facts essential to show the elements of [their] cause[s] of action" as of December 2009 and May 2011. *Miller*, 817 P.2d at 113. Rather, Respondents highlighted those dates as "the very earliest that [they] could have possibly discovered that something was wrong" because their securities had not declined in value at all before those dates. Thus, even though the arbitration panel appears to have accepted Respondents' tolling argument with respect to Rule 12206, it may still have later determined that Respondents' claims did not accrue for statute of limitations purposes until the spring of 2012, as Respondents argued at the final arbitration hearing. Such a factual determination is not reviewable by this Court. *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201, 1204 (10th Cir. 1999). Moreover, even if Respondents had admitted that their claims accrued in December 2009 and May 2011, the panel may have simply decided that the Colorado statutes of limitation did not apply in this arbitration proceeding. This Court may not reverse a legal determination, even if it is erroneous. *ARW*, 45 F.3d at 1463. Nothing in the record reflects

that the arbitration panel willfully and expressly ignored governing law with respect to either Rule 12206 or Colorado statutes of limitation. As such, the Court finds no manifest disregard of the law with respect to the eligibility or timeliness of Respondents' claims.

Final Damages Award

The final damages award is disturbing. The arbitration panel awarded Respondents both net out-of-pocket losses (what the panel called "initial investment loss[es]") and market-adjusted damages (what the panel called "compensatory damages"), thereby double-counting Respondents' lost investment. MACC contends that the arbitration panel exceeded its powers by awarding damages in excess of what Respondents requested, because Respondents presented net out-of-pocket losses and market-adjusted damages as alternative damages measures and argued to the panel that net out-of-pocket losses should not be used to determine damages. [*See* Doc. 10-3 at 33:11-16.] MACC cites several authorities for the proposition that arbitrators exceed their powers if they award damages that were not requested. [*See* Doc. 10-2 at 16; Doc. 33 at 42:22-43:2.] These cited cases hold that arbitrators exceed their powers either by resolving a dispute that was not submitted to arbitration, *see Totes Isotoner Corp. v. Int'l Chem. Workers Union Council/UFCW Local 664C*, 532 F.3d 405 (6th Cir. 2008), or by fashioning a different remedy than what is prescribed by the parties' arbitration agreement, *see Coast Trading Co. v. Pac. Molasses Co.*, 681 F.2d 1195 (9th Cir. 1982); *Mo. River Servs., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848 (8th Cir. 2001). These cases are not comparable to this dispute.

"The question under [9 U.S.C. § 10(a)(4)] is 'whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue.'" *Stolt-Nielsen*, 559 U.S. at 693. Here,

the issue of damages was unquestionably submitted to the panel to decide, and both net out-of-pocket losses and market-adjusted damages are described in the FINRA Office of Dispute Resolution Arbitrator's Guide as types of compensatory damages that a panel may consider. [Doc. 15-3 at 65-66.] The panel did not fashion some type of remedy outside the scope of the parties' arbitration agreement. What appears is that the panel made a mistake of fact or law by awarding both measures of damages. Such mistakes are beyond this Court's review. As such, the Court does not find that the arbitration panel exceeded its powers with respect to the damages award. Nor does the record reflect that the panel knew and explicitly disregarded the governing damages law, and therefore the Court finds no manifest disregard of the law.

As an alternative to vacatur of the damages award, MACC asks the Court to modify the amount of the award to correct the double-counting. A court may modify or correct an arbitration award "[w]here there was an evident material miscalculation of figures." 9 U.S.C. § 11(a). This is generally interpreted to mean a mathematical error that appears on the face of the award.[4] *See, e.g.*, *U.S. Energy Corp. v. Nukem, Inc.*, 162 F.3d 1175, 1998 WL 738336, at *5 (10th Cir. 1998) (unpublished); *Grain v. Trinity Health*, 551 F.3d 374, 378 (6th Cir. 2008); *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 194 (4th Cir. 1998). There is no such miscalculation evident on the face of the award in this case.

Accordingly, this Court does not have authority to modify the amount of the award. Even assuming such authority, simply subtracting the "initial investment loss[es]" awarded

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[4] MACC cites one authority holding that a court may look beyond the face of an award to correct a double recovery under 9 U.S.C. § 11(a), but that authority is not binding on this Court and contradicts the weight of authority from other circuits. *See Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994).

by the panel from the total damages amount as MACC suggests would disregard the panel's requirement that Respondents reassign ownership of their investments back to MACC, in effect reducing the value of the award by the present value of those investments. That was not contemplated or accounted for in any of the damages calculations that Respondents' expert presented at the hearing. Any correction of the panel's damages award would require some hearing to determine that value and account for the reassignment requirement.

In addition to the double-counting of Respondents' lost investment, MACC argues that the panel committed other errors in the damages award. The Court finds MACC's arguments unavailing. With respect to the interest award, while the FINRA Code provides that an award "shall bear interest from the date of the award," the panel had discretion to award interest from an earlier date. [*See* Doc. 15-3 at 67-68.] Regarding the attorneys' fees award, Respondents apparently proved their requested fee amount to the satisfaction of the panel. [*See* Doc. 15-3 at 70.] These and the other alleged errors that MACC raises are the type of factual determinations or applications of law that are beyond this Court's authority. Accordingly, the Court declines to vacate or modify the damages award on the basis of these other alleged errors.

Respondents have not yet assigned the subject securities back to MACC as the award requires. No final judgment can be entered until that matter is resolved. Upon the foregoing, it is ORDERED that

Petitioner's Amended Motion to Vacate or in the Alternative, to Modify or Correct Arbitration Award [Doc. 10] is DENIED;

Respondents' Cross-Motion to Confirm FINRA Arbitration Award [Doc. 14] is GRANTED;

the final arbitration award executed on December 12, 2016 [Doc. 14-1] is CONFIRMED;

Respondents shall draft a final judgment and submit it to Petitioner for review on or before March 30, 2018;

if agreed, the parties shall deliver their agreed proposed final judgment directly to chambers in paper form (do not use electronic filing) on or before April 12, 2018; and

if not agreed, each side shall deliver its proposed final judgment directly to chambers in paper form (do not use electronic filing) on or before April 12, 2018.

DATED: March 23, 2018

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge