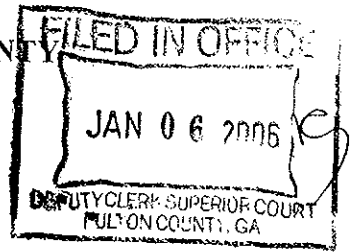


IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



BARBARA F. BRADY-MIKOS,)
formerly known as BARBARA F. BRADY,)
)
Plaintiff,)
)
v.)
)
BANC OF AMERICA INVESTMENT)
SERVICES, INC., formerly known as)
NATIONSSECURITIES and)
DAVID STEVEN BURROUGHS,)
)
Defendants.)

Civil Action No. 2005CV105850

FINAL ORDER

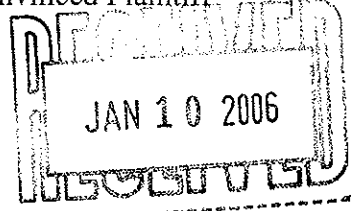
ORDER

The above-referenced matter came before the Court on January 3, 2006 for a hearing on Plaintiff's Amended Complaint/Application to Vacate Arbitration Award (herein "the Application"). After hearing the arguments of counsel, the Plaintiff's Application is **HEREBY DENIED**.

STATEMENT OF FACTS

Plaintiff first opened accounts with Defendant Banc of America Investment Services and Defendant David Burroughs (collectively "Defendants") in January 1995. At all times relevant to the events discussed below, Defendant Burroughs served Plaintiff in the capacity of a securities broker employed by Defendant Banc of America Investment Services. Application, ¶¶ 3-4.

Plaintiff alleges that Defendants, rather than develop a complete investment plan for Plaintiff, immediately began to invest too much of Plaintiff's assets in the stock market and to trade stocks in a manner designed to generate commissions and fees for Defendants, conduct known as "churning." On or before December 16, 1998, Defendant Burroughs convinced Plaintiff



to switch from a cash account to a margin account, so that they “could increase their ability to churn Plaintiff’s account in unsuitable investments.” Application, ¶¶ 5-10.

At the time the Defendants began to use margin in Plaintiff’s account, on December 16, 1998, the value of Plaintiff’s account was approximately \$712,957.54. As of December 31, 1999, the margin account balance was \$174,480.47. In July of 2000, Plaintiff specifically instructed Defendant Burroughs to sell securities sufficient to eliminate the margin debt in her account. Despite his representations that he would do so, Defendant Burroughs did not carry out Plaintiff’s instructions to eliminate the margin debt in her account despite the fact that the stock market began to decline more rapidly. Thereafter, Defendant Burroughs only sold securities positions as necessary to meet “margin calls.” Plaintiff claims that the Defendants’ actions caused her to lose at least \$320,851. Application, ¶¶ 11-20.

On August 7, 2004, Plaintiff filed an arbitration claim with the National Association of Securities Dealers (“NASD”), asserting claims for fraud, breach of contract, breach of fiduciary duties, violations of the Georgia securities law (O.C.G.A. 10-5-12) and the Federal securities law (15 U.S.C. 10b). The Defendants filed a Motion to Dismiss, to which Plaintiff responded. After a hearing on March 28, 2005 before all of the three NASD arbitrators on the panel assigned to Plaintiff’s case, the panel unanimously denied the Motion to Dismiss. Application, ¶¶ 21-22.

The Defendants filed a motion for reconsideration of the panel’s denial of Defendants’ Motion to Dismiss Plaintiff’s Georgia securities law and Federal securities law claims. Plaintiff responded to that motion for reconsideration and agreed that the Georgia securities law claim should be dismissed. On June 6, 2005, without further briefs or argument, the NASD arbitration panel reversed itself and dismissed all of Plaintiff’s arbitration claims. That decision was

incorporated into an "Award" and mailed to Plaintiff on June 6, 2005. No explanation was provided for the reversal. Plaintiff received the Award on June 8, 2005. Application, ¶¶ 23-24.

On September 6, 2005, Plaintiff filed a "Complaint" seeking vacatur of the panel's Award. However, following the Defendants' Motion to Dismiss for failure to file her grievance as an "Application," as opposed to a "Complaint" seeking full-blown retrial of the issues before the arbitrators, Plaintiff filed her "Amended Complaint/Application to Vacate Arbitration Award" (herein "the Application") on November 15, 2005. See Defendants' Motion to Dismiss and for Judgment on the Pleadings. Plaintiff alleges that the panel's Award should be vacated based on the federal statutory ground set out at 9 U.S.C. 10(a)(4), and two non-statutory grounds: that the decision of the panel was (1) arbitrary and capricious and (2) made in manifest disregard of the law. Application, ¶¶ 25-36.

ANALYSIS

The Federal Arbitration Act (herein "FAA") governs the Court's review of the panel's decision. Joyner v. Raymond James Financial Services, Inc., 268 Ga.App. 835, 602 S.E.2d 871 (2004) citing Hilton Constr. Co. v. Martin Mechanical Contractors, 251 Ga. 701, 703, 308 S.E.2d 830 (1983). The party moving for vacatur "bears the burden of setting forth sufficient grounds to vacate the arbitration award." Scott v. Prudential Securities, Inc., 141 F.3d 1007, 1014 citing O.R. Securities, Inc. v. Professional Planning, 857 F.2d 742, 746 (1988) (herein O.R. Securities). Grounds for vacatur include four statutory grounds provided by the FAA at 9 U.S.C. § 10 and three limited non-statutory grounds carved out by the federal judiciary. These non-statutory grounds allow an award to be vacated where the decision of the panel is shown to be (1) arbitrary and

capricious; (2) in manifest disregard of the law; or (3) violative of public policy. Montes v. Shearson Lehman Brothers, Inc., 128 F.3d 1456 (1997) (herein Montes). Plaintiff seeks vacatur based on 9 U.S.C. § 10(a)(4), and her allegation that the Award was (1) arbitrary and capricious and (2) in manifest disregard of the law.¹

“Judicial review of arbitration awards under the FAA is very limited.” Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 778 (11th Cir. 1993) citing Booth v. Hume Publishing, Inc., 902 F.2d 925, 932 (11th Cir. 1990). In order to find an award to be made in “manifest disregard of the law,” the arbitrators’ decision must be shown to have been more egregious than a “misinterpretation, misstatement or misapplication of the law.” Montes, 128 F.3d at 1461. Rather, “[t]o manifestly disregard the law, one must be conscious of the law and deliberately ignore it.” Id. citing O.R. Securities, 857 F.2d at 747. It must be “apparent on the face of the record” that the arbitrators chose to disregard the law. Raiford v. Merrill Lynch, 903 F.2d 1410 (1990) citing O.R. Securities, 857 F.2d 742, 747. Specifically, “If a court is to vacate an arbitration award on the basis of a manifest disregard of the law, there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it.” O.R. Securities, 857 F.2d at 747.

An example of “manifest disregard” on the face of the record comes from Montes, *supra*, where the Eleventh Circuit reversed the district court’s denial of plaintiff’s petition to vacate the arbitration award. The court noted that counsel for the defendants, in his opening statements to the arbitration board, expressly urged the board to disregard the law, stating, “The law says one thing. What equity demands and requires and is saying is another. What is right and fair and proper in

¹ Plaintiff’s argument that vacatur is warranted based on 9 U.S.C. § 10(a)(4) is wholly without merit and will not be addressed.

this? You know as arbitrators you have the ability, you're not strictly bound by case law and precedent..." Montes, 128 F.3d at 1459. The Montes court interpreted counsel's comments as "flagrantly and blatantly" urging the board to disregard the law, and stated:

The arbitrators expressly took note of this plea in their award when summarizing the parties' arguments. There is nothing in the award or elsewhere in the record to indicate that they did not heed this plea. In the absence of any stated reasons for the decision and in light of the marginal evidence presented to it, we cannot say that this is not what the panel did. We conclude that a manifest disregard for the law, in contrast to a misinterpretation, misstatement or misapplication of the law, can constitute grounds to vacate an arbitration decision. We emphasize again that this ground is a narrow one. We apply it here because we are able to clearly discern from the record that this is one of those cases where manifest disregard of the law is applicable, as the arbitrators recognized that they were told to disregard the law (which the record reflects they knew) in a case in which the evidence to support the award was marginal.

Montes, 128 F.3d at 1461 (Emphasis supplied). Accordingly, based on the evidence of record that the arbitrators recognized that they were being told to disregard the law, the Eleventh Circuit reversed the district court's affirmance of the panel's award.

On the other hand, where there is no evidence of such on the face of the record, a "manifest disregard for the law" cannot be inferred from an arbitration board's refusal to provide an explanation for its decision. In O.R. Securities, *supra*, the plaintiff contended that the arbitrators exhibited a "manifest disregard of the law" when they held the plaintiff jointly and severally liable with another party for a "fraudulent conveyance." The plaintiff specifically alleged that the arbitrators failed to follow the law on "successor liability" since the plaintiff never explicitly or implicitly assumed the other party's liabilities. The Eleventh Circuit upheld the district court's dismissal of the plaintiff's application to vacate the award, finding that the plaintiff failed to make any showing that the arbitrators acted in "manifest disregard of the law." With respect to the

plaintiff's claim that the arbitrators' refusal to provide an explanation for their decision compels a finding that the panel ignored the law, the court stated,

Contrary to O.R.'s arguments, "the absence of express reasoning by the arbitrators [does not] support the conclusion that they disregarded the law." (Citation omitted). In fact, when the arbitrators do not give their reasons, it is nearly impossible for the court to determine whether they acted in disregard of the law. "[T]o allow a court to conclude that it may substitute its own judgment for the arbitrator's whenever the arbitrator chooses not to explain the award would improperly subvert the proper functioning of the arbitral process..." (Citation omitted).

If a court is to vacate an arbitration award on the basis of a manifest disregard of the law, there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it. We recognize that this would be extremely difficult where the arbitrators failed to state the reasons for their decision. However, we repeat that a party seeking to vacate an arbitration award on the ground of manifest disregard of the law may not proceed by merely objecting to the results of the arbitration. To do so would result in relitigation of the claim, in violation of the basic purposes of arbitration: a fast, inexpensive resolution of claims.

O.R. Securities, 857 F.2d at 747.

Here, Plaintiff alleges that the panel disregarded Georgia law on various statutes of limitations relating to her claims. As support for her contention, Plaintiff argues that the Defendants' citation of non-Georgia law in their brief to the panel amounts to an explicit plea to disregard the law, similar to that made by counsel in Montes. Accordingly, the argument goes, because the arbitrators must have been aware of the applicable statutes of limitations since they were provided with such in Plaintiff's brief to the panel, the dismissal of Plaintiff's claims amounts to a "manifest disregard of the law."

The Court disagrees, and finds that the panel's decision, if truly in error, amounts to no more than a "misapplication" of the law. Plaintiff has failed to direct the Court's attention to

anything in the record that would indicate that the arbitrators explicitly acknowledged that they were aware of the law, and affirmatively chose to disregard it. As previously mentioned, the Eleventh Circuit has emphasized that “manifest disregard for the law” is a “narrow” ground. Montes, 128 F.3d at 1461. Accordingly, because the record does not indicate that the arbitrators’ conduct rose to the level required by the Eleventh Circuit, the Court finds that the Award was not made in “manifest disregard of the law.”

Next, Plaintiff contends that vacatur is appropriate because the arbitrators acted in an “arbitrary and capricious” manner in issuing the Award. The Eleventh Circuit explains the “arbitrary and capricious” standard as follows:

[C]ourts may vacate an award as arbitrary and capricious when the award exhibits a wholesale departure from the law. An award is arbitrary and capricious only if a legal ground for the arbitrators['] decision cannot be inferred from the facts of the case. [An] award may be vacated as arbitrary and capricious if the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling.... For an award to be vacated as arbitrary and capricious, the Panel's award must contain more than an error of law or interpretation. Rather, there must be no ground for the Panel's decision.

(Citations and punctuation omitted.) Joyner v. Raymond James Financial Services, Inc., 268 Ga.App. 835, 838, 602 S.E.2d 871 (2004) (herein Joyner) quoting Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 781(III)(A) (11th Cir. 1993) (herein Brown). Further, “Where an arbitration award is silent as to its rationale, the party seeking vacatur under this standard must refute every rational basis on which the arbitrators could have relied.” Joyner, 268 Ga.App. at 838 citing Brown, 994 F.2d at 779(II)(A).

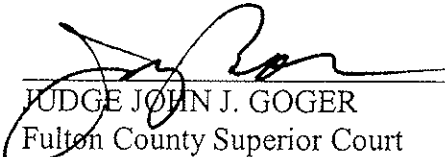
Because she has not refuted “every rationale basis on which the arbitrators could have relied,” Plaintiff has failed to show that the arbitrators acted in an “arbitrary and capricious”

manner in issuing the Award. The panel declined to provide an explanation for their dismissal of Plaintiff's claims, and the basis for its decision is therefore unknown. Plaintiff's Application theorizes that the panel considered each of the six counts contained in her Statement of Claim separately, applying an erroneous statute of limitations to each. It is conceivable, however, that the panel did not consider each of Plaintiff's claims separately, but instead granted Defendants' motion to dismiss all of the claims based solely on its determination that Plaintiff's federal securities claim (Count I) was filed outside the two year statute of limitations. To explain, following the panel's denial of Defendants' motion to dismiss, Defendants filed a motion for reconsideration in which the only argument raised was that, because Plaintiff admitted at the motion to dismiss hearing that she had actual knowledge of the alleged fraud beginning in mid-September 2000, Plaintiff's Georgia securities law claims (Count III) and federal securities law claims (Count I) are time-barred by their respective one and two-year statutes of limitations. Plaintiff responded by conceding that her Georgia securities law claims were time-barred, and arguing that there was a question of fact as to when the alleged fraud constituting the federal securities law claims occurred.

Based on the fact that the panel reversed itself and decided to dismiss all of Plaintiff's claims following its consideration of Defendants' argument that the federal securities claim was time-barred, it may be inferred that the panel considered the success or failure of Plaintiff's Statement of Claim to hinge on the viability of Plaintiff's federal securities claim. A reviewing court may not vacate a panel's award under the "arbitrary and capricious" standard unless it is "so palpably faulty that no judge could have applied the law as it did." Brown, 994 F.2d at 782. Accordingly, because the panel's dismissal of the federal securities law claim was not wholly unfounded, the Court finds that the Award was not made in an "arbitrary and capricious" manner.

Based on the foregoing, Plaintiff's Application is **HEREBY DENIED**.

SO ORDERED this 6th day of January, 2006.



JUDGE JOHN J. GOGER
Fulton County Superior Court

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