

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-6337-08T3

VOORHEES OFFICE CENTER, LLC  
AND EYE PHYSICIANS, P.C.,

Plaintiffs-Appellants,

v.

TARGET BUILDING CONSTRUCTION,  
INC.,

Defendant-Respondent.

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Argued September 15, 2010 - Decided October 4, 2010

Before Judges Axelrad, R. B. Coleman, and  
J. N. Harris.

On appeal from the Superior Court of New  
Jersey, Law Division, Camden County, Docket  
No. L-764-09.

Gary D. Fry argued the cause for appellants  
(Archer & Greiner, attorneys; Mr. Fry, Frank  
D. Allen and Nancy Burdine Talley, of  
counsel and on the brief).

Michael J. Vassalotti argued the cause for  
respondent (Brown & Connery, LLP, attorneys;  
Mr. Vassalotti, on the brief).

PER CURIAM

Affiliated plaintiffs Voorhees Office Center, LLC (VOC) and Eye Physicians, P.C. (Eye), appeal from the Law Division's final order vacating a portion of an arbitration award of \$602,499 relating to a construction contract, and remanding for a new proceeding before a different arbitrator. Because we conclude that the Law Division erred in its application of the New Jersey Arbitration Act of 2003 (the Act), N.J.S.A. 2A:23B-1 to -32, we reverse and remand for the entry of a judgment confirming the arbitrator's award.

I.

The parties' dispute originally revolved around competing claims for breach of contract between (1) Target Building Construction, Inc. (Target) on one side and (2) VOC and Eye<sup>1</sup> on the other. Initially, the parties drew their battle lines in a civil action commenced in the Law Division. As part of that lawsuit, VOC served an offer of judgment pursuant to Rule 4:58-1 upon Target to allow judgment to be taken against VOC in the amount of \$20,000. Target did not accept VOC's offer of judgment. Subsequently, the parties agreed to resolve their entire dispute through arbitration instead of a bench trial, and

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<sup>1</sup> Eye was joined as a plaintiff in an amended complaint in which it sought putative lost profits relating to an alleged breach of the construction contract to which it was not a party.

to have the arbitrator rule on the offer of judgment, if necessary, after the underlying controversy was resolved. To facilitate the arbitrator's autonomy, the parties arranged not to advise him of the offer of judgment until after he ruled on the underlying contractual disputes.

Shortly before the arbitration hearings were scheduled to begin, VOC and its counsel agreed that no further attorneys' fees would be charged by the law firm to the client for the services rendered, and that the firm would attempt to recover reallocated attorneys' fees pursuant to a proceeding for the offer of judgment. In a letter dated October 10, 2007, VOC's attorney wrote to his client's representative:

This will confirm our agreement that, based upon the fact that you are a valued client of this firm and further due to your significant relationship with Wills Eye Hospital, we will agree that no further invoices for legal fees will be rendered in this matter. The firm's sole recourse for recovery of fees will be by way of award of same by the court and/or arbitrator, as the case may be. We will, however, require that you continue to reimburse the firm for all costs incurred in this matter.

A plenary hearing spanned nine days from January to May, 2008, which was limited to construction-related issues only. Thereafter, in September 2008, the arbitrator issued a thirty-three page opinion awarding \$178,583 to VOC, \$100,605 to Target, and nothing to Eye. From this, a net award of \$77,978 was

distilled in VOC's favor. This award triggered the requirement to decide the unresolved issue of reallocation of attorneys' fees and expenses pursuant to the offer of judgment. It was at this time that the arbitrator was informed of his continued responsibilities to now consider and decide those offer of judgment issues.

In pursuance of resolution of the offer of judgment issues, Target sought (on several occasions) permission from the arbitrator to engage in extensive discovery and requested a plenary hearing. Target asserted, among other things, that there were several examples of unreasonable billing by its adversaries' attorneys requiring testimonial examination. The arbitrator permitted limited discovery of documents and billing records, but no depositions were allowed.

The arbitrator denied the requests for a plenary hearing and elected to making a ruling on the extensive written submissions and oral argument provided by the parties. The arbitrator ultimately reduced the amount of attorneys' fees that had been sought, agreeing that there were instances of unreasonable billing. He also determined that Eye was not entitled to attorneys' fees because it did not prevail in the arbitration. Finding it extremely burdensome to identify the precise legal work performed solely for VOC, and to separate out

the legal services performed for Eye, the arbitrator further reduced the attorneys' fee request by twenty-five percent. The ultimate award in favor of VOC, however, included attorneys' fees and expenses of \$511,259 plus interest of \$13,262.

Appellants subsequently sought to confirm the award in the Law Division by means of a summary action, and Target counterclaimed for vacation of the award. The trial court — itself relying upon documentary submissions and oral argument from the parties — concluded that the arbitrator's denial of an evidentiary hearing to address the offer of judgment issues did not amount to arbitral misconduct but nevertheless constituted a refusal to consider evidence material to the controversy and, therefore, merited a vacation of the offer of judgment award pursuant to N.J.S.A. 2A:23B-23(a)(3). The court entered a final judgment: (1) confirming "the award in favor of [VOC] as to all issues other than the issues of [VOC's and Eye's] entitlement to counsel fees under R[ule] 4:58-1 and the amount of counsel fees to be awarded to VOC," (2) vacating "that portion of the prior arbitration award which awarded counsel fees to plaintiff [VOC]," and (3) remanding the matter to a new arbitrator to conduct an "evidentiary hearing" on the entitlement to and amount, if any, of counsel fees to VOC.

This appeal followed.

## II.

An arbitration award is presumed valid. Del Piano v. Merrill Lynch, 372 N.J. Super. 503, 510 (App. Div. 2004), certif. granted, 183 N.J. 218 (2005), certif. dismissed as improvidently granted, 195 N.J. 512 (2005). Consequently, to ensure "finality, as well as to secure arbitration's speedy and inexpensive nature, there exists a strong preference for judicial confirmation of arbitration awards." N.J. Tpk. Auth. v. Local 196, I.F.P.T.E., 190 N.J. 283, 292 (2007) (internal citations and quotations omitted). Accordingly, a party "seeking to vacate [an arbitration award] bears a heavy burden." Del Piano, supra, 372 N.J. Super. at 510. On appeal from a trial court's decision vacating an arbitration award, our review is de novo, that is, "'[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Id. at 507 (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

The parties' agreement to arbitrate in this case is governed by the Act, specifically N.J.S.A. 2A:23B-3. That Act "codifies [the State's] policy favoring arbitration." Malik v. Ruttenberg, 398 N.J. Super. 489, 495 (App. Div. 2008). Pursuant to N.J.S.A. 2A:23B-22, an action to confirm the award carries a

judicial obligation so that "the court shall issue a confirming order unless the award is modified or corrected pursuant to section 20 or 24 of this [A]ct or is vacated pursuant to section 23 of this [A]ct." However, "the [Act] precludes judicial interference with an arbitrator's award except in extremely limited circumstances." Id.; see also Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 358 (1994) (quoting Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 548 (1992) ("'Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators.'").

The key grievance in this appeal is the manner of conducting the arbitration to resolve the attorneys' fee dispute that was triggered by the offer of judgment. The fulcrum of the dispute lies in the arbitrator's decision to decide the reallocation issue without the benefit of plenary discovery or a full evidentiary hearing. The Law Division was of the view that "there are glaring issues that jump out at me" and "there was no consideration of evidence material to the controversy," which he viewed as violative of N.J.S.A. 2A:23B-23(a)(3). That part of the Act provides as follows:

- a. Upon the filing of a summary action with the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

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(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding[.]

[N.J.S.A. 2A:23B-23(a)(3)(emphasis added).]

We are unable to agree with the Law Division for the simple reason that the arbitrator's exercise of discretion in the manner of conducting the arbitration was consistent with law<sup>2</sup> and was not an abuse of the ample authority implicitly conferred upon him by the agreement of the parties and expressly by the Act. "An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding." N.J.S.A. 2A:23B-15(a). Moreover, Target suffered no substantial prejudice to its rights as result of the manner of disposition by the arbitrator. It received all of the process that it was due, and although the adverse result was unfortunate, it was not unjust.

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<sup>2</sup> We note that errors of law or fact made by the arbitrator are "not correctable" by a reviewing court. Selective Ins. Co. v. Nat'l Cont'l Ins. Co., 385 N.J. Super. 62, 67 (App. Div.), certif. denied, 188 N.J. 218 (2006).



Rule 4:58-2 is a procedural mechanism intended to facilitate the settlement of litigation. Wiese v. Dedhia, 188 N.J. 587, 593 (2006). It "'penalize[s] a party who rejects a settlement offer that turns out to be more favorable than the ultimate judgment.'" Ibid. (quoting Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 125 (2005)). One is penalized for rejecting a pre-trial offer of judgment when the subsequent monetary award is equal to or exceeds 120% of the offer; the Rule then requires a court to award "a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance," along with costs incurred for the prolonging of the litigation. R. 4:58-2(a). This rule is also applicable to arbitration proceedings. Elrac, Inc. v. Britto, 341 N.J. Super. 400, 404 (App. Div. 2001).

R.P.C. 1.5(a) sets forth the relevant factors for determining whether an attorneys' fee is reasonable:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

[See also Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386-87 (2009).]

The arbitrator did not refuse to consider evidence material to the controversy so as to substantially prejudice the rights of Target. There was abundant opportunity for Target to submit its opposition, which it did, to VOC's and Eye's application, and the arbitrator's ruling demonstrates that he considered those arguments rather than rubber stamping appellants' initial requests. Target received a fair arbitration even though it did not receive a plenary hearing. The arbitrator exercised his sound discretion in setting the award for attorneys' fees and denying defendant's request for a hearing. As we recently observed:

Our Supreme Court has "strongly discourage[d] the use of an attorney-fee application as an invitation to become mired in a second round of litigation." Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 24 (2004). "[A] plenary hearing should be

conducted only when the certifications of counsel raise material factual disputes that can be resolved solely by the taking of testimony." Ibid. Such hearings "will be a rare, not a routine, occurrence." Ibid.; see Jacobitti v. Jacobitti, 263 N.J. Super. 608, 619 (App. Div. 1993), aff'd, 135 N.J. 571 (1994) (finding no need for an "extensive and time-wasting hearing" on attorney's fees in a matrimonial action). As such, the trial courts have "wide latitude in resolving attorney-fee applications," and appellate courts will not disturb the decision to deny a plenary hearing unless there is a "clear abuse of discretion." Furst, supra, 182 N.J. at 25.

[Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292, 308 (App. Div. 2010).]

Target was not prejudiced in the manner of the plaintiff in Wilde v. O'Leary, 374 N.J. Super. 582, 586-87 (App. Div.), certif. denied, 183 N.J. 585 (2005), where the arbitrators engaged in misconduct by granting a last-minute motion precluding the plaintiff's expert witness from testifying and not affording the plaintiff reasonable time to find a new expert witness. Nor was Target victimized along the lines of the plaintiff in Manchester Township Board of Education v. Carney, 199 N.J. Super. 266, 271-76 (App. Div. 1985), where the arbitrator refused to permit the plaintiff to present rebuttal expert testimony on a key issue and instead closed the case. Here, the arbitrator's conduct did not rise to the egregiousness of the conduct exhibited by the arbitrators in Manchester

Township Board of Education or Wilde, nor was Target sufficiently prejudiced to warrant a vacation of the award.

Lastly, we note that VOC's and its counsel's agreement that counsel would only receive compensation by way of an attorneys' fee award after October 10, 2007, does not compromise the arbitrator's award. The arbitrator appropriately awarded plaintiff, and not counsel, the fee award. Furthermore, "where the retainer agreement contemplates the possibility of recovery of counsel fees in lieu of payment from the client, counsel may endeavor to collect them even though the client may not be obligated for the entire amount." Specialized Med. Sys., Inc. v. Lemmerling, 252 N.J. Super. 180, 186 (App. Div. 1991), certif. granted, 127 N.J. 565 (1992), appeal dismissed, 142 N.J. 443 (1995). Hence, VOC was free to seek attorneys' fees despite its arrangement with counsel.

The preservation of the independence of arbitral forums through a judicial hands-off attitude best serves the legislative goals of the Act. As much as Target would like to have expanded the record and cross-examined its adversary's attorney, we cannot say that it was deprived of any material rights enjoyed under the Act. The slender corridor that exists to vacate arbitration awards was simply not accessible to the Law Division when it mistakenly vacated a portion of the award

and remanded the offer of judgment dispute for a plenary hearing.

Reversed and remanded for the entry of a judgment confirming the arbitrator's award of January 15, 2009.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION