COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP195 **Cir. Ct. No. 2006CV490**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

TRI-COUNTY INVESTMENTS, LLC,

PLAINTIFF-RESPONDENT,

V.

TONEY LAW OFFICES, S.C.,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Toney Law Offices, S.C.[1] appeals judgments confirming an arbitration award awarding damages against Toney for breaching a lease and assessing it one-half of the arbitrator's fees. Toney argues: (1) the arbitrator lacked jurisdiction to hear the dispute because the parties failed to comply with the contractual provisions for selecting an arbitrator; (2) the arbitrator lacked jurisdiction to decide a rescission issue; (3) the arbitrator disregarded the law, and engaged in misconduct and partiality; (4) the arbitrator erroneously exercised his discretion[2] by failing to adjourn the hearing; and (5) the judgment assessing one-half of the arbitrator's fees against Toney should be vacated. We reject Toney's arguments and affirm.

FACTUAL BACKGROUND

¶2 Toney entered into a five-year lease whereby it was to lease law office space in a former medical clinic building in New London from Tri-County Investments, LLC. An area that originally consisted of three smaller offices was to be modified to provide two larger offices. After construction started, it was discovered that the previous walls contained two support pillars that could only be removed with great difficulty and expense. Tri-County concluded the pillars were structurally necessary and the cost of removing them and creating new support structures in the common wall between the offices was financially impractical. Tri-County offered to take steps to ameliorate the problem. Toney advised this

[1] Attorney Steven Toney is the sole stockholder of Toney Law Offices, S.C., and all references will be collectively to "Toney."

[2] Throughout his briefs, Toney uses the phrase "abused his discretion." Appellate courts have not used the term "abuse of discretion" since 1992 because of its unjustified negative connotation. *See* ***Hefty v. Hefty***, 172 Wis. 2d 124, 128 n.1, 493 N.W.2d 33 (1992).

was unsatisfactory and declared the lease rescinded. Tri-County communicated to Toney that it did not consider the pillars a material breach of the lease terms.

¶3 Tri-County sought arbitration pursuant to an arbitration clause contained in the lease. On October 19, 2005, an arbitrator requested by Tri-County telephoned Toney to inform him that Tri-County requested that he arbitrate the dispute and to discuss setting an arbitration date. Toney agreed both to arbitrate, and to hold the hearing on December 20, 2005. Toney contends the arbitrator agreed to provide a court reporter for the arbitration hearing. Toney received an "Arbitration Submission Agreement" together with a scheduling order on November 3, 2005.[3] The arbitration submission agreement stated the arbitration would commence on December 19, 2005, at 9 a.m.

¶4 Toney's mother died on November 1 and he was absent from his office from November 1 through November 7, 2005. Toney never signed or returned the arbitration submission agreement. He subsequently took a vacation from December 11 through December 18. When checking his e-mails early on December 19, Toney discovered an e-mail from his paralegal dated December 16, informing him that "Erin told me she received a call from [the arbitrator's] asst. today. According to the paperwork, the hearing is Monday, December 19th at 9:00 a.m…."

¶5 At 7:55 a.m. on December 19, Toney telephoned the arbitrator at his home and informed him that Toney did not have the arbitration on his calendar, Toney had not signed the arbitration submission agreement, and that he had a

[3] The arbitration submission agreement provides under the heading "Conduct of the Hearing" that, among other things, "There will be no stenographic record of the hearing."

hearing scheduled at 11:30 a.m. that date in Oconto. Toney also contended a work load problem had developed due to his mother's illness and death, and that he wished to conduct pre-arbitration discovery. The arbitrator declined to postpone the hearing. Toney claims the arbitrator "then hung up on Atty. Toney, who immediately telephoned [the arbitrator] again, but was informed by [the arbitrator] that the arbitration would proceed whether or not he appeared."

¶6 Toney appeared at the arbitration, requested recusal of the arbitrator and objected to the arbitration. The arbitrator denied the request for recusal. Toney then requested an adjournment. He also objected to the absence of a court reporter. The arbitrator denied the request for adjournment and the hearing proceeded.

¶7 A continuation of the hearing was held on December 29, 2005, which was followed by an inspection of the site. Toney submitted an "Arbitration Brief" dated December 29, which was marked as an exhibit at the hearing. The arbitrator provided Toney an opportunity to file a subsequent arbitration submission and Toney submitted a letter brief dated January 3, 2006.

¶8 On January 18, 2006, the arbitration award was issued. The arbitrator concluded the pillars did not constitute a material breach of the lease, as neither appearance nor function was seriously affected by the existence of the pillars. The arbitrator also rejected Toney's argument that there was a mutual agreement between the parties to rescind the lease. Damages were assessed against Toney in the amount of $23,416.66 for breaching the lease, and one-half of the arbitration fees were assessed to each party.

¶9 Toney filed a "Complaint for Declaratory Judgment to Vacate, Modify or Correct Arbitration Award." Toney argued the arbitrator's refusal to

recuse himself, to adjourn the hearing, or to have a court reporter present at the hearing prejudiced his rights. Toney further argued that proceeding with the arbitration after he no longer consented to the arbitrator violated the terms of the arbitration agreement. As a result, Toney insisted the arbitrator "exceeded his powers and was guilty of misconduct by refusing to recuse himself, and further by holding the hearing without granting a postponement as requested." Toney also contended the refusal to adjourn the hearing evidenced partiality on behalf of the arbitrator.

¶10 The circuit court confirmed the arbitrator's award. The court found the arbitrator had jurisdiction over the matter pursuant to WIS. STAT. ch. 788.[4] The court also found that Toney failed to establish misconduct or partiality by the arbitrator. The court further found Toney failed to show good cause for adjourning the arbitration and therefore the arbitrator did not erroneously exercise his discretion in denying the adjournment request. Judgment was granted for the damages against Toney, and a separate judgment was granted in favor of the arbitrator against Toney for the fees in connection with the arbitration. Toney now appeals.

DISCUSSION

¶11 The "arbitrator's award comes before us clothed with a presumption that it should be confirmed." ***Steichen v. Hensler***, 2005 WI App 117, ¶13, 283 Wis. 2d 755, 701 N.W.2d 1 (citation omitted). We may disturb the award only if we conclude the arbitrator committed one of a limited number of transgressions.

[4] References to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Id., ¶12. Invalidity of the award must be demonstrated by clear and convincing evidence. ***Diversified Mgmt. Servs. v. Slotten***, 119 Wis. 2d 441, 445, 351 N.W.2d 176 (Ct. App. 1984). We will not overturn an arbitrator's decision for mere errors of law or fact, but only when "perverse misconstruction or positive misconduct [is] plainly established, or if there is a manifest disregard of the law, or if the award itself is illegal or violates strong public policy." ***Steichen***, 283 Wis. 2d 755, ¶12 (citation omitted).

¶12 We turn first to the issue of substantive arbitrability, that is, whether the award should be vacated because the arbitrator lacked authority to determine the merits of the matters in dispute. The grounds for vacating an award are set out in WIS. STAT. § 788.10(1):

> (a) Where the award was procured by corruption, fraud or undue means;
>
> (b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; [and]
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

¶13 Toney argues the arbitrator exceeded his powers within the meaning of WIS. STAT. §§ 788.10(1)(c)-(d) by arbitrating without Toney's consent.[5] We

[5] Toney does not develop his argument under WIS. STAT. § 788.10(1)(c). Toney merely cites subpara. (c) only in the final sentence of his argument on this issue. We therefore need not reach the issue concerning subpara. (c). *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

agree with the circuit court's determination that the arbitrator did not exceed his powers.

¶14 The lease provided at paragraph 21, "All legal disputes shall be arbitrated and neither party may commence legal proceedings other than to enforce an arbitration decision." Despite this broad arbitration clause, Toney contends the lease required a written request for arbitration by one of the parties. However, as the circuit court correctly observed, Toney admitted in a signed affidavit that he agreed to arbitrate the dispute during the telephone call with the arbitrator on October 19, 2005. Toney therefore waived any procedural deficiency that could be assumed with regard to a written request for arbitration.

¶15 Toney insists his agreement during the telephone call with the arbitrator did not manifest an agreement with Tri-County. Toney contends that only an agreement reached between the parties would suffice as an agreement to arbitrate. This argument is pure semantics. Toney concedes the arbitration depended upon the parties' mutual consent. It cannot be seriously argued that Tri-County did not consent, because it requested the arbitrator, and Toney's consent is demonstrated by his own sworn affidavit.

¶16 Toney also argues that his consent was clearly revoked when he never returned the signed arbitration submission agreement as requested. We are not persuaded. Toney's failure or neglect to sign the arbitration submission agreement is neither dispositive nor necessarily indicative of a revocation of his earlier assent to arbitrate.

¶17 Toney next argues the arbitrator lacked jurisdiction to decide whether the parties agreed to rescind the lease. Toney contends that WIS. STAT. § 788.01 "is clear that courts, not arbitrators, are to decide the issue of rescission

of a contract containing an arbitration clause." Section 788.01 provides, in relevant part:

> [A]n agreement in writing between 2 or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable and enforceable except upon such grounds as exist at law or in equity for the revocation of any contract.

¶18 We are not persuaded the provisions of WIS. STAT. § 788.01 necessarily mean that only a court may make the determination whether a lease was rescinded, when a specific arbitration provision states that all legal disputes shall be arbitrated and neither party may commence legal proceedings other than to enforce an arbitration decision. Toney insists that in this case, the parties entered into a separate oral agreement to rescind the lease prior to the arbitration. Toney reasons that as an agreement separate from the lease, it was not subject to arbitration at all. We disagree. The phrase "[a]ll legal disputes shall be arbitrated" would include a dispute over whether the lease itself was rescinded. Moreover, Toney's argument rests upon the improper premise that an agreement existed between the parties to rescind the lease, which is directly contrary to the arbitrator's findings. The arbitrator did not exceed the scope of the subject matter submitted to arbitration.

¶19 The next issue is whether the arbitrator disregarded the law by concluding Toney was not entitled to rescind the lease. Toney fails to indicate which subsection of WIS. STAT. § 788.10 this argument proceeds under and we therefore need not reach the issue. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). In any event, Toney's substantive argument again rests on the improper premise that he was entitled to rescind the lease. In this regard, Toney's argument is little more than an attempt to replay

before this court the arbitrated dispute. We note that Toney directly appeals neither the arbitrator's conclusion that the failure to remove the pillars was not a material breach of the lease, nor the conclusion that the lease was not rescinded by mutual agreement. Nevertheless, Toney's arguments in his briefs to this court are for all intents and purposes an attempt to re-litigate the issue of rescission addressed in the arbitration. The standards of review do not allow this court to review arbitrated disputes to supplant the outcome.

¶20 Toney also insists the arbitrator cited no authority for his conclusion that the parties did not make a separate oral agreement to rescind the lease. Toney is mistaken. The arbitration award sets forth the facts and reasoning underlying the conclusions reached. It does not follow that simply because the arbitrator viewed the historical facts differently than Toney that such constitutes a disregard of the law. There was a sufficient evidentiary basis for the arbitrator's decision. It is simply wrong to portray the arbitrator's decision as a mischaracterization of the evidence.

¶21 It is also dismaying that Toney's accusation of a mischaracterization of the record is joined with the reference to a lack of a formal record of the hearing for this court to review. The latter reference serves no legitimate purpose other than to imply an improper motive. This is especially disturbing given the absence of any indication that Toney requested a court reporter for the continuation of the hearing on December 29, 2005. One wonders what value Toney perceives in such strident appellate advocacy. That being said, Toney has not plainly shown perverse misconstruction or positive misconduct. To the contrary, the arbitrator did not quarrel with Toney's theoretical right to rescind, but only his right under the facts the arbitrator credited.

¶22 Toney next argues the arbitrator erroneously exercised his discretion and committed misconduct contrary to WIS. STAT. § 788.10(1)(c) by refusing to adjourn the arbitration hearing. Toney contends that circuit courts are often faced with a request for an adjournment of an evidentiary proceeding and the decisions to grant or deny such a request "usually revolve around questions such as whether there were previous requests for continuances, how long the matter had been pending, how much time a party had to prepare, the reasons for the requested continuance, and the issues of prejudice." Toney ignores the fact that the circuit court in the present action confirmed the arbitrator's refusal to grant an adjournment. Following the consideration of briefs and oral argument, the circuit court in the present case concluded, "the record shows that the Defendant failed to show good cause for continuance." Although the court acknowledged that extenuating circumstances existed, it stated "the record does not show clearly … why someone would still not be prepared for the arbitration hearing in the amount of time that they had between those events." We agree with the circuit court's conclusions. Rather than finding fault with the arbitrator, the much more compelling conclusion is that Toney failed to exercise diligence with regard to the arbitration matter. Criticism of the arbitrator is unwarranted.

¶23 Toney also argues that as a result of the refusal to adjourn the hearing, he was "required to proceed without the benefit of pre-arbitration discovery." We note the arbitration provision does not specify how discovery would be handled, and therefore the parties were limited to the discovery procedures provided in WIS. STAT. § 788.07. *See* ***Borst v. Allstate Ins. Co.***, 2006 WI 70, ¶¶59, 62, 291 Wis. 2d 361, 717 N.W.2d 42. Regardless, the arbitrator provided an additional ten-day period after the initial hearing for Toney to accumulate further evidence. He also allowed Toney to view, measure and

photograph the office premises after the continuation of the hearing on December 29, 2005. The arbitrator then provided Toney with the opportunity to submit additional briefing after the continuation of the hearing on December 29. These accommodations had the effect of an adjournment, the very request Toney made on December 19. In addition, there is no indication in the record that Toney was prevented from cross-examining witnesses at either the initial hearing or the continued hearing, or prevented from attempting informal discovery as soon as the dispute arose, whether or not Toney felt he revoked the consent to the arbitration. The arbitrator did not erroneously exercise his discretion in denying the request for an adjournment.

¶24 Toney next insists the arbitrator evidenced partiality. When a claim of partiality is made, "the court must ascertain from such record as is available whether the arbitrators' conduct was so biased and prejudiced as to destroy fundamental fairness." ***Diversified Mgmt.***, 119 Wis. 2d at 446 (citation omitted).

¶25 Toney argues "[t]he fact that the Arbitration Award was mailed in January from Venice, FL suggests that [the arbitrator] may have given his personal vacation plans priority over fairness to the parties." Toney also claims the arbitrator refused to allow the requested adjournment on the ground that Tri-County had "'waited long enough,' when it had only been six weeks since the hearing was scheduled and when the parties' Lease contained no time-table."

¶26 Toney fails to provide any basis to conclude the arbitrator's conduct was so biased and prejudiced as to destroy fundamental fairness. Toney's argument that the arbitrator put his own interests above fairness to the parties simply because the arbitration award was mailed from Florida is speculation and borders on the frivolous. As mentioned, Toney concedes the arbitrator held a

second hearing and inspection of the premises with Toney on December 29, and provided additional time for Toney to submit additional briefing. It is also somewhat more than disengenuous for Toney to complain when he himself took a vacation just before the scheduled arbitration date. Toney was not denied due process or fundamental fairness. Nothing in Toney's claim of partiality or misconduct meets his burden of proof by clear and convincing evidence that there was evident partiality. *See* ***id.*** at 445; *see also* ***In re Kemp v. Fisher***, 89 Wis. 2d 94, 100-01, 277 N.W.2d 859 (1979).

¶27 Toney next argues the arbitrator committed misconduct by failing to provide a court reporter for the hearing. He contends that in the telephone conversation of October 19, 2005, the arbitrator agreed to provide a court reporter for the arbitration hearing. Toney claims he had a right to rely on the arbitrator's statement unless it was agreed otherwise. Toney also argues the failure to provide a reporter for the arbitration hearing was "critical to a thorough and appropriate review by this court…." However, although helpful for appellate review, we disagree the transcription of an arbitration proceeding is critical as a matter of law. Moreover, as indicated previously, there is no indication in the record that Toney attempted to provide a reporter for the continued hearing on December 29. The lack of a court reporter did not constitute misconduct.

¶28 Toney next argues the judgment in favor of the arbitrator should be vacated. Toney's argument in this regard is contingent upon prevailing on appeal of the judgment in favor of Tri-County. Because we affirm the judgment in favor of Tri-County, we need not reach this issue.

¶29 Finally, we note that we are troubled by the tone of Toney's briefs. Vigorous advocacy and civility are not inconsistent requirements. The award in

this case was confirmed by a circuit court that found no evidence, much less evidence of a clear and convincing nature, to satisfy any of the statutory grounds for vacating the arbitration award. Yet, the briefs to this court betray an acerbic, and quite frankly, unprofessional tone toward the arbitrator. A cardinal rule of appellate practice is to avoid disparaging the court system. *See* ***State v. Rossmanith***, 146 Wis. 2d 89, 89, 430 N.W.2d 93 (1988). We do not consider an arbitrator outside the ambit of that rule. Moreover, Toney fails to acknowledge standards of review directly contrary to his position. *See* SCR 20:3.3. He also infuses argument into the factual sections of his briefs, argues issues not appealed, and improperly portrays facts found contrary to his position as if restating a closing argument. Our review in this case has been unnecessarily complicated by Toney's failure to render this court the aid contemplated by the rules of appellate procedure and the rules of professional conduct.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.