Third District Court of Appeal

State of Florida

Opinion filed February 12, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-357
Lower Tribunal No. 18-16567

David Efron,
Appellant,

vs.

UBS Financial Services Incorporated of Puerto Rico,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Pedro P. Echarte, Jr., Judge.

The Ferraro Law Firm, P.A, and Leslie B. Rothenberg; Kozyak Tropin Throckmorton, Dyanne E. Feinberg and Daniel S. Maland, for appellant.

Bressler, Amery, & Ross, P.C., and Alex J. Sabo; Williams & Connolly LLP, and Christopher N. Manning and Michael R. Fishman (Washington, DC), for appellee.

Before LOGUE, SCALES, and GORDO, JJ.

LOGUE, J.

David Efron appeals the final judgment confirming an arbitration award of $9,721,050.65 plus interest against him and in favor of Appellee, UBS Financial Services Incorporated of Puerto Rico. The issue on appeal is whether the trial court erred in confirming the award when the arbitration panel denied Efron's second motion for postponement which was filed eleven days before the arbitration was scheduled to commence on the day that Efron's attorney withdrew citing irreconcilable differences.

FACTS

In January of 2017, UBS initiated an arbitration before the Financial Industry Regulatory Authority against Efron seeking indemnification for moneys UBS had paid relating to Efron's UBS accounts. On May 5, 2017, the arbitration panel set the hearing to begin on April 23, 2018. A month later, an associate of Efron agreed that a medical malpractice case pending before the district court of Puerto Rico should be specially set also beginning April 23, 2018.

On February 28, 2018, Efron filed his first motion for a postponement of the arbitration. In his motion, Efron asserted that he served as the lead trial attorney in the malpractice cases handled by his office and the conflict between the arbitration and medical malpractice dates "was clearly unforeseen" because the trial "was scheduled to proceed to trial last year, however it was delayed by the hurricane that struck Puerto Rico in the Fall of 2017." It was later established by an affidavit filed

by UBS that both matters had, in fact, been scheduled months before the Hurricane struck the island. When challenged on this point, Efron filed an affidavit explaining that the scheduling conflict was caused by his personal calendar being kept separate from his law office's calendar and he was not aware his associate had agreed to a trial date in conflict with the arbitration. In these circumstances, the arbitration panel denied Efron's first motion for postponement.

On April 12, 2018, eleven calendar days before the scheduled beginning of the arbitration, Efron's attorney filed a notice of withdrawal as counsel citing "irreconcilable differences" without further explanation. On the same day, Efron filed his second motion for postponement in which he requested "the Final Hearings be postponed and that I be granted sixty (60) days to find and retain substitute counsel to adequately prepare for those final hearings." On April 18, 2018, the arbitration panel denied Efron's second motion without giving a specific reason.

The arbitration occurred as scheduled. Efron did not appear. The panel took testimony from two witnesses for two days and admitted 41 exhibits into evidence. It then issued its award in favor of UBS. Thereafter, UBS initiated an action in circuit court to confirm the award. Efron moved to vacate the award arguing the panel improperly denied his second motion for postponement. The circuit judge denied Efron's motion and entered a final judgment in the amount of the arbitration award with prejudgment interest. Efron timely appealed.

ANALYSIS

The transactions at issue in the arbitration occurred in interstate commerce, and, therefore, as UBS argues and Efron concedes, the arbitration was governed by the Federal Arbitration Act. Regarding judicial review of arbitrators' decision to grant or deny postponements, Title 9 U.S.C. Section 10 of the Federal Arbitration Act reads:

> (a) In any of the following cases 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
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> (1) Where the award was procured by corruption, fraud, or undue means;
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) 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; or
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was made.

(Emphasis added). "Because the expeditious resolution of a dispute is one of the principal purposes for referring a matter to arbitration, the Act limits the court's

review to a determination of whether the arbitrators were guilty of misconduct in denying a request for an adjournment." Storey v. Searle Blatt Ltd., 685 F. Supp. 80, 82 (S.D.N.Y. 1988) (citing Fairchild & Co., Inc. v. Richmond, et al., 516 F. Supp. 1305, 1313 (D.D.C.1981)).

As used in this section, "misconduct" means a decision "which so affects the rights of a party that it may be said that he was deprived of a fair hearing." Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir.1968), cert. denied, 393 U.S. 954 (1968). Under this standard, "[t]he arbitrary denial of a reasonable request for a postponement may serve as grounds for vacating an arbitration award." Fairchild, 516 F. Supp. at 1313 (citing Tube & Steel Corp. of Am. v. Chicago Carbon Steel Products, 319 F.Supp. 1302 (S.D.N.Y.1970)). In our review, therefore, "we must decide whether there was any reasonable basis for failing to postpone the hearing." Johnson, et al. v. Directory Assistants Inc., 797 F.3d 1294, 1301 (11th Cir. 2015) (quoting Scott v. Prudential Sec's, Inc., 141 F.3d 1007, 1016 (11th Cir. 1998), abrogated on other grounds, Hall St. Assoc., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584-85 (2008)).

The order denying Efron's second motion for postponement does not contain any statement of reasons. UBS, however, argues the panel could have found that Efron attempted to stall the proceedings by inducing the withdrawal of his attorney by non-payment of fees. UBS points out that many courts will refuse to allow

counsel to withdraw on the eve of trial for this very reason. See Whiting v. Lacara, 187 F.3d 317, 321 (2d Cir. 1999) ("a district court has wide latitude to deny a counsel's motion to withdraw . . . on the eve of trial"). Here, the forum chosen by the parties, arbitration, apparently does not provide the option of requiring counsel to remain on the case. Moreover, the fact that courts will force reluctant counsel to remain on a case merely highlights the obvious fact that a "party's ability to obtain representation, even in civil cases, is an issue intimately connected to the integrity of the judicial process." Dorsey v. Payne, 44 F. App'x 164, 167 (9th Cir. 2002) (reversing trial court's decision to deny continuance after allowing counsel to withdraw shortly before trial).

Because Efron's attorney's written notice of withdrawal does not mention attorney's fees but simply "irreconcilable differences," the only factual grounds UBS can identify to support its contention that Efron manipulated the withdrawal of his counsel are (1) Efron previously moved for a postponement, which was denied; and (2) the unsworn and conclusory remarks of UBS's attorney made in the course of legal argument that Efron's attorney told him his withdrawal related to fees.

As to the first point, the fact that Efron previously moved for a postponement which was denied does not support, by itself, a reasonable inference that he subsequently attempted to stall the proceedings by inducing the withdrawal of his attorney by non-payment of fees. As to the second point, we are mindful that the

judicial rules of procedure and evidence do not apply in arbitrations. However, given that the record contains a notice of withdrawal by Efron's counsel, and the obvious prejudice a party would sustain by replacing long standing counsel at the eleventh hour before a scheduled arbitration, something more than the unsworn remarks of opposing counsel must support UBS's contention in order for it to provide a reasonable basis for failing to postpone the hearing.

UBS also argues that the arbitrators could have denied the postponement on the basis that Efron's request for "sixty (60) days to find and retain substitute counsel to adequately prepare" could be interpreted as being essentially open ended. But the focus here is not on the amount of time. If the arbitrators had granted a postponement for some period of time, even a small period of time, we would be reviewing that decision. Here, however, the arbitrators refused to grant any postponement, even though this would have been the first postponement of the matter.

Because, a "party's ability to obtain representation, even in civil cases, is an issue intimately connected to the integrity of the judicial process," Dorsey, 44 F. App'x 1 at 167, the denial of the motion to postpone here without a reasonable basis is a matter "which so affects the rights of a party that it may be said that he was deprived of a fair hearing." Newark Stereotypers', 397 F.2d at 599.

Reversed and remanded.