UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 381

September Term, 2016

HSN, LLC, *et al.*

v.

ALI REZA KALANTAR

Kehoe,
*Krauser,
Battaglia, Lynne A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: June 7, 2017

*Krauser, C.J., now retired, participated in the hearing of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

In the present case, we have been asked to vacate an arbitration award of rescission of a contract, which was based upon the finding that an agent of HSN, LLC, (HSN), and Homa Ravanbakhsh, Appellants, had fraudulently induced Ali Reza Kalantar, Appellee, to enter into a contract, which enabled Mr. Kalantar to buy a 50 percent ownership interest in HSN. After Judge Althea Handy of the Circuit Court for Baltimore City affirmed the rescission award, HSN and Ms. Ravanbakhsh appealed, raising one question: "Did the Circuit Court err in affirming the Arbitrator's award?"[1]

The present matter is governed by the Maryland Uniform Arbitration Act (the "Act"), codified in Sections 3-201 *et seq.* of the Courts and Judicial Proceedings Article of the Maryland Code (1973, 2013 Repl. Vol.). Section 3-224(c) of the Act provides that

[1] In their brief, the Appellants identify a number of arguments subsumed under the one question:

> C. The Arbitration Award Fails to Take Into Account the Undisclosed and Improper and [sic] Conflict of Interest of the Reza Golesorkhi, Esquire, the Attorney Who Drafted the MPA
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> D. The Arbitration Award Fails to Take Into Account Other Irregularities, Which Were Compounded By The Arbitrator Allowing Mr. Kalantar to Run Out The Clock And Then Having the Arbitrator Hold that Against Ms. Ravanbakhsh and HSN
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> E. The Arbitration Award Fails to Find By "Clear and Convincing Evidence" That Ms. Ravanbakhsh or HSN Committed Fraud, Nor Could Such A Finding of Fraud Be Made Under that Standard
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> > 1. The Arbitrator Did Not Find That Ms. Ravanbakhsh or HSN Made False Statements
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> > 2. The Arbitrator Did Not Find That Ms. Ravanbakhsh or HSN Knew of Any False Representation Being Made
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> > 3. The Arbitrator Did Not Demonstrate Ms. Ravanbakhsh's or HSN's Intent to Defraud
> >
> > 4. The Arbitrator Did Not Demonstrate Justifiable Reliance
>
> F. The Arbitration Award Applies the Remedy of Rescission in An Unfair and Improper Manner that Violates Maryland Law

a reviewing court "shall not vacate the award or refuse to confirm the award on the ground that a court of law or equity could not or would not grant the same relief." Section 3-224(b) provides for a court to vacate an arbitrator's award if any one of various determinations is made:

> (b) *Grounds.* — The court shall vacate an award if:
> (1) An award was procured by corruption, fraud, or other undue means;
> (2) There was evident partiality by an arbitrator appointed as a neutral, corruption in any arbitrator, or misconduct prejudicing the rights of any party;
> (3) The arbitrators exceeded their powers;
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 3-213 of this subtitle, as to prejudice substantially the rights of a party; or
> (5) There was no arbitration agreement as described in § 3-206 of this subtitle, the issue was not adversely determined in proceedings under § 3-208 of this subtitle, and the party did not participate in the arbitration hearing without raising the objection.

We have acknowledged that under the statute, "[j]udicial review of an arbitrator's decision is extremely limited, and a party seeking to set it aside has a heavy burden." *Letke Sec. Contractors, Inc. v. United States Sur. Co.*, 191 Md. App. 462, 472 (2010). The Court of Appeals has recognized that "courts generally defer[] to the arbitrator's findings of fact and applications of law. . . . [M]ere errors of law and fact [do] not ordinarily furnish grounds for a court to vacate or refuse enforcement of an arbitration award." *Downey v. Sharp*, 428 Md. 249, 266 (2012) (quoting *Board of Education v. Prince George's Cnty. Educator's Ass'n*, 309 Md. 85, 98–99 (1987)).

HSN and Ms. Ravanbakhsh initially challenge the instant award by questioning the bases for the arbitrator's ultimate factual finding that Mr. Kalantar had been

fraudulently induced to enter into the contract. They assert that the arbitrator erred in deriving the ultimate finding of fraudulent inducement because he seemingly favored Mr. Kalantar in allocating time to receive evidence; credited biased testimony from Mr. Kalantar's witnesses; and faulted HSN and Ms. Ravanbakhsh for not calling certain witnesses. They further claim that the arbitrator failed to find by clear and convincing evidence that HSN and Ms. Ravanbakhsh fraudulently induced Mr. Kalantar to sign the contract, because the arbitrator failed to find that HSN and Ms. Ravanbakhsh's agent had knowingly misrepresented the nature of HSN's preexisting litigation with other parties to induce Mr. Kalantar to enter into the contract; that the agent, HSN, or Ms. Ravanbakhsh intended to make that misrepresentation; and that Mr. Kalantar had justifiably relied on the agent's misrepresentation in entering into the contract.

The essential problem with the challenges by HSN and Ms. Ravanbakhsh to the factual findings made by the arbitrator is that no recording of the arbitration proceedings was made, so that there is no transcript of the proceeding to enable any meaningful judicial review of the alleged errors. The documents in the record also include only the arbitration award, the promissory note executed by Mr. Kalantar to enable his purchase, the contract entitled the Membership Purchase Agreement, and Mr. Kalantar's Demand for Arbitration, none of which is a resource to address the factual issues asserted.

In similar circumstances, Judge John Eldridge, writing for the Court of Appeals in *Downey*, 428 Md. at 266–67, when confronted with allegations of error in an arbitrator's findings of fact, recognized that a reviewing court cannot "refuse to defer" to an

arbitrator's factual findings or engage in its own fact finding when no transcript of the arbitration proceedings nor relevant documents existed:

> In the case at bar, not only did the Court of Special Appeals refuse to defer to the arbitrator's findings of fact and conclusions of law, but the intermediate appellate court rendered its own findings of fact and conclusions, which were contrary to those of the arbitrator. Moreover, the Court of Special Appeals did so in a case where there was no transcript of the proceedings before the arbitrator and where exhibits submitted at the arbitration proceedings were not included in the record. A transcript of the hearing before the arbitrator, if there had been one, and the exhibits, might have shed some light upon the arbitrator's apparent conflicting findings of fact. There might have been testimony, documentary evidence, concessions, statements of counsel, etc., which might have explained the arbitrator's findings in the first amendment to the arbitration award which stated that Sharp "does not have an implied easement by necessity, *he does not need one*." (Italicized language added by the amendment).[] A transcript of the hearing before the arbitrator and the exhibits might have helped to explain some of the other inconsistences or ambiguities in the award.

(Footnote omitted.)

In *Wicomico County Education Ass'n, Inc. v. Board of Education*, 59 Md. App. 564, 567–68 (1984), we also considered the reviewability of an arbitrator's factual findings when a transcript of the collective bargaining proceedings was not available and opined:

> Although it is true that there were factual disputes concerning the happenings before the arbitrator, there is no dispute to the fact that a transcript was lacking. Thus, absent a *de novo* trial, the court was unable to resolve the factual disputes upon which the petition was based.
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> * * *
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> Patently, [the appellants] could have had a transcript made of the arbitration proceeding. Because they voluntarily did not order a transcript of that hearing, they now seek to have the court rehear that which the arbitrator heard. Their failure to order the transcript may not be converted into their advantage, i.e., a *de novo* hearing where the judge hears anew the testimony and assesses his evaluation of the credibility of the witnesses rather than relying upon that of the arbitrator. *Cf. Langrall, Muir & Noppinger v. Gladding*, 282 Md. 397, 384 A.2d 737 (1978). Were the law otherwise, the arbitration would be but a first airing of

> the evidence, a prelude to trial, instead of the termination of the evidentiary phase of the dispute.

Judicial review of factual findings, we recognized, is totally thwarted without a transcript:

> Nothing in the Maryland Uniform Arbitration Act, codified in Courts Art. § 3-201 through 3-234, authorizes the circuit court to conduct either a partial or a complete hearing *de novo*. Moreover, such a proceeding would expand the court's authority to review arbitration awards well beyond the present boundaries set by the legislature.
>
> All of this discussion leads us back to where we began. When there is no transcript of the hearing before the arbitrator, the circuit court is totally without a means of resolving the factual disputes properly before it.

Id. at 569.

As recognized in *Downey* and *Wicomico County Education Ass'n, Inc.*, then, judicial review of the alleged errors in the arbitrator's findings of fact in the instant case is totally inhibited, because no transcript of the proceedings is available and in the record, and the exhibits available in the record do not assist in resolving any of the factual errors alleged.

HSN and Ms. Ravanbakhsh also allege that the arbitrator, in rescinding the contract in favor of Mr. Kalantar, failed to credit the importance of evidence that revealed that the contract was drafted by an attorney who allegedly had failed to disclose his existing professional and personal relationship with Mr. Kalantar, which they allege is a violation of Rule 1.7 of the Maryland Rules of Professional Conduct.[2] Recognizing that

[2] We cite to the iteration of Rule 1.7 of the Maryland Rules of Professional Conduct, amended in 2007, which was in effect at all times relevant to this appeal. The Rule states:

> **Rule 1.7. Conflict of Interest: General Rule.**
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> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if:

there is no record available to gauge the validity of their assertions, HSN and Ms. Ravanbakhsh argue that Rule 1.7 is inherently violated if an attorney with a preexisting relationship with one party drafts a contract for both parties; such a paradigm, they argue, requires vacation of the rescission award, because the resulting contract favored Mr. Kalantar. In asserting that Rule 1.7 dictates a remedy, however, the Appellants fail to realize that the Preamble to the Rules of Professional Conduct clearly acknowledges that violating the Rules does not create civil liability:

> Violation of a Rule does not itself give rise to a cause of action against a lawyer nor does it create any presumption that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other non-disciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, in some circumstances, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct. Nothing in this Preamble

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(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

> and Scope is intended to detract from the holdings of the Court of Appeals in Post v. Bregman, 349 Md. 142 (1998) and Son v. Margolius, Mallios, Davis, Rider & Tomar, 349 Md. 441 (1998).

Maryland Rules of Professional Conduct, Preamble (2007).[3]

As a result, even were there a record available to evaluate HSN and Ms. Ravanbakhsh's factual allegations regarding a violation of Rule 1.7 by the attorney who drafted the contract, any such alleged violation of the Rules could not be relied upon to support a civil action.

HSN and Ms. Ravanbakhsh finally argue that the arbitrator also exceeded his powers under Section 3-224(b)(3) of the Courts and Judicial Proceedings Article of the Maryland Code (1973, 2013 Repl. Vol.),[4] by ordering rescission as a remedy for the fraudulent inducement; the arbitrator determined:

> A person who has been fraudulently induced to enter a contract can elect to either reaffirm the contract and recover damages, or to rescind the contract and obtain restitution of the payments made under the contract. Mr. Kalantar has elected the latter remedy. As a result, I will declare the [contract] void, require HSN and Ms. Ravanbakhsh to return the money Mr. Kalantar paid to them and declare that Mr. Kalantar has no membership interest in HSN.

HSN and Ms. Ravanbakhsh contend that the arbitrator failed to articulate the bases for his decision to rescind and that Mr. Kalantar allegedly waived his right to rescind the contract by not promptly seeking rescission after learning that he had been fraudulently induced to enter into the contract.

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[3] We cite to the iteration of the Preamble to the Maryland Rules of Professional Conduct which was amended in 2007 and in effect at all times relevant to this appeal.

[4] Section 3-224(b)(3) of the Courts and Judicial Proceedings Article of the Maryland Code (1973, 2013 Repl. Vol.) provides, "The court shall vacate an award if . . . [t]he arbitrators exceeded their powers . . ."

In *Birkey Design Group, Inc. v. Egle Nursing Home, Inc.*, 113 Md. App. 261, 266–67 (1997), we recognized, "Before an award can be vacated on the ground that an arbitrator exceeded his authority, the record must objectively disclose that the arbitrator exceeded that authority in some respect." "If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced." *Id.* at 267. We also have acknowledged that "the Act does not require that arbitrators issue opinions or memoranda containing full explanations for their decisions." *Gordon v. Lewis*, 215 Md. App. 298, 312–13 (2013).

When a contract provides that any disputes arising under that contract are to be resolved by arbitration, the arbitrator does not exceed his powers by ordering rescission of the contract as a remedy in the appropriate scenario. *See Washington Homes, Inc. v. Interstate Land Dev. Co., Inc.*, 281 Md. 712, 721–22, 729 (1978). As a remedy for fraudulent inducement, the party asserting that he has been defrauded has the option to elect to rescind the contract or ratify the contract and seek "damages to redress the injury inflicted by the false and fraudulent misrepresentation." *Sonnenberg v. Sec. Mgmt. Corp.*, 325 Md. 117, 124–25 (1992) (quoting *Telma v. Gingell*, 157 Md. 411, 413 (1929)). The right to rescind the contract may be waived, however, if the party does not "promptly" elect rescission, which, in this regard, refers to "a reasonable time, which is determined, in large part, by whether the period has been long enough to result in prejudice." *Merritt v. Craig*, 130 Md. App. 350, 360 (2000) (quoting *Cutler v. Sugarman Org., Ltd.*, 88 Md. App. 567 (1991)); *see also Doe Mountain Enter., Inc. v. Jaffe*, 171 Md. App. 1, 17 (2006) ("[W]hen a party to a contract discovers a fraud has been perpetrated upon him [or her],

he [or she] is put to a prompt election to rescind the contract or to ratify it and claim damages.")

The arbitrator's determination of rescission of the contract after penultimately finding fraudulent inducement was within his authority, as recognized in our jurisprudence, and he was not obliged to explain fully his rationale. With respect to whether rescission was promptly elected, once again, the record is bare to enable us to evaluate whether Mr. Kalantar rescinded within a reasonable time and whether HSN and Ms. Ravanbakhsh suffered prejudice as a result.

As a result, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.