NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3192-09T4

CAPITAL ONE BANK, (U.S.A), N.A.,

Plaintiff-Respondent,

v.

RED INDUSTRIES, INC.,

Defendant,

and

VAROUJAN PANOSSIAN,

Defendant-Appellant.

Argued November 15, 2010 - Decided May 17, 2011

Before Judges C.L. Miniman and LeWinn.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-7910-08.

Joseph R. Mariniello, Jr., argued the cause for appellant (Mariniello & Mariniello, P.C., attorneys; Mr. Mariniello, on the brief).

John E. Brigandi argued the cause for respondent (Eichenbaum & Stylianou, LLC, attorneys; Mr. Brigandi, on the brief).

PER CURIAM

Defendant, Varoujan Panossian, is a part-owner of Red Industries, Inc. Plaintiff, Capital One Bank, (U.S.A.), N.A. (Capital One) sued Panossian and Red Industries for the unpaid balance on a business credit card in the name of Red Industries; Panossian had personally signed the credit card application. The matter was referred to arbitration. On September 8, 2009, the arbitrator awarded Capital One $28,185 against Panossian "due to [his] personal guarantee."

On November 3, 2009, Capital One filed a motion to enforce the arbitration award. On November 6, 2009, Panossian filed a motion to set aside the arbitration award and a demand for a trial de novo; he requested oral argument. On December 10, 2009, the judge decided both motions on the papers and entered two orders, one entering judgment in favor of Capital One for the amount of the arbitration award, and the other denying Panossian's motion in its entirety. Panossian moved for reconsideration and again requested oral argument. On January 27, 2010, the judge entered an order denying reconsideration without holding oral argument.

Panossian now appeals from the orders of December 10, 2009 and January 27, 2010. We affirm.

Only the attorneys for both parties appeared at the arbitration. Capital One submitted the credit card application

bearing Panossian's signature, the monthly billing statements, and the terms and conditions of the account. Counsel for Panossian contended that a former partner in Red Industries, Enis Hrdisa, had forged Panossian's name on the application; counsel submitted a copy of Panossian's signature on interrogatory answers furnished in discovery in an attempt to prove the forgery.

In his decision, the arbitrator noted that he could not find a factual basis to support the forgery defense because Panossian did not testify. Furthermore, there was no expert testimony presented on the issue.

In his motion to set aside the arbitration award and demand a trial de novo, filed fifty-nine days after entry of the award, Panossian claimed that his failure to file within the requisite thirty days, R. 4:21A-6(b)(1), was due to a calendaring error by his attorney. He also asserted a "meritorious defense," namely forgery, and contended that "justice require[d] that he be allowed to file . . . out of time."

The judge did not explain his failure to grant Panossian's request for oral argument. In a statement of reasons appended to his December 10, 2009 order, the judge noted that the thirty-day time limit in the Rule "can be extended for good cause shown[,]" but the concept of "'extraordinary circumstances'

. . . does not include excusable neglect and hence does not encompass negligence or carelessness by the attorney or his office staff."

Regarding Panossian's claim of a meritorious defense of forgery, the judge noted that the arbitrator found no basis for such a defense because defendant neither testified nor presented expert testimony on the issue, adding:

> In [d]efendant's [m]otion, . . . counsel provides no further basis for [d]efendant's alleged meritorious defense . . . other than his certified statement. If [d]efendant really did have a meritorious defense worthy of determination, a showing should have been made at arbitration or again here. Instead, there is nothing more to support the assertion of a meritorious defense other than defense counsel's hearsay statements.

The judge concluded that Panossian "had an opportunity to argue the merits of his case before the arbitrator by having his counsel appear on his behalf . . . . He was not denied his day in court, and he received a fair hearing on the merits. . . . [N]o new circumstances or evidence ha[d] surfaced" with respect to his forgery defense.

Panossian filed a motion for reconsideration on or about January 6, 2010, again requesting oral argument. He alleged that a "grave injustice" had resulted from the trial court's December 10, 2009 order. He attached a series of checks dated September 6, 2005 through April 19, 2007, and a report prepared

by a document examiner who concluded that "[n]either the disputed handwriting [n]or the disputed signature appearing on the subject [application] can be identified as being by the hand of . . . Panossian." He also argued that even without a showing of "extraordinary circumstances," the judge should relax Rule 4:21A-6(b)(1) pursuant to Rule 1:1-2(a) to prevent an injustice.

Notwithstanding the request for oral argument, the judge denied Panossian's motion for reconsideration on the papers. In his statement of reasons, the judge "st[ood] by [his] prior decision . . . that [Panossian's] carelessness or negligence" did not meet the "'extraordinary circumstances' standard . . . ." With respect to Panossian's request to relax Rule 4:21A-6(b)(1) in the interest of justice, the judge stated that, in the absence of extraordinary circumstances, he "chose not to exercise that discretion . . . ."

On appeal, Panossian asserts the following four errors in the judge's decisions: (1) Rule 4:21A-6(b)(1) should have been relaxed pursuant to Rule 1:1-2; (2) the "principle behind the 'extraordinary circumstances' basis for [a]llowing late filings does not apply in this case"; (3) the arbitrator's ruling was "without any basis . . . as it was entered without a single piece of evidence or testimony . . . by [Capital One]"; and (4)

the judge erred in not granting the requests for oral argument on both motions.

We note the standard of review governing our consideration of Panossian's arguments on appeal. An appellate court's review of a trial court's fact finding is limited. "Trial court findings are ordinarily not disturbed unless 'they are so wholly unsupportable as to result in a denial of justice' . . . ." Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 (1988) (quoting Rova Farms Resort v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974)). Findings that "may be regarded as mixed resolutions of law and fact" receive the same deference on appeal, with review "limited to determining whether there is sufficient credible evidence in the record to support these findings[.]" P.T. & L. Constr. Co., Inc. v. N.J. Dep't of Transp., 108 N.J. 539, 560 (1987).

Rule 4:21A-6(b)(1) provides that a party seeking a trial de novo following an arbitration must file a notice of rejection of the arbitrator's award and demand for a trial de novo, along with applicable fees, "within [thirty] days after filing of the arbitration award." Rule 1:1-2(a) provides that "any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice." However, when neither party has made a timely motion for a trial

de novo, the trial court's power to extend the time frame "'must be sparingly exercised . . . to the end that the arbitration proceedings achieve finality.'" Martinelli v. Farm-Rite, Inc., 345 N.J. Super. 306, 310 (App. Div. 2001) (quoting Mazakas v. Wray, 205 N.J. Super. 367, 372 (App. Div. 1985)), certif. denied, 171 N.J. 338 (2002). Therefore, the thirty-day rule for filing a demand for a trial de novo may be relaxed only upon a showing of "extraordinary circumstances." Hartsfield v. Fantini, 149 N.J. 611, 616-17 (1997); Wallace v. JFK Hartwyck at Oak Tree, Inc., 149 N.J. 605, 607 (1997).

"A fact-sensitive analysis is necessary in each case to determine what constitutes an extraordinary circumstance." Martinelli, supra, 345 N.J. Super. at 310 (citing Hartsfield, supra, 149 N.J. at 618). To qualify as "extraordinary," the situation must be something "unusual or remarkable," or "having little or no precedent and usually totally unexpected." Id. at 311 (citations omitted).

We are satisfied that the motion judge engaged in an appropriate "fact-sensitive analysis[,]" id. at 310, in denying both motions. Panossian's claim of "extraordinary circumstances" consisted of three points: (1) his attorney's "calendar was mistaken and showed an entry of a due date on one of [his] other matters"; (2) the delay in obtaining a

handwriting expert was due to the expense and time involved in other pending suits against him; and (3) his forgery defense was so meritorious that it would be "unjust" to enter an award against him.

The first two points reflect attorney neglect. It is clear that "an attorney's heavy workload or improper supervision of staff does not constitute 'extraordinary circumstances.'" Hartsfield, supra, 149 N.J. at 618. "'Mere carelessness'" or "'lack of proper diligence'" on the part of the attorney does not rise to this level. Martinelli, supra, 345 N.J. Super. at 310 (quoting Hartsfield, supra, 149 N.J. at 618). See also Wallace, supra, 149 N.J. at 610 (attorney who "marked the wrong date in his calendar[,]" thereby allowing the thirty-day filing period to elapse, did not demonstrate extraordinary circumstances warranting relief). As we noted in Behm v. Ferreira, 286 N.J. Super. 566, 574 (App. Div. 1996),

> [i]f a party could set aside an arbitration award and obtain a trial de novo whenever his or her attorney neglected to file . . . within time solely because of a clerical error or failure to note or advise the client of the thirty-day requirement . . ., there would be an open door which would render the thirty-day limit of R. 4:21A-6(b)(1) meaningless.

Panossian patently failed to demonstrate extraordinary circumstance based on his attorney's oversight.

Regarding Panossian's proffered meritorious defense of forgery, we concur with the motion judge's observation that he should have presented evidence supporting this defense to the arbitrator; failing that, he should at least have submitted such evidence in support of his motion to vacate the award and demand a trial de novo. Instead, the first time Panossian submitted anything tending to support this defense was on his motion for reconsideration.

"'[R]econsideration is a matter within the sound discretion of the [c]ourt, to be exercised in the interest of justice.'" Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). Therefore, any error by the trial court in granting or denying a motion for reconsideration is reviewed under the "abuse of discretion" standard. Del Vecchio v. Hemberger, 388 N.J. Super. 179, 189 (App. Div. 2006).

> "Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence. . . ."
>
> [Cummings, supra, 295 N.J. Super. at 384 (quoting D'Atria, supra, 242 N.J. Super. at 401).]

If a party seeking reconsideration "'wishes to bring new or additional information to the [c]ourt's attention which it could not have provided on the first application, the [c]ourt should, in the interest of justice (and in the exercise of sound discretion), consider the evidence.'" Ibid. However, a motion for reconsideration is properly denied if it is based on unraised facts known to the movant prior to entry of judgment. See Del Vecchio, supra, 388 N.J. Super. at 188-89 (affirming denial of motion for reconsideration that was premised upon an investigation that occurred after the first motion had been denied, but could have taken place before then).

At the arbitration proceeding, Panossian had the opportunity to present all evidence in support of his defense. Clearly, if he had a valid forgery defense, the production of evidence supporting that defense should have been a top priority. Panossian presented no good reason why the evidence he submitted in his motion for reconsideration could not have been proffered earlier. We are, therefore, satisfied that the judge properly denied his motion for reconsideration.

Panossian's argument that the "extraordinary circumstances" standard applicable to the thirty-day time limit in Rule 4:21A-6(b)(1) does not apply to cases submitted to arbitration under Rule 4:21A-1(a)(3), is "without sufficient merit to warrant

discussion in a written opinion." R. 2:11-3(e)(1)(E). Suffice it to say, the designation of the type of case subject to arbitration under Rule 4:21A-1(a) has no bearing on the applicability of the requirements of Rule 4:21A-6(b)(1), once an arbitration award has been rendered.

We further reject Panossian's contention that the principles applicable to the disposition of motions under Rule 4:50-1 should apply here. This position was expressly rejected by the Supreme Court in Hartsfield, supra, 149 N.J. at 618, where the Court noted that "[m]any parties seeking relief under Rule 4:50-1 have not had an opportunity to argue the merits of their case . . ., i.e., default judgments have been entered against them." By contrast, "most parties seeking relief for failure to file a timely petition for trial de novo have had an opportunity to argue the merits of their case before an arbitrator. Such claimants have not been denied a day in court." Ibid.

Panossian's contention that his motion to vacate should have been granted because Capital One did not present sufficient evidence before the arbitrator, is likewise without merit. R. 2:11-3(e)(1)(E). The quantum of evidence before the arbitrator is immaterial to Panossian's obligation to comply with the requirements of Rule 4:21A-6(b)(1). His failure to do so

renders the arbitrator's decision immune from review. Grey v. Trump Castle Assocs., L.P., 367 N.J. Super. 443, 447 (App. Div. 2004).

Finally, we concur with Panossian that the motion judge erred in deciding both motions on the papers notwithstanding his express requests for oral argument. R. 1:6-2(d) provides that requests for oral argument on motions "shall be granted as of right." We are satisfied, however, that this error was harmless, as oral argument would not have changed the outcome of either motion.

The motion judge "by a[] . . . memorandum decision . . . [found] the facts and state[d [his] conclusions of law[,]" as required by Rule 1:7-4(a). Having reviewed those findings and conclusions, we have determined that the orders at issue should be affirmed. Panossian vigorously pursued his contentions in his motion papers. Under the circumstances, a remand at this juncture to allow oral argument would serve no purpose other than needlessly "burdening the parties and the court system with [a] remand that . . . [is] otherwise . . . [un]necessary." Filippone v. Lee, 304 N.J. Super. 301, 307 (App. Div. 1997).

Affirmed.