NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2691-10T2

COMPREHENSIVE PSYCHOLOGY
SYSTEM, P.C.,

Plaintiff-Respondent,

v.

BRETT PRINCE, PH.D,

Defendant-Appellant.

Argued February 14, 2012 - Decided March 23, 2012

Before Judges Parrillo, Skillman and Hoffman.

On appeal from the Superior Court of New Jersey, Chancery Division, Monmouth County, Docket No. C-000274-03.

Melissa Cipriano argued the cause for appellant (Cipriano Law Offices, P.C., attorneys; Ms. Cipriano and Jessica S. Swenson, of counsel and on the brief).

Joseph G. LePore argued the cause for respondent (LePore Luizzi, P.C., attorneys; Mr. LePore, of counsel; Durmeriss Cruver-Smith, on the brief).

PER CURIAM

Defendant, Brett Prince, Ph.D., appeals from the December 17, 2010 order of the Chancery Division confirming an arbitrator's award dismissing his claim for lost salary and

benefits and awarding attorney's fees of $6,500 to his former employer, plaintiff Comprehensive Psychology System, P.C. (CPS). We affirm.

This matter arises from an employment relationship between the parties. CPS is a corporation providing professional neuropsychological services to individuals under the trade name LifeSpan. Defendant, a licensed psychologist, was employed by CPS from July 1, 1996 to September 2, 2003. The initial term of the employment contract was for one year and renewed automatically each year thereafter unless either party gave notice at least ninety days prior to the end of the term. The contract could be terminated without cause "by mutual agreement" or "for cause" for any number of specified reasons.

The contract also contained a restrictive covenant limiting the ability of the former employee from practicing his profession within ten miles of CPS's facility or from soliciting CPS's patients for two years following date of termination. Lastly, the contract called for all disputes thereunder to be resolved by binding arbitration and that "the non-prevailing party shall pay all reasonable attorney's fees incurred by the prevailing party in connection with such arbitration . . . ." As to the former, the contract specifically provided:

> (d) Finality. The parties agree that the arbitrator(s) shall have the broadest

> power to conclusively resolve all such disputes, including without limitation, the power to decide issues arbitrarily and to allow reasonable limited discovery and that, except as review of binding arbitration is permitted by law, no judicial review shall be made of the arbitrator's decision on any grounds, including grounds of public policy.

The circumstances surrounding the termination of this employment relationship were the subject of litigation and ultimately arbitration, which is the focus of this appeal. The procedural history is rather long and involved, but briefly stated, CPS's attempts to enforce the employment contract's non-compete clause were unsuccessful in both the Chancery Division and on appeal. Comprehensive Psychology Sys., P.C. v. Prince, 375 N.J. Super. 273 (App. Div. 2005). Thereafter, on April 7, 2005, defendant demanded arbitration by the American Arbitration Association (AAA). The matter was temporarily suspended on January 23, 2006 as the parties had not submitted the required deposits. While reinstated on February 9, 2006, the matter was administratively closed on November 5, 2007, as a result of defendant's lack of prosecution.

Defendant made a second demand for arbitration on November 16, 2007, which CPS unsuccessfully challenged in the Chancery Division. Thereafter, a new arbitrator, retired Judge Murray Brochin, was appointed on June 18, 2009, but a scheduling

conference did not take place until February 23, 2010, a delay defendant's counsel attributed to "an unexpected hiatus[,]" and AAA attributed to defendant's counsel's illness and recovery period.[1] The next scheduling order, issued on April 5, 2010, directed the parties to comply with reasonable discovery requests submitted by April 15, 2010, and set the final hearing for June 7, 2010, which was not to be postponed except for a "strong showing of good cause." The order was followed by one dated May 6, 2010, narrowing the claims to be arbitrated.[2] Further, in response to CPS's complaint that defendant was still non-compliant with discovery, the order directed defendant to provide "the first page or pages of his income tax returns as filed that show his or his entity's gross profit from the

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[1] Once again, CPS's counsel questioned the continuation of a proceeding that had been inactive for nearly three years and also, in the same correspondence, renewed a demand for documentation as to defendant's income.

[2] In particular, the order provided:

> The only disputes articulated by the parties that come within that jurisdictional clause are Dr. Prince's claim for lost salary and benefits to which he contends he is entitled under his employment contract and CPS's claim for damages for his allegedly breaching that contract by wrongfully interfering with its relationship with its patients. All other claims are dismissed for lack of jurisdiction. Those are the only claims that will be considered at the final hearing.

practice of his profession during calendar years 2003 and 2004" and if the documents were not provided to CPS, "the Arbitrator [would] draw an inference that the document would fully support CPS's case." The order also provided that discovery was not to delay the final hearing which was to occur on June 7, 2010.

Prior to the final hearing, CPS notified the arbitrator that defendant had failed to provide discovery and requested the matter be dismissed. By order of June 2, 2010, the arbitrator denied CPS's dismissal motion, explaining:

> [t]he determination of the dispute between [the] parties has been unduly delayed. The cessation of employment that engendered the dispute is alleged to have occurred in September 2003. The subject matter of this arbitration was also the subject of a suit in Superior Court and an appeal to the Appellate Division. This arbitration was previously dismissed administratively and then refiled. Because of these circumstances, I am unwilling to dismiss the arbitration . . . [s]ince a dismissal for failure to provide discovery would be a dismissal without prejudice . . . .

That same order confirmed that the hearing date was peremptory:

> [t]he hearing will not be postponed or adjourned except by order of the Arbitrator entered on motion and upon a strong showing of good cause. If the hearing has not been postponed or adjourned and one party fails to appear, the hearing will proceed in his absence. If the hearing has not been postponed or adjourned and both parties fail to appear, the arbitration will be dismissed with prejudice.

Despite this order, the hearing did not take place on June 7 because defendant's counsel was beginning medical treatment. Apparently unaware of the adjournment, CPS's counsel appeared on that date and requested attorney's fees. The matter was heard by the arbitrator by telephone conference on June 23, 2010. At that time, defendant's counsel provided no excuse for his failure to give timely notice of his unavailability on June 7 and, by his own admission, acknowledged that "no part of [defendant's] tax returns had been furnished to [CPS]." As the arbitrator later concluded: "[defendant's] counsel represented that he had provided the necessary information by sending a letter to his adversary based on Dr. Prince's assertion, without any other foundation. That was not a reasonable compliance with the Arbitrator's prior order."

On July 19, 2010, the arbitrator issued a final award, rendering the following findings and conclusions:

> 1. Despite repeated requests from [plaintiff] and the Orders of the Arbitrator, [defendant] has failed to provide the ordered discovery or to show an inability to do so. The Arbitrator therefore infers that if the discovery had been provided, it would have shown that [defendant's] income during the relevant period was equal to or greater than the amounts, if any, to which he was entitled under his employment agreement. Accordingly, [plaintiff] does not owe [defendant]

any damages and [defendant] is not entitled to any recovery.

2. Taking into consideration results achieved, time expended and all other relevant factors, $6,500 is awarded to [plaintiff] as a reasonable attorney's fee.

CPS moved in the Chancery Division to confirm the award. Defendant, on the other hand, moved for vacatur. Following argument, the judge confirmed the final award, rejecting defendant's dual contentions that his claims were dismissed solely for want of discovery and without benefit of a hearing, finding instead that the arbitrator "ha[d] every right to" draw a negative inference.

This appeal follows in which defendant raises the following issues:

I. THE DECEMBER 17, 2010 ORDER MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED WHEN IT CONFIRMED THE JULY 19, 2010 ARBITRATION AWARD IN VIOLATION OF N.J.S.A. 2A:[23B-23].

A. The July 19, 2010 Final Arbitration Award should have been vacated because it was procured by undue means.

B. The July 19, 2010 Final Arbitration Award should have been vacated because the arbitrator imperfectly executed his powers that a mutual, final and definite award upon the subject matter submitted was not made.

II. THE DECEMBER 17, 2010 ORDER MUST BE REVERSED BECAUSE ANY FAILURE TO PROVIDE DISCOVERY CLEARLY CONSTITUTES EXCUSABLE NEGLECT.

We deem these arguments to be without merit.

The New Jersey Arbitration Act (Act), N.J.S.A. 2A:23B-1 to -32, as revised in 2003, L. 2003, c. 95, which governs this matter, grants arbitrators extremely broad powers, N.J.S.A. 2A:23B-15, and "extends judicial support to the arbitration process subject only to limited review." Barcon Assoc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981) (interpreting predecessor Act, N.J.S.A. 2A:24-1 to -11). Generally, an arbitration award is presumed valid. Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super. 503, 510 (App. Div. 2004), certif. granted, 183 N.J. 218, appeal dismissed by 195 N.J. 512 (2005).

As noted, "the scope of review of an arbitration award is narrow[,]" lest "the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes . . . be severely undermined." Fawzy v. Fawzy, 199 N.J. 456, 470 (2009). "Because arbitration is so highly favored by the law, the presumed validity of the arbitration award is entitled to every indulgence, and the party opposing confirmation has the burden of establishing statutory grounds for vacation." Pressler & Verniero, Current N.J. Court Rules,

comment 3.3.3 on R. 4:5-4 (2012); see also Twp. of Wyckoff v. PBA Local 261, 409 N.J. Super. 344 (App. Div. 2009). Further, the Court in Trentina Printing, Inc. v. Fitzpatrick & Assoc., Inc., 135 N.J. 349 (1994),

> imposed a strict standard of review of private contract arbitration, limited by a narrow construction of the statutory grounds stated by . . . [N.J.S.A. 2A: 23B-23] for judicial review. Trentina overruled Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479 (1992), which had permitted judicial intervention for gross errors of law by the arbitrators.
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> [Pressler, supra, comment 3.3.3 on R. 4:5-4.]

Consequently, arbitration awards may be vacated only if:

> (1) the award was procured by corruption, fraud, or other undue means;
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> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
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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;
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> (4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 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).]

With specific reference to subsection (a)(3), proscribing a hearing contrary to Section 15 of the Act, N.J.S.A. 2A:23B-15 provides:

> c. If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection due to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the

> arbitrator to conduct the hearing promptly and render a timely decision.
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> d. At a hearing pursuant to subsection c. of this section, a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.
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> [N.J.S.A. 2A:23B-15(c), (d).]

In this case, the only statutory bases argued by defendant for vacatur are that the award was procured by undue means, N.J.S.A. 2A:23B-23(a)(1), and without benefit, and notice, of a hearing prescribed by the Act, N.J.S.A. 2A:23B-23(a)(3), (6). As to the former, defendant argues that the arbitrator failed to consider that the tax returns were provided to plaintiff in the form of correspondence and that they were not ordered to be produced by a certain date. We disagree.

Courts have interpreted "undue means" as a "clearly mistaken view of fact or law." Local Union 560, I.B.T. v. Eazor Express, Inc., 95 N.J. Super. 219, 227-28 (App. Div. 1967). This "does not include situations, . . . where the arbitrator bases his decision on one party's version of the facts, finding that version to be credible." Local No. 153, Office & Prof'l Employees Int'l Union v. Trust Co. of N.J., 105 N.J. 442, 450 n.1 (1987). Rather, the mistake of fact must appear on the face of the award or by the statement of the arbitrator, Office of

Employee Relations v. Commc'ns Workers of Am., 154 N.J. 98, 111 (1998); PBA Local 160 v. Twp. of N. Brunswick, 272 N.J. Super. 467, 474 (App. Div.), certif. denied, 138 N.J. 262 (1994), and be so gross as to suggest fraud or corruption. Trentina, supra, 135 N.J. at 358; Held v. Comfort Bus Line, 136 N.J.L. 640, 642 (Sup. Ct. 1948).

We discern no mistake of fact, much less one so gross as to justify overturning the arbitration award. The arbitrator expressly recognized counsel's representation that he had sent correspondence to his adversary containing tax information based on defendant's assertion, but deemed this unreasonable as "without further foundation" and non-compliant with the court's explicit order of May 6, 2010, which states that defendant was to provide CPS "with a true copy of . . . the first page or pages of his income tax returns as filed that show his or his entity's gross profit from the practice of this profession during calendar years 2003 and 2004 . . . ." There is no claim that the arbitrator misstated the contents of his own order or misinterpreted its express requirement. Nor may it credibly be argued that the arbitrator's ultimate finding of non-compliance evidences either fraud, misconduct or want of good faith so as to warrant judicial interference. On this score, the fact that the order does not explicitly provide a discovery deadline is

inconsequential because one may be readily and reasonably inferred from the order's clear mandate that the June 7 hearing date will not be postponed due to discovery. Accordingly, there is no basis to find that the arbitrator made a mistake as to fact, especially a mistake that would suggest fraud or misconduct. See Held, supra, 136 N.J.L. at 642.

Defendant also argues he was denied notice and a hearing prescribed by the Act. We again disagree.

Three prior orders of the arbitrators — April 5, May 6 and June 2, 2010 — fixed June 7, 2010 as the date certain for the hearing. In fact, the order resulting from the May 6, 2010 conference detailed the arbitral claims, reiterated the final hearing date, and specifically noticed the parties that "[i]f [defendant] fails to produce a document called for by this order and fails to prove that the document, through no fault of his own, is not within his possession, custody or control, the Arbitrator will draw an inference that the document would fully support CPS's case." Despite the certainty and volume of these orders, defendant not only failed to give timely notice of counsel's inability to attend the June 7, 2010 hearing, but also failed to comply with all the discovery mandates therein, namely to provide verifiable income documentation in support of his damages claim. Nonetheless, another hearing was held via

telephone, at which defendant's discovery lapse was confirmed and remained unremedied. Consequently, the arbitrator properly exercised his authority, as noticed in his previous order of May 6, 2010, to draw an adverse inference from defendant's non-production of income information.

Contrary to defendant's contention that the arbitrator refused to postpone the final hearing and to consider evidence, the arbitrator dismissed defendant's claim based on the lack of evidence of any ascertainable loss suffered by defendant, after giving both parties the opportunity to be heard, and in consideration of all the circumstances surrounding the nearly three-year delay in bringing this matter to conclusion. Indeed, defendant points to no evidence material to the controversy, consideration of which would have changed the result of the arbitration. Under the facts and circumstances, we are satisfied defendant received due notice of the hearing and the consequences attending failure to make discovery, and we discern no irregularity on the part of the arbitrator, who "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-15a, including hearing the matter summarily, N.J.S.A. 2A:23B-15b.

Defendant's remaining issues are of insufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

Affirmed.