(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

ASSOCIATED HUMANE SOCIETIES, INC.,

Plaintiff-Appellant,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH,

INC.; MERRILL LYNCH TRUST CO.,

BRUCE G. BARTH, CYNTHIA WALKER,

and NANCY DOMBROWSKI,

Defendants-Respondents.

October 29, 2014

Argued October 16, 2014 -
Decided

Before Judges Alvarez, Maven, and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4376-13.

Harry J. Levin argued the cause for appellant (Levin Cyphers, attorneys; Mr. Levin and Colleen Flynn Cyphers, on the briefs).

David J. Libowsky argued the cause for respondents (Bressler, Amery & Ross, P.C., attorneys; Mr. Libowsky, on the brief).

PER CURIAM

Plaintiff Associated Humane Societies, Inc. appeals the Law Division's August 12, 2013 order denying its application to vacate portions of an arbitration award that limited plaintiff's recovery of punitive damages to $126,077 and denied its request for attorney's fees. We affirm.

Plaintiff is a charitable organization that provides animal rescue, control, adoption, and sheltering services. This matter arises out of plaintiff's decision to retain the services of defendants Merrill Lynch Pierce Fenner & Smith, Inc. and Merrill Lynch Trust Company to handle its investments. Bruce G. Barth (Barth), Cynthia Walker (Walker), and Nancy Dombrowski (Dombrowski) were employed by defendants and involved in the investment of plaintiff's funds.[1]

Plaintiff established two securities brokerage accounts with defendants, which were managed by Barth and William Wolf ("Wolf") in the Barth/Wolf group of defendants' Newark,

New Jersey branch. Pursuant to the account relationship, plaintiff purchased two variable annuities and other equity investments. Plaintiff also opened five equity managed accounts and one fixed income managed account through defendants' Consults Program.

On April 2, 2004, in connection with the Consults Accounts, the parties executed the Merrill Lynch Trust Company, FSB Account Opening Application. It provided that defendants' fee would be:

> based on a 60/40 Equity/Fixed Income Asset Allocation with a 25% discount on equity and a 25% discount on fixed income with a total of 6 managers, the total blended fee is approximately 1.3%.

By contrast, on April 21, 2004, defendants executed an internal document called the Fee Concession Approval Form, which provided that the fee would be:

> based on a 75/25 Equity/Fixed income Asset Allocation with a 15% discount on Equity and a 15% discount on Fixed. We have a total of 6 managers; 5 Equity and 1 Fixed Income, all Consults. The total blended fee is approximately 1.7%. . .

Ultimately, on April 23, 2004, the parties executed a Client Fee Acknowledgement Form, which provided that defendants' fee would be:

> based on a 75/25 Equity/Fixed Income Asset Allocation with a 15% discount on Equity and a 15% discount on Fixed Income. There are a total of 6 Consults managers; 5 Equity and 1 Fixed Income. The total blended fee is approximately 1.67%.

The parties also agreed

> "that any arbitration under this [Merrill Lynch Trust Company, FSB Agency] Agreement shall be conducted only before the New York Stock Exchange, Inc., an arbitration facility provided by any other exchange of which [defendants] [are] a member, or the National Association of Securities Dealers, Inc. [the predecessor-in-interest to FINRA], and in accordance with its arbitration rules then in force."

In the Client Agreement, they further agreed that arbitration was "final and binding on the parties," and that

> [t]he arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

The parties maintained their account relationship uneventfully until 2007, when plaintiff first realized it was being overcharged. In October 2007, plaintiff's Assistant Executive Director, Terrence Clark, alerted defendants of the overcharge. Defendants' internal notes reflect that:

> terri had called to find out what fees they were getting chrged b/c they were having thier [sic] annual meeting. he had said thier [sic] cpa said ml is ripping thme [sic] off on thier [sic] fees . . . I let bill know. he spoke w/ ml trst office cyndi walker. cyndi said cl's ac was not aggregated, something mat mckean shld hv done. also they nvr discounted the fees for the trst ac. they r getting chrg the same amt as they originally started w/. this shld hve been discounted b/c ovr the yrs cl took

> out a lot of mny from ac. bb aware.
> [sic]

Defendants did not remedy the problem, and plaintiff filed a Statement of Claim with FINRA on February 2, 2009, alleging, among other things, that it was overcharged in the management of the investment accounts. Plaintiff also filed a Submission Agreement that authorized the arbitrators to decide all of the claims submitted. Specifically, plaintiff claimed that (1) the annuities were an improper investment; (2) it improperly sustained withdrawal penalties and surrender charges upon the premature liquidation of the annuities; (3) defendants improperly managed and churned the accounts; and (4) defendants overcharged fees on the Consults Accounts. Plaintiff requested compensatory damages, interest, punitive damages, and attorney's fees.

After discovery, the panel of three arbitrators held thirty-four hearing sessions over eighteen days. On the final day of the hearing, plaintiff was granted leave to file an Amended Statement of Claim, in which it specifically demanded $278,223 for overcharges in the Consults Accounts, $400,993 for market adjusted damages, $192,955 for annuity surrender charges, $10,000,000 in punitive damages, $544,299 for attorney's fees and costs, plus unspecified damages for churning.

The arbitration panel issued its fifteen-page award on February 14, 2013. The panel noted that although it was not required to explain its reasoning, it did so due to the complexity of the case. It determined that plaintiff failed to prove its claims for market adjusted damages, for annuity surrender charges, and for churning. Plaintiff does not challenge the arbitrators' denial of these claims.

Plaintiff did prevail in part on its claim for overcharges on the Consults Accounts. However, the panel determined that the initial fee formula, as set forth in the Account Opening

Application and upon which plaintiff relied, was superceded by the formula specified in the later Client Fee Acknowledgement form. Concluding that plaintiff had been overcharged under that subsequent formula, the panel awarded compensatory damages of $168,103, together with interest, rather than the $278,223 urged by plaintiff utilizing the initial formula. Again, plaintiff does not challenge this award.

The panel also awarded plaintiff $126,077 in punitive damages. It explained that defendants' failure to aggregate the Consults Accounts by itself did not warrant the imposition of punitive damages. The panel found "no evidence that [defendants] ever promised [plaintiff] that the accounts would be aggregated." However, the panel accepted certain testimony that the accounts "should have been aggregated for [plaintiff]." It concluded that it was defendants' "failure to take corrective action once the error was discovered" that warranted punitive damages.

The arbitrators next determined that the amount requested by plaintiff was "wildly disproportionate to the actual damages inflicted." Instead, it awarded punitive damages in the amount of seventy-five percent of the actual damages, or $126,077. The panel acknowledged that "this is a miniscule amount if compared to the total net worth of [defendants] but it is still sufficient to demonstrate [defendants'] willful disregard of its client's interests and [defendants'] failure in not attempting to force the issue." The panel also found no basis to award plaintiff attorney's fees under the New Jersey Frivolous Litigation Statute (FLS).[2]

Plaintiff moved in the Law Division to vacate portions of the arbitration award, claiming that the punitive damages were inadequate and that the panel erred in denying attorney's fees. Following briefing and oral argument, the judge denied plaintiff's application, finding that none of the grounds enumerated in N.J.S.A. 2A:23B-23 for setting aside an arbitration award had been satisfied. For that reason, the judge confirmed the arbitration award in its entirety.

This appeal follows in which plaintiff raises the following issues:

I. THE COURT ERRED BY REFUSING TO APPLY THE "MANIFEST DISREGARD OF THE LAW" STANDARD IN DECIDING WHETHER TO VACATE THE AWARD OF THE ARBITRATION PANEL

II. THE COURT ERRED IN ITS FINDING THAT THE ARBITRATION PANEL DID NOT MAKE A BLATANT AND GROSS ERROR WHEN IT LIMITED THE PUNITIVE DAMAGES AWARD TO [PLAINTIFF]

III. THE COURT ERRED IN AFFIRMING THE DECISION OF THE ARBITRATION PANEL THAT THE NEW JERSEY FRIVOLOUS LITIGATION ACT DOES NOT APPLY TO ARBITRATION PROCEEDINGS

IV. THE COURT ERRED WHEN IT OPINED THAT MERRILL LYNCH'S CONTINUED DENIAL THAT IT OVERCHARGE [PLAINTIFF] WAS NOT AKIN TO A FRIVOLOUS DEFENSE

V. EVEN WITHOUT APPLYING THE FRIVOLOUS LIT[I]GATION ACT, THE COURT ERRED BY NOT FINDING THAT ATTORNEY FEES WERE WARRANTED IN THE INTEREST OF JUSTICE

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 Assocs. v. Tri-Cnty. 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, 195 N.J. 512 (2005). It is also well-settled that "there is a strong preference for judicial confirmation of arbitration awards." Linden Bd. of Educ. v. Linden Educ. Ass'n, 202 N.J. 268, 276 (2010) (citation and internal quotation marks omitted). See also Martindale v. Sandvik, Inc., 173 N.J. 76 (2002).

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 (2015); see also Twp. of Wyckoff v. PBA Local 261, 409 N.J. Super. 344 (App. Div. 2009).

The Court in Tretina Printing, Inc. v. Fitzpatrick & Assocs., 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 intervention. Tretina 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.

Consequently, a court may vacate an arbitration only if:

> (1) the award was procured by corruption, fraud, or other undue means;

> (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;
>
> (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;
>
> (4) an arbitrator exceeded the arbitrator's powers . . . .
>
> [N.J.S.A. 2A:23B-23.]

At the outset, we note that our limited scope of review squares with the express intent of the parties' Client Agreement that "any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited." Moreover, it was agreed that arbitration was to be "final and binding" on the parties.

We also note that plaintiff's grounds for seeking vacatur do not fall within any of the statutory parameters for vacating arbitration awards that we have outlined. Rather, plaintiff's argument, i.e., that the arbitrators committed gross and blatant errors in limiting the punitive damages award and in denying attorney's fees, effectively seeks a review of the award under the Perini standard that the Court has since abandoned. See Tretina, supra, 135 N.J. at 357-58.

Relying on Liberty Mutual Ins. Co. v. Open MRI of Morris & Essex, L.P., 356 N.J. Super. 567 (Law Div. 2002), plaintiff further contends that the trial court erred in refusing to apply the "manifest disregard of the law" standard in declining to vacate the arbitration award. However, even if such standard remains viable post-Tretina, vacating an arbitration award under that standard is warranted only if a reviewing court determines both that the arbitrators knew the correct law, and also engaged in a conscious decision to ignore it. Id. at 582-84.

In the present case, we are not persuaded that the arbitrators made gross errors of law, or that they were aware of the law yet consciously disregarded it. The arbitrators were keenly cognizant of the Punitive Damages Act,[3] which governs the award of punitive damages. The panel "[a]ppl[ied] the tests enunciated by the . . . [A]ct," and concluded that defendants were liable for punitive damages of seventy-five percent of the compensatory damages award. The arbitrators expressly rejected plaintiff's demand for $10,000,000 in punitive damages as "wildly disproportionate" to the actual damages inflicted by defendants. In doing so, the panel implicitly acknowledged the statutory cap on punitive damages awards.[4]

We reach a similar conclusion with respect to the arbitrators' determination not to award attorney's fees, which plaintiff sought under the FLS. Again the panel acknowledged the statute, but concluded that plaintiff failed to meet it.

The FLS permits an award of reasonable counsel fees and litigation costs to a prevailing party in a civil action if it is determined that the complaint, counterclaim, cross-claim, or defense is frivolous. N.J.S.A. 2A:15-59.1. There are two bases on which a claim or defense can be considered frivolous:

> (1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or

> (2) The nonprevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.
>
> [N.J.S.A. 2A:15-59.1(b).]

A claim or defense is considered frivolous when: "no rational argument can be advanced in its support"; "it is not supported by any credible evidence"; "a reasonable person could not have expected its success"; or "it is completely untenable." Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div.), certif. denied, 162 N.J. 196 (1999). "[F]alse allegations of fact [will] not justify [an] award . . . unless they are made in bad faith, 'for the purpose of harassment, delay or malicious injury.'" McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 561 (1993) (quoting N.J.S.A. 2A:15-59.1(b)(1)). An honest attempt to pursue a perceived, though ill-founded, claim or defense is not considered to be frivolous. Id. at 563. The burden of proving bad faith is on the party who seeks the fees and costs. Id. at 559.

Guided by these standards, we perceive no error in the arbitrators' determination not to award fees to plaintiff under the FLS, much less a "gross error" or "manifest disregard of the law." Plaintiff is correct in its assertion that by the end of the arbitration hearings defendant conceded that it had become aware of the overcharge in the Consults Accounts but had not taken steps to correct it. However, nothing in the record supports a conclusion that defendant abandoned its defense as to the quantum of the resulting overcharge. Ultimately defendant was successful in reducing the amount of the overcharge claimed by plaintiff from $278,223 to

$168,103. Parenthetically, we also note that defendant prevailed on all of plaintiff's remaining compensatory damages claims.

In Liberty Mutual Ins. Co., supra, 356 N.J. Super. at 582-584, the "manifest disregard of law standard" was not applied in isolation but rather in conjunction with the public policy exception identified in Tretina, supra, 135 N.J. at 364-65. This exception, which plaintiff also urges us to apply, allows a court to vacate an arbitration award that violates "a clear mandate of public policy." Weiss v. Carpenter, 143 N.J. 420, 443 (1996). However, such intervention is appropriate only where "the public-policy question is not reasonably debatable." Ibid. See also Faherty v. Faherty, 97 N.J. 99, 111 (1984) (holding that heightened judicial scrutiny of an arbitration award affecting child support is required because of the courts' traditional role as parens patriae).

Although we do not doubt that plaintiff serves an admirable charitable purpose, the arbitration award itself is not connected to any significant public policy. Neither the arbitrators' modest punitive damages award nor their denial of attorney's fees would itself discourage charitable support of the organization. However, even were we to subject the arbitration award to a heightened degree of scrutiny under the public policy exception, we simply are unable to conclude that the panel abused its discretion, for the reasons that we have previously enumerated.

To the extent that we have not specifically addressed plaintiff's remaining arguments on appeal, we find them to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

[1] Although named as defendants, Walker and Dombrowski are not members of the Financial Industry Regulatory Authority (FINRA) and did not submit to FINRA's jurisdiction. Consequently the arbitration award did not determine any claims asserted against them. The arbitration panel denied all claims against Barth.

2 N.J.S.A. 2A:15-59.1.

3 N.J.S.A. 2A:15-5.12 to -5.17

4 "No defendant shall be liable for punitive damages . . . in excess of five times the liability of that defendant for compensatory damages or $350,000, whichever is greater." N.J.S.A. 2A:15-5.14(b).
