

1992

Arutheru Mintz, Trustee of the Mintz Family Turst
v. Marc Development, an Illinois corporation :
Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 920571

IN THE UTAH COURT OF APPEALS

ARTHUR MINTZ, Trustee of the)
Mintz Family Trust,)
)
Plaintiff and Appellee,)
)
vs.)
)
MARC DEVELOPMENT, an)
Illinois corporation,)
)
Defendant and Appellant.)

Case No. 920571-CA

Priority Non

On Appeal From the Judgment of
the Third Judicial District Court
of Summit County, State of Utah
Honorable Homer Wilkinson, District Judge

APPELLANT' S REPLY BRIEF

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ARGUMENT

I. The Arbitration Award Should Be Set Aside Because the Arbitrator Relied on Fraudulent Evidence of the Fair Market Value of the Subject Property.

Arbitration is a speedy and inexpensive method of resolving disputes. Utility Trailer Sales of Salt Lake, Inc. v. Fake, 740 P.2d 1327, 1329 (Utah 1987) (citing Robinson & Wells, P.C. v. Warren, 669 P.2d 844, 846 (Utah 1983)). As a general rule, however, an arbitration award may be set aside for fraud, improper conduct or unfair means used in procuring the award. See Teal v. Bilby, 123 U.S. 572 (1887) (fraudulent concealment of facts); Michael A. Rosenhouse, Annotation, What Constitutes Corruption, Fraud, or Undue Means in Obtaining Arbitration Award Justifying Avoidance of Award Under State Law, 22 A.L.R. 4th 366, 377-81 (1983). In the present case, the arbitration award cannot stand because the proceeding was not fair and honest and because the substantial rights of the parties have not been respected. See Utility Trailer, 740 P.2d at 1329.

In his Appellee's Brief, Mintz argues that Marc Development somehow waived its right to challenge the arbitrator's decision by failing to file a motion to set aside the award within twenty days after the award was issued. (Mintz Brief p. 12) The basis for Marc Development's motion to set the award aside, however, was new information that the award had been procured through fraud.

A. Marc Development Moved to Set Aside the Arbitration Award Within the Statutory Limitations Period.

The Utah Arbitration Act establishes the time frame within which a motion to vacate an award must be filed. In pertinent part, the Act provides:

(1) Upon motion to the court by any party to the arbitration proceeding for vacation of the award, the court shall vacate the award if it appears:

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

. . . .

(2) A motion to vacate an award shall be made to the court within 20 days after a copy of the award is served upon the moving party, or if predicated upon corruption, fraud, or other undue means, within 20 days after the grounds are known or should have been known.

Utah Code Ann. § 78-31a-14 (1992) (emphasis supplied).

Marc Development discovered that the arbitration proceeding was defective shortly after Mintz filed his Motion for Judgment on the Pleadings. Marc Development filed its Memorandum of Points and Authorities in Support of its Objection to Judgment on the Pleadings on February 4, 1992, well within the limitations period imposed by § 78-31a-14(2). (See R. 36-64)

B. Marc Development has Marshalled the Evidence Demonstrating that the Case Should Be Remanded for Further Proceedings.

Mintz argues that Marc Development has failed to marshal any evidence in support of its claims. (Mintz Brief p. 16) This argument is without any substance because the trial court refused to allow Marc Development an opportunity to present evidence in support of its claim of fraud. The essence of Marc Development's argument is that the trial court refused to grant an opportunity for Marc Development to establish these critical facts on the record.

The record is clear, however, that Marc development presented new evidence suggesting that the arbitration award had been procured through fraud. (R. 36-77) The record is equally clear that the trial court refused to hear this evidence. (R. 122-60)

The trial court's summary disposition of this matter placed Marc Development in the same position of a litigant opposing a motion for summary judgment before discovery was commenced. Marc Development had only recently learned of facts that indicated the arbitrator's award was defective. After Mintz brought his action to confirm the award, Marc Development was forced to present all available evidence to the court. After raising these material issues, Marc Development should have been allowed to complete its investigation of the facts and

to present the results of that investigation to the court. The Utah Arbitration Act was never intended to foreclose all possibility of discovery to confirm or disprove whether an arbitration award was procured by corruption, fraud, or other undue means. See Utah Code Ann. § 78-31a-14(1).

C. Marc Development Presented Evidence That the Arbitration Award Had Been Procured Through Fraud.

An arbitral award will not be enforced if it was procured by fraud or coercion. Utah Code Ann. § 78-31a-14(1)(a); Office and Professional Employees International Union, Local 2 v. Washington Metropolitan Area Transit Authority, 724 F.2d 133 (D.C. Cir. 1983). The burden of showing fraud sufficient to set aside an arbitration award is on the party seeking to set the award aside. Keen v. IFG Leasing Co., 622 P.2d 861 (Wash. Ct. App. 1980). The party bearing this burden must prove by clear and convincing evidence that the arbitration award was obtained by fraud. Hot Springs County School District No. 1 v. Strube Const. Co., 715 P.2d 540 (Wyo. 1986). It is axiomatic that clear and convincing evidence cannot be presented without an opportunity to conduct discovery or to examine live witnesses.

As set forth in its Memorandum in Support of its Objection to Judgment on the Pleadings (R. 36-64), Marc Development learned that on at least two occasions, Mintz

solicited bids from individuals on the subject property at prices substantially below fair market value and offered to "split the difference" with the bidding individual between the offered purchase price and the guarantee. The arbitration award was defective because the arbitrator actually relied on this false and deceptive evidence to establish the value of the subject property. (See R. 53, 58) Marc Development also learned that Mintz may have been involved in a scheme to tie up assets of Marc Development so that the subject property could not be repurchased from Mintz. All of these events were discovered after the arbitrator's award had been entered.

Mintz argues that there is no evidence in the record to support Marc Development's claim of fraud. (Mintz Brief p. 17) Marc Development did, however, present evidence that the arbitrator's award had been procured by the submission of deceptive and defective evidence and that Mintz failed to fairly and accurately represent the purported offer of \$400,000.00 for the subject property.

In reviewing the granting of a motion for judgment on the pleadings, the facts and all inferences are reviewed in the light most favorable to Marc Development. See Young v. Texas Co., 8 Utah 2d 206, 331 P.2d 1099, 1100 (1958). For purposes of appellate review, a motion for judgment on the pleadings is treated as a motion for summary judgment where matters outside

the pleadings have been presented and not excluded by the court. Id.; see also Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983) ("Doubts or uncertainties concerning issues of fact properly presented, or the nature of inferences to be drawn from the facts, are to be construed in a light favorable to the party opposing the summary judgment.").

The record reveals that on February 4, 1992, Marc Development filed its Memorandum of Points and Authorities in Support of its Objection to Judgment on the Pleadings. (R. 36-64) The Memorandum was supported by the Affidavit of Mark Kaplan (R. 65-73) and the Affidavit of Jon Olch. (R. 74-77) The Kaplan Affidavit established that on at least two separate occasions, Mintz solicited bids on the subject property at prices substantially below the fair market value of the property. (R. 71) Mintz sought bids from Peter Arnold and James Schwartz and offered to "split the difference" with the bidding party between the offered price and the guarantee. (R. 71) The Kaplan Affidavit also established that Mintz had listed the subject property for sale for \$588,500.00 but had refused to sell it to Marc Development in order to satisfy the guarantee. (R. 71)

The Affidavit of Jon Olch established that Mintz listed and sold the subject property for an amount significantly greater than the value attributed to the property by the

arbitrator. Olch is a licensed real estate agent employed with Prudential Coleman Real Estate, the selling broker for the subject property. (R. 74) The Olch Affidavit established that Mintz had entered into a binding sale agreement with Mr. and Mrs. Carmela J. Santoro, as Trustees of the Santoro Family Trust, for the purchase and sale of the subject property for \$570,000,000. (R. 75) The property was listed at \$588,500.00 and the buyer originally offered \$560,000.00 for the property. (R. 75)

In order to defeat the motion for judgment on the pleadings, Marc Development was required only to present evidence sufficient to raise an issue of fact as to whether the arbitration award had been procured through fraud. The Kaplan and Olch Affidavits raised issues of fact which, if proved, would serve as a basis for setting the arbitration award aside. Marc Development was never allowed an opportunity to prove these facts or even to conduct a complete investigation into the matter. Because the evidence went to the very heart of the arbitrator's ruling, the trial court erred in refusing to allow Marc Development an opportunity to present this evidence at an evidentiary hearing.

D. Marc Development Was Denied a Meaningful Opportunity to Present Evidence that the Arbitration Award Was Defective.

Marc Development filed a request for oral argument on February 28, 1992. (R. 115-6) The trial court, however, refused this request and granted Mintz's motion for judgment on the pleadings in a minute entry dated March 24, 1992. (R. 152) The trial court entered its formal Order and Judgment confirming the arbitration award on March 25, 1992. (R. 153-6) The trial court entered an Order and Supplemental Judgment on March 25, 1992 awarding attorneys' fees and costs. (R. 157-60) Marc Development was never allowed an opportunity to present its argument and evidence to the court.

The Kaplan and Olch Affidavits were offered to show only that the arbitration award should not be confirmed because the award had been procured through fraud. An offer to show fraud in attacking arbitration award should indicate facts which, if proved, would be sufficient to sustain such a finding. Parking Unlimited, Inc. v. Monsour Medical Foundation, 445 A.2d 758, 762 (Pa. Super. Ct. 1982). The Affidavits indicated the existence of material issues of disputed facts. The Affidavits themselves were never intended to be a substitute for live testimony. The trial court should have granted an evidentiary hearing to allow Marc Development to call live witnesses, such as Mintz, Peter Arnold and James Schwartz, to conclusively

establish or disprove these facts. See Malibu Pools of New Mexico, Inc. v. Harvard, 637 P.2d 537 (N.M. 1981) (trial court erred in refusing to hear evidence of arbitration panel's alleged misconduct for failure to hear evidence). Only after hearing this evidence, the trial court could then confirm or set aside the arbitration award. To confirm the award without hearing the evidence, however, frustrates the essential purposes of arbitration.

An evidentiary hearing would not, of course, be for the purpose of retrying the issues before the arbitrator. The hearing would be for the sole purpose of determining whether the arbitration award was defective because of the reliance by the arbitrator on false and deceptive evidence.

The trial court erred in granting the motion for judgment on the pleadings because the Kaplan and Olch Affidavits submitted in opposition to the motion created a material issue of fact as to whether Mintz obtained the arbitration award through fraud. See American Concept Insurance Co. v. Lochhead, 751 P.2d 271 (Utah Ct. App. 1988). Mintz offered no evidence to rebut these affidavits. The trial court erred in failing to hold an evidentiary hearing to allow Marc Development to call live witnesses to establish these facts.

E. The Trial Court Failed to Enter a Written Statement of the Ground for its Decision as Required by Rule 52.

Because the confirmation of the arbitration award had the same effect as the grant of a motion for summary judgment under Rule 56, the trial court was required to enter a written statement of the ground for its decision in accordance with Rule 52, Utah Rules of Civil Procedure. Clawson v. Habilitat, Inc., 783 P.2d 1230 (Hawaii 1989) (findings of fact and conclusions of law should be entered by the trial court on motions to vacate arbitration awards); Utah R. Civ. P. 52. Without a statement of findings of fact and conclusions of law, this Court is unable to determine whether the trial court erred in denying the motion to vacate. See Clawson, 783 P.2d at 1232. Indeed, this Court is unable even to determine whether the trial court was aware of the new evidence presented by Marc Development.

In pertinent part, Rule 52 states as follows:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A The trial court need not enter findings of fact and conclusions of law in ruling on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

Utah R. Civ. P. 52(a).

Because Marc Development raised issues of fact outside the pleadings, the motion to confirm the arbitration award is viewed as a motion for summary judgment under Rule 56. Young v. Texas Co., 8 Utah 2d 206, 331 P.2d 1099, 1100 (1958). The trial court failed to enter a written statement of the ground for its decision. This failure is critical because it effectively denies Marc Development of the right to seek meaningful judicial review of the trial court's decision.

II. Mintz Has Obtained a Double Recovery as a Result of the Arbitration Award.

After persuading the arbitrator that the fair market value of the subject property was only \$400,000.00, Mintz listed the subject property for sale at \$588,500.00. (R. 75) Mintz ultimately accepted an offer of \$570,000.00 for the property. (R. 75) Mintz now seeks to again recover the difference between the \$400,000.00 value established by the arbitrator and the \$588,500.00 guarantee. Mintz has already been compensated for any loss suffered and to permit the enforcement of the arbitration award would result in an improper windfall to Mintz. See Brigham City Sand & Gravel Machinery Center, Inc., 613 P.2d 510, 511 (Utah 1980) (a party may not obtain a double recovery for the same loss).

Evidence of the actual sales price of the subject property is important only as it relates to the arbitration

award. The listing of the subject property at the guarantee and the eventual sale of the property for less than four percent under the listing price serve to demonstrate that the arbitrator relied on defective evidence in fixing the value of the property at \$400,000.00. Marc Development has explained how the arbitrator was misled by false evidence manufactured by Mintz in an attempt to deceive the arbitrator.

III. The District Court Should Determine the Actual Amount of Damages Suffered by Mintz.

As it presently stands, the arbitration award allows Mintz \$188,500.00 in damages plus interest and fees. This amount represents the guaranteed price of \$588,500.00 less the \$400,000.00 "fair market value" of the property as determined by the arbitrator. The evidence, however, shows that Mintz may have suffered as little as \$18,500.00 in actual damages after the subject property was sold. The actual damages are calculated by subtracting the \$570,000.00 actual sales price of the subject property from the \$588,500.00 guarantee price. Because of the obvious and wide discrepancy between the actual damages suffered by Mintz and the amount of the arbitration award, the case should be remanded to the district court for a determination of the actual damages suffered by Mintz.

The actual damages suffered by Mintz were established during January, 1992 when Mintz agreed to sell the subject property for \$570,000.00. (See R. 75) Thus, the actual damages

suffered by Mintz were established within eight months of the arbitration award and before the award was confirmed by the district court.

Because the subject property has been sold, and the amount of the damages actually suffered by Mintz can be fixed with precision, the district court should hear evidence of the actual damages suffered by Mintz. The amount of damages awarded by the arbitrator were based upon inaccurate estimates and conjecture as to the actual value of the property. To allow the arbitration award to stand would ignore the realities of the case and would unfairly penalize Marc Development. Conversely, a redetermination of the damages actually suffered by Mintz would fairly compensate Mintz and would preserve the essential determination of the arbitrator.

CONCLUSION

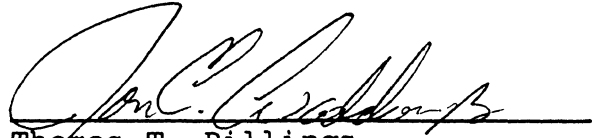
For the above reasons, Marc Development respectfully requests that the decision of the district court be reversed and the case remanded with instructions to hold an evidentiary hearing to allow Marc Development to present evidence on its claim that the arbitration award was procured through the use of fraudulent evidence and to determine the exact nature and extent

of the damages suffered by Mintz.

DATED this 17th day of November, 1992.

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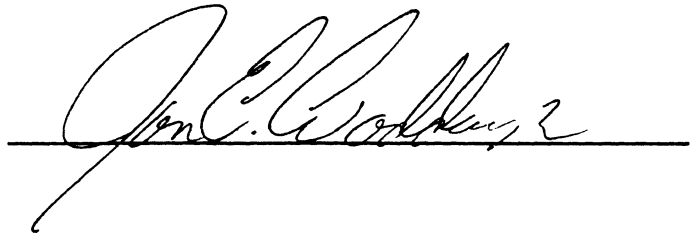
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CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the within and foregoing Reply Brief of Appellant to be hand delivered, this 17th day of November, 1992, to the following:

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A handwritten signature in cursive script, appearing to read "Glen D. Watkins", is written over a solid horizontal line.