NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0915-14T3

THE EILEEN J. ZIGARELLI 2014
TRUST AGREEMENT, as successor-
in-interest to Eileen Zigarelli,
and EILEEN ZIGARELLI,

Plaintiffs-Respondents,

v.

65 MADISON AVENUE ASSOCIATES,
L.L.C.,

Defendant-Appellant.

Argued April 14, 2015 – Decided June 17, 2015

Before Judges Reisner, Koblitz and Haas.

On appeal from the Superior Court of New Jersey, Chancery Division, Morris County, Docket No. C-98-14.

Thomas A. Buonocore argued the cause for appellant (Law Offices of Thomas A. Buonocore, attorneys; Mr. Buonocore, of counsel and on the briefs; Mark E. Thompson, on the briefs).

Owen C. McCarthy argued the cause for respondents (Connell Foley, LLP, attorneys; Mr. McCarthy, of counsel and on the brief).

PER CURIAM

Defendant 65 Madison Avenue Associates, LLC (tenant) appeals from a September 11, 2014 order, granting a motion filed by plaintiff Eileen J. Zigarelli 2014 Trust Agreement (landlord) to vacate an arbitration award.

Having reviewed the record, we conclude that the trial court employed the wrong legal standard to evaluate the landlord's challenge to the award. In essence, the court applied de novo review, re-weighed the evidence, and invoked equitable principles that might have been appropriate had it been deciding the dispute in the first instance. However, a far more narrow and deferential standard is required in reviewing an arbitrator's award. See Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 354-59 (1994). Using the correct legal standard, we find no basis to disturb the arbitrator's decision. Accordingly, we reverse the order on appeal and remand with direction to enter an order confirming the award.

The arbitrated dispute centered on a ninety-nine-year commercial lease for an office building. The lease was executed in 1973, and provided for a recalculation of the ground rent every ten years (the rent re-set provision). Section 3.01B of the lease provided that if the parties could not reach agreement on the new rent, they would each designate a real estate appraiser by no later than thirty days before the lease expired, and the appraisers would determine the new rent according to a

set formula. Pursuant to section 3.01B, if either party failed to appoint its appraiser by the deadline, but the other party did timely appoint an appraiser, the latter's report would be binding. However, the lease, as later amended in 1995, set a minimum base rent of $55,000 which would be due even if the appraiser(s) opined that it should be lower. The lease also contained an arbitration clause.

There is no dispute that in 1983, 1993, and 2003, the parties did not comply with the rent re-set provision. The lease was next due to expire on April 30, 2013 with a new rent to commence on May 1. Hence, under the terms of the lease, the appraisers should have been designated by April 1. On March 29, 2013, the tenant mailed the landlord its appraiser's report. Pursuant to section 22.01 of the lease, notice was deemed complete upon mailing.[1] The landlord did not send the tenant a designation of its own appraiser until April 26, 2013. The tenant rejected the designation as untimely, contended that its appraiser's valuation was binding, and tendered rent in the amount set forth in its appraiser's report.[2] The landlord

[1] On this appeal, the landlord argues that its attorney did not actually receive the report until April 3, 2013, and therefore the tenant also did not comply with section 3.01B of the lease. That argument is precluded by section 22.01 of the lease.

[2] That amount was less than the $55,000 minimum figure the lease required. The tenant later tendered the full amount of $55,000.

accepted the tendered rent under protest, and the parties proceeded to arbitration.

The arbitrator denied the tenant's motion for summary judgment. The arbitrator found that the landlord missed the April 1 deadline to designate its appraiser. However, he found that there was "an issue of fact whether Tenant waived the aforementioned [timing] provision of Section 3.01 B of the Lease and is estopped from claiming any benefit because Landlord did not . . . timely appoint an appraiser."

At the arbitration hearing, the arbitrator heard testimony from the tenant's co-managing member, Mr. Seidman, that following the rent cycle which ended in 2003, the parties spent "approximately two and a half years" negotiating over the new rent. They did not arrive at a settlement until 2006. According to Seidman, during those negotiations, he told the landlord's attorney several times that the arduous process they were going through was inefficient and wasteful, and the next time the rent was due to be re-set the parties should abide strictly by the terms of the lease (i.e., section 3.01B).[3] According to Seidman, the attorney agreed with him.

[3] In his testimony, Seidman noted that their legal expenses during the negotiations exceeded the amount of the eventual rent increase.

The attorney was present at the arbitration but did not testify, thus leaving Seidman's testimony unrefuted. Seidman's partner, Mr. Billing, also testified that the tenant never agreed to waive its rights under section 3.01B. The tenant's appraiser testified that his firm completed its appraisal report "in March of 2013." There was no testimony or other evidence that the tenant intentionally waited until the last minute to provide the report to the landlord. Seidman testified that their goal was not to miss the April 1 deadline.

The arbitrator credited Seidman's testimony about his conversation with the landlord's attorney. The arbitrator did not credit testimony offered on behalf of the landlord concerning the parties' prior course of dealing, because the witness had so little personal knowledge about the process.[4] Based on his evaluation of witness credibility, the arbitrator found that the parties did not waive the lease's rent re-set provision. Instead, he found, they agreed to abide by it. The arbitrator also found that the rent re-set provision remained in force, regardless of the fact that in prior years the parties had deviated from its provisions. He noted that previous

[4] The original landlords were Eileen Zigarelli and her husband. Mr. Zigarelli died in 2001. Mrs. Zigarelli was still alive at the time of the 2014 arbitration, but she did not testify. The landlord's witness was the Zigarellis' daughter Patricia. She only became involved in the rent re-setting process in 2003.

agreements resetting the rent had stated that no other provisions of the lease were being amended or modified.

The arbitrator considered the testimony of the landlord's expert appraiser concerning the appropriate amount of rent under the section 3.01B formula. The landlord relied on that testimony to support its argument that adopting the tenant's position would result in unjust enrichment to the tenant. However, the arbitrator ultimately concluded that the testimony was irrelevant. Because the parties were bound by their written contract (the lease), the arbitrator concluded as a matter of law that the equitable doctrine of unjust enrichment was inapplicable. That is, the tenant was entitled to enforce the contract, even if enforcing the contract produced a bad deal for the landlord. See Dunkin' Donuts of Am., Inc. v. Middletown Donut Corp., 100 N.J. 166, 183-84 (1985). Based on the facts as he found them to be, the arbitrator also concluded that the tenant had not violated the covenant of good faith and fair dealing. Accordingly, he determined that the rent should be reset at $55,000, which was greater than the amount the tenant's appraiser arrived at but was the minimum rent set by the lease.

In his oral opinion, the trial judge discounted the evidence of the conversation between Seidman and the landlord's attorney, in light of the parties' long history of ignoring the contractual deadline. Instead, the judge reasoned that the

arbitrator should have been persuaded by what the judge characterized as the "unjust enrichment" accruing to the tenant due to the relatively low rent the arbitrator awarded.[5] The judge found that the arbitrator employed "undue means" in refusing to consider plaintiff's valuation expert report because it was submitted untimely. In other words, the judge disagreed with the arbitrator's decision to enforce section 3.01B of the lease. The judge vacated the award and remanded the case back to the arbitrator to consider the landlord's appraiser's testimony on the merits.

On this appeal, our review of the trial court's decision is de novo. Minkowitz v. Israeli, 433 N.J. Super. 111, 136 (App. Div. 2013). On the other hand, the trial court was bound to employ a deferential standard in reviewing the arbitrator's award, because our public policy favors arbitration and there is a strong preference to uphold arbitration awards. Id. at 135.

The arbitration statute only permits a court to vacate an arbitration award on very narrow grounds, and, as the Supreme Court held in Tretina, supra, 135 N.J. at 357-58, those grounds

[5] The trial court issued a supplemental written opinion, summarizing the parties' submissions in detail. However, that opinion did not set forth the court's factual findings or legal conclusions, except on an issue pertaining to counsel fees. We infer that the court's discussion of the parties' submissions was support for its conclusion that no counsel fees should be awarded. That is not an issue on appeal.

do not include an arbitrator's alleged mistakes of law. The Court there espoused the following language from Chief Justice Wilentz's concurring opinion in Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479 (1992):

> Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. [They] can be corrected or modified only for very specifically defined mistakes as set forth in [the arbitration statute]. If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award. For those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court, I would hold that the parties are free to expand the scope of judicial review by providing for such expansion in their contract; that they may, for example, specifically provide that the arbitrators shall render their decision only in conformance with New Jersey law, and that such awards may be reversed either for mere errors of New Jersey law, substantial errors, or gross errors of New Jersey law and define therein what they mean by that. I doubt if many will. And if they do, they should abandon arbitration and go directly to the law courts.
> [Tretina, supra, 135 N.J. at 358 (quoting Perini, supra, 129 N.J. at 548-49 (Wilentz, C.J., concurring)) (first alteration in the original).]

Under the arbitration statute, a court may vacate an arbitration award if the challenger establishes one of a few limited grounds:

> (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;
>
> (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).]

Based on our review of the arbitration record, we conclude that none of those grounds applies here.

Contrary to the trial judge's conclusion, the arbitrator did not employ undue means or refuse to consider evidence. Instead, the arbitrator allowed both parties to present all of their evidence. The arbitrator evaluated witness credibility

where it was relevant, and appropriately made findings of fact based on the evidence. He then reached legal conclusions based on the facts as he found them to be.

Based on Seidman's testimony, and the lack of rebuttal testimony from the landlord, as well as the absence of written evidence that the parties agreed to modify section 3.01B, the arbitrator concluded that the tenant had not waived enforcement of that provision. Instead, he found that the tenant had put the landlord on notice, years in advance, that the parties should strictly comply with section 3.01B the next time the rent was to be re-set. As a result, the arbitrator concluded that the landlord's appraisal report could not be considered on its merits, because it was submitted untimely. Because the tenant's appraiser would have set a rent below the "floor" set by the lease, the arbitrator properly set the rent at $55,000.

The trial court had no grounds to disturb the arbitrator's legal conclusions or to vacate the award. It was not the trial judge's role to second-guess the arbitrator's evaluation of Seidman's credibility, or to re-weigh the evidence in order to reach a result the court believed was more fair to the landlord.

Further, although it is not our role to judge the wisdom or fairness of the arbitrator's conclusions, we do not find the result here unjust. Seidman explained how, as he described it, the landlord put him and his partner through "arduous,"

"[p]ainful[]," expensive, and time-consuming negotiations over the 2003 rent re-set. He was determined not to let that happen again, and he told the landlord's attorney that next time, they would follow the lease. According to Seidman's credible testimony, the attorney agreed with him. The tenant protected its rights under the lease; the landlord did not.

Because the landlord's application did not satisfy any of the statutory criteria to vacate the award, we reverse the order on appeal and remand with direction to enter an order confirming the arbitration award.

Reversed and remanded.