STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
Orange Unit — Docket No. 21-CV-03582

Martha Diebold Real Estate,
Plaintiff

v.

Ann Swanson,
Defendant

Opinion And Order On Plaintiff's Motion To Vacate

At issue is an October 13, 2021 award of $4,973.75 issued by a Vermont Association of Realtors arbitration panel to Defendant Ann Swanson, to be paid by Plaintiff Martha Diebold Real Estate. The arbitration proceeding was initiated by Defendant, who sought a referral fee from Plaintiff for a real estate listing that Defendant had referred to one of Plaintiff's agents, Susanne Pacilio, in the fall of 2019.

On November 12, 2021, Plaintiff filed the instant complaint seeking to vacate the arbitration award. Plaintiff argued that no fee was owed because the referral fee agreement was not formalized in writing as required by 20-4 Vt. Code R. § 1800:4.13(b), and that the arbitration panel manifestly disregarded the law by granting Defendant's award in the face of the controlling regulation. On December 2, 2021, Defendant filed a memorandum in opposition, arguing that manifest disregard for the law carries an exceptionally high burden and is only applicable to instances of excessively egregious conduct on behalf of an arbitration panel. Defendant also argued that equitable theories such as good faith and fair dealing,

promissory estoppel, and unjust enrichment could all justify an award in absence of a written agreement. Plaintiff filed a reply on December 23, 2021, reiterating its earlier position and additionally arguing that the regulatory scheme does not contemplate equitable remedies and that allowing recovery on an equitable theory would effectively render § 1800:4.13(b) moot. A hearing was held on May 19, 2022. Both sides appeared through counsel and made arguments to the Court. The Court makes the following determinations.

The Facts

Plaintiff agrees that this Court must view all facts and inferences in Defendant's favor. In that light, the filings and exhibits submitted to the Court show that: (1) Both Defendant and Plaintiff are professional real estate brokers; (2) Defendant referred a listing for a house to Plaintiff's agent, Ms. Pacilio, in fall 2019; (3) Defendant told Ms. Pacilio that the current homeowners had more land available they were potentially interested in selling in a separate listing; (4) it was agreed that a 25% referral fee would be paid to Defendant; (5) no written agreement was made, however; (6) after initially expiring and then being relisted with Plaintiff, the referred home was eventually sold for $375,000, with Plaintiff receiving a commission fee of $11,250; (7) the original owner of the referred home also listed and sold an attached piece of property through Plaintiff for $247,000, from which Plaintiff received a commission fee of $17,290; (8) Defendant did not receive any portion of the commission fee from the house listing or from the property listing until Defendant asked Ms. Pacilio nearly a year after the sale, after

which Defendant was eventually paid $1,125 from Ms. Pacilio's personal account, 10% of the $11,250 commission fee from the initial referred property; (9) Defendant continued to seek the full 25% referral fee, as well as a portion of the commission fee from the second listing; (10) Defendant had other agents that she could have referred the listing to who would have paid the "usual and customary referral fee of 25%;" (11) Defendant knew Ms. Pacilio for thirty years and relied on her agreement to pay the customary fee; (12) Ms. Pacilio was aware that Defendant relied on the expectation of that referral fee when deciding to give her the referral; (13) after failing to obtain the fee, Defendant opened an arbitration proceeding against Plaintiff and Ms. Pacilio; and (14) the arbitration panel awarded Defendant $4,973.75, to be paid by Plaintiff, without explaining its decision making or how it reached that figure.

To the final $4,973.75 amount, Defendant contends that the award represents 25% of Plaintiff's $11,250 commission from the home ($2,812.50), and half of a 25% share from Plaintiff's $17,290 commission on the secondary property ($2,161.25). The Court does not make any specific findings as to the nature of the award, but does note that Defendant's math is correct, assuming her theory is accurate.

Analysis

In relevant part, 20-4 Vt. Code R. § 1800:4.13(b) states that "[a] referral fee may be paid or received for referring a prospect to another brokerage firm licensed in Vermont or another jurisdiction. A referral fee agreement must be in writing."

No referral agreement was committed to writing in this case, and Plaintiff seeks to vacate the arbitrator's award on that basis.

Courts have extremely limited ability to overturn arbitration awards. *See Vermont Built Inc. v. Krolick*, 2008 VT 131, ¶ 13, 185 Vt. 139, 969 A.2d 80 ("Vermont has a strong tradition of upholding arbitration awards whenever possible." (citation and quotation marks omitted)). "The trial court can modify or vacate an arbitrator's award only pursuant to statutory grounds or if the parties are "denied due process." *Id.*, ¶ 14 (internal quotation omitted). Arbitrators "need not provide any explanation or reasoning beyond the award figure." *Id.*; *see also Wall Street Assocs. v. Becker Paribas Inc.*, 27 F.3d 845, 849 (2d Cir. 1994) (same principle at federal level).

Under either the Federal Arbitration Act ("FAA") or the Vermont Arbitration Act ("VAA"), an arbitration award may be vacated:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a); *see Muzzy v. Chevrolet Div., General Motors Corp.*, 153 Vt. 179, 183 (noting that the Vermont Arbitration Act is "identical in substance" to the Federal Arbitration Act in this context).

Plaintiff does not plead any of the enumerated statutory remedies under the FAA or VAA but, rather, relies on the alternative doctrine of "manifest disregard for the law." This principle allows courts to overturn arbitration awards where it "finds both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignore it, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004). In 2008, the United States Supreme Court appeared to hold that manifest disregard for the law was not an affirmative additional ground for overturning an arbitration award under the FAA. *See Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). The Court did not outright shut the door on its use, however. *See id.* at 590 ("In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.").

In the wake of *Hall Street*, jurisdictions have differed in their continuing acceptance of the manifest disregard doctrine. Vermont has explicitly rejected it as grounds for overturning an arbitration award under state law. *Vermont Built Inc.*,

2008 VT 131, ¶ 13 n. 2 ("[W]e take this opportunity to clarify that we do not recognize a court's right to review an arbitrator's decision for manifest disregard of the law."). On the federal level, circuits are split, with some that *Hall Street* precludes the manifest disregard standard and some ruling that it can be seen as a gloss on the exceptions set out in the statute. *Compare Schwartz v. Merrill Lynch & Co., Inc.*, 665 F.3d 444, 451 (2d Cir. 2011) ("[W]e have held that the court may set aside an arbitration award if it was rendered in "manifest disregard of the law.") (citation omitted); *with Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009) ("[M]anifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.").

Here, the parties seem in agreement that the FAA governs the arbitration at issue (as opposed to the VAA), because the underlying land sale implicated interstate commerce. Plaintiff further contends that the weight of the federal authority favors applying manifest disregard and vacating the award, as the arbitration panel ignored Plaintiff's repeated invocation of 20-4 Vt. Code R. § 1800:4.13(b) when making its decision. For her part, Defendant does not ask the Court to reject the manifest disregard standard. Instead, she maintains that manifest disregard of the law is not met here as the arbitrators may have relied on various equitable theories to overcome the lack of a written referral agreement.

In this instance, the Court will assume, *arguendo,* that the manifest disregard doctrine applies. The doctrine sets an exacting standard, however. As the United States Court of Appeals for the Second Circuit describes the standard,

an award will not be vacated "because of a simple error in law or a failure by the arbitrators to understand or apply it" but only when a party clearly demonstrates "that the panel intentionally defied the law." *STMicroelectronics, N.V. v. Credit Suisse Securities (USA) LLC*, 648 F.3d 68, 78 (2d Cir. 2011) (internal quotation omitted).

As further described by our Supreme Court:

> Manifest disregard of the law is therefore more than "mere error in the law or failure on the part of the arbitrators to understand or apply the law." *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 208 (2d Cir. 2002) (quotation omitted); *see also Giller v. Oracle USA, Inc.*, 512 F. App'x 71, 73-74 (2d Cir. 2013) (summary order) ("[T]he manifest disregard of law standard essentially bars review of whether an arbitrator misconstrued a contract." (quotation omitted)). A court applying this standard should only vacate an arbitration award "'in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent,'" such as "'when an arbitrator strays from interpretation and application of the agreement and effectively dispenses [their] own brand of industrial justice.'" *Weiss*, 939 F.3d at 109 (first quoting *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010); *then quoting Stolt-Nielsen S.A.*, 559 U.S. at 671, 130 S. Ct. 1758).

Masseau v. Luck, 2021 VT 9, ¶ 31, *cert. denied Masseau v. Henning*, 142 S. Ct. 89 (2021).

Here, when taking into consideration the high deference the Court owes arbitration panels and the alternate equitable theories that could justify an award in absence of a written agreement, the Court finds that the arbitrators did not manifestly disregard the law when issuing Defendant's award.

In Vermont, even where a writing is required by statute to enforce an agreement, equitable remedies such as promissory estoppel may still justify

enforcement in absence of the writing. *See Hayes v. Mountain View Estates Homeowners Association*, 2018 VT 41, ¶ 12, 207 Vt. 293 ("[T]here is an equitable exception to the requirements of the Statute of Frauds where the promisee has relied upon an oral agreement to the promisee's own detriment.").

The elements of promissory estoppel are as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Foote v. Simmonds Precision Products Co., Inc., 158 Vt. 566, 573, 613 A.2d 1277 (1992).

In this case, the Court finds that promissory estoppel is, at least, a plausible basis for the panel's award.[1] Per the facts, it may not have been a manifest disregard of the law for the arbitration panel to conclude that that Plaintiff's agent promised to pay Defendant a referral fee of 25% of the commission if the property sold as well as a smaller percentage from the second listing, and that Defendant only referred the listing and mentioned the potential second listing to Ms. Pacilio in reliance on a promise to pay, even if the agreement was not formalized in writing. Thus, as promissory estoppel is a facially valid basis upon which to award Defendant a percentage of Plaintiff's fees, failure to apply § 1800:4.13(b) was not manifest disregard for the law.

[1] Given that determination, the Court need not consider the other equitable doctrines proffered by Defendant.

Plaintiff's arguments about the lack of enumerated equitable exceptions to the real estate regulations, its concern about the exception "swallowing the rule," and its advocacy for the clear rule that the requirement of a writing would provide, does not persuade the Court against invoking equitable doctrines in this context. Common law equitable exceptions are rarely explicitly recognized by statute, and the great deference owed to the arbitration panel's decision making discourages the Court from making any sweeping pronouncement that there can be no equitable remedies in this circumstance.

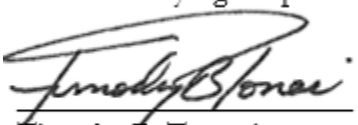
Considering the plausibility of a promissory estoppel claim, coupled with the deference the Court owes to the arbitration panel's decisions, the Court concludes that it has no basis to vacate the award and that Plaintiff's motion should be denied.

Conclusion

In light of the foregoing, Defendant's Motion to Vacate is DENIED and the proceeding is DISMISSED.

Dated June 3, 2022.

Electronically signed pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge