

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ALEX KARAKHANOV,)
)
 Plaintiff,)
) Case No. 4:05-CV-00943-CAS
 v.)
)
 MBNA AMERICA BANK, N.A.,)
)
 Defendant.)

**DEFENDANT MBNA’S RESPONSE TO PLAINTIFF’S MOTION TO VACATE
AND MEMORANDUM IN SUPPORT OF DEFENDANT’S CROSS MOTION TO
CONFIRM THE ARBITRATION AWARD**

INTRODUCTION

Plaintiff’s Application to Vacate Arbitration Award (Docket Entry 1) is a disingenuous attempt to exploit a clerical error to re-argue the merits of a case already decided during arbitration. Armed only with evidence of an innocent technical mistake – the arbitrator’s apparent attachment of an incorrect electronic signature to an earlier version of his decision – Plaintiff has accused the arbitrator, the National Arbitration Foundation, and Defendant of corruption and fraud. Plaintiff’s accusations are baseless, without any evidentiary support, and not a legal basis for overturning the arbitrator’s award.

BACKGROUND

Plaintiff, while on vacation, used his MBNA credit card to purchase a time-share in Mexico. The contract for this time-share provided that Plaintiff could cancel his purchase only under very narrow circumstances: such a cancellation had to be done within 10 business days of purchase and had to take place “in the domicile of the

[seller].” (Ex. A, April 13, 2005, Am. Arbitration Order, p. 1). Upon returning to the United States, Plaintiff sought to cancel the contract by letter. *Id.* at 2. This letter was initially refused by the time-share seller, and ultimately did not reach the seller until the time for canceling the contract had expired. *Id.* The seller of the time-share refused to honor the cancellation because Plaintiff’s attempt to cancel the contract by letter did not comply with (1) the requirement that cancellation be done “in the domicile of the [seller],” and (2) the requirement that cancellation be done within 10 business days. *Id.*

Plaintiff disputed the charge with Defendant MBNA Bank, which issued Plaintiff’s credit card. *Id.* Defendant investigated the dispute and declined to resolve the dispute in Plaintiff’s favor, explaining:

We have thoroughly reviewed the details of your dispute and exhausted all avenues available to us through the formal dispute resolution process. Unfortunately, because we cannot intervene in situations involving a merchant’s return, refund or cancellation policy we are unable to assist you Merchants have the ability to operate their businesses independently and to set return and refund policies that best suit their business needs. The consumer has the responsibility to inquire about the store’s refund policy prior to making a purchase, to ensure that it will offer them the flexibility they need.

Id. (quoting MBNA America Bank’s July 16, 2002 Letter to Plaintiff). Plaintiff refused to pay the balance due and owing on his credit card, and Defendant thereupon reported Plaintiff’s delinquency to various credit reporting agencies. *Id.*

Plaintiff sued Defendant under various legal theories, including alleged breaches of the Fair Credit Billing Act, the Truth in Lending Act, and the Fair Credit Reporting Act, as well as under a common law theory of tortious interference with a credit expectancy. *Id.* at 3. Defendant invoked the arbitration clause in Plaintiff’s credit-card

contract, and an arbitration proceeding was conducted by Mark D. Mittleman, Esq., of the National Arbitration Forum. *Id.*

On March 21, 2005, the National Arbitration Forum released a three-page order and opinion which found in favor of Defendant. (Ex. B, Mar. 21, 2005, Arbitration Order). While this order contained a detailed discussion of the evidence presented in Plaintiff's case and a reasoned explanation of the arbitrator's findings, an incorrect signature block and, it appears,¹ an incorrect electronic signature were attached to this order. *Id.* at 3. Plaintiff immediately contacted arbitrator Mittleman, who promptly issued an amended order with the correct signature block and signature. (Ex. A, at. 3). In all other respects, this amended order was identical to the original order. (*Compare* Ex. A with Ex. B).

On June 13, 2005, Plaintiff filed his Application to Vacate Arbitration Award (Docket Entry 1) with this Court. Based *solely* upon the erroneous signature block and signature, Plaintiff now argues (1) that "the arbitrator who presided over [Plaintiff's arbitration proceeding] was not the person who prepared the Order resolving these issues," (2) that National Arbitration Forum arbitrators are "simply accustomed to 'rubber-stamping' NAF Orders prepared by somebody else," and (3) that "the outcome of NAF arbitrations [are] not decided by an arbitrator on the merits of the case, but rather by an NAF representative whose primary interest [is] keeping [companies like Defendant]

¹ Defendants do not know how the incorrect signature block and signature ("Professor Michael A. Middleton, Esq.") came to be attached to the March 21, 2005, Order. Defendants have been reluctant to contact the arbitrator for fear of violating prohibitions on *ex parte* communications with arbitrators. See NATIONAL ARBITRATION FORUM CODE OF PROCEDURE R. 24 (July 2003) ("No Party or Party representative shall directly communicate with an Arbitrator except . . . by providing documents in accord with this Code, or during a conference with the Arbitrator scheduled by the Forum.").

contented.” (Pl.’s Mem. In Supp. of Application for Order to Vacate Arbitration Award, at 4).

ARGUMENT

Judicial review of an arbitration award is among the “narrowest [forms of review] known in the law.” *Maine Central R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 873 F.2d 425, 428 (1st Cir. 1989). Technical defects in the form of an award will not serve as a basis for overturning an arbitration award. *See, e.g., Publicis Communication v. True North Communications, Inc.*, 206 F.3d 725, 728-29 (7th Cir. 2000) (holding arbitrator’s failure to call decision an “award” irrelevant to decision to enforce the award). “Indeed, an award must be confirmed even if a court is convinced the arbitrator **committed a serious error**, so ‘long as the arbitrator is **even arguably** construing or applying the contract and acting within the scope of his authority.’” *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 798 (8th Cir. 2004) (emphasis added) (quoting *Bureau of Engraving, Inc. v. Graphic Communication Int’l Union, Local 1B*, 284 F.3d 821, 824 (8th Cir. 2002)).

The Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) permits a district court to vacate an arbitration award under only very limited circumstances:

- (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) (2004).

In his motion to vacate the arbitration award, Plaintiff incorrectly argues two bases for overturning the arbitrator's award: (1) "corruption, fraud, or undue means" and (2) "manifest disregard for the law."

1. "Corruption, Fraud, or Undue Means"

Plaintiff's first argues that the arbitrator's award should be vacated because it was procured by "corruption, fraud, or undue means." In order to overturn an arbitration award on this basis, the party alleging fraud must demonstrate (1) "clear and convincing evidence" of the fraud, (2) that the fraud materially relates to an issue involved in the arbitration, and (3) that due diligence would not have prompted the discovery of the fraud during or prior to the arbitration. *Int'l Bhd. Of Teamsters, Local 519 v. United Parcel Serv., Inc.*, 335 F.3d 497, 502 (6th Cir. 2003); *Forsythe Int'l S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1022 (5th Cir. 1990); *Bacume v. City of Flint*, 132 F. Supp. 2d 549, 556 (E.D. Mich. 2001). Overturning an award requires more than a mere appearance of bias. *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 328-29 (6th Cir. 1998). "The alleged partiality must be direct, definite, and capable of demonstration and the 'party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator.'" *Id.* at 329 (quoting *Consolidation Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir. 1995)).

Plaintiff's claim that the arbitration award was procured by "corruption, fraud, or undue means" rests entirely upon a single piece of "evidence": the apparent attachment

of the wrong signature block and electronic signature to the original March 21, 2005, award. (See Pl.’s Mem. In Supp. of Application for Order to Vacate Arbitration Award, p. 4). This obvious clerical error does not even approach the “clear and convincing evidence” standard for overturning an arbitration award on the basis of fraud. See *Andersons, Inc.*, 166 F.3d at 328-29. Indeed, the Eighth Circuit has flatly refused to permit vacation of arbitration awards on far more egregious facts. See, e.g., *Delta Mine Holding Co. v. AFC Coal Properties, Inc.*, 280 F.3d 815, 820-22 (8th Cir. 2001) (despite movant’s contention that arbitrator failed to disclose extent of his ongoing consulting relationship with movant’s adversary in arbitration, court could not vacate arbitration where, *inter alia*, movant “failed to show that the neutral arbitrators were deceived or misled” by the partial arbitrator).

Plaintiff’s assertions that his claim was “not decided by an arbitrator on the merits of the case,” and his allegations of bias on the part of arbitrator Mark Mittleman and the National Arbitration Forum, are pure speculation without any evidentiary support. (See Pl.’s Mem. In Supp. of Application for Order to Vacate Arbitration Award, p. 4). Therefore, this Court should deny Plaintiff’s motion to vacate, and confirm the arbitrator’s award.

2. “Manifest Disregard of Law”

In the Plaintiff’s second point, Plaintiff argues that the arbitrator’s decision is subject to judicial reversal because it exhibits a “manifest disregard for the law.” *Id.* at 5. This argument is specious. A party seeking to vacate an award on the basis of “manifest disregard for the law” bears the onerous burden of proving that the arbitrator deliberately chose to ignore clearly defined legal principles. *Stark*, 381 F.3d at 802. “[D]isagreement

regarding the arbitrator's interpretation of the law or determination of the facts of the case is an insufficient basis for setting aside his award." *El Dorado Sch. Dist. # 15 v. Cont'l Cas. Co.*, 247 F.3d 843, 847 (8th Cir. 2001). The Eighth Circuit has recently clarified a movant's herculean burden in showing of "manifest disregard for the law":

[T]here must be some evidence in the record, *other than the result, that the arbitrators were aware of the law and intentionally disregarded it* Manifest disregard requires something more than a mere error of law. If an arbitrator, for example, stated the law, acknowledged that he was rendering a decision contrary to law, and said that he was doing so because he thought the law unfair, that would be an instance of "manifest disregard." Nothing of the kind appears here. **To require anything less would threaten to subvert the arbitral process.**

Lincoln Nat'l Life Ins. Co. v. Payne, 374 F.3d 672, 675 (8th Cir. 2004) (emphasis added).

In other words, as explained by the Eighth Circuit, a party certainly may not obtain reversal of an arbitrator's decision merely by arguing that the arbitrator was incorrect on the law. On the contrary, settled precedent requires that courts be "careful to distinguish an arbitrator's *interpretation* of the law, which is insulated from review, from an arbitrator's *disregard* of the law, which may open the door for judicial scrutiny." *Id.* at 674 (emphasis added).

Here, plaintiff offers absolutely nothing in support of his argument that arbitrator Mittleman somehow "manifestly disregarded the law" short of plaintiff's own disagreement with the result the arbitrator reached. Far from constituting "manifest disregard of the law," however, the arbitrator's decision was the correct resolution of plaintiff's unsupportable claims. As the arbitrator recognized, plaintiff's complaint sought to impose liability upon MBNA under 15 U.S.C. §§ 1681i, 1681n, 1681s-2, 1602(f), 1640(a) and 1666; Federal Reserve Board Regulation Z §§ 226.2(a)(17) and

226.13; and (d) tortious interference with credit expectancy under Missouri law. The arbitrator correctly disposed of each of these claims, ruling that:

- 15 U.S.C. § 1681i does not apply to MBNA in that MBNA is not a “credit reporting agency” (Ex. A, at 3);²
- 15 U.S.C. § 1681s-2 creates no private cause of action unless (as plaintiff failed to allege) a furnisher of credit information received information of a dispute from a credit reporting agency rather than the consumers themselves (*id.* at 3);³
- As a factual matter, MBNA conducted a “prompt, sufficiently thorough” and “reasonable” investigation and reinvestigation of plaintiff’s position, precluding liability on MBNA’s part under the Fair Credit Billing Act, the Fair Credit Reporting Act, the Truth in Lending Act, and Regulation Z (*id.*); and

² As one federal court explained in concluding that a bank was not a “consumer reporting agency,”

The term [“]consumer report[”] does not include any report containing information solely as to transactions or experiences between the consumer and the person making the report. 15 U.S.C. § 1681a(d). **Thus, where the bank is furnishing information based solely on its own experience with the consumer, the information is not a consumer report and the bank is not in those circumstances a consumer reporting agency.** The complaint does not allege that the bank conveyed information other than that based on its own credit experience with the Plaintiffs. ... The Court concludes that no consumer report was issued by the bank and thus Plaintiffs failed to state a claim against the bank under the [Fair Credit Reporting] Act.

Freeman v. Southern Nat’l Bank, 531 F. Supp. 94, 95 (S.D. Tex. 1982) (emphasis added).

³ *Aklagi v. Nationscredit Financial Servs. Corp.*, 196 F. Supp.2d 1186, 1192 (D. Kan.. 2002) (citing § 1681s-2(c), (d)) (“[T]he duties imposed under subsection (a) [of § 1681s-2] can be enforced only by government agencies and officials.”). *See also id.* at 1123 (entering summary judgment for defendant on claim under § 1681s-2(b) where plaintiffs “failed to produce any admissible evidence to suggest that a consumer reporting agency notified [defendant] that the [plaintiffs] were disputing the account”); § 1681s-2(b) (imposing certain duties of investigation upon a furnisher of information “[a]fter [it] receiv[es] notice pursuant to section 1681i(a)(2) of this title”). Here, plaintiff did not alleged that MBNA received notice of the dispute from a credit reporting agency. Nor did plaintiff alleged that MBNA failed to take any of the steps required by § 1681s-2(b)(1)(A)-(E)—the duties invoked after a furnisher receives notice of a dispute. Hence, the arbitrator correctly found that plaintiff could not rely upon § 1681s-2.

- As to his common law tortious interference claim, Plaintiff failed to make the essential showing that MBNA acted without justification, in that MBNA “acted justifiably to protect its economic interest without using any legally improper means” and “in compliance with the applicable Federal laws.” (*Id.*)

Upon considering the contract for the time share, the written record, and the testimony, the arbitrator found that the merchant selling the time-share “had a legally and factually colorable, if not necessary conclusive or ethical, reason to disallow the cancellation under the terms of the contract,” and that—as a factual matter—MBNA’s investigation and handling of Plaintiff’s dispute were “reasonable.” (Ex. A, at 3). Hence, the arbitrator was plainly correct in his legal conclusion that MBNA complied with the billing investigation requirements of TILA and Regulation Z. These provisions require that a creditor must, after receiving notice from a consumer of a billing error, either:

make appropriate corrections in the account of the obligor ... **or ... send a written explanation or clarification to the obligor, after having conducted an investigation, setting forth to the extent applicable the reasons why the creditor believes the account of the obligor was correctly shown in the statement** and, upon request of the obligor, provide copies of documentary evidence of the obligor’s indebtedness.

15 U.S.C. § 1666(a)(3)(B)(i)-(ii) (emphasis added). *See also* Reg. Z, 12 C.F.R. § 226.13(f)(1) (“If, after conducting a **reasonable investigation**, a creditor determines that no billing error occurred ... the creditor shall ... [m]ail or deliver to the consumer an explanation that sets forth the reasons for the creditor’s belief that the billing error alleged by the consumer is incorrect ...”) (emphasis added); *Stafford v. Cross Country Bank*, 262 F. Supp.2d 776, 789-90 (W.D. Ky. 2003) (“[Section] 1666 provides that on receipt of timely notice of a billing error, a card issuer must ... within ninety days, either correct the

cardholder's account, or send the cardholder a written explanation of why the charges in question are correctly reflected on the statement.”) (citations omitted).

The Fair Credit Billing Act only requires MBNA to conduct a “reasonable investigation.” *Id.* If, after conducting a “reasonable investigation,” the creditor concludes that the disputed charge is valid, the creditor has fulfilled its obligations under § 1666. “Under [§ 1666], **it is ultimately for the creditor to determine whether a charge is valid.** ... A creditor who complies with the procedural requirements of the Act regarding an alleged billing error has no further legal responsibility.” *Berman v. Nationsbank of Del., N.A.*, 1998 WL 88342, *2 (E.D. Pa. Mar. 2, 1998) (emphasis added) (dismissing a Fair Credit Billing Act claim because “Plaintiff has essentially alleged only that defendant has not removed a charge which plaintiff contests”).

Notwithstanding plaintiff's disagreement with the arbitrator's factual findings and legal conclusions, plaintiff has not produced and could not possibly produce an iota of evidence that the arbitrator “manifestly disregarded” the law.” *See Lincoln Nat'l Life Ins. Co.*, 374 F.3d at 675. On the contrary, plaintiff's claims were thoroughly and correctly resolved by the neutral tribunal contractually selected by the parties. In seeking to burden this Court and MBNA with further litigation, plaintiff attempts to “subvert the arbitral process.” *Lincoln Nat'l Life Ins. Co. v. Payne*, 374 F.3d at 675. Denial of Plaintiff's Motion to Vacate is therefore required, and confirmation of the arbitration award is appropriate.

CONCLUSION

Based upon the foregoing, MBNA America Bank respectfully requests that this Court deny Plaintiff's Motion to Vacate Arbitration Award, confirm the arbitrator's award in favor of Defendant, and grant Defendant such further relief as this Court may deem just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2005, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon:

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