For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

TREMCORP HOLDINGS, INC., Appellant/Defendant, v. **SCOTT HARRIS and JOHN McCANN,** Appellees/Plaintiffs.	)	**S. Ct. Civ. No. 2019-0041** Re: Super. Ct. Civ. No. 085/2013 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Harold W. Willocks

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BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Edward L. Barry, Esq.
Law Offices of Edward L. Barry
St. Croix, U.S.V.I.
Attorney for Appellant,

Michael J. Sanford, Esq.
John Amerling, Esq.
Sanford, Amerling & Associates
St. Croix, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

CABRET, **Associate Justice**.

¶ 1 Appellant Tremcorp Holdings, Inc. ("Tremcorp") appeals from a March 7, 2019 memorandum opinion and order of the Superior Court denying Tremcorp's motion to vacate an arbitrator's award in which the arbitrator found that Appellees Harris and McCann were not liable for making material misrepresentations of fact in connection with a stock purchase agreement executed by the parties. Because the Superior Court correctly concluded that the arbitrator did not manifestly disregard the law in reaching his decision, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

¶ 2 On August 7, 2012, Appellant Tremcorp entered into a stock purchase agreement with Appellees Harris and McCann for the purchase of all outstanding shares of stock of UDI Management, Inc., a Virgin Islands corporation owned by Appellees. Pursuant to the agreement, Tremcorp paid Appellees a $300,000 cash down payment upon closing, and further executed and delivered to Appellees a first promissory note in the amount of $500,000 and a second promissory note in the amount of $400,000. Both notes were secured by certain real property holdings and the outstanding shares of UDI stock that were transferred to Tremcorp under the stock purchase agreement. When Tremcorp was unable to timely make payment on the first promissory note, Appellees granted Tremcorp an extension of time in exchange for an immediate payment of $100,000 applied toward the principal debt. When Tremcorp failed to make payment on the note by the extended deadline, Appellees declared default on the first promissory note, reasserted control over UDI, and filed an action in the Superior Court seeking a preliminary injunction, a permanent injunction, and declaratory judgment barring Tremblay from interfering with Harris's

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[1] Because we have already thoroughly described the factual background of this case in previous appeals in this matter, we limit our discussion of the facts only to those relevant to the instant appeal. For a more detailed explanation of the factual background of this case, *see Tremcorp Holdings, Inc. v. Harris,* 67 V.I. 601, 602 (V.I. 2017).

and McCann's repossession of UDI. *Tremcorp Holdings, Inc. v. Harris,* 67 V.I. 601, 602 (V.I. 2017). After the Superior Court granted UDI's motion for preliminary injunction, enjoining Tremblay from “entering or occupying, or interfering with or preventing [UDI] and its officers, agents and representatives from entering and occupying [UDI's] property,” Tremcorp filed a separate action alleging, among other things, fraudulent inducement in the transaction. *Id.*

¶ 3 After reaching an impasse in attempting to mediate their disputes, the parties executed a stipulated agreement to arbitrate which was approved by the Superior Court. *Id.* Pursuant to the stipulated arbitration agreement, the parties agreed “to arbitrate [all disputes] pursuant to the Federal Arbitration Act, 9 U.S.C. [§] 1 et seq.” *Id.* The arbitration agreement was based upon and expressly referenced the text of the original stock purchase agreement between the parties, which provides, in relevant part: “If the parties fail in their attempt to resolve a dispute by mediation, they will submit the dispute to arbitration pursuant to the Federal Arbitration Act. The laws of the U.S. Virgin Islands will govern the rights and obligations of the parties with respect to the matters in controversy.”

¶ 4 At arbitration, Tremcorp claimed that it was entitled to rescission of the stock purchase agreement, or alternatively an award of damages, because Harris and McCann made material misstatements of fact in connection with the sale of UDI in violation of the Virgin Islands Uniform Securities Act. Specifically, Tremcorp alleged that Appellees “substantially overstated the net income of UDI Management” and “grossly inflated the value of real estate” held by UDI. Relying upon decisions of courts in other jurisdictions interpreting substantively identical provisions of their own securities acts, the arbitrator concluded that Tremcorp failed to establish that the misrepresentations made by Harris and McCann were material within the meaning of the statute because Tremcorp failed to prove that, given the “total mix” of information provided by Appellees in connection with the sale, the alleged misrepresentations "significantly affected the investment decisions" made by Tremcorp.

¶ 5 Tremcorp subsequently moved the Superior Court to vacate the arbitrator's award, arguing that the arbitrator's decision manifestly disregarded the law. By memorandum opinion and order entered March 7, 2019, the Superior Court denied Tremcorp's motion to vacate, concluding that, in the absence of any Virgin Islands caselaw on point, the arbitrator diligently evaluated relevant decisions of courts in other jurisdictions to interpret the provisions of the Virgin Islands Uniform Securities Act, and ultimately provided a "reasonable analysis" of why Tremcorp could not succeed on its claim. Tremcorp timely filed its notice of appeal on April 8, 2019.

II. JURISDICTION AND STANDARD OF REVIEW

¶ 6 This Court has "jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." V.I. CODE ANN. tit 4, § 32(a). In turn, "the denial of a motion to vacate an arbitration award constitutes a final judgment for purposes of section 32(a)," and we therefore possess jurisdiction over this appeal. *Tremcorp Holdings, Inc. v. Harris,* 65 V.I. 364, 367 (V.I. 2016) (determining that the denial of a motion to vacate an arbitration award constitutes an appealable final judgment (citing *Gov't of the V.I. v. United Indus., Serv., Trans., Prof. and Gov't Workers of N. Am.–Seafarers Int'l Union of N. Am.*, 64 V.I. 312, 319–20 (V.I. 2016))). Because the Superior Court's denial of Tremcorp's motion to vacate the arbitration award is based upon the court's conclusion that the arbitrator did not exhibit manifest disregard for the law in reaching his decision, we exercise plenary review of the Superior Court's interpretation and application of this legal precept. *See Gov't of Virgin Islands, Dep't of Educ. v. St. Tomas/St. John Educ. Administrators' Ass'n, Local 101, o.b.o. Forde* ("*Forde*"), 67 V.I. 623, 628 (V.I. 2017) ("When reviewing the Superior Court's decision to confirm an arbitration award, we exercise plenary review over the Superior Court's application of the law and review any findings of fact for clear error."); *see also Local 863 Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Jersey Coast Egg Producers, Inc.* ("*Jersey Coast*"), 773 F.2d 530, 533 (3d Cir. 1985) ("Because [review of the district court's conclusion that the arbitrator exhibited manifest disregard for the law] involves the interpretation and application of legal precepts, our review is plenary.").

III. DISCUSSION

¶ 7 Tremcorp's sole argument on appeal is that the Superior Court erred in denying its motion to vacate the arbitrator's award because the arbitrator manifestly disregarded the provisions of the Virgin Islands Uniform Securities Act. Specifically, Tremcorp argues that the arbitrator manifestly disregarded relevant law by applying a subjective standard of materiality and by focusing his analysis on Tremcorp's lack of due diligence and Tremcorp's failure to demonstrate that Appellees' misrepresentations were intentional. However, because Tremcorp's argument ultimately amounts to an assertion that the arbitrator erred in his interpretation of the statute rather than an assertion that the arbitrator manifestly disregarded the provisions of the statute entirely, we affirm the Superior Court's memorandum opinion and order denying Tremcorp's motion to vacate.

A. Manifest Disregard as a Standard for Vacatur

¶ 8 In a previous appeal in this same matter, we concluded that the parties' express agreement "to arbitrate such matters pursuant to the [FAA]" indicated "that it was the parties' intent for relevant FAA provisions to control the arbitrative proceedings," including procedural provisions such as section 12 establishing the deadline for filing motions to vacate. *Tremcorp*, 67 V.I. at 605. Thus, despite the fact that section 10 of the FAA, establishing permissible grounds for vacating an arbitrator's award, does not preempt local law and is not, on its own terms, automatically applicable to arbitration proceedings in the Virgin Islands, *see Forde,* 67 V.I. at 632, the parties in this matter expressly contracted for the provisions of the FAA, including section 10, to govern the resolution of their disputes.

¶ 9 Notably, manifest disregard of the law is not listed as one of the grounds for vacating an arbitrator's award in section 10 of the FAA.[2] Rather, "'[m]anifest disregard of the law' by arbitrators is a judicially-created ground for vacating their arbitration award, which was introduced by the Supreme Court in *Wilko v. Swan,* 346 U.S. 427, 436–37, 74 S.Ct. 182, 187–88, 98 L.Ed. 168 (1953)." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker* ("*Bobker*"), 808 F.2d 930, 933 (2d Cir. 1986). In *Wilko,* the Supreme Court observed that "the interpretations of the law by the arbitrators *in contrast to manifest disregard [of the law]* are not subject, in the federal courts, to judicial review for error in interpretation." *Wilko,* 346 U.S. at 436–37 (emphasis added). Following *Wilko*, the federal Courts of Appeal have articulated the manifest disregard standard in various, slightly differing formulations, yet there is universal agreement that manifest disregard of the law must mean something more than erroneous interpretation or misunderstanding of the law. *See, e.g.*, *Jersey Coast,* 773 F.2d at 533 ("An award may be set aside only in limited circumstances, for example, where the arbitrator's decision evidences manifest disregard for the law rather than an

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[2] In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
(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.

erroneous interpretation of the law."); *Bobker*, 808 F.2d at 933 ("Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law…. We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it."); *Matthews v. Nat'l Football League Mgmt. Council*, 688 F.3d 1107, 1115 (9th Cir. 2012) ("Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the [FAA]."); *Renard v. Ameriprise Fin. Servs., Inc.,* 778 F.3d 563, 568 (7th Cir. 2015) ("Simple mistake of law is not enough. Thus, even if these arbitrators erred in their application of Minnesota law… such an error falls short of a manifest disregard of the law."); *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1178 (D.C. Cir. 1991) ("[I]t is clear that [manifest disregard] means more than error or misunderstanding with respect to the law.").

¶ 10 One frequently cited explanation of the manifest disregard standard comes from the Second Circuit's decision in *Bobker*, in which the court opined:

> The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it… Judicial inquiry under the "manifest disregard" standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it.

Bobker, 808 F.2d at 933; *see also* Bret F. Randall, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards,* 1992 B.Y.U. L. REV. 759, 766 (1992) (examining the history of the manifest disregard standard in federal courts and observing that "the most often cited formulation of the manifest disregard standard originated in the Second Circuit").

¶ 11 At present, there is some disagreement among the federal Circuit Courts as to whether the manifest disregard standard survives the Supreme Court's decision in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), which held that section 10 provides the FAA's "exclusive grounds for expedited vacatur." *See, e.g., Frazier v. CitiFinancial Corp., LLC,* 604 F.3d 1313, 1314 (11th Cir. 2010) ("[T]he judicially-created grounds for vacatur we have recognized in our prior precedent [including manifest disregard of the law] are no longer valid after the Supreme Court's decision in *Hall Street*…."); *Affinity Fin. Corp. v. AARP Fin., Inc.*, 468 Fed. Appx. 4, 5 (D.C. Cir. 2012) ("Assuming without deciding that the "manifest disregard of the law" standard still exists after *Hall Street*...."); *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011) ("This Court, in the wake of *Hall Street*, concluded that manifest disregard remains a valid ground for vacating arbitration awards….") (internal quotation marks omitted). Even the Supreme Court itself has, in recent cases, declined to decide whether manifest disregard survives its decision in *Hall Street* "as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 672 n.3 (2010). Instead, assuming without deciding that manifest disregard remained a valid ground for vacatur, the Court opined that a successful claim for vacatur premised upon manifest disregard required "a showing that the arbitrators knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it," and further determined that this formulation of the standard was satisfied in that case. *Id.*

¶ 12 Like the Supreme Court in *Stolt-Nielsen*, we need not decide here whether manifest disregard of the law survives as an independent basis for vacating an arbitrator's award because, as explained in detail below, assuming *arguendo* that the standard applies, Tremcorp has failed to demonstrate that the arbitrator manifestly disregarded the law in this case under any reasonable formulation of that standard.

B. The Arbitrator's Award

¶ 13 At arbitration, Tremcorp claimed that it was entitled to damages and to obtain rescission of the stock purchase agreement because Harris and McCann violated the provisions of the Virgin Islands Uniform Securities Act by misrepresenting certain material facts including "substantially overstat[ing] the net income of UDI Management" and "grossly inflat[ing] the value of real estate" held by UDI. The Act provides in relevant part:

> A person is liable to the purchaser if the person sells a security in violation of section 621, or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission, and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission.

9 V.I.C. § 659(b).

¶ 14 As both the arbitrator and the Superior Court recognized, no Virgin Islands court has ever had the opportunity to interpret or apply the provisions of this statute. In the absence of any Virgin Islands caselaw on this issue, the arbitrator looked to decisions in other jurisdictions interpreting and applying substantively identical provisions of their own analogous statutes. For example, the arbitrator cited the Supreme Court of the United States' decision in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), in which the Court explained that for a misrepresentation to be material within the meaning of the analogous Federal Securities Act, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* at 449. Additionally, the arbitrator relied on a decision of the Fifth Circuit Court of Appeals interpreting and applying the substantively identical provisions of the Texas Security Act for the proposition that "[t]o be material, a misrepresentation or omission must have influenced the buyer's actions to the extent that the buyer would not have entered into the transaction had the representation not been made." *In re Westcap Enterprises*, 230 F.3d 717, 726 (5th Cir. 2000) (citing *Lutheran Bhd. v. Kidder Peabody & Co.*, 829 S.W.2d 300, 307 (Tex. App. 1992), *judgment set aside on other grounds*, 840 S.W.2d 384 (Tex.1992)). Ultimately, the arbitrator synthesized these two standards and determined that Appellees' alleged misrepresentations were only material within the meaning of the statute if, given the total mix of information provided, the misrepresentations significantly affected Tremcorp's investment decision.

¶ 15 In applying this standard, the arbitrator noted that despite repeated suggestions from both Appellees and Tremcorp's own advisors that Tremcorp seek its own independent appraisals of the value of the real estate and the business entities at issue, Tremcorp failed to conduct any due diligence before proceeding with the transaction. The arbitrator found that even after Tremcorp received revised profit statements from Appellees indicating that UBI's earnings were significantly less than originally represented, Tremcorp made no attempt to contact Appellees to raise any concerns, despite the fact that this misinformation became apparent during the contractual due diligence period following Tremcorp's initial, non-refundable $300,000 down payment. The Arbitrator summarized his findings as follows:

> Utilizing the "total mix" analysis, the Arbitrator concludes that [Appellees] were earnest in conceding the inadequacy of their valuations of the property and businesses and that [Tremcorp] became aware of sufficient discrepancies to warrant further evaluation and appraisals, which [Tremcorp] eschewed. The Arbitrator finds that [Appellees] and even [Tremcorp's] own experts suggested due diligence

> as the quickest and surest way to determine the viability and profitability of the purchase, but [Tremcorp] failed to abide by their advice.

Thus, given Tremcorp's unwillingness to perform any due diligence and insistence on proceeding with the purchase despite repeated warnings and apparent red flags concerning the valuations of the real estate and businesses involved in the transaction, the arbitrator concluded that Tremcorp failed to demonstrate that the alleged misrepresentations significantly affected its investment decision and therefore failed to prove that Appellees' misrepresentations were material within the meaning of 9 V.I.C. § 659(b).

¶ 16 On appeal, Tremcorp argues that the arbitrator manifestly disregarded the provisions of §659 by applying a subjective standard of materiality that improperly considered Tremcorp's failure to conduct due diligence and Appellees' lack of bad faith. In support, Tremcorp cites a number of cases from various jurisdictions explaining that the materiality requirement found in analogous securities acts is an objective standard focused on whether the misrepresentation would assume relevance in the investment decisions of a hypothetical reasonable investor. *See, e.g.*, *Dunn v. Borta*, 369 F.3d 421, 427 (4th Cir. 2004) ("In applying this materiality standard, we must bear in mind that it does not require proof that an investor would not have invested had he known the truth; rather, the reasonable investor standard requires a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable [investor].") (internal quotation marks omitted). Tremcorp correctly points out that even *Westcap Enterprises*, the case chiefly relied upon by the arbitrator, clearly states that the analogous Texas Securities Act "does not require that the buyer prove his own due diligence." 230 F.3d at 726.

¶ 17 All of this amounts to an argument that the arbitrator misinterpreted the materiality requirement of § 659. But regardless of whether this Court would reach a different interpretation if called upon to do so in this first instance, this type of error "falls short of a manifest disregard of the law." *See Renard*, 778 F.3d at 568. The Virgin Islands Uniform Securities Act contains no definition of the term "material" as used in this context, and no Virgin Islands court has yet the opportunity to provide one. Thus, the "governing law alleged to have been ignored by the arbitrator[]" is not "well defined, explicit, and clearly applicable." *See Bobker*, 808 F.2d at 933. Indeed, this is not a case in which the alleged error is "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator," nor is it a case where "the arbitrator appreciate[d] the existence of a clearly governing legal principle but decide[d] to ignore or pay no attention to it." *Id.* Rather, in the absence of binding authority on the issue, the arbitrator looked to decisions of other jurisdictions interpreting and applying identical provisions of analogous statutes and synthesized and applied a standard of materiality reasonably grounded in relevant jurisprudence. Thus, Tremcorp has failed to demonstrate that the arbitrator manifestly disregarded the law in reaching his decision and, consequently, the Superior Court did not err in denying Tremcorp's motion to vacate the arbitrator's award.

IV. CONCLUSION

¶ 18 Because Tremcorp has failed to demonstrate that the arbitrator manifestly disregarded, as opposed to merely misinterpreted, the provisions of the Virgin Islands Uniform Securities Act, we affirm the Superior Court's March 7, 2019 memorandum opinion and order denying Tremcorp's motion to vacate the arbitrator's award.

Dated this 21st day of September, 2020.

BY THE COURT:

/s/ Maria M. Cabret___

MARIA M. CABRET

Associate Justice

ATTEST:

VERONICA J. HANDY, ESQ.

Clerk of the Court