

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3962-10T2

FRANK A. MARINACCIO,

Plaintiff-Appellant,

v.

ROSEMARIE GRGEC and SUZANNE
DAPKINS, jointly,

Defendants-Respondents.

Argued October 31, 2011 – Decided January 04, 2012

Before Judges Grall, Alvarez and Skillman.

On appeal from Superior Court of New
Jersey, Chancery Division, Somerset
County, Docket No. C-12017-11.

Salvatore Salibello argued the cause
for appellant.

Andrew M. Epstein argued the cause for
respondents (Lampf, Lipkind, Prupis &
Petigrow, P.A., attorneys; Mr. Epstein,
on the brief).

PER CURIAM

Frank A. Marinaccio appeals from a final order of the
Chancery Division confirming an umpire's determinations in
proceedings conducted pursuant to the New Jersey Alternative
Procedure for Dispute Resolution Act (the APDRA), N.J.S.A.

2A:23A-1 to -30. Marinaccio's dispute was with his sisters, Rosemarie Grgec and Suzanne Dapkins, and it concerns the distribution of testamentary trusts. On appeal, Marinaccio contends the judge erred in confirming the umpire's denial of his application to set aside a mediated settlement and the umpire's award of \$15,000 for legal fees and costs to his sisters.

Pursuant to N.J.S.A. 2A:23-18b, we dismiss Marinaccio's appeal of the decision on the motion to vacate. We affirm the confirmation of the counsel fee award substantially for the reasons stated by Judge Allison E. Accurso in her oral opinion of March 18, 2011.

I

The testamentary trusts at issue were established by the litigants' parents, Anthony and Anna, and their great-aunt, Angelina. All three of the trusts were for the benefit of Anthony and Anna, and the assets remaining following the death of both parents were to be equally divided among their children. Angelina and Anthony predeceased Anna, who died in 2007. Marinaccio was the sole trustee for the trusts established by Angelina and Anna, and he and Anna were co-trustees of his father's trust during Anna's life and the sole trustee thereafter.

Marinaccio's sisters filed their lawsuit to compel an accounting and distribution of remaining assets after Anna's death. In the midst of pretrial proceedings, the parties agreed to attempt mediation, and they reached and signed an agreement in March 2010. "[I]n full and final satisfaction of all claims raised in" the litigation, Marinaccio promised to give each of his sisters \$250,000. The agreement authorized him to make the payments from the net proceeds of the sale of his parents' former home, which he had acquired by deed in 1996. In the settlement with his sisters, Marinaccio promised to "list the house for sale forthwith" and to "keep [his sisters] fully informed as to all activities regarding the sale of the home, including but not limited to the identity of the broker," "any offers," and "any responses" to offers.

The parties further agreed that their attorneys would execute and file a consent order "dismissing the litigation with prejudice, directing the parties to perform in accordance with their settlement agreement, and providing that any disputes shall be resolved by binding arbitration before" the umpire who had mediated the settlement. The consent order further provided that any disputes arising under the settlement agreement would be resolved through arbitration in accordance with the APDRA. Paragraph two of the consent order states: "The parties are

directed to perform in accordance with the terms of their settlement agreement." Judge Accurso signed that consent order, and it was filed on March 30, 2010.

About six months after the dismissal of the litigation, Marinaccio's sisters moved before the umpire for an order declaring Marinaccio in violation of their agreement due to his failure to keep them informed and make his best effort to sell the house. He had rejected an offer that exceeded the \$500,000 settlement by several hundred thousand dollars without informing them. Relying upon Rule 1:10-3, the sisters also sought compensation for fees and costs incurred in enforcing the March 30, 2010 order. In response, Marinaccio moved to vacate the settlement. He claimed entitlement to that relief based on "newly discovered" evidence – documents pertinent to an accounting of the estates that he had "discovered" in a basement closet of his house. He made that assertion about the documents despite the fact that prior to the settlement, he had claimed he could not comply with discovery because he could not locate the papers.

In considering Marinaccio's motion to vacate the settlement, the umpire applied Rule 4:50-1b, which permits relief where there is "newly discovered evidence which would

probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial" The umpire concluded that if Marinaccio had conducted a search for the records consistent with "due diligence," he would have uncovered the records prior to the settlement. The umpire also considered the fact that as a trustee and co-trustee Marinaccio had a duty to keep the records.

The umpire's reasons for awarding the sisters \$15,000 for fees and costs pursuant to Rule 1:10-3 are set forth in his oral decision of February 16, 2011. The umpire focused on Marinaccio's obligation to perform in accordance with the settlement, which is an obligation stated in the court's order of March 30, 2010. He concluded that Marinaccio had acted in bad faith and violated his obligations by rejecting an offer without advising his sisters of the details. The umpire also determined that an award of counsel fees was necessary to make Marinaccio understand he would be held to the responsibilities he had assumed in the settlement agreement. Noting that the charges enumerated in counsel's certification of services were reasonable and that Marinaccio had not claimed otherwise, the umpire ordered Marinaccio to pay \$15,000 of the approximately \$30,000 his sisters incurred.

In the Chancery Division, Marinaccio sought reversal of the umpire's denial of his motion to vacate, pursuant to paragraph c(5) of N.J.S.A. 2A:23A-13, which applies where the umpire committed "prejudicial error by erroneously applying law to the issues and facts presented for alternative resolution." Ibid. Observing that the umpire had assumed the truth of Marinaccio's account of his discovery of the documents, Judge Accurso turned to consider legal error and found none. She explained that the umpire concluded Marinaccio was not entitled to vacate the settlement because the records he found did not constitute "newly discovered" evidence within the meaning of Rule 4:50-1b as he could have discovered them prior to the settlement if he had exercised due diligence.

Judge Accurso also determined that the \$15,000 award to Marinaccio's sisters was well within the discretion of the umpire. Her decision sets forth the reasons.

II

A

Marinaccio's appeal to this court from the umpire's decision on his motion to vacate the settlement is barred by the APDRA.

There is no dispute that the post-settlement proceedings to resolve disputes arising under this settlement agreement are

governed by the APDRA. For parties to be bound by the APDRA, it is "'sufficient that [they] signify their intention to resolve their dispute by reference'" to the Act. Mt. Hope Dev. Assocs. v. Mt. Hope Waterpower Project, L.P., 154 N.J. 141, 146 (1998) (quoting N.J.S.A. 2A:23A-2a). In this case, the settlement agreement and consent order establish the parties' intent to invoke and be bound by the APDRA.

Under the APDRA, Judge Accurso's order confirming the umpire's denial of his motion to vacate the settlement is not appealable. "The APDRA . . . provides that once a court grants an order confirming, modifying, or correcting an award, 'a judgment or decree shall be entered by the court in conformity therewith and be enforced as any other judgment or decree. There shall be no further review of the judgment or decree.'"

Ibid. (quoting N.J.S.A. 2A:23A-18b). Although such "limited judicial review is a central component of the APDRA," we recognize that the parties can expand its scope by the terms of their agreement to proceed under the Act. Id. at 149. These parties, however, did not do so. Accordingly, we dismiss the part of this appeal challenging the denial of Marinaccio's motion to vacate the settlement.

Marinaccio, quite correctly, argues that there are "'rare circumstances' grounded in public policy that might compel this

[c]ourt to grant limited appellate review." Id. at 152 (quoting Trentino Printing Inc. v. Fitzpatrick & Assocs., 135 N.J. 349, 364-65 (1994)). The decision suggests that review is compelled in circumstances where courts have a "nondelegable, special supervisory function." Ibid. (internal quotation marks omitted). The rare exceptions include: child support and the best interests of children, ibid.; rulings rendered by a biased judge, ibid.; judicial decisions that exceed the court's authority or ignore statutory standards, N.J. Citizens Underwriting Reciprocal Exch. v. Collins, 399 N.J. Super. 40, 48 (App. Div.), certif. denied, 196 N.J. 344 (2008); Morel v. State Farm Ins. Co., 396 N.J. Super. 472, 476 (App. Div. 2007); and the award of attorney's fees, which is governed by court rules and Rules of Professional Conduct and "within the exclusive supervisory powers of the [c]ourt," Allstate Ins. Co. v. Sabato, 380 N.J. Super. 463, 473 (App. Div. 2005). None of those circumstances are presented by the denial of Marinaccio's motion to vacate.

B


Quite obviously, the award of counsel fees to Marinaccio's sisters falls within the exception to the APDRA's bar against appellate review recognized in Sabato. Ibid. Consequently, we have considered Marinaccio's arguments on that award in light of

the record. As noted at the outset of this opinion, we affirm the determination substantially for the reasons stated by Judge Accurso.

We add only a brief statement of our reasons for rejecting arguments presented on appeal. Judge Accurso properly confirmed this award of counsel fees as a sanction for Marinaccio's failure to comply with the settlement agreement. Umpires are expected to address requests for ancillary relief in the first instance. N.J.S.A. 2A:23A-5a. The sisters' request for relief in aid of litigants pursuant to Rule 1:10-3 was ancillary to the issue of performance under the agreement that the parties submitted to the umpire. In fact, Marinaccio's obligation to perform in conformity with the settlement agreement was stated in paragraph two of the consent order entered by the court on March 30, 2010, which also provided for an umpire to resolve disputes under the settlement agreement pursuant to the APDRA. There is no question that Marinaccio's non-compliance was subject to redress pursuant to Rule 1:10-3.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION