COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP1071 **Cir. Ct. No. 2003CV458**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE MATTER OF THE ARBITRATION BETWEEN:

MBNA AMERICA BANK, NA, A FOREIGN CORPORATION,

PLAINTIFF-RESPONDENT,

V.

GARY GILBERTSON,

DEFENDANT,

DAVID GILBERTSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. David Gilbertson has appealed from a judgment awarding $30,727.65 to the respondent, MBNA America Bank, NA. Judgment was entered pursuant to a circuit court order which confirmed an arbitration award entered in favor of MBNA and denied David's motion to vacate the award.[1] We affirm the judgment.

¶2 MBNA filed an arbitration claim against David and his brother, Gary Gilbertson, in February 2002, seeking arbitration based on the Gilbertsons' alleged default on payments owed under a credit card issued by MBNA, and a provision for arbitration in the credit card agreement. MBNA alleged that the Gilbertsons were bound by the terms of the credit card agreement "[b]y way of contract and retention and use of the credit card issued by MBNA." The Gilbertsons filed a response dated March 11, 2002, in which they denied that they were indebted under the credit card agreement and alleged that any use of the credit card issued by MBNA was "on and on behalf of Power, Inc.," a corporation.

¶3 On May 14, 2002, the arbitrator requested MBNA to provide a copy of the credit card application and all credit contracts signed by the Gilbertsons. He also requested that the Gilbertsons provide copies of all documents supporting their defenses. He stated that the parties had until June 3, 2002, to submit the requested information and any other pertinent information to the arbitration forum, and that in the absence of the information the arbitrator would make a decision based on the evidence at hand.

[1] The circuit court denied MBNA's motion to confirm the arbitration award against Gary Gilbertson on the ground that it was untimely. David Gilbertson is therefore the sole appellant.

¶4 MBNA filed a response dated May 30, 2002, stating that no credit card application or credit contract signed by the Gilbertsons was available. However, it contended that the Gilbertsons were bound by the terms and conditions outlined in the credit card agreement by virtue of their use of the credit card. It also submitted copies of credit card statements sent to the Gilbertsons in 2000 and 2001, showing the unpaid balance on the account.

¶5 The Gilbertsons filed nothing in response to the arbitrator's request for information. On July 30, 2002, the arbitrator issued a second notice requesting that MBNA provide a copy of the signed credit card application and all credit contracts signed by the Gilbertsons or others regarding the MBNA account at issue. The arbitrator's notice also stated that the Gilbertsons would be allowed to submit additional information to the arbitrator. The notice stated that the parties had until August 19, 2002, to submit this and any other pertinent information to the arbitrator and the other parties, and that in the absence of the requested information the arbitrator would make a decision based on the evidence at hand.

¶6 MBNA submitted a memorandum dated August 16, 2002, in response to the arbitrator's request. In the memorandum, MBNA reiterated that a signed credit card application was not available. However, it disputed the allegation that a corporate entity was liable for the account in question. It contended that the Gilbertsons were personally liable for the unpaid account balance because the account was held in their names, and they had accepted and used it for more than ten years without objection. It relied on ***Footville State Bank v. Harvell***, 146 Wis. 2d 524, 432 N.W.2d 122 (Ct. App. 1988), for the proposition that a consumer who uses and derives a benefit from using a credit card may be held liable for the value of the goods and services received, even if the consumer did not personally sign for or request the credit card. In addition, it

relied on language on the back of its credit cards, stating that by using the card, the customer agrees to the terms of the issuing bank's credit card agreement. It attached a copy of the terms and conditions for the account used by the Gilbertsons, which included a provision that "[a]ll persons who … use the account are individually and together responsible for any total outstanding balance."

¶7 In a letter dated August 22, 2002, the Gilbertsons' attorney contended that MBNA had failed to provide a signed credit card application or contract as directed by the arbitrator. The Gilbertsons' attorney also stated that he would be filing a "reply" to MBNA's August 2002 memorandum. However, on August 23, 2002, the arbitrator issued his decision, stating that the evidence and information submitted in the case supported an award in favor of MBNA in the amount of $30,727.65.

¶8 In a letter dated August 30, 2002, the Gilbertsons' attorney petitioned the arbitrator to reconsider the award. He contended that he had not received MBNA's August 2002 memorandum until August 22, 2002, and that equity and fairness dictated that he be permitted to reply. He attached an affidavit of Gary Gilbertson, which stated that it was Gary's understanding that the credit card involved in this case was a corporate card. Gary also attested that the card was not used for personal items and that, as the chief operating officer of Power, Inc., he instructed employees to use the credit card for business purposes only. Counsel also attached an affidavit signed by David, indicating that he was told to use the card for corporate business, and that he never signed any document agreeing to be personally responsible, nor was he informed that he would be personally responsible for debt incurred on the card.

¶9 On September 27, 2002, a case management supervisor for the arbitration forum sent a letter to the Gilbertsons' attorney stating that the case was closed. She pointed out that the due date for submitting information had been August 19, 2002, and that the arbitration code did not allow a party the opportunity to respond to information provided by another party after the due date for the requested information expired.

¶10 Subsequently, MBNA moved the circuit court to confirm the arbitration award against David. The circuit court granted the motion, and David appealed.

¶11 It is well settled in Wisconsin that deference is due an arbitrator's award. ***City of Madison v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d 576, 585, 425 N.W.2d 8 (1988). The scope of our review of the arbitrator's decision is the same as that of the circuit court. ***City of Madison v. Local 311***, 133 Wis. 2d 186, 190, 394 N.W.2d 766 (Ct. App. 1986). The role of the reviewing court is essentially supervisory, with the goal of assuring that the parties are getting the arbitration for which they contracted. ***Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d at 585-86. Because the parties have contracted for arbitration, they get the arbitrator's award, whether that award is correct or incorrect as a matter of fact or of law. ***Id.*** at 586. The reviewing court will not overturn the arbitrator's decision for mere errors of law or fact, but only when perverse misconstruction or positive misconduct is plainly established, there is a manifest disregard of the law, or the award itself is illegal or violates strong public policy. ***Id.***

¶12 These narrow grounds for overturning an arbitrator's award are echoed in WIS. STAT. § 788.10(1) (2003-04).[2] ***Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d at 586. Applying these principles here, we conclude that the circuit court properly confirmed the arbitrator's award.

¶13 David's first argument on appeal is that the arbitrator lacked authority to conduct the arbitration and render an award against him because MBNA failed to produce a written contract whereby David agreed to arbitration. However, a challenge to the arbitrator's authority to address MBNA's claim and make an arbitration award was never raised before the arbitrator. The responses and other material submitted by David to the arbitrator are fully detailed above, and include no contention that the arbitrator lacked authority to resolve MBNA's claim. Although David disputed his liability, he never challenged the arbitrability of MBNA's claim. David waived his right to challenge the arbitrator's authority when he failed to raise the issue before the arbitrator. *See* ***DePue v. Mastermold, Inc.***, 161 Wis. 2d 697, 703-04, 468 N.W.2d 750 (Ct. App. 1991).

¶14 David also argues that MBNA provided no evidentiary basis for the award. He contends that the award therefore must be vacated under WIS. STAT. § 788.10(1)(d) because the arbitrator exceeded his powers by rendering an award against him. We reject this contention.

¶15 MBNA clearly argued to the arbitrator that even though it could not submit a credit card agreement or contract signed by David, David was liable because he used the credit card. MBNA made this argument in its May 30, 2002

[2] All references to the Wisconsin Statutes are to the 2003-04 version.

response and in its August 16, 2002 memorandum. It submitted copies of numerous account statements with its May 30, 2002 response. Those statements were addressed to David and Gary, and listed them as the cardholders. Nothing in the statements indicated that the account was a corporate account.

¶16 David failed to timely rebut MBNA's claims and submissions. In his initial response to MBNA's claim, he did not deny that he had used the card. He merely alleged that it was used on behalf of the corporation. He then filed nothing in response to the arbitrator's May 14, 2002 request for information and MBNA's May 30, 2002 response. He also failed to respond to the arbitrator's July 30, 2002 notice establishing an August 19, 2002 deadline for all submissions. Instead, in a letter dated August 22, 2002, he simply notified the arbitrator that he intended to reply to MBNA's memorandum. However, the deadline for submitting material had already passed.

¶17 David did not respond to MBNA's contention that he was personally liable for the credit card debt based on his use of the card until August 30, 2002, after the August 19, 2002 deadline and after the arbitrator issued the award. The arbitrator was therefore entitled to issue the decision based on the information submitted to him before he issued the award. That information included the account statements listing David as a cardholder and showing the unpaid balance on the credit card account. It also included copies of a credit card agreement stating that a person who uses the account is liable for the balance due on it. The arbitrator could infer and conclude from the submissions that David was a user of the account.[3] He could construe the agreement to permit an award against David

[3] At the circuit court hearing, counsel for David conceded that David used the account.

based upon his use of the card. Any other defense to MBNA's theory of liability was waived when David failed to submit information or argument in support of a defense by August 19, 2002. *See* ***Local 311***, 133 Wis. 2d at 192.

¶18 Nothing in David's remaining arguments provides a basis to disturb the arbitrator's award.[4] We therefore affirm the circuit court order confirming it.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] David argues that the award should be set aside based on equity and fairness, but he simply repeats the arguments previously made by him. In addition, in his reply brief he cites WIS. STAT. § 788.10(1)(c) for the proposition that the arbitrator engaged in misconduct because he "improperly refused to postpone the hearing." Issues raised for the first time in a reply brief need not be addressed by this court. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (1981). In any event, David never responded to the arbitrator's requests for information or requested an extension of the time for submitting information until after the deadline for doing so had passed. It is therefore specious to argue that the arbitrator engaged in misconduct.