

2013 WL 1295357 (La.App. 3 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Third Circuit.

Frances R. DETRAZ,
v.
BANC ONE SECURITIES CORP, et al.

No. 2013-CA-00191.
March 22, 2013.

On Appeal from the 15th Judicial District Court for the Parish of Lafayette, State of Louisiana
No. C-20107723 “F”
Honorable Glennon P. Everett, Judge
A Civil Proceeding

Original Brief of Appellant, Frances R. Detraz

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***1 I. STATEMENT OF JURISDICTION**

The jurisdiction of this court is based on [Louisiana Constitution Article V, Section 10](#), [Louisiana Code of Civil Procedure Article 2083](#) and Rule 2 of the Uniform Rules – Courts of Appeal, this being an appeal from a final judgment of the 15th Judicial District Court for the Parish of Lafayette.

The judgment complained of herein was rendered by the Hon. Glennon P. Everett, District Judge for the 15th Judicial District Court for the Parish of Lafayette, Final Judgment Confirming Arbitration Award.

II. STATEMENT OF THE CASE

Mrs. Frances Detraz filed a state court case against her stockbroker, Eric Leblanc and his employers, Banc One Securities and Morgan Keegan & Company for mishandling of her savings account. Once litigation ensued, Mrs. Detraz consented to arbitrate the case as a result of a mandatory arbitration clause she was unaware she signed when she opened the account. Three out-of-state arbitrators that admittedly had no knowledge of Louisiana law heard the matter and found against Mrs. Detraz despite uncontroverted evidence of a violation of Louisiana law. The chairperson was a former New York lawyer and the other two arbitrators that were formerly employed in **financial** related industries in Florida and New Jersey. See Exhibit “A”-Motion to Vacate and Exhibits –Arbitrator Profiles.

Mrs. Detraz is a 73 year-old **elderly** widow with no investment education or experience. After her husband died, she went to the bank to deposit approximately \$100,000 from the life insurance death benefits and real estate sale proceeds into her insured Bank One bank account; when, the Bank One teller insisted on introducing her to Eric LeBlanc. The teller informed Mrs. Detraz that he was someone who will “help” her with her money. Mrs. Detraz believed Mr. LeBlanc to be a Bank One banker with special training in helping *2 bank customers with managing their bank accounts. She was not told that he was a stockbroker that earned commissions from customer purchases and sales of securities.

Ms. Detraz advised Mr. LeBlanc that she could not meet her living expenses with her social security income and intended to use the life insurance proceeds to make ends meet. Mr. LeBlanc told her that if she let him manage her money at Bank One, she could withdraw approximately \$600 a month from the \$100,000 (7.2% a month withdrawal rate) on deposit in her account without reducing her safely invested principal. Mrs. Detraz followed his advice and began making monthly withdrawals. Mr. LeBlanc did not explain either verbally **or in writing as required by Louisiana law** the risks involved in the stock market and Mrs. Detraz had no understanding that she could lose all of her money. She did not know that her money was no longer federally insured and did not understand the difference between Bank One and Banc One Securities.

During the market upswing, in 2000, Mrs. Detraz deposited an additional \$195,000 from a real estate sale. Her account was then valued at \$280,000. Mr. LeBlanc advised Mrs. Detraz that she could increase her withdrawals to \$1,500 a month on average (a 6.4% withdrawal rate) for the remainder of her life and that she would not “outlive her money.” Again, Mr. Leblanc did nothing to advise Mrs. Detraz of the risks involved either verbally or in writing should the market turn down for a long period of time. Mr. LeBlanc did not explain that market conditions may require that she reduce the amount of her monthly withdrawals until her account was already depleted.

Mr. LeBlanc selected and recommended the purchase of an unsuitable allocation of aggressive stocks and junk bonds. The account was tied to a high withdrawal rate, which doomed the investment plan from the beginning. With *3 the investments selected and the withdrawal rate, no account could have been survived **under any market condition** regardless of Mr. Leblanc's special skills in investing. Mr. Leblanc misrepresented that she could never out live her money from the start. Mr. Leblanc admitted during cross examination, that no written disclosure was ever made explaining the allocation, withdrawal rate or any illustration or projection of what could happen in the future as required by Louisiana law.

In March 2005, Mr. LeBlanc left Banc One Securities and moved to Morgan Keegan & Company, Inc. He requested that Mrs. Detraz transfer her account to Morgan Keegan and she complied. When she started noticing that the account value was dropping each month on her account statement, she made calls to Mr. LeBlanc to express concern. Mr. LeBlanc merely would tell her

that the market would improve and that she should continue to withdraw \$1,500 a month without worry. He repeatedly assured her that she would not outlive her money.

On March 9, 2009, Mrs. Detraz and her son, Quinn Hebert, met with Mr. LeBlanc. For the first time, Mr. LeBlanc informed her verbally that she only had enough money to last another year or two of withdrawals. The account value had dropped to \$68,000. He asked Mrs. Detraz if she had a “Plan B.” Mrs. Detraz was shocked and when questioned, Mr. LeBlanc simply blamed the market – a market that Mrs. Detraz, as an income investor never should have been invested in from the start with fully understanding the risk.

Mrs. Detraz moved vacate the award because the arbitrators did not apply state law and disregarded uncontested testimony under oath from the broker who admitted that there was no written disclosure to an **elderly** investor as required by state law as set forth in the *Beckstrom v. Parnell*, 97-1200, pp. 8-9 (La.App. 1 Cir. 11/6/98), 730 So.2d 942, 947-48 case. Exhibit “A”- Motion to *4 Vacate and Exhibits. Although the arbitrators were not aware of the law at the onset of the litigation, undersigned counsel presented the state law requirements during the motion to compel discovery documents and during the arbitration. Mrs. Detraz seeks a review of the arbitration award on the grounds that the arbitrators have exceeded their powers and a mutual, final, and definite award was not rendered under La. R.S. 9:4210.

III. ISSUES AND QUESTIONS OF LAW PRESENTED FOR REVIEW

Out-of-state arbitrators received uncontroverted evidence under oath that the stockbroker, who is held to be a fiduciary under Louisiana law, did not disclose investment strategies in writing to **elderly** customer. Did arbitrators exceed their power by failing to apply state law requiring fiduciaries to present investment strategies in writing to **elderly** clients?

IV. ASSIGNMENT OF ERROR

The trial court erred by denying the motion to vacate arbitration award under La. R.S. 9:4210 on the grounds that the arbitrators who rendered the award exceeded their power by failing to apply state law which required fiduciaries to send written confirmation of investment strategies to **elderly** customers even after arbitrators received uncontroverted evidence of the violation.

V. LEGAL ARGUMENT

A trial court does not ordinarily sit in an appellate capacity to an arbitration panel, but confines its determination to whether there exists one or more of the specific grounds ... as provided for under the applicable [vacatur] statute. *MMR-Radon Constructors, Inc. v. Continental Ins. Co.*, 97-0159, p. 7 (La. App. 1st Cir. 3/3/98), 714 So.2d 1, 5, writ denied, 98-1485 (La. 9/4/98), 721 So.2d 915.

*5 Mrs. Detraz moved to vacate the award because the arbitrators did not apply state law and disregarded uncontested testimony proving that there was no written disclosure to an **elderly** investor as required in the *Beckstrom* case. *Beckstrom* at 952. The arbitrators were out-of-state arbitrators with no knowledge of Louisiana law. The chairperson was a former New York lawyer and the other two arbitrators that were formerly employed in **financial** related industries in Florida and New Jersey. Exhibit “A”-Motion to Vacate and Exhibits. Although they were not aware of the law at the onset of the litigation, undersigned counsel adamantly presented the state law requirements during the motion to compel and during the arbitration.

1. Louisiana Fiduciary Duties of a Stockbroker to **Elderly** Customers

In the case of *Beckstrom v. Parnell* an **elderly** customer filed suit against his stockbroker and his employer, Morgan Keegan & Co. for breach of fiduciary duty resulting from a series of investments that were excessive and inappropriate. *Beckstrom v.*

Parnell, 97-1200, pp. 8-9 (La.App. 1 Cir. 11/6/98), 730 So.2d 942, 947-48. At dispute was the appropriateness of selling certain bond funds and mutual funds, particularly after Mr. Beckstrom became a less sophisticated investor as he aged. *Id.*

The Third Circuit explained that “[t]he essence of the fiduciary duty lies in the special relationship between the parties. The fiduciary's duty includes the ordinary duties owed under tort principles, as well as a legally imposed duty which requires the fiduciary to handle the matter “as though it were his own affair.” *Federal Deposit Insurance Corporation v. Caplan*, 874 F.Supp. 741, 744 (W.D.La.1995), quoting, *Noe v. Roussel*, 310 So.2d 806, 819 (La.1975). “In addition, the ‘fiduciary may not take even the slightest advantage, but must zealously, diligently and honestly guard and champion the rights of his principal against all other persons whomsoever, and is bound not to act in *6 antagonism, opposition or conflict with the interest of the principal to even the slightest extent.’” *Id.* It is this duty of loyalty which distinguishes the fiduciary relationship. *Gerdes v. Estate of Cush*, 953 F.2d 201, 204, 205 (5th Cir.1992).

In *Beckstrom* the plaintiff was initially sophisticated but at some point in his life became unable to fully understand investment decisions as he aged. *Beckstrom* at 951. The court found that even though the plaintiff received prospectuses from the funds, the investment information available to plaintiff at the time of the investments was insufficient to put him on notice that the trading in his account was excessive and not in his best interest. *Id.* at 952.

The Third Circuit held that “[w]hen faced with this **elderly** client, or indeed **any client, whose judgment is patently adverse to his own best interest**, a broker's duty encompasses written confirmation of the ramifications of the proposed transaction. [Stockbroker's]... provision of prospectus and general information on each investment was insufficient under the circumstances sub judice. It was the broker's duty to “do the math” and present the results of such a change, in writing, to the investor. Mr. Beckstrom deserved to “see” the “math” so that he could cogitate and ruminate over such a move. There is no evidence in the record which would indicate that this investor was presented, in writing, with a clear picture of what such a sale and redemption would create in terms of the total value of the account. The understanding of such a “move” is significant; it cannot be washed away by the flood of “confirmation slips” or prospectus brochures that the investor received. This full-service broker breached his fiduciary obligation to Mr. Beckstrom when he defaulted to performing as an “order taker”; ethical responsibility circumscribes the ever changing competency of his/her client. *Id.* at 952.

*7 In the case at hand it is undisputed that Mrs. Detraz had an excessive withdrawal rate that was not in her best interest. And during the testimony of the stockbroker, Mr. Eric Leblanc, undersigned counsel specifically asked:

Ms. Vasquez: Did you prepare any illustrations or projections showing the effect of the types of investments you were going to invest her in and how that...how her withdrawal rates would affect her investments?

Mr. Leblanc: Could you repeat that?

Ms. Vasquez: Did you prepare any illustrations or projections at all?

Mr. Leblanc: Uh.I'm not sure that I had an illustration because...um...when we talked about the investment options we talked about a variety of things so it was uh...CDs, so I didn't have any type of capability to show a CD investment and a mutual fund investments and a mixed annuity investment all in one illustration.

Ms. Vasquez: Did you have an obligation to get anything in writing for her that would...that would explain to her the impact of the withdrawals?

Mr.Leblanc: No.

Ms. Vasquez: Did you ever write to her...actually you've already answered this but you can confirm it in another way. You never wrote to her or did any kind of mathematical calculation showing that she would run out of money at the rate she was going at any point during the relationship with her at Bank One?

Mr. Leblanc: She had...I would have no written correspondence saying that, that's right.

Exhibit "A"- Transcript Attached to Motion to Vacate and Exhibits.

Further, there was were no evidence submitted in the record which would indicate that Mrs. Detraz was presented, in writing, with a calculation and explanation of what would be occurring in her accounts before they were invested, as required by law. Mrs. Detraz had filed a motion to compel within the arbitration seeking an adverse finding based on the spoliation of documents that were presumed missing in the case. Namely, because a written disclosure of the investment strategy and other account documentation had not been produced. The arbitrators denied the motion made during the arbitration.

*8 The Beckstrom case makes it clear that an explanation is required before the investment is made so the investor can understand and ruminate over the strategy and this obligation "cannot be washed away by the flood of after the fact "confirmation slips" or prospectus brochures that the investor received." Beckstrom at 952. The court found a violation of fiduciary duty on these grounds because it had encompassed the duty to give written explanations of investment strategies.

Thus, the lack of written explanation and "doing the math" was a violation of Mr. Leblanc's duty of fiduciary to Mrs. Detraz as set forth in the *Beckstrom* case. *Beckstrom* at 952.

2. Arbitration Award Should Be Vacated For Exceeding Power

[La. R.S. 9:4210](#) states that the court shall issue an order vacating the award upon the application of any party to the arbitration where:

A. Where the award was procured by corruption, fraud, or undue means.

B. Where there was evident partiality or corruption on the part of the arbitrators or any of them.

C. 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.

D. 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. (emphasis added.)

Plaintiff urges that the award be vacated under section D because the arbitrators exceed their powers or so imperfectly executed them by not following Louisiana law. There is judicial precedence holding that arbitrators who do not follow the law, exceed the powers bestowed upon them by [La. Civil Code Article 3110](#). [Article 3110](#) explains that the arbitrators "ought to determine as judges, agreeably to the strictness of the law."

*9 For example, the Fifth Circuit in *Citigroup Global Markets, Inc. v. Bacon*, held that "Because the arbitrator is fully aware of the controlling principle of law and yet does not apply it, he flouts the law in such a manner as to exceed the powers bestowed upon him." *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349,355 (5th Cir. 2009).

In this case, the arbitrators were presented with a motion to compel seeking an adverse ruling since documents were missing in discovery, namely written confirmation required by state law. The arbitrators were given the *Beckstrom* case to review and undersigned counsel argued the requirement of written disclosure. See Exhibit A- Excerpt from Closing Argument in Motion to Vacate and Exhibits.

Mr. Leblanc, admitted that he did not provide written disclosure, illustrations, mathematical calculations, explanations and did not retain any telephone conversations notes from his conversations with Mrs. Detraz. Yet the arbitration panel disregarded uncontested testimony and exceeded their powers when they found that the claim was clearly erroneous. The arbitrators did not address whether or not state law was satisfied or not and it could not have been since the evidence submitted was uncontroverted.

Thus, the award should not have been confirmed, but instead, vacated on grounds that the arbitrators exceeded their powers.

***10 CONCLUSION**

The court committed clear error by failing to grant the motion to vacate because the arbitration panel clearly exceeded their power by disregarding the law on fiduciary duties. The trial court's ruling granting the motion to confirm arbitration award should be overruled and the case should be reinstated.

Appendix not available.

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