

No. 1-12-3508

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BETTIE PAYTON-WHITE,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 11 M1 302332
)	
ANTHONY WEIR,)	Honorable
)	James E. Snyder,
Defendant-Appellee.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiff failed to show that trial court abused its discretion in barring plaintiff from rejecting arbitration award for defendant and in entering judgment on award, where there is no record of proceedings for the motion to bar rejection and where plaintiff arguably demonstrated deliberate and pronounced disregard for the arbitration process by arriving after the hearing had concluded without sufficient extenuating circumstances.

¶ 2 Plaintiff Bettie Payton-White appeals from a judgment in favor of defendant Anthony

Weir entered upon an arbitration award in her negligence action for personal injury arising from

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a vehicular collision. Plaintiff contends on appeal that the trial court erred in granting defendant's motion to bar her from rejecting the award and in entering judgment on the award because she was late for the arbitration due to extenuating circumstances -- health conditions slowing her ability to walk -- rather than absent in bad faith as the arbitrators found. For the reasons stated below, we affirm.

¶ 3 In August 2011, plaintiff filed a personal injury complaint alleging that a November 2010 collision between vehicles driven by plaintiff and defendant was caused by defendant's negligent driving. Defendant's answer admitted that the collision occurred but denied negligence and contested damages.

¶ 4 The court assigned the case to mandatory arbitration, and the arbitration hearing was scheduled for 8:30 a.m. on May 29, 2012. On that day, the arbitrators entered an award for defendant for \$436 in costs, finding that plaintiff did not participate in the hearing in good faith because she did not appear either in person or through counsel until 8:48 a.m., "after the defendant left." The award noted that the hearing both began and ended at 8:45 a.m.

¶ 5 Defendant filed a motion to bar plaintiff from rejecting the award based on her failure to appear at the arbitration hearing.

¶ 6 Plaintiff responded, alleging that her failure to timely appear in person or through counsel arose from her health issues that "prevented her from being able to walk fast enough to get to the arbitration center within 15 minutes from three blocks away." She alleged that she

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arrived with counsel at the arbitration center at about 8:46 a.m., by which time defendant "had been allowed by the arbitrators to leave" and an award for defendant was being entered. Plaintiff also alleged that the arbitrators "contended they were without discretion to require the Defendant to stay [past] the 15 minute grace period and had permitted the Defendant to leave at 8:45." She argued that a party who appears before the hearing has concluded cannot be barred on the basis of non-attendance, and that the key issue for failure to participate in good faith is whether the party acted with deliberate and pronounced disregard for the arbitration process and the court. She also argued that the arbitration manual suggesting a "practice to wait at least 15 minutes after the scheduled hour before proceeding to an *ex parte* hearing and award" was not binding upon the arbitrators. Thus, she argued that her rejection of the award on the day it was issued should stand.

¶ 7 Plaintiff's response was supported by an affidavit from her attorney averring that he and plaintiff left his office at 111 West Washington Street in Chicago at about 8:20 a.m. to walk to the arbitration center¹ but "unbeknownst to me" her health issues "greatly affected her gait and walking speed" so that "we were only able to proceed to the arbitration at a very slow pace" while "rush hour traffic prevented our ability to catch a taxi." When they arrived at about 8:46 a.m., "the arbitrators informed us that the Defendant had left at exactly 8:45, and that the arbitrators had no discretion to require [him] to stay past the 15 minute 'grace period.'" Counsel

¹ The arbitration center is located at 222 North LaSalle Street, about three blocks away from counsel's office.

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averred that he and plaintiff intended, and were prepared, to participate in the arbitration hearing in good faith.

¶ 8 Defendant replied in support of his motion to bar rejection, claiming that plaintiff in her response had admitted not only to arriving late at the arbitration hearing "but that they had not even left counsel's office at the time that the arbitration was scheduled to start." Defendant argued that plaintiff's health condition was unsubstantiated because she did not provide an affidavit from plaintiff herself or her physician. Defendant also argued that bad faith in arbitration is not limited to intentional obstruction but includes intentional disregard or inept preparation for the hearing. No counter-affidavit or other evidence was attached to defendant's reply.

¶ 9 Hearing on the motion to bar rejection was scheduled for September 11, 2012. On that day, the court entered judgment on the arbitration award for defendant for \$436 in costs, in an order finding that plaintiff was barred from rejecting the award.

¶ 10 Plaintiff filed a motion to reconsider the September 11 order, supported by an affidavit from plaintiff herself that she argued had been unavailable at the September 11 hearing. Plaintiff's affidavit was similar to that of her attorney, and she averred that "[d]ue to my health issues, I am only able to walk very slowly." The court heard and denied the reconsideration motion on November 13, 2012, and this appeal timely followed.

¶ 11 We note before proceeding to the merits of this appeal that the record does not include a

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transcript or appropriate substitute (Ill. S. Ct R. 323 (eff. Dec. 13, 2005)) for any proceedings herein, including the hearings on the motion to bar rejection and the reconsideration motion.

Plaintiff is obligated to provide us a sufficiently complete record of the trial court proceedings to support her claims of error, so that we must presume in the absence of such a record that the court's orders conformed to the law and had a sufficient factual basis. *In re Marriage of Gulla and Kanaval*, 234 Ill. 2d 414, 422 (2009). In particular, an issue relating to a trial court's factual findings and the basis for its legal conclusions cannot be reviewed absent a record of the proceedings. *Id.* Our review is not precluded by the absence of transcripts if the record contains all that is necessary to dispose of the issues raised under the applicable standard of review.

Midwest Builder Distributing, Inc. v. Lord & Essex, Inc., 383 Ill. App. 3d 645, 655 (2007).

¶ 12 On appeal, plaintiff contends that the trial court erred in barring her from rejecting the arbitration award and entering judgment thereon, arguing that she was late for the arbitration hearing due to extenuating circumstances rather than absent in bad faith as the arbitrators found. She contends that the arbitrators acted under the mistaken belief that they had no discretion to extend the recommended 15-minute grace period, and thus that this case is governed by our decision in *Zietara v. DaimlerChrysler Corp.*, 361 Ill. App. 3d 819 (2005).

¶ 13 Supreme Court Rule 91(b) requires that parties to a mandatory arbitration hearing "must participate in the hearing in good faith and in a meaningful manner" and provides that:

"If a panel of arbitrators unanimously finds that a party has failed

to participate in the hearing in good faith and in a meaningful manner, the panel's finding and factual basis therefor shall be stated on the award. Such award shall be *prima facie* evidence that the party failed to participate in the arbitration hearing in good faith and in a meaningful manner and a court, when presented with a petition for sanctions or remedy therefor, may order sanctions *** including, but not limited to, an order debarring that party from rejecting the award, and costs and attorney fees incurred for the arbitration hearing and in the prosecution of the petition for sanctions, against that party." Ill. S. Ct. R. 91(b) (eff. June 1, 1993).

¶ 14 The purpose of Rule 91(b) is to prevent parties from physically appearing at, but refusing to participate in, arbitration hearings. *Reyes v. Menard, Inc.*, 2012 IL App (1st) 112555, ¶ 17; *Nix v. Whitehead*, 368 Ill. App. 3d 1, 9 (2006). (By contrast, Rule 91(a) (eff. June 1, 1993) governs appearance at mandatory arbitration and provides that a party not present at the hearing, either in person or through counsel, thereby waives his right to reject the award.) Mere inept preparation for the arbitration hearing does not constitute a failure to participate in the hearing in good faith and a meaningful manner under Rule 91(b). *Reyes*, ¶ 45. Because the arbitrators' findings are *prima facie* evidence, they may be refuted, and indeed the circuit court can find bad

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faith even where the arbitrators found that the party in question acted in good faith. *Id.*, ¶ 18.

The circuit court's decision to bar a party from rejecting an arbitration award under Rule 91(b) is a matter of the court's discretion reviewed on an abuse of discretion basis, with the issue being whether the party's conduct was characterized by a deliberate and pronounced disregard for the arbitration rules and the court. *Id.*, ¶¶ 14, 19.

¶ 15 In *Zietara*, we held that a party does not fail to appear at an arbitration hearing for purposes of Rule 91(a) where he arrives before the arbitrators have entered an award and before the opposing party has departed. *Zietara*, 361 Ill. App. 3d 819, 822 (2005). This court followed *Zietara* in *Nix*, where the plaintiff arrived at the arbitration hearing after counsel for one defendant had already left and while counsel for another defendant was leaving. *Nix*, 368 Ill. App. 3d at 8. While the arbitrators' manual suggests a 15-minute grace period, it is not mandatory and does not deprive the arbitrators of their discretion to allow brief additional time for an absent party to appear. *Nix*, 368 Ill. App. 3d at 6-7, citing *Zietara*, 361 Ill. App. 3d at 823. The circuit court or the arbitrators err by refusing to exercise their discretion in the mistaken belief that they have no discretion. *Zietara*, 361 Ill. App. 3d at 823. Thus, where a party arrives at an arbitration hearing shortly after the grace period but before an award is entered, and the arbitrators enter an award on the basis that they lack discretion to do otherwise once the grace period expires, it is not the party who refuses to participate in bad faith under Rule 91(b) but the arbitrators who prevent the party from participating. *Nix*, 368 Ill. App. 3d at 9, see also *Zietara*,

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361 Ill. App. 3d at 822 ("Plaintiff's conduct did not amount to a deliberate and pronounced disregard where the arbitrators did not permit plaintiff to participate in the hearing.") However, the *Nix* court emphasized the limited nature of its holding, noting that:

"We do not condone tardiness, and our decision here is not meant to imply that a party who is significantly late in arriving at the hearing would necessarily be beyond the scope of Rule 91(a). Such tardiness could conceivably constitute a failure to be present under Rule 91(a), and could result in debarment of the party from rejecting the arbitration award." *Nix*, 368 Ill. App. 3d at 8.

¶ 16 Here, plaintiff and her attorney came to the arbitration hearing late, arriving one to three minutes after the recommended 15-minute grace period ("grace" or "grace period"), similar to the two minutes past grace in *Nix* and up to five minutes past grace in *Zietara*. They arrived after defendant had left but before the arbitrators entered an award. The arbitrators then issued an award including findings of bad faith and that plaintiff and counsel appeared after defendant had left the hearing, and the matter went before the circuit court on a motion to bar rejection. As noted above, a motion to bar rejection is a matter of the circuit court's discretion reviewed by this court on an abuse of discretion basis, and the circuit court is not bound by the findings of the

arbitrators

but may make its own decision on whether the party in question demonstrated deliberate and pronounced disregard for the arbitration process.

¶ 17 Plaintiff maintains that the arbitrators professed to lack discretion regarding her late arrival, as in *Zietara*, so that *Zietara* should govern here. Firstly, absent a record of the proceedings on the motion to bar or the motion to reconsider, we cannot know what evidence defendant may have introduced to counter plaintiff's affidavits, or credibility determinations the court may have made, on this key point. Moreover, plaintiff and counsel averred that the arbitrators claimed a lack of discretion to keep defendant at the hearing past the grace period, while the *Zietara* arbitrators expressed an "understanding that they had 'no discretion' to hear the matter if a party arrived more than 15 minutes late to the arbitration" and the *Nix* arbitrators merely asserted that the plaintiff's counsel "had arrived too late to present plaintiff's case." *Nix*, 368 Ill. App. 3d at 8; *Zietara*, 361 Ill. App. 3d at 821. In other words, *Zietara* and *Nix* were framed in terms of the arbitrators' discretion to proceed with the hearing after the plaintiff arrives late, while the instant case concerns their discretion to keep defendant at the hearing once the grace period passes. This is a vital distinction between *Zietara* and *Nix*, where at least one defendant was still present, and the instant case where defendant had left the hearing. In considering the motion to bar rejection, the court could have properly concluded that, while it is erroneous under *Zietara* and *Nix* to not allow a party to proceed with arbitration when the

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opposing party is present, it is not erroneous for the arbitrators to allow a present party to leave at the end of the grace period absent a reason to keep the party or its witnesses at the hearing. No such reason was provided to the arbitrators here, and thus whether or not they knew they had the discretion or authority to keep the hearing in session is moot as they were not provided any reason to exercise that authority.

¶ 18 Moreover, just because the arbitrators may have believed that they lacked discretion, it does not follow that the circuit court similarly acted here without discretion. The court could very well have made a finding of bad faith and barred plaintiff from rejection based on its independent analysis of the evidence and argument put before it. However, the record of that evidence and argument is fatally incomplete to our consideration of plaintiff's contention of error. Stated another way, we cannot conclude on this record that a finding of plaintiff's deliberate and pronounced disregard for the arbitration, and thus the orders barring rejection and denying reconsideration, constituted an abuse of discretion.

¶ 19 That is particularly so on the evidence that *is* before us. Plaintiff and counsel attribute their tardiness to plaintiff's unidentified medical condition affecting her walking pace. However, assuming *arguendo* that defendant did not present evidence contradicting the averred condition, plaintiff was presumably aware of her condition even if counsel was not. They allowed only about 10 minutes to travel approximately three blocks to the hearing and pass through the security measures for the arbitration center, which is potentially insufficient even for a healthy

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walker. Moreover, as defendant notes, plaintiff's counsel could have acted to prevent adjournment and defendant's departure by timely providing the arbitrators a reason to keep the hearing in session: he could have walked to the hearing ahead of plaintiff and told the arbitrators that she was on her way, or phoned the arbitrators to inform them that they were on their way. The court could reasonably consider plaintiff's failure to take such simple measures to be reckless -- taking risks a party or attorney would not dare for a trial in the circuit court -- and thus indicative of deliberate and pronounced disregard for the arbitration process. Under such circumstances, and absent a complete record as noted above, we cannot conclude that the trial court erred by barring plaintiff from rejecting the award or by denying reconsideration thereof.

¶ 20 Accordingly, the judgment of the circuit court is affirmed.

¶ 21 Affirmed.