

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-12797
Non-Argument Calendar

KASHYAP BAKHAI,
a Florida citizen,

Plaintiff-Appellee,

versus

BDO USA, P.C.,
a Virginia professional corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:24-cv-23896-RKA

Before JORDAN, ABUDU, and ANDERSON, Circuit Judges.

PER CURIAM:

BDO USA appeals the district court’s order confirming Kashyap Bakhai’s arbitration award and denying its motion to vacate the award. BDO raises two issues. First, it contends that the award was procured by fraud because a witness testified falsely before the arbitrators. *See* 9 U.S.C. § 10(a)(1). Second, BDO says that the arbitrators exceeded their powers by modifying the parties’ agreement, entering a contradictory award, and disregarding the law. *See* § 10(a)(4). We affirm.¹

I

A

Mr. Bakhai is a certified public accountant who provides services to high-net-worth clients. He became a partner at BDO and entered into a partnership agreement. Under that agreement, BDO’s “Board of Directors . . . may for cause (as defined in Section 11.5) terminate the interest in the Partnership of any Partner at any time.”

Section 11.5 of the agreement provides:

For all purposes of this Agreement, “cause” entitling the Board of Directors to terminate a Partner’s interest, shall mean, in each case in the determination of the Board of Directors:

¹ Because we write for the parties, we assume their familiarity with the record and set out only what is necessary to explain our decision.

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- (a) such Partner's material breach of any applicable covenant under this Agreement;
- (b) such Partner's material breach of any written policy of the Partnership, including but not limited to the Partnership's Code of Conduct; . . .
- (d) gross negligence or willful misconduct by such Partner in the performance of his/her duties;
- (e) such Partner's material failure to perform his/her duties or make continued, material economic contributions to the Partnership to an extent that such Partner no longer deserves to remain a Partner; . . .
- (i) conduct by such Partner that has caused, or could reasonably be expected to cause, substantial injury, whether monetary or otherwise, to the Partnership, its business or its reputation; [and]
- (j) such Partner's pursuit of activities that are materially adverse or contrary to the best interests of the Partnership or its business[.]

BDO's Board of Directors unanimously voted to terminate Mr. Bakhai's partnership interest for cause. That decision was based on two events. First, the Board believed that Mr. Bakhai had leaked confidential information about one of BDO's clients that was later used against the firm in a lawsuit. Second, in the Board's view, Mr. Bakhai had intentionally failed to disengage a client who had sexually harassed a firm employee.

Mr. Bakhai initiated arbitration against BDO for breach of contract. He denied the accusations against him and asserted that

BDO acted in bad faith because he wasn't given an opportunity to disengage the client or explain why he hadn't done so yet. BDO argued that the business judgment rule under Delaware law entitled its decision to deference. BDO also asserted that a preponderance of the evidence demonstrated that it had cause, as defined in the agreement, to terminate Mr. Bakhai.

A three-person arbitration panel heard testimony and reviewed evidence for six days. One of Mr. Bakhai's clients, Desiree Perez, testified on his behalf by video deposition. She testified that Mr. Bakhai was not the source of the leaked information.

On cross-examination, BDO's counsel asked Ms. Perez if she had ever spoken to Paul Schwiep (Mr. Bakhai's counsel) before testifying. Ms. Perez said that Mr. Schwiep had called her about a week before to confirm that she was coming in for the deposition. Then BDO asked if that was the first time she had spoken to Mr. Schwiep. Ms. Perez said, "yes." A few questions later, BDO asked whether she "ha[d] any conversations with Mr. Schwiep with regard to [her] preparation for today's deposition." She replied, "just [']am I going to be here.[']" After that, BDO's counsel asked, "[w]ho did you meet with in preparation for your deposition today?" Ms. Perez said, "no one."

B

The panel ruled in favor of Mr. Bakhai in a 2-1 decision.

The majority first reasoned that the business judgment rule did not apply to a company's breach of contract. Significantly, it noted that sometimes "[t]he language of a contract . . . may give

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rise to a situation similar to the business judgment rule.” Those cases “involve contracts that used language such as ‘vested with final, binding, and conclusive authority’ or ‘all decisions, determinations and interpretations shall be final and binding on all participants’ or ‘sole and absolute discretion’ or ‘of which the committee shall be the sole judge.’” But “[t]here is . . . no such language in the contract here.” Mr. Bakhai “did not contract to give the BDO [B]oard final, binding authority or sole and absolute discretion in determining if there was cause to terminate his partnership interest.”

The majority also concluded that the evidence did not support BDO’s conclusion that Mr. Bakhai was the leak of the confidential information and that BDO failed to give Mr. Bakhai sufficient process regarding the disengagement of the client before terminating his partnership interest. Therefore, the majority concluded, BDO breached its contract with Mr. Bakhai.

As part of the award, the majority determined that Mr. Bakhai was entitled to recover his reasonable attorney’s fees incurred in the arbitration. Mr. Bakhai’s attorneys submitted a fee application including a log documenting the time they spent on the matter.

One entry was for 1.7 hours and read: “Call with Mr. Schwiep re: witness Desiree Perez for final hearing; Draft brief memorandum regarding same; Coordinate deposition dates with witness.” Another one was for 1.9 hours and read: “Telephone conversation with D. Perez; draft email to opposing counsel; draft

memo re: interview.” A third said: “Confer with P. Schwiep. Review notes from call with Desiree Perez.” Approximately two weeks after that, one of Mr. Bakhai’s attorneys logged: “Telephone conversation with D. Perez.” And the same description was used for a time entry one week after that.

C

BDO moved the district court to vacate the award on three grounds. Only two of those grounds are raised on appeal.

First, BDO asserted that the award was procured by fraud because Ms. Perez committed perjury when she falsely testified that she had only one brief, non-substantive phone call with Mr. Bakhai’s attorneys before her deposition.

Second, BDO argued that the arbitrators exceeded their powers in several ways. According to BDO, the arbitrators ignored the words (emphasis ours) in Section 11.5 of the agreement: “‘cause’ . . . shall mean, *in each case in the determination of the Board of Directors*, (a)” The award is also “irrational,” BDO argued, because the majority simultaneously (1) concluded that BDO did not have cause to terminate Mr. Bakhai at the time that it did, and (2) credited BDO’s assertion that it would have terminated Mr. Bakhai’s employment after the firm converted from a partnership to a corporation and all former partners became at-will employees.²

² We appreciate BDO’s acknowledgement that its final argument below—that the arbitrators “manifestly disregarded the law”—is foreclosed by binding

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The district court confirmed the award to Mr. Bakhai and denied BDO's motion to vacate. BDO now appeals.

II

On appeal of an order confirming or vacating an arbitration award, we review the district court's factual findings for clear error and its legal conclusions de novo. See *NuVasive, Inc. v. Absolute Med., LLC*, 71 F.4th 861, 872 (11th Cir. 2023).

III

A

A federal district court "may" vacate an arbitration award "where the award was procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). "This Court uses 'a three part test to determine whether an arbitration award should be vacated for fraud.'" *NuVasive*, 71 F.4th at 878 (quoting *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988)).

First, the moving party must establish the fraud by clear and convincing evidence; second, the fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration; and third, the person seeking to vacate the award must demonstrate that the fraud materially related to an issue in the arbitration.

precedent. See *S. Commc'ns Servs., Inc. v. Thomas*, 720 F.3d 1352, 1358 (11th Cir. 2013).

Id. (internal quotation marks omitted). The movant is not required “to establish that the result of the proceedings would have been different had the fraud not occurred,” but must show “that perjury prevented [the] losing party from fully and fairly presenting his case or defense.” *Bonar*, 835 F.2d at 1383 & n.8 (internal quotation marks omitted).

Here, the district court found that, although Ms. Perez’s testimony was false, there was not clear and convincing evidence that she purposefully lied. On appeal, that factual finding is subject to clear error review. *See NuVasive*, 71 F.4th at 878. A “finding that is plausible in light of the full record—even if another is equally or more so—” is not clearly erroneous. *Cooper v. Harris*, 581 U.S. 285, 293 (2017) (internal quotation marks omitted).

BDO has not shown that the district court clearly erred when it found that BDO failed to establish by clear and convincing evidence that Ms. Perez intentionally lied. BDO speculates that Ms. Perez must have lied because her sworn answer omitted multiple long conversations that the fee application says took place. But that is insufficient to meet BDO’s high burden to show that the district court clearly erred. Witnesses can be mistaken; they can forget things; they can misunderstand questions. Some of the entries in the redacted fee application in the record do not state unequivocally that an attorney spoke to Ms. Perez. For example, the entry for 1.7 hours states that one attorney spoke to Mr. Schwiep about Ms. Perez “for final hearing.” Moreover, the fee application does not indicate which attorneys spoke with Ms. Perez or what

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those conversations were about. And BDO never moved the district court for an evidentiary hearing, at which the court could have assessed the credibility of Ms. Perez. Cf. *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1341 (11th Cir. 2002) (“Some motions challenging arbitration awards may require evidentiary hearings[.]”) (brackets omitted).

The district court also concluded that the testimony was not material to the arbitrators’ decision. Whether we review that conclusion as a factual finding or as a mixed question of law and fact, we discern no error.

BDO argues that Ms. Perez was a key witness and the arbitrators’ knowledge of her false testimony would have undermined her credibility. But even if we assume this is true, the majority could have credited her testimony that Mr. Bakhai was not the source of the leak nonetheless, particularly if they believed she had not intentionally lied. More importantly, the award was not based predominantly on Ms. Perez’s testimony. The majority also credited the testimony of Alex Spiro, the lead attorney for the recipient of the leaked information, who likewise testified that Mr. Bakhai was not the source of the leak. The majority further noted that there was no contrary testimony from any of the Board’s investigators. And it concluded that the lack of due process afforded to Mr. Bakhai made BDO’s decision “fatally flawed.”

We conclude that the district court’s factual findings are not clearly erroneous. Thus, BDO has not established the first element

of fraud and the third element of materiality under *Bonar*. The district court did not err in rejecting BDO’s § 10(a)(1) challenge.

B

Next, BDO argues that the arbitrators exceeded their powers. “While a federal court may vacate an arbitration award when it ‘exceeds the scope of the arbitrator’s authority,’ few awards are vacated because the scope of the arbitrator’s authority is so broad.” *Wiregrass Metal Trades Council AFL-CIO v. Shaw Env’t & Infrastructure, Inc.*, 837 F.3d 1083, 1087 (11th Cir. 2016) (citations omitted).

“Under [§] 10(a)(4), an arbitration award may be unenforceable, but only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice.” *Reach Air Med. Servs. LLC v. Kaiser Found. Health Plan Inc.*, 160 F.4th 1110, 1119 (11th Cir. 2025) (internal quotation marks and brackets omitted). “It is not enough to show that the arbitrator committed an error—or even a serious error.” *Id.* (ellipse and brackets omitted). And “an arbitrator’s actual reasoning is of such little importance to our review that it need not be explained—the decision itself is enough.” *Id.* at 1120. “Our sole question under § 10(a)(4) is whether the arbitrator (even arguably) performed the assigned task, not whether she got the outcome right or wrong.” *Id.* (internal quotation marks, ellipse, and brackets omitted).

BDO first argues that the award ignores the following words (emphasis ours) in Section 11.5 of the partnership agreement: “‘cause’ . . . shall mean, *in each case in the determination of the Board*

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of Directors: (a) . . .” Had the majority considered that language in the agreement, BDO says, they would have concluded that the determination of “cause” was within the Board’s discretion, as long as the Board didn’t act in bad faith.

But this argument simply misconstrues the award. As noted, the arbitration panel specifically considered whether the language of Sections 11.4 and 11.5 imbued the Board with near-absolute discretion to determine whether cause for termination exists, and they concluded that it did not:

The language of a contract, however, may give rise to a situation similar to the business judgment rule. Several of the cases cited by the Respondent are in this vein. . . . These involve contracts that used language such as “vested with final, binding, and conclusive authority” or “all decisions, determinations and interpretations...shall be final and binding on all participants” or “sole and absolute discretion” or “of which the committee shall be the sole judge.”

When such language is used in a contract, then yes, the courts will give deference to the corporate decision-maker unless the claimant can show bad faith. There is, however, no such language in the contract here. It simply says that a partner’s interest may be terminated “for cause” by a vote of 75% of the board. Bakhai did not contract to give the BDO board final, binding authority or sole and absolute discretion in determining if there was cause to terminate his part-

nership interest. He didn't agree that the board's decision would stand as long as its members acted in good faith or had a reasonable basis for it.

Under the FAA, it is not the role of courts to determine whether the arbitrators interpreted the agreement correctly. "Our sole question under § 10(a)(4) is whether the arbitrator (even arguably) performed the assigned task[.]" *Reach Air Med. Servs.*, 160 F.4th at 1120 (citation modified). Here, the arbitrators did not ignore the contract and therefore did not exceed their powers.

BDO's final argument—that it would have terminated Mr. Bakhai's employment anyway—is without merit. Our cases have held that "an award that is arbitrary or capricious is not required to be enforced." *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992). "An award is arbitrary and capricious only if a ground for the arbitrator's decision cannot be inferred from the facts of the case." *Id.* (internal quotation marks omitted). BDO contends that the award is capricious because the majority simultaneously (1) concluded that BDO did not have cause to terminate Mr. Bakhai at the time that it did, and (2) credited BDO's assertion that it would have terminated Mr. Bakhai's employment after the firm converted from a partnership to a corporation and all former partners became at-will employees. This argument is non-sequitur. That BDO would have fired Mr. Bakhai had he been an at-will employee is irrelevant to the issue of whether BDO had cause to terminate his partnership interest under their contract. The award is not arbitrary or capricious.

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IV

We affirm the district court's order confirming Mr. Bakhai's arbitration award and denying BDO's motion to vacate the award.

AFFIRMED.