

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

14-P-949

KEVIN KAY

vs.

FVFM INSURANCE AGENCY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This matter involves a dispute between an insurance salesperson, Kevin Kay, and his former employer, Association Benefits Insurance Agency, Inc. (ABIA, now known as FVFM). Pursuant to the parties' "producer agreement," the dispute was sent to an arbitrator. The arbitrator determined that ABIA/FVFM owed Kay \$174,507 in deferred compensation, as defined by the producer agreement, and that the five-year noncompete clause in the producer agreement was overly broad and would be limited to three years. Both parties filed independent Superior Court actions -- Kay to confirm, FVFM to vacate -- that were later consolidated. A Superior Court judge confirmed so much of the arbitrator's award as awarded Kay the \$174,507 but vacated so much as reduced the producer agreement's noncompete clause to a three-year period. FVFM has appealed.

For present purposes the facts may be stated simply. The entity then known as ABIA was in the business of selling various insurance products. Kay became employed by ABIA in 2001, mostly selling workers' compensation policies in New Hampshire and then attempting to cross-sell the insureds various other more lucrative products. In 2004 ABIA decided to formalize the relationship; Kay (and various other salespeople) and ABIA entered into formal "producer contracts." By his contract Kay was to receive various commissions on his sales. Both parties were free to terminate the contract, Kay at any time for any reason, ABIA at any time for "cause" and on thirty-day notice for any other reason. Upon termination other than for cause, the contract specified that Kay was to receive deferred compensation to be paid out over a sixty-month period with the total payout amount to be based on his "book of business." The agreement also contained a five-year noncompete agreement. Finally, the agreement contained a broad-form arbitration agreement.

In 2011, ABIA, apparently then in financial distress, sold its business to an entity known as HUB. ABIA then changed its name to FVFM and, essentially, went out of business, remaining "live" only as a pay-through entity for amounts to be received from HUB and to satisfy the deferred compensation provisions in the various producer contracts. At that time ABIA/FVFM

terminated Kay's and various other producers' contracts for, in the arbitrator's words, "convenience," offering the salespeople a certain buyout under their deferred compensation agreements; ABIA/FVFM offered Kay a \$118,804 buyout. Kay refused, believing that this buyout undervalued his book of business.

ABIA/FVFM then filed an arbitration demand, generally asserting that it was obligated to pay Kay nothing under his deferred compensation clause because Kay had materially breached the producer agreement by, essentially: (i) acting as the police chief for some hamlet in New Hampshire; and (ii) passing along confidential information in an effort to sell his book of business to some other entity. Kay denied ABIA/FVFM's allegations, claimed that ABIA/FVFM owed him \$185,000 in deferred compensation, and charged that the noncompete clause in his producer contract was unenforceable. The arbitrator essentially found that Kay did not materially breach any of the provisions of his producer contract and that under the formula provided for in the producer contract, ABIA/FVFM owed Kay \$174,507 in deferred compensation. The arbitrator also held that while Kay's noncompete clause could be enforced, its five-year provision was overly broad and would be limited to a three-year period.

As previously noted, the Superior Court judge affirmed in part, and vacated in part, the arbitration decision. Relevant

here, the judge held that even if the arbitrator was wrong as to his factual findings and misconstrued the producer contract's deferred compensation provisions, there existed no valid basis to set aside the arbitrator's award of \$174,507 to Kay. On the other hand, the judge held that the arbitrator exceeded his authority when he reduced the effective term of Kay's noncompete clause to a three-year period.

Although Kay apparently takes issue with the Superior Court judge's conclusion as to the noncompete clause, he did not file a separate notice of appeal and makes no formal argument on this point. Accordingly, we will not address the point further.

Although ABIA/FVFM also raises a variety of other arguments, they all essentially boil down to the assertion that the arbitrator made the wrong call with respect to Kay's damages award. Reduced to its essentials, the ABIA/FVFM contention on appeal is that the record leads to only one reasonable conclusion, which is that Kay materially breached the producer agreement and deserves no deferred compensation whatsoever, and that the arbitrator therefore exceeded his authority by "ignoring" Kay's actions. As the Superior Court judge reasoned -- reasons well founded, which we adopt as noted -- this would not constitute grounds to vacate the arbitrator's decision.

We quote from the Superior Court judge's analysis, which is both legally correct and is quite persuasive.

"As a starting point, the court notes that, to the extent that ABIA is attempting to argue that [the arbitrator] exceeded the scope of his authority by concluding Kay did not materially breach the Agreement and by determining it owed Kay \$174,507 in deferred compensation, the arguments fail. First, Section 12 of the Agreement establishes that 'any dispute[s] or controvers[ies]' between the parties 'arising' under the Agreement or with respect to its 'interpretation or implementation' would be resolved by 'binding arbitration' in accordance with the American Arbitration Association's rules and that the arbitrator's award would be 'final.' . . . Whether Kay's actions constituted a material breach of the Agreement and the proper interpretation of Section 6(c) [the deferred compensation provision] clearly fall within this broad grant of authority to decide any disputes between the parties. Moreover, with ABIA's 'Demand for Arbitration,' which asserted that Kay's breach of the Agreement excused it from having to perform, and Kay's counterclaim, which argued ABIA owed him \$185,000 in deferred compensation under Section 6(c), the parties essentially authorized [the arbitrator] to decide these issues. ABIA cannot now successfully claim [the arbitrator] exceeded his authority in deciding these matters merely because he decided them in favor of Kay."

Judgment affirmed.

By the Court (Rapoza, C.J.,
Berry & Maldonado, JJ.¹),

Clerk

Entered: March 30, 2015.

¹ The panelists are listed in order of seniority.