

NOV 28 2008

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. AZ-07-1409-MkEMo
)
 THE ROMAN CATHOLIC CHURCH)
 OF THE DIOCESE OF TUCSON) Bk. No. 04-04721
 aka THE DIOCESE OF TUCSON,)
)
 Debtor.)
)
 _____)
)
 LAWRENCE EUGENE GOMES and)
 BEVERLY J. GOMES,)
)
 Appellants,)
)
 v.) **MEMORANDUM¹**
)
 THE ROMAN CATHOLIC CHURCH)
 OF THE DIOCESE OF TUCSON;)
 CREDITORS' COMMITTEE; LINA)
 RODRIGUEZ, Special Arbitrator;))
 UNITED STATES TRUSTEE,)
)
 Appellees.)
 _____)

Argued and Submitted on October 17, 2008
in Phoenix, Arizona

Filed - November 28, 2008

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable James M. Marlar, Bankruptcy Judge, Presiding

¹This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 Before: MARKELL, EFREMSKY,² and MONTALI, Bankruptcy Judges.

2 This appeal is brought by pro se litigants, Lawrence E.
3 Gomes and his wife, Beverly J. Gomes, whose tort claim against
4 the debtor, the Roman Catholic Diocese of Tucson, was rejected by
5 a special arbitrator appointed to adjudicate all such tort
6 claims. The Gomes cannot overcome the fact that in 2005, when
7 they were represented by counsel and presumably on the advice of
8 counsel, they stipulated to the Debtor's Third Amended and
9 Restated Plan of Reorganization, under which the special
10 arbitrator was appointed to handle, evaluate, and decide tort
11 claims against the Debtor. And on the decisive point for this
12 appeal, the bankruptcy plan is explicit: "The decision of the
13 Special Arbitrator is final and nonappealable." The bankruptcy
14 court underscored this point when it confirmed the bankruptcy
15 plan: "All decisions of the Special Arbitrator shall be final and
16 there shall be no right of appeal."

17 In short, the debtor's confirmed chapter 11 plan
18 contemplated and established that the special arbitrator would be
19 the final decisionmaker on all tort claims against the debtor.
20 All claimants understood that when they elected to be settling
21 claimants, that was the arrangement they were choosing.

22 Nevertheless, the Gomes appealed after a decision by the
23 special arbitrator disallowing and dismissing their tort claim,
24 and they sought a new trial on the matter. They asserted that
25 the special arbitrator had acted improperly and beyond the bounds
26 of her authority. The bankruptcy court correctly ruled that the

27
28 ²Hon. Roger L. Efremsky, Bankruptcy Judge for the Northern
District of California, sitting by designation.

1 Gomes are and were bound by the terms of the bankruptcy plan,
2 under which the special arbitrator's decisions were final and
3 could not be appealed. We AFFIRM.

4
5 FACTS

6 The Diocese of Tucson filed bankruptcy in 2004 as the result
7 of a large number of complaints of sexual abuse by clergymen in
8 the diocese. Mr. Gomes and his wife filed suit against the
9 diocese, alleging that Mr. Gomes had been sexually abused by a
10 priest there in 1964, when he was seven years old.³

11 Under the debtor's bankruptcy plan, each claimant could
12 choose to be a nonsettling claimant and have a trial on his claim
13 or a settling claimant whose claim would be adjudicated by the
14 special arbitrator. Mr. Gomes and his wife chose to be settling
15 claimants and stipulated to binding arbitration of their tort
16 claim under Article 15 of the Third Amended and Restated Plan of
17 Reorganization.⁴

18
19 ³The excerpts of record do not show when, where, or in what
20 court Mr. Gomes filed his original tort claim against the
21 diocese, but there is no dispute that such a claim was properly
22 filed. The excerpts of record do include an undated amended
23 proof of claim charging sexual abuse against the diocese, which
24 the Gomes filed with the bankruptcy court. The form, which the
25 diocese distributed to all claimants, says, "This proof of claim
26 form must be received no later than 4:00 p.m. Mountain Standard
27 Time, Friday, April 15, 2005." A handwritten notation at the
28 bottom of the form identifies the claimant as "#80."

⁴The stipulation, dated August 10, 2005, was filed by the
attorney G. David DeLozier on behalf of claimants #2, 80, and
253, and it states, "4. On his ballot, Claimant elected to become
a Non-Settling Tort Claimant. 5. Claimant now desires to revoke
his election to be a Non-Settling Tort Claimant . . . but would
instead like to be treated as a Settling Tort Claimant and to

(continued...)

1 The bankruptcy court appointed Lina Rodriguez, a retired
2 judge of the Pima County Superior Court, as the special
3 arbitrator to handle and rule on the complaints against the
4 diocese. As noted, under the terms of the bankruptcy plan as
5 approved by the court, the special arbitrator's decisions on the
6 tort claims were final and nonappealable.

7 The Gomes filed their complaint against the diocese after
8 the statute of limitations on the alleged tort had run. But Mr.
9 Gomes claimed that he had repressed the memory of the sexual
10 abuse, which would toll the statute of limitations. On September
11 17, 2007, the special arbitrator conducted a trial on the
12 repressed-memory claim, as the bankruptcy plan required, during
13 which she reviewed "two notebooks of exhibits submitted by the
14 claimants" along with their depositions, as well as expert
15 testimony and reports. She concluded:

16 The Special Arbitrator finds and concludes that
17 Mr. Lawrence Gomes' memory of his sexual molestation .
18 . . was not repressed nor did he suffer from any other
19 mental incompetence as defined under Arizona law; thus
20 the statute of limitations was not tolled. The Special
21 Arbitrator finds and concludes that Mr. Gomes always
22 retained sufficient facts that would have put him, or
23 any reasonable person on notice to investigate whether
24 his injury was caused by [the priest's] alleged
25 conduct. Inasmuch as Mr. Gomes claim was not filed
26 within the two years following his reaching the age of
27 majority, the Special Arbitrator finds that Mr. Gomes'
28 claim and Mrs. Gomes' derivative claim are barred by
the statute of limitations. **It is therefore ordered
dismissing [sic] with prejudice Mr. and Mrs. Gomes'
claims herein.**

25 ⁴(...continued)

26 have his claim determined pursuant to Article 15 of the Plan,
27 and, if allowed, treated and paid pursuant to the Settlement
28 Trust Agreement." There is no indication in the record of how
long Mr. DeLozier had represented Mr. Gomes before this
stipulation was entered or whether the binding arbitration rules
of Article 15 had been explained to him.

1 The special arbitrator's decision, issued September 24, 2007, is
2 Docket #1150 in case 4-04-bk-04721, filed October 29, 2007.
3 Citation omitted, emphasis in original.

4 In order to accommodate Mr. Gomes, the trial on the
5 repressed-memory claim was conducted at the Wilmot Prison, where
6 he was an inmate.⁵ He was therefore able to appear and testify
7 in person, he was able to participate and assist his counsel at
8 the trial, he was able to call another prison inmate to appear
9 and testify at the trial, and he was able to call a Department of
10 Corrections treating psychologist as another in-person witness.
11 The Gomes subsequently contended and argued to the bankruptcy
12 court and in their appeal that holding the trial in the prison
13 was illegal.

14 Up until this point, including the stipulation agreeing to
15 binding arbitration and the trial on the repressed-memory claim,
16 the Gomes were represented by counsel.

17 On October 1, 2007, after receiving the special arbitrator's
18 decision, Mr. Gomes mailed several documents he prepared to the
19 special arbitrator, including a notice of termination of service
20 of his lawyer, Mr. DeLozier, and a "Demand for Trial de Novo" and
21 a "Motion for New Trial." A central argument in the demand and
22 motion for a new trial was the assertion that it was illegal to
23 hold the trial in the prison.

24
25 ⁵As a matter of policy, the Arizona Department of
26 Corrections will not transport a prisoner to a courthouse for a
27 civil trial. The special arbitrator originally planned to hold
28 the trial on Mr. Gomes's repressed-memory claim in a regular
courtroom and to have Mr. Gomes appear by telephone. But
arrangements were then made to hold the trial in the prison. All
parties, including Mr. Gomes through his attorney, agreed.

1 On October 22, 2007, the special arbitrator granted Mr.
2 DeLozier's motion to withdraw as attorney of record for the
3 Gomes. The record does not indicate whether Mr. DeLozier
4 withdrew because of Mr. Gomes notice of termination or whether
5 his motion was already pending. The following day, the special
6 arbitrator denied the Gomes' demand and motion for a new trial.
7 She noted that "great effort" had been expended to arrange to
8 conduct the trial in the prison, all for Mr. Gomes's benefit, and
9 that all parties, including the Gomes' lawyer, had agreed to the
10 venue. She found that the assertion that it was illegal to
11 conduct the trial in prison was "without merit."

12 The Gomes also made "various arguments with regard to the
13 statute of limitations and repressed memory." These arguments
14 were also dismissed:

15 The Special Arbitrator finds and concludes that
16 Mr. Gomes' assertions with regard to the statute of
17 limitations and repressed memory are without merit. The Special Arbitrator has been well briefed by the
18 attorneys herein with regard to the statute of
19 limitations issues and repressed memory. On that
20 basis, the Special Arbitrator ordered a bifurcated
21 trial on the issue of repressed memory. The Special
22 Arbitrator made a factual determination based upon her
evaluation of the credibility of the witnesses,
included that of Mr. Gomes, that Mr. Gomes did not
repress his memory of the sexual molestation by [the
priest]. On that basis, all claims filed by Mr. and
Mrs. Gomes were dismissed with prejudice as untimely
under the provisions of the statute of limitations.

23 These findings and conclusions are contained in an order by the
24 special arbitrator dated October 23, 2007, and filed October 29,
25 2007. Docket #1151.

26 In addition, "The Special Arbitrator finds and concludes
27 that all remaining arguments set forth by Mr. Gomes in his Motion
28 for a New Trial" are without merit. Id. The special arbitrator

1 concluded her order as follows: "**Pursuant to the Bankruptcy Plan**
2 **herein, these rulings are final and nonappealable.**" Id. (emphasis
3 in original).

4 Nonetheless, the Gomes then filed "numerous pleadings" with
5 the bankruptcy court seeking to overturn the special arbitrator's
6 disallowance and dismissal of their claims and refusal to grant a
7 new trial on repressed memory. The court found that "[w]hether
8 intentionally or by default, the Gomes elected to have their
9 claims against the [diocese] heard and decided through the
10 arbitration proceedings," which were final and nonappealable. It
11 therefore denied all of their pleadings.

12 The Gomes timely appealed on October 29, 2007.⁶

13
14 ISSUE

15 Can the appellants avoid the provisions of the Third Amended
16 and Restated Plan of Reorganization, under which they elected
17 binding arbitration of their claims, and ask a court to review
18 the special arbitrator's final and nonappealable decision?⁷

19
20
21

⁶In addition to their notice of appeal, the Gomes filed
22 several pleadings before oral argument, none of which were
23 proper, but all of which we have reviewed.

24 ⁷The appellants frame the issues as follows:

25 "1. Are the decisions of an arbitrator reviewable
26 and appealable? When the bankruptcy rules and laws are
27 not followed?

28 "2. Does the arbitrator have the authority to
alter the rules? Conduct a trial? In a prison?

"3. Do her decisions have to cite fact, law and
science or can it be 'just because I said so?'"
Appellants' Opening Brief at vii.

1 JURISDICTION

2 The bankruptcy court had jurisdiction under 28 U.S.C.
3 §§ 157(a) and (b)(2)(I). We have jurisdiction under 28 U.S.C.
4 § 158.

5
6 STANDARD OF REVIEW

7 "We review . . . conclusions of law, including
8 interpretation of provisions of the Bankruptcy Code, de novo."
9 Mendez v. Salven (In re Mendez), 367 B.R. 109, 113 (9th Cir. BAP
10 2007).

11
12 DISCUSSION

13 Having agreed to binding, nonappealable arbitration of their
14 tort claim against the Diocese of Tucson, the Gomes may not
15 appeal a decision of the special arbitrator even though it went
16 against them. The bankruptcy court confirmed the diocese's
17 bankruptcy plan, and the Gomes stipulated to the binding
18 arbitration. See Order Approving Stipulation (September 22,
19 2005) Docket #897. If the Gomes objected to the bankruptcy plan
20 and the procedures it set in place, they could have appealed the
21 confirmation order itself. They did not, and they are therefore
22 bound by the plan, as are all other parties. "Once a bankruptcy
23 plan is confirmed, it is binding on all parties and all questions
24 that could have been raised pertaining to the plan are entitled
25 to *res judicata* effect. See 11 U.S.C. § 1141(a)." Trulis v.
26 Barton, 107 F.3d 685, 691 (9th Cir. 1995).

27 Under Article 12 of the bankruptcy plan, a special
28 arbitrator would resolve all tort claims, and those claims that

1 were disallowed had no further rights:

2 A Settling Tort Claimant, a Relationship Tort Claimant
3 or an Unknown Tort Claimant whose Claim is Disallowed
4 pursuant to the claim determination procedures set
5 forth in the Plan will receive no distribution under
6 the Plan and will have no further Claim against the
7 Diocese, the Reorganized Debtor, a participating Third
8 Party, a Settling Party or a Settling Insurer[.]⁸

9 Article 15 of the bankruptcy plan sets out the procedures
10 and criteria for the special arbitrator to use in evaluating tort
11 claims, such as the Gomes'. If the special arbitrator disallows a
12 claim, "Claimant will receive nothing under the Plan and will
13 have no further Claim or right against the Debtor, the
14 Reorganized Debtor, the Trustee or the Special Arbitrator."

15 The Gomes' Demand for Trial De Novo cites the federal
16 arbitration statute, 28 U.S.C. § 657(c). As the bankruptcy court
17 correctly found, that statute governs court-mandated arbitration
18 as part of alternative dispute resolution in bankruptcy adversary
19 proceedings and does not apply to a confirmed reorganization
20 plan. Once a reorganization plan is confirmed, it is a new
21 contract among the parties, who are bound by it. See, e.g. Hillis
22 Motors, Inc. v. Hawaii Auto. Dealers' Ass'n 997 F.2d 581 (9th
23 Cir. 1993) ("A reorganization plan resembles a consent decree and
24 therefore, should be construed basically as a contract." Id. at
25 588.)

26 In the current case, the bankruptcy plan provides for a
27 special arbitrator to decide on allowing or disallowing tort
28 claims according to the procedures and criteria contained in the
29 plan. These procedures do not incorporate the dispute resolution

⁸As noted above, the Gomes had elected to be settling tort
claimants. See note 4.

1 statute in 28 U.S.C. § 657(c), and they do not allow for an
2 appeal of a special arbitrator's decision or a request for a new
3 trial. Rather, once the special arbitrator has disallowed a
4 claim, the rights of the claimants are terminated, and there is
5 no procedure in the bankruptcy plan for reviewing the special
6 arbitrator's decisions.

7 Where parties have agreed to binding, nonappealable
8 arbitration, courts should be extremely reluctant to review an
9 arbitrator's decisions. Otherwise "binding" arbitration would
10 become just another step in the litigation process. The unstated
11 premise in the appellants' argument in this case is that the
12 arbitrator's final and nonappealable decision should be
13 reviewable because the arbitrator did not follow the rules and
14 the law.

15 At oral argument, Mr. Gomes said that the special arbitrator
16 had acted improperly by bifurcating the trial on his repressed-
17 memory claim from a trial on his damage claim. There is no
18 showing that this was improper or that anything that the special
19 arbitrator did was improper. On the contrary, the record
20 indicates that throughout the handling of the Gomes' claim, the
21 special arbitrator acted properly and in accordance with the
22 debtor's reorganization plan and sound judicial conduct. Mr.
23 Gomes was given every opportunity to make his case and establish
24 the validity of his repressed-memory claim and his underlying
25 tort claim.

26 Although not directly applicable here, the issue of when a
27 party may appeal an arbitrator's decision despite a prior
28 agreement not to do so has arisen in other contexts. Under the

1 Federal Arbitration Act, 9 U.S.C. 10(a),

2 Judicial review of arbitration awards . . . is limited.
3 Booth v. Hume Publ'g, Inc., 902 F.2d 925, 932 (11th
4 Cir. 1990). The [act] presumes that arbitration awards
5 will be confirmed and lists only the following four
6 situations in which they may be vacated:

7 (1) where the award was procured by corruption,
8 fraud, or undue means;

9 (2) where there was evident partiality or
10 corruption in the arbitrators, or either of them;

11 (3) where the arbitrators were guilty of misconduct
12 in refusing to postpone the hearing, upon sufficient
13 cause shown, or in refusing to hear evidence pertinent
14 and material to the controversy; or of any other
15 misbehavior by which the rights of any party have been
16 prejudiced; or

17 (4) where the arbitrators exceeded the powers, or
18 so imperfectly executed them that a mutual, final, and
19 definite award upon the subject matter submitted was
20 not made.

21 PuroSystems Inc. v. John S. Fralc et al. (In re Fralc), 2008

22 Westlaw 1932311 (Bankr. D. Ariz), at 6.

23 In addition to the statutory grounds for reviewing a
24 nonappealable arbitrator's decision, the Fralc court said that
25 courts had recognized three additional nonstatutory grounds for
26 vacating an arbitration award: "First, . . . if it exhibits
27 manifest disregard of law. . . . Second, . . . if it is arbitrary
28 and capricious. Third, . . . if enforcement of the award is
contrary to public policy." Id. at 6-7, citations omitted.

Despite appellants' statement of the issues (see note 4
above), our review of the record here reveals that none of these
statutory or nonstatutory grounds for vacating the arbitrator's
binding decision are present.

The trial and arbitration in this case was conducted by a
seasoned arbitrator who was a retired state court judge. The
issue involved - repressed memory syndrome - requires the
judgment and probity that such an arbitrator could bring to this

1 proceeding, and there is no showing that she ruled arbitrarily -
2 she didn't decide by rolling dice, picking alternate winners and
3 losers, or any other process other than the accepted hearing and
4 weighing of the parties' evidence against an existing legal
5 standard.

6 Moreover, the arbitration was one of many proceedings
7 conducted under the arbitration provisions of the bankruptcy
8 plan, and in addition to normal measures of procedural fairness
9 used in those and in this proceeding, the arbitrator went out her
10 way to accommodate Mr. Gomes by holding the proceeding where he
11 was incarcerated and allowing him to call witnesses who were
12 present at the trial.

13 Against this standard, we cannot find anything that would
14 cause us to ignore the nonappealability provision that the Gomes
15 agreed to.

17 CONCLUSION

18 The special arbitrator's ruling disallowing and dismissing
19 the Gomes' tort claim is not appealable, and the bankruptcy court
20 correctly dismissed appellants' motions for a new trial.

21 AFFIRMED.