STATE OF MICHIGAN

COURT OF APPEALS

ANN REDDING,

Plaintiff-Appellee,

v

OLLIE W. ROSE and O.W. ROSE & ASSOCIATES,

Defendants-Appellants.

UNPUBLISHED
January 7, 2000

No. 205604
Oakland Circuit Court
LC No. 95-507429 CZ

Before: Cavanagh, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's judgment confirming an arbitration award, pursuant to which defendants were ordered to pay plaintiff $14,780 on her trespass claim and were denied relief on their counterclaim for breach of a lease, conversion, and waste. We affirm.

Defendants argue that the arbitration award should be vacated pursuant to MCR 3.602(J)(1) on grounds that the arbitrator was biased and that he exceeded the scope of his powers by making several errors of law and unwarranted findings of fact. However, defendants' claim of error is not preserved for this Court's review. "It is well established that 'having invoked binding arbitration, the parties are required to proceed according to the applicable statute and court rule.' " *Konal v Forlini*, 235 Mich App 69, 73-74; 596 NW2d 630 (1999), quoting *Dick v Dick*, 210 Mich App 576, 588; 534 NW2d 185 (1995). Accordingly, in order to avoid confirmation of the arbitration award, defendants were required to utilize the procedure for vacating or modifying the award as set forth in MCR 3.602(J) and (K), which provide that an application to vacate or modify an award must be filed within twenty-one days after delivery of a copy of the award to the applicant. MCR 3.602(J)(2), (K)(1). Defendants failed to file an application to vacate or modify the arbitration award; instead, they simply submitted to the arbitrator a motion for reconsideration, which was denied, and then brought the instant appeal. Therefore, because the issue whether the arbitration award should be vacated was not raised before or addressed by the trial court, it is not preserved for appellate review. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998); *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 421; 546 NW2d 648 (1996).

Defendants have failed to establish the existence of grounds sufficient to justify vacating the arbitration award. MCR 3.602(A) "governs statutory arbitration under MCL 600.5001-600.5035; MSA 27A.5001-27A.5035", and provides a circuit court with only three options when an arbitration award is challenged: (1) confirm the award, (2) vacate the award if obtained through fraud, duress, or other undue means, or (3) modify the award or correct errors that are apparent on the face of the award. *Konal, supra* at 74. MCR 3.602(J)(1) provides that a court may not vacate an award unless:

> (a) the award was procured by corruption, fraud, or other undue means;
>
> (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
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> (c) the arbitrator exceeded his or her powers; or
>
> (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

MCR 3.602(J)(1) further provides that "[t]he fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award."

Defendants argue that the arbitrator in this case exceeded his powers by making several errors of law concerning the parties' agreement, and that vacation of the arbitration award is therefore warranted pursuant to MCR 3.602(J)(1)(c). Arbitrators exceed their powers whenever they act beyond the material terms of the contract from which they draw their authority. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496; 475 NW2d 704 (1991); *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176-177; 550 NW2d 608 (1996). Where it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrator through an error in law has been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, a reviewing court may set aside the award and decision. *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982); *Dohanyos, supra* at 176.

However, a general principle of arbitration precludes courts from upsetting an award for reasons that concern the merits of the claim. *Gordon Sel-Way, supra* at 500; *Dohanyos, supra* at 177. Courts may not engage in contract interpretation, which is a question for the arbitrator, *Konal, supra* at 74; nor may this Court review a claim that an arbitrator made a factual error, *id*. at 75. Rather, "[i]t is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable." *Gavin, supra* at 429. The legal errors alleged by defendants are dependent upon numerous findings of fact, which are not subject to review by this Court, *Konal, supra* at 75, and require the interpretation of the parties' agreement, which is a question strictly for the arbitrator, *id*. at 74. Moreover, we find that no legal error is clearly apparent on the face of the arbitration award. Accordingly, this Court may not substitute its judgment for that of the arbitrator. *Dohanyos, supra* at 177-178.

Defendants further contend that the arbitrator exceeded the scope of his authority by awarding plaintiff damages in the amount of $14,780; defendants claim that no evidence was provided to support such an award, and that the arbitrator erred in trebling the damage award pursuant to MCL 600.2919(1); MSA 27A.2919(1). It is the parties' arbitration agreement which confers upon the arbitrator the authority to act. *Gordon Sel-Way*, *supra* at 496. Accordingly, "an award will be presumed to be within the scope of the arbitrators' authority absent express language to the contrary." *Id*. at 497. In the instant case, the parties' arbitration agreement broadly conferred upon the arbitrator the authority to resolve "all issues raised by [the] pleadings," and further provided that "the arbitrator shall have all the powers as set forth in MCLA 600.5001, *et seq.*, regarding the issuance of a monetary award." Therefore, the arbitrator was empowered to fashion an award of damages which would compensate plaintiff for any harm she suffered as a result of defendants' actions. See *Gordon Sel-Way*, *supra* at 498.

The arbitrator's finding of fact, based on the evidence presented, that plaintiff suffered approximately $4,927 in actual damages is not subject to review by this Court. Although defendants contend that this amount included an improper award of attorney fees, the arbitrator clearly stated in his opinion that "attorney fees cannot be awarded and shall not be awarded and neither party shall pay the attorney fee on behalf of the other party." Furthermore, the arbitrator did not err in awarding treble damages pursuant to MCL 600.2919(1)(b); MSA 27A.2919(1)(b), which provides that any person who

> digs up or carries away stone, ore, gravel, clay, sand, turf, or mould or any root, fruit, or plant from another's lands . . . without the permission of the owner of the lands . . . is liable to the owner of the land . . . for 3 times the amount of actual damages. If upon the trial of an action under this provision or any other action for trespass on lands it appears that the trespass was casual and involuntary, . . . judgment shall be given for the amount of single damages only.

Plaintiff clearly pleaded trespass in her complaint; additionally, she alleged that the trespass had resulted in extensive damage to the property, including the destruction of foliage and trees and the removal of topsoil. The arbitrator found that a trespass had occurred; that the trespass was not merely negligent or unintentional; and that the trespass had resulted in the removal of topsoil. Accordingly, the arbitrator did not err in awarding treble damages pursuant to MCL 600.2919(1)(b); MSA 27A.2919(1)(b). Moreover, "[t]he fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." MCR 3.602(J)(1); see also MCL 600.5025; MSA 27A.5025.

Finally, defendants argue that the arbitrator's award must be vacated because it was the result of partiality, bias, and prejudice. This contention is meritless. A party attacking the impartiality of an arbitrator has the burden of proof. *Emmons v Lake States Ins Co*, 193 Mich App 460, 466; 484 NW2d 712 (1992). To overturn the arbitration award, the partiality or bias must be certain and direct, not remote, uncertain or speculative. *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988); *Kauffman v Haas*, 113 Mich App 816, 819; 318 NW2d 572 (1982). Absent certain

and direct evidence of partiality, there is no basis for vacating an arbitration award. *Belen, supra* at 645.

Defendants' claim of "evident partiality" is simply a restatement of their contention that the arbitrator exceeded his authority by making several errors of law and making unwarranted findings of fact. As noted by this Court in *Belen, supra* at 641, "MCR 3.602(J)(1)(b), by its own terms, indicates a degree of partiality that is readily observable." *Id*. at 645. Defendants cite nothing more than alleged errors of fact and law as evidence of the arbitrator's partiality and bias. Accordingly, MCR 3.602(J)(1)(b) does not provide a basis for the vacation of the arbitration award.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly