STATE OF MICHIGAN

COURT OF APPEALS

FAWZI B. SHAYA and MARY SHAYA,

Plaintiffs-Appellees,

v

UNIVERSAL STANDARD MEDICAL LABORATORIES, INC.,

Defendant-Appellant.

UNPUBLISHED
August 29, 2000

No. 209948
Oakland Circuit Court
LC No. 96-525523-CK

Before: Griffin, P.J., and Holbrook, Jr. and J.B Sullivan*, JJ.

PER CURIAM.

Defendant appeals as of right from a bench trial judgment for plaintiffs which followed the trial court's denial of its motion for summary disposition based on an agreement to arbitrate. Plaintiffs commenced this breach of contract action against defendant seeking a $500,000 balloon payment pursuant to the terms of a promissory note given by defendant as partial consideration for the sale of the customer list of plaintiff's medical laboratory. We reverse.

Defendant argues on appeal that the trial court improperly denied its motion for summary disposition pursuant to MCR 2.116(C)(7) (agreement to arbitrate). We agree. MCR 2.116(C)(7) permits summary disposition where the claim is barred because of an agreement to arbitrate. *Maiden v Rozwood*, 461 Mich 109, 118 n 3; 597 NW2d 817 (1999). This Court reviews a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo to determine whether the moving party is entitled to judgment as a matter of law. *Hetrick v Friedman*, 237 Mich App 264, 266; 602 NW2d 603 (1999). This Court considers all affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construes the pleadings in favor of the plaintiff. *Patrick v US Tangible Investment Corp*, 234 Mich App 541, 543-544; 595 NW2d 162 (1999). A motion under MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery. *Id.*, at 544.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Michigan's public policy strongly favors arbitration as a means of settling disputes. *Hetrick, supra,* at 277; *Rembert v Ryan's Family Steak Houses, Inc,* 235 Mich App 118, 123; 596 NW2d 208 (1999). In *Rembert,* this Court described the Michigan Arbitration Act, MCL 600.5001 *et seq.*; MSA 27A.5001 *et seq.*, as "a strong and unequivocal legislative expression of Michigan's pro-arbitration public policy." *Id.* Arbitration clauses should be liberally construed to resolve all doubts in favor of arbitration. *Grazia v Sanchez,* 199 Mich App 582, 584; 502 NW2d 751 (1993). Arbitration can be statutory or common law as follows:

> This Court distinguishes between "statutory arbitration" and "common law" arbitration. "The Michigan arbitration statute provides that an agreement to settle a controversy by arbitration under the statute is valid, enforceable, and irrevocable *if the agreement provides that a circuit court can render judgment on the arbitration award*." *Tellkamp v Wolverine Mut Ins Co,* 219 Mich App 231, 237; 556 NW2d 504 (1996) (emphasis supplied), citing MCL 600.5001; MSA 27A.5001. . . Statutory arbitration agreements are irrevocable except by mutual consent. MCL 600.5011; MSA 27A.5011.
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> In contrast, if the arbitration agreement does not provide "that judgment shall be entered in accordance with the arbitrators' decision," the contract involves common-law arbitration rather than statutory arbitration. *Beattie v Autostyle Plastics*, 217 Mich App 572, 578; 552 N.W.2d 181 (1996) (citing MCL 600.5001 *et seq.*; MSA 27A.5001 *et seq.*) Under the "unilateral revocation rule," when the agreement is for common-law arbitration, either party may unilaterally revoke the arbitration agreement at any time before the announcement of an award, regardless of which party initiated the arbitration. [*Hetrick, supra,* at 268-269.]

The intent to have statutory arbitration may also be found by reference to the American Arbitration Association rules. *Id.*, at 269.

In this case, the trial court denied defendant's motion for summary disposition initially on the authority of this Court's opinion in *Brucker v McKinlay Transport, Inc*, 212 Mich App 334; 537 NW2d 474 (1995) (*Brucker I*), vacated 454 Mich 8; 557 NW2d 536 (1997) (*Brucker II*). In *Brucker I,* the majority found an arbitration agreement to be invalid because, while it invoked statutory arbitration, it also purported to impermissibly grant to the circuit court the authority to decide questions of contract interpretation. In vacating *Brucker I,* the Supreme Court agreed with the majority that certain parts of the agreement were invalid, but "agree[d] with Judge O'Connell, however, that it would be unnecessary and improvident to reject entirely the arbitration agreement in this case." *Brucker II,* at 18. As will be explained, *infra,* based on *Brucker II* and decisions of this Court, we conclude that defendant was entitled to summary disposition on the grounds of the parties' agreement to arbitrate payment disputes.

Plaintiffs argue, for the first time on appeal, that the agreement was for common law arbitration and that they revoked it by the filing of their complaint. (In the trial court, plaintiffs argued that their agreement was an invalid *Brucker I* "hybrid" agreement.) Failure to raise this issue in the trial court

waives it for review. *Garavaglia v Centra,* 211 Mich App 625, 628; 536 NW2d 805 (1995). In any event, the agreement provided that defendant would determine the total collected revenue for the relevant time period, that if there was a dispute, "the parties agree that such dispute shall be settled by arbitration in Detroit, Michigan in accordance with the rules of the American Arbitration Association . . . , [and that] judgment on the arbitrator's award may be entered in any court having jurisdiction thereof." Because the agreement not only referenced the rules of the American Arbitration Association but also provided for entry of judgment on the arbitrator's award, plaintiff's claim that the agreement was for common law arbitration and was revoked by the filing of the complaint is without merit. Moreover, plaintiffs argued in their November 22, 1996, brief in opposition to defendant's motion for summary disposition, "The arbitration agreements at issue in this case . . . are *statutory* arbitration agreements pursuant to Dick [*v Dick,* 210 Mich App 576; 534 NW2d 185 (1995)] and Brucker [*Brucker I*]" [emphasis added.] We also find plaintiff's claim that *Brucker I* "had nothing of substance to do with the trial court's decision" at best disingenuous given plaintiffs' reliance on that case to successfully argue that defendant's motion for summary disposition should be denied, and given the trial court's explicit use of the case. In this Court, plaintiffs rely on *Whitaker v Giem & Associates,* 85 Mich App 511; 271 NW2d 296 (1978), wherein the Court stated that where an agreement is not in conformity with the statutory arbitration requirements, it will be held to be a common law arbitration. However, as noted *supra,* the agreement in this case is in conformity with the statutory arbitration requirements. *Hetrick, supra,* at 268-269. The fact that a certain phrase or word is inconsistent with the court rule and must be deleted does not render the entire agreement a common law agreement subject to unilateral revocation. *Brucker II, supra,* at 18.[1]

Similarly, for the first time on appeal, plaintiffs argue that defendant waived its right to assert arbitration. Again, plaintiff's failure to raise this issue in the trial court waives it for review on appeal. *Garavaglia, supra.* Defendant raised the issue of arbitration in their responsive pleading and in motions for summary disposition and reconsideration, but plaintiffs failed to request a ruling by the trial court to determine if defendant's four-month delay between raising the arbitration agreement as an affirmative defense and its subsequent motion for summary disposition constituted a waiver. See, *Campbell v St John Hospital,* 434 Mich 608, 617; 455 NW2d 695 (1990), affirming 170 Mich App 551, 560; 428 NW2d (1988) (trial court must determine whether two-year delay between raising arbitration agreement and subsequent motion for summary disposition based on arbitration agreement constituted waiver). We note that, had plaintiffs raised the waiver issue in the trial court, they would have faced a "heavy burden of proof" to show acts by defendant inconsistent with a demand for arbitration and resulting prejudice to plaintiffs arising therefrom as opposed to prejudice arising from their own choice to violate their agreement to arbitrate by filing suit. See, *Salesin v State Farm,* 229 Mich App, 346, 356; 581 NW2d 781 (1998); *Kauffman v Chicago Corp,* 187 Mich App 284, 291-292; 482 NW2d 716 (1991); *North West Mich Const v Stroud,* 185 Mich App 649; 462 NW2d 804 (1990).

[1] We also reject plaintiffs' claim, without citation to authority, that a bench trial is the same thing as arbitration. See, *Weiss v Hodge (Aft Rem),* 223 Mich App 620, 637; 567 NW2d 468 (1993).

Plaintiffs also claim that the language of the arbitration agreement impermissibly "purported to expand the jurisdiction of the court by allowing correction of the findings of law or fact, and/or to correct manifest errors." An arbitration agreement that calls for entry of a circuit court judgment must conform to the statute and court rule. *Brucker II, supra,* at 17. MCL 600.5021; MSA 27A.5021 provides that arbitration is to be conducted in accordance with the rules of the Michigan Supreme Court. The circuit court's authority over statutory arbitration is limited by MCR 3.602(J) and (K) to confirming, vacating, modifying, or correcting the award. *Konal v Forlini,* 235 Mich App 69, 74; 596 NW2d 630 (1999). Claims that the arbitrator erred in factual findings are beyond the scope of appellate review. *Id.,* at 75. However, conclusions of law will be set aside when it clearly appears on the face of the award that the arbitrators have made an error of law and that, but for that error, a substantially different award must have been made. *DAIIE v Gavin,* 416 Mich 407, 443; 331 NW2d 418 (1982). While parties are generally free to craft whatever alternate dispute resolution they choose, they are prohibited from reaching a private agreement which dictates a role for public institutions. *Brucker II, supra,* at 17. Parties to arbitration cannot, for example, create a hybrid form of arbitration wherein the circuit court, as opposed to the arbitrator, decides issues of contract interpretation. *Brucker II, supra,* at 17-18; *Konal, supra,* at 74*; Dick, supra* at 588-599. According to MCR 3.602(J)(1), the court may vacate an arbitration award if:

> (a) the award was procured by corruption, fraud, or other undue means;
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> (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitration, or misconduct prejudicing a party's rights;
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> (c) the arbitrator exceeded his or her powers; or
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> (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.
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> The 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(K)(1) provides that the court shall modify or correct the award if:

> (a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award;
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> (b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or
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> (c) the award is imperfect in a matter of form not affecting the merits of the controversy.

In the case at bar, the language which permits review of "findings of . . . fact" is inconsistent with the language of MCR 3.602, because neither the court rules nor case law provides for review of findings of fact. We therefore, pursuant to *Brucker II, Dick, supra,* and the severability clause[2] of the purchase agreement, delete "findings of . . . fact" from the agreement. However, pursuant to *Gavin, supra,* the language which permits review of "findings of law" is not inconsistent with the statute or court rules governing statutory arbitration. In *Gavin, supra,* at 432, the Court stated, "All would agree [arbitrators] are not free to decide disputes . . . by recourse to a coin toss, or other capricious means." The language "and/or to correct manifest errors" is arguably consistent with MCR 3.602(K) which permits modifying or correction of the award where there is "evident miscalculation" of figures or an "evident mistake" in the description of something referred to in the award. However, because of the limited judicial review of arbitration awards (and pursuant to the severability clause) we similarly strike that language. We note that the parties are not prohibited from utilizing the provisions of MCR 3.602.

Finally, while plaintiffs argue that *Brucker II* was explicitly intended to be prospective in nature and is therefore not applicable to the instant case, defendant argues that *Brucker II* did not create new law but rather is consistent with this Court's opinion in *Dick, supra,* in which an arbitration agreement was modified by striking the offending language. As noted, in *Brucker II,* the Supreme Court stated that parties to an arbitration agreement are not permitted to dictate roles for public institutions; that an arbitration agreement which calls for entry of a circuit court judgment must conform to the arbitration statute and court rule, neither of which permit the parties to use the courts as a resource for issuing advisory opinions, *Dick, supra;* but that the agreement at issue did contain certain invalid provisions. *Brucker, supra,* 17-18. The Court then stated:

> We agree with Judge O'CONNELL, however, that it would be unnecessary and improvident to reject entirely the arbitration agreement in this case. Our ruling today concerns an arbitration agreement executed in 1982, and implemented by rules of arbitration that were adopted by stipulation and executed without protest by the parties and the circuit court. From these events, we can discern neither prejudice to any party nor significant harm to the integrity of the court system. Accordingly, our analysis of the arbitration issue raised sua sponte by the Court of Appeals is prospective, and does not affect the stipulated manner of arbitration adopted by the parties in this case.
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> For these reasons, we vacate the judgment of the Court of Appeals, and remand the case to the Court of Appeals for consideration of the issues raised by the parties in their briefs on appeal. MCR 7.302(F)(1). [*Brucker, supra,* 454 Mich 17-18.]

Given that the Court neither invalidated the agreement nor reformed it, notwithstanding its approving citation to *Dick, supra,* a case wherein this Court reformed the agreement, we conclude that the prospectivity language was in the opinion because the Court intended to carve out an exception for the *Brucker* parties, that exception being remand to this Court for consideration of the issues raised by the

[2] The severability clause of the purchase agreement states that if any part of the agreement is found to be void or illegal the remaining clauses "shall nevertheless be continued in full force and effect to assure the parties obtain the benefit of their bargain to the fullest extent possible."

parties in their briefs on appeal. Indeed, on remand, this Court stated, "We emphasize that this opinion cannot and should not be read for the proposition that courts may engage in contract interpretation." *Brucker v McKinlay Transport (On Rem),* 225 Mich App 442, 447 n 2; 571 NW2d 548 (1997). However, we agree with defendant that the

Court did not create new law, but rather, while making an exception for the case before it, affirmed the reformation of agreements which invoke statutory arbitration. *Dick, supra*.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joseph B. Sullivan