STATE OF MICHIGAN

COURT OF APPEALS

DEMARIA BUILDING COMPANY, INC.,

Plaintiff/Counterdefendant-Appellee,

v

WORD OF FAITH INTERNATIONAL CHRISTIAN CENTER,

Defendant/Counterplaintiff-Appellant,

and

EDDIE PICKETT, SHREM/LUTTERMOSER ASSOCIATES, INC., MICHIGAN NATIONAL BANK, and EFFICIENT DESIGN, INC.,

Defendants.

UNPUBLISHED
July 14, 2005

No. 252892
Oakland Circuit Court
LC No. 1999-012237-CK

Before: Neff, P.J., Smolenski and Talbot, JJ.

PER CURIAM.

Defendant Word of Faith International Christian Center hired plaintiff as the general contractor for a project involving the construction of a sanctuary building at defendant's property in Southfield, but defendant terminated plaintiff's services before the construction was completed. Plaintiff filed this lawsuit for breach of contract, maintaining that it was terminated without cause. The parties stipulated to submit their dispute to binding arbitration. The arbitrator found that defendant breached the contract for convenience, rather than for cause, and awarded plaintiff total damages of $2,082,748.37. The trial court subsequently denied defendant's motion to vacate or modify the arbitration award and entered a judgment in favor of plaintiff consistent with the award. Defendant now appeals as of right. We affirm in part and reverse in part.

Defendant first argues that, because plaintiff failed to meet the substantial completion date set forth in the construction contract, the arbitrator was required to find as a matter of law that defendant terminated plaintiff for cause, rather than convenience. We disagree.

A trial court's decision to enforce, vacate, or modify an arbitration award is reviewed de novo. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003).

Defendant correctly observes that the "interpretation of unambiguous and unequivocal contracts is a question of law." *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994). Where contractual language is unclear or susceptible to multiple meanings, however, interpretation is a question of fact. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

In this case, the parties' breach of contract dispute was submitted to binding arbitration. Judicial review of an arbitration award is limited.[1] A court may not review an arbitrator's factual findings or decision on the merits. *Byron Center Public Schools Bd of Ed v Kent Co Ed Ass'n*, 186 Mich App 29, 31; 463 NW2d 112 (1990); *Donegan v Michigan Mutual Ins Co*, 151 Mich App 540, 549; 391 NW2d 403 (1986). A court may set aside an arbitration award only if it clearly appears on the face of the award or in the reasons for the decision that the arbitrator made an error of law and that, but for that error, a substantially different award must be made. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991); *DAIIE v Gavin*, 416 Mich 407, 428-429, 443; 331 NW2d 418 (1982); *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). In an arbitration arising from a contract dispute, the arbitrator is bound to render an award that comports with the terms of the parties' contract. *Gordon Sel-Way, Inc*, *supra* at 496. The role of the court is to examine whether the arbitrator has rendered an award that facially comports with the terms of the contract. *Id.*; see also *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 555-556; 682 NW2d 542 (2004). But a court may not engage in contract interpretation, which is a question only for the arbitrator, especially when it involves the application of questions of fact. *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999).

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[1] MCR 3.602(J)(1) identifies the circumstances in which a court can vacate an arbitration award:

> On application of a party, the court shall vacate an award if:
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> (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 arbitrator, or misconduct prejudicing a party's rights;
>
> (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.
>
> 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.

In this case, defendant has not shown that the arbitrator erred by considering evidence that the parties may have extended the contract completion date, notwithstanding the absence of a written time extension request by plaintiff. See *Belen v Allstate Ins Co*, 173 Mich App 641, 645-646; 434 NW2d 203 (1988). Defendant has also failed to show that the arbitrator made a clear error of law by apparently determining that defendant's actions or other considerations altered the substantial completion date. See *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003) (parties to a contract are free to mutually waive or modify their contract); see also *Phoenix Contractors, Inc v General Motors Corp*, 135 Mich App 787, 793-794; 355 NW2d 673 (1984) and *Verran v Blacklock*, 60 Mich App 763, 768; 231 NW2d 544 (1975) (interference by the opposing party can excuse a failure to comply with contract time provisions).

Furthermore, it is not apparent that a substantially different award would be required but for the alleged error concerning the project completion date. The parties' agreement does not specify the allowable damages for a failure to complete the project in the time indicated, nor does it list this contingency among the stated reasons justifying termination for cause. Additionally, contrary to what defendant argues, the arbitrator's decision was not based solely, or principally, on the arbitrator's reliance on a modified project completion date. Rather, the arbitrator found that defendant repeatedly violated the terms of the contract though the use of unapproved agents, its intentional failure to provide critical information about the project, and attempts to undermine plaintiff's relationships with subcontractors.

The question of a substantial or material breach based on the arbitrator's additional factual determinations was a question of fact to be decided by the arbitrator. Contrary to defendant's position, where reasonable minds could differ about the conclusions to be drawn from the evidence, the question whether a party committed a material or substantial breach is one of fact. See *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992); *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997); *Michaels v Amway Corp*, 206 Mich App 644, 651; 522 NW2d 703 (1994). Thus, this question is outside the proper scope of judicial review from an arbitration award. *Saveski, supra* at 555-556; *Byron, supra* at 31. Defendant has not demonstrated that the arbitration award would have been substantially different but for the arbitrator's decision regarding the completion date. Therefore, appellate relief is not warranted with respect to this issue.

Defendant also argues that the arbitrator erred by failing to find that defendant properly terminated plaintiff for cause due to plaintiff's use of substandard materials and workmanship. Because this determination requires review of the arbitrator's factual findings, which may not be disturbed on appeal, it provides no basis for appellate relief. *Saveski, supra* at 555-556; *Byron, supra* at 31.

Defendant next argues that the arbitration award should be modified to reflect that plaintiff, rather than defendant, was required to pay for building permit fees. We recognize that § 3.7.1 of the parties' contract supports defendant's position. But parties to a contract are free to mutually waive or modify contract provisions. *Quality Products & Concepts Co, supra* at 364. Here, Burlee Jackson, defendant's secretary/treasurer, testified that it was his understanding that defendant was responsible for paying the permit fees because he was told this by the project architect, Robert Luttermoser. As the arbitrator noted, Luttermoser was authorized to advise and

consult with defendant and was further authorized to act on its behalf under § 4.2.1 of the contract. Kent Broughman, plaintiff's estimator, stated that he did not include permit costs in the preliminary estimate he prepared. He further testified that, in his experience, owners regularly paid permit costs.

Given this evidence, the arbitrator could have found that, despite the language of § 3.7.1, the parties agreed to modify the contract so that defendant would be responsible for the permit fees. Under the circumstances, defendant has not shown that the arbitrator made a clear error of law that may be reviewed on appeal, as opposed to an "unwarranted" factual finding, which is not subject to appellate relief. See *Gavin*, *supra* at 428-429; *Saveski*, *supra* at 555, 557. Therefore, we decline to find that the arbitrator exceeded his authority by not crediting defendant with payment of the permit fees.

Defendant lastly argues that the arbitrator erroneously awarded plaintiff damages of $154,546, representing fees that plaintiff had previously waived in connection with the acceptance of change order #2. We agree.

We acknowledge that an arbitrator generally has broad powers to fashion remedies, even remedies that are not generally available in a court of law. See MCL 600.5025; MCR 3.602(J)(1). In this instance, however, the arbitrator's award of the waived fees is contrary to both Michigan law and the parties' agreement. Damages available for breach of a commercial contract are generally limited to the monetary value of the contract had the breaching party fully performed under it. *Corl v Huron Castings, Inc*, 450 Mich 620, 625, n 7; 544 NW2d 278 (1996), citing *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414-415; 295 NW2d 50 (1980). Here, under the plain language of the parties' contract, as amended by change order #2, had the parties fully performed, plaintiff would not have been entitled to recover the $154,546 in fees associated with change order #2. The arbitrator's "waived fee" award is facially contrary to this contract language. Had the arbitrator referred to this award as representing a form of exemplary damages not ordinarily awarded in a contract case, it might be supportable under MCL 600.5025 and MCR 3.602(J)(1), but the arbitrator specifically referred to this amount as an award for "waived fees." It is clear, therefore, that the arbitrator effectively added this amount to plaintiff's damages after plaintiff expressly agreed to waive it. In this circumstance, it was improper for the arbitrator to fashion an award that directly conflicted with the parties' express contract, as amended. *Gordon Sel-Way, Inc*, *supra* at 496-497; *Gavin*, *supra* at 428-429; *Saveski*, *supra* at 555-556.

Accordingly, we vacate the portion of the arbitrator's decision awarding plaintiff fees that were expressly waived by the acceptance of change order #2. The arbitration award is affirmed in all other respects.

Affirmed in part, reversed and vacated in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Michael J. Talbot