STATE OF MICHIGAN

COURT OF APPEALS

SAMUEL POSNER,

Plaintiff/Counter-Defendant-Appellant,

v

AUGUSTUS[1] SHANKER,

Defendant/Counter-Plaintiff-Appellee,

and

JAMES BUEHLER,

Defendant.

UNPUBLISHED
November 17, 2005

No. 256357
Ingham Circuit Court
LC No. 03-000395-CZ

Before: Donofrio, P.J. and Zahra and Kelly, JJ.

PER CURIAM.

Plaintiff Samuel Posner appeals as of right the trial court's order confirming an arbitration award requiring plaintiff to pay defendant Augustus Shanker $5,000 in attorney fees. Plaintiff also appeals a prior order changing venue from Oakland Circuit Court to Ingham Circuit Court. We vacate the trial court's order confirming the arbitration award and remand for entry of an order confirming the award while vacating the portion awarding attorney fees. We affirm the order changing venue.

I. Facts

Plaintiff was a client of Roney & Co., now known as Raymond James & Associates. James Buehler and defendant were brokers and employees of Raymond James & Associates.

[1] This spelling, though consistent with the majority of the lower court record, is inconsistent with the signature of this party as it appears on the NASD dispute resolution arbitration agreement. On that document, the party signed her name "Augusta Shanker."

This case arises out of plaintiff's arbitration action against Buehler, in which plaintiff alleged several claims all related to the sale of certain stocks.

Plaintiff filed with the National Association of Securities Dealers Regulation, Inc. (NASD) an arbitration action against Raymond James & Associates and Buehler. The arbitration was brought to resolve a dispute between plaintiff and the brokerage firm arising from actions taken by Buehler while defendant, plaintiff's usual broker, was out of town. Buehler brought defendant into the arbitration action as a third-party defendant. The arbitration was administered pursuant to the NASD code of arbitration procedure. All of the arbitration hearings were held in Oakland County. The arbitrators awarded defendant $5,000 in attorney fees "pursuant to common law."

Plaintiff filed a complaint in Oakland Circuit Court to vacate the arbitration award of attorney fees. Defendant moved to change venue to the Ingham Circuit Court. The Oakland Circuit Court granted defendant's motion. The case was transferred to Ingham Circuit Court. Defendant filed a counterclaim against plaintiff to confirm the arbitration award under 9 USC 9.

Plaintiff then moved for summary disposition arguing that the award of attorney fees was an apparent error of law because under the common law American rule attorney fees may not be awarded absent a specific statute, court rule, or exception authorizing such an award. Plaintiff also argued that defendant's counterclaim was untimely, having been filed more than one year after the arbitration award was rendered. Defendant responded by moving for summary disposition, arguing that the arbitration panel derived its power from the arbitration agreement, and under that agreement, the panel was authorized to determine any matter put into controversy by the parties' pleadings. Defendant further argued that her counterclaim was not untimely because, while it was filed slightly late, plaintiff stipulated to filing of the counterclaim and its tardiness was not prejudicial to plaintiff.

After holding its ruling in abeyance pending submission of supplemental authority, the court entered an order confirming the arbitration award. The court held that the award of attorney fees was within the scope of the arbitrator's authority because the parties' arbitration agreement set forth the arbitrator's authority to act and the issue of attorney fees was "specifically contemplated by the parties when they submitted their matter to arbitration." Plaintiff filed a motion for reconsideration, which the trial court denied.

II. Analysis

A. Confirmation of Arbitration Award

Plaintiff first argues that the trial court clearly erred in confirming the arbitrators' award of attorney fees "pursuant to common law." We agree. "We review de novo a trial court's decision to enforce, vacate, or modify a statutory arbitration award." *Tokar v Estate of Tokar*, 258 Mich App 350, 352; 671 NW2d 139 (2003).

Arbitrators derive their authority from the parties' arbitration agreement; thus, they are bound to act within those terms—the parties' contract is the law of the case. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496; 475 NW2d 704 (1991). Arbitrators exceed their power when they act beyond the material terms of the governing contract or by ignoring or

acting in contravention of controlling principles of law. *Detroit Automobile Inter-Ins Exch v Gavin*, 416 Mich 407, 433, 434; 331 NW2d 418 (1982). To invite judicial action to vacate an arbitration award, the character or seriousness of a claimed error of law must have been "so material or so substantial as to have governed the award, and but for which, the award would have been substantially otherwise." *Id.* at 443.

The parties submitted the underlying arbitration pursuant to a uniform submission agreement that stated, in pertinent part, that the parties agreed to submit to arbitration the matter in controversy, as set forth in the statement of claim, answers, cross claims and all related counterclaims and/or third party claims. The issue of attorney fees was put before the arbitrators by virtue of both plaintiff's and defendant's requests for such fees.

Nonetheless, we hold that, by awarding attorney fees "pursuant to common law," the arbitrators exceeded their power by acting in contravention of controlling principles of law. With respect to awards of attorney fees, Michigan follows the American rule. *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005).

> Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award. The American rule is codified at MCL 600.2405(6), which provides that among the items that may be taxed and awarded as costs are "[a]ny attorney fees authorized by statute or by court rule." [*Id.* at 707 (citation omitted).]

Attorney fees may also be awarded where the parties entered into an agreement that provides for the award of attorney fees. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

Here, the arbitrators did not award the attorney fees pursuant to statute or court rule. Nor did they award the attorney fees pursuant to the parties' arbitration agreement. Rather, they awarded the attorney fees "pursuant to common law," which is not a proper basis for such an award under the American rule. Unlike in *Henderson v Detroit Automobile Inter-Ins Exch*, 142 Mich App 203; 369 NW2d 210 (1985), the arbitrators here did not fail to specify the reason for granting attorney fees. Rather, the arbitrators specifically stated that attorney fees were awarded "pursuant to common law." And, despite defendant's contentions to the contrary, this language cannot simply be ignored. Thus, it clearly appears from the face of the award that the arbitrators made an error in law that was "so material or so substantial as to have governed the award, and but for which, the award would have been substantially otherwise." *Gavin, supra* at 443. Therefore, we vacate the trial court's order confirming the arbitration award and remand for entry of an order affirming the award, but vacating the offending portion.

B. Change of Venue

We next address plaintiff's argument that the trial court erred in granting defendant's motion to change venue. We disagree. A trial court's ruling on a motion to change venue is reviewed for clear error. *Colucci v McMillin*, 256 Mich App 88, 93; 662 NW2d 87 (2003). "'Clear error exists when the reviewing court is left with a definite and firm conviction that a

mistake has been made.'" *Id*., quoting *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000).

MCL 600.5031 governs venue for enforcement of statutory arbitration decisions. Here, the arbitration agreement did not specify a circuit court for enforcement of the arbitrators' decision. Under MCL 600.5031(1), venue is proper in the circuit court of the county where the adverse party resides or has a place of business. There is no dispute that defendant resides in Ingham County and works out of the East Lansing office of the brokerage firm. Therefore, venue was proper in Ingham Circuit Court.

In support of his argument that venue should not have been changed from Oakland Circuit Court to Wayne Circuit Court, plaintiff argues that, under § 10(a) of the Federal Arbitration Act, a motion to vacate must be filed in "the United States court in and for the district wherein the award was made" or in the corresponding county where the award was rendered. However, § 9 of the FAA states, "If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made." Section 10(a) of the FAA provides: "(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—". Thus, section 10(a) of the FAA clearly indicates appropriate venues for claims filed under the FAA. It does not provide any guidance regarding the appropriate venue for state claims not filed under the FAA and not filed federal courts. Because venue for plaintiff's state claim filed in state court was proper in Ingham Circuit Court pursuant to MCL 600.5031(1), we are not left with a define and firm conviction that the trial court made a mistake changing venue to that location.

We vacate the order affirming the arbitration award and remand for entry of an order affirming the arbitration award, but vacating the offending portion of the award. We affirm the order changing venue. We do not retain jurisdiction.[2]

/s/ Pat M. Donofrio
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly

[2] We decline to address plaintiff's argument that he was entitled to summary disposition on the ground that defendant's counterclaim was untimely because plaintiff failed to identify it as an issue in his questions presented on appeal. MCR 7.212(C)(5).