STATE OF MICHIGAN

COURT OF APPEALS

INDUSTRIAL POWER PRODUCTS,

Plaintiff-Appellant,

and

JOHN LIVERMORE and JAMES STEVENSON,

Plaintiffs,

v

FORD MOTOR COMPANY and RICHARD KUNEC,

Defendants-Appellants.

UNPUBLISHED
November 29, 2005

No. 257021
Wayne Circuit Court
LC No. 01-139069-CB

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

In this action for breach of contract, plaintiff Industrial Power Products appeals as of right from the trial court's order denying its motion to vacate an arbitration award in favor of defendant Ford Motor Company. We affirm.

I. Basic Facts and Procedural History

This case arises from the termination of an eight-year business relationship between plaintiff Industrial Power Products (IPP), a distributor of industrial drivetrain gearmotors, and defendant Ford Motor Company. In 1993, IPP began supplying Ford with several variations of the gearmotors used by Ford to operate its North American assembly plant conveyor systems. According to IPP, during the period between 1993 and 1999, the gearmotors supplied by it to Ford outperformed those provided to Ford by other gearmotor suppliers and, as a result, plaintiff was issued a "blanket order" for several of its gearmotors in August 1999. However, without ever having issued a release for purchases against that order, Ford cancelled the blanket order and deactivated IPP's supplier code in February 2001.

IPP and its principals, plaintiffs John Livermore and James Stevenson, subsequently filed the instant suit against Ford and defendant Richard Kunec, a senior project supervisor with Ford's conveyor engineering department, alleging that the blanket order issued to IPP

represented a contract to supply conveyor gearmotors for each of the forty-one assembly plants listed within the order, and that Ford's failure to meet its obligations under that agreement constituted a breach of that contract. Plaintiffs also alleged, among other things, that Ford's decision to cancel the blanket order before ever having executed a release against that order was prompted, not by any legitimate business consideration, but rather IPP's refusal to "play ball" with Kunec and several others by participating in a scheme of bribery and kickbacks violative of MCL 408.478 and the public policy of this state.

Defendants successfully sought summary disposition of plaintiffs' claims, arguing that an agreement to arbitrate any dispute arising from the blanket order, incorporated by reference into the terms of the blanket order issued to IPP through Ford's Global Terms for Production Parts and Non-Production Goods and Services (Global Terms), required that the trial court dismiss plaintiffs' suit pursuant to MCR 2.116(C)(7). The trial court agreed and, after dismissing Kunec from the suit, ordered the remaining parties to mediate and then arbitrate their dispute. Following a failed attempt to mediate, plaintiffs and defendant Ford proceeded to arbitration, wherein plaintiffs' renewed their claims against Ford as originally alleged in their complaint.

Following the summary dismissal of Livermore and Stevenson, and all but IPP's claim for breach of contract, the arbitrator concluded that Ford was not contractually obligated under the blanket order to purchase gearmotors from IPP and that, therefore, Ford's failure to do so and its decision to ultimately cancel that order and deactivate IPP's supplier code was not a breach of contract. Although also noting that this conclusion rendered moot the reasons for Ford's decisions in that regard, the arbitrator nonetheless addressed IPP's claim that Ford's actions were prompted by IPP having "blown the whistle" on the scheme of bribery and kickbacks allegedly rampant at Ford and, therefore, violated the requirement that Ford perform its obligations under the blanket order in good faith. In addressing that claim, the arbitrator concluded that there was "no explicit requirement of good faith dealing in the contract at issue here," and that any similar obligation otherwise imposed on Ford under the law was irrelevant, as the record failed to "support a finding on a preponderance of the evidence that Ford's action *vis-à-vis* IPP were lacking in good faith or legitimate business purpose."

Following issuance of the arbitrator's written award dismissing its claims against Ford, IPP returned to the trial court where it moved to vacate the award on the ground that the arbitrator had exceeded his powers. See MCR 3.602(J)(1)(c). Specifically, IPP argued that in concluding that the blanket order and Global Terms did not require that Ford act in good faith, the arbitrator ignored both the express terms of the blanket order and controlling principles of law. IPP further asserted that the arbitrator refused to hear evidence material to the controversy, see MCR 3.602(J)(1)(d), and also ignored evidence overwhelmingly establishing that Ford violated this good-faith requirement. Finding "no violation and no reason to vacate the arbitration award," however, the trial court denied the motion to vacate and entered an order confirming the arbitration award. This appeal followed.

II. The Agreement to Arbitrate

We first address IPP's claim that because the blanket order at issue here did not contain an arbitration clause, the trial court erred in ordering the parties to binding arbitration. As previously noted, the trial court entered its order compelling arbitration of this matter in connection with Ford's motion for summary disposition pursuant to MCR 2.116(C)(7). When a

defendant seeks summary disposition under MCR 2.116(C)(7) on the ground that the plaintiff's right to litigate its claims is precluded by an agreement to arbitrate, the trial court must decide as a matter of law whether the parties are bound by the arbitration agreement. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 98-99; 323 NW2d 1 (1982). Thus, whether an arbitration agreement exists and is enforceable is a question of law for the court, which is reviewed de novo on appeal. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000).

An arbitration provision is enforceable if it is a binding contract. *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 413; 550 NW2d 243 (1996); see also *Grazia v Sanchez*, 199 Mich App 582, 586; 502 NW2d 751 (1993) ("[c]ontract principles apply to arbitration agreements"). In determining the extent to which parties have agreed to be contractually bound by a written agreement, effect must be given to writings incorporated into that agreement by reference. *Whittlesey v Herbrand Co*, 217 Mich 625, 627-628; 187 NW 279 (1922). Here, as argued by IPP, the arbitration provision on which the trial court relied in compelling arbitration of this matter is not itself contained in the August 1999 blanket order. However, as previously noted, the blanket order expressly incorporated into its terms the terms set forth in Ford's Global Terms, which include an agreement to arbitrate any dispute arising from the blanket order.

IPP does not dispute that this agreement to arbitrate was incorporated by reference into the terms of the blanket order, or that such agreement required arbitration of the contractually based claims asserted by it in its complaint. Rather, IPP contends that because it was not provided with a copy of the Global Terms, it cannot be said to have agreed to the terms contained therein. In making this argument, IPP relies on several cases from other jurisdictions to assert that to be enforceable an agreement to arbitrate must be contained in the "primary" contract and must further constitute a knowing and voluntary waiver of the right to judicial process. However, it is well settled in Michigan that where additional documents or terms are made part of a written agreement by reference, the parties are bound by those additional terms even if they have never seen them. See *Ginsberg v Myers*, 215 Mich 148, 150-151; 183 NW 749 (1921). Moreover, aside from offering no binding precedential value, the cases cited by IPP are distinguishable in this regard, as the arbitration provisions at issue in each of those cases were either not incorporated by reference into the parties' primary agreements, see *Century Steel Erectors, Inc v Aetna Casualty & Surety Co*, 757 F Supp 659, 660-661 (WD Pa, 1990), improperly limited rights expressly granted by the statute under which the plaintiff complained, see, generally, *Trumbull v Century Marketing Corporation*, 12 F Supp 2d 683 (ND Ohio, 1998), or were asserted to bind entities not expressly a party to the agreement at issue, see *Nicholas A Califano, MD, Inc v Shearson Leahman Bros, Inc*, 690 F Supp 1354, 1355-1356 (SDNY, 1988). See also *Dougherty v Mieczkowski*, 661 F Supp 267, 275-276 (D Del, 1987) (finding question of fact regarding whether consumers were bound by the terms of an arbitration agreement incorporated by reference into a customer agreement of which the consumers claimed they were not aware). None of these circumstances are present here. Consequently, there being no dispute that the arbitration provision at issue here was properly incorporated by reference into the blanket order, we find no error in the trial court's decision to compel arbitration of the contractually based claims raised in the complaint. *Ginsberg*, *supra*.

III. Motion to Vacate Final Award and Order of Arbitration

We similarly find no error in the trial court's decision to deny IPP's motion to vacate the arbitration award. Judicial review of a binding arbitration award is limited to a determination

whether the arbitrator, through an error of law, has been led to a wrong conclusion that, "but for such error, a substantially different award must have been made." *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982). Thus, pursuant to MCR 3.602(J)(1), parties are conclusively bound by a binding arbitrator's decision absent a showing that the award was procured by duress or fraud, that the arbitrator or another is guilty of corruption or misconduct that prejudiced the party's rights, that the arbitrator exceeded his powers, or that the arbitrator refused to hear material evidence, refused to postpone the hearing on sufficient cause, or conducted the hearing in a manner that substantially prejudiced a party's rights.

With respect to the bases for setting aside the award of an arbitrator found in MCR 3.602(J)(1), IPP first argues that in concluding that it was not incumbent on Ford to act in good faith with respect to its dealings with IPP, the arbitrator exceeded his powers by ignoring the express terms of the writings setting forth the parties' respective obligations, as well as the common law covenant of good faith and fair dealing found to exist in all contracts, see *Hammon v United of Oakland, Inc*, 193 Mich App 146, 151-152; 483 NW2d 652 (1992), and the requirement of good faith statutorily imposed in contracts entered into by commercial parties, see MCL 440.1203.[1] See also *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996) (an arbitrator exceeds the scope of his powers when he acts in contravention of controlling principles of law). However, as noted above, in addition to concluding that nothing in the express terms of the blanket order bound Ford to act in good faith, the arbitrator also found that regardless whether a duty of good faith and fair dealing existed under any of the theories advanced by IPP, the record before him simply did "not support a finding on a preponderance of the evidence that Ford's actions *vis-à-vis* IPP were lacking in good faith or legitimate business purpose." In so finding, the arbitrator cited what he found to be "credible" testimony from several Ford witnesses who indicated that the decision to forgo purchases under the blanket order issued to IPP stemmed from Ford's efforts during the late 1990s to standardize its conveyor gearmotors on a global level, and the failure of IPP gearmotors to meet the specifications established by that standardization effort. Although IPP asserts that the evidence produced at the arbitration hearing establishes that Ford's claim of globally standardizing conveyor gearmotors was merely a pretext for retaliation against IPP for its efforts to resist the alleged scheme of bribery and kickbacks at Ford, the arbitrator's determination that this testimony was credible and represented a sound business reason for nonuse of the blanket order is a factual finding "beyond the scope of appellate review." See *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999) (claims that challenge an arbitrator's factual findings are not subject to appellate review); see also *Byron Center Pub Schools Bd of Ed v Kent Co Ed Ass'n*, 186 Mich App 29, 31; 463 NW2d 112 (1990) ("[a] court may not review an arbitrator's factual findings or decision on the merits").

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[1] IPP also argues that it was an intended third-party beneficiary of Ford's internal policies, known as "C-3," which required that it treat all suppliers in the spirit of good faith and fair dealing. The arbitrator, however, did not expressly address this claim in his final written award. Nonetheless, as explained below, because the arbitrator found that the evidence did not support a finding of bad faith on the part of Ford in its dealing with IPP, this Court need not address the merits of IPP's claim in this regard.

In concluding that the evidence similarly did not support a finding of bad faith regarding Ford's decisions to cancel the blanket order and supplier code issued to IPP, the arbitrator again found persuasive the testimony of Ford witnesses indicating that these decisions were the result of nonuse of the blanket order during its effective period and statements by plaintiff Livermore regarding the dissolution of IPP by its principals. Again, the arbitrator's reliance on such testimony in determining that Ford acted within the limits of any good faith requirement to which it might have been bound is a factual question not subject to judicial review. *Konal*, *supra*; *Byron Center*, *supra*. Accordingly, because the arbitrator's award in favor of Ford is ultimately premised not on any "error of law" regarding Ford's good faith obligation to purchase from IPP under the blanket order, but rather his findings with respect to the weight and credibility of the evidence, see *Gavin*, *supra*, we reject IPP's claim that the trial court erred in failing to vacate the arbitration award on the ground that the arbitrator exceeded his powers by failing to find that Ford breached an applicable obligation of good faith and fair dealing.[2]

IPP also argues that "the [a]rbitrator erroneously refused to admit or consider . . . evidence damning to Ford's position at trial," and that such refusal also requires that the arbitration award be vacated. However, although MCR 3.602(J)(1)(d) permits the vacation of a binding arbitration award where the arbitrator "refused to hear evidence material to the controversy," IPP identifies no such evidence in its brief on appeal, but rather recounts the testimony and evidence offered before the arbitrator, which it asserts "the [a]rbitrator's opinion completely and entirely ignores." Such assertion is, in essence, a claim that the award was against the great weight of the evidence, which this Court may not review. See *Donegan v Michigan Mut Ins Co*, 151 Mich App 540, 549; 391 NW2d 403 (1986) (the standard of review applicable to arbitration awards "precludes review on the basis that the award was against the great weight of the evidence or that it was not supported by substantial evidence"). Accordingly, IPP having failed to show an error of law sufficient to warrant vacation of the arbitration award, we affirm the trial court's order confirming the final award and order of the arbitrator.

IV. Applicability of MCL 408.478

IPP also argues that the trial court erred in dismissing its statutory and public policy claims premised on the scheme of bribery and kickbacks allegedly required by Ford conveyor engineering department employees to do business with that department as a supplier of conveyor gearmotors to Ford. IPP's claim in this regard, however, is not included within its statement of questions presented and is, therefore, not preserved for review by this Court. See *Ligget Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 139; 676 NW2d 633 (2003), citing MCR 7.212(C)(5). In any event, even had IPP properly preserved this issue, we would find its claim of entitlement to damages for such conduct under MCL 408.478 to be without merit.

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[2] We similarly reject IPP's assertion that the arbitrator erroneously focused his analysis on whether Ford acted in good faith in "issuing," rather than canceling, the blanket order. Although the arbitrator did note that "there is no contention nor evidence that Ford acted in bad faith when it used the Blanket Order to IPP," review of the aribitrator's final written order clearly reveals that his analysis and determination of the good faith issue focused on the cancellation and deactivation of the blanket order and supplier code issued to IPP.

As previously noted, plaintiffs' claim for damages relating to the scheme of bribery and kickbacks allegedly required by Ford conveyor engineering department employees is rooted in MCL 408.478. As it does on appeal, Ford argued in its motion for summary disposition that the provisions of MCL 408.478 were inapplicable to the facts of this case and that, therefore, summary disposition of plaintiffs' claims under that statute was appropriate under MCR 2.116(C)(8). Although it is unclear whether the trial court agreed with that rationale in dismissing plaintiffs' claim, whether a statute applies to a particular case presents a question of law subject to review de novo. *Grzesick v Cepela*, 237 Mich App 554, 559; 603 NW2d 809 (1999).

MCL 408.478 was enacted as part of Michigan's wages and fringe benefits act (WFBA), MCL 408.471 *et seq*., and provides in pertinent part that:

> [a]n employer, agent or representative of an employer, or other person having authority from the employer to hire, employ, or direct the services of other persons in the employment of the employer shall not demand or receive, directly or indirectly *from an* ***employee***, a fee, gift, tip, gratuity, or other remuneration or consideration, *as a condition of* ***employment or continuation of employment***. . . . [MCL 408.478(1) (emphasis added).]

Pursuant to MCL 408.471(c), for purposes of the WFBA an "employee" is "an individual employed by an employer." As argued by Ford, none of the plaintiffs in this case were "employees" of Ford as defined by the plain language of MCL 408.471(c). *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). Rather, plaintiffs were merely third-party suppliers to Ford not expressly subject to the provisions of MCL 408.478(1). IPP argues, however, that the public policy against bribery and kickbacks evident in the enactment of MCL 408.478 nonetheless supports plaintiffs' claim for damages arising from the conduct alleged here. However, as stated by our Supreme Court in *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002):

> In identifying the boundaries of public policy, . . . the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.

Absent from the statutory language at issue here is any indication that our Legislature, in enacting the WFBA, was concerned with the requirement of conditional remuneration outside of the employment context. Cf. *Sands Appliance Service, Inc v Wilson*, 463 Mich 231, 241; 615 NW2d 241 (2000) (legislative purpose of MCL 408.478, as drawn from that statute's plain language, is "to prevent kickbacks or payments of any kind to an employer in return for employment or its continuation"); see also 1978 PA 390. Moreover, other than in the context of an employer-employee relationship, IPP has failed to direct this Court to any authority recognizing a public policy violation arising from conditional remuneration. Consequently, we find no error in the trial court's grant of summary disposition of plaintiffs' claims stemming, either expressly or as a violation of the public policy stated therein, from MCL 408.478. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (it is not incumbent upon this Court to search for authority to support a party's position on appeal).

We affirm.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray