

STATE OF MICHIGAN
COURT OF APPEALS

MOSHER, DOLAN, CATALDO & KELLY,
INC.,

UNPUBLISHED
October 23, 2007

Plaintiff-Appellee/Cross-Appellant,

v

DAVID FEINBLOOM and LISA ANN
SCHOLNICK FEINBLOOM,

No. 270579
Oakland Circuit Court
LC No. 2005-067646-CZ

Defendants-Appellants/Cross-
Appellees.

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendants appeal as of right a trial court order affirming the majority of an arbitration award. Plaintiff cross-appeals from the portion of the trial court order that vacated the arbitrator's determination that defendants were not entitled to consequential damages. We reverse that portion of the trial court's order vacating the arbitrator's denial of consequential damages, and affirm in all other respects.

Defendants contracted with plaintiff to construct their new residence. Upon its completion, defendants moved into the home, but moved out a short time later due to concerns about visible mold, mold spores, and defective workmanship. Defendants also withheld the final payment owed plaintiff on the contract. In December 2003, defendants, pursuant to an arbitration clause contained within the parties' contract, filed a complaint in arbitration against plaintiff claiming that the house was defective and that plaintiff breached the parties' contract in providing a defective home/defective workmanship. Plaintiff counter-claimed for the remaining balance of the contract (\$175,589.97).

An arbitrator conducted several hearings and issued an interim award in November 2004, finding that defendant's home contained a number of defects in material and workmanship and that the defects constituted material breaches of the contract, express warranties, and code requirements. The arbitrator further found that the defects did not justify demolition of the home, but instead required appropriate (and specified) remediation.

After several additional hearings, the arbitrator issued an award on July 8, 2005 finding that the remaining balance owed on the contract by defendants, when offset by the cost of

remediation for the defects, required payment by defendants to plaintiff in the amount of \$66,988.59. The award further provided that if the parties did not submit additional material concerning remaining “punch list” defect disputes by September 1, 2005, the award would automatically become a final award.

On July 11, 2005, plaintiff filed its complaint in the circuit court to confirm the July 8, 2005 arbitration award, requesting that a judgment on the award be entered. On August 1, 2005, defendants moved to vacate the arbitration award, arguing that the arbitrator conducted the hearing in a way that prejudiced defendants’ rights and committed clear errors of law, and because the award was not a final award. Plaintiff thereafter advised that the arbitrator issued a final (revised) award on August 17, 2005, and sought to confirm both awards.

The trial court determined that the arbitrator had conducted the hearings in a manner that substantially prejudiced defendants’ claim for consequential damages, but that there was no indication the hearings were prejudicial to defendants in any other manner. The trial court ultimately vacated that the portion of the arbitrator’s award declining to award consequential damages and confirmed the award in all other respects. The trial court further indicated that defendants could, if they desired, initiate new arbitration proceedings before a new arbitrator regarding their claim for consequential damages. Both parties appeal the trial court’s order.

On appeal, defendants first assert that the arbitration award must be vacated in its entirety because it was untimely. We disagree.

We review de novo a trial court's decision on a motion to enforce, vacate, or modify an arbitration award. *Bayati v Bayati*, 264 Mich App 595, 597-598; 691 NW2d 812 (2004). “Judicial review of arbitration awards is limited.” *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). Arbitration awards are given great deference and should not be lightly set aside. *Bell v Seabury*, 243 Mich App 413, 422; 622 NW2d 347 (2000).

Pursuant to MCR 3.602, when an arbitration award is challenged a circuit court may (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*. Under MCR 3.602(J)(1), an arbitration award shall be vacated if:

- (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;
- (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.

“[A]rbitrators can fairly be said to exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law.” *DAIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982).

Here, defendants argue that the arbitrator exceeded his power because he issued his decision in contravention of the American Arbitration Association (AAA) rules that governed the

parties' arbitration proceedings. Specifically, defendants contend that AAA Rule 42 requires that a final award be made within 30 days of the close of the parties' proofs. According to defendants, the parties' proofs closed on June 9, 2005, thus requiring a final award by July 11, 2005. Defendants acknowledge that the arbitrator issued an opinion on July 8, 2005, but assert that the opinion expressly left open the possibility of additional proofs being submitted regarding certain punch list items that remained unresolved and provided that the matters would be resolved by September 1, 2005. According to defendants, the arbitrator did not actually issue a "final" award until August 17, 2005--beyond the 30-day limit set forth in the AAA rules.

AAA Rule 42 provides:

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

While defendants argue that the hearings closed on June 9, 2005, AAA Rule 36 provides a concise definition of when a hearing is determined to be closed:

When satisfied that the presentation of the parties is complete, the arbitrator shall declare the hearing closed.

If documents or responses are to be filed as provided in Section R-33, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of documents, responses, or briefs. The time limit within which the arbitrator is required to make the award shall commence to run, in the absence of other agreements by the parties and the arbitrator, upon the closing of the hearing.

AAA Rule 33, referenced above in Rule 36, governs the post-hearing filing of documents or other evidence. That rule provides the arbitrator with the authority to direct that documents or other evidence be submitted to him/her after the hearing(s) concluded.

In this matter, although the hearings concluded on June 9, 2005, the arbitrator issued an award on July 8, 2005 resolving most of the parties' disputes, but specifically retaining jurisdiction over the punch list items dispute. The July 8, 2005 award provided that if the parties failed to submit additional material regarding the punch list items to him before September 1, 2005, the award would become final, but that if the parties submitted additional materials for the arbitrator's review before that date, the arbitrator would issue a final award incorporating the July 8, 2005 award by reference. The July 8, 2005 award further stated that if the parties did not want to wait until September 1, 2005, they could sign a stipulation deleting the punch list items dispute from the arbitration and the July 8, 2005 award would thereafter become final. Because the arbitrator provided for the submission of post-hearing documents by September 1, 2005, the hearings were not officially closed until that date and the time limit within which the arbitrator was required to issue an award would commence to run on September 1, 2005. See AAA Rule 36. As the arbitrator issued a final award on August 17, 2005, he did not act in violation of AAA Rule 42. Moreover, although the award was issued prior to the September 1, 2005 cutoff date for additional documentation, plaintiff filed a complaint on July 11, 2005 to confirm the

July 8, 2005 award and, in a July 25, 2005 letter, defendants indicated that the arbitrator should have already issued a final award. These communications could easily be viewed as a stipulation by the parties that no other documentation would be submitted and the issuance of a final award would be appropriate. The timing of the August 17, 2005 final award thus serves as no basis to vacate the arbitration award.

Defendants next contend that the arbitrator made specific errors of law, thus exceeding his power, which require that the arbitration award be vacated. The first claimed error concerns whether the arbitrator ignored plaintiff's binding admission (through counsel) that it would make all of the necessary repairs, then awarding defendants a dollar amount for the repairs based on what they term "lowball estimates" from plaintiff's subcontractors. Plaintiff counters that defendants never permitted them to enter the home during the arbitration proceedings to correct the items, then caused additional damage to the interior of their home in search of more evidence of mold.

"Admission" is defined as a statement "by a party, or someone identified with him in legal interest, of the existence of a fact which is relevant to the cause of his adversary." Black's Law Dictionary (abridged 6th edition). A statement is a judicial admission only if it is a statement made by a party or his attorney during the course of trial (or, by extension, an arbitration proceeding), and is a distinct, formal, solemn admission which is made for the express purpose of dispensing with formal proof of that particular fact. *Gojcaj v Moser*, 140 Mich App 828, 833-834; 366 NW2d 54 (1985).

During one of the arbitration hearings, counsel for plaintiff stated, "If there are any code violations in that house, Mosher Dolan will correct them, and was really in the process of correcting many of these when they were back in there in November and December. So we have the obligation to correct, and we have the opportunity to correct, and under the contract. . .the Feinblooms have to give us the opportunity to correct any deficiencies in that house, and we stand ready to do that." Defendants contend that this statement was an admission by counsel that bound plaintiff to perform all necessary repairs.

The above appears to be more in line with an offer or promise rather than an admission. This is necessarily so, as counsel prefaced his remark with "*If* there are any code violations. . ." and, at the time of the statement, no final award had yet been issued. Counsel's statement contains no admission of fact (i.e. that there were code violations), but instead indicated that if there were code violations, his client would correct the deficiencies.

In addition, defendants do not claim they were not awarded damages for any code violations, or that the award of monetary damages was an inadequate remedy at law, but appear to argue simply that plaintiff should have personally remedied the deficiencies. Unfortunately, we are not privy to whether, as claimed by plaintiff, defendants refused to allow plaintiff access to the home to correct any code violations and impaired the residence such that plaintiff could not perform remedial work. However, in the July 8, 2005 award, the arbitrator noted that "claimants rightly or wrongly interfered with respondent's access to the work site for periods of time and eventually barred any access." This suggests that any offer/promise by plaintiff to perform remedial work was rejected or frustrated by defendants. The arbitrator also noted in his July 8, 2005 award that defendants testified to their lack of confidence in plaintiff's abilities and, at times, that they would likely have the home demolished (obviating the need for remedial

work). The arbitrator additionally noted a complete breakdown in the parties' relationship that would render specific performance by plaintiff counter-productive and likely leading to endless litigation or arbitration. The arbitrator was clearly in the best position to make this determination. No legal error can be found on this issue.

Defendants' second allegation of legal error requires this Court to determine whether the arbitrator refused to award defendants consequential damages on an alleged mistaken belief that the law did not allow recovery of consequential damages in construction contract cases.

Consequential damages are recoverable for a breach of contract when those damages arise naturally from the breach or can reasonably be said to have been in contemplation of the parties at the time they entered the contract. *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 11-12; 516 NW2d 43 (1994). "Application of this principle in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414-415; 295 NW2d 50 (1980).

Clearly, consequential damages can be awarded for the breach of a commercial contract under certain circumstances. The arbitrator in this matter acknowledged as much, indicating in the July 8, 2005 award that, "Michigan case law consistently rules that the award of consequential damages depends on whether the parties contemplated the consequential damages and whether they were a foreseeable result of a breach at the time they entered into the contract." The arbitrator then resolved the matter in plaintiff's favor, finding that not only did the parties not contemplate consequential damages, but that defendants failed to provide credible evidence to support the vast majority of their claimed consequential damages. Defendants' allegation of legal error on this issue thus fails.

Moreover, an arbitration award is not vacated simply where there is an error of law. *NuVision v Dunscombe*, 163 Mich App 674, 684; 415 NW2d 234 (1987). Rather for a court to vacate an award, there "must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Id.*, citing *DAIIE v Gavin, supra*. If, in fact, the arbitrator made any misstatement concerning a legal basis for awarding consequential damages for breach of construction contracts, the error was not material or substantial so as to have governed the award. The arbitrator's written award clearly reflects that he addressed the availability of such damages and resolved the factual disputes concerning the claimed consequential damages by reviewing the submitted evidence.

The next alleged legal error involves the arbitrator's failure to award attorney fees and litigation expenses to defendants as the prevailing party. Defendants, however, have provided little analysis of this claim and cite to no binding authority setting forth a legal basis for their claim of attorney fees and litigation expenses in an arbitration proceeding. It is not enough for an appellant to simply announce a position or assert an error in his brief and then leave it up to this Court to discover and rationalize the basis for his claims, or elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

The remaining issues on direct appeal and in plaintiff's cross-appeal focus on the arbitrator's refusal to award consequential damages to defendants and the trial court's vacation of that portion of the arbitrator's award. Particularly contentious are the consequential damages claimed to have been incurred because defendants moved out of the home when mold was discovered and whether defendants should have remedied some of the defects in the home, thus mitigating their damages. Defendants contend that the arbitrator committed clear legal error and conducted the hearings in a manner that substantially prejudiced their rights inasmuch as he indicated that plaintiff would be ordered to remedy the problems and warned defendants not to undertake that task, then later refused to award consequential damages based on a finding that defendants failed to mitigate their damages (i.e. that they could and should have undertaken repairs on their own). The trial court agreed, vacating that portion of the arbitration award that refused to award defendants their consequential damages. Defendants now contend that the arbitrator's finding on the consequential damages issue demonstrates how he deprived defendants of any meaningful remedy and that the resulting prejudice was so pervasive that the entire award should be vacated.

Plaintiff, on the other hand, argues that the trial court erred in vacating that portion of the arbitration award denying consequential damages to defendants and should have affirmed the entire award. Plaintiff contends that the trial court vacated that portion of the award based upon its erroneous belief that the arbitrator denied consequential damages solely because defendants failed to mitigate their damages when, in fact, the arbitrator denied consequential damages because defendants failed to prove them, and because the parties did not contemplate consequential damages when contracting.

In the July 8, 2005 award (incorporated into the August, 2005 final award), the arbitrator declined to award consequential damages for defendants claimed loss of value of the home due to the presence of mold. The arbitrator found that "claimants failed to offer any credible evidence on this issue. . . the absence of any credible evidence would necessitate that I speculate about the quantum of lost value. I decline to do so." The arbitrator also declined to award other consequential damages, stating as follows:

Claimants submitted exhibit CX-56, which lists a wide array of expenses incurred by them. Their papers assert that the exhibit was prepared as a running tally for their own purposes, not necessarily as a trial exhibit. However, they have offered the exhibit to prove some of their damages. The list contains many items as to which they have failed to prove by a preponderance of the credible evidence that Respondent's actions or inaction were the cause. Indeed, I fail to see how many of the items even relate to the dispute with Respondent. The majority of the items could be called "disappointment and frustration" damages, i.e. money spent on a home that they have not yet been able to fully enjoy. Claimants called the exhibit their list of "consequential damages." Some of the items clearly would fall within the legal definition of consequential damages if proved. Included, just by way of example, were a variety of costs associated with obtaining and living in a second home, storing goods and not being able to live in the subject residence for a period of time.

Claimants failed to prove by a preponderance of the credible evidence that they and respondent contemplated consequential damages at the time they entered into the contract. . . Therefore, I deny any claim for consequential damages.

In addition, I find that Claimants failed to mitigate their damages associated with obtaining and living in a second home, storing goods and not being able to live in the subject residence. . .they could and should have performed the remediation, completion and punch list work within a reasonable time.

Defendants direct this Court's attention to two different statements by the arbitrator that purportedly contradict his refusal to award consequential damages and serve as a basis to vacate the award. First, the November 2004 interim award listed several defects in the home that required remediation. The interim award provided that performance of the remediation work would necessitate some duration of evacuation of the residence and that "[e]vidence of entitlement and the reasonable duration and estimated costs of such evacuation will be received and considered in the second phase of the hearings." The above supposes, however, that remediation work would be performed. Given the specific language of the interim award, and taking into account the arbitrator's observations that defendants did not permit plaintiff access to the home and repeatedly testified that they would likely have the home demolished (obviating the need for remediation work), the final award does not directly conflict with the language in the November, 2004 interim award and did not prejudice defendants.

Second, at a January, 2005 hearing, the arbitrator stated on the record that "there is a strong possibility that I would employ equity powers and order it done that way because I'm concerned if you have other people doing it, this plumber over there is going to say well, he screwed up my plumbing I'm not going to take care of warranty work. And that's a real—a real likelihood in building construction." Notably, the above is only an oral statement reflecting a "strong possibility", not a determination, and does not appear on the face of any arbitration award. Whether this statement induced defendants to refrain from performing any remediation work is speculative, at best, given that it does not appear in any award, and given the arbitrator's findings in the July 8, 2005 award that defendants refused to allow plaintiff's access to the home to perform remediation work.

Neither of the statements cited by defendants can be said to be inconsistent, legally erroneous, or substantially prejudicial to defendants' rights. Vacation of the entire arbitration award would thus be inappropriate.

More importantly, the arbitrator specifically stated in the awards(s) that he was denying consequential damages because defendants failed to prove that the parties contemplated consequential damages when contracting and because defendants failed to prove through credible evidence that plaintiff's actions or inaction were the cause of their consequential damages. The arbitrator noted that the majority of the claimed consequential damages bore no relationship to the dispute with plaintiff and concluded "[t]herefore, I deny any claim for consequential damages" before addressing mitigation of damages. The arbitrator, then, based his

decision to deny consequential damages not solely because defendants failed to mitigate their damages as indicated by the trial court, but because they failed to prove their damages. The language concerning defendants' failure to mitigate their damages was merely an *additional* reason for denying consequential damages and not necessary to the ultimate resolution of the issue. According proper deference to the arbitration award, and taking into account that the arbitrator announced his denial of consequential damages before delving into whether defendants should have mitigated their damages, we conclude that the trial court erred in reversing the portion of the arbitration award denying consequential damages.

We reverse the trial court's reversal of that portion of the arbitration award denying defendants' claim for consequential damages, affirm the trial court order in all other respects, and remand for entry of an order affirming the entire arbitration award. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Pat M. Donofrio

/s/ Deborah A. Servitto