STATE OF MICHIGAN

COURT OF APPEALS

VERSATUBE STAMPING CORPORATION, Plaintiff-Appellant,	UNPUBLISHED November 20, 2008
v	No. 279674 Oakland Circuit Court
LOUIS G. CONTI, Defendant-Appellee.	LC No. 2006-078952-CZ

LOUIS G. CONTI, Plaintiff-Appellee,	
v	No. 279675 Oakland Circuit Court
VERSATUBE CORPORATION, Defendant-Appellant.	LC No. 2006-079472-CZ

Before: Jansen, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

In these consolidated appeals, appellant Versatube Corporation, a/k/a Versatube Stamping Corporation ("Versatube"), appeals as of right from the circuit court's judgment confirming the arbitration award and denying Versatube's motion to vacate the award. We affirm.

I. Facts

This case arises from appellee Louis Conti's employment with Versatube pursuant to an employment agreement. After Versatube terminated Conti's employment, Conti pursued a claim for unpaid commissions. An arbitrator awarded Conti unpaid commissions, including a double-damages penalty under the sales representative commission act (SRCA), MCL 600.2961. The circuit court confirmed the $61,097.52 arbitration award, and denied Versatube's motion to vacate the award.

II. Standard of Review

We review issues concerning whether to vacate or modify an arbitration award de novo. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004). MCR 3.602(J) prescribes the grounds for vacating an arbitration award. Former MCR 3.602(J)(1)[1] provided that an arbitration award shall be vacated on application of a party under the following circumstances:

> (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.

Where it is claimed that the arbitrator made an error of law, our review is restricted to cases where the error appears from the face of arbitration award, the terms of the contract of submission, or such documentation that the parties agree will constitute the record. *DAIIE v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982); *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 175-176; 550 NW2d 608 (1996). The arbitration award will be set aside if it clearly appears from the face of the award or the reasons stated for the decision that the arbitrator, through an error of law, was led to a wrong conclusion and, but for the error, a substantially different award must have been made. *Saveski, supra* at 555. As explained in *DAIIE, supra* at 429:

> Arbitration, by its very nature, restricts meaningful legal review in the traditional sense. As a general observation, courts will be reluctant to modify or vacate an award because of the difficulty or impossibility, without speculation, of determining what caused an arbitrator to rule as he did. The informal and sometimes unorthodox procedures of the arbitration hearings, combined with the absence of a verbatim record and formal findings of fact and conclusions of law, make it virtually impossible to discern the mental path leading to an award. Reviewing courts are usually left without a plainly recognizable basis for finding substantial legal error. It is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable, such as that involved in these cases. In many cases the arbitrator's alleged error will be as

[1] MCR 3.602(J) was amended, effective January 1, 2008. The grounds for vacating an award are now listed in MCR 3.602(J)(2).

> equally attributable to alleged "unwarranted" factfinding as to asserted "error of law". In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and the arbitrator's findings of fact are unreviewable.

III. Application of SRCA

In this case, Versatube challenges the arbitrator's application of the SRCA, MCL 600.2961, to commissions that the arbitrator found were owed to Conti. Versatube argues that the arbitrator ignored express provisions of the employment agreement and incorrectly concluded that Conti was a sales representative. We disagree.

MCL 600.2961(3)(e) defines "sales representative" as "a person who contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or in part, by commission." An arbitrator exceeds his or her powers under MCR 3.602(J)(1)(c) by acting beyond the material terms of the contract from which he or she primarily draws authority or by acting in contravention of controlling principles of law. *Saveski, supra* at 554. In commonplace contractual matters, there is no requirement that an arbitrator make specific findings of fact and legal conclusions. *Id.* at 557. Neither the face of the arbitration award, nor Conti's employment agreement, provide any basis for vacating the arbitrator's decision to award double-damages under the SRCA.

Contrary to Versatube's argument, nothing in the SRCA indicates that it is limited to employment relationships where solicitation or sales work are an employee's primary duties. The SRCA only requires that a person contract, or be employed, to solicit orders or sell goods and be paid, in whole or in part, on commission. MCL 600.2961(1)(e). An unambiguous statute is applied as written. *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 627; 752 NW2d 479 (2008).

However, the particular activities for which commissions are earned are to be considered in determining the applicability of the SRCA. See *Mahnick v Bell Co*, 256 Mich App 154, 162-163; 662 NW2d 830 (2003). The SRCA prescribes a penalty of double damages where a principal purposefully fails to pay a commission when it is due. *In re Certified Question*, 468 Mich 109, 119; 659 NW2d 597 (2003).

Here, it is apparent from the arbitrator's decision that the arbitrator looked to the employment agreement to determine Conti's entitlement to commissions. There is no basis for concluding that the arbitrator ignored unambiguous language in the employment agreement. The arbitrator found that the employment agreement entitled Conti to commissions for "new work" brought to Versatube, which were to be computed on the basis of sales. He found that Conti was entitled to unpaid commissions for "sales of stampings" to four customers, but was not entitled to commissions where he was insufficiently involved in the sales.

We may not look beyond the arbitration award to consider documentation regarding the particular activities on which the arbitrator based his award of commissions to determine whether they should be treated as transactions for services, rather than goods. "It is difficult to imagine a commercial product which does not require some type of service prior to its purchase, whether design, assembly, installation, or manufacture." *Neibarger v Universal Cooperatives,*

Inc 439 Mich 512, 536; 486 NW2d 612 (1992). Generally, the question whether goods or services predominates a contract is one of fact, *Frommert v Bobson Constr Co*, 219 Mich App 735, 738; 558 NW2d 239 (1996), and the arbitrator's factual findings may not be disturbed. *DAIIE, supra* at 429.

Because this case involves statutory arbitration, our concern is whether error clearly appears from the face of the arbitration award. *Id.* at 443. It is not clear from the face of the arbitration award that the arbitrator misapplied the SRCA in finding that the commissions owed to Conti were subject to the double-damages penalty. Therefore, the circuit court did not err in refusing to vacate or modify the arbitration award on this ground.

IV. Ex Parte Communication

Versatube next argues that the circuit court should have vacated the arbitration award, or at least found a question of material fact sufficient to preclude summary disposition, because it offered evidence that the arbitrator had an ex parte conversation with Conti during a break in the arbitration hearing. We disagree.

The presumption of prejudice applies only to ex parte communications regarding substantive matters related to the litigation. *People v France*, 436 Mich 138, 163-164; 461 NW2d 621 (1990). The affidavit submitted by Versatube does not indicate that the arbitrator and Conti participated in a conversation regarding the case; it only indicates that Conti disclosed that the brief restroom conversation was one about raising children. Speculation does not provide a basis for challenging an arbitrator's conduct. See generally *Bayati v Bayati*, 264 Mich App 595, 601; 691 NW2d 812 (2004); *Gordon Sel-Way, Inc v Spence Bros, Inc*, 177 Mich App 116, 121; 440 NW2d 116 (1989), rev'd in part on other grounds 438 Mich 488 (1991); *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988); *Kauffman v Haas*, 113 Mich App 816, 819; 318 NW2d 572 (1982). Further, speculation and conjecture do not create a genuine issue of material fact. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Thus, Versatube failed to show any basis for vacating the arbitration award on the basis of prejudicial misconduct. MCR 3.602(J)(1)(b).

V. Waived Issue

Finally, Versatube argues that the trial court should have vacated the arbitration award, or at least found a question of material fact sufficient to preclude summary disposition, because it offered an affidavit from its president, Gene Goodman, who averred that the arbitrator fell asleep during the arbitration hearing. We agree with Conti that this issue should be deemed waived because it was not presented to the arbitrator.

A party's failure to object at the time of an arbitration proceeding can constitute a waiver, where the party had knowledge of the reasons supporting the objection. See *Gordon Sel-way, Inc, supra* at 120; *Apperson v Fleet Carrier Corp*, 879 F2d 1344, 1358-1359 (CA 6, 1989). Given Goodman's averment that the arbitrator was asleep, it is reasonable to expect that, as Versatube's president, he would have brought this concern to the attention of Versatube's attorney during the arbitration hearing so that it could be presented to the arbitrator. There is no evidence that Goodman did so; therefore, we deem this issue waived.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Donald S. Owens