STATE OF MICHIGAN

COURT OF APPEALS

MOSHER, DOLAN, CATALDO & KELLY, INC.,	UNPUBLISHED October 27, 2009
Plaintiff-Appellee,	
v	No. 285445 Oakland Circuit Court
DAVID FEINBLOOM, and LISA ANN SCHOLNICK-FEINBLOOM,	LC No. 2005-067646-CZ
Defendants-Appellants.	

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendants appeal as of right from a circuit court judgment affirming an original arbitration award in its entirety. We affirm.

This appeal is a continuation of the matter addressed in this Court's prior decision in *Mosher, Dolan, Cataldo & Kelly, Inc v Feinbloom*, unpublished opinion per curiam of the Court of Appeals, issued October 23, 2007 (Docket No. 270579), lv den 480 Mich 1077 (2008) ("*Mosher I*"). In *Mosher I*, we set forth the background facts as follows:

> 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).
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> 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.

On August 17, 2005, after notice that the parties did not intend to make additional submissions, the arbitrator issued a "final award" resolving all pending punch list issues. In accordance with the parties' agreement, the final award awarded defendants an additional $18,535.02 for the punch list items, thereby reducing plaintiff's net award to $48,453.57. The arbitrator denied defendants' request for consequential damages. Plaintiff then sought to enforce the final award in the trial court. Defendants moved to vacate the award. The trial court ultimately vacated the portion of the arbitrator's award declining to award consequential damages, but confirmed the award in all other respects. The court further indicated that defendants could, if they desired, initiate a new arbitration proceeding with regard to their claim for consequential damages.

Both parties appealed to this Court. While the appeal was pending, defendants initiated a second arbitration proceeding regarding consequential damages. Plaintiff filed a motion to stay the second arbitration proceeding pending the outcome of the appeal, but this Court denied that motion. The second arbitration panel eventually awarded defendants consequential damages of $179,337.67. Three weeks later, on October 23, 2007, this Court decided *Mosher I*, in which it rejected defendants' various challenges to the original arbitration award and also concluded that the circuit court erred in reversing the portion of the arbitration award denying consequential damages. This Court remanded the case "for entry of an order affirming the entire arbitration award."

On November 1, 2007, defendants moved in the trial court to vacate the second arbitration award or to require the arbitration panel to explain its denial of certain claims, although defendants conceded that the panel had granted all of their other requests. The trial court did not hold a hearing or address defendants' motion; instead, the trial court entered an order affirming the original arbitration award in its entirety, pursuant to this Court's decision in *Mosher I*. After our Supreme Court denied defendants' application for leave to appeal in *Mosher I*, plaintiffs moved in the trial court for entry of a judgment confirming the original arbitration

award. Defendants opposed that motion, arguing that plaintiffs had not timely sought to vacate the second arbitration award, and therefore the trial court was required to confirm it.

The trial court opined that "defendants, in fact, suffered significant consequential damages as a result of plaintiff's conduct." However, this Court had rejected the trial court's "concerns regarding the manner in which the initial arbitration proceedings were conducted," and our ruling that the initial award was proper necessarily meant "that the subsequent arbitration proceedings should not have commenced in the first place." The trial court therefore determined that it was bound by this Court's decision in *Mosher I* to enter a judgment confirming the original arbitration award in its entirety. Defendants now appeal.

"As a general rule, an appellate court's determination of an issue binds lower tribunals on remand." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). Thus, a lower court "may not take action on remand that is *inconsistent* with the judgment of the appellate court." *Id*. (emphasis added). In *Mosher I*, this Court explicitly held that the circuit court erred in vacating the portion of the arbitration award that denied defendants' claim for consequential damages. *Mosher, supra* at 1, 5-8. The second arbitration award, awarding consequential damages, was based on the circuit court's decision, later reversed in *Mosher I*, to vacate the portion of the original arbitration award that denied consequential damages. By reversing the circuit court, this Court reinstated the portion of the original arbitration award that had denied defendants' claim for consequential damages. Thus, the second arbitration award was clearly inconsistent with this Court's decision in *Mosher I*, and if the circuit court had confirmed the second arbitration award on remand, it would have impermissibly taken action that was inconsistent with this Court's prior decision. Therefore, the circuit court correctly refused to confirm the second arbitration award.

Defendants nevertheless argue that the trial court was not permitted to vacate the second arbitration award. We disagree.

Defendants first argue that plaintiff failed to move to vacate the second arbitration award within the 21-day period then permitted by MCR 3.602(J)(2).[1] In fact, plaintiff never moved to vacate the second arbitration award, but *defendants* actually moved to vacate it within the 21-day period. At the time, MCR 3.602(J)(1) allowed a court to vacate an arbitration award "[o]n application of *a* party." Plaintiff was not required to file a duplicative motion, even if defendants later withdrew theirs to await a decision from our Supreme Court on their appeal.

Defendants next argue that the trial court's failure to confirm the second arbitration award rendered meaningless this Court's prior denial of plaintiff's motion to stay the second arbitration proceeding. However, at no time were defendants *ordered* to proceed to the second arbitration, by this Court or by the trial court. Rather, "[p]laintiffs [sic] *may, if they desire*, initiate new arbitration proceedings regarding their claim for consequential damages." [Emphasis added]. Similarly, this Court did not order the parties to arbitrate. It simply denied plaintiff's motion for a stay. Defendants then chose to proceed.

[1] The court rule was amended, effective January 1, 2008, to extend the time for filing a motion to vacate an arbitration award to 91 days, except in cases of fraud, corruption, or undue means, and in domestic relations cases.

Defendants finally argue that this Court incorrectly decided *Mosher I*. However, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Grievance Administrator*, *supra* at 259 (internal quotations and citation omitted). Thus, an appellate court's determination of an issue not only binds lower courts, but also binds "the appellate court in subsequent appeals." *Id*. at 260. The law of the case doctrine applies "only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Id*. And although it "is discretionary and expresses the practice of courts generally," *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002), the doctrine "is sufficiently important that it applies without regard to whether the [prior] decision was actually correct." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

"The rationale behind the [law of the case] doctrine includes the need for finality of judgments and the lack of jurisdiction of an appellate court to modify its judgments except on rehearing." *Grace*, *supra* at, 363. The law of the case "doctrine is designed to preclude relitigating the issue of the correctness of a prior appellate decision." *Bennett*, *supra* at 504. But if review of a prior decision were permitted whenever a panel believes that a prior decision is incorrect, the doctrine would be eviscerated because such a practice would "reopen every case to relitigation of every issue previously decided in the hopes that a subsequent panel of the Court would decided the issue differently than did the prior panel." *Id*. at 500. Therefore, the doctrine would have "no usefulness if it [were] only applied when a panel of this Court agrees with the decision reached by a prior panel." *Id*.

We note that, as defendants point out, exceptions to the law of the case doctrine do exist, although we disagree that any of them apply here. In *criminal* cases, trial courts are empowered to grant new trials "at any time where justice has not been done," irrespective of the law of the case doctrine. *People v Herrera (On Remand)*, 204 Mich App 333, 340-341; 514 NW2d 543 (1994). However, this Court explained that hat power does not extend to *civil* cases like this one, i*d*., and defendants have not cited any authority to the contrary. The law of the case doctrine will also yield to competing doctrines of greater importance, such as the requirement of independent review of constitutional facts. *Locricchio v Evening News Ass'n*, 438 Mich 84, 109-110; 476 NW2d 112 (1991). But this is not an exceptional case involving constitutional rights.

In any event, defendants have failed to persuade us that "justice has not been done." In *Mosher I*, this Court considered and rejected each of the arguments that defendants raise in this appeal concerning the alleged deficiencies of the original arbitration award. Defendants do not claim that the law has changed, nor do they dispute that, aside from the second arbitration award, the facts have remained substantially the same. Therefore, the law of the case doctrine applies

and, in the interest of finality, we decline defendants' invitation to reexamine the merits of *Mosher I*, or the merits of the original arbitration award.

Affirmed.

/s/ Alton T. Davis
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro