STATE OF MICHIGAN

COURT OF APPEALS

BLUE RIVER FINANCIAL GROUP, INC., Plaintiff-Appellee,	UNPUBLISHED September 2, 2010
v TBI ENTERPRISES, L.L.C., EUGENE J. THOMAS and WALTER THOMAS, Defendants-Appellants.	No. 289396 Macomb Circuit Court LC No. 2007-003293-CK
COMPUTER BUSINESS WORLD, L.L.C., Plaintiff-Appellee,	
v EUGENE THOMAS, WALTER THOMAS, CBW ENTERPRISES, INC., CBW TECHNOLOGIES, INC., SCD ENTERPRISES, INC., AMERICAN EAGLE WARRANTY CORPORATION, TIMES SQUARE, INC., and TBI PROPERTIES, L.L.C., Defendants-Appellants.	No. 290366 Oakland Circuit Court LC No. 2008-093586-CK

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

These consolidated appeals stem from a transfer of business assets. In Docket No. 289396, defendants TBI Enterprises, L.L.C., Eugene J. Thomas, and Walter Thomas (the TBI defendants) appeal as of right from a circuit court order granting plaintiff Blue River Financial Group, Inc. (Blue River) summary disposition of its breach of contract claim under MCR 2.116(C)(10). In Docket No. 290366, defendants Eugene Thomas, Walter Thomas, CBW Enterprises, Inc., CBW Technologies, Inc., SCD Enterprises, Inc., American Eagle Warranty

Corporation, Times Square, Inc., and TBI Properties, L.L.C. (the arbitration defendants)[1] appeal as of right a circuit court order confirming an arbitration award and entering a judgment in favor of plaintiff Computer Business World, L.L.C. (CBW). We affirm in both appeals.

I. UNDERLYING FACTS AND PROCEEDINGS

The agreements underlying these appeals include an asset purchase agreement and a related promissory note for a commission pertaining to the sale and purchase of several businesses. According to a complaint CBW filed in Oakland Circuit Court #2008-093586-CK, the arbitration defendants "were engaged in the business of assembling, distributing, and offering for retail custom computer desktops, notebooks, computer workstations, and server systems." On June 26, 2006, pursuant to an asset purchase agreement (APA), CBW purchased nearly all of the assets held by the arbitration defendants, except TBI Properties. The asset purchase price consisted of $1,750,000 payable at the closing, an additional $250,000 due within three days of the closing, and a $700,000 promissory note known as the "Reference Note." On July 5, 2006, the TBI defendants executed a separate promissory note agreeing to pay Blue River a $75,000 commission related to the APA between CBW and the arbitration defendants; the Thomases individually guaranteed payment on the promissory note to Blue River.

Within a relatively brief period after the APA closing date, CBW commenced an arbitration proceeding, as contemplated in § 13.15 of the APA, asserting that the arbitration defendants had misrepresented the condition of the companies CBW purchased. In early August 2008, an arbitrator issued an opinion and award, which made the following relevant conclusions of law:

> Based on the evidence, I find that Respondents [the arbitration defendants] had a legal duty to disclose the practice of fabricating advertisements and invoices for [Advanced Micro Devices] AMD and Intel [Corp.], as well as the fact that they were purchasing a high volume of parts from Intel and AMD at discounted prices and selling them through improper market channels. I also find that Respondents failed to disclose these facts in order to induce reliance by Claimants [CBW], that the non-disclosure was misleading, that Respondents knew that the non-disclosure was misleading, that Claimants acted in reliance on the misimpression created by Respondents in purchasing the CBW Entities, and that Claimants were damaged as a result of Respondents' failure to disclose. In this regard, I find that Respondents inaccurately reported the reimbursements from the [marketing development fund] MDF programs as rebates in the cost of goods sold, rather than as advertising expenses, on the companies' financial statements.

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[1] For ease of reference, we refer to all defendants in Docket No. 290366 collectively as "the arbitration defendants," notwithstanding that TBI Properties, L.L.C., did not participate in the arbitration proceeding.

> I also find that Respondents breached the provisions of the APA by failing to continue to work for the company after the closing for one year. In this regard, I find that Respondents were the first to breach the provisions of the APA.
>
> Nevertheless, I find that Claimants are not entitled to rescission of the APA because they did not make a seasonable assertion of their rescission right. Claimants are, however, entitled to damages based on Respondents' fraudulent concealment and breach of contract. Although there is conflicting testimony as to the amount of damages, there is no uncertainty as to the fact of damages, and therefore, I will determine from the evidence the amount of damages.
>
> With respect to Respondents' request to void the non-competition provision of the APA, there is no longer a legitimate business interest to protect, because Claimants' business failed. Accordingly, the non-competition provision is not enforceable.

The arbitrator found CBW entitled to damages representing "the difference between the actual value of the company at the time of making the contract and the value that it would have possessed if material facts had not been concealed," which the arbitrator calculated in the following manner:

> Assuming that the actual value at the time of sale was the amount that Claimant, . . . [CBW], paid for the business (approximately $4,000,000.00) and using the highest value assigned by Claimants' expert [for the business at the time of sale if material facts had not been concealed], the difference between the actual value of the business and the value that it would have possessed if material facts had not been concealed, is $3,500,000.00 ($4,000,000.00 - $500,000.00). Subtracting $700,000.00 which was to be paid by Claimant, . . . to Respondents as part of the purchase price, the damages of Claimant, . . . total $2,800,000.00. . . .

Two days after the arbitrator issued the award, CBW instituted #08-093586-CK in the Oakland Circuit Court, requesting confirmation of the award in conformity with MCR 3.602. The arbitration defendants answered, among other protestations, that (1) the arbitrator had exceeded his authority by awarding CBW more damages than the APA permitted, (2) "[b]ecause the arbitrator exceeded the contractual cap, the entire award is void as being in excess of the arbitrator's authority," and (3) the circuit court's enforcement of the arbitrator's award would violate the arbitration defendants' due process rights because highly relevant evidence in the form of AMD representative testimony remained beyond "the subpoena power of the [arbitration defendants]." The arbitration defendants urged the circuit court "to hold a trial, or at least an evidentiary hearing, on the issue of damages to determine what 'actual compensatory damages' really are in this case." CBW replied that the arbitration defendants had waived all of their positions given that they did not raise any of them before the arbitrator. CBW added that it presented in the course of the arbitration a fraud claim to which the APA damage limits did not apply, that the arbitration defendants had presented evidence and testimony without restriction during the arbitration, and that the arbitration defendants "fail[ed] to identify any issues of fact with respect to the arbitration award that would require an evidentiary hearing or trial."

The circuit court ruled that it would confirm the arbitrator's award, reasoning in relevant part:

> Defendants have raised a multitude of issues. However, the Court finds every one of those issues was waived by the defendants because they never objected to these issues during the lengthy arbitration proceeding. Even with regard to defendants' claim that the arbitrator exceeded a contractual monetary cap on damage, . . . the award reflects damages for a claim raised outside the contractual cap, and the defendants never objected to the plaintiff's request to amend its complaint to add a tort claim. Nor, did defendants object to the arbitrator considering this issue during the proceeding.
>
> Based on defendants' failure to make any objections during the proceeding, looking at the face of the award, the Court cannot find any mistakes of fact or law that the arbitrator exceeded his authority or any conduct by the arbitrator which would justify vacating the award as provided in MCR 3.602(K).
>
> Thus, after considering the arguments of the parties, the Court finds the award of the arbitrator should be confirmed and a judgment should be entered consistent with this award. . . .

Meanwhile, in July 2007, Blue River had filed a complaint in the Macomb Circuit Court (#2007-003293-CK), alleging that the TBI defendants had breached their obligation to pay Blue River under the terms of their $75,000 promissory note. Almost a year later, Blue River sought summary disposition pursuant to MCR 2.116(C)(10). Blue River conceded that the terms of the promissory note signed by the TBI defendants conditioned the TBI defendants' obligation to pay Blue River on the TBI defendants' "receipt of payments from . . . [CBW] pursuant to the terms of . . . [the] 'Reference Note' between [the TBI d]efendants and CBW." Blue River emphasized that the TBI defendants' obligation to it "did *not* cease if CBW failed to make payments to [the] TBI [defendants] based on 'its exercise of a right of set off or deduction.'" (emphasis in original). According to Blue River, although CBW made no payments to the TBI defendants in conformity with the Reference Note, (1) the arbitrator's recent award to CBW reflected that "CBW was exercising a right of set off or deduction against [the] TBI [defendants] by not making payments on the Reference Note," and (2) consequently, "CBW's exercise of right or set off or deduction in not paying [the] TBI [defendants] on the Reference Note means that TBI remains liable to [Blue River] on the Note."

The TBI defendants characterized Blue River's motion as "premature" to the extent it invoked the arbitrator's award to CBW in light of the arbitration defendants' pending challenges to the unlawful award. The TBI defendants also asserted that the arbitrator did not find CBW entitled to a setoff, and that under the plain terms of the Blue River-TBI promissory note "CBW's payments pursuant to the Reference Note . . . are a condition precedent to [the TBI defendants'] obligation to pay [Blue River] pursuant to the Note." At an October 2008 summary disposition hearing, the circuit court reasoned as follows that it would grant Blue River's motion:

> There is no genuine issue of material fact but that there was a setoff. If something different comes from the venue or the substantive issues on the motion to vacate or confirm, then you can ask to reinstate the file, but at this point there is

> no genuine issue of material fact. There was a setoff, it was taken in the arbitration award, and your request is granted.
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> * * *
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> It [the arbitration award] does not mention a setoff but it is in the exact same amount of money the award less the setoff equals the setoff, so, it is very clearly spelled out in [Blue River's] motion.

II. DOCKET NO. 290366

A

The arbitration defendants argue that the circuit court erred in several respects when it confirmed the arbitration award. We review de novo a circuit court's decision whether to confirm an arbitration award. *City of Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009).

An arbitrator derives his authority from the parties' contract and arbitration agreement and remains bound to act within the terms of the agreement. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). "Judicial review of arbitration awards is limited." *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). "[A] reviewing court's ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record." *Detroit Automobile Inter-Ins Exch v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982). "A court may not review an arbitrator's factual findings or decision on the merits[,]" may not second guess the arbitrator's interpretation of the parties' contract, and may not substitute its judgment for that of the arbitrator. *AFSCME Local 369*, 284 Mich App at 144. "The inquiry for the reviewing court is merely whether the award was beyond the contractual authority of the arbitrator." *Id*. If the arbitrator did not disregard the scope of his authority as expressly set forth in the parties' agreement, then judicial review ceases. *Id.* "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court may not overturn the decision even if convinced that the arbitrator committed a serious error." *Id*. (internal quotation omitted).

> Where it clearly appears on the face of the award or in the reasons for the decision, being substantially a part of the award, that the arbitrators through an error of law have been led to a wrong conclusion, and that, but for such error a substantially different award must have been made, the award and decision will be set aside. The character or seriousness of an error of law that will require a court of law to vacate an arbitration award must be so material or so substantial as to have governed the award, and the error must be one but for which the award would have been substantially otherwise. [*Dohanyos*, 217 Mich App at 176.]

B

The arbitration defendants first submit that the arbitrator exceeded his authority to the extent that he may have awarded damages for CBW's claim of fraud in the inducement. The arbitration defendants contend that fraud in the inducement was not a valid legal theory because the APA contained a merger clause, which extinguished the fraud in the inducement claim as a matter of law. We initially observe that the clear and unambiguous language comprising the parties' arbitration agreement in § 13.15 of the APA confirms that the parties invested the arbitrator with broad authority to contemplate all manner of disputes between the parties.[2]

> 13.15 *Arbitration*. Any controversy or claim arising out of or relating to this Agreement or any related agreement shall be settled by arbitration in accordance with the following provisions:
>
> (a) *Disputes Covered*. The agreement of the parties to arbitrate covers *all disputes of every kind relating to or arising out of this Agreement*, any related agreement or any of the Contemplated Transactions. Disputes include actions for breach of contract with respect to this Agreement or the related agreement, *as well as any claim based upon tort or any other causes of action relating to the Contemplated Transactions, such as claims based upon an allegation of fraud or misrepresentation* and claims based upon a federal or state statute. In addition, *the arbitrators* selected according to procedures set forth below *shall determine the arbitrability of any matter brought to them, and their decision shall be final and binding on the parties*. [Emphasis added.]

By the APA's plain terms, the arbitrator had authority to consider CBW's fraud in the inducement claim, and his decision relating to "arbitrability of [this] matter . . . [is] final and binding on the [arbitration defendants]."

In asserting that the arbitrator wrongfully ruled concerning a fraud in the inducement claim by CBW, the arbitration defendants necessarily urge this Court to revisit the merits of the arbitrator's decision, in particular the arbitrator's manner of arrival at the amount of damages he awarded CBW. An allegation that an arbitrator has exceeded his authority "must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrator['s] decision." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). Because the arbitration defendants' fraud in the inducement assertion presents an impermissible invitation to scrutinize the merits of the arbitration award, we decline to consider any purported error by the arbitrator in this regard. *Id*.; *AFSCME Local 369*, 284 Mich App at 144.

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[2] "An agreement to arbitrate is a contract. The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *City of Ferndale v Florence Cement Co*, 269 Mich App 452, 458; 712 NW2d 522 (2006). Contractual language "clear on its face may be construed as a matter of law by the courts." *Rasheed v Chrysler Corp*, 445 Mich 109, 127; 517 NW2d 19 (1994). "The existence of an arbitration agreement and the enforceability of its terms are judicial questions for the court, not the arbitrators." *City of Ferndale*, 269 Mich App at 458.

Even assuming the arbitration defendants correctly posit that the arbitrator committed an error of law by awarding damages premised on a claim of fraud in the inducement, the following APA arbitration provision becomes relevant:

> *Substantive Law*. The arbitrators shall be bound by and shall strictly enforce the terms of this Agreement and may not limit, expand or otherwise modify its terms. *The arbitrators shall make a good faith effort to apply substantive applicable law, but an arbitration decision shall not be subject to review because of errors of law*. . . . [§ 13.15(g) (emphasis added).]

In light of the APA's unambiguous declaration that the parties cannot seek review of the arbitrator's decision on the basis that he in good faith committed an error of law, we conclude that the arbitration defendants have failed to show their entitlement to review of the arbitration award on the ground that the arbitrator may have considered a fraud in the inducement claim.

C

The arbitration defendants also suggest that the arbitrator exceeded his authority by awarding compensatory damages in excess of a $2.7 million cap set forth in the APA. Our attempt to ascertain whether the APA compensatory damages cap applied would of necessity obligate us to engage in contractual interpretation, which the law prohibits us from doing. *AFSCME Local 369*, 284 Mich App at 144 ("[A] reviewing court cannot engage in contract interpretation, which is an issue for the arbitrator to determine."). The arbitration defendants cite a portion of APA § 13.15(h), stating that the arbitrator "shall not have power to award damages in connection with any dispute in excess of actual compensatory damages and shall not multiply actual damages or award consequential or punitive damages or award any other damages that are excluded under the provisions of Article 11 of this Agreement." Article 11, pertaining to indemnification and remedies, contains several sections, including § 11.5(b), which reads in relevant part:

> Notwithstanding any other provision of this Agreement, the Seller Parties shall not be liable, in the aggregate, for indemnification or otherwise to Buyer or any Buyer indemnified Person under this Agreement for more than an aggregate of Two Million Seven Hundred Thousand Dollars ($2,700,000). However, this Section 11.5(b) shall not apply to claims under Section 3.1 (related to organization and good standing), Section 3.2 (related to enforceability), Section 3.5 (related to real property), Section 3.7 (related to title to the Purchased Assets), Section 3.13 (related to employee benefits), Section 3.15 (related to legal proceedings), Section 3.18 (related to Environmental Laws), Section 3.21 (related to brokers or finders), [or] claims by franchisees pursuant to Section 3.17, Section 11.2(c), or Section 11.2(e).

Although the arbitration defendants theorize that none of the damage limitation exceptions apply to the parties' dispute, our consideration of this proposition would require us to delve into an examination and interpretation of the language in at least APA §§ 13.15(h) and 11.5(b), which, as we have observed, we simply cannot do. A reviewing court may not engage in contract interpretation or review the arbitrator's factual findings concerning the applicability of a particular contractual term; "as long as the arbitrator is even arguably construing or applying the

contract and acting within the scope of his authority, a court may not overturn the decision even if convinced that the arbitrator made a serious error." *AFSCME Local 369*, 284 Mich App at 144. Because the arbitrator arguably construed the APA and acted within the scope of his authority, we must affirm his damage calculations and award to CBW.

D

The arbitration defendants further assert that the arbitrator exceeded the scope of his authority by awarding damages in excess of actual compensatory damages. Specifically, the arbitration defendants believe that in calculating the amount of damages, the arbitrator neglected to reduce the award to account for CBW's receipt of equipment worth $230,000 and goodwill worth $2,042,769. Because this argument again asks us to scrutinize the arbitrator's decision and award on its merits, which we may not do, the arbitration defendants have not shown their entitlement to relief in this regard. *AFSCME Local 369*, 284 Mich App at 144.

E

The arbitration defendants next argue that the arbitrator deprived them of due process when he refused to adjourn the proceedings to allow them to subpoena AMD account representative "Mr. Stein" to testify. We consider de novo the constitutional question whether a party has received due process. *York v Civil Service Comm*, 263 Mich App 694, 699; 689 NW2d 533 (2004).

Because the parties privately contracted to arbitrate their claims, constitutional due process principles do not apply. *City of Dearborn v Freeman-Darling, Inc*, 119 Mich App 439, 441-442; 326 NW2d 831 (1982). "The proscriptions of the Due Process Clause apply only to actions of the state and not to private conduct." *Id.* at 442. Thus, "[c]ontract actions between private parties will not invoke the Due Process Clause." *Id.* Additionally, "[w]hen contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial." *Id.* at 443, quoting *Burton v Bush*, 614 F2d 389, 390 (CA 4, 1980). In summary, the arbitrator's refusal to adjourn the proceedings did not infringe on the arbitration defendants' due process rights.

F

The arbitration defendants also contend that the award should be vacated as contemplated in MCR 3.602(J)(2)(d), which directs a court to vacate an award if "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." The arbitration defendants maintain that Stein would have testified that he authorized their practice of manufacturing advertising invoices to receive high volume purchaser rebates. In the arbitration defendants' opinion, Stein's testimony would have established that they acted in good faith and resulted in an award favorable to them.

The arbitration defendants have failed to establish either that sufficient cause existed to justify a postponement of the arbitration proceedings or that any evidence supplied by Stein would have qualified as material to the controversy, as required under MCR 3.602(J)(2)(d). The arbitrator concluded that the arbitration defendants had a legal duty to disclose their practice of

fabricating advertisements and invoices relating to AMD and Intel, a practice that CBW could not otherwise have detected. The arbitrator also found that the arbitration defendants did not disclose this practice "in order to induce reliance by [CBW], [and] that the non-disclosure was misleading." In light of the arbitrator's findings and logic, it appears highly unlikely that he would have deemed integral or even relevant to his analysis whether an AMD representative had authorized the invoice fabrication practice. At a minimum, especially given the arbitration defendants' neglect to substantiate in any respect any purported information to which Stein could have testified, the record before us offers only speculation to bolster the arbitration defendants' averments that "the arbitrator refused to postpone the hearing on a showing of sufficient cause, [or] refused to hear evidence material to the controversy." And as a general rule, courts will not vacate an arbitrator's award on the basis of speculative concerns. See *Detroit Automobile Inter-Ins Exch*, 416 Mich at 429 ("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."). We thus conclude that the arbitration defendants have not established their entitlement to vacation of the award pursuant to MCR 3.602(J)(2)(d).

G

The arbitration defendants additionally complain that the circuit court erred by declining to consider any argument not raised in the arbitration proceeding, given that MCR 3.602(J)(2)(c) and (d) authorize collateral attack of an arbitrator's award. To the extent that the circuit court erred when it rejected the arbitration defendants' protestations of error on the ground that they did not raise them during the arbitration, any error was harmless because, as discussed above, the arbitration defendants have failed to demonstrate that any of their claims of arbitration impropriety entitle them to relief. Moreover, the circuit court record reflects that the court did examine the face of the arbitrator's award and determined that it evidenced no mistake of fact or law. Accordingly, the circuit court properly confirmed the arbitrator's award, even if it employed incorrect logic in doing so. *Dybata v Wayne Co*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 283413, 283414, issued 3/25/2010), slip op at 8.

H

Lastly, the arbitration defendants suggest that the circuit court should have conducted an evidentiary hearing to ascertain, for example, whether the arbitrator had awareness of the APA damages cap and what portions of damages the arbitrator assigned to breach of contract versus fraud. These matters directly pertain to the merits of the arbitrator's decision, which the law precludes the circuit court or this Court from revisiting. *AFSCME Local 369*, 284 Mich App at 144. Consequently, the circuit court committed no error by declining to hold an evidentiary hearing.

III. DOCKET NO. 289396

The TBI defendants challenge the Macomb Circuit Court's grant of summary disposition to Blue River, which we review de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A court may grant a motion for summary disposition under MCR 2.116(C)(10) if no factual dispute exists and the moving party is entitled to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits,

and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "[T]he nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute, making trial necessary." *Rice*, 252 Mich App at 31.

The TBI defendants contend that the circuit court erred in taking into account the arbitration award as a basis for finding that no genuine issue of material fact existed concerning their payment obligation to Blue River. The TBI defendants dispute that the arbitration award was dispositive of whether CBW had exercised its right to a setoff or deduction under the Reference Note, relying on *P R Post Corp v Maryland Cas Co*, 403 Mich 543; 271 NW2d 521 (1978). In that case, the defendant surety did not receive notice of an agreement to arbitrate entered into between a property owner and a construction company, and the surety did not participate in later arbitration proceedings involving the property owner and the construction company. *Id*. at 546. After the circuit court and Court of Appeals confirmed the arbitration award in the plaintiff property owner's favor, the plaintiff filed suit against the defendant surety to recover damages, including "the amount the arbitrator awarded [the] plaintiff against the contractor." *Id*. at 546-547. The Supreme Court held that the arbitrator's award did not conclusively bind the surety, but was admissible as prima facie evidence. *Id*. at 552. The Court explained that "[t]he legal effect of the admission of prima facie evidence is to shift the burden of proceeding to the party calling the evidence into question." *Id*.

In this case, unlike in *P R Post Corp*, the TBI defendants knew of the arbitration proceeding and participated in the proceeding. Even applying the holding in *P R Post Corp* to the circumstances of this case, Blue River relied on the arbitration award as reflecting the arbitrator's implicit determination that CBW exercised its right to a setoff or deduction. Pursuant to *P R Post Corp*, 403 Mich at 552, the burden then shifted to the TBI defendants to produce some evidence that CBW's neglect to make payments did not amount to an exercise of its right to a setoff or deduction. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999); *P R Post Corp*, 403 Mich at 552. The TBI defendants presented no relevant evidence in this regard, thereby failing to establish a material factual dispute for trial. *Smith*, 460 Mich at 455.

Furthermore, the promissory note does not require a finding, ruling, or any confirmation that CBW properly or lawfully exercised its right to a setoff or deduction for the TBI defendants to remain responsible for paying Blue River under the note. The relevant promissory note language reads:

> Commencing on October 5, 2006, installment payments in the amount of 10.714% of the amount of each installment payment received by the Obligor pursuant to that certain Buyer's Promissory Note of even date herewith ("the Reference Note") by Computer Business World, LLC, . . . in favor of the Obligor shall be due and payable by the Obligor to the Obligee within five (5) business days of Obligor's receipt of payments from Computer Business World; provided, *however, if Computer Business World does not make a scheduled payment to Obligor on the Reference Note based on its exercise of a right of set-off or deduction, Obligor shall still make payment to Obligee* of 10.714% of the amount

> of the installment payment which would otherwise have been due by Computer Business World LLC . . . . [Emphasis added.]

The promissory note simply states that if CBW does not make a scheduled payment on the Reference Note "based on its exercise of a right of set-off or deduction," then the TBI defendants still must make payments to Blue River under the note.

The TBI defendants lastly submit that the fact that an appeal remains pending with respect to the Oakland Circuit Court's confirmation of the arbitration award gives rise to a genuine issue of material fact in this case regarding whether CBW exercised its right to a setoff or deduction. To the contrary, irrespective of the outcome of the appeal in Docket No. 290366, the evidence of record in both Docket Nos. 289396 and 290366 shows that CBW withheld payments under the Reference Note pursuant to its exercise of its right to a setoff or deduction. As noted, the promissory note here does not envision that CBW's exercise of its right to a setoff or deduction must be adjudicated lawful or proper for the TBI defendants to remain liable for paying Blue River under the terms of the promissory note. Consequently, the circuit court properly granted Blue River summary disposition pursuant to MCR 2.116(C)(10). Moreover, for the reasons discussed *supra* in Docket No. 290366, we are affirming the confirmation of the arbitration award.

Affirmed. Appellate costs to CBW and Blue River as the prevailing parties. MCR 7.219(A).

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher