STATE OF MICHIGAN

COURT OF APPEALS

CCS, LLC d/b/a Columbia Construction Services and MARK S. PROVENZANO, Plaintiff-Appellants, v IWI VENTURES, LLC, Defendant-Appellee.	UNPUBLISHED January 24, 2012 No. 300940 Macomb Circuit Court LC No. 09-5697-CZ

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

CCS and Mark Provenzano appeal from the trial court order enforcing an arbitration award in favor of IWI Ventures (IWI). Because the arbitrator did not exceed the scope of the agreement to arbitrate, we affirm.

On March 21, 2008, IWI and CCS executed an agreement under which CCS would provide labor and materials for the construction of a Noodles & Company restaurant franchise in Springfield, Illinois. The contract required CCS, when requesting payment from IWI, to submit general contractor and subcontractor lien waivers to show that previous payments had in fact been used to pay subcontractors. It is undisputed that IWI made two payments to CCS totaling $277,323.30, and that CCS failed to pay a number of subcontractors. The subcontractors asserted construction liens against the property, and IWI made additional payments to CCS's subcontractors totaling $262,096.50. To obtain the two payments, CCS had submitted waivers including sworn statements by Provenzano that the property was free from claims of construction liens or the possibility of construction liens. It is undisputed that IWI reasonably relied on these false statements and authorized the payments to CCS.

IWI filed suit against CCS and Provenzano in Macomb Circuit Court, alleging breach of contract by CCS and a violation of Michigan's Building Contract Fund Act (BCFA), MCL 570.151 et seq., by both CCS and Provenzano. On defendant's motion, the trial court dismissed the suit because the contract between CCS and IWI expressly required all disputes be settled by arbitration, and because all claims against Provenzano arose out of or related to the contract because they were all based on CCS's failure to pay its subcontractors.

IWI then filed an arbitration proceeding against CCS and Provenzano in Illinois, articulating the same theories as in the prior civil case. The arbitrator held that Michigan law did not apply so there could be no violation of the BCFA. However, the arbitrator held that under Illinois law Provenzano and CCS were liable for common law fraud. The arbitrator also imposed $11,428.72 in administrative fees and costs of arbitration against CCS and Provenzano. The arbitrator denied a motion to modify or vacate the award on December 28, 2009.

Provenzano and CCS filed a complaint to modify and vacate, in part, the arbitration award in Macomb Circuit Court on December 29, 2009. On May 12, 2010, IWI filed a motion for summary disposition, seeking to enter judgments upon the arbitration award. CCS and Provenzano responded with a counter-motion for summary disposition on May 26, 2010, arguing that the arbitrator had exceeded the scope of his authority by finding Provenzano and CCS liable for fraud when IWI plead only breach of contract and violation of the BCFA. The trial court granted summary disposition in favor of IWI, and CCS and Provenzano now appeal.

We review de novo a trial court's decision to enforce an arbitration award. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003).

IWI correctly points out that CCS and Provenzano did not make a timely motion to modify or vacate the arbitration award. MCR 3.602(J)(3) and MCR 3.602(K)(2) allow a circuit court to vacate or modify an award, but only on a motion filed within 91 days after the date of the award. *Cipriano v Cipriano*, 289 Mich App 361, 378-379; ___ NW2d ___ (2010) (trial court erred by modifying an award where party failed to follow timing requirements of MCR 3.602); see also *Vyletel-Rivard v Rivard*, 286 Mich App 13, 22; 777 NW2d 722 (2009) (involving 21-day period for domestic relations cases). CCS and Provenzano properly filed a complaint within 21 days of the award, MCR 3.602(J)(1), (K)(1), but did not make a motion as required by MCR 3.602(J)(3) and (K)(2).

Moreover, the arbitrator did not exceed the scope of his authority. CCS and Provenzano argue that the issue of fraud was never raised, and it is true that IWI stated its claim in terms of the BCFA. However, a claim under the BCFA requires a showing of fraud. MCL 570.152; 570.153. CCS and Provenzano therefore knew from the outset that they had to defend against some form of fraud claim. See *Cal-Circuit ABCO, Inc v Solbourne Computer, Inc*, 848 F. Supp 1506, 1506 (D Colo, 1994) (arbitrator did not exceed authority where defendant knew from the outset that it had to defend against a claim based on failure to pay for "firm" purchase orders). Similarly, a cause of action may be amended to fit the facts produced at trial so long as there is no prejudice or surprise to the defendant. *Dacon v Transue*, 441 Mich 315, 333; 490 NW2d (1992); MCR 2.118(C)(2). All of the facts relevant to the finding of common law fraud—i.e., misrepresentation of a presently known fact—would also have been relevant under the BCFA, and CCS and Provenzano do not suggest that the finding of fraud was factually incorrect. CCS and Provenzano do not articulate how the proofs would have been different if IWI had explicitly

pled a common law fraud claim. The issue of fraud, however labeled, was before the arbitrator and he did not exceed his authority by applying Illinois law to the facts before him.[1]

Affirmed.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher

[1] We note that if the BCFA had applied in this case, at least according to IWI, CCS and Provenzano would have been liable for the full amount of all funds wrongfully retained, whereas under the theory of common law fraud they were only liable for the amounts they wrongfully stated had already been paid to subcontractors.