

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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WIRELESS TOYZ FRANCHISE, L.L.C.,

Plaintiff/Counter-Defendant-  
Appellee,

v

CLEAR CHOICE COMMUNICATION, INC.,  
LAMAR KARMO, ALVIN KARMO, KHALED  
NAJIIB, and KARMO GROUP, L.L.C.,

Defendants/Counter-Plaintiffs-  
Appellants.

UNPUBLISHED  
May 31, 2012

No. 303619  
Oakland Circuit Court  
LC No. 2007-084560-CK

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Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendants appeal as of right an order denying their motion to vacate the arbitration award and confirming the arbitration award. We reverse and remand for further proceedings.

This case arises out of the alleged breach of two franchise agreements. Plaintiff sued defendants, alleging that defendants breached the agreements and defendants filed a counterclaim, alleging that plaintiff breached the franchise agreements and committed fraud by failing to disclose that it had entered into another franchise agreement for a competing store within two miles of defendants' planned stores. The parties eventually stipulated to submit the entire matter to binding arbitration, and the order included that the action would be dismissed but the trial court would retain jurisdiction to enforce the stipulated order and the arbitration award. Following the arbitration hearing, the arbitrator issued an opinion denying an award to either party on their respective claims. The arbitrator concluded that both parties "engaged in, at a minimum, innocent misrepresentation that induced the other into the franchise relationship, and that the franchise agreements must therefore be rescinded." With regard to plaintiff, it failed to advise defendants that a competing store was opening within two miles of one of defendants' stores. With regard to defendants, they failed to disclose the actual owners of the companies. In light of the fraud committed by both parties, rescission of the franchise agreements was warranted because, the arbitrator concluded, "[t]he facts suppressed were material to the transaction, from which both parties necessarily benefitted in the form of the resulting franchise relationship."

Defendants moved to vacate the arbitration award, arguing that the arbitrator exceeded the scope of his authority by deciding plaintiff's purported fraud claim that was not pending at the time the stipulated order to arbitrate the case was entered. That is, plaintiff did not challenge the validity of the franchise agreements by claiming that defendants failed to identify all ownership interests in their companies until the arbitration hearing was in progress. Plaintiff responded, arguing that the arbitrator did not exceed the scope of his authority because the stipulated order conferred the broadest possible authority on the arbitrator to "resolve all disputes and controversies between the parties." The order did not limit the arbitrator's authority "solely to claims, counterclaims, defenses and evidence in [sic] pending at the time of the Arbitration Order." And additional discovery was contemplated in the order. Accordingly, plaintiff argued, the arbitration award should be confirmed. After oral arguments were held on defendants' motion, the trial court agreed with plaintiff that the arbitrator acted within his powers, holding:

Specifically, the parties' arbitration agreement contemplated that the claims could be amended to conform to the evidence as [sic] explicitly provided that discovery was not complete and granted the arbitrator all the powers of a circuit court judge.

Moreover, the conduct on which the arbitrator's findings were based also constitutes a breach or default of the defendants' obligations under the franchise agreement. And plaintiff also placed those issues before the arbitrator.

This appeal followed.

Defendants argue that the arbitrator exceeded his authority by considering fraud claims raised by plaintiff during the arbitration proceeding because such claims were neither filed nor pending in the trial court at the time the parties entered into the arbitration agreement. We agree.

"A trial court's decision to enforce, vacate, or modify an arbitration award is reviewed de novo." *Nordlund & Assoc, Inc v Village of Hesperia*, 288 Mich App 222, 226; 792 NW2d 59 (2010) (citation omitted). MCR 3.602(J)(2)(c) provides that an arbitration award shall be vacated if the arbitrator exceeded his powers. "Generally, the parties' agreement determines the scope of arbitration." *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007). That is, an arbitration agreement is a contract by which the parties agree to forgo their rights to proceed in civil court and submit their dispute to an arbitrator. *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 577; 552 NW2d 181 (1996). Accordingly, the arbitration agreement constitutes the law of the case and the arbitrator is bound to follow the guidelines set forth in that agreement. *Id.* "[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." *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982).

The stipulated order to submit the controversy to arbitration and arbitration agreement provided in pertinent part as follows:

IT IS HEARBY ORDERED that the parties shall arbitrate all *pending* claims, counterclaims and defenses *raised* in the above action based upon the terms and conditions set forth herein;

\* \* \*

IT IS FURTHER ORDERED that the arbitrator shall have all the powers of a Circuit Court Judge, and as otherwise set forth in MCLA 600.5001 and the Michigan Court Rule 3.602. The Arbitrator shall apply the Michigan Court Rules, the Michigan statutes and Michigan law in adjudicating *the* claims, counterclaims and defenses in the Arbitration. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and strict conformity to the rules of evidence shall not be necessary.

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IT IS FURTHER ORDERED that the parties may conduct necessary, reasonable and appropriate discovery.

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IT IS FURTHER ORDERED that the decision on the Arbitration Award of the Arbitrator will represent a full and final resolution as to any claims, counterclaims and defenses *filed* in the above action . . . . [Emphasis supplied.]

“Stipulated orders that are accepted by the trial court are generally construed under the same rules of construction as contracts.” *In re Nestorovski Estate*, 283 Mich App 177, 183; 769 NW2d 720 (2009) (quotation omitted). The goal of contract interpretation is to ascertain and enforce the intent of the parties. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). “A contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). Clear and unambiguous contractual language must be enforced as written. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010).

The stipulated order to submit the controversy to arbitration and arbitration agreement fairly admits of but one interpretation—only the claims filed and pending in the trial court at the time the arbitration agreement was entered into were properly before the arbitrator. The plain and unambiguous terms of the arbitration agreement provided that “the parties shall arbitrate all *pending* claims, counterclaims and defenses *raised* in the above action,” that Michigan law would apply “in adjudicating *the* claims,” and the arbitration award of the arbitrator would “represent a full and final resolution as to any claims, counterclaims and defenses *filed* in the above action.” Plaintiff never *filed* an innocent misrepresentation claim in the trial court thus such a claim was not *pending* at the time of the stipulated arbitration agreement. We will not rewrite the parties’ unambiguous contract under the guise of interpretation. See *Woodington v Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010). Accordingly, the arbitrator exceeded his authority when he considered the issue whether defendants engaged in innocent misrepresentation that induced plaintiff to enter into the franchise relationships.

Further, we reject plaintiff’s arguments on appeal that, because the arbitration agreement provided that the Michigan Court Rules applied and the arbitrator had the powers of a judge, the arbitrator was authorized to consider the issue whether defendants engaged in innocent misrepresentation. While the arbitration agreement provided that the arbitrator “shall have all

the powers of a Circuit Court Judge” and the Michigan Court Rules would apply, plaintiff has failed to provide any legal support for its purported claim that a circuit court judge can amend an arbitration agreement—a contract—unilaterally or even with the consent of only one of the contracting parties. Thus, plaintiff has failed to establish that an arbitrator can rewrite the parties’ contract.

And MCR 2.118(C)(1) does not support such a position. That court rule allows for amendment of the pleadings, but by its plain language it applies in a situation where “issues not raised by the pleadings are *tried* by express or implied consent of the parties.” That is, this rule of civil procedure applies to trials, not arbitrations. The scope of the arbitrator’s authority in arbitration is specifically defined by the terms of the arbitration agreement, contract terms agreed to by the parties. Here, as discussed above, that scope was confined to the claims filed and pending in the trial court. A claim of innocent misrepresentation was not filed by plaintiff and thus was not pending in the trial court. Further, that the arbitration agreement permitted “a reasonable time to complete discovery” merely allowed the parties to complete discovery with regard to the filed and pending claims and did not give rise to the additional right to circumvent the plain and unambiguous terms of the arbitration agreement.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Karen M. Fort Hood