IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DANIEL OMER, a single person, Respondent, v. ANCO Investments, LLC, a Washington limited liability company; JOHN TAYLOR and "JANE DOE" TAYLOR, husband and wife and the marital community comprised thereof; ENDEAVOR, INC., d/b/a ENDEAVOR CONSULTANTS, INC., a Washington corporation; GORDY S. ENGLERT and "JANE DOE" ENGLERT, husband and wife and the marital community comprised thereof; and MAIN STREET ESCROW, INC., a Washington corporation, Defendants, And THE ALPS CREDIT UNION, Appellant.	No. 41565-8-II UNPUBLISHED OPINION

Armstrong, J. — The Alps Credit Union appeals the trial court's order confirming an arbitration award in Daniel Omer's favor, arguing that the arbitrator (1) went beyond the scope of his authority under the parties' arbitration agreement, (2) was partial toward Omer, and (3) engaged in misconduct that prejudiced the Credit Union. Finding no error, we affirm the trial court's order confirming the award.

FACTS

In September 2007, Omer sold his vacant lot in Puyallup to Anco Investments LLC for $70,000. John Taylor, owner of Anco Investments LLC,[1] paid Omer $17,500 initially and agreed to pay the balance, approximately $52,000, under the terms of a promissory note Omer held. The promissory note both Omer and Taylor signed stated that the "[s]eller shall be in a Second Lien Position." Clerk's Papers (CP) at 101. The Payment Terms Addendum to the Purchase and Sale Agreement also stated that the indebtedness was secured by the promissory note and Omer's second lien position on the deed of trust.

On September 25, 2007, the Credit Union granted Taylor a $180,000 line of credit secured by a first position deed of trust. Taylor also signed a promissory note for the loan, agreeing to pay interest of 18 percent per annum and 30 percent per annum in the event of default. The former director of the Credit Union, Kevin Wessell, declared that the purpose of the loan was to enable Taylor to purchase the vacant land and to build a home for resale at a profit. Taylor and the Credit Union signed a Speculative Construction Loan Agreement, which stated that the loan was to enable the purchase of real property and the construction of a residence.

Omer returned to Main Street Escrow on October 1, 2007, requesting changes to the Purchase and Sale Agreement to grant him a first lien position. Omer also asked Taylor to agree not to file bankruptcy before paying off the property. On October 3, 2007, Omer verbally authorized the escrow company to record the documents.[2]

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[1] We refer to John Taylor and Anco Investments LLC collectively as "Taylor."

[2] Omer did not receive a first position lien or a commitment from Taylor that he would not file for bankruptcy protection.

The Credit Union loaned Taylor approximately $50,000: a $19,000 payment on September 25, 2007, to Main Street Escrow; $21,000 to Taylor on October 25, 2007; and $10,400 paid to Taylor on January 8, 2008.

Omer received the $17,500 down payment and one monthly payment of $385 on November 1, 2007. The next month, Taylor defaulted on both the note held by Omer and the note held by the Credit Union. The Credit Union non-judicially foreclosed and purchased the property at a trustee's sale in December 2008. The Credit Union was the only bidder at the trustee's sale.

Omer sued Taylor, Endeavor, Inc. d/b/a Endeavor Consultants, Gordy Englert, the Credit Union, and Main Street Escrow, alleging that they conspired to defraud him of $52,000 secured by his second position lien.[3] Specifically, he claimed that (1) he was entitled to judicially foreclose on his deed of trust, (2) the defendants engaged in fraud, (3) the defendants conspired to place him in a second lien position, (4) the court should disregard Anco's and Endeavor's corporate veils, (5) Englert and Endeavor acted as agents of the Credit Union, and (6) Omer's lien against the property should restrain the trustee's sale.

In an amended complaint, Omer added allegations that the trial court should pierce the

[3] Omer asserts that the Credit Union engaged in a fraudulent scheme. According to Omer, Endeavor teaches classes on real estate investing that participants can finance through an in-house credit. Englert teaches part of the class and identifies a "straw man." Omer contends that "the '[s]traw [m]an,' was John Taylor." Br. of Resp't at 1. The straw man would purchase vacant real estate through seller financing and a promissory note secured by a second position line on the deed of trust. Next, Endeavor would direct the straw man to use the Credit Union as the lender for the construction loan with a high interest rate. Later, the straw man would default on the loan and the Credit Union would conduct a non-judicial foreclosure and purchase the property at a trustee's sale. Because the arbitrator did not find the Credit Union liable for fraud or for engaging in a criminal scheme, Omer's allegations of fraud are not relevant to this appeal.

Credit Union's corporate veil and that the defendants violated RCW 9A.82.100 by engaging in a criminal profiteering scheme. Omer sought relief in the amount of $52,000 at eight percent interest and his attorney fees. In neither his original nor his amended complaint did Omer allege any claims for breach of contract.

On November 9, 2009, the Credit Union, Endeavor, and Taylor moved for summary judgment dismissal of Omer's claims of fraud, conspiracy, and violation of the Washington Criminal Profiteering Act, chapter 9A.82 RCW. The trial court denied summary judgment.

The parties then agreed to arbitrate the case and selected former Pierce County Superior Court Judge Robert H. Peterson as the arbitrator. The "CR2A Agreement to Arbitrate" stated that arbitration was "for the purpose of deciding the claims in Pierce County Superior Court Cause No. 08-2-15380-6." CP at 486.

During the arbitration proceeding, the arbitrator asked whether Omer asserted a third-party beneficiary claim.[4] The Credit Union claims that the arbitrator asked Omer's counsel why he had not made a claim as a third-party beneficiary, while Omer claims that the arbitrator asked whether Omer was a third-party beneficiary. In the arbitrator's final written decision, the arbitrator recognized that he "did raise the breach of contract theory as a possible theory of recovery . . ." CP at 573. After the arbitrator raised the breach of contract theory, Omer moved to conform the pleadings to the evidence under CR 15(b), to include an unjust enrichment claim and a third-party beneficiary claim. The Credit Union objected. The arbitrator granted Omer's oral motion to amend the pleadings to include the third-party beneficiary claim.

[4] The arbitration proceeding was conducted without a court reporter.

In his final decision, the arbitrator stated, "I as the arbitrator did raise the breach of contract theory as a possible theory of recovery and granted Plaintiff's motion to amend. I decided for Plaintiff based on breach of contract but dismissed all three fraud theories which were alleged in the pleadings." CP at 616. The arbitrator entered a judgment for Omer in the amount of $52,115, plus eight percent interest per annum from November 1, 2007, to the entry of judgment. The arbitrator denied Omer's request for attorney fees.

The trial court entered judgment confirming the arbitration award. The trial court denied the Credit Union's cross-motion to vacate the award and granted Omer's motion to strike parts of Wessell's declaration in support of the Credit Union's cross-motion to vacate the arbitration award.[5]

ANALYSIS

I. Review of Arbitration Award

Washington public policy strongly favors finality of arbitration awards. *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). "As a rule, a contractual dispute is arbitrable unless the court can say with positive assurance that no interpretation of the arbitration clause could cover the particular dispute." *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 46, 17 P.3d 1266 (2001) (citing *Kamaya Co., Ltd. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 713, 959 P.2d 1140 (1998)). The broader the arbitration submission, "the less susceptible an award is to challenge as being beyond the scope of the submission, and in the absence of an express reservation, the participants are presumed to agree that the arbitrator has the authority to

[5] The trial judge ordered that paragraphs 3, 5-8, and 10-13 be stricken from Wessel's declaration. The paragraphs in question included Wessell's recitation of what occurred during arbitration.

determine all issues of fact and law necessary to an ultimate decision." 21 Richard A. Lord, Williston on Contracts, Authority of Arbitrators § 57:77 (4th ed. 2001).

Under the Washington Uniform Arbitration Act, chapter 7.04A RCW, the trial court has the limited power to confirm, vacate, modify, or correct an arbitration award. *Pegasus Constr. Corp. v. Turner Constr. Co.*, 84 Wn. App. 744, 747, 929 P.2d 1200 (1997) (quoting *Barnett v. Hicks*, 119 Wn.2d 151, 829 P.2d 1087 (1992)). On appeal, we review only the face of the award to determine whether it manifests an erroneous rule of law or a mistaken application of law. *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). We do not review the merits of the case and, ordinarily, will not consider the evidence before the arbitrator. *Davidson*, 135 Wn.2d at 119. The arbitrator is the final judge of both the facts and the law. *Clark County Pub. Util. Dist. No. 1 v. Int'l Bhd. of Elec. Workers, Local 125*, 150 Wn.2d 237, 245, 76 P.3d 248 (2003).

II. Arbitration Agreement

The Credit Union argues that the trial court erred when it confirmed the arbitration award because the award was based on a breach of contract issue that was beyond the scope of the parties' submission to arbitration.[6] Omer responds that the face of the arbitration award does not contain an error of law for us to review and that the parties' arbitration agreement granted the arbitrator full authority to decide the case.

[6] The Credit Union relies on *Anderson v. Farmers Insurance Co.*, 83 Wn. App. 725, 730-31, 923 P.2d 713 (1996), *Price v. Farmers Insurance Co.*, 133 Wn.2d 490, 498-500, 946 P.2d 388 (1997), and *Sullivan v. Great American Insurance Co.*, 23 Wn. App. 242, 594 P.2d 454 (1979). Each case dealt with the scope of an arbitrator's authority under an underinsured motorists provision of an insurance policy. And in each case, the court enforced the specific limits and coverage set forth in the policy. The arbitration agreement here lacks the specificity of the insurance contracts at issue in *Anderson*, *Price*, and *Sullivan*. The cases do not support the Credit Union's position.

Parties are free to decide whether they want to arbitrate and what issues are to be submitted to arbitration. *Godfrey v. Hartford Cas. Ins., Co.*, 142 Wn.2d 885, 894, 16 P.3d 617 (2001). The arbitrator's authority is limited by the parties' arbitration agreement. *Price v. Farmers Ins. Co.*, 133 Wn.2d 490, 500, 946 P.2d 388 (1997). To determine whether an issue was presented to the arbitrator, we examine the face of the award in light of the arbitration agreement and the demand for arbitration. *Hanson v. Shim*, 87 Wn. App. 538, 546, 943 P.2d 322 (1997). The award does not include the arbitrator's reasons for the award. *Barnett*, 119 Wn.2d at 156 (citing *Westmark Props., Inc. v. McGuire*, 53 Wn. App. 400, 403, 766 P.2d 1146 (1989)).

Here, Omer's complaint before arbitration pleaded claims for fraud based on intentional misrepresentation, civil conspiracy, and criminal racketeering, and also alleged that Endeavor acted as an agent for the Credit Union. Omer sought monetary damages and "such other and further relief as the court deems just and equitable." CP at 13. The parties' arbitration agreement stated, "The undersigned parties agree . . . to conduct an arbitration pursuant to RCW 7.04A for the purpose of deciding the claims in Pierce County Superior Court Cause No. 08-2-15380-6." CP at 486. The parties chose not to limit the issues presented to the arbitrator.

The Credit Union's argument appears to specifically challenge the arbitrator's findings and reasons for the arbitration award. For example, the Credit Union points to the arbitrator's preliminary decision to find in favor of Omer with regard to a third-party beneficiary breach of contract claim. . . ."[7] Br. of Appellant at 20; CP at 612-13. We are not concerned with the reasons for the arbitrator's decision, however, but with whether the face of the award is limited to

[7] The arbitrator's only mention of a third-party beneficiary claim is found in his preliminary decision.

the issues presented for arbitration. *Price*, 133 Wn.2d at 496-98. Here, the arbitrator's final decision is the resulting award, not the preliminary decision that the Credit Union refers to. And in the final decision, the arbitrator "decided for Plaintiff based on breach of contract." CP at 616-17.

The parties agreed to arbitrate the "claims" in their pending superior court case, No. 08-2-15380-6. CP at 486. The specific issue is whether we should construe "claims" as limited to the existing claims or to include those claims likely to arise in the ordinary course of litigating the parties' overall dispute. Here, we can easily find that the parties intended to resolve all their disputes stemming from the transaction between Omer, the Credit Union, and Taylor. Also persuasive is that the parties did not choose to limit the procedural powers of the arbitrator as they could have. Parties may provide in the arbitration agreement specific details regarding any limitations they might want to impose on the arbitrator's powers, or conversely, provide the arbitrator essentially unlimited discretion. 7 Richard A. Lord, Williston on Contracts, Obstructing Justice § 15:11 (4th ed. 2003).

The agreement here is general and broad, thus allowing the arbitrator to rule on all issues of fact and law to resolve the matter. *See Cont'l Materials Corp. v. Gaddis Mining Co.*, 306 F.2d 952, 954 (10th Cir. 1962) (in the absence of the parties expressly limiting the arbitrator's authority, the participants are presumed to agree that the arbitrator has the authority to determine all issues of fact and law necessary to an ultimate decision). We cannot "say with positive assurance that no interpretation of the arbitration clause could cover" the amended claim for breach of contract. *Stein*, 105 Wn. App. at 46. We affirm the arbitration award.

III. Arbitrator's Authority

Next, the Credit Union asserts that the arbitrator showed partiality, engaged in misconduct, and exceeded his powers as arbitrator. The Credit Union argues that because Omer did not originally plead a contract claim, (1) the arbitrator lacked the authority to suggest the third-party beneficiary theory of recovery; (2) the arbitrator lacked authority to grant a CR 15(b) motion to amend; and (3) the arbitrator's conduct prejudiced the parties.

RCW 7.04A.230 states:

> Upon motion of a party to the arbitration proceeding, the court shall vacate an award if . . . (b) There was: (i) Evident partiality by an arbitrator appointed as a neutral . . . (iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding . . . (d) [a]n arbitrator exceeded the arbitrator's powers.

An arbitrator exceeds his powers when the arbitration award exhibits an error of law. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 237, 236 P.3d 182 (2010). The scope of the arbitrator's authority depends on the terms of the agreement to arbitrate. *Barnett*, 119 Wn.2d at 155.

We have already rejected the Credit Union's contention that the arbitrator exceeded his authority under the arbitration agreement. And the Credit Union does not argue that it objected to the arbitrator's grant of the CR 15(b) motion on partiality or misconduct grounds. Rather, the Credit Union only generally objected to the motion to amend. The Credit Union argued partiality and misconduct only after the arbitrator sent its preliminary decision. Without showing more than just an adverse decision and that it objected to the arbitrator's conduct on partiality and misconduct grounds, the Credit Union's arguments fail. *See S & S Const., Inc. v. ADC Props. LLC*, 151 Wn. App. 247, 260, 211 P.3d 415 (2009); *Kempf v. Puryear*, 87 Wn. App. 390, 393,

942 P.2d 375 (1997) (Division Three held that because the complaining party did not object to the claimed misconduct at the time of arbitration, assertions that the arbitrators refused to hear certain evidence, refused cross-examination, did not swear witnesses, and had ex parte contacts with both parties did not require vacating an arbitration award.).

IV. Policy Considerations

The Credit Union next argues that we should vacate the judgment confirming the arbitration award for policy reasons. In making this argument, the Credit Union repeats its challenge to the scope of the arbitrator's authority and argues that the arbitrator's conclusion is "completely lacking in legal basis." Br. of Appellant at 26-28 (emphasis omitted). But limiting judicial review to the face of the award is a shorthand description for the policy that courts should accord substantial finality to arbitrator decisions. *Davidson*, 135 Wn.2d at 118.

The Credit Union argues that the arbitrator misapplied third-party beneficiary contract principles. But to reach this issue, we would have to go behind the face of the arbitration award and we have no authority to do so.

V. Declaration

The Credit Union argues that the trial court erred in striking portions of the declaration of Wessell, former director of the Credit Union, which it submitted in support of the Credit Union's cross-motion to vacate the arbitration award.

A trial court's limited authority to confirm, vacate, modify, or correct an arbitration award arises from statute. RCW 7.04A.220-.240; *Hanson*, 87 Wn. App. at 545. Judicial review of an arbitration award is exceedingly limited. *Davidson*, 135 Wn.2d at 119. As we have discussed above, courts can consider only the face of the award in addressing a claim of legal error. *Boyd*, 127 Wn.2d at 262-63. If the claimed error does not appear on the face of the award, a court cannot vacate or modify the award. *Davidson*, 135 Wn.2d at 119.

The Credit Union provided a declaration by Wessell in support of its cross-motion to

vacate the arbitration award. The trial court struck multiple paragraphs of Wessell's declaration. In the paragraphs at issue, Wessell (1) identified the defendants and set forth the legal issues alleged in Omer's first amended complaint; (2) reiterated the scope of the arbitration agreement and argued that "[t]he fact is Alps never agreed or intended to provide the [a]rbitrator with the authority to amend pleadings to conform to the evidence and decide new, unpled claims like the third-party beneficiary claim"; (3) stated that the "Alps, Mr. Englert, and Mr. Omer all testified that the Plaintiff never spoke with or corresponded with any of the Defendants before he signed the closing documents concerning the Property at Main Street Escrow"; (4) narrated that the arbitrator asked Omer as to why he did not plead a third-party beneficiary claim and that Omer subsequently moved to amend his pleadings; (5) declared that the third-party beneficiary theory was new; and (6) summarized the arbitration award. CP at 509-11.

On appeal, the Credit Union provides no relevant authority to support its assertion that the trial court improperly struck portions of the Wessell declaration or that the declaration is pertinent to our limited review of the arbitration award. Wessell's declaration reports either basic facts from the superior court pleadings, the Credit Union's interpretation of the arbitration agreement, or what occurred in the arbitration. The trial court already had the pleadings and the arbitration agreement before it, and a court will not consider the parties' subjective beliefs about what they intended to arbitrate. *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 854, 22 P.3d 804 (2001) (citing *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981)). Nor could the trial court consider evidence from the arbitration or statements about what occurred during the arbitration. *See Davidson*, 135 Wn.2d at 119, 122. The Credit

Union's attempt to present this material to the trial court violates the well-established law that judicial review of the award is limited to the face of the award. *See Davidson*, 135 Wn.2d at 118-19.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Penoyar, C.J.