IN THE COURT OF APPEALS OF IOWA

No. 2-275 / 11-1493
Filed June 27, 2012

ROBERT F. KAZIMOUR CO., KORLIN K. KAZIMOUR, KIMBERLY K. KAZIMOUR, JANIS L. KAZIMOUR, RFK TRANSPORTATION, INC., JANCO TRANSPORTATION, INC., PAN AMERICAN WORLD HIGHWAYS, LTD., ROBERT F. AND JANIS L. KAZIMOUR CHARITABLE LEAD TRUST, and RFK SYSTEMS, INC.,
Plaintiffs-Appellants,

vs.

WEST SIDE UNLIMITED CORPORATION, WEST SIDE TRANSPORT, INC., WEST SIDE BROKERAGE, INC., and DONALD VOGT,
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, Fae Hoover-Grinde, Judge.

The plaintiffs appeal the district court's confirmation of an arbitration award. **AFFIRMED.**

Donald G. Thompson and Vernon P. Squires of Bradley & Riley, P.C., Cedar Rapids, for appellants.

Kevin J. Visser and Robert S. Hatala of Simmons, Perrine, Moyer, Bergman, P.L.C., Cedar Rapids, for appellees.

Heard by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DOYLE, J.

This is an appeal from the confirmation of an arbitration award. The plaintiffs, Robert Kazimour, his wife (Janis), their two daughters (Korlin and Kimberly), and the Kazimours' various businesses, claim the damages awarded by the arbitrators in their suit against Donald Vogt and his companies, West Side Unlimited Corporation, West Side Transport, Inc., and West Side Brokerage, Inc., were inadequate. We disagree and affirm the judgment of the district court.

I. Background Facts and Prior Proceedings.

The largely undisputed facts giving rise to this appeal were set forth in the majority decision of the panel of arbitrators as follows:

> The case centers on the failed merger of two Iowa-based over-the-road dry-haul trucking and logistics companies, Robert F. Kazimour Company and West Side Unlimited Corporation. . . .
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> . . . Beginning in January 2006 and continuing through June 2007, David F. McIrvin as president and CEO of West Side Unlimited negotiated a series of agreements between West Side and Robert F. Kazimour, then-president of Robert F. Kazimour Co., for the creation of two new entities known as RFK Transportation, L.L.C., and RFK Transportation Logistics, L.L.C. The transaction required a "series" of agreements because various Kazimour family members and entities owned pieces of the Robert F. Kazimour trucking and logistics businesses. The objective for the agreements was for the Kazimour family to contribute their existing trucking and logistics businesses in exchange for 50% ownership of the two new LLCs and for West Side Unlimited to contribute cash in amounts equal to the agreed upon values of the trucking and logistics businesses contributed by the Kazimour family [$50,000 for the trucking business and $100,000 for the logistics business]. After 42 months, West Side Unlimited Corporation was obligated to buy out the Kazimours' interests using a formula based on weighted earnings before interest and taxes (EBIT). West Side Transport, Inc., a wholly-owned division of West Side Unlimited, would manage the day-to-day affairs of the two LLCs during the 42-month period.
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> The devil, of course, always lurks in the details. . . .
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> Despite a great deal of testimony and review of financial documents, the pertinent facts surrounding the collapse of the joint

> enterprises in July 2008 are less than clear. Plainly it was not the orderly "winding up" that one might contemplate under either the parties' agreements or the Code of Iowa. . . .
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> At least four events crucial to these proceedings appear uncontroverted: (1) RFK Transportation LLC, which had operated at a loss every month since its inception, ceased to exist in late-spring 2008; (2) the trailers (and, to the extent that any remained, the tractors) contributed to the joint enterprise by Robert F. Kazimour entities remained in the service of West Side and were returned, if at all, only after delays measuring in length from fourteen days to eight months; (3) no payments were made on the Kazimour entity leases after July 1, 2008; and (4) the RFK Transportation Logistics LLC operation that had been headquartered at the Kazimour facility and had shown operating profits throughout the year of its existence was moved, "lock, stock and barrel," at the direction of Don Vogt [owner of West Side Unlimited entities], to West Side and continued thereafter as part of West Side's brokerage enterprise.
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> . . . The dispute between the parties is primarily over the financial fall-out from this disorderly winding up of the new limited liability companies.

(Footnote omitted.)

The Kazimours filed suit in federal court against Vogt and the West Side entities involved in the failed merger. West Side moved to compel arbitration based on the following identical provisions in the operating agreements for the limited liability companies:

> Any dispute between the Members that cannot be resolved by the Board of Directors shall be resolved by binding arbitration. . . . The arbitration shall be conducted pursuant to the rules of the American Arbitration Association or pursuant to such other rules and procedures that are mutually agreeable to the Members. . . .

The Kazimours filed a consent to the motion, which stated: "Without conceding that the arbitration provisions do, in fact or law, compel arbitration of all disputes between all of the parties, Plaintiffs have agreed to arbitrate all such disputes. Plaintiffs and Defendants have negotiated and executed an Arbitration Submission Agreement." Based on the parties' agreement, the federal district

court dismissed the Kazimours' complaint and entered an order directing the parties "to binding arbitration over all of their claims."

An arbitration hearing commenced in November 2009. After listening to more than a week of testimony and reviewing hundreds of pages of documents, two out of the three arbitrators decided to award the Kazimours damages totaling $378,330 for West Side's conduct in the demise of the trucking companies' merger. The dissenting arbitrator would have awarded the Kazimours $4,291,690 in damages.

The Kazimours filed an application to vacate the award under Iowa Code section 679A.12(1)(c) and (f) (2009), while West Side sought its confirmation under section 679A.11. The district court denied the Kazimours' application, finding the arbitrators did not exceed their powers in making the award. The court found the damages awarded by the arbitrators were supported by substantial evidence and entered an order confirming the award. The Kazimours appeal.

II. Scope and Standards of Review.

This case is on appeal from Iowa Code section 679A.17(1)(c), which provides an appeal may be taken from an order granting confirmation of an arbitration award. Section 679A.17(2) directs us to review the appeal "in the manner and to the same extent as from orders or judgments in a civil action." Our review is accordingly for the correction of errors at law. *Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 839 (Iowa 2007).

III. Scope of Arbitration.

The threshold question in reviewing an arbitration award is to determine whether the issue in dispute is one the parties had agreed to settle by arbitration. *LCI, Inc. v. Chipman*, 572 N.W.2d 158, 160 (Iowa 1997); *see also* Iowa Code § 679A.12(1)(c). A broad scope of inclusion applies to arbitration under chapter 679A. *LCI, Inc.*, 572 N.W.2d at 160.

In their "Arbitration Submission Agreement," the parties agreed the only claims that were not subject to arbitration were the pending actions filed by West Side for the dissolution of the two limited liability companies. The Kazimours claim the arbitrators violated this limitation "by effectively dissolving RFK Transportation Logistics, L.L.C. and awarding damages based upon a provision in the Operating Agreement regarding return of the parties' capital." We think this is a skewed view of the arbitrators' majority decision, which clearly did not dissolve the logistics company, but rather used the dissolution provisions of the company's operating agreement as a benchmark against which to measure the Kazimours' claimed damages.

As will be discussed in more detail below, Korlin and Kimberly Kazimour were awarded $150,000 in damages for the breach of fiduciary duties by Vogt and West Side in unilaterally closing RFK Transportation Logistics, L.L.C. and retaining its assets and profits. In making this award, the arbitrators noted the Kazimours' claimed damages of $1,269,735 each were based

> on Dave McIrvin's projections for a going operation three years down the road. . . . Calculations by McIrvin based on the profits generated by the logistics LLC during the year before its demise ($700,000) might be useful if calculating the likely success of a going business. But this operation, as a joint venture, was a failure.

> Rather than speculate as to what might have happened had the business gone forward, the arbitrators believe the parties' own operating agreement provides a more accurate way of measuring the loss.

The arbitrators accordingly examined the termination and dissolution provisions of the operating agreement for the logistics company, which provided that in the event of a dissolution, the

> Members shall look solely to the assets of the Company for the return of their capital contributions, and if the assets of the Company remaining after payment or discharge of the debts and liabilities of the Company are insufficient to return such capital contributions, they shall have no recourse against any other Member for such purpose.

Under this provision, the arbitrators stated the Kazimours would not be entitled to any damages because there were no profits to be divided:

> Trial Exhibit 35, the RFK Transportation Logistics Detail Balance Sheet for the period ending June 30, 2008, shows total company assets of $2.7 million, which includes the $1.9 million "note receivable" from by-then-defunct RFK Transportation LLC. "Current" liabilities are reported at $649,871. Reported separately is the long term debt of $1.2 million payable by RFK Transportation Logistics LLC to Banker's Trust pursuant to a promissory note dated June 29, 2007.

The arbitrators nevertheless awarded Korlin and Kimberly damages, reasoning:

> [T]he customer list "pirated" by West Side and eventually installed on its computer contained both customers that were "originally" RFK Transportation Co. customers as well as longtime West Side customers. . . . [T]hrough December 31, 2008, these lists remained nearly identical, meaning the former RFK customers became West Side Brokerage customers. . . . West Side's conduct of folding RFK customers into its own company . . . should not be rewarded. The arbitrators hereby award the sum of $150,000 in favor of the plaintiffs and against the defendants for the value of that lost customer list and the potential revenue stream, net of expenses, it may have generated in the short term.

When the arbitrators' decision is read in its entirety, rather than piecemeal as in the Kazimours' brief, it is obvious the arbitrators did not exceed their authority and dissolve the logistics company. We turn next to the sufficiency of the evidence supporting the award.

IV. Sufficiency of the Evidence.

A. Waiver.

At the outset, we must address West Side's argument that the Kazimours waived a substantial-evidence review under section 679A.12(1)(f) by agreeing to "binding arbitration."[1] That section provides that upon application of a party, the district court shall vacate an award if "[s]ubstantial evidence on the record as a whole does not support the award. The court shall not vacate an award on this ground . . . *if the parties have agreed that a vacation shall not be made on this ground*." Iowa Code § 679A.12(1)(f) (emphasis added).

Referencing the above-italicized language, the Iowa Supreme Court in *O'Malley v. Gundermann*, 618 N.W.2d 286, 289, 292 (Iowa 2000), held an arbitration agreement that provided the "decision of the arbitrator shall be final and binding on both parties" implied the parties did not intend for the decision to be subject to a substantial-evidence review.

Here, the arbitration provisions in the operating agreements for the limited liability companies stated, "Any dispute between the Members that cannot be

[1] West Side alternatively contends the relief sought by the Kazimours is actually a modification or correction of the amount of damages awarded by the arbitrators, which must be brought pursuant to Iowa Code section 679A.13, rather than section 679A.12(1)(f). As West Side observes, section 679A.17(1) does not provide for an appeal from an order denying an application to modify or correct an award under section 679A.13. But the Kazimours' application before the district court was explicitly brought and denied under the grounds listed in section 679A.12 for vacation of an award. We accordingly reject this argument and review the Kazimours' application as it was pled.

resolved by the Board of Directors shall be resolved by binding arbitration." And the federal district court order dismissing the Kazimour's complaint declared: "Plaintiffs . . . have signed an agreement with Defendants for binding arbitration of all of the parties' claims. Accordingly, the parties are ordered to binding arbitration over all of their claims."[2] However, the "Arbitration Submission Agreement" entered into by the parties did not contain any similar statements regarding the binding nature of the arbitration. In fact, paragraph thirty-six of the agreement provided in relevant part:

> The parties agree that the 90 day period provided for in Iowa Code Section 679A.12 and 679A.13 is hereby shortened by agreement to 45 days, to permit the payment of the award within 45 days in the absence of an application to vacate an award under Section 679A.12 or an application for modification or correction of an award under Section 679A.13.

By referencing the section 679A.12 right to apply to vacate an award and the section 679A.13 right to apply for modification or correction of an award without limiting or waiving those rights, we conclude the rights were preserved by the parties' agreement. Though we are tempted to do otherwise,[3] we will

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[2] The Kazimours claim because these provisions state only that arbitration would be "binding," not "final and binding," *O'Malley* does not apply. This seems to us a distinction without a difference given a later statement in *O'Malley* that did not reference the word "final." 618 N.W.2d at 292 ("[T]he Agreement clearly provides that the decision of the arbitrator shall be binding on both parties. This provision of the Agreement clearly implies that the parties did not intend that the arbitrator's decision would be subject to a substantial-evidence challenge or review."). We need not decide the question, however, because we believe language in the parties' subsequent arbitration agreement indicates the substantial-evidence ground was not waived.

[3] We understand West Side's obvious frustration with the Kazimours' ability to have the award reviewed for substantial evidence. As our supreme court has stated on several prior occasions:

> "[A]rbitration decisions are not . . . closely scrutinized. A refined quality of justice is not the goal in arbitration matters. Indeed such a goal is deliberately sacrificed in favor of a sure and speedy resolution. Under our common-law view the purpose of arbitration is to end disputes without

assume for the sake of argument that the substantial-evidence review is available to the Kazimours.

B. Breach of Fiduciary Duty Damages.

The Kazimours claim the district court erred in refusing to vacate the $150,000 awarded to Kimberly and Korlin for Vogt and West Side's breach of fiduciary duty in assuming the business of RFK Transportation Logistics, L.L.C. They argue the award was not supported by substantial evidence because the arbitrators ignored the testimony of the Kazimours' expert witness, David McIrvin, regarding the profits lost by the logistics company due to the breach. We disagree.

The ultimate question in assessing a substantial-evidence challenge under section 679A.12(1)(f) is whether the evidence supports the finding actually made, not whether the evidence would support a different finding. *Ales*, 728 N.W.2d at 839. "This court does not consider evidence to be insubstantial merely because different conclusions can be drawn from the evidence." *Id.* Evidence is instead substantial if a reasonable person would accept it as sufficient to reach a conclusion. *LCI, Inc.*, 572 N.W.2d at 161.

Review of an arbitrator's damage award has been compared to that of a verdict of a jury. *Id.* at 162. We accordingly view the evidence in the light most

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> court participation. It is no idle coincidence that the words 'arbitration' and 'arbitrary' are both derived from the same Latin word."

LCI, Inc., 572 N.W.2d at 162 (citations omitted). Litigation like this defeats the goal of arbitration to provide a quick and cheap decision. *See Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp.*, 86 F.3d 96, 100 (7th Cir. 1996). Our legislature, however, saw fit to allow substantial-evidence reviews of arbitration awards, though no similar grounds existed at common law, or in the federal or uniform arbitration acts. *See LCI, Inc.*, 572 N.W.2d at 161; *see also Humphreys v. Joe Johnston Law Firm, P.C.*, 491 N.W.2d 513, 515 (Iowa 1992).

favorable to the award. *Yoch v. City of Cedar Rapids*, 353 N.W.2d 95, 98 (Iowa Ct. App. 1984). Damages should be set aside as inadequate only where it appears clearly from the uncontroverted evidence that the amount bears no reasonable relationship to the loss suffered by the plaintiff. *Id.* at 99.

McIrvin, who was also the architect of the failed merger between the Kazimours and West Side, presented three damage scenarios to the district court on Kimberly and Korlin's fiduciary duty claims, ranging from $1,269,735 to $1,637,289. His calculations were based on the profits that would have been realized by the logistics company through December 2010, had the merger gone as planned and the buy-out of Kimberly and Korlin's interests occurred. All of the arbitrators, the dissenting panel member included, found McIrvin's calculations to be too speculative. That is an acceptable basis upon which recovery for lost profits may be denied. *See Harsha v. State Sav. Bank*, 346 N.W.2d 791, 797 (Iowa 1984); *see also Pavone v. Kirke*, 801 N.W.2d 477, 495 (Iowa 2011) (noting while "some speculation on the amount of damages sustained is acceptable . . . overly speculative damages cannot be recovered").

The arbitrators clearly felt McIrvin's projections based on the first-year profits of the company were overly optimistic, especially considering their finding that the new logistics businesses started by both the Kazimours and West Side after the demise of RFK Transportation Logistics, L.L.C. were also failures. The award of $150,000 "for the value of [the Kazimours'] lost customer list and the potential revenue stream, net of expenses, [the company] may have generated in the short term," is equal to the value of the Kazimours' capital contribution to the enterprise. *See LCI, Inc.*, 572 N.W.2d at 162. ("The calculation of damages for

the arbitrators, as for a jury, is not an exact science."). This was reasonable and supported by the evidence. *See, e.g.*, *id.* (refusing to vacate arbitration award where "panel's consideration of a multiplier of 1.5 instead of 1.35, as well as its apparent application of a fifteen percent value on the covenant and the two-year limitation on the period of time for the allowance of damages all 'inhered' in the award and may not be the basis for setting it aside").

C. Lease Damages.

The arbitrators determined the Kazimours were entitled to $228,330 for Vogt's conduct in keeping the Kazimours' tractors and trailers on the road "after July 1, 2008, while this controversy raged." That figure was based upon "the average monthly lease rental ($258; *see* Tr. Ex. 100, ex. 2) multiplied by the 181 trailers that generated revenue for West Side and were not recovered by Kazimour until between two and eight months after the demise of the transportation LLC." The Kazimours claim the "problem with this approach—and the reason it lacks substantial basis in the record—is that Exhibit 100, Ex. 2, represents a hypothetical situation." Be that as it may, we find the court's award is supported by the evidence.

The exhibit relied upon by the arbitrators was prepared by McIrvin. He testified that in preparing the exhibit, he "was placing [him]self back in the role of running the Transportation, L.L.C., at the time that . . . the economic conditions in the freight industry had changed" for the worse. He accordingly assumed "that the L.L.C. would have been successful in negotiating a reduction in the monthly trailer lease cost by $70 per month per trailer from July 1, 2008, through . . . December 31st, 2010." This testimony provides sufficient support for the

arbitrators' award which, contrary to the Kazimours' arguments otherwise, was not required to "be based on the actual lease rates at the time." *See Yoch*, 353 N.W.2d at 98 (stating we will not interfere with a verdict where it "is within a reasonable range as indicated by the evidence").

The Kazimours' related claim, that West Side agreed to assume all lease payments in the asset purchase agreement, was roundly rejected by the arbitrators. The parties to the asset purchase agreement were Robert F. Kazimour Co. as the seller and RFK Transportation, L.L.C. as the buyer, although the signature line at the end of the agreement identified the buyer as "West Side Unlimited Corp." Kazimour testified he would never have "done the deal" had West Side not assumed the leases. The majority of arbitrators found

> no contemporaneous evidence supports his statement. David McIrvin, who was intimately involved with the negotiations and otherwise testified favorably on behalf of the plaintiffs, countered that no one other than the new LLCs were intended to be responsible for the leases. Consistent with that view, the record reveals RFK Transportation, LLC, not West Side, made all the lease payments while the corporation was in existence. Moreover, the agreements described above, considered together, make plain that West Side Unlimited assumed no obligation for the leases until it was required to purchase the Kazimour entities' interests on December 31, 2010.

Substantial evidence supports these findings. The Kazimours' arguments otherwise are disingenuous.

V. Conclusion.

We end by repeating the observation made by our supreme court in *LCI, Inc.*, 572 N.W.2d at 162: subjecting the arbitrators' awards to the degree of scrutiny on judicial review advocated by the Kazimours "would be inconsistent with the rationale underlying the concept of arbitration," transforming it from a

commercially useful alternative method of dispute resolution into a burdensome additional step on the march through the court system. *See also Flexible Mfg. Sys. Pty. Ltd.*, 86 F.3d at 100.

The Kazimours agreed to submit their dispute to a panel of arbitrators. Our limited judicial review gives them what they bargained for—"'binding arbitration, not merely arbitration binding if a court agrees with the arbitrator's conclusion.'" *Humphrey*, 491 N.W.2d at 515 (citation omitted).

We accordingly affirm the district court's confirmation of the arbitration award.

AFFIRMED.