STATE OF MICHIGAN

COURT OF APPEALS

SHELDON D. ERLICH, NORMAN ROSEN, and J. MARTIN BARTNICK,

Plaintiffs/Counterdefendants-Appellants,

v

RIVARD ASSOCIATES, INC.,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellee,

v

ERLICH, ROSEN & BARTNICK, P.C.,

Third-Party Defendant.

UNPUBLISHED
April 21, 2000

No. 208047
Wayne Circuit Court
LC No. 93-317908-NZ

Before: White, P.J., and Sawyer and Griffin, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment on an arbitration award in favor of defendant Rivard Associates, Inc. We affirm but remand for the limited purpose of recalculation of judgment interest.

Plaintiffs first filed a shareholder's action for relief pursuant to MCL 450.1489; MSA 21.200(489) alleging that they were defendant's minority shareholders each owning fifteen percent of defendant's shares, that defendant's sole asset was an office building located at 1301 East Jefferson in Detroit, and that the building was subject to an April 25, 1989, lease between defendant and the building's sole tenant, the law firm now known as Lopatin, Miller, Freedman, Bluestone & Herskovic, P.C. (hereafter Lopatin Miller). Two of the plaintiffs are former partners of Lopatin, Miller, and the third is a former associate. Defendant's remaining shareholders are all officers, employees, or shareholders of Lopatin Miller. In their original lawsuit, plaintiffs alleged that defendant had formed a new lease with Lopatin Miller, without plaintiffs' knowledge, substantially reducing defendant's monthly

rental income, and asked the court to void the modification, enjoin defendant from further lease modifications, order the dissolution of defendant's assets, and award plaintiffs damages.

Defendant filed a countercomplaint, alleging that, when defendant was formed, plaintiffs repeatedly represented to defendant's majority shareholders that if a large building were purchased and reconstructed to house the Lopatin Miller law firm, they would continue to work for the firm for at least ten years, the life of the lease. Instead, plaintiffs secretly formed a new law firm by forestalling client settlements, raiding their firm's clients, files, and referrals and utilizing its capital and support staff. In so doing, they deprived defendant's only tenant of more than $17,200,000 in business and substantial future earnings. Defendant pleaded counts against plaintiffs of promissory estoppel, partial performance, breach of contract, and fraud and misrepresentation and asked for damages.

Plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that the claims were barred by "an agreement to arbitrate . . . or other disposition on the claim before commencement of the action" and MCR 2.116(C)(8), arguing that defendant's allegations against employees of its tenant for actions allegedly detrimental to the tenant did not state a cause of action for defendant. Plaintiffs noted in their brief that Lopatin Miller had previously filed suit against them alleging that plaintiffs were disloyal to the firm, misappropriated firm files, and their actions impaired Lopatin Miller's rights to attorney fees and costs advanced on the files, and this dispute had been ordered into arbitration and was currently pending. The circuit court held proceedings on this motion and took the matter under advisement.

Before the motion for summary disposition was decided, the parties stipulated that the action would be submitted to binding arbitration pursuant to MCL 600.5001(1), MSA 27A.5001(1) and that the arbitrator would be Franklin D. Gettleson, and, accordingly, the circuit court ordered the claims into arbitration. Plaintiffs contend on appeal that, shortly after the order sending this dispute into arbitration was entered, they filed a memorandum of law with the arbitrator in support of the completion of the summary disposition hearing. The arbitrator denied this request.

On July 28, 1997, the arbitrator issued a written decision, rejecting all of the parties' claims for relief except for defendant's breach of contract claim, and the arbitrator awarded defendant $66,600 on that claim. Defendant moved the circuit court to affirm the arbitration award pursuant to MCR 3.602(I) and enter judgment and asked for twelve percent judgment interest from the date of the countercomplaint pursuant to MCL 600.6013(5); MSA 27A.6013(5). Plaintiffs filed a motion to vacate the arbitration award, arguing that defendant twice sent written communications to the arbitrator without providing a copy to plaintiffs, in violation of MCR 2.107(A)(1). Plaintiffs also challenged the arbitration award on the basis that it was premised on a contract, but did not indicate the nature of the contract, the parties to it, when it was made, and whether it was written or oral. Further, the award was issued before plaintiffs had an opportunity to present evidence, which constituted a refusal to hear material evidence and substantially prejudiced plaintiffs' rights. Plaintiffs also contended that the award was procured by undue means under MCR 3.602(J)(1)(a) and should be vacated.

The circuit court denied plaintiffs' motion to vacate the arbitration award and granted defendant's motion to affirm the award and enter judgment. The court found that "the arbitrator's

decision is supported by competent, material, and substantial evidence and that there was no abuse of discretion on the part of the arbitrator in reaching his decision. In addition, the arbitrator did not exceed his authority in reaching the conclusions he reached." Defendant moved for entry of judgment and the circuit court entered judgment on the arbitration award and awarded defendant twelve percent judgment interest, which is applicable to an award based on a written instrument.

A court's ability to review an arbitration 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-Insurance Exchange v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982); *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 175-176; 550 NW2d 608 (1996). Because these parties stipulated to binding arbitration, they were "required to proceed according to the applicable statute and court rule." *Dick v Dick*, 210 Mich App 576, 588; 534 NW2d 185 (1995), citing MCL 600.5021; MSA 27A.5021; MCR 3.602. A circuit court's authority to review an arbitration award is limited. *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). Generally, parties who submit to binding arbitration are

> conclusively bound by the decision of the arbitrator absent a showing that the award was procured by duress or fraud, that the arbitrator or another is guilty of corruption or misconduct that prejudiced the party's rights, that the arbitrator exceeded his powers, or that the arbitrator refused to hear material evidence, refused to postpone the hearing on a showing of sufficient cause, or conducted the hearing in a manner that substantially prejudiced a party's rights. [*Id.* at 75, citing MCR 3.602.]

The fact that the relief contained in an arbitration award could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award. MCR 3.602(J)(1). However, "where it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in 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." *Gavin*, *supra* at 443, quoting *Howe v Patrons' Mutual Fire Ins Co of Michigan*, 216 Mich 560, 570; 185 NW 864 (1921); *Dohanyos*, *supra* at 176. 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. *Id*.

Plaintiffs argue that the circuit court erred in enforcing the arbitration award because the award contained on its face an error of law that substantially affected the outcome of the arbitration. We disagree. As the parties note, the eight-page arbitration award does not specifically identify the contract that the arbitrator found plaintiffs had breached and were therefore liable to defendant for damages. While mentioning the lease as the measurement of damages, the arbitration award does not mention any alleged oral contract between plaintiffs and defendant's majority shareholders.

We find that the circuit court properly affirmed the arbitration award because there was no good reason for vacating it. The award was not procured by duress or fraud, the arbitrator, or the

participants were not guilty of corruption or misconduct during the arbitration proceedings that prejudiced plaintiffs' rights, and the arbitrator did not exceed his powers or conduct the hearing in a manner that prejudiced plaintiffs' rights. MCL 3.602; *Konal*, *supra* at 75. While the award is inexact on the logic of finding a breach of contract, this ambiguity does not mandate that the award be vacated because the arbitrator had no duty to make findings of fact or conclusions of law in his award. *Gavin*, *supra* at 428. Even if we would have ruled differently than the arbitrator, that also would not be cause to vacate the award. MCR 3.602(J)(1).

Next, plaintiffs argue that the circuit court should have vacated the arbitration award because the arbitrator refused to rule on the summary disposition motion pending in the circuit court when the case was ordered into binding arbitration. Once the dispute was ordered into arbitration, the arbitrator had the authority to address and decide every issue raised by these parties in this case. The arbitrator also had the authority to decide all procedural matters that arose out of the dispute. *Amtower v Roney & Co (On Remand)*, 232 Mich App 226, 231; 590 NW2d 580 (1998). Thus, it was for the arbitrator to decide the issues raised in the pending summary disposition motion once the dispute had been handed over to him. However, he was not required to address the motion itself but only the issues raised by the parties.[1] Plaintiffs' argument that defendant's breach of contract claim would have been eliminated before any testimony was taken had the arbitrator considered their motion for summary disposition has no merit. Plaintiffs submitted proposed findings of fact and conclusions of law to the arbitrator and presumably had the opportunity to present to the arbitrator the issues raised in their motion including their argument that any alleged representations they made to defendant came within the statute of frauds. Although the arbitrator did not specifically address the issues in his award, there is no requirement that he detail all of his findings of fact and law. *Gavin*, *supra* at 428.

Next, plaintiffs argue that the circuit court erred in enforcing the arbitration award because there was no evidence submitted at the arbitration hearing to support the award. However, this argument was not presented as an issue to the lower court and therefore was not decided. Accordingly, this issue is not preserved for appellate review. *Booth Newspapers, Inc v Univ of Michigan*, 444 Mich 211, 234; 507 NW2d 422 (1993). Moreover, we would not upset the arbitration award for reasons that concern the merits of defendant's claim. *Gordon Sel-Way, Inc v Spence Brothers, Inc*, 438 Mich 488, 500; 475 NW2d 704 (1991); *Dohanyos*, *supra* at 177.

Finally, plaintiffs argue, and defendant concedes, that the circuit court erred in awarding interest on the arbitration award based on the statutory rate for claims based on a written instrument. The parties now agree that the correct judgment interest rate is that found in MCL 600.6013(6); MSA 27A.6013(6), which provides in pertinent part:

> (6) Except as otherwise provided in subsection (5) . . . interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1 . . .

Accordingly, while we affirm the circuit court order affirming the arbitration award, we remand to the circuit court for a recalculation of judgment interest and total award to defendant in accordance with this opinion.

Affirmed but remanded for the limited purpose of recalculation of judgment interest. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ David H. Sawyer
/s/ Richard Allen Griffin

[1] We note that in *Nielson v Barnett*, 440 Mich 1, 9; 485 NW2d 666 (1992), the motion for summary disposition was raised before the arbitrator and during the arbitration process, not in the circuit court before the matter was ordered into arbitration as in the present case. *Id.* at 10-11.