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UNPUBLISHED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., Sawyer and Griffin, JJ.

WHITE, J. (concurring).

I write separately to address plaintiffs' claim that an error of law is apparent in the arbitrator's award.

Plaintiffs argue that the circuit court erred in enforcing the arbitration award because the award contained an error of law that substantially affected the outcome of the arbitration. Plaintiffs contend that the arbitrator failed to identify the contract that was breached; that there are two possible contracts, the lease between Lopatin, Miller and Rivard, and the alleged oral promise from plaintiffs that they would continue to work at Lopatin, Miller for ten years or forever; and that a legal error is inherent in the enforcement of either contract because the individual shareholders of Lopatin, Miller were not responsible for rent under the lease, and the alleged oral agreement violated the statute of frauds. Plaintiffs respond to counter-plaintiff's argument that it presented evidence of promissory estoppel and partial performance to remove the agreement from the statute of frauds by focusing on that portion of

the arbitrator's decision that rejects the other counts of the counter-complaint, which specifically pleaded promissory estoppel and partial performance.

In discussing the proper scope of judicial review of arbitration awards, the Supreme Court stated:

> Arbitration, by its very nature, restricts meaningful legal review in the traditional sense. As a general observation, courts will be reluctant to modify or vacate an award because of the difficulty or impossibility, without speculation, of determining what caused an arbitrator to rule as he did. The informal and sometimes unorthodox procedures of the arbitration hearings, combined with the absence of a verbatim record[1] and formal findings of fact and conclusions of law, make it virtually impossible to discern the mental path leading to an award. Reviewing courts are usually left without a plainly recognizable basis for finding substantial legal error. *It is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable, such as that involved in these cases.* [Arbitrators refused to apply anti-stacking provision of insurance contract.] In many cases the arbitrator's alleged error will be as equally attributed to alleged "unwarranted" factfinding as to asserted "error of law". In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and the arbitrator's findings of fact are unreviewable. [*DAIIE v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982). Emphasis added.]

The error of law complained of is not apparent on the face of the award. While plaintiffs reason logically from an initial premise that there are two possible contracts at issue, that premise is itself an assumption that is not clear on the face of the award As the parties observe, the eight-page arbitration award does not specifically identify the contract that the arbitrator found plaintiffs had breached. Count III of the counter-complaint did not set forth a specific contract, but relied on all prior allegations of the counter-complaint. The prior allegations taken as a whole allege a series of relationships, representations, expectations, events and transactions that were claimed to together form an agreement and establish a breach of that agreement. The mental path inferred by plaintiffs - - improper enforcement of an alleged oral promise to work for the law firm forever or for ten years, unsupported by any exception to the statute of frauds[2] - - is but one possible avenue of reasoning suggested by the face of the award.[3] The arbitrator made factual findings in the sense that the "Factual Synopsis" offered by the arbitrator reflects his personal distillation of the testimony. However, the mental path leading from the factual synopsis to the award does not clearly appear. Rather, one must *assume* that the arbitrator enforced the lease or the oral contract to remain at the law firm to reach the conclusion that an error of law as identified by plaintiffs was committed, but for which the award would have been substantially different.

I concur in the remainder of the majority opinion.[4]

/s/ Helene N. White

[1] While there was a verbatim record here, there was still an absence of formal findings of fact and conclusions of law, making it "virtually impossible to discern the mental path leading to [the] award." *Gavin, supra.*

[2] Plaintiffs' assessment of the significance of the arbitrator's statement that he rejected all claims except the contract count is not compelled. Partial performance is not a cause of action in and of itself. Rejection of the promissory estoppel count as a basis for recovering damages consisting of loss of the value of the building and improvements, and loss of rent under a favorable lease does not necessarily equate with a finding that no exception to the statute of frauds was established. All allegations in counts I and II were incorporated into count III, the breach of contract count, so that the arbitrator could have rejected partial performance and promissory estoppel as separate grounds for collecting over $3,000,000, but still viewed those allegations as part of the *factual* predicate leading to an award on the contract count. Further, to the extent plaintiffs' alleged representations regarding their remaining at the law firm formed part of the factual predicate of the arbitrator's award, the arbitrator's statement regarding the other counts does not mean that the arbitrator did not find corresponding reliance and performance by the other shareholders.

[3] The amount awarded appears to be a figure that reflects not damages for breach of the lease, nor damages for failure to remain at the law firm, but, rather, plaintiffs' share of the net expense to the other Rivard shareholders of keeping the asset of the corporation going until the property was returned to the lender after the shareholders' mutual understandings and expectations regarding the property failed upon plaintiffs' departure. Such a mental path focuses on plaintiffs' obligations to Rivard as shareholders and incorporators of Rivard, which obligations the arbitrator seems to have concluded were instinct in the allegations specifically incorporated by reference into the breach of contract claim, and the shared and agreed-upon corporate purpose to purchase and improve a building that would generate funds for the Rivard shareholders under a "sweetheart" lease (the annual rent of $440,804 was over $150,000 in excess of the $272,160 annual debt service and other expenses) supported by plaintiffs' efforts at the law firm, and not on plaintiffs' obligations to the law firm, or to Rivard as ex-members of the law firm.

[4] While I agree that plaintiffs' effort to challenge the arbitration award on the basis of the adequacy of the evidence fails, I note that plaintiffs did make this argument below in their supplemental brief in support of the motion to vacate arbitration award.