STATE OF MICHIGAN

COURT OF APPEALS

EDWARD F. ANDREWS and COLLEEN ANDREWS, Plaintiffs-Appellants, v LIVING SPACES, INC., Defendant-Appellee.	UNPUBLISHED January 22, 2002 No. 225443 Oakland Circuit Court LC No. 1998-004096-CZ

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiffs, Edward F. Andrews and Colleen Andrews, appeal as of right from a trial court order denying their motion for summary disposition and granting defendant, Living Spaces, Inc.'s motion to affirm an arbitration award. We affirm.

I. Facts and Procedural History

During the summer of 1995, the Andrews began construction on a home on Cass Lake in Oakland County. This case arises out of contracts Colleen Andrews entered with Living Spaces for Living Spaces to provide designs, cabinetry and countertops for certain rooms in the Andrews' home. On August 21, 1995, Colleen Andrews and Living Spaces entered a Design Retainer Agreement for Living Spaces to design and outfit a kitchen for the new home. The design budget was estimated at $102,000, and Colleen Andrews paid a $10,000 retainer fee which, according to the Retainer Agreement, "will be applied in full toward any project regardless of size or cost." Thereafter, Colleen Andrews and Living Spaces entered three additional written agreements, referred to as Standard Form Agreements for Design & Installation, in December 1995, February 1996, and April 1996.

Of primary importance on appeal is the December 1995 agreement, which provides that Living Spaces "agrees to furnish the materials and services set forth in the drawings . . . and specifications annexed hereto." In handwriting next to this provision, the agreement states "final drawings & specs to follow." The agreement further states that the Andrews will pay a contract price of $166,147 for the work; however, that price is crossed out and $160,000 is handwritten on the agreement as the contract price. Following the signed agreement is a letter to Colleen Andrews from Pamela Bytner Kilbarger, dated December 19, 1995. The letter sets forth "[t]he price of [the] cabinetry per the proposed plans and specifications . . . ." The letter lists the costs,

including labor and material, for the cabinetry and countertops for various rooms in the house. According to the figures indicated, the total price of material and labor for the countertops is $20,642 and the total price of material and labor for the cabinets is $166,147.

According to the Andrews' complaint and subsequent briefs, their relationship with Living Spaces deteriorated during the summer and fall of 1996 and the April 1996 contract was terminated before its completion. On February 12, 1997, Living Spaces filed a demand for arbitration with the American Arbitration Association. The demand asserts that the Andrews failed to pay $16,523 owed under the design and installation agreements. Thereafter, on May 15, 1997, the Andrews filed an arbitration counterclaim alleging breach of contract, fraud and violation of the Michigan Consumer Protection Act. Specifically, plaintiffs argued that Living Spaces knowingly misrepresented the nature and quality of certain "Cottonwood" cabinets and that Living Spaces failed to credit their retainer deposit. The Andrews also claimed that Living Spaces breached the December 1995 Standard Form of Agreement for Design & Installation by failing to install any of the marble and granite countertops indicated in Kilbarger's letter attached to the agreement. In response, Living Spaces argued that Colleen Andrews and Living Spaces agreed to omit the countertops from the agreement. In support of this assertion, Living Spaces pointed out that the December 1995 contract price includes only the total price of cabinetry and that the final specifications and drawings sent in April 1996 do not include countertops.

Following two evidentiary hearings, the assigned arbitrator, attorney Louis G. Basso, filed an award in favor of Living Spaces for $16,523. The Andrews then filed a complaint in the circuit court, seeking a judgment vacating the arbitral award under MCR 2.605. According to the Andrews' complaint, Basso fell asleep during the arbitration hearing, he had no authority or jurisdiction to determine the claims, he made erroneous rulings of law that prejudiced plaintiffs, he failed to consider or address certain arguments and he wrongly determined that Living Spaces credited the Andrews' $10,000 retainer fee. Further, the Andrews reasserted their claims that Living Spaces breached the December 1995 agreement to install countertops, failed to disclose the markup on materials and misrepresented the nature and quality of the Cottonwood cabinets.

On July 30, 1999, the Andrews filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) and, on August 4, 1999, Living Spaces filed a motion for summary disposition under 2.116(C)(7), (8) and (10). On January 26, 2000, the trial court issued a written opinion and order denying the Andrews' motion for summary disposition and granting defendant, Living Spaces, Inc.'s motion to affirm the arbitration award.

II. Analysis

A. Standard of Review

This Court reviews motions for summary disposition de novo. *Taylor v Laban*, 241 Mich App 449, 451; 616 NW2d 229 (2000). As our Supreme Court stated in *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable

> to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [Citations omitted.]

Regarding the review of arbitration awards, our Court articulated in *Dohanyos v Detrex Corp*, 217 Mich App 171, 174-175; 550 NW2d 608 (1996):

> Statutory arbitration is to be conducted in accordance with the rules of the Michigan Supreme Court. MCL 600.5021. An arbitration award may be confirmed, modified, corrected, or vacated. The court's power to modify, correct, or vacate an arbitration award is limited by court rule. An arbitration award may be vacated if (1) the award was procured by corruption, fraud, or other undue means; (2) there was evident partiality by an arbitrator, corruption by an arbitrator, or misconduct prejudicing a party's rights; (3) the arbitrator exceeded granted powers; or (4) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights. MCR 3.602(J)(1).

B. The Arbitrator's Alleged Misconduct

The Andrews claim that the trial court erred by failing to vacate the arbitration award under MCR 3.602(J)(1), which provides, in pertinent part:

> On application of a party, the court shall vacate an award if:
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> (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights.
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> ***
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> (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

Specifically, the Andrews assert that the trial court should have vacated the award because Basso was generally inattentive and fell asleep during the arbitration hearing. Under MCR 3.602(J)(1), the determinative question is whether Basso's conduct constituted misconduct that prejudiced the Andrews' rights or whether he conducted the hearing to substantially prejudice the Andrews' rights.

In support of their motion in the trial court, the Andrews submitted the April 9, 1998, affidavit of Kathleen Reising, which states, in pertinent part:

> 10. On September 9, 1997, the parties recessed for lunch at approximately 9:24 a.m., and concluded at approximately 3:30 p.m.

> 11. During the course of the proceedings that afternoon, I was positioned on one side of the conference table in such a way that I could observe the Arbitrator who was seated at the head of the table.
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> 12. Twice during the afternoon's proceedings, my attention was drawn to Mr. Basso. Each time I observed that his eyes were closed, his breathing even and his facial muscles relaxed. It appeared to me, on each occasion, that Mr. Basso was sleeping.
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> 13. On one of the two occasions, somebody in the room coughed while Mr. Basso was sleeping. He opened his eyes and appeared startled.

The parties acknowledge that the transcript from the arbitration hearing does not disclose whether and when Basso fell asleep during the proceedings. Living Spaces adamantly denies the charge and the Andrews admit that it is impossible to discern what and how much testimony Basso may have missed. Moreover, Reising's affidavit does not establish at what point or for how long Basso appeared to be asleep, whether he actually was asleep (or merely closing his eyes), or whether witnesses were testifying during those incidents. It is, therefore, impossible to determine whether Basso missed any testimony at all and, if he did, no evidence shows whose testimony he missed and how much he missed. Further, the Andrews offer no argument regarding what testimony Basso may have missed and how it was essential to the Andrews' claims. Therefore, the Andrews' allegations regarding Basso's misconduct are merely speculative and fail to show with any specificity how the alleged misconduct prejudiced them.

As the trial court observed, the parties also filed four briefs after the arbitration hearings and before Basso issued the award. Further, the Andrews do not contest Living Spaces' assertion that it submitted the entire transcript from the arbitration hearings to Basso before he decided the claims. Thus, we cannot conclude that Reising's assertions establish that Basso lacked or failed to consider any evidence presented.

Moreover, we find it utterly implausible that Basso could have slept during the proceedings while none of the witnesses, nor the three attorneys present at the hearing, noted it on the record or raised it in the arbitration briefs filed after the hearings. Indeed, the Andrews raised the issue only after they received an unfavorable result from Basso and they procured Reising's affidavit on April 9, 1998, some seven months after the hearing at issue.[1]

Accordingly, we affirm the trial court's denial of plaintiffs' motion for summary disposition on this issue.

C. Sufficiency of Analysis in the Arbitration Award

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[1] While the Andrews also assert that Basso was generally inattentive and unresponsive to counsel throughout the proceedings, they cite no examples of this and they do not refute Living Spaces' assertion that Basso was actually a very active arbitrator, speaking on 152 of 229 pages of testimony. Because the Andrews fail to discuss which incidents of general inattention constituted misconduct or how those incidents prejudiced them, we consider this claim abandoned.

The Andrews claim that Basso's failure to "provide written documentation of his reasoning and disposition of the many, many issues of law" constituted misconduct which prejudiced them. The Andrews also argue that Basso's failure to address their UCC and doctrine of unilateral mistake claims constituted misconduct and a failure to apply controlling law.

In essence, the Andrews assert that Basso's explanation of his findings in the arbitration award is inadequate. The Andrews point to no rule or case law that requires an arbitrator to set forth with specificity each finding of fact and legal rule upon which he relies in rendering an arbitration award. Nor do the Andrews cite authority to support their claim that the arbitrator must discuss every issue raised by the parties. To the contrary, our Supreme Court held in *Detroit Auto Inter-Insurance Exchange v Gavin*, 416 Mich 407, 428; 331 NW2d 418 (1982), that "[t]here is no requirement that a verbatim record be made of private arbitration proceedings, there are no formal requirements of procedure and practice beyond those assuring impartiality, and no findings of fact or conclusions of law are required." Moreover, as Living Spaces points out, our Supreme Court also observed in *Gavin*:

> 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 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. In many cases the arbitrator's alleged error will be as equally attributable 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. [*Gavin*, *supra* at 429.]

Thus, our Supreme Court has clearly recognized that an arbitrator's decision need not, and often cannot, be predicated on a thorough written analysis of each finding of fact and conclusion of law raised by the parties. Nonetheless, Basso's written award specifically addresses the reasons for his decision and the award clearly reflects that he based his decision on a plain reading of the agreements. While Basso does not cite specific case law to support his conclusions, no such citation is required and no error appears on the face of the award. Accordingly, the Andrews' claim of prejudicial misconduct for Basso's failure to set forth a more detailed analysis is without merit.

C. Claim that the Arbitrator Exceeded his Authority

The Andrews further aver that the trial court erred in failing to vacate the arbitration award because Basso exceeded his authority as arbitrator under MCR 3.602(J)(1)(c) and ignored controlling principles of law.

It is well-settled that a trial court may vacate an arbitration award "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." *Gavin, supra* at 443. Further, as this Court articulated in *Dohanyos, supra* at 175-176:

> The appropriate standard of review for determining whether arbitrators have exceeded the scope of their authority was set forth in *DAIIE v Gavin* . . . and more recently in *Gordon Sel-Way* [*v Spence Bros, Inc*, 438 Mich 488, 495, 475 NW2d 704 (1991)]. In *Gavin, supra*, . . . the Supreme Court stated that a reviewing court's ability to review an 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. Therefore, arbitrators have exceeded their powers 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. This is because arbitrators derive their authority from the parties' contract and arbitration agreement and they are bound to act within those terms.
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> Where it clearly appears on the face of the award or in the reasons for the decision, being substantially a part of the award, that the arbitrators through an error of 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. 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. [Some citations omitted.]

The Andrews claim that Basso exceeded his powers because no written agreement to arbitrate exists. In the arbitration award, Basso concludes that Living Spaces did not agree to provide granite and marble countertops under the December 1995 Standard Form of Agreement for Design & Installation. The Andrews acknowledge that the December 1995 agreement contains an arbitration clause; however, they allege that Basso actually based his decision on a modified oral agreement which, by its nature, could not contain a written arbitration clause.

The Andrews' argument fails for several reasons. First, nothing in the arbitration award suggests that Basso based his award on a new oral agreement. Instead, Basso based his decision regarding the countertops on the terms set forth in the agreement, including the clause "final drawings and specs to follow," and the final specifications sent in April 1996. The agreement on which Basso relied contains the arbitration clause. Further, the Andrews raised the issue of the omitted countertops when they filed their counterclaim regarding the terms of the December 1995 agreement. It is simply disingenuous for the Andrews to submit the issue for arbitration, then to argue that the arbitrator lacked jurisdiction based on his finding against them under the contract.

The Andrews assert several other claims based on their belief that Basso found a new oral agreement or an oral modification to the December 1995 agreement. Specifically, the Andrews claim that Basso exceeded his powers by acting beyond the material terms of the December 1995

agreement, that he "[f]ailed to recognize and enforce the express contractual provisions requiring all amendments and modifications to be in writing" and that he "[f]ailed and refused to apply controlling statutory Michigan authority on parole [sic] evidence and other substantive provisions of the Uniform Commercial Code." The award indicates that (1) per the December 1995 agreement, Living Spaces sent final specifications which included the cabinetry alone, (2) plaintiffs did not dispute the accuracy of the specifications, (3) the total price of the cabinets alone appears on the face of the December 1995 agreement, (4) Living Spaces delivered the cabinets according to the final specifications and plaintiffs accepted and installed them. Nothing in the award suggests that Basso concluded that there was an oral agreement or an oral modification of the written agreement. Further, nothing on the face of the award shows that Basso exceeded his powers by acting beyond the material terms of the contract.[2]

Moreover, were we to find that Basso relied on evidence of an oral modification, this would not show Basso legally erred in rendering the award. An arbitration award may be set aside only "where it clearly appears on the face of the award or in the reasons for the decision . . . that the arbitrators through an error of law have been led to a wrong conclusion." *Gavin, supra* at 443, quoting *Howe v Patrons' Mutual Fire Ins Co of Michigan*, 216 Mich 560, 570; 185 NW 864 (1921). Further, "[i]t is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable . . . ." *Gavin, supra* at 429. As the trial court notes in its opinion, Basso could have found the December 1995 agreement ambiguous and, therefore, could have properly considered extrinsic evidence to determine the intent of the parties. However, this Court is not charged with divining "what caused an arbitrator to rule as he did." *Gavin, supra* at 429. Rather, review is limited to those legal errors that clearly appear on the face of the award. Plaintiffs have failed to show such error.

We regard the Andrews claims on these issues as "a ruse to induce the court to review the merits of the arbitrators' decision," a use that is prohibited by *Gordon Sel-Way, supra* at 497. Essentially, the Andrews disagree with Basso's interpretation of the December 1995 agreement. We will not review the merits of the arbitration claims and will not substitute our judgment for that of the arbitrator. *Id*.

D. The Arbitrator's Reliance on the Design Retainer Agreement

The Andrews also claim that Basso exceeded his authority by ruling that Living Spaces properly charged plaintiffs $2,705 under the Design Retainer Agreement, which does not contain an arbitration clause. Specifically, Basso's award indicates that he relied on the following portion of the Design Retainer Agreement:

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[2] To support their claim that Basso relied on a subsequent oral agreement in contravention of the parol evidence rule and ignored the integration clause in the agreements, the Andrews point to testimony during the arbitration hearing in which Kilbarger stated that Colleen Andrews told her the countertops were omitted from the December agreement. However, as noted above, the award does not indicate that Basso relied on such an oral agreement in rendering his decision. Therefore, even if such reliance would violate the integration clause or the parol evidence rule, the Andrews have not shown an error by Basso. The Andrews may not predicate error on testimony given at the hearing if the award itself makes not reference to it. The Andrews' claim on this issue, therefore, fails.

> The retainer will be applied toward the purchase price of the project, you may purchase the designs prepared for you by the staff of Living Spaces, Inc. for 10% of the estimated cost of the completed project.

In the award, Basso states that Living Spaces properly charged plaintiffs for keeping the designs Living Spaces created for the butler's pantry and lower level bar in the April 1996 agreement that was ultimately cancelled.

The record indicates that both the Andrews and Living Spaces argued claims regarding the Design Retainer Agreement during the arbitration proceedings. Specifically, Living Spaces asserted in its arbitration brief that it kept 10% of the retainer under the April 1996 contract for the lower level design work because the Andrews failed to return the plans when the contract was cancelled. In their counterclaim, the Andrews' argue that Living Spaces failed to properly credit their retainer fee. Further, in the Andrews' arbitration reply brief, they argue that the Design Retainer Agreement does not apply to the April contract because the parties did not contemplate any lower level work at the time the Design Retainer Agreement was executed.

The Andrews correctly observe that the Design Retainer Agreement contains no arbitration clause and that, generally, an arbitrator may not act beyond the material terms of the contracts from which he drew his authority. *Gavin*, *supra* 416 Mich at 434. However, the issue whether the retainer was properly credited or whether Living Spaces properly charged the Andrews for the plans under the April 1996 agreement was necessary to determine the amount owed by the Andrews to Living Spaces or the amount Living Spaces owed to the Andrews under the April 1996 Standard Form of Agreement for Design & Installation. Further, the Andrews specifically pursued claims at arbitration regarding the proper application of the $10,000 towards work completed. The April 1996 Standard Form of Agreement for Design & Installation contains the arbitration clause and it specifically refers to the portion of the $10,000 retainer to be credited to the work. Therefore, the issue arose out of the 1996 agreement and was properly considered at arbitration and the Andrews' claim that Basso exceeded his authority in deciding this issue is without merit.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Peter D. O'Connell