STATE OF MICHIGAN

COURT OF APPEALS

LOCKWOOD BUILDING COMPANY, INC., Plaintiff-Appellee,	UNPUBLISHED December 30, 2003
v	No. 241508 Oakland Circuit Court
DAN DEMPSEY and LISA DEMPSEY, Defendants-Appellants.	LC No. 02-038866-CH

Before: Schuette, P.J. and Murphy and Bandstra, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment confirming an arbitration award and foreclosure in favor of plaintiff. We affirm.

I. FACTS

This case arose from a residential construction agreement between defendants and plaintiff entered into on May 16, 2000. The agreement called for plaintiff to build an addition to defendants' existing home. The contract price for this addition was $309,400. The contract set four different payment times: 1) $61,880 upon signing of the agreement; 2) $92,820 at beginning of framing; 3) $123,760 at completion of drywall; and 4) $30,940 at approval of final inspection. The contract had an arbitration clause, which stated, in part:

> Any dispute between the builder and the clients about this agreement, including the interpretation of this agreement and the adequacy of any performance under this agreement, shall be resolved by arbitration before a single arbitrator who is mutually acceptable to the clients and the builder.

Eventually, the relationship between the parties broke down. On March 5, 2001, defendants sent out a letter to National City Mortgage (lender) directing them not to release further payments to plaintiff until defendants approved. Plaintiff filed a demand for arbitration. Defendants answered the demand for arbitration and filed a counter-claim for breach of contract. Defendants claimed that plaintiff had failed to perform the work contracted, that plaintiff had violated its warranty by not making repairs, that plaintiff was not entitled to payment because it had not provided lien waivers, that plaintiff had breached the contract by filing a lien against defendants' property, and that defendants suffered damages as a result of plaintiff's actions.

The arbitrator handed down an award on March 8, 2002. The arbitrator found that the contract was not a "satisfaction contract," but instead, was a contract requiring substantial completion before full payment. The arbitrator stated that plaintiff reached substantial completion under the contract terms when the building was ready for occupancy (not withstanding minor items requiring replacement or repair after that date). The arbitrator found that plaintiff had reached substantial completion on or about March 22, 2001. He based his finding of substantial completion on the approval of the city of Novi and an agent of the lender, which took place on March 21, 2001. The arbitrator stated that defendants failed to raise the issue of the lien waivers as a reason for not issuing the final payment. Further, he stated that even if the lien waivers were not submitted at the time plaintiff requested payment, defendants were not affected in any way. In regards to the defendants' claim that a Certificate of Occupancy was required before payment was necessary, the arbitrator stated that it is the habit of many communities not to issue such certificates for home improvements. He further noted that defendants had in fact occupied the home prior to March 2001 and were not evicted.

The arbitrator found that defendants' March 5, 2001 letter to the lender constituted a breach of contract because it violated the payment provision of the acknowledgement and was not justified by the facts and circumstances existing at that time. He found that defendants' breach of contract removed plaintiff's obligation to perform warranty items and "punch list" items. The arbitrator disallowed defendants' counter-claim. He stated that defendants made the completion of the construction and the "punch list" items impossible, and thus, could not recover damages.

The arbitrator found that plaintiff's claim of lien was valid on its face. He stated that the lien should be considered foreclosed by the arbitration. The arbitrator found plaintiff was a prevailing party under the Construction Lien Act and was subsequently entitled to attorney fees. The arbitrator listed the balance due under the contract as $44,341.02, and awarded $17,119.05 in attorney fees, for a total award of $61,460.07.

Plaintiff subsequently filed a petition to enroll and confirm the arbitration award pursuant to MCR 3.602 and MCL 600.5001 *et seq*. Plaintiff asked the lower court to enter a judgment enrolling and confirming the award, establish statutory proceedings required to sell defendants' property to satisfy plaintiff's lien, and to order the sale of the property with the proceeds paying off the amount of the arbitration award. In the alternative, plaintiff asked for the appointing of a receiver to collect rents and profits from the property.

The trial court held a motion hearing on May 1, 2002. The court stated that it was not going to vacate the award. The court stated that the arbitrator was not really dealing with the title to the property when he decided that the lien was valid. Instead, the court ruled that the arbitrator was just deciding if there was money owed and if a lien existed. The trial court ordered defendants to pay plaintiff $63,121.68 (which was the amount awarded by the arbitrator plus $1,125 in arbitration fees and $536.61 in interest). The court further ordered defendants to pay plaintiff's costs and fees for having to respond to their motion to vacate under MCR 2.114

and as part of plaintiff's efforts to enforce its claim of lien pursuant to MCL 570.1118. Defendants now appeal as of right.[1]

II. STANDARD OF REVIEW

A trial court's decision to vacate, enforce, or modify an arbitration award is reviewed de novo. *Tokar v Albery*, __ Mich App __; __ NW2d __ (Docket No. 238946, issued September 4, 2003), slip op, p 2. A reviewing court shall vacate an arbitration award if: (1) the award was procured through corruption, fraud, or undue means; (2) the arbitrator or another is guilty of corruption or misconduct prejudicing a party's rights; (3) the arbitrator exceeded his power; or (4) the arbitrator refused to hear material evidence, refused to postpone a hearing on a sufficient showing of cause, or otherwise conducted the hearing in a way to substantially prejudice a party's rights. MCR 3.602(J). This Court can review only those awards containing an error of law discernable on the face of the award itself. *Krist v Krist*, 246 Mich App 59, 67; 631 NW2d 53 (2001). The party seeking to vacate the award must demonstrate that the arbitrator displayed a manifest disregard of the applicable law "but for which the award would have been substantially otherwise." *Id*. at 67, quoting *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982). An arbitrator's factual findings are beyond the scope of judicial review. *Id*. at 69.

III. ANALYSIS

Plaintiff first contends that the arbitrator exceeded his power by finding that the contract required final payment upon substantial completion of the construction, and by finding that a Certificate of Occupancy was not required before final payment. We disagree. An arbitrator derives his authority from the parties contract. Therefore, the arbitrator is bound to act within the terms of that contract. *Gordon Sel-Way Inc v Spencer Bros Inc*, 438 Mich 488, 496; 475 NW2d 704 (1991). The proper role of this Court is to examine whether the arbitrator has rendered an award that comports with the terms of the contract. *Id*. at 496. But we cannot engage in contract interpretation, which is a question only for the arbitrator. *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999).

The crux of this issue goes to the Residential Construction Agreement ¶ 4, which states:

> Price and payment. The clients shall pay the builder the following total price exclusive of all valid changes pursuant to paragraph 5 of this Agreement, in the installments shown below. The total price is a firm price except for items designated in the Proposal as allowances; those items are subject to increases or decreases depending on actual experiences during construction. The total contract price of 309,400.00 shall be paid as follows:
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> | | | |
> |---|---|---|
> | a. | Upon signing of this agreement | $61,880.00 |
> | b. | At beginning of framing | $92,820.00 |

[1] Defendants have obtained a stay bond. This stayed any proceedings to enforce the judgment pending exhaustion of this appeal and discharged the lien placed against their property.

c.	At completion of drywall	$123,760.00
d.	At approval of final inspection	$30,940.00
	TOTAL	$309,400.00

> The clients shall make these payments within 10 days after the builder notifies them of the completion of the applicable stage and provides sworn statements and lien waivers for all work for which payment is being made. Builder will also provide a Notice of Commencement to clients. Substantial completion shall be deemed to be accomplished when the building is ready for occupancy, notwithstanding any minor items that require completion, replacement, or repair after that date.
>
> The arbitrator stated in his findings:
>
> The contract between Claimant and Respondent is <u>not</u> a "satisfaction" contract. It is a Contract, which requires substantial completion before full payment is required by Dempsey to Lockwood. Substantial completion under the terms of the contract is accomplished when the building is ready for occupancy, notwithstanding any minor items that require completion, replacement or repair after that date.

Defendants basically argue that this finding is contrary to the plain language of the contract. We disagree. The language of the contract is not crystal clear, but seems to imply that the contract is a substantial completion contract by defining "substantial completion." Given that the plain language does not contradict the arbitrator's finding, he did not exceed his power. Only the arbitrator can interpret a contract. It is not the proper role of this Court to second-guess this interpretation. *Konal, supra*, 235 Mich App 74.

Further, the arbitrator based his finding of substantial completion on the fact that the city of Novi and an agent of the lender gave the necessary approval following final inspection. Although defendants strongly disagree with this and present a significant amount of argument in their brief to the contrary, this was the factual finding of the arbitrator. An arbitrator's factual findings are beyond the scope of judicial review. *Krist, supra*, 246 Mich App 69. Thus, according to the arbitrator's findings of fact, the necessary approval occurred to trigger defendants' duty to pay. This finding is not contrary to the plain language of the contract.

Regarding the issue of the requirement of a Certificate of Occupancy, the arbitrator made factual findings that a Certificate of Occupancy was neither required by contract nor law. This court cannot review the factual findings of an arbitrator. *Krist, supra*, 246 Mich App 69. Further, nothing on the face of the contract contradicts this finding. Therefore, the arbitrator did not exceed his authority.

Next, defendants argue the arbitrator disregarded the unequivocal language of the contract when he held that the final payment was due despite plaintiff's failure to provide final waivers of lien and sworn statements prior to requesting final payment. We disagree. Regarding the issues of lien waivers, the arbitrator found:

> On the issues of waivers of Lien, and/or the failure to submit Waivers of Lien, the lack of Waivers of Liens was never raised by the Respondent [sic] as a reason for withhold final payment in breach of Contract. If in fact Waivers of Lien were not submitted at the time payment requests were made, a defect did not impact the parties in any way, either favorably or adversely.

The arbitrator's findings seem to be based at least in part on a procedural issue (the fact that defendants failed to raise the issue as grounds for withholding payment). Procedural issues are for the arbitrator and not for this Court to determine. *Bennett v Shearson Lehman-American Express Inc*, 168 Mich App 80, 83; 423 NW2d 911 (1987). Procedural issues are simply not judicially reviewable. *Bay County Building Authority v Spence Bros*, 140 Mich App 182, 188; 362 NW2d 739 (1984). Therefore, we cannot review this issue. *Id*. at 188; *Bennett*, *supra*, 168 Mich App 83.

Defendants wish this Court to delve into the factual issues of this case. The parties obviously dispute if, when, and to whom the lien waivers were to be delivered. The arbitrator heard the evidence. The arbitrator decided that defendants would not have been harmed if it were true that plaintiff failed to provide the sworn statements or lien waivers. It is inappropriate for this Court to dispute this factual finding. An arbitrator's factual findings are beyond the scope of judicial review. *Krist*, *supra*, 246 Mich App 69.

Next, defendants claim that the arbitrator exceed his power because Michigan law requires lien waivers. We disagree. Contrary to defendants' argument, the arbitrator did not hold that plaintiff was not required to provide lien waivers. He stated:

> On the issues of waivers of Lien, and/or the failure to submit Waivers of Lien, the lack of Waivers of Liens was never raised by the Respondent [sic] as a reason for withhold final payment in breach of Contract. If in fact Waivers of Lien were not submitted at the time payment requests were made, a defect did not impact the parties in any way, either favorably or adversely.

This does not directly address the issue of the contract requirement or if the lien waivers were in fact issued. It simply states that the issue does not affect the parties either way. The arbitrator does not delve further into the issue of lien waivers and makes no factual findings about whether the lien waivers were in fact provided. The parties continue to argue the point in their briefs. But it is improper for this court to delve into the factual issues of the case. Factual determination is province of the arbitrator not the reviewing court. *Krist*, *supra*, 246 Mich App 69.

We can review only those awards containing an error of law discernable on the face of the award itself. *Krist*, *supra*, 246 Mich App 67. The parties contest an issue that is not addressed on the face of the award. To decide if the arbitrator exceeded his power as defendants claim would require this Court to go beyond the four corners of the document and delve into the arbitrator's thought process. We simply cannot do so. *Krist*, *supra*, 246 Mich App 67. On the face of the award there is no error. Therefore, we cannot review the issue and the arbitrator did not exceed his power.

Defendants next argue that the arbitrator exceeded his power by using the lender's agent as a basis to find the necessary final approval. We disagree. Defendants base their argument on

the Construction Loan Agreement (an agreement between defendants and their lender). Dealing with a separate issue, the arbitrator concluded that the Construction Loan Agreement was binding on defendants and not plaintiff. He stated that the Construction Loan Agreement did not affect the rights of the plaintiff. Defendants again ask this Court to ignore the factual findings of the arbitrator and come to a different conclusion. As repeatedly stated, *supra*, an arbitrator's factual findings are beyond the scope of judicial review. *Krist, supra*, 246 Mich App 69.

Further, to uphold defendants' argument, we would have to interpret the contract in their favor. First, we would have to interpret the contract to include the Construction Loan Agreement (contrary to the arbitrator's findings). Second, we would have to interpret the section of the Construction Loan Agreement cited by defendants and decide that it applies to plaintiff (which it seems not to). Only the arbitrator can interpret a contract. It is not the proper role of the reviewing court to engage in such interpretation interpretation. *Konal, supra*, 235 Mich App 74.

Next, defendants claim that the arbitrator exceeded his power and committed a legal error by failing to setoff the contract balance by a portion of the cost to complete the project or award damages under their counter-claim. We disagree. Defendants are again attempting to litigate this case before this Court. Defendants ask us to evaluate the evidence and come to a different factual conclusion than the arbitrator. As stated, *supra*, an arbitrator's factual findings are simply beyond the scope of judicial review. *Krist, supra*, 246 Mich App 69. Even if the arbitrator reached erroneous findings of fact from the evidence, we could not set aside the award. *Fraternal Order of Police etc v Bensinger*, 122 Mich App 437, 447; 333 NW2d 73 (1983). We simply cannot review the evidence or the factual findings of the arbitrator.

Regarding the defendants counter-claim the arbitrator stated:

> The breach of the Contract by Respondent [sic] removes the obligation of the Claimant to continue performance on the punch list items and warranty items until such time as the breach is cured. *Flamm v Scherer*, 40 Mich App 1(1972). The failure to complete remaining punch list items and perform warranty work by the Claimant was occasioned through the fault and prevention of the Respondent [sic]. The Counter-Claim of the Respondent [sic] is disallowed for the reason that the Completion [sic] of the project was effectively prevented by the Respondent, [sic] and the rendering of impossibility of performance of the punch list items and the warranty items remaining being occasioned by the Respondent, [sic] they cannot now recover for damages. *Gibson v Group Insurance Company*, 142 Mich App 271 (2001) [sic].[2] *Kiff Contractor's Inc v Beamand*, 10 Mich App 207 (1968). [Footnote added.]

Defendants do not challenge this conclusion of law. And no error of law appears on the face of this award. It has long been settled "one who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for failure to perform." *Sentry Ins A Mut Co v Lardner Elevator Co*, 153 Mich App 317, 323; 395 NW2d 31 (1986). We can

[2] This case's correct cite is 142 Mich App 271; 369 NW2d 484 (1985).

review only those awards containing an error of law discernable on the face of the award itself. Therefore, this award is not subject to review and must be affirmed. *Krist*, *supra*, 246 Mich App 67.

Further, defendants argue that the award should be set off against the items under warranty needing repair. But in their brief, defendants admit that the warranty does not start until after final payment. Defendants have obviously not made final payment as this is the subject of this appeal. Given that final payment has not yet been made, plaintiff has no obligation to perform under the warranty.

Next, defendants claim we must vacate the award on the ground that the arbitrator refused to hear all evidence material to the controversy. We disagree. Defendants first argue that the arbitrator refused to open an envelope. They allege that the envelope contained information and evidence pertinent to the issue of lien waivers. The arbitrator basically found that the issue of lien waivers was unimportant and immaterial to the case. Given this ruling, the evidence allegedly contained in the mysterious envelope would also be immaterial. Therefore, the arbitrator did not refuse to hear material evidence. Further, this is a procedural determination by the arbitrator. Defendants admit in their brief that the envelope was not produced two days before the hearing began as required by arbitration rules. Procedural issues are for the arbitrator and not for this Court to determine. *Bennett*, *supra*, 168 Mich App 83. A reviewing court simply cannot review procedural issues. *Spence Bros*, *supra*, 140 Mich App 188. Therefore, we cannot review this issue. *Bennett*, *supra*, 168 Mich App 83; *Spence Bros*, *supra*, 140 Mich App 188.

Defendants also state that the arbitrator refused to hear material evidence when he allegedly refused to let defendants change a list of defects in the construction. As stated, *supra*, the arbitrator found that defendants breached the contract and as a result, plaintiff was not required to do the punch list items or the warranty items. The arbitrator also found that the defendants could not recover for damages given their breach of contract. Further evidence regarding these damages and the items not completed would have been immaterial. Therefore, the arbitrator did not refuse to hear material evidence when he allegedly refused to allow defendants to update their list.

Further, defendants admit the arbitrator considered a majority of the list. Defendants' argument suggests that the arbitrator refused to give sufficient weight to this evidence. MCR 3.602(J)(1)(d) is applicable to an arbitrator's refusal to hear material evidence. It does not apply to a refusal to give weight in deliberation to the evidence. *Belen v Allstate Ins Co*, 173 Mich App 641, 645-646; 434 NW2d 203 (1988). The decision to allow defendants to update their list of allegedly unfinished work is also procedural. Defendants again admit that they did not exchange the list prior to the commencement of arbitration. We cannot review this procedural issue. *Bennett*, *supra*, 168 Mich App 83; *Spence Bros*, *supra*, 140 Mich App 188.

Finally, defendants argue that the arbitrator lacked jurisdiction to decide the validity of the construction lien or foreclose that lien. We disagree. A party may challenge subject matter jurisdiction at any time, including on appeal. Therefore, this issue is preserved. *Bass v Combs*, 238 Mich App 16, 23; 604 NW2d 727 (1999). Subject matter jurisdiction is a question of law we review de novo. *Bass*, *supra*, 238 Mich App 23.

Defendants' challenge to the arbitrator's jurisdictional ability to rule on the validity of the lien is substantially based on MCL 600.5005, which states:

> A submission to arbitration shall not be made respecting the claim of any person to any estate, in fee, or for life, in real estate, except as provided in Act No. 59 of the Public Acts of 1978, as amended, being sections 559.101 to 559.272 of the Michigan Compiled Laws. However, a claim to an interest for a term of years, or for 1 year or less, in real estate, and controversies respecting the partition of lands between joint tenants or tenants in common, concerning the boundaries of lands, or concerning the admeasurement of dower, may be submitted to arbitration.

This Court interpreted MCL 600.5005 in *McFerren v B & B Investment*, 233 Mich App 505; 592 NW2d 782 (1999). In *McFerren*, this Court stated that, pursuant to MCL 600.5005, arbitrators are prohibited from deciding claims regarding the fee ownership of real estate. *Id*. at 511-512. This case is distinguishable from *McFerren*. *McFerren* dealt with a dispute over ownership of real property. Each party claimed an estate interest in the real estate. The parties submitted their dispute over ownership in the property to an arbitrator. *McFerren*, *supra*, 506-507. This Court subsequently decided that the arbitrator did not have subject matter jurisdiction to decide the issue. *Id*. at 511-512.

In this case, plaintiff does not dispute ownership of the property. Ownership remains with defendants. A construction lien simply does not change the ownership of the property. The lien does not give the contractor an ownership interest in the land. MCL 570.1107. Although at some point, further down the line, the property may be foreclosed and sold to satisfy the lien, the lien itself does not change the ownership of the property. MCL 570.1107; MCL 570.1117; MCL 570.1121. Unlike *McFerren*, this case does not deal with a dispute in ownership of property. The arbitrator was not deciding title to the property. He was simply deciding if a lien existed. Therefore, the arbitrator's jurisdiction was not limited pursuant to MCL 600.5005.

Further, MCL 600.5005 only deals with fee or life estate interests in real estate. Liens are mere encumbrances on land. *Darr v First Federal Sav & Loan Asso*, 426 Mich 11, 20; 393 NW2d 152 (1986). They simply are not the same as a fee or life estate interest in land. Therefore, MCL 600.5005 does not affect the arbitrator's jurisdiction to decide the issue.

Defendants also challenge the arbitrator's jurisdiction based on the language of MCL 570.1118, which states:

> (1) An action to enforce a construction lien through foreclosure shall be brought in the circuit court for the county where the real property described in the claim of lien is located. If the real property is located in more than 1 county or judicial circuit, the action may be brought in any of the counties where the real property is located. An action to enforce a construction lien through foreclosure shall be equitable in nature. A construction lien also may be enforced by a cross-claim or counterclaim timely filed in a pending action involving title to, or foreclosure of mortgages or encumbrances on, real property.

Defendants stress the language "shall be brought in the circuit court" and argue that this gives the circuit court exclusive jurisdiction. This interpretation disregards the rest of the sentence and

section of the statute. Read as a whole, the statute addresses which county the action shall be brought in, not which court. When interpreting a statute, we must give effect to the Legislature's intent as expressed in the statutory language. *Gladych v New Family Homes Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). Defendants' interpretation reads an extra requirement into the statute. A reviewing court may read nothing into an unambiguous statute. *Roberts v Mecosta County Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Read as a whole, MCL 570.1118 does not affect the arbitrator's ability to rule on the validity of the lien.

Further, the arbitrator did not truly enforce the lien through foreclosure as dealt with in MCL 570.1118. To actually enforce the lien foreclosure, plaintiff would have to take further action such as seeking and obtaining a judicial sale. These further actions would have to be in the circuit court of the county where the property is located pursuant to MCL 570.1118. Thus, the arbitrator exercising jurisdiction over this issue is not inconsistent with MCL 570.1118.

Plaintiff asks this Court to award post-award and post-judgment fees and costs. We decline plaintiff's request.

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ Richard A. Bandstra