STATE OF MICHIGAN

COURT OF APPEALS

WOLD ARCHITECTS AND ENGINEERS, INC., Plaintiff-Appellant,	UNPUBLISHED June 17, 2004
v THOMAS STRAT and STRAT & ASSOCIATES, INC., Defendants-Appellees.	No. 246874 Oakland Circuit Court LC No. 2002-044483-CK

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff Wold Architects and Engineers, Inc., appeals as of right from the trial court's order granting defendants Thomas Strat and Strat & Associates, Inc.'s ("SAI"), motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff also appeals the trial court's orders denying its application to vacate the arbitration award and denying its motion to declare the arbitration clause non-binding. We reverse the trial court's orders and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

As part of the sale of SAI to plaintiff, plaintiff and Mr. Strat entered into an "employment/incentive compensation agreement" to formalize Mr. Strat's future employment with plaintiff,[1] and an "asset purchase agreement." One of the assets plaintiff acquired was a

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[1] The employment agreement contains an arbitration agreement that provides:

> The parties agree to submit any disputes arising from this Agreement to binding arbitration. The arbitrator shall be selected through the mutual cooperation between the representatives or counsel for the respective parties, failing agreement on which may be referred by either party to the Detroit Regional Office of the American Arbitration Association for appointment of an arbitrator and processing under their Voluntary Labor Arbitration Rules. [Employment/Incentive Compensation Agreement, ¶ 5.]

contract already in progress to renovate the Macomb County courthouse. Mr. Strat asserted that he had already billed the County for fifty-three percent of the total project fee, an amount he was entitled to pursuant to the agreement. He also asserted at the time of the sale that the project was near completion. However, this assertion was false and plaintiff was required to complete seventy percent of the project while being limited to only forty-three percent of the total project fee. As a result of Mr. Strat's billing and/or to offset amounts advanced to various subcontractors on the courthouse project, plaintiff withheld Mr. Strat's incentive compensation.

To collect the withheld funds, Mr. Strat invoked the arbitration clause of his employment agreement and initiated an action with the American Arbitration Association ("AAA"). Plaintiff objected to proceeding in arbitration and notified defendants of its intent to unilaterally revoke the arbitration provision. The AAA case manager, however, found the provision valid and ordered the arbitration to continue as scheduled. The case manager also indicated that, although the parties' arbitration clause provided that any disputes would be governed by AAA's Voluntary Labor Arbitration Rules ("Rules"),[2] the Rules were inapplicable in the situation and AAA would proceed under its Commercial Dispute Resolution Procedures ("Procedures").

In response to the AAA order, plaintiff filed the instant lawsuit seeking a declaratory judgment that: (1) the pending arbitration was invalid because the asset purchase agreement did not contain an arbitration provision; and (2) the arbitration provision in the employment agreement lacked the requisite language to be a statutory agreement, and was, therefore, revocable.[3] Plaintiff alleged, pursuant to the purchase agreement, that defendants negligently or innocently misrepresented the extent of the completion of the courthouse project amounting to fraud in the inducement. Plaintiff also sought a preliminary injunction to delay the scheduled arbitration.

Acknowledging that the parties entered into two separate agreements, the trial court found all the claims submitted to AAA to be arbitrable and that the arbitration would not cause plaintiff to suffer irreparable harm. The trial court also acknowledged that the arbitration provision in the employment agreement provided that the Rules would govern any dispute. However, the trial court confused the Rules and Procedures and concluded that the requisite language to form a statutory agreement was incorporated by reference under R-50(c) of the Rules.[4] R-50(c) is actually part of the Procedures, and the Rules do not provide for the entry of judgment based on the arbitration award.

The trial court denied plaintiff's motion for a preliminary injunction and the arbitration proceeded as scheduled in October of 2002. Mr. Strat was awarded $104,559, in past due incentive compensation, attorney fees, and interest. Defendants then moved for summary

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[2] The Rules have since been renamed the Labor Arbitration Rules, but are still effective.

[3] As will be discussed in further detail *supra*, statutory arbitration provisions must allow for the entry of judgment consistent with the arbitration award.

[4] [Opinion and Order, October 22, 2002, pp 5-6.]

disposition pursuant to MCR 2.116(C)(10), contending that there was no longer any genuine issue of material fact regarding whether the parties entered into a valid arbitration agreement. Plaintiff also moved for partial summary disposition contending that, even if Mr. Strat's claim under the employment agreement was arbitrable, plaintiff's fraud claim pursuant to the purchase agreement was not. Plaintiff continued to argue that the Rules governed the arbitration clause, which was non-binding.

Plaintiff also moved to vacate the arbitration award, as it had unilaterally revoked the arbitration provision prior to the announcement of the award and contended that AAA improperly awarded defendants attorney fees. The trial court granted summary disposition in favor of defendants and declined to vacate the arbitration award. The trial court found that the parties agreed to arbitration governed by the *Rules*, and, again, erroneously concluded that pursuant to R-50(c), the parties consented to the court's entrance of judgment based on the award. Further confusing the Rules and Procedures, the trial court then found that the parties had consented to arbitration governed by the *Procedures* by proceeding to arbitration.[5]

II. Standards of Review

We review a trial court's determination regarding a motion for summary disposition de novo.[6] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[7] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[8] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law."[9]

A trial court's power to enforce, vacate, or modify an arbitration award is very limited and a decision to do so is reviewed de novo.[10] To invite judicial action to vacate an arbitration award, the character or seriousness of a claimed error of law must have been so material or substantial that the award would have been substantially different but for the error.[11]

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[5] [Opinion and Order, January 15, 2003, p 5.]

[6] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

[7] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

[8] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[9] *MacDonald v PKT, Inc,* 464 Mich 322, 332; 628 NW2d 33 (2001).

[10] MCR 3.602(J)-(K); *Tokar v Estate of Tokar*, 258 Mich App 350, 352; 671 NW2d 139 (2003), citing *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496-497; 475 NW2d 704 (1991).

[11] *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982).

III. Legal Analysis

Plaintiff contends that the trial court erred in finding that binding statutory arbitration was provided for in the employment agreement. Specifically, plaintiff contends that arbitration provisions must contain the necessary language to form a statutory agreement or they are not binding. We find that the instant arbitration provision did not contain that language, either expressly or by reference.

Whether the arbitration provision in the employment agreement is binding depends on whether the provision qualifies as a statutory or common-law arbitration agreement. A statutory agreement must clearly provide that a circuit court can render judgment on the ultimate arbitration award.[12] The agreement must either expressly include the requisite statutory language or refer to arbitration procedures or rules that provide for the entry of judgment.[13] Conversely, an arbitration agreement lacking the requisite statutory language is a common-law arbitration agreement.[14] Either party may revoke a common-law agreement unilaterally at any time before the announcement of the award.[15] Statutory arbitration provisions, however, are irrevocable except by mutual consent.[16]

The existence of an arbitration agreement and the enforceability of its terms are judicial questions for the court.[17] Michigan has a "strong public policy favoring arbitration" and all doubts regarding an arbitration clause should be resolved in favor of arbitration.[18] However, arbitration is a matter of contract; therefore, a valid agreement must exist for arbitration to be binding.[19] The contract defines and limits the parties' rights and duties, and the arbitration clause confers the arbitrator's authority to act. Arbitrators are bound to act within those terms.

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[12] MCL 600.5001(2); *Hetrick v Friedman*, 237 Mich App 264, 268; 602 NW2d 603 (1999).

[13] *Gordon Sel-Way, Inc*, *supra* at 495; *Hetrick, supra* at 269.

[14] *Hetrick*, *supra* at 268, citing *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 578; 552 NW2d 181 (1996).

[15] *Id.* at 268-269, citing *Tony Andreski, Inc v Ski Brule, Inc*, 190 Mich App 343, 347-348; 475 NW2d 469 (1991). This Court has questioned the continued viability of the unilaterally revocable nature of common-law arbitration agreements, but based on the binding precedent of this Court's decisions in *Tony Andreski, Inc* and *Beattie*, the unilateral revocation rule remains viable in Michigan. *Id.* at 270-277.

[16] MCL 600.5011; *Hetrick*, *supra* at 268.

[17] *Huntington Woods v Ajax Paving Industries, Inc (After Remand)*, 196 Mich App 71, 74; 492 NW2d 463 (1992), citing *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99; 323 NW2d 1 (1982).

[18] *Grazia v Sanchez*, 199 Mich App 582, 584; 502 NW2d 751 (1993).

[19] *Arrow Overall Supply Co*, *supra* at 98; *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 234; 590 NW2d 580 (1998).

"Stated otherwise, the parties' contract is the law of the case in this context."[20] Arbitrators "exceed their power" when they act beyond the material terms of the contract by ignoring its express and unambiguous terms or by acting in contravention of controlling principles of law.[21]

The instant arbitration provision clearly does not contain the requisite statutory language. However, the provision does provide that disputes would be governed by the Rules. The Labor Arbitration Rules, as they are now called, do not provide that a circuit court can render judgment on the arbitration award. Accordingly, the arbitration provision lacks the requisite language to create a statutory arbitration agreement, either expressly or by reference. Therefore, the trial court erred in enforcing a common-law arbitration agreement that plaintiff revoked before the announcement of an arbitration award. As plaintiff was entitled to remain in the trial court, we need not determine plaintiff's other claims on appeal.

To remedy any confusion on the part of the trial court, we note that the application of the Procedures by AAA and the trial court was inappropriate. The parties contracted to be governed by the Rules, regardless of whether their application to the current dispute was appropriate or not. The parties contract expressly prohibited modification "unless such change or modification is made in writing and signed by both Wold and Strat."[22] As the Rules were allegedly improperly referenced in the provision, the trial court, and AAA, should have construed the ambiguity against defendants as the drafters,[23] and honored plaintiff's right to unilaterally revoke the agreement.

We find that the arbitration agreement was a common-law agreement that plaintiff was entitled to unilaterally revoke. Therefore, we reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Jessica R. Cooper

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[20] *Gordon Sel-Way, Inc*, *supra* at 496, citing *DAIIE*, *supra*, and *Stowe v Mutual Home Builders Corp*, 252 Mich 492, 497; 233 NW 391 (1930).

[21] *DAIIE*, *supra* at 434.

[22] [Employment/Incentive Compensation Agreement, ¶ 6.]

[23] See *Stark v Kent Products Inc*, 62 Mich App 546, 548; 233 NW2d 643 (1975).