

STATE OF MICHIGAN
COURT OF APPEALS

DAWN A. G. KULONGOWSKI, D.D.S.,
HEATHER L. ZIELINSKI, D.D.S., and
PLATINUM PROFESSIONALS, P.C.,

UNPUBLISHED
November 9, 2010

Plaintiffs-Appellees,

v

DAVID L. BROWER, D.D.S., DAVID L.
BROWER, D.D.S, P.C., and LARAINÉ K.
BROWER,

No. 293996
Oakland Circuit Court
LC No. 2009-098520-CK

Defendants-Appellants.

Before: SERVITTO, P.J., and ZAHRA and DONOFIO, JJ.

PER CURIAM.

Defendants appeal as of right from a circuit court judgment that confirmed an arbitration award for plaintiffs. The judgment awarded plaintiffs the principal sum of \$1,488,520.42, and reasonable investigation expenses and attorney fees of \$42,114.57. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This action arises from plaintiffs' purchase of defendants' dental practice. Plaintiffs purchased the practice for \$1,615,000. The parties allocated 80 percent of the purchase price to goodwill. The parties' agreement contained a restrictive covenant that prohibited defendant Dr. David Brower from practicing dentistry within a 25-mile radius of plaintiffs' location for five years, and also prohibited defendants from soliciting former patients for a period of five years. The agreement also contained a liquidated damages clause providing that if defendants intentionally and materially breached the restrictive covenant, plaintiffs would be entitled to liquidated damages in an amount equal to 80 percent of the purchase price. Further, the agreement provided that all disputes would be submitted to arbitration, but provided that the arbitrator "shall not have the power to award punitive damages."

Plaintiffs alleged a violation of the restrictive covenant and the parties' dispute was submitted to arbitration. The arbitrator determined that defendants breached the restrictive covenant by practicing dentistry in Lapeer, which was less than 25 miles from plaintiffs' practice, and by soliciting former patients to come to their new practice, and that more than 100 former patients became patients at defendants' new practice. Accordingly, the arbitrator awarded plaintiffs liquidated damages in an amount equal to 80 percent of the purchase price in

accordance with the liquidated damages provision of the parties' agreement. Plaintiff filed this action in the circuit court to enforce the arbitration award, and the court confirmed the award.

Defendants now argue that the circuit court erred in confirming the arbitration award, and instead should have vacated the award because the arbitrator exceeded his authority. According to defendants, the liquidated damages that were awarded to plaintiffs were effectively punitive and, therefore, the arbitrator exceeded his authority by awarding punitive damages, contrary to the parties' agreement.

This Court reviews de novo a circuit court's decision to enforce an arbitration award. *Miller v Miller*, 474 Mich 27, 30; 707 NW2d 341 (2005). An arbitration award may be vacated when "the arbitrator exceeded his or her powers." MCR 3.602(J)(2)(c). An arbitrator exceeds his powers when he acts beyond the material terms of the contract from which he draws his authority. *Miller*, 474 Mich at 30. The parties' agreement dictates the authority of the arbitrator. *Id.* at 32. More specifically, the arbitrator's remedial authority is limited to the contractual agreement of the parties. *Ehresman v Bultynck & Co, PC*, 203 Mich App 350, 355; 511 NW2d 724 (1994). "The fact that the relief 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)(2). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court may not overturn the decision even if convinced that the arbitrator committed a serious error." *City of Ann Arbor v American Federation of State, Co, & Muni Employees*, 284 Mich App 126, 144; 771 NW2d 843 (2009) (internal quotation marks omitted).

In this case, the arbitrator awarded liquidated damages in accordance with the parties' agreement. We disagree with defendants' argument that an award of liquidated damages that is expressly authorized by the parties' agreement should be considered impermissible punitive damages. Defendants' position that the parties would agree to specified damages, but also agree that the damages could not be enforced defies reason. Further, what the parties intended by the phrase "punitive damages" is an issue of contract interpretation, which is a matter for the arbitrator to decide. *City of Ann Arbor*, 284 Mich App at 144. For the purposes of deciding whether the arbitrator exceeded his authority, this Court need only determine whether "the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." Because the arbitrator awarded liquidated damages that were expressly authorized by the parties' agreement, the arbitrator at the least was "arguably" applying the contract and acting within the scope of his authority. *Id.* Accordingly, the trial court did not err in confirming the arbitration award.

Affirmed.

/s/ Deborah A. Servitto

/s/ Brian K. Zahra

/s/ Pat M. Donofrio