STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL ENVIRONMENTAL GROUP, L.L.C.,	UNPUBLISHED January 20, 2011
Plaintiff-Appellee,	
v	No. 292454 Oakland Circuit Court
LANDFILL AVOIDANCE SYSTEMS, L.L.C., and JOHN J. BONES,	LC No. 2008-096503-NZ
Defendants-Appellants.	

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's judgment in favor of plaintiff, consistent with an arbitrator's award. We affirm.

This dispute arose from the alleged breach of an asset purchase agreement entered into by the parties in October 2005. Defendant Landfill Avoidance Systems, L.L.C. (LAS), undertook to purchase from plaintiff certain personal property and to perform certain construction work on the building housing the personal property. Defendant John J. Bones, a managing member of LAS, signed a personal guaranty. Pursuant to an arbitration clause in the agreement, plaintiff filed a demand for arbitration with the American Arbitration Association (AAA) in 2008, alleging that LAS violated the purchase agreement. After an arbitration hearing, the arbitrator issued his arbitration award in favor of plaintiff and against defendants, jointly and severally, in the amount of $30,545.14, plus $1,350 in costs. Subsequently, plaintiff filed suit, petitioning the Oakland Circuit Court to enter a judgment on the arbitrator's award. The trial court granted plaintiff's motion for summary disposition and entered a judgment in plaintiff's favor in accordance with the arbitration award. On appeal, defendants contend that the trial court erred in granting plaintiff's motion because the arbitrator exceeded his authority.

Defendants first argue that the arbitrator exceeded his authority when he failed to consider defendants' affirmative defenses, specifically the "set-off" defense, which would have allegedly reduced or eliminated the damages award against defendants. Defendants contend that, in failing to consider the set-off defense, the arbitrator contravened a controlling principle of law, violated public policy, and deprived defendants of their rights to due process. We disagree.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Washington v Sinai Hosp*, 478 Mich 412, 417; 733 NW2d 755 (2007). A motion under MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

A court may confirm, modify or correct, or vacate an arbitration award. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991). "The court's power to modify, correct, or vacate an arbitration award, however, is very limited." *Id*. "By narrowing the grounds upon which an arbitration decision may be invaded, the court rules preserve the efficiency and reliability of arbitration as an expedited, efficient, and informal means of private dispute resolution." *Id*. The court may vacate an award when an arbitrator exceeds his power, which occurs, among other times, when an arbitrator contravenes a controlling principle of law or violates public policy. See *Detroit Auto Inter-Ins Exchange v Gavin*, 416 Mich 407, 434, 441; 331 NW2d 418 (1982).

> [W]here 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, the award and decision will be set aside. [*Id*. at 443 (internal citation and quotation marks omitted).]

Defendants submitted their answer, affirmative defenses, and counterclaim in one document. In violation of Rule R-4 of the AAA Commercial Arbitration Rules, defendants failed to submit a filing fee with their counterclaim. The AAA sent defendants' counsel a letter advising that if defendants wished the counterclaim to be considered, they needed to submit a filing fee within five business days. Defendants failed to do so. In a subsequent letter, the AAA informed defendants that their counterclaim was being returned as improperly filed, and, "[a]s the Answer and Counterclaim are combined in one document, Respondent may wish to modify their document and resubmit their answering statement." Defendants never resubmitted their answer or affirmative defenses. In turn, the arbitrator concluded that defendants were not entitled to any affirmative relief, including a set-off, because their affirmative defenses were not properly filed.

Defendants' affirmative-defenses document did not actually employ the term "set-off," but it did assert that plaintiff materially breached the agreement in several ways, thereby substantially interfering with defendants' ability to perform under the agreement, and it asserted that defendants were entitled to damages in excess of $25,000 for plaintiff's breaches. Irrespective of whether this is considered sufficient to plead a set-off defense, we find no error in the arbitrator's decision to not consider defendants' affirmative defenses. The defenses were not properly filed. An arbitrator does not exceed the scope of his authority by simply applying the standard arbitration rules. Indeed, the purchase agreement stated that, should arbitration be invoked, the rules of the AAA would apply. The arbitrator imposed no unreasonable burden on defendants. Defendants were advised to refile their answer and affirmative defenses and chose not to do so. Defendants present no authority for the proposition that the arbitrator was required to consider an affirmative defense that was not filed in accordance with the standard rules governing arbitration filings. Given the necessarily limited nature of our review, we find no basis for reversal.

Defendants assert, unpersuasively, that the arbitrator's decision not to consider the set-off affirmative defense violated public policy and deprived defendants of their right to due process. According to defendants, public policy dictates that "affirmative defenses duly submitted in litigation matters will be addressed and determined" and further dictates that one's right to due process be respected. As discussed above, however, defendants' affirmative defenses were *not* duly submitted. As far as due process is concerned, defendants had the opportunity, which they took, to present all their arguments and evidence before the arbitrator during the two-day arbitration hearing. The arbitrator's seven-page award demonstrates that he had a firm grip of the facts and the law and made an informed decision. Again, defendants were advised to refile their answer and affirmative defenses and chose not to do so. Defendants cannot demonstrate a due-process violation here. Accordingly, the trial court did not err in granting plaintiff's motion for summary disposition on this point.

Finally, defendants assert that it was a contravention of the plain language of the purchase agreement and personal guaranty for the arbitrator to find that Bones was liable for LAS's breach. We disagree.

In interpreting a contract, this Court's obligation (and likewise the arbitrator's obligation) is to determine the intent of the parties. *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007). "This Court must examine the language of the contract and accord the words their ordinary and plain meanings, if such meanings are apparent." *Id*. "If the contractual language is unambiguous, courts must interpret and enforce the contract as written." *Id*.

The purchase agreement provides that LAS has 120 days to complete the construction services listed in exhibit B of the agreement. It is undisputed that the construction services were not completed within 120 days. As the arbitrator concluded, "the 120-day performance period was breached by LAS." Pursuant to the personal guaranty signed by Bones, he, too, became liable for LAS's breach. The guaranty provides, in pertinent part, that Bones:

> absolutely, unconditionally, and irrevocably guarantees the Seller all duties and obligations owed to Seller for the services contained in Exhibit B [list of construction services] of this Agreement, together with interest and all other sums owing the Seller and/or Broker in connection with this Agreement, including, but not limited to, legal fees, and other expenses incurred by the Seller to the extent of and limited by the provisions of paragraph 4.2 of this Agreement. This Guaranty is a guaranty of collection.

Defendants note that the 120-day performance provision is part of the original agreement only, not of the guaranty. Defendants unpersuasively argue that, because Bones never signed the agreement, mere completion of the construction services – regardless of timeliness – is sufficient to insulate Bones from liability. However, as plaintiff points out, the 120-day performance provision was clearly a part of the agreement, and Bones, by way of the guaranty, guaranteed "*all duties and obligations* owed to the Seller for the services contained in Exhibit B" (emphasis added). By signing the guaranty, Bones warranted that, should LAS breach some provision of the agreement related to LAS's obligation to undertake construction services, Bones would be liable. Accordingly, we find no error in the arbitrator's determination that Bones was liable for LAS's breach of the 120-day performance provision.

Defendants also argue that the arbitrator improperly construed a provision in the agreement concerning an "escrow amount." Paragraph 4.2 of the agreement requires LAS to place $125,000 in escrow to be held as security for performance by LAS of its obligations under the agreement. In the event that LAS breaches the agreement and fails to cure the breach within ten days, plaintiff "may withdraw from the Escrow Amount an amount equal to the reasonable amount of damages sustained by Seller for said breach. Should the damages exceed the Escrow Amount, and only if the damages exceed the Escrow Amount, Seller may proceed against the Guarantor or to the extent [sic] of such excess."

LAS never placed $125,000 in escrow. According to defendants, the "escrow amount" is $125,000, regardless of whether that amount was actually placed into the escrow account. Defendants rely on ¶ 4.2 of the agreement, which states that LAS shall deliver to plaintiff "$125,000 to be held in escrow by Seller ('Escrow Amount')." Defendants argue that, because plaintiff does not claim damages in excess of $125,000, and Bones's liability is limited to the amount of damages that exceed $125,000, Bones is not liable for any of plaintiff's damages. Plaintiff counters that, because no amount was actually placed in escrow, the "escrow amount" is zero, and all of its damages exceed the escrow amount. The arbitrator sided with plaintiff in determining that, "since the Escrow Amount of $125,000 was never delivered, the Claimant's damages exceed the actual escrowed funds provided." The arbitrator concluded that Bones was liable for plaintiff's damages pursuant to the guaranty. We are not convinced that the arbitrator misconstrued the term "escrow amount." The phrase may reasonably be understood to mean the amount that was *actually* placed in escrow, i.e., zero dollars. Accordingly, the arbitrator did not contravene the plain language of the purchase agreement by holding Bones liable under the guaranty.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter