STATE OF MICHIGAN

COURT OF APPEALS

PROSPECT FUNDING HOLDINGS,

Plaintiff-Appellee,

v

REIFMAN LAW FIRM, PLLC,

Defendant-Appellant.

UNPUBLISHED
March 11, 2021

No. 352808
Oakland Circuit Court
LC No. 2018-169596-CB

Before: LETICA, PJ., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order confirming an arbitration award and its corresponding judgment in favor of plaintiff. We affirm.

I. FACTUAL BACKGROUND

This case arises out of an automobile accident involving defendant's former client, Marash Dukaj, and agreements that were made between the parties in light of the litigation that resulted from that accident. Defendant is a law firm that represents no-fault clients. Plaintiff is a funding company that advances money to individuals during the pendency of lawsuits.

Following the automobile accident, defendant, on behalf of Dukaj, filed suit in the Macomb Circuit Court against Dukaj's automobile insurer, Hastings Mutual Insurance Company ("Hastings Mutual"), for no-fault benefits. During the pendency of that litigation, Dukaj sought two presettlement loans from plaintiff. One loan was issued for a total purchase price of $6,800, and the second was issued for a purchase price of $4,080.[1] The loans contained repayment schedules with maximum amounts that could come due—called the "Prospect Ownership Amounts"—of $20,400 and $13,872, respectively.

[1] Dukaj received approximately $5,000 and $3,000 from the loans, respectively.

A variety of agreements and affirmations were made in pursuit of the loans. First, Dukaj affirmed that he had no outstanding liens against him. Additionally, the contracts contained a liquidated-damages clause which allowed plaintiff to receive "twice the Prospect Ownership Amount[s]" should Dukaj fail to comply with the terms of the agreements. The contracts also contained binding arbitration clauses. In association with the contracts, Dukaj signed two letters of direction addressed to his counsel—defendant. The first letter pertained to the initial loan and directed defendant "to place an assignment, consensual lien and security interest against any and all of the settlement proceeds due to [Dukaj] from the legal claim(s)/case(s) in which [defendant] represent[ed Dukaj], after payment of any and all legal fees and reimbursable costs, and to protect and satisfy this assignment, consensual lien and security interest of $20,400 which is the Prospect Ownership amount." The second letter, pertaining to the second loan, contained identical language, except that the Prospect Ownership Amount for that loan was listed as $13,872.

Defendant also signed its own agreements to accompany the loans. Defendant signed a letter of acknowledgment affirming that he would "honor" Dukaj's requests with respect to the letters of direction. Defendant further certified that "all disputes regarding this agreement will be resolved via arbitration . . . [and] [a]ll proceeds of the legal claim will be disbursed via the attorney's trust account."

After these agreements were entered, Dukaj settled his no-fault claim with Hastings Mutual for $100,000. The settlement funds were sent to defendant for distribution. Around that same time, it was discovered that Dukaj had liens against him from the Friend of the Court for unpaid child support of $27,560.55, and for a loan to a private individual of $14,000. After the discovery of these two liens, defendant attempted to renegotiate Dukaj's repayment amount for the two loans for an amount lower than indicated on the repayment schedule.[2] When the parties were not able to come to an agreement on the amount owed to plaintiff, Dukaj filed a motion under MCL 500.3112 (the 3112 motion) in the no-fault case asking the court to apportion the proceeds of the settlement to Dukaj's various lienholders.[3] At the conclusion of the hearing, the Macomb court allocated $8,113.33 of the settlement funds to plaintiff. Defendant later sent plaintiff a check for that amount and remitted the remaining balance, after attorney fees and repayment to the other lienholders, to Dukaj.

Thereafter, plaintiff instituted the arbitration action that led to this appeal, seeking the full amount it could claim under the loan agreements on the basis of the liquidated-damages clauses.[4] Defendant filed a response to plaintiff's allegations, but the arbitrator declined to consider defendant's arguments because defendant failed to pay the associated filing fees. The arbitrator found that $34,272 represented the full Prospect Ownership Amount when considering both loans, but also found that plaintiff had been provided $10,880. Notwithstanding its conclusion that some money had already been provided plaintiff, nor its subsequent conclusion that defendant was not

[2] According to the repayment schedules, the amount owed on both loans at the time totaled approximately $18,428.

[3] Defendant purportedly sent plaintiff notice of the hearing on the 3112 motion, but plaintiff did not attempt to intervene in the action, nor did it appear on the date of the hearing.

[4] Plaintiff did not name Dukaj as a respondent in the arbitration proceedings.

bound by the liquidated-damages clauses, the arbitrator awarded plaintiff the full liquidated-damages amount of $68,544.

Plaintiff later filed a petition and motion in the Oakland Circuit Court to confirm the arbitrator's award. Defendant asserted that plaintiff was barred by res judicata. The trial court disagreed and granted plaintiff's motion to confirm the award, subsequently issuing a judgment in favor of plaintiff. This appeal followed.

II. ANALYSIS

Defendant contends that plaintiff's claim before the arbitrator should have been barred by the doctrine of res judicata because it had already been fully adjudicated in the Macomb action. Defendant further contends that the trial court erred in confirming the arbitration award because the award was erroneous on its face. We disagree with defendant's analysis of the res judicata issue, but agree that the arbitration award is problematic on its face. However, on the basis of defendant's plentiful procedural errors, we ultimately conclude that we are left without an avenue to properly address either issue.

We review de novo issues of statutory interpretation, *Nason v State Employees' Retirement Sys*, 290 Mich App 416, 424; 801 NW2d 889 (2010), and the principles of statutory construction also apply to the interpretation of court rules, *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). Our role in reviewing an arbitration award is limited. *TSP Servs, Inc v Nat'l-Std, LLC*, 329 Mich App 615, 619; 944 NW2d 148 (2019). Indeed, "[a] court may not review an arbitrator's factual findings or decisions on the merits." *Ann Arbor v American Federation of State, Co, & Muni Employees (AFSCME) Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009). "Instead, a court may only review an arbitrator's decision for errors of law." *TSP Servs, Inc*, 329 Mich App at 620. "Moreover, in determining whether there is legal error, the court cannot engage in a review of an arbitrator's mental process, but instead must review the face of the award itself." *Id*.

Importantly, the Uniform Arbitration Act, MCL 691.1681 *et seq*., specifies a route by which aggrieved parties may challenge an arbitration award. Defendant has systematically failed to follow the statutory scheme. First, it would appear that defendant failed to properly raise either of the two issues he now raises on appeal before the actual arbitrator.[5] Then, perhaps more importantly for our purposes, defendant failed to raise the issues or any other argument in a proper motion to the trial court. MCL 691.1703(2) provided defendant 90 days from receiving notice of the arbitration award to file a motion to vacate that award.[6] MCL 691.1704(1) provided defendant

[5] Defendant filed a response to plaintiff's arbitration petition and a counterclaim, but the arbitrator noted that these were not considered because defendant failed to pay the required filing fees. After the award was entered, defendant could and should have filed a motion to modify or correct the award with the arbitrator under MCL 691.1700, but there is no evidence that it did so.

[6] Had defendant properly filed such a motion, it may have had merit. The statute provides that, upon a proper motion, a court may vacate an arbitration award if the "arbitrator exceeded the arbitrator's powers." MCL 691.1703(1)(d). An arbitrator acting beyond the material terms of a

90 days from receiving notice of the arbitration award to file a motion to correct or modify that award with the trial court.[7] Absent an order entered on the basis of one of the above motions, MCL 691.1702 provides that a court "shall issue" an order confirming an arbitration award upon the motion of a party to do so. Thus, with the above statutes in mind, while there is a process for a trial court to consider vacating an arbitration award on the basis of errors made by the arbitrator, that process appears only to be triggered—and indeed, permitted—upon a motion by a challenging party.[8] See MCL 691.1700; MCL 691.1702; MCL 691.1703; MCL 691.1704. All that is to say that it seems that the result reached by the trial court in this case was a statutory requirement.

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contract from which he draws his authority or in contravention to controlling principles of law exceeds his power. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554-555; 682 NW2d 542 (2004). Here, the arbitrator concluded that the liquidated-damages clause on which its award was based plainly did not apply to defendant, and yet saddled defendant with the damages regardless. To that end, one could argue from the face of the award that it went beyond the material terms of the contract. Again, however, on the basis of defendant's consistent procedural failings, we are unaware of any law that would provide us an avenue to address this issue at this juncture.

[7] Defendant suggests that it was not time-barred because the motion it filed was a motion to dismiss in response to plaintiff's motion to confirm the arbitration award, and not a motion to modify or vacate the award. We agree with plaintiff, however, that defendant's motion to dismiss was, in effect, a motion to vacate the arbitration award. See *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011) (noting that we are not bound by a party's choice of label where being so bound would result in the exultation of form over substance).

[8] We note that there may be some issues which would allow a court to reach the merits of an arbitration award despite a party's failure to raise the issue. For example, in *Smith v Highland Park Bd of Ed*, 83 Mich App 541, 546; 269 NW2d 216 (1978), we effectively vacated aspects of an arbitration award because they were outside the scope of the agreement to arbitrate. We referred to *Stowe v Mut Home Builders Corp*, 252 Mich 492, 497; 233 NW 391 (1930), wherein our Supreme Court held that an arbitration award outside the scope of the agreement to arbitrate is not binding because it has no legal sanction. This is because the scope of an agreement to arbitrate necessarily involves the jurisdiction of the arbitrator. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99 n 2; 323 NW2d 1 (1982). An arbitrator without jurisdiction has no authority, and thus, "[w]henever the jurisdiction of an arbitrator is questioned, it *must* be determined in order to make an award on arbitration binding." *Id*. at 98-99 (emphasis added). Defendant did not brief this issue, but we note regardless that it does not impact our analysis. First, it must be noted that these cases were decided long before the Uniform Arbitration Act was enacted. Second, defendant does not argue on appeal that the arbitrator lacked jurisdiction because the award was outside the scope of the agreement to arbitrate; defendant contends the arbitrator lacked jurisdiction on the basis of res judicata. We are not confident, however, that defendant's unsupported assertion—that claim preclusion is a matter of jurisdiction and that a subsequent court that is barred from addressing a claim can be said to have never had jurisdiction in the first instance—is accurate. Those courts cannot be said to be completely deprived of jurisdiction on the basis of res judicata when it is also those courts in which the issue of res judicata tends to be first decided. Moreover, and as noted below, even assuming we could reach the arbitration award on

Defendant suggests that the above interpretation of the law is inaccurate, and references MCR 3.602 as its authority. That court rule deals generally with arbitration. MCR 3.602(I) provides:

> **(I) Award; Confirmation by Court.** A party may move for confirmation of an arbitration award within one year after the award was rendered. The court may confirm the award, unless it is vacated, corrected, or modified, or a decision is postponed, as provided in this rule.

MCR 3.602(J) and (K) provide, respectively, avenues by which a party may seek to either vacate, or to modify or correct, an arbitration award. They provided defendant, at maximum, 21 days from the date of the award to file a complaint to vacate or modify in the circuit court, and 91 days from the date of the arbitration award for defendant to file a motion. MCR 3.602(J)(1) and (3); MCR 3.602(K)(1) and (2).[9] Defendants suggestion is that the statutory limitations apply to motions to vacate or confirm an arbitration award filed on their own, and that MCR 3.602 allows another avenue for such motions where they are made in response to a motion to confirm an arbitration award. Nothing in the court rule suggests this is true. These are separate motions with separate limitations, and defendant has provided no authority which would allow us to conclude that the filing of a motion to confirm an arbitration award resets the limitation period for the filing of motions to vacate or modify that award.

With all of the above in mind, we see no avenue by which we may disturb the trial court's ruling, nor the underlying ruling of the arbitrator.

We now turn to the issue of res judicata for the limited purpose of illustrating that, to the extent that defendant would argue that we can reach the arbitration award because the arbitrator lacked jurisdiction on the basis of res judicata, res judicata did not apply in this case.

"The question whether res judicata bars a subsequent action is reviewed de novo by this Court." *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). "The existence of a contract to arbitrate and its enforceability constitute judicial questions that we also consider de novo." *In re Nestorovski Estate*, 283 Mich App 177, 197; 769 NW2d 720 (2009).

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res

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the basis of res judicata because it could be said to involve the jurisdiction of the arbitrator, we cannot do so in this case because there is no merit to defendant's res judicata argument.

[9] It would seem that the difference between the court rules and the statutes is that the latter provides parties 91 days *from the date of the award* to file their respective motions, MCR 3.602(J)(3) and (K)(2), while the former provides 90 days *after receiving notice* of the award, MCL 691.1703(2); MCL 691.1704(1).

> judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Adair*, 470 Mich at 121 (citations omitted).]

First, the issues in this case were not and could not have been fully resolved in the Macomb case. In *Miller v Citizens Ins Co (Miller II)*, 490 Mich 905; 804 NW2d 740 (2011), which analyzes this Court's holding in *Miller v Citizens Ins Co (Miller I)*, 288 Mich App 424; 794 NW2d 622 (2010), the Detroit Medical Center (DMC) provided medical services to the plaintiff after an automobile accident. *Miller I*, 288 Mich App at 426. The plaintiff settled with the insurance company; however there remained a dispute between the DMC and the plaintiff about the allocation of fees to the plaintiff's attorney. *Id*. at 434-435. Consequently, the plaintiff filed a motion under MCL 500.3112 to settle the matter. *Id*. at 432. The trial court granted the attorney fees, which effectively reduced the amount the DMC recovered for its medical services. *Id*. at 426. The DMC appealed to this Court arguing that it was entitled to the full amount of the cost for the medical services provided. *Id*. at 435. After we affirmed the trial court's order, our Supreme Court granted leave to appeal. *Miller II*, 490 Mich 905. With respect to the amount owed to the DMC for medical services, the Court stated:

> Of concern to this Court is that the circuit court's order, and the Court of Appeals' affirmance, could be mistakenly interpreted as extinguishing the DMC's contractual right to payment for its services. We wish to make clear that this is not the case. No-fault benefits are 'payable to or for the benefit of an injured person . . . .'" MCL 500.3112. In this case, through settlement, the benefits were paid to plaintiff, and her attorney asserted an attorney's charging lien over the settlement proceeds. Thus, the effect of this was only to settle claims as between the insurer, plaintiff, and her attorney. The circuit court's order of dismissal pursuant to the settlement agreement did not have the effect of extinguishing the DMC's right to collect the remainder of its bill from plaintiff. Such a result could not have been achieved without an explicit waiver, or at least unequivocal acquiescence, by the DMC, which was not obtained. [*Id*.]

The inference derived from *Miller II* is that while a 3112 motion effectively resolves the apportionment of settlement proceeds in a particular action, these motions do not necessarily resolve every contractual claim a party may have for additional damages. Applying that reasoning to this case, while the $8,133.33 allocated by the Macomb court reflects an apportionment of the amount owed to plaintiff under the settlement in that case, it did not bind plaintiff to that amount where additional contractual claims could arise outside of the case.

Relatedly, we also disagree with defendants' contention that plaintiff was a party to the Macomb action. "The parties to the second action need be only substantially identical to the parties in the first action, in that the rule applies to both parties and their privies." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12; 672 NW2d 351 (2003). Indeed, "perfect identity of the parties is not required, only a substantial identity of interests that are adequately presented and protected by the first litigant." *Adair*, 470 Mich at 122. "In order to find privity between a party and a nonparty, Michigan courts require 'both a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.' " *Peterson Novelties, Inc*, 259 Mich App at 13. "To be in privity is to

be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Moses v Dep't of Corrections*, 274 Mich App 481, 503; 736 NW2d 269 (2007), citing *Adair*, 470 Mich at 122.

Here, and as noted above, the named parties in the Macomb litigation were Dukaj and his insurance company, Hastings Mutual. Neither of those parties were in privity with plaintiff such that they could be said to represent the contractual interests plaintiff raises in this case. Again, in the Macomb action, the relief sought by Dukaj in the 3112 motion was to "designate payees and make equitable apportionment" of the settlement agreement in that case. MCL 500.3112. In contrast, in this case, plaintiff does not dispute the apportionment of the insurance settlement because its claims are related to loan contracts outside the scope of that settlement.[10]

Affirmed.

/s/ Anica Letica
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

[10] As an aside, we note the argument that plaintiff is a party to the Macomb case because plaintiff received notice of the settlement proceedings. Defendant has provided no authority for us to conclude that an entity on notice of proceedings that *may* in some way impact that entity's immediate interests is necessarily a party to those proceedings.