

STATE OF MICHIGAN
COURT OF APPEALS

ALLEN R. PLATT, DDS,

Plaintiff-Appellee,

v

RONALD D. BERRIS, DDS & ALLEN R.
PLATT, DDS, PC and RONALD D. BERRIS,
DDS,

Defendants-Appellants.

UNPUBLISHED
April 23, 2013

Nos. 297292 & 298872
Oakland Circuit Court
LC No. 1999-012920-CZ

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendants Ronald D. Berris, D.D.S. & Allen R. Platt, D.D.S., P.C. (the practice), and Ronald D. Berris, D.D.S., appeal as of right the trial court's order denying their motion to vacate an arbitration award and granting plaintiff Allen R. Platt, D.D.S.'s motion to confirm it. We affirm.

I. FACTS

A. BACKGROUND

In May 1996, the parties agreed to practice together. Berris sold Platt half the practice's stock. Platt and the practice contractually agreed that the parties would settle any disputes by arbitration "in accordance with the rules . . . of the American Arbitration Association[.]" The contract also provided that the practice would compensate Platt with a percentage of its revenue.

On March 1, 1999, Platt filed a civil suit in the circuit court that sought to dissolve the corporation and alleged that Berris refused to abide by the parties' contract. The trial court ordered the parties to arbitrate the dispute.

B. THE ARBITRATION

The parties' arbitration contract provided that "Joseph W. Cunningham and such other individuals as are appropriate in the circumstances" would perform the arbitration services. Beginning in May 1999, Cunningham began asking the parties for detailed documentation about the practice's finances. In November 2000, Cunningham indicated that his assistant, "Mary

Ade[,] suggested using extrapolation from industry statistics for expenses that were not otherwise available.” In March 2001, Cunningham requested additional information, but noted that Berris informed him that some of the practice’s records were not available.

In July 2003, Cunningham expanded the proposed schedule of the arbitration hearing to two days, including opening and closing statements, direct and cross-examinations, and rebuttals. On October 22, 2003, Cunningham indicated that he still required certain financial information to resolve the issues material to the dispute. On October 30, 2003, Cunningham indicated which parties were responsible to provide him with specific pieces of information. On July 13, 2004, after holding an arbitration hearing, Cunningham reiterated that he still required certain documents. On October 27, 2004, Cunningham again requested the documents.

Two years later, on October 15, 2006, Cunningham submitted an extensive preliminary report, and allowed the parties to submit objections. The report analyzed the practice’s income and expenses from 1996 through 1998. On October 27, 2006, Cunningham indicated that he would allow the parties another half-day hearing to present additional documents. The parties subsequently scheduled a final arbitration hearing, and Cunningham confirmed that both parties could act as witnesses, testify, and be cross-examined at the hearing.

On November 9, 2006, Cunningham responded to the parties’ objections. Cunningham noted that “the lack of records to support claims made by one or both parties” was a “serious difficult[y]” in the case. Cunningham found that the practice was a partnership, and determined the practice’s income, the parties’ respectively owed compensations, and how much of those compensations were paid. Cunningham determined that Berris owed Platt \$154,000. Cunningham also compared his calculations to industry standards.

On September 19, 2008, Cunningham emailed the parties about whether Berris was entitled to further question Platt and Lisa Salim, Platt’s assistant. Cunningham noted that the parties had agreed at the last meeting that Cunningham would meet informally with Platt and Salim, and that Berris would cross-examine Platt and Salim if the meeting “resulted in an outcome unfavorable to Dr. Berris.”

On December 4, 2008, Cunningham issued his final decision. Cunningham found that the result of his meeting with Platt and Salim was favorable to Berris. Cunningham’s final opinion was that Berris owed Platt \$110,000. Cunningham found that both parties were responsible for the lengthy duration of the arbitration.

C. THE TRIAL COURT’S ORDER

On May 17, 2009, Berris moved the trial court to vacate the arbitration award. Berris argued that the trial court must vacate the award because (1) Cunningham used industry standards instead of data to calculate the award, (2) Cunningham delegated his duties to Ade, (3) Cunningham did not allow Berris to cross-examine Platt after the ex parte hearing, (4) the decision failed to specify the party responsible for paying the award, and (5) the decision was factually inaccurate. Platt moved the trial court to confirm the award.

On November 4, 2009, the trial court denied Berris’s motion to vacate the award and granted Platt’s motion to confirm the award. Examining each of Berris’s allegations, the trial

court determined that Cunningham did not act improperly and that it could not review the alleged factual errors.

II. THE ARBITRATION AWARD

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's decision to enforce an arbitration award.¹ We review de novo whether an arbitrator exceeded his or her authority.²

B. LEGAL STANDARDS

A court's review of an arbitrator's award is very limited.³ The reviewing court must accept the arbitrator's factual findings and decisions on the merits, and cannot engage in contractual interpretation.⁴ MCR 3.602(J)(2) provides the circumstances under which the trial court must vacate an arbitration award, which include when

(c) the arbitrator exceeded his or her powers; or

(d) the arbitrator refused to . . . hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

An arbitrator exceeds his or her powers when the arbitrator (1) acts beyond the material terms of the arbitration contract, or (2) the decision contravenes controlling principles of law in a way that materially prejudices the rights of the parties.⁵

C. APPLYING THE STANDARDS

1. CONTRACTUAL POWERS

First, Berris contends that Cunningham improperly delegated his duties to his assistant, Ade. We disagree.

We conclude that the arbitration contract expressly allowed Cunningham to utilize Ade's services. An arbitrator's authority arises exclusively from the contract between the parties.⁶

¹ *Miller v Miller*, 474 Mich 27, 30; 707 NW2d 341 (2005); *City of Ann Arbor v AFSCME*, 284 Mich App 126, 144; 771 NW2d 843 (2009).

² *Washington v Washington*, 283 Mich App 667, 672; 770 NW2d 908 (2009).

³ *Police Officers Ass'n of Mich v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002).

⁴ *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150; 393 NW2d 811 (1986); *City of Ann Arbor*, 284 Mich App at 144.

⁵ *Washington*, 283 Mich App at 672.

⁶ See *Port Huron Area Sch Dist*, 426 Mich at 150-151.

Here, the contract expressly provided that the arbitration services would “be performed by Joseph W. Cunningham and such other individuals as are appropriate in the circumstances.” Thus, Cunningham’s use of Ade’s services did not violate the terms of the arbitration contract.

Second, Berris contends that this delegation violated the American Arbitration Association Rules and Ethics Codes. As a preliminary matter, we do not agree with Platt’s assertion that these rules do not apply in this case. Here, the parties’ contract providing for binding arbitration under these rules. An arbitration agreement may incorporate the American Arbitration Association Rules by reference.⁷ When the parties incorporate these rules into their contract by reference, they are controlling.⁸ Thus, we will consider these rules when determining whether Cunningham acted within the arbitration contract.

We conclude that Berris has not supported his contention that Cunningham violated the American Arbitration Association Rules. Canon V of the American Arbitration Association Rules, as is available in the lower court record, states in part that “[a]n arbitrator should not delegate the duty *to decide* to any other person.” Nothing in the record indicates that Ade, rather than Cunningham, rendered the decision in this case. Thus, we conclude that Berris’s argument is without merit.

Berris also contends that the trial court should have vacated the arbitration award because Cunningham conducted an inappropriate *ex parte* hearing with Platt. The parties and the arbitrator may make agreements about how to conduct the arbitration hearings.⁹ Thus, the question is whether the *ex parte* meeting violated the parties’ arbitration agreement.¹⁰

Here, nothing in the parties’ arbitration agreement prohibits *ex parte* meetings. Further, the parties agreed to the specific *ex parte* meeting that Berris now challenges on appeal—that is, the parties agreed that Cunningham would speak with Platt and Salim individually, and that Berris could cross-examine them if the outcome of the conversation was unfavorable to him. Cunningham found that the outcome was not unfavorable to Berris, because he did not accept Platt and Salim’s contentions. We cannot review the arbitrator’s factual findings on appeal.¹¹ We conclude that Berris’s assertion that the *ex parte* meeting required the trial court to vacate the award is without merit.

Third, Berris contends that Cunningham failed to arbitrate the entire dispute between the parties because he failed to consider the years 1995 and 1999. Cunningham found that “it was agreed early on that the period of partnership was 3 years, 1996-1998.” We cannot review the arbitrator’s factual finding that the years 1995 and 1999 were not in dispute.

⁷ *Hetrick v David A Friedman, DPM, PC*, 237 Mich App 264, 269; 602 NW2d 603 (1999).

⁸ See *id.*

⁹ *Miller*, 474 Mich at 33.

¹⁰ *Cipriano v Cipriano*, 289 Mich App 361, 371; 808 NW2d 230 (2010).

¹¹ *Port Huron Area Sch Dist*, 426 Mich at 150; *City of Ann Arbor*, 284 Mich App at 144.

Similarly, Berris contends that Cunningham did not identify the proper party responsible to pay the award, asserting that Platt's contract was with the practice, not with Berris directly. We reiterate that we cannot engage in contractual interpretation on appeal.¹² Further, the parties' arbitration contract provides that they hired Cunningham to determine the "amount[] that . . . Ronald D. Berris, DDS (Practice) owes to Allen R. Platt, DDS." The arbitrator's determination was within the scope of the parties' contract.

Fourth, Berris contends that Cunningham should not have considered industry standards when making his factual findings. "[O]rdinarily, unless otherwise expressly agreed, an arbitrator has great latitude in the sources he may rely upon in resolving disputes concerning the appropriate interpretation of specific contractual provisions"¹³ Here, nothing in the parties' arbitration agreement prohibits the arbitrator from considering industry standards. Thus, we conclude that Cunningham's consideration of industry standards did not exceed the scope of his powers.

We conclude that Cunningham did not act beyond the material terms of the contract when he utilized the services of Mary Ade as an assistant or when he conducted an ex-parte meeting with Platt and Salim.

2. REFUSAL TO HEAR MATERIAL EVIDENCE

We conclude that Berris has not supported his contention that Cunningham refused to hear evidence. Berris does not identify any instance in which Cunningham *refused to hear* evidence. To the contrary, it is clear from the record that Cunningham requested and accepted a wide variety of financial evidence from both parties, as well as conducting hearings at which the parties could present evidence. To the extent that Berris invites this Court to reconsider Cunningham's factual determinations concerning Cunningham's methods and the weight and credibility of the evidence that the parties presented, we cannot do so. "It is simply outside the province of the courts to engage in a fact-intensive review of how an arbitrator calculated values, and whether the evidence he relied on was the most reliable or credible evidence presented."¹⁴ We conclude that Berris's assertion that Cunningham refused to hear material evidence is without merit.

III. CONCLUSION

Berris also alleges that Cunningham's errors resulted in several factual inaccuracies in his decision. We reiterate that we must accept the arbitrator's factual findings, contractual

¹² *Port Huron Area Sch Dist*, 426 Mich at 150; *City of Ann Arbor*, 284 Mich App at 144.

¹³ *Port Huron Area Sch Dist*, 426 Mich at 160.

¹⁴ *Washington*, 283 Mich App at 675; *City of Ann Arbor*, 284 Mich App 144.

interpretation, and decision on the merits.¹⁵ We conclude that Cunningham did not exceed the scope of his powers or refuse to hear evidence material to the dispute.

We affirm.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

¹⁵ *Port Huron Area Sch Dist*, 426 Mich at 150; *City of Ann Arbor*, 284 Mich App at 144.