

STATE OF MICHIGAN
COURT OF APPEALS

JEAN REYNOLDS and JERRY REYNOLDS,

Plaintiffs/Counter-Defendants-
Appellees,

and

KELLY BERTIN, JOHN J. WAGNER
REVOCABLE LIVING TRUST DATED APRIL
11, 1991, and EDNA J. WAGNER REVOCABLE
TRUST DATED MARCH 13, 1987,

Plaintiffs-Appellees,

v

PARKLANE INVESTMENTS, INC.,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellant,

and

RICHARD D. JOSAITIS,

Defendant-Appellant,

and

JOHN J. WAGNER REVOCABLE LIVING
TRUST DATED MARCH 13, 1987, E.
WAGNER, L.L.C., and EDNA JEAN WAGNER
IRREVOCABLE TRUST DATED NOVEMBER
13, 1995,

Third-Party Defendants-Appellees.

UNPUBLISHED
September 20, 2011

No. 298777
Wayne Circuit Court
LC No. 08-118746-CZ

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendants, Parklane Investments, Inc., and Richard D. Josaitis, appeal as of right from a circuit court order and judgment confirming an arbitration award. Defendants primarily contend that the arbitrator exceeded his authority by making an award in favor of third-party defendant E. Wagner, L.L.C. (“the LLC”), because that entity was not a named plaintiff and had not filed a claim as a cross-plaintiff. We affirm.

Plaintiffs and third-party defendants are former clients of defendants’ investment management services business. Plaintiffs alleged in part that defendants were paid to manage six accounts with an online broker at specified fee percentages, but charged more than the specified amounts without written authorization. Parklane Investment denied plaintiffs’ allegations and asserted as an affirmative defense that it was “entitled to set-off the amounts due and owing it for services rendered at the request of Plaintiffs and their predecessors.” Parklane Investments filed a countercomplaint and third-party complaint alleging that it performed “investment advisor services related to” six accounts, including one for the LLC, which it named as a third-party defendant.

Ultimately, the parties agreed to arbitration. The arbitration award includes a section for “Claims Made by the Second Amended and Restated Edna J. Wagner Revocable Living Trust Dated March 13, 1987, as Amended (“Edna J. Wagner Trust”) and by the LLC. In the award, the arbitrator recognized that the LLC was not a named plaintiff, but explained:

The LLC was formed in 2000, with the Edna J. Wagner Trust as its sole member. Presently, the Edna J. Wagner Trust is the majority member of the LLC, and all of the assets of the Edna J. Wagner Trust have been folded into the LLC. Whereas the Complaint alleges investment management fee overcharges by Parklane and Josaitis with respect to services provided to the Edna J. Wagner Trust, all of these services, since the date of the formation of the LLC, were, in fact, performed by Parklane and Josaitis for the LLC. Accordingly, the Arbitrator is treating the LLC as the real party in interest with respect to said claims.

Defendants challenge the circuit court judgment premised on this award.

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); *Norlund & Assoc, Inc v Village of Hesperia*, 288 Mich App 222, 226; 792 NW2d 59 (2010). Judicial review and enforcement of an arbitration award is governed by MCR 3.602. *Id.* at 227. MCR 3.602(J)(2) sets forth several grounds for a court to vacate an arbitration award. Defendants rely on MCR 3.602(J)(2)(c), which provides that “the arbitrator exceeded his or her powers.”

An arbitrator exceeds his powers when he acts beyond the material terms of the contract from which he draws his authority or when he acts in contravention of controlling law.¹ *Miller*, 474 Mich at 30. The agreement dictates the authority of the arbitrator. *Id.* at 32. “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 AFSCME Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009) (internal quotation marks omitted).

The order submitting the matter to arbitration, styled as “STIPULATED ORDER FOR APPOINTMENT OF ARBITRATOR AND SUBMISSION OF ALL DISPUTES TO BINDING ARBITRATION,” states in pertinent part:

IT IS ORDERED that the parties, per their agreement, shall submit those matters pled by the parties in this litigation to Lawrence R. Abramczak . . . to serve as final arbiter of all allegations and disputes pled by the parties.

IT IS SO ORDERED that the following disputes are subject to this Stipulated Order:

(a) Claims between Edna Wagner Trust dated March 13, 1987 and Parklane/Josaitis;

* * *

(e) Claims between Parklane/Josaitis and E. Wagner, LLC.

Contrary to defendants’ argument, the arbitrator was at least “arguably . . . acting within the scope of his authority” by making an award to the LLC, as the real party in interest with respect to the overcharges involving the assets of plaintiff Edna J. Wagner Trust. The overcharges, Parklane Investments’ assertion of a set-off, and a countercomplaint and third-party complaint for unpaid services were “matters pled by the parties.” The order submitting the dispute to arbitration is comprehensive. It refers to “all allegations and disputes pled by the parties.” The list of specified disputes included “claims” between defendants and the trust and the LLC. The arbitrator recognized that the LLC was not a named plaintiff, but explained that it was the real party in interest for the overcharge claims advanced by plaintiff Edna J. Wagner Trust. In making that determination, the arbitrator did not exceed his authority.

Defendants argue that because the LLC did not file a claim, the statute of limitations was never tolled for any claim that the arbitrator perceived it had. Accordingly, defendants argue, the arbitrator should not have awarded any damages to the LLC. However, the arbitrator made the

¹ Defendants focus on whether the arbitrator exceeded his powers and do not argue that the arbitrator acted in contravention of controlling law.

award to the LLC, as the real party in interest for the claim that had been advanced by plaintiff Edna J. Wagner Trust. The arbitrator stated that although the LLC did not file a claim in its own name, it could rely on the claim brought by the trust. Referring to the applicable limitations period, the arbitrator specifically limited an award of damages to overcharges that occurred after July 25, 2002, six years before the complaint was filed on July 25, 2008. The arbitrator's handling of the limitations period is consistent with the relation-back doctrine. See *Tice Estate v Tice*, 288 Mich App 665, 669-670; 795 NW2d 604 (2010). Evaluating whether the arbitrator properly treated the LLC as the real party in interest for the trust's claim would require this Court to scrutinize the merits of the arbitrator's award, which is incompatible with limited judicial review of arbitration awards.

In defendants' reply brief, they argue that the circuit court's judgment did not conform to the arbitrator's award because the judgment did not specify the amounts awarded to the various parties. The issue whether the judgment properly reflects the arbitrator's award is distinct from the issue whether the arbitrator exceeded his authority. The judgment issue was not raised or argued in defendants' initial brief, nor is it implicated by the arguments in the appellees' brief. "Reply briefs must be confined to rebuttal of the arguments in the appellee's or cross-appellee's brief[.]" MCR 7.212(G). Raising an issue for the first time in a reply brief is insufficient to present the issue for appeal. *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 576; 692 NW2d 68 (2004). In any event, the judgment does not affect the amount or extent of defendants' liability, and plaintiffs and third-party defendants do not complain about the collective award. Thus, defendants have not shown that they are prejudiced by the alleged lack of specificity in the judgment.

We reject defendants' argument that they are entitled to relief because the circuit court entered its order confirming the arbitration award while a separate motion to vacate the award was still pending. At the hearing on plaintiffs' and third-party defendants' motion to confirm the arbitration award, defendants noted that they had filed a motion to vacate that was pending. They did not assert, however, that the pending motion precluded the circuit court from entering an order confirming the award. Instead, defendants presented their arguments in support of vacating the award. They invited the court to rule on the merits of their arguments at the hearing. Defendants may not now argue on appeal that the circuit court erred by ruling on those arguments because the separate motion to vacate wherein they raised the same arguments was pending. An appellant cannot contribute to error by plan or design and then argue error on appeal. *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 691; 476 NW2d 487 (1991). Furthermore, any error in prematurely ruling on the motion to confirm the arbitration award before the scheduled hearing on defendants' motion to vacate was harmless because it did not affect defendants' substantial rights. MCL 600.2301. The circuit court had the opportunity to consider the arguments at the March 26, 2010, hearing, and also when the court ruled on defendants' motion to vacate and their motion for rehearing. Thus, defendants had ample opportunity to present their arguments to the circuit court.

Finally, defendants argue that the circuit court should have modified or corrected the arbitration award because the arbitrator incorrectly awarded damages to a party that had not pleaded a claim and because the arbitrator made miscalculations with respect to when the limitations period expired. However, given our conclusion that the arbitrator acted within his authority in making the award to the LLC, we find no merit to defendants' argument that relief is

warranted under MCR 3.602(K)(2)(b) because the arbitrator “awarded on a matter not submitted to the arbitrator.” Further, the award does not have an “evident miscalculation” that would constitute a ground for relief pursuant to MCR 3.602(K)(2)(a).

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot