

STATE OF MICHIGAN
COURT OF APPEALS

GEORGE J. MAGER, JR.,

Plaintiff/Counter Defendant-
Appellee/Cross Appellant,

v

GIARMARCO, MULLINS & HORTON, P.C.,

Defendant/Counter Plaintiff-
Appellant/Cross Appellee.

UNPUBLISHED
June 25, 2013

No. 309235
Oakland Circuit Court
LC No. 2011-119461-CZ

Before: JANSEN, P.J., and CAVANAGH and MARKEY, JJ.

PER CURIAM.

Defendant, Giarmarco, Mullins & Horton, P.C., appeals as of right the trial court's order denying its motion for summary disposition. On cross-appeal, plaintiff, George J. Mager, Jr., appeals as of right the trial court's order denying his motion to modify an arbitration award. We affirm both rulings.

I. BASIC FACTS AND PROCEDURAL HISTORY

On January 1, 2001, the law firm of Mager, Mercer & Alber, P.C. merged into defendant firm, then known as Cox, Hodgman & Giarmarco, P.C. The statutory merger was effectuated through an Agreement and Plan of Merger. In conjunction therewith, plaintiff and defendant entered into several contracts, including a Deferred Compensation Agreement (the "agreement") that is the subject of the controversy at issue in this case.

Under the agreement, plaintiff was to receive deferred compensation for past services rendered upon his termination of employment with the firm. The agreement prohibited payment where plaintiff voluntarily resigned and subsequently engaged in the private practice of law. However, the agreement excluded employment "as in-house legal counsel for a business entity" from the definition of the private practice of law. The agreement further provided that "[a]ny dispute arising out of or under this Agreement shall be resolved by arbitration"

On March 1, 2004, plaintiff resigned from all of his positions with the firm to pursue employment as in-house, general counsel for one of defendant's clients. For several years after plaintiff's resignation, he and defendant negotiated the terms of his severance. Plaintiff asserted his right to payment of deferred compensation and filed a demand for arbitration against his

former employer alleging that under the terms of the contracts relating to the merger and in connection with his resignation from the firm, defendant owed him the benefits and an equity buyout.

Following a two-day hearing, the arbitrator found in favor of plaintiff on his deferred compensation agreement claim, finding that the agreement was valid and enforceable, and plaintiff was entitled to receive a total of \$276,620 minus offsets. Plaintiff filed a motion to modify the arbitration award with the circuit court, disputing the arbitrator's finding regarding the date the payments were to commence and the length of the restrictive covenant. Defendant also filed a motion with the court, which was entitled a "motion for summary disposition" but requested the court to vacate the arbitration award. The trial court denied both motions, upholding the arbitrator's award. This appeal and cross-appeal followed.

II. ARBITRATION AWARD — DEFENDANT'S APPEAL

On appeal, defendant claims that the trial court erred in upholding the arbitration award of deferred compensation where the agreement between the parties was invalid pursuant to MRPC 5.6(a). We disagree.

Defendant did not properly preserve this claim for appeal, raising it in his misnomered "motion for summary disposition," which was untimely filed. Despite defendant's attempts to characterize its motion as being a motion for summary disposition instead of a motion to modify or vacate the arbitrator's award, it is obvious that the motion was filed for the latter reason. At the hearing on its motion, defense counsel answered the trial court in the affirmative when asked if he sought to vacate the arbitration award. Counsel then asserted that he was requesting a declaration that the agreement between the parties was void and unenforceable. The arbitrator specifically found that defendant must pay plaintiff deferred compensation under the terms of the agreement since it is a valid and enforceable contract; therefore, relief could not be granted to defendant without modifying or vacating the arbitrator's award.

Defendant's motion was untimely because the firm failed to file a motion to vacate or modify the award within 91 days. MCR 3.602(J)(3) and (K)(2) allow a circuit court to vacate or modify an arbitration award, but only on a motion filed within 91 days after issuance of the award. *Cipriano v Cipriano*, 289 Mich App 361, 378-379; 808 NW2d 230 (2010) (trial court erred by modifying an award where party failed to follow timing requirements of MCR 3.602); see also *Vyletel-Rivard v Rivard*, 286 Mich App 13, 22; 777 NW2d 722 (2009) (relating to 21-day period for domestic relations cases). The arbitrator issued his final award on May 11, 2011. Defendant had until August 10, 2011, to file a motion to vacate or modify the award. Instead, defendant filed the motion at issue on October 3, 2011. Defendant did not make a motion within 91 days as required by MCR 3.602(J)(3) and (K)(2), and relief was not warranted. While the trial court was incorrect in failing to dismiss defendant's motion as untimely, we briefly discuss the substance of defendant's claim.

We review unpreserved claims for plain error affecting substantial rights. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006). An error affects substantial rights when it is outcome determinative. *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998). A trial court's ruling on a motion to vacate or modify an arbitration award is

reviewed de novo. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009). The interpretation of court rules and statutes is also reviewed de novo. *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 555; 692 NW2d 58 (2004).

Defendant's motion was also substantively without merit. "Judicial review of arbitration awards is usually extremely limited." *Washington*, 283 Mich App at 671. MCR 3.602 governs enforcement and review of statutory arbitration agreements. MCR 3.602(J)(2) provides that a trial court may only vacate an arbitration award if one of the following occurs:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) there was evident partiality by an arbitrator, appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
- (c) the arbitrator exceeded his or her powers; or
- (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

The limiting of the grounds for invading an arbitration determination "preserve[s] the efficiency and reliability of arbitration as an expedited, efficient, and informal means of private dispute resolution." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991).

In order to prove that an arbitrator exceeded his powers, a party must show that the arbitrator either acted beyond the material terms of the arbitration agreement or contrary to controlling law. *Washington*, 283 Mich App at 672. The arbitrator's findings of fact are not reviewable. *Id.*, citing *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982). Additionally, this Court may not engage in a review of an "arbitrator's 'mental path leading to [the] award.'" *Krist v Krist*, 246 Mich App 59, 67; 631 NW2d 53 (2001), quoting *Gavin*, 416 Mich at 429. Thus, an error of law must be apparent on the face of the award. *Washington*, 283 Mich App at 672, citing *Gavin*, 416 Mich at 428-429. Furthermore, in order to modify or vacate an arbitration award, "any error of law must be 'so substantial that, but for the error, the award would have been substantially different.'" *Id.* at 672-673, quoting *Collins v Blue Cross Blue Shield of Mich*, 228 Mich App 560, 567; 579 NW2d 435 (1998).

In the instant case, the arbitrator presided over a two-day hearing at which the parties presented evidence and arguments in support of their positions. Subsequently, the arbitrator made factual findings with regard to the validity of the parties' deferred compensation agreement: that the agreement was not executed in conjunction with the sale of a law practice as contemplated in MRPC 1.17, that the agreement contemplated plaintiff's retirement from the active practice of law by retirement or death, and that the agreement comes within the specifically defined exception contained in MRPC 5.6(a). Again, a court may not review an arbitrator's factual findings. *Washington*, 283 Mich App at 672. It is this set of facts that supports the arbitrator's ruling that the agreement was valid and enforceable and did not violate MRPC 5.6(a). Under MRPC 5.6(a), a lawyer is prohibited from making "a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the

relationship” However, “an agreement concerning benefits upon retirement” or restrictions included in the terms of a sale are exceptions to the prohibition. Considering the factual finding that the parties contemplated plaintiff’s retirement as part of the agreement and the rule that benefits upon retirement are an exception, there is no legal error apparent on the face of the award.

Moreover, defendant did not make an argument that the arbitrator exceeded his authority in making this award. Rather, in its brief on cross-appeal, defendant contends that the parties granted the arbitrator the “authority to resolve ‘[a]ny dispute’ relating to the deferred compensation agreement,” and defendant was the party that raised the issue of validity at the arbitration hearing. Thus, the arbitrator acted within the authority granted in considering and deciding this matter. Given the general reluctance of courts to overturn an arbitrator’s decision, the trial court and this Court’s inability to review factual findings, and defendant’s failure to present any legal error regarding the matter of overturning the arbitrator’s ruling, we conclude that even if defendant’s motion had been timely, it would have lacked merit.

III. ARBITRATION AWARD — PLAINTIFF’S CROSS-APPEAL

On cross-appeal, plaintiff contends that the arbitrator exceeded his authority by incorrectly changing the starting date for the deferred compensation payments contrary to the plain language of the agreement and the arbitrator’s finding that there was no mutual assent to modify the terms of the contract. Additionally, plaintiff asserts that he is entitled to interest on the delayed compensation payments. We disagree.

Once again, appellate review of an arbitration award is extremely limited. *Washington*, 283 Mich App at 671. MCR 3.602 governs enforcement and review of statutory arbitration agreements. MCR 3.602(K)(2) provides for modification of an arbitration award, upon finding of any of the following:

- (a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award;
- (b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or
- (c) the award is imperfect in a matter of form, not affecting the merits of the controversy.

Plaintiff asserts that the award should be changed because the arbitrator exceeded his authority, an argument essentially relating to subsection (b).

First, the arbitrator did not act beyond the scope of his authority. The deferred compensation agreement provided that “[a]ny dispute arising out of or under this Agreement shall be resolved by arbitration” Significant to this issue, the parties authorized the arbitrator to resolve the following matters: the amount of deferred compensation, if any, to be paid to plaintiff; the time the payments were to commence; and the method for discharging the payments. Therefore, the arbitrator was acting within the authority granted.

Second, there is no error of law apparent on the record. The arbitrator did not err in determining that the parties agreed to delay the date of the initial payment. After hearing testimony and reviewing documentation submitted by the parties, the arbitrator made the following findings of fact related to the language of the deferred compensation agreement: there was no dispute over the total sum to be paid to plaintiff, the sum was to have been paid in 60 monthly installments beginning on the 15th day of the third month after the valuation day, and if performed, the first payment would have been made to plaintiff on June 15, 2004. Nonetheless, the arbitrator's analysis suggests a more complex situation. The evidence prompted the arbitrator to find that, following plaintiff's resignation, the parties participated in "a series of meetings" to implement plaintiff's severance. The trial court noted that the "negotiations . . . were sporadic, relatively unorganized and never reached a final conclusion on the various topics involved in [plaintiff's] separation" and that they "continued for a period of years with neither side seemingly eager to push the matter to conclusion." The parties disputed the extent and impact of the agreements made during these negotiations.

Subsequently, the arbitrator made the following findings regarding the intentions of the parties:

The undersigned specifically finds, based upon the evidence and the actions and inactions of the parties that an agreement was reached to defer the initial payment due under [the Deferred Compensation Agreement]. The extent of the deferral was never finally agreed upon. [Plaintiff] was of the opinion that a retroactive payment of all missed installments commencing on June 15, 2004, would be made at the time the final agreement on payment was reached. [Defendant] was of the opinion that upon reaching an overall resolution of all disputes with [plaintiff], the 60 monthly installments would start. The undersigned finds that neither of these positions w[as] adequately conveyed by one side to the other. The undersigned further finds that it was not until July 8, 2009, that [plaintiff] finally conveyed his position that the entire amount of the deferred compensation was then due and owing. . . . It was only after [defendant's] failure to perform the agreement that the obligation to pay became fixed. [Defendant] shall pay to [plaintiff] the sum of \$276,620.00 in 60 equal monthly installments without interest, commencing on August 15, 2009 ($\$276,620.00/60=\$4,610.33$).

Regarding the restriction on practicing law, the arbitrator further found that the restriction was to remain operable as long as the deferred compensation payments were being made. However, he refused to rule on whether the restrictive covenant was effective afterward. The arbitrator concluded:

The restriction shall remain in force as long as deferred compensation payments are being made by [defendant] to [plaintiff]. The undersigned has not been requested by either party to rule upon, and specifically declines to rule upon, the validity of the restriction after the final payment of deferred compensation under this Award.

The arbitrator further concluded that, since his resignation on March 31, 2004, plaintiff “has not engaged in the private practice of law” as defined in the agreement and was thus entitled to receive the deferred compensation payments.

The agreement provides for payment of deferred compensation upon the termination of plaintiff’s employment with defendant and for modification or amendment by the written agreement of the parties and approval of defendant’s Board of Directors. However, review of the evidence prompted the arbitrator to conclude that, indeed, there had been a modification regarding the timing of the deferred compensation payments to plaintiff. The arbitrator found that both parties participated in negotiations to modify the terms of the agreement and, although never reaching a final conclusion on numerous issues regarding plaintiff’s resignation, they reached an agreement to defer the initial payment due under the agreement. These findings are not inconsistent as plaintiff contends. Rather, they indicate that there were multiple issues involving plaintiff’s departure, one of which was the timing of the payouts. According to the arbitrator, the parties were able to agree on the issue of deferring the initial payment. Additionally, the arbitrator did not choose a random date for the payments to begin as plaintiff implies. Instead, the facts indicate that the arbitrator selected August 15, 2009, because that was the month following the date “that [plaintiff] finally conveyed his position that the entire amount of the deferred compensation was then due and owing” and defendant failed “to perform the agreement.” This Court does not have the benefit of reviewing the documentation and testimonial evidence that was presented before the arbitrator. However, it is clear that the issue of the commencement of the payments was submitted to the arbitrator and that he considered the matter and made a final determination based on the evidence. The arbitrator specifically stated that his conclusion in this matter was “based upon the evidence and the actions and inactions of the parties.” There is nothing to establish that the arbitrator’s conclusion was legally erroneous.

Additionally, the arbitrator’s finding that the restrictive covenant was to remain in effect while plaintiff was receiving deferred compensation is based on the plain language of the agreement. According to the agreement, plaintiff “shall be entitled to deferred compensation unless . . . [plaintiff] voluntarily resigns his or her employment and subsequently engages in the private practice of law.” The document specifically ties the payments to the restriction to practice law. Furthermore, the arbitrator did not rule on the validity of the restrictive covenant following the final payment of benefits, precluding this Court’s review of that issue.

Finally, the arbitrator did not err in concluding that plaintiff was not entitled to interest on the delayed payments. The specific language of the agreement allowing the arbitrator to determine the “amount of deferred compensation,” as well as the broad language of the agreement allowing for “any dispute” regarding the contract to be resolved by arbitration, permitted the arbitrator to determine the issue of interest payments. The arbitrator concluded that plaintiff’s award was “without interest” unless defendant failed to tender payment by a specific date. The arbitrator’s finding was not contrary to the agreement and comported with his conclusion that the parties agreed to delay the initial payment of benefits. There can be no award of interest as an element of damages where, as here, it was found that plaintiff assented to a delay.

In sum, the arbitrator acted within the scope of his authority and made findings that were not contrary to law. Based on our limited review and the absence of a patent legal error, there is no basis for overturning the arbitrator's award.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Jane E. Markey