STATE OF MICHIGAN

COURT OF APPEALS

OAKLAND-MACOMB INTERCEPTOR DRAIN DRAINAGE DISTRICT,

Plaintiff-Appellant,

v

RIC-MAN CONSTRUCTION, INC., and AMERICAN ARBITRATION ASSOCIATION, INC.,

Defendants-Appellees.

FOR PUBLICATION
January 30, 2014

No. 314098
Oakland Circuit Court
LC No. 2012-129662-CK

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

JANSEN, J. (*dissenting*).

Because I conclude that the circuit court reached the correct result in this case, albeit for the wrong reason, I must respectfully dissent.

The circuit court dismissed plaintiff's complaint for declaratory and injunctive relief, concluding that defendant American Arbitration Association (AAA) had fully complied with the plain language of the arbitration agreement when it selected Michael Hayslip as the lawyer-member of the arbitral panel. The circuit court ruled that plaintiff was "reading into the arbitration [agreement] a requirement that does not exist."

The circuit court reached the correct result by dismissing plaintiff's complaint, even though it did so for the wrong reason. For purposes of this appeal, it actually makes no difference whether the arbitration agreement required AAA to appoint a lawyer-member with a particular number of years of construction litigation experience. Irrespective of the exact requirements set forth in the arbitration agreement at issue in this case, it is well settled that "[a]ppellants cannot obtain judicial review of . . . decisions about the qualifications of the arbitrators . . . prior to the making of an award." *Cox v Piper, Jaffray & Hopwood, Inc*, 848 F2d 842, 844 (CA 8, 1988). The Federal Arbitration Act (FAA), 9 USC 1 *et seq*., "does not provide for pre-award removal of an arbitrator."[1] *Aviall, Inc v Ryder System, Inc*, 110 F3d 892, 895 (CA

[1] It is undisputed that the FAA applies in this case.

2, 1997). Indeed, "'it is well established that a . . . court cannot entertain an attack upon the qualifications . . . of arbitrators until after the conclusion of the arbitration and the rendition of an award.'" *Id.*, quoting *Michaels v Mariforum Shipping, SA*, 624 F2d 411, 414 n 4 (CA 2, 1980). "The [FAA] does not provide for judicial scrutiny of an arbitrator's qualifications to serve, other than in a proceeding to confirm or vacate an award, which necessarily occurs after the arbitrator has rendered his service." *Florasynth, Inc v Pickholz*, 750 F2d 171, 174 (CA 2, 1984); see also *Gulf Guaranty Life Ins Co v Connecticut Gen Life Ins Co*, 304 F3d 476, 490-491 (CA 5, 2002).

Of course, a court would have the authority to remove a particular arbitrator prior to issuance of the arbitral award if the dispute concerning the arbitrator's qualifications implicated "grounds . . . at law or in equity for the revocation of [the] contract." 9 USC 2; see also *Aviall*, 110 F3d at 895. However, it is appropriate for the court to make such a pre-award removal "only when there is a claim, for example, that there was 'fraud in the inducement' or some other 'infirmity in the contracting process' regarding the parties' establishing arbitral qualifications, which ground would invalidate the agreement to arbitrate." *Gulf Guaranty*, 304 F3d at 491, quoting *Aviall*, 110 F3d at 896. Similarly, pre-award removal may be permissible under § 2 of the FAA when "the arbitrator's relationship to one party was undisclosed, or unanticipated and unintended, thereby invalidating the contract." *Id*.

In the present case, there is no claim that AAA's selection of Hayslip as the lawyer-member of the arbitral panel involved fraud or any other fundamental infirmity in the contracting process that would completely invalidate of the arbitration agreement. See 9 USC 2; see also *Gulf Guaranty*, 304 F3d at 491. Nor is there any claim that Hayslip had an inappropriate relationship with either party. See *Aviall*, 110 F3d at 896. It may well be that Hayslip did not meet the specific requirements for appointment set forth in the arbitration agreement. But plaintiff was required to wait until after issuance of the arbitral award and raise this matter in a proceeding to vacate. See 9 USC 10; see also *Gulf Guaranty*, 304 F3d at 490-491; *Florasynth*, 750 F2d at 174.

Because the dispute over Hayslip's qualifications to serve as the lawyer-member did not constitute a sufficient ground to warrant the entire revocation of the arbitration agreement, the circuit court was without authority to reach the issue at this stage of the proceedings. See 9 USC 2; see also *Gulf Guaranty*, 304 F3d at 491 (noting that "a court may not entertain disputes over the qualifications of an arbitrator to serve merely because a party claims that enforcement of the contract by its terms is at issue, unless such claim raises concerns rising to the level that the very validity of the agreement be at issue"). The dispute regarding Hayslip's qualifications to serve, although framed by plaintiff as a request to enforce the arbitration agreement according to its terms, "is not the type of challenge that the [circuit] court was authorized to adjudicate pursuant to the FAA prior to issuance of an arbitral award." *Id*. at 492.[2]

[2] As the majority opinion correctly observes, "[d]ecisions from lower federal courts are not binding but may be considered persuasive." *Truel v Dearborn*, 291 Mich App 125, 136 n 3; 804 NW2d 744 (2010). At the same time, however, the Supremacy Clause precludes this Court from applying any state law or policy that is inconsistent with the FAA. See *Abela v Gen Motors*

In my opinion, the circuit court reached the correct result, albeit for the wrong reason, when it dismissed plaintiff's complaint. "It is well settled that we will not reverse when the circuit court has reached the correct result, even if it has done so for the wrong reason." *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 225; 813 NW2d 752 (2011). I would affirm the circuit court's dismissal of plaintiff's complaint.

/s/ Kathleen Jansen

Corp, 257 Mich App 513, 524-525; 669 NW2d 271 (2003), aff'd 469 Mich 603 (2004). Both our Supreme Court and this Court have looked to the decisions of lower federal courts when interpreting and applying the FAA. See, e.g., *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004); *Scanlon v P&J Enterprises, Inc*, 182 Mich App 347, 351; 451 NW2d 616 (1990).