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NO. COA05-376

NORTH CAROLINA COURT OF APPEALS

Filed: 3 January 2006

EARL M. YANDLE,
Plaintiff,

v.

Mecklenburg County
No. 04 CVS 12633

BOYD P. FALLS & "AUSTIN,
FALLS & CHANDLER", a
partnership,
Defendants.

Appeal by Defendants from judgment entered 5 November 2004 by Judge Albert Diaz in Superior Court, Mecklenburg County. Heard in the Court of Appeals 29 November 2005.

Howard M. Labiner, for plaintiff-appellee.

Joe T. Millsaps and Erwin and Eleazer, P.A., by L. Holmes Eleazer, Jr., for defendant-appellants.

WYNN, Judge.

An arbitration award is subject to attack if the arbitrator, through mistake of law, exceeded his authority to arbitrate. *Calvine Cotton Mills, Inc. v. Textile Workers Union of Am.*, 238 N.C. 719, 722, 79 S.E.2d 181, 183 (1953). In this case, Defendants argue that the arbitrator exceeded his authority in granting Plaintiff an interest in the equity of the partnership because the agreement did not address equity. Because the arbitration agreement allowed arbitration of any claim related to the

partnership agreement (which would include an equity interest claim), we hold that the arbitrator did not exceed his authority.

The facts of this matter are fully set forth in this Court's opinion following a prior appeal of this case. *Yandle v. Falls*, 142 N.C. App. 707, 545 S.E.2d 495 (2001) (unpublished opinion COA00-110). Summarily, we note that on 5 April 1986, Plaintiff Earl M. Yandle entered into a written partnership agreement with the public accounting partnership of Austin, Falls, Wallace & Hamel. Defendant Boyd P. Falls signed on behalf of the partnership whose name was later changed to Austin, Falls & Yandle. Mr. Yandle withdrew from the partnership in December 1998 and the firm name was later changed to Austin, Falls & Chandler.

In June 1999, Mr. Yandle brought an action, 99 CVS 9879, against Mr. Falls seeking money owed and a receiver to operate and liquidate Austin, Falls & Yandle. Mr. Falls counterclaimed for breach of a restrictive covenant. Thereafter, the trial court denied Mr. Yandle's motion to compel arbitration under the partnership agreement but this Court, on appeal, reversed and remanded for entry of an order compelling arbitration. *Id.*

In June 2002, Mr. Yandle and Mr. Falls voluntarily dismissed their respective claims and counterclaims in 99 CVS 9879. The parties agreed upon Judge Robert Kirby as the arbitrator. Judge Kirby entered his arbitration decision on 14 June 2004, awarding Mr. Yandle (1) \$43,004.00, the total of his capital account on 31 December 1998; (2) \$7,081.00 for income earned in 1998 but not paid

due to a mathematical error; and (3) \$70,000.00, Mr. Yandle's share of the value of the firm as of 31 December 1998.

On 21 July 2004, Mr. Yandle filed a new complaint, designated 04 CVS 12633, against Mr. Falls and Austin, Falls & Chandler, seeking an order confirming the arbitration award. Defendants filed an application to vacate the arbitration award or to modify or correct the award. The trial court confirmed the arbitration award by order entered 5 November 2004. From this order Defendants appeal.

On appeal, Defendants contend that the trial court erred in confirming the arbitration award and in denying their motion to vacate, correct, or modify the award, because (1) the arbitrator exceeded his authority and (2) the application for court enforcement of the award was not timely.

First, Defendants argue that the trial court erred in confirming the arbitration award and in denying their motion to vacate, correct, or modify the award, because the arbitrator exceeded his authority. Defendants only contest the award of \$70,000.00, Mr. Yandle's share of the value of the firm as of 31 December 1998. They acknowledge that the arbitrator was within his authority to award \$43,004.00, the total of his capital account on 31 December 1998, and \$7,081.00 for income earned in 1998 but not paid due to a mathematical error.

Since this appeal arises from a decision on a motion to confirm an arbitration award, we first note "that a strong policy

supports upholding arbitration awards." *Cyclone Roofing Co., Inc. v. David M. LaFave Co., Inc.*, 312 N.C. 224, 234, 321 S.E.2d 872, 879 (1984). Further, "judicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for vacation of an award under the [Uniform] Arbitration [Act]." *Carolina Virginia Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 411, 255 S.E.2d 414, 418 (1979). "An award is conclusive on matters of law and fact if decided in accordance with the legal construction of the contract in which the arbitrators derive their authority." *J. M. Owen Bldg. Contractors, Inc. v. Coll. Walk, Ltd.*, 101 N.C. App. 483, 488, 400 S.E.2d 468, 471 (1991). However, the arbitration award is subject to attack if the arbitrator, through mistake of law, exceeded his authority provided to him in the agreement to arbitrate. *Calvine Cotton Mills, Inc.*, 238 N.C. at 722, 79 S.E.2d at 183.

Defendants argue that the arbitrator exceeded his authority in awarding the \$70,000.00, Mr. Yandle's share of the value of the firm as of 31 December 1998, because the agreement contains no "provision or term granting or acknowledging to Yandle a share in partnership assets[,] " and therefore the arbitration order should be vacated. See *id.* The 1986 agreement sets forth what could be arbitrated as follows: "Any claim or controversy between parties hereto arising out of or relating to this agreement or breach thereof, or in any way related to the terms and conditions of the employment of Employee by Austin, Falls, Wallace & Hamel, shall be settled by arbitration under North Carolina law." (emphasis added).

The 1986 agreement creates a partnership contract between Mr. Yandle and Austin, Falls, Wallace & Hamel. It specifically sets forth the percentage of profit Mr. Yandle was to be paid, but is silent as to whether Mr. Yandle obtained an interest in the equity of the partnership. Whether Mr. Yandle obtained an equity interest in the partnership when he was made a partner of the firm relates to the 1986 agreement. Therefore, pursuant to the arbitration provision of the 1986 agreement, the arbitrator did not exceed his authority in determining interest in the equity of the partnership.

Second, Defendants contend that Rule 41(a)(1) of the North Carolina Rules of Civil Procedure bars Mr. Yandle's second complaint to enforce the arbitration award because he voluntarily dismissed 99 CVS 9879 on 7 June 2002, and did not recommence the action within one year.

Rule 41(a)(1) of the North Carolina Rules of Civil Procedure provides in pertinent part: "If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal" N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2004). However, Mr. Yandle's claim in 04 CVS 12633 is not the same claim as 99 CVS 9879, but is instead a complaint asking the court to enforce an arbitration award. Therefore, Rule 41(a)(1) is not applicable.

Moreover, Defendants voluntarily participated in arbitration on the same issues alleged in the first complaint. They cannot now attack an order confirming the arbitration award as time barred,

when they voluntarily participated in the arbitration. See *Andrews v. Jordan*, 205 N.C. 618, 172 S.E. 319 (1934) (Court held that the defendants waived any objection to the arbitrator's failure to comply with statutorily prescribed deadlines by participating in arbitration); *WMS, Inc. v. Weaver*, 166 N.C. App. 352, 367, 602 S.E.2d 706, 716, *disc. review denied*, 359 N.C. 197, 608 S.E.2d 330 (2004).

In sum, as the arbitrator did not exceed his authority and the order to enforce the arbitration award was timely filed, the trial court did not err in denying Defendants' motion to vacate or modify the arbitration award and in granting Mr. Yandle's motion to confirm the arbitration award.

Affirmed.

Judges STEELMAN and SMITH concur.

Report per Rule 30(e).