STATE OF MICHIGAN

COURT OF APPEALS

BOBBIE SUE ROBERTSON,

Plaintiff-Appellee,

v

DR. SHELDON M. MINTZ, D.D.S. and SHELDON M. MINTZ, D.D.S., EDWARD R. BORNINSKI, D.D.S., ROBERT A. MILLER, D.D.S. & ASSOCIATES, P.C.,

Defendants-Appellants.

UNPUBLISHED
August 23, 1996

No. 176859
LC No. 90-003923-NH

Before: Murphy, P.J., and Reilly , and C.W. Simon, Jr.*, JJ

PER CURIAM.

Defendant appeals as of right an order awarding plaintiff $99,387.87 ($64,500 judgment, $24,614.51 in interest, and $10,273.36 in costs) entered in Wayne Circuit Court pursuant to an arbitration award in this medical malpractice action. We affirm in part, reverse in part and remand for recalculation of interest.

Defendants first contend that the trial court improperly entered an order enforcing the arbitration award because plaintiff did not comply with MCR 3.602(B)(1). According to defendants, because there was no "pending action" plaintiff was required to file a complaint to confirm the award.

The lower court action that is the subject of this appeal, No. 90-003923-NH began when plaintiff filed a complaint against defendants on February 13, 1990. Because plaintiff, before surgery, agreed to arbitrate any disputes, defendants filed a motion requesting that the trial court, "pursuant to MCR 3.602 and MCL 600.5040 et seq. . . . dismiss Plaintiff's complaint and remand this matter to Arbitration . . . ." On May 23, 1990, the court entered a stipulation and order of dismissal. Despite the dismissal, the parties continued filing pleadings with the circuit court in No. 90-003923. For example, defendants filed a motion to set aside the arbitration chairperson's ruling limiting testimony of treating physicians. The motion was dated August 26, 1992. Inasmuch as both parties treated the case as

* Circuit judge, sitting on the Court of Appeals by assignment.

though it had been stayed, rather than dismissed, defendants should not now be heard to complain that the action was not a "pending action" under MCR 3.602(B)(2). Furthermore, by responding to plaintiff's motion for entry of judgment and arguing the merits of the motion in court, defense counsel made a general appearance before the trial court and waived any objection that may have been had as to the trial court's exercise of personal jurisdiction over defendants. See *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178; 511 NW2d 896 (1993).[1]

Defendants also argue that the court incorrectly calculated the amount of interest defendants are required to pay as a result of the arbitration award. The arbitrators ordered defendants to pay plaintiff's costs "together with interest as prayed for in her complaint." The award did not specify the amount of either the costs or the interest, and as a result, both amounts are disputed by the parties. Plaintiff's attorney apparently calculated the amount of prejudgment interest using a sliding scale rate of interest, pursuant to MCL 600.6013; MSA 27A.6013, beginning February 13, 1990, the date the complaint was filed through the date of the judgment. The trial court accepted plaintiff's calculation of interest.

Defendants do not dispute the arbitrators' power to include interest as part of plaintiff's recovery. The concept of preaward interest is distinct from prejudgment interest as derived from statute and from interest on the award after it is rendered. *Gordon Sel-Way, Inc v Spence Bros*, 438 Mich 488, 499, n 9, 501; 475 NW2d 704 (1991). "The decision whether to award preaward, prejudgment interest is a decision to be made solely by the arbitrators." *Holloway Construction v Oakland County Bd of Rd Commissioners*, 450 Mich 608, 618; 543 NW2d 923 (1996).

Unlike the arbitrators in *Holloway*, the arbitrators in this case explicitly awarded interest. The difficulty is that the arbitrators did not state the amount of interest or how it should be calculated. Instead, the award refers only to "interest as prayed for in her [plaintiff's] complaint." Defendants note that plaintiff's complaint is not specific as to the computation of the interest sought. However, defendants' brief explains that "the general expectation among attorneys [is] that, when they demand interest in a Complaint, they are asking for pre-judgment interest under MCL 600.6013; MSA 27A.6013, i.e., interest from the date of filing the Complaint." Defendants' recognition of this general expectation is consistent with and supports the trial court's decision to interpret the award as providing for interest under MCL 600.6013; MSA 27A.6013 e.g. "sliding scale interest", beginning February 13, 1990. Contrary to defendants' assertion that the arbitrators intended to award interest from the date of the demand for arbitration, we discern no reason to believe that the "interest as prayed for in [plaintiff's] complaint" would have been limited to that accruing after the date of the demand for arbitration.

However, sliding scale interest should not be applied to the entire period after the arbitration award was rendered. Because the parties were contractually obligated to arbitrate their dispute, MCL 438.7; MSA 19.4 governs the rate of prejudgment interest from the date the arbitration award was rendered until plaintiff filed the motion to confirm the award, and MCL 600.6013; MSA 27A.6013 governs from that date until the date the judgment was satisfied. *Wiselogle v Mich Mutual Ins Co*, 212 Mich App 612, 621; 538 NW2d 98 (1995). Because the amount of interest in the judgment was apparently calculated under MCL 600.6013; MSA 27A.6013 even during the post-award, pre-filing period, we remand for recalculation of interest consistent with this opinion.

Defendants also dispute the amount the court awarded as costs. Initially, we note that the arbitration award itself provided that defendants were ordered to "pay Plaintiff's costs incurred in the prosecution of this matter . . ." in addition to "all administrative costs involved in this arbitration, including the fees and expenses of the arbitrators . . . ." Defendant contends that the trial court should not have included $117 incurred in the filing and service of plaintiff's complaint, which was dismissed by the circuit court pursuant to the parties' stipulation. We agree with defendants that a plaintiff whose case has been dismissed is not ordinarily a "prevailing party" entitled to costs under MCR 2.625(A)(1). However, the pertinent language in this case is found in the arbitration award itself. Inasmuch as this expense was incurred "in the prosecution of this matter", we are not persuaded that the court erred by including this amount in the judgment.

Defendants also contend that the trial court "simply approved the amounts requested by plaintiff without any consideration of whether they were reasonable." The arbitration award did not limit defendants' obligation to pay to "*reasonable* costs incurred in the prosecution of this matter," and therefore, the court's authority to disallow expenses in the process of confirming the arbitration award was limited. In any event, the court heard defendants' arguments and had the opportunity to review the bills. Therefore, although the court rejected defendants' arguments, we have no reason to believe that the court did not consider the reasonableness of the charges, as defendants have suggested. Accordingly, the trial court's decision with respect to the amount of costs is affirmed.

Affirmed in part, reversed in part and remanded for recalculation of interest. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Maureen Pulte Reilly
/s/ Charles W. Simon, Jr.

[1] To the extent that defendants are asserting that the court lacked subject matter jurisdiction, we disagree. Subject-matter jurisdiction refers to the power of the court to "exercise judicial power over a class of cases; not the particular case before it; but rather the abstract power to try a case of the kind or character of the one pending." *People v Smith*, 438 Mich 715, 724; 475 NW2d 333 (1991) opinion of J. Boyle. (Internal quotation marks omitted.) MCL 600.5025; MSA 27A.5025 provides that circuit courts have jurisdiction to render judgments on an award rendered pursuant to an arbitration agreement. Thus, the circuit court had the power over the class of cases.