

STATE OF MICHIGAN
COURT OF APPEALS

DETROIT BOARD OF EDUCATION,

Plaintiff–Appellant,

v

T.F. BECK COMPANY,

Defendant–Appellee.

UNPUBLISHED

February 28, 1997

No. 185063

Wayne Circuit Court

LC No. 94-429659 CK

Before: Gribbs, P.J., and Young and W. J. Caprathe,* JJ.

PER CURIAM.

Plaintiff appeals as of right an order of the Wayne Circuit Court confirming a \$115,561 arbitration award in favor of defendant. On cross-appeal, defendant claims that the trial court erred by denying its motion for attorney fees pursuant to MCR 2.114(E). We affirm.

The present case arises out of a roofing contract between plaintiff and defendant for the replacement of the roof on the Grayling Elementary School. Defendant began work on the roof in October 1993. In January or February 1993, defendant completed the roofing work and requested payment from plaintiff. Upon defendant's demand for payment, plaintiff conducted test cuts on the roof, without informing defendant, to insure that the work was done properly. Plaintiff apparently determined that the roofing work did not comply with the contract in several respects and refused payment.

Pursuant to the contract, defendant brought its claim for payment before the American Arbitration Association. Plaintiff then filed a counterclaim for the expenses necessary to conduct roofing repairs and for the shortened lifespan of the roof, which allegedly were caused by defendant's deficient work. After a hearing, the arbitrator awarded defendant \$115,561 on its claim and denied plaintiff's

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

counterclaim. Plaintiff then filed suit in Wayne Circuit Court, requesting the court to vacate the arbitration award. The circuit court ultimately issued an order confirming the arbitration award.

Plaintiff first argues that the circuit court erred refusing to vacate the award pursuant to MCR 3.602(J)(1)(C) because the arbitrator exceeded his powers by ignoring numerous express provisions of the contract. We disagree.

Our review of an arbitrator's award is very limited. *Berrien Co Probate Judges v Mich AFSCME*, 217 Mich App 205, 208; 550 NW2d 859 (1996). MCR 3.602(J)(1)(C) provides that a court shall vacate an arbitration award if the arbitrator has exceeded his or her powers. When reviewing an arbitrator's award we are not permitted to second-guess the findings of fact or conclusions reached on the merits of the case. *Berrien Co, supra*. Review of an arbitrator's "award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record." *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 175-176; 550 NW2d 608 (1996). Thus, because an arbitrator's authority is created by the parties' contract and the arbitration agreement, and an arbitrator is bound by their terms, an arbitrator exceeds his or her authority by acting either beyond the material terms of the contract from which they primarily draw their authority or in contravention of controlling principles of law. *Id.* at 176. To justify setting aside an arbitrator's award, any error must appear on the face of the award and must be so material or so substantial as to have governed the award and, but for which error, the award would have been substantially otherwise. *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982).

Moreover, we may not review the arbitration decision for whether it was against the great weight of the evidence or was not supported by substantial evidence. *Donegan v Michigan Mutual Insurance Company*, 151 Mich App 540, 549; 391 NW2d 403 (1986). We must assure that an allegation that an arbitrator exceeded his or her powers is not actually "used as a ruse to induce the court to review the merits of the decision." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). Thus, we may not substitute our judgment for that of the arbitrator and must not vacate or modify an arbitrator's award when the arbitrator's power is not somehow limited by the arbitration agreement. *Id.*

Plaintiff argues that the arbitrator acted beyond the material terms of the contract because plaintiff presented uncontroverted evidence that defendant's roofing work did not comply with the contract and the arbitration award did not reflect those contract violations. However, plaintiff's claim is not supported by the record, which contains evidence that the roofing work was done in compliance with the contract. Furthermore, although an arbitrator's refusal to hear material evidence is subject to appellate review, the degree of consideration given to evidence by the arbitrator is not. *Berrien Co, supra*; *Belen v Allstate Ins Co*, 173 Mich App 641, 646; 434 NW2d 203 (1988). Whether the roofing work complied with the contract was a question of fact and the arbitrator's factual determinations do not warrant review merely because there was substantial evidence before the arbitrator to support a contrary conclusion. *Donegan, supra*.

Plaintiff's next argument is that the arbitrator committed a substantial error of law by ignoring uncontroverted evidence that the roofing work did not comply with the contract. Again, we disagree because the record contains evidence to rebut plaintiff's claims of contract violations and because the factual determinations of the arbitrator are not reviewable by the courts. *Donegan, supra*.

On cross-appeal, defendant argues that the trial court's denial of its motion for attorney fees pursuant to MCR 2.114(E) was error. We disagree.

At the conclusion of the hearing on the motion for reconsideration, plaintiff made an oral motion for costs and attorney fees as sanctions as provided in MCR 2.114(E). While looking at the rule, the court stated:

I don't think that that is a property [sic] authority for these attorney fees. However, I'm not going to dictate as to whether or not you can file a motion for attorney fees, but that is up to you. The court will, of course, determine any attorney fees on a proper motion, but that is my opinion." (emphasis added.)

Earlier in the hearing plaintiff offered to submit "a separate motion if you desire or a bill of costs and attorney fees". Plaintiff did not file such a motion. Accordingly, we conclude that the court did not clearly err since it requested a motion on the issue and the plaintiff failed to file such motion. The issue is waived.

Affirmed. Defendant being the prevailing party it may tax costs pursuant to MCR 7.219. In addition, plaintiff is ordered to pay defendant attorney fees of \$1,000 pursuant to MCR 7.216 (c)(1)(a) within 30 days of the release of this opinion.

/s/ Roman S. Gibbs

/s/ Robert P. Young, Jr.

/s/ William J. Caprathe