

STATE OF MICHIGAN
COURT OF APPEALS

SHERWIN SCHREIER,

Plaintiff/Counter-Defendant/Third-
Party Defendant/Appellant/Cross-
Appellee,

v

MEKLIR, SCHREIER, NOLISH & FRIEDMAN,
P.C.,

Defendant/Appellee/Cross-Appellant,

and

SAMUEL A. MEKLIR,

Defendant/Counter-Plaintiff/Appellee/
Cross-Appellant,

and

JACK NOLISH, STEPHEN FRIEDMAN and IRA
SAPERSTEIN,

Intervening Third-Party Plaintiffs/
Appellees.

Before: Hood, P. J. and Saad and T. S. Eveland*,JJ.

PER CURIAM.

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

UNPUBLISHED
March 21, 1997

No. 185552
Oakland Circuit Court
LC No. 91-413232 CZ

In this action arising out of the dissolution of a law firm, plaintiff appeals as of right from a stipulation and order of dismissal. On appeal, plaintiff challenges the trial court's decision to enforce the arbitrator's findings regarding the ownership interests of plaintiff, Jack Nolish, Stephen Friedman and Ira Saperstein, and the division of the proceeds of workers compensation and social security cases. Defendants Meklir, Schreier, Nolish & Friedman, P.C. and Samuel A. Meklir cross appeal by leave granted, challenging the trial court's decision not to enforce some of the arbitrator's findings. We affirm in part, reverse in part, and remand.

In June, 1991, plaintiff commenced the instant action to dissolve the professional corporation and moved for appointment of a receiver to manage the firm pending disposition of his claim. On the date of the hearing on plaintiff's motion, the parties reached an interim agreement regarding the management of the firm. The interim agreement provided that disputes over the day to day operations of the firm would be submitted to an arbitrator for a binding decision. Thereafter, third-party plaintiffs Nolish, Friedman and Saperstein were permitted to intervene in the action in order to assert tort and contract claims against plaintiff Schreier stemming from Schreier's claim that they did not have ownership interests in the firm. The parties then agreed to amend the interim agreement and expand the arbitrator's powers to include engaging in ex parte communication, mediating disputes without counsel present, investigating claims and making recommendations to the court. An order appointing Joel Serlin as the arbitrator was subsequently entered by the trial court.

Plaintiff and four of the firm's other attorneys formed a new practice and prepared to move from the firm's offices at the end of the fiscal year (September 30, 1991). In preparation for the move, Serlin conducted an evidentiary hearing at plaintiff's request regarding the issues of firm ownership and the division of case files. On October 1, 1991, he divided the case files and established escrow accounts into which the fees received for services performed in connection with the cases would be deposited. Two months later, plaintiff moved for the removal of Arbitrator Serlin and the appointment of a receiver because, he alleged, Serlin failed to exercise his authority to protect plaintiff's interest in the firm and restrain Meklir from depleting firm resources. The trial court denied the motion, reasoning that plaintiff failed to demonstrate that Serlin was acting arbitrarily or capriciously in his capacity as arbitrator. Over plaintiff's objections, Serlin presided over additional arbitration hearings that concluded in March, 1993. His written findings were issued in January, 1994.

Defendants and third-party plaintiffs then moved to enforce the arbitrator's findings. The court enforced the arbitrator's decisions with regard to (1) the parties' ownership interest, (2) the division of escrow funds, (3) the division of proceeds from workers compensation and social security cases, and (4) the prepayment of expenses to the extent that it occurred after the appointment of the arbitrator. The court also enforced the arbitrator's finding that the parties were entitled to review those files that were the firm's property prior to October 1, 1991. The court declined to enforce the remainder of the arbitrator's findings, but considered the findings regarding the costs of expanding the office, the firm's phone number, miscellaneous expenses and referral fees to be advisory. Rather than proceeding to trial on the remaining issues, the parties entered into a stipulation and order of dismissal. The parties agreed that they would be bound by the arbitrator's division of the escrow funds and that plaintiff would only appeal the issues involving the arbitrator's findings regarding the parties' ownership interests and the

division of the proceeds of workers compensation and social security cases. The parties also agreed that the issues remaining after appeal would be resolved by a new arbitrator, would be selected in accordance with the procedure set forth in the stipulation and order. They now appeal.

Plaintiff contends that the trial court erred in enforcing the arbitrator's decisions regarding the parties' ownership interests and the division of the proceeds of workers compensation and social security cases. An arbitration agreement is a contract by which the parties submit a dispute to an arbitrator or panel of arbitrators. *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 577; 552 NW2d 181 (1996). "[A]rbitrators who derive their authority from the contract calling for their services are bound to act within the terms of the submission." *Id.* at 577-578 (quoting *DAIIE v Gavin*, 416 Mich 407, 432; 331 NW2d 418 (1982)). The scope of the arbitration is determined by the contract and the arbitrator must follow "the guidelines set forth in the four corners of the document." *Id.* at 577.

Because the parties' agreement did not provide that judgment would be entered upon the arbitrator's award, this case involves common law arbitration and the procedures governing statutory arbitration are not applicable. *Beattie, supra* at 578. Consequently, the arbitrator's authority is governed solely by the terms of the arbitration agreement. *Id.* The goal in construing a contract is to ascertain the intent of the parties. *In re Loose*, 201 Mich App 361, 367; 505 NW2d 922 (1993). The "court must determine what the parties' agreement is and enforce it." *G & A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). An unnatural construction will be avoided if the contract language supports a fair and reasonable construction. *Loose, supra* at 367. In construing the contract, terms are given their plain and ordinary meanings. *G & A, supra* at 331.

Here, the parties entered into the arbitration agreement in order to avoid the need for the appointment of a receiver to manage the firm's affairs. This purpose is clearly set forth in the "recitals" section of the interim agreement where the parties stated as follows:

The parties are entering into this Agreement in an effort to settle and resolve the Receiver Motion and to provide for a basis upon which the day-to-day operations of the Company can continue pending final resolution of the matters alleged in the Lawsuit.

Through the use of clear language, the parties limited the arbitrator's authority to disputes over matters involved in the day to day operations of the firm. The arbitrable matters specifically set forth in the agreement involve the business operations of the firm. This limitation is consistent with the purpose of the agreement--to ensure that the day to day operations of the firm would continue pending disposition of the lawsuit. In fact, the parties specifically indicated that the agreement did not encompass issues involving the dissolution of the firm by agreeing in section 6(c) that "the Arbitrator shall have no authority to determine the claims in the Lawsuit."

Defendants and third-party plaintiffs nevertheless contend that by granting the arbitrator the power to "mediate disputes" in the amendment to the agreement, the parties extended the arbitrator's authority to include the ownership and division of proceeds issues. However, no such intent can be discerned from the language of the agreement. The additional powers enable the parties and the

arbitrator to bypass the formalities contained in section 6 of the original agreement in order to achieve a swift resolution of their disputes. In furtherance thereof, the parties granted the arbitrator the power to act as a mediator and facilitate an agreement between the parties instead of issuing a binding decision.

Upon review of the contract language in its entirety, we find that through clear language, the parties limited the arbitrator's authority to the consideration of disputes over the day to day operations of the firm. The pleadings in this case reveal that the parties' ownership interests and the division of assets, including the proceeds of workers compensation and social security cases, are the issues that underlay the claims proffered. Thus, the arbitrator exceeded the scope of his authority when he decided these issues. Our analysis, however, does not end with this determination.

Defendants and third-party plaintiffs contend that even if the agreement did not grant the arbitrator the authority to decide the issues, plaintiff is nevertheless bound by the determinations because the issues were submitted to arbitration. First, they argue that pursuant to the contractual provision that decisions of the arbitrator are binding, plaintiff is bound by the arbitrator's decision on issues submitted to him even if the issue is outside the scope of his authority. We disagree. The parties to an arbitration contract are, however, free to exclude issues from arbitration and limit the binding effect of the decision. *Tellkamp v Wolverine Mutual Ins*, 219 Mich App 231; 556 NW2d 504 (1996) The fact that they agreed that the arbitrator's findings would be binding and conclusive does not limit a party's ability to challenge actions taken outside the scope of the arbitrator's authority. See *Beattie, supra* at 577. Accordingly, contrary to defendants and third-party plaintiffs' assertions, public policy does not require that all issues submitted to the arbitrator result in binding decisions. *Tellkamp, supra*.

Next, defendants and third-party plaintiffs argue that the parties in this case orally modified their arbitration agreement when they litigated the issues at the arbitration hearing. We again disagree. Although parties may generally make oral modifications of a written agreement, a modification must be in writing when the agreement itself is required to be in writing. *Minkus v Sarge*, 348 Mich 415, 421; 83 NW2d 310 (1957); 72 Am Jur 2d, Statute of Frauds, § 274, pp 789-791. By statute, an agreement to submit a dispute to arbitration must be in writing. MCL 600.5001(1); MSA 27A.5001(1); *Ehresman v Bultynck & Co*, 203 Mich App 350, 354; 511 NW2d 724 (1994). Accordingly, because any modification of the arbitration agreement had to be in writing, the parties could not modify it simply by submitting the issues to the arbitrator at the hearing.

Intertwined with the preceding arguments is defendants and third-party plaintiffs' contention that plaintiff is estopped from challenging the arbitrator's authority because he submitted the issues to arbitration. We agree. Under the doctrine of judicial estoppel, or estoppel by pleading, "a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding." *Lichon v American Universal Ins Co*, 435 Mich 408, 416; 459 NW2d 288 (1990). Contrary to plaintiff's assertion, he submitted the issues of ownership and division of assets, including proceeds of workers compensation and social security cases, to the arbitrator at the arbitration hearing. In his opening statement at the hearing, plaintiff's counsel explained that because the fiscal year was about to end and plaintiff intended to separate from the firm, he needed a ruling by the arbitrator regarding the division of the firm's assets. He also argued

that a determination of the parties' respective ownership interests was essential to any division of the assets.

Upon review of the circumstances of this case, we find that plaintiff is estopped from asserting error in the arbitrator's consideration of the ownership and division of proceeds issues because he submitted these issues to the arbitrator for a decision. See *McDonald v Hardee Co School Bd*, 448 So2d 593 (Fla Dist Ct App, 1984). That plaintiff later moved to remove the arbitrator and objected to the continuation of hearings does not alter this result. In common law arbitration, a party may revoke the agreement to arbitrate at any time prior to the announcement of the award even when he initiated the arbitration proceedings. *Tony Andreski, Inc v Ski Brule, Inc*, 190 Mich App 343, 346-348; 475 NW2d 469 (1991). However, when the submission is made under order of the court, the party must obtain leave of the court to revoke the agreement. *Brown v Eubank*, 443 SW2d 386 (Tex Civ App, 1969); see generally 4 Am Jur 2d, Alternate Dispute Resolution, § 94, pp 148-149. Here, the parties, by stipulation, obtained an order of the trial court appointing Joel Serlin as arbitrator "with the powers as set forth in the Interim Agreement dated June 26, 1991, and the Amendment Interim Agreement dated August 27, 1991." As the court's order specifically appointed the arbitrator to resolve issues involved in the pending litigation, plaintiff could not revoke the arbitration agreement without leave of the court. See *Register v Herrin*, 140 SE2d 82, 83 (Ga Ct App, 1964). Accordingly, because plaintiff submitted the issues of ownership and division of assets, including the proceeds of workers compensation and social security cases, for resolution by the arbitrator, he is estopped from claiming that the arbitrator exceeded his authority in deciding these issues. We therefore affirm the trial court's decision to enforce these findings.

In their cross appeal, defendants contend that the trial court erred in not enforcing the remainder of the arbitrator's findings in their entirety. As explained above, the trial court should have enforced the findings if they concerned the day to day operations of the firm or were submitted to arbitration by plaintiff. Upon scrutiny of the arbitrator's findings and all the information regarding the arbitration hearing contained in the record, we find that the trial court erred in not enforcing the arbitrator's decisions regarding the firm's telephone number, the costs of expanding the firm's office and the prepaid expenses. Plaintiff submitted these issues to arbitration, and is therefore estopped from arguing that their consideration was beyond the scope of the arbitrator's authority.

Unlike the foregoing issues, the record reveals that plaintiff did not submit the issues of contingent liabilities, the inspection, inventorying and supervision costs, and the Jay Schreier referral fee. However, given the absence of information regarding the arbitrator's findings, we are unable to determine whether these issues concerned matters within the day to day operations of the firm. Thus, we remand this matter for this determination. If the issues concern matters within the day to day operations of the firm, the trial court should enforce the arbitrator's findings.

With respect to the remaining finding made by the arbitrator, we find that the trial court properly declined to enforce the arbitrator's allocation of the costs of the arbitration proceedings. In allocating the costs, the arbitrator exceeded the scope of his authority by violating the terms of the parties' agreement. Section 5(a) of the interim agreement provides that the arbitrator "shall be entitled to

reasonable compensation and reimbursement of reasonable expenses from the Company.” For purposes of the agreement, the “Company” is identified as the law firm. As is readily apparent, the arbitrator did not have the authority to consider this issue because the parties agreed that the law firm would pay for the arbitration proceedings. *Beattie, supra* at 577.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Harold Hood

/s/ Henry William Saad

/s/ Thomas S. Eveland