STATE OF MICHIGAN

COURT OF APPEALS

DARRELL PARKS,

Plaintiff-Appellant,

v

LAURI PARKS,

Defendant-Appellee.

UNPUBLISHED
November 21, 1997

No. 197955
Oakland Circuit Court
LC No. 93-467031-DO

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the August 27, 1996, judgment of divorce. The judgment incorporated the findings, conclusion, and award of the arbitrator who heard the case. On appeal, plaintiff argues that this Court should find that the arbitrator exceeded his powers by considering issues which were not submitted to arbitration. Because a review of the record from the arbitration proceeding was impossible, plaintiff contends that the trial court should have granted discovery and held an evidentiary hearing concerning plaintiff's motion to disqualify the arbitrator. Finally, plaintiff requests that this Court set aside the judgment and remand this case for further proceedings before another judge. We affirm the judgment of divorce.

Plaintiff filed a complaint for divorce in December 1993. One of the primary disputed issues was the valuation of plaintiff's business. After mediation failed, the parties agreed to submit the case to binding arbitration, and on February 13, 1996, the trial court entered an order to that effect. Following arbitration, plaintiff filed an amended motion to disqualify the arbitrator.[1] Plaintiff alleged that the arbitrator decided the case before plaintiff submitted his final tax return and before all the evidence was presented. Moreover, plaintiff alleged that the arbitrator should be disqualified because he was using defendant's expert, Joseph Cunningham, as an expert for one of his clients in a similar case.[2] Plaintiff asserted that the arbitrator failed to disclose his working relationship with Cunningham.

The arbitrator was present at a hearing held August 27, 1996. Although he was not sworn, he discussed the arbitration proceedings in open court and informed the court that on the day arbitration began, he disclosed his working relationship with Cunningham and also indicated that he knew plaintiff's

expert, Peter Meagher.[3] When questioned by the court, the arbitrator denied that he gave any more weight to Cunningham's opinion because of his working relationship with the expert. The trial court concluded that the arbitrator had, in fact, disclosed his relationship to the parties and that the relationship had not influenced his decision in the matter. The court then denied plaintiff's motion to disqualify the arbitrator and entered the judgment of divorce.[4]

After the judgment of divorce was entered, defendant's counsel realized that the testimony had not been taken in open court concerning the statutory ground for divorce, although it had been presented to the arbitrator. Counsel filed a motion to cure the defect by taking the testimony *nunc pro tunc* to the date of the judgment. On October 2, 1996, the trial court heard testimony, concluded there had been a breakdown of the marital relationship, and entered the order *nunc pro tunc*.

Plaintiff first argues that apart from the issue of mortgage payments, the parties never made any stipulations as to what issues would be arbitrated. We disagree.

Under MCR 3.602(J), an arbitration award may be vacated if:

> (a) the award was procured by corruption, fraud, or other undue means;
>
> (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
>
> (c) the arbitrator exceeded his or her powers; or
>
> (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights. [MCR 3.602(J)(1); *Dick v Dick*, 210 Mich App 576, 588; 534 NW2d 185 (1995).]

This Court may set aside an award only when it clearly appears on the face of the award that an error in law led the arbitrator to the wrong conclusion and that but for that error, the arbitrator would have made a substantially different award. *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982). This Court must carefully evaluate allegations that the arbitrator exceeded his powers to assure that the claim is not a ruse to induce the Court to review the merits of the arbitrator's decision. *Gordon Sel-Way, Inc v Spence Brothers, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991).

Michigan law allows parties to agree to submit a dispute to arbitration. MCL 600.5001(1); MSA 27A.5001(1); *Ehresman v Bultynck & Co, PC*, 203 Mich App 350, 353; 511 NW2d 724 (1994). While the statute requires an arbitration agreement to be in writing, it does not require the agreement to be signed by either or both parties. *Id.* at 354. Moreover, this Court has held that a signature is not required where mutuality of assent is demonstrated. *Id.* Plaintiff argues that there was no written arbitration agreement in the present case. However, plaintiff fails to consider that there is a court order referring the case to binding arbitration which is signed by both parties.[5] Additionally, there is a transcript of the agreement to submit the case to arbitration. Therefore, we conclude that the requirement for a written agreement is satisfied.

Arbitrators derive their authority to arbitrate from the agreement between the parties and are bound by those terms. *Gordon Sel-Way, supra* at 496. "[C]ourts may not substitute their judgment for that of the arbitrators and hence are reluctant to vacate or modify an award when the arbitration agreement does not expressly limit the arbitrators' power in some way." The court order contains no limiting language, but states that "it is hereby ordered that the above captioned cause be sent to binding arbitration." After the order was entered, a dispute arose concerning court-ordered mortgage payments. *Plaintiff's own counsel* zealously argued that the parties had agreed to submit *all issues* to binding arbitration. Therefore, plaintiff's argument on appeal that the parties only agreed to submit the issue of the mortgage payments to arbitration is disingenuous and appears to be nothing more than an attempt to induce this Court to review the merits of the arbitrator's decision. We conclude that there is no limitation on the issues the parties agreed to submit to binding arbitration. Therefore, the arbitrator did not exceed his powers.

Plaintiff next argues that the arbitrator should have been disqualified because of his bias or prejudice. Plaintiff asserts that the arbitrator failed to disclose his relationship with defendant's expert to the parties. We disagree.

Under MCR 3.602(J)(1)(b), an arbitrator's failure to disclose facts which may reasonably create an impression of bias constitutes a ground for vacating an arbitration award. However, in order for this Court to overturn the award, the partiality or bias "must be certain and direct, not remote, uncertain or speculative." *Belen v Allstate Ins Co,* 173 Mich App 641, 645; 434 NW2d 203 (1988).

Both the arbitrator and defendant's counsel indicated that the arbitrator disclosed his working relationship with Cunningham. Moreover, the arbitrator denied that he gave more weight to Cunningham's opinion because of their working relationship. The arbitrator indicated he listened to the testimony of both parties and reviewed the reports from both experts. Cunningham valued the business at $500,000, while plaintiff's expert opined the business was insolvent. Based on testimony from the plaintiff which indicated that although his company was going out of business, there was still business available, the arbitrator concluded that a reasonable value of the business was $350,000. Arbitrators are not required to give "equal credence" to all testimony, and they may reject arguments which they find unpersuasive. *Belen, supra* at 645.

Plaintiff also asserts that he was entitled to an evidentiary hearing on his motion because he fairly raised the issue of partiality and there was no record of the arbitration proceedings. We disagree. This Court has held that a party abandons his or her right to a hearing if they fail to specifically assert that right. *Mitchell v Mitchell*, 198 Mich App 393, 399; 499 NW2d 386 (1993). Plaintiff did not request an evidentiary hearing in his amended motion to disqualify the arbitrator. Therefore, plaintiff waived his right to a hearing.[6]

Plaintiff also asserts that the arbitrator refused to allow sufficient time to collect documents and that the arbitrator refused to consider some documents. The trial court did not address this issue, and plaintiff did not object to arbitration commencing on April 26, 1996. This Court is not required to address issues first raised on appeal and generally will not consider an

issue which was not decided by the trial court. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Smit v State Farm Mutual Automobile Ins Co*, 207 Mich App 674, 685; 525 NW2d 528 (1994). Therefore, we decline to review this issue.

Finally, plaintiff argues that the trial court abused its discretion by taking testimony regarding the statutory ground for divorce after the judgment was entered and by issuing an order that the testimony be *nunc pro tunc* to the date of the judgment. We disagree.

This Court reviews the trial court's decision to enter an order *nunc pro tunc* for an abuse of discretion. *Vioglavich v Vioglavich*, 113 Mich App 376, 386-387; 317 NW2d 633 (1982). MCL 552.6(3); MSA 25.86(3) states that the court shall enter a judgment of divorce "if evidence is presented in open court that there has been a breakdown in the marriage relationship . . . ." In the present case, although the arbitrator found that there had been a breakdown in the marriage relationship, no such finding was made in open court at the time the court entered the judgment of divorce.

Plaintiff argues that failure to comply with MCL 552.6(3); MSA 25.86(3) rendered the divorce judgment voidable. Plaintiff relies upon *Calo v Calo*, 143 Mich App 749; 373 NW2d 207 (1985), to support his argument. In *Calo*, this Court determined that taking testimony prior to the expiration of the sixth-month waiting period of MCL 552.9f; MSA 25.89(6) rendered the judgment of divorce voidable. *Id.* at 753. This Court declined to characterize such an error as harmless because it was unwilling to conclude that reconciliation between the parties was impossible. *Id.* Additionally, in *Smith v Smith*, 218 Mich App 727, 730; 555 NW2d 271 (1996), this Court held that the residency and waiting period requirements are jurisdictional, and if they are not met, the trial court cannot grant a judgment of divorce and must dismiss the case.

The present case is distinguishable from *Calo* and *Smith* because the present case does not involve the jurisdictional requirements. Further, the error in the present case may be considered harmless. It is clear from the record that there was no possibility of reconciliation between the parties. Plaintiff objected to curing the defect only because he hoped he would be able to use the defect as the basis for setting aside an unfavorable arbitration award. In *Alexander v Alexander*, 103 Mich App 263, 265; 303 NW2d 202 (1981), this Court refused to declare a divorce judgment void *ab initio* where the parties stipulated to a waiver of the sixty-day waiting period. While this Court concluded that it was error for the trial court to allow the stipulation, it determined that the error was "one of time alone" because the statute allowed proofs to be taken at that time for preservation purposes and the judgment to be entered after the sixty days expired. *Id.* at 266. Similarly, the error in this case was one of time. See also *Vioglavich*, *supra*.

The present case is complicated by the fact that the trial court entered the order to cure the defect after plaintiff had filed his claim of appeal from the judgment of divorce. After a claim of appeal is filed, MCR 7.208(A) prohibits the trial court from setting aside or amending the judgment or order appealed from except by order from this Court, stipulation of the parties, or as otherwise provided for by law. *Wilson v General Motors Corp*, 183 Mich App 21, 41; 454 NW2d 405 (1990). However, MCR 7.208(C), which governs corrections of defects, states:

> Except as otherwise provided by rule and until the record is filed in the Court of Appeals, the trial court or tribunal has jurisdiction
>
> (1) to grant further time to do, properly perform, or correct any act in the trial court or tribunal in connection with the appeal that was omitted or insufficiently done, other than to extend the time for filing a claim of appeal or for paying the entry fee or to allow delayed appeal.
>
> (2) to correct any part of the record to be transmitted to the Court of appeals, but only after notice to the parties and an opportunity for a hearing on the proposed correction.
>
> After the record is filed in the Court of Appeals, the trial court may correct the record only with leave of the Court of Appeals.

We conclude that MCR 7.208(C) controls the present case and that the trial court's order *nunc pro tunc* constituted a permissible correction of the record.[7] At the time the order was entered, the record had not yet been filed with this Court. Plaintiff received notice of the proposed correction, and the trial court held a hearing on the issue. Therefore, the trial court did not abuse its discretion by entering the order.

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell

I concur in the result only.

/s/ Richard Allen Griffin

[1] Plaintiff had also filed two earlier motions to disqualify the arbitrator: one motion before arbitration began and one motion after arbitration but before the amended motion was filed. The first motion was denied, and the second motion was never ruled on.

[2] Originally, the parties agreed to mutually hire Cunningham to value plaintiff's business.

[3] Coincidentally, Meagher was the expert on the opposing side of the arbitrator's pending case.

[4] Although the trial court denied plaintiff's motion on August 27, 1996, the court did not enter an order until October 2, 1996.

[5] According to the arbitrator, the parties' counsel stated that it was unnecessary to sign a subsequent arbitration agreement at the arbitration because the court had already entered the court order.

[6] Moreover, we note that the issue of partiality was not fairly raised and that the arbitrator did discuss the case with the trial court, although he was not sworn. There is no requirement that arbitration proceedings be transcribed. *DAIIE, supra* at 428.

[7] Compare *Wilson, supra* at 41, in which this Court held that the trial court's award of attorney fees constituted an amendment of the court's order unless the original order provided that the court would award attorney fees.