STATE OF MICHIGAN

COURT OF APPEALS

JANET BILOUS,

Plaintiff-Appellee,

v

CENTURY 21 EAST, INC., and SHARON BILOUS,

Defendants-Appellants,

and

BARBARA GLAVIND, ALL-POINTS INSPECTION, INC., ROBERT PALLITTO, LINDA HOLZHEUTER, AUTOMOBILE ASSOCIATION OF MICHIGAN (AAA) and CLINTON TOWNSHIP,

Defendants,

and

WILLIAM BOUTELL,

Defendant/Third-Party Plaintiff,

and

WILLIAM J. DOBSON d/b/a DOBSON CONSTRUCTION COMPANY,

Third-Party Defendant.

UNPUBLISHED
May 8, 1998

No. 201806
Macomb Circuit Court
LC No. 91-001205-CK

JANET BILOUS,

Plaintiff-Appellee,

v

No. 201844
Macomb Circuit Court
LC No. 91-001205-CK

B. F. CHAMBERLAIN REAL ESTATE COMPANY,

Defendant-Appellant,

and

CENTURY 21 EAST, INC., SHARON BILOUS, BARBARA GLAVIND, ALL-POINTS INSPECTION, INC., ROBERT PALLITTO, LINDA HOLZHEUTER, AUTOMOBILE ASSOCIATION OF MICHIGAN (AAA) and CLINTON TOWNSHIP,

Defendants,

and

WILLIAM BOUTELL,

Defendant/Third-Party Plaintiff,

and

WILLIAM J. DOBSON d/b/a DOBSON CONSTRUCTION COMPANY,

Third-Party Defendant.

Before: Jansen, P.J., and Kelly and Markey, JJ.

PER CURIAM.

In these consolidated appeals, defendants Century 21 East, Inc., Sharon Bilous and B.F. Chamberlain Real Estate Company (hereinafter "defendants") appeal by of right the trial court's order confirming an arbitration award issued in favor of plaintiff. We affirm.

This is an action for fraud and negligence against several parties involved with the sale of residential real estate. After settlement negotiations stalled, the parties entered binding arbitration. An arbitration panel issued an award for $35,000 in favor of plaintiff and allocated liability jointly and severally among the numerous defendants.[1] The trial court confirmed the arbitration award and entered a corresponding order of judgment. In these consolidated appeals, defendants appeal the trial court's order of judgment, arguing that there was no valid agreement to arbitrate, that the arbitrators exceeded their power, and that the arbitrators made substantial errors of law requiring that the award be set aside.

Both the existence of a contract to arbitrate and the extent of the contract's enforceability are judicial questions. *Ehresman v Bultynck & Co, P C*, 203 Mich App 350, 354; 511 NW2d 724 (1994); *Huntington Woods v Ajax Paving Industries, Inc (After Remand)*, 196 Mich App 71, 74; 492 NW2d 463 (1992). Questions of law are reviewed de novo. See, e.g., *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 418-419; 546 NW2d 648 (1996).

Arbitration is a matter of contract, and a party cannot be forced to arbitrate without an agreement to do so. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99 & n 2; 323 NW2d 1 (1982); *Ehresman, supra* at 353-354. Statutory arbitration pursuant to MCL 600.5001(1); MSA 27A.5001(1), requires a written arbitration agreement. When an arbitration agreement is not in conformity with or governed by a statute or court rule, it is considered a common-law agreement to arbitrate. *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 578; 552 NW2d 181 (1996) (when an arbitration agreement is not in conformity with or governed by statute or court rule, it is a common law agreement); *Whitaker v Seth E Giem & Assoc, Inc*, 85 Mich App 511, 513; 271 NW2d 296 (1978).

Defendants argue that their agreement to arbitrate was not valid because it failed to satisfy MCL 600.5001; MSA 27A.5001, which requires an arbitration agreement to be in writing. Because the parties agreed to binding arbitration on the record and in open court at the facilitation hearing, however, the fact that the agreement was not in writing will not preclude a determination that a valid arbitration agreement exists. Rather, the parties participated in common-law arbitration. "An agreement or compromise between the parties which is made in open court is thereafter binding on the parties and may not be set aside absent satisfactory evidence of mistake, fraud or unconscionable conduct." *Northern Michigan Ed Ass'n v Bd of Ed of Cheboygan Area Schools*, 126 Mich App 781, 788; 337 NW2d 923 (1983); see also MCR 2.507(H).

Defendants contend that there was never a valid agreement to arbitrate because defendant Clinton Township failed to agree to it on the record; counsel for the township stated on the record that he needed the approval of the city council before the township could join in the arbitration. The parties did not state on the record, however, that their individual agreements were contingent on all defendants agreeing to binding arbitration. Indeed, all the parties present at the facilitation hearing knew that defendant Clinton Township might not submit to arbitration. Yet, none of defendants placed on the record the precondition that they would submit to binding arbitration only if defendant Clinton Township participated in the proceedings.[2] Therefore, because plaintiff was free to resolve her claims with defendants individually through a variety of methods which included arbitration, settlement, or trial, the

fact that Clinton Township chose settlement instead of arbitration will not nullify defendants' agreement, made on the record in open court, to arbitrate.

Defendants further argue that there was no agreement to arbitrate because the trial court unilaterally changed the method for choosing the third neutral arbitrator. After defendants chose one of the three arbitrators pursuant to the agreement on record, paid their share of the arbitrators' fees, participated in the arbitration proceedings, and received an unfavorable decision, defendants objected to the trial court's appointment of the third arbitrator by asserting that there was never a valid agreement to arbitrate. Upon reviewing the record, we find that defendants did not object when the trial court stated that it would appoint the third arbitrator. By voluntarily participating in the arbitration without raising the issue whether the claims were subject to arbitration, the parties waived the issue of arbitrability, i.e., whether there was a valid agreement to arbitrate placed on the record. See *American Motorists Ins Co v Llanes*, 396 Mich 113, 114; 240 NW2d 203 (1976). Parties may not adopt a "wait and see" approach after arbitration and then complain for the first time after the ruling. *Id.;* see also *Arrow Overall Supply Co*, *supra* at 99-100.

Defendants also assert that they did not voluntarily submit to arbitration, but were forced into the process by the trial court. The trial court asked the parties if there were any objections to his appointment of the third arbitrator[3] and received no response. Additionally, because the parties failed to place their agreement to arbitrate in writing, the parties undertook common-law arbitration process. *Beattie, supra* at 578. Under common-law arbitration, a party may revoke its consent to arbitrate any time before the announcement of an award. *Tony Andreski, Inc v Ski Brule, Inc*, 190 Mich App 343, 346; 475 NW2d 469 (1991). Defendants raised no objection to the trial court until *after* plaintiff moved for entry of judgment on the award. Thus, defendants failed to timely revoke their consent to arbitrate.

Relying on *Arrow Overall Supply Co*, *supra*, defendants contend that an issue regarding the validity of an arbitration agreement may be raised when confirmation of the award is sought. We find that *Arrow* is clearly distinguished from the instant case. In *Arrow*, the party against whom the arbitration award was rendered did not participate in the arbitration proceedings. *Id.* at 100. In the instant case, defendants fully participated in the arbitration process. The fact that defendants erroneously believed that they were powerless to challenge any decision made by the trial court is no reason to set aside a legitimate arbitration award.

Finally, in *Brush v Fisher*, 70 Mich 469, 476-477; 38 NW 446 (1888), the Michigan Supreme Court held that the defendant waived any objections he may have had regarding the composition of the arbitration panel by failing to object to the panel's composition until after he participated in the arbitration proceedings and the arbitrators had reached a decision. While *Brush* is certainly an old decision, it is still good law. Because defendants failed to object to the composition of the arbitration panel until after an award was rendered with full knowledge of the identities of the three arbitrators, defendants are precluded from challenging the composition on appeal, absent newly discovered issues concerning fraudulent conduct by the arbitrators.

Next, defendants argue that the arbitrators exceeded their powers and made substantial errors of law, requiring that the award be set aside. Review of alleged errors of law is limited to those that appear on the face of the award. *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988). The standard of judicial review from a private arbitration award was stated in *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982) (citing *Howe v Patrons' Mutual Fire Ins Co of Michigan*, 216 Mich 560, 570; 185 NW 864 (1921)):

> "[W]here it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside."

Judicial review of common law arbitration awards is limited. Courts may vacate an award due to (1) fraud on the part of the arbitrator; (2) fraud on the part of a party; (3) gross unfairness in the conduct of the proceedings, (4) lack of jurisdiction in the arbitrator, and (5) violation of public policy. *DAIIE, supra* at 441.

First, defendants assert that the arbitrators made a substantial error of law by granting a joint and several award in favor of plaintiff. According to defendants, the arbitrators' decision was erroneous on its face as a matter of law because all defendants were lumped together regardless of their liability for each of the different claims and without consideration for their degree of fault. We disagree.

An arbitration panel may impose joint liability when there are multiple parties subject to an award provided that the arbitration agreement did not contain a provision limiting the panel's authority to make such an award. *Ehresman, supra* at 351, 355. The general remedial authority of an arbitration panel is limited to the contractual agreement of the parties. *Id*. at 355; see *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150-151; 393 NW2d 811 (1986). While defendants argue that the arbitrators exceeded their authority by issuing a joint and several liability award in favor of plaintiff, the arbitration agreement placed on the record did not limit the arbitrators' ability to impose joint and several liability upon the multiple defendants. In fact, the agreement was silent with regard to damages. Because the arbitration agreement provided no method for apportioning damages among the various defendants and contained no agreement that prevented the panel from imposing joint and several liability, the arbitration panel acted within its authority to impose a joint and several award.

Second, defendants argue that the arbitrators exceeded their authority and made substantial errors of law by allowing plaintiff to depose a witness who was available to testify at the arbitration hearing but who refused to honor a subpoena that was untimely and improperly served. According to defendants, the witness could have been subpoenaed but for plaintiff's counsel's negligence. The court rules defendants cite govern statutory arbitration under MCL 600.5001; MSA 27A.5001 to MCL 600.5035; MSA 27A.5035, not common-law arbitration. MCR 3.602(A). Even under the court rules for statutory arbitration, the arbitrators had the authority to allow deposition testimony.

Assuming that the witness was not required to appear because of improper service of process, the court rules would permit the arbitrators to use deposition testimony. MCR 3.602(F)(2) states, "On

a party's request, the arbitrator may permit the taking of a deposition, for use as evidence, of a witness who cannot be subpoenaed or is unable to attend the hearing." The court rule does not specifically eliminate the authority of an arbitrator to allow deposition testimony because a party failed to properly serve that subpoena. Based on defendant's argument, the witness could not have been subpoenaed to appear before the arbitration proceedings because the witness was not given the two-day notice required by court rules. Therefore, the witness could not be subpoenaed and the arbitrators had the authority to allow deposition testimony.

Furthermore, there is no evidence that the witness' deposition testimony affected the arbitrator's decision. None of the parties have provided this Court with a copy of the arbitrators' award, and defendants have provided no evidence that but for the improper admission of the witness' deposition testimony, there would have been a substantially different award.

Finally, defendants contend that the arbitrators improperly considered evidence regarding a new theory of liability that plaintiff raised for the first time in her arbitration brief. According to defendants, the parties did not agree to submit the new agency theory of liability to arbitration. Therefore, the arbitrators' consideration of the theory while making their award exceeded their authority and resulted in substantial prejudice to defendants. We disagree. While a party cannot be required to arbitrate an issue that he has not agreed to submit to arbitration, *Omega Construction Company, Inc v Altman*, 147 Mich App 649, 655; 382 NW2d 839 (1985), there is no evidence in the instant case that the arbitrators evaluated evidence concerning a new theory of liability or that a new theory of liability affected their award.

Thus, we find that the trial court did not err by entering a judgment in favor of plaintiff based upon the arbitration award.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael J. Kelly
/s/ Jane E. Markey

[1] Neither party provided this Court with a copy of the arbitrator's award. Thus, we take this statement from the trial court's order affirming the arbitration award.

[2] Although defendants claim that this "all or nothing" approach to arbitration precluded the arbitrators from proceeding, they supply no applicable case law or statutory authority to support this position. Also, we note that defendant Clinton Township was dismissed by stipulation on June 20, 1996, *before* the August 2, 1996 arbitration decision, and the arbitrators apparently did not consider Clinton Township when making its award. Thus, Clinton Township's absence from the arbitration had no impact on the arbitration decision affecting the other defendants who agreed to the arbitration.

[3] After explaining that it would appoint the third arbitrator due to his past experiences with parties having problems agreeing on a third arbitrator, the trial court said, "Is that all right with everybody?" The next sentence reads "Don't everybody talk at once I mean . . ." and plaintiff's counsel asked whether the parties would provide a list of neutrals, to which the trial court said no. There were no other comments on the record objecting to the court's proposal.