

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY A. GROSSKLAUS,

Plaintiff/Counterdefendant-
Appellee,

v

SUSAN R. GROSSKLAUS,

Defendant/Counterplaintiff-
Appellant.

UNPUBLISHED
December 9, 2003

No. 240124
Wayne Circuit Court
LC No. 98-816343-DM

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

The parties submitted their divorce action to binding arbitration. After the arbitrator issued awards, plaintiff moved to vacate the awards under MCR 3.602. The circuit court concluded that common-law, not statutory, arbitration was involved, the arbitration agreement was voidable and the parties were not bound to accept the awards. Defendant appeals as of right. We reverse and remand for further proceedings.

I

In May 1998, plaintiff filed a complaint for divorce. Defendant filed a countercomplaint. In February 1999, the parties stipulated to submit the case to binding arbitration¹ and the court appointed an arbitrator. In April 1999, the parties entered into a “Matrimonial Binding Mediation Agreement” with the arbitrator, which outlined the terms of the arbitration process. Arbitration took place between June 1999 and February 2000. The arbitrator issued several separate awards, the final one being in August 2000.

¹ The terms “mediation” and “arbitration” were used interchangeably below. “Binding mediation is functionally the same as binding arbitration,” and both are reviewed under the same rules. *Frain v Frain*, 213 Mich App 509, 511; 540 NW2d 741 (1995). We will use the term “arbitration” in this opinion, unless the context requires otherwise.

In September 2000, plaintiff filed a motion in the circuit court to vacate the arbitration awards pursuant to MCR 3.602(J) and (K). In a decision issued on April 3, 2001, the circuit court found that because the parties' agreement did not contain a clause allowing the arbitrator's decision to be incorporated into a circuit court judgment, the parties engaged in only common-law arbitration, rather than statutory arbitration, which is not governed by the court rule. The court held that the parties' agreement governed the scope of the arbitrator's authority and, because the arbitrator failed to render his decision within forty-five days after the proceedings ended, contrary to the parties' agreement, the agreement was voidable and the parties were not bound to accept the awards. The court suggested that the parties could agree to modify the agreement. Plaintiff then filed a notice of intent to void the mediation agreement.

In October 2001, defendant filed a motion to reform the parties' agreement to reflect the parties' intent that the arbitrator's decision would be binding and reduced to judgment. On February 4, 2002, the circuit court entered its order dismissing the case. Defendant's motion for reconsideration was denied. Defendant filed a claim of appeal from the order of dismissal.

II

We first address plaintiff's challenge to this Court's jurisdiction. Plaintiff argues that defendant is precluded from raising issues pertaining to the circuit court's April 3, 2001, decision, because defendant did not timely file a claim of appeal therefrom. We disagree.

With certain exceptions not applicable here, this Court has jurisdiction of an appeal of right from final judgments or orders only. MCR 7.203(A)(1). A final order in a civil action is the first order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order. MCR 7.202(7)(a)(i). The final order for purposes of appeal is not necessarily the last order in the lower court file. *Dean v Tucker*, 182 Mich App 27, 30; 451 NW2d 571 (1990).

The circuit court's April 3, 2001, decision concluded that the arbitration agreement was voidable by either party and that it could not enter judgment on the arbitration awards. The court also offered the parties options on how to proceed. The court's April 3, 2001, order did not dispose of the parties' claims and, therefore, was not a final order appealable as of right. Thus, defendant could not have filed an appeal as of right from that order. The February 4, 2002, order of dismissal was the final order in this case. Having timely filed a claim of appeal from that order, defendant properly may raise any issue on appeal relating to the court's prior orders. *Dean, supra* at 31.

III

We also reject plaintiff's argument that the circuit court is without jurisdiction to enter judgment on the award because it was issued well over a year ago. MCR 3.602(I). Plaintiff filed his motion to vacate the award under MCR 3.602. The court held hearings and requested supplemental memoranda and proposed findings of fact and conclusions of law. Defendant's submissions requested findings rejecting all of plaintiff's claims. Defendant also presented a Judgment of Divorce, which included:

This divorce case comes before the Court after Binding Mediation on all contested issues. A Stipulated Order appointing Scott Bassett as Binding Mediator was entered on February 17, 1999; both parties and their respective lawyers executed a Binding Mediation Agreement on April 17, 1999 granting the Binding Mediator authority to rule on all issues. The Binding Mediator has issued a Final Binding Mediation Award Re: Child Custody and Parenting Time; a Revised Final Binding Mediation Award Re: Child Custody and Parenting Time; a Binding Mediation Award Re: Property and Financial Issues; and a Clarification of Binding Mediation Award Re: Property and Financial Issues[.]

Thereafter, plaintiff Timothy A. Grossklaus filed a Motion to Vacate Binding Mediation Award and defendant filed an Answer to the Motion, and thereafter a Supplemental Responsive Memorandum. The court considered the arguments of counsel, the exhibits received, and testimony; the court received and considered the proposed Findings of Fact and Conclusions of Law submitted by counsel for both parties. The Court entered an Order denying plaintiff's motion to vacate the Binding Mediation Award, and therefore approves the Binding Mediation Award.

The plaintiff has entered his proofs from which it satisfactorily appears to the Court that the statutory grounds for divorce and the jurisdictional residency requirements have been established.

The remainder of the Judgment of Divorce incorporated the arbitrator's award.

Defendant thus requested that judgment be entered on the award within the one-year period. The circuit court's erroneous decision that the court rule did not apply cannot operate to deprive it of jurisdiction to enter a judgment under the court rule on remand.

IV

We next consider whether the circuit court correctly ruled that the arbitration involved was common-law arbitration. If the parties' agreement does not provide that judgment shall be entered in accordance with the arbitrator's decision, common-law, rather than statutory, arbitration is involved. *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 578; 552 NW2d 181 (1996).

In this case, the circuit court's February 17, 1999, order for binding mediation provides:

It is further ordered that upon submission of the Binding Mediator's report to the Court that a Judgment of Divorce shall be prepared in compliance with the Binding Mediator's report and submitted to the Wayne County Circuit Court for entry.

Although similar language does not appear in the parties' Matrimonial Binding Mediation Agreement, that agreement provides:

This Agreement is entered into between the parties regarding the marriage of Susan R. Grossklaus and Timothy A. Grossklaus, Case NO. 98-816343-DM,

currently pending in the Wayne County Circuit Court, Family Division, State of Michigan, and pursuant to the court order dated the 17th day of February, 1999. [Emphasis added.]

Because the agreement expressly refers to the court's earlier February 17, 1999, order, the circuit court should have construed the two writings together and considered them as parts of the same agreement. *Culver v Castro*, 126 Mich App 824, 826; 338 NW2d 232 (1983); see also *Hetrick v Friedman*, 237 Mich App 264, 269; 602 NW2d 603 (1999). When viewed in this manner, it is apparent that the parties' agreement contains the requisite language providing that judgment shall enter in accordance with the arbitrator's decision. Therefore, the circuit court erred in concluding that the parties engaged in only common-law, rather than statutory, arbitration, and that the court rule was thus not applicable.

V

Defendant argues that the circuit court erred in vacating the arbitrator's awards for the reasons given. However, the court did not vacate the awards, but rather, ruled that the parties' agreement was voidable. Further, because the court believed the court rule did not apply, it did not consider whether plaintiff was entitled to have the awards vacated under MCR 3.602(J).

We will consider aspects of this issue that can be resolved as a matter of law on this record. *Koster v June's Trucking, Inc*, 244 Mich App 162, 168; 625 NW2d 82 (2000). MCR 3.602(J) provides in pertinent part:

- (1) On application of a party, the court shall vacate an award 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.

An arbitrator exceeds his authority when he acts beyond the material terms of the contract from which he draws his authority, or in contravention of controlling principles of law. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). Arbitrators derive their authority from the parties' contract and arbitration agreement and are bound to act within those terms. *Id.*

Plaintiff argued that the arbitrator exceeded his authority when he issued additional awards after issuing his first final custody and parenting time award on June 15, 2000. Because

there is nothing in the parties' agreement prohibiting the arbitrator from rendering his decision in a piecemeal fashion, we conclude that this is not a proper basis to vacate the awards.

Plaintiff also argued that the arbitrator exceeded his authority by failing to issue his final decision within forty-five days of the last arbitration hearing, which occurred on February 10, 2000. Plaintiff relies on the following provision of the parties' agreement:

Upon completion of the hearing, if no settlement is reached, the Binding Mediator will issue an Award in writing and deliver a copy of said award to each party or their respective attorney by hand delivery or mail within forty-five (45) days or as otherwise established by agreement by the parties and the Binding Mediator, with said award being final and binding upon both parties, subject only to the rules and law applicable to said binding mediation.

However, there is no indication that time was of the essence. The parties' agreement does not contain a provision making time of the essence, and nothing about the nature of the agreement or the circumstances under which it was executed suggests an understanding that time was of the essence. See *In re Day Estate*, 70 Mich App 242, 246; 245 NW2d 582 (1976). We note that the first award was issued well after the forty-five day period, and plaintiff did not object at that time. We conclude that the time frame expressed in the parties' agreement was not a material term of the contract. Accordingly, by failing to comply with this provision, the arbitrator did not act outside the material terms of the contract and, therefore, did not exceed his powers within the meaning of MCR 3.602(J) when he failed to render an award within the stated time frame.

Plaintiff also argued that the arbitrator improperly found that he was at fault for the breakdown of the marriage. Because this matter is directed at the merits of the arbitrator's decision, it is not a proper basis for upsetting the arbitrator's awards. *Dohanyos, supra* at 177.

Plaintiff's remaining claims, which are addressed to mediator partiality, the award of the Island Building Company, defendant's statements of fact during the arbitration proceedings, and whether the arbitrator failed to follow procedural and substantive law, shall be addressed by the court on remand for consideration of the party's motions under MCR 3.602. Additionally, on remand, the court shall consider defendant's claim that relief is warranted because plaintiff failed to fully disclose an interest he may have held in property at 28802 Coleman, in Grosse Isle.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William D. Schuette
/s/ Mark J. Cavanagh
/s/ Helene N. White