

STATE OF MICHIGAN
COURT OF APPEALS

DIMITRIOS PAPAS¹ and TED GATZAROS,

Plaintiffs-Appellants,

v

GREEKTOWN CASINO, L.L.C., MONROE
PARTNERS, L.L.C., and KEWADIN
GREEKTOWN CASINO, L.L.C.,

Defendants-Appellees,

and

SAULT STE. MARIE TRIBE OF CHIPPEWA
INDIANS and KEWADIN GAMING
AUTHORITY,

Defendants.

UNPUBLISHED

March 23, 2006

No. 257156

Wayne Circuit Court

LC No. 03-331815-CZ

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a final judgment confirming an arbitration award in this breach of contract action. We affirm.

The sole issue on appeal is whether the trial court erred in denying plaintiffs' motion to partially vacate the arbitration award regarding the "Eaton Redemption Agreement."² Plaintiffs

¹ Plaintiff Dimitrios Papas is no longer a party to this appeal, apparently because of a settlement reached with defendants.

² On August 4, 2000, defendant Monroe Partners, L.L.C., defendant Kewadin Greektown Casino, L.L.C., and A. Gregory Eaton entered into the "Eaton Redemption Agreement," which set forth the terms of Monroe's redemption of the four percent membership interest owned by Eaton. Although plaintiffs were not direct parties to the Eaton Redemption Agreement, § 4.13 of that agreement provided that plaintiffs were "express third party beneficiaries of the representations,

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specifically contend that the arbitrators exceeded their authority by ignoring and failing to enforce a material contract provision, called the “drop dead” provision, in § 2.2(c) of the Eaton Redemption Agreement and that such a failure mandates the vacation of the award under MCR 3.602(J)(1)(c). We disagree.

A trial court’s decision to enforce, vacate, or modify an award is reviewed de novo. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003), citing *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496-497; 475 NW2d 704 (1991). Upon de novo review, we conclude that under both the Federal Arbitration Act (FAA)³ and Michigan case law, we cannot review the merits of the arbitrators’ decision under the guise of determining whether the arbitrators exceeded their authority.

The FAA sets forth specific reasons for vacating an arbitration award. See 9 USC 10(a). Section 10(a)(4) of the FAA expressly provides that a district court may vacate an arbitrator’s award if the arbitrator “exceeded [his] powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” 9 USC 10(a)(4). Therefore, under the FAA, review of arbitration awards is “extremely deferential.” *Dluhos v Strasberg*, 321 F3d 365, 370 (CA 3, 2003). The FAA’s authorization to vacate under § 10(a)(4) is “consistently accorded the narrowest of readings . . . especially where that language has been invoked in the context of arbitrators’ alleged failure to correctly decide a question which all concede to have been properly submitted in the first instance.” *Westerbeke Corp v Daihatsu Motor Co, Ltd*, 304 F3d 200, 220 (CA 2, 2002), quoting *Andros Compania Maritima, S.A. v Marc Rich & Co, A.G.*, 579 F2d 691, 703 (CA 2, 1978). A contention that “the arbitrators misconstrued a contract is not open to judicial review” under § 10(a)(4) of the FAA. *Miller v Prudential Bache Securities, Inc*, 884 F2d 128, 130 (CA 4, 1989), quoting *Bernhardt v Polygraphic Co of America*, 350 US 198, 203 n 4; 76 S Ct 273; 100 L Ed 199 (1956).

(...continued)

warranties and covenants of the Parties contained in this Agreement, and [Plaintiffs] may enforce such provisions for their own benefit as if they were direct parties hereto.”

³ We are not precluded from deciding whether § 10(a)(4) of the FAA is the appropriate standard for vacatur. Defendant asserted in the trial court that the FAA standards applied. Additionally, an appellee is not required to file a cross-appeal to advance arguments in support of a judgment on appeal that were rejected by the lower court. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). Defendants’ argument that this Court should not relitigate the merits of the arbitration award did not seek any greater relief than affirming the final judgment confirming the arbitration award; instead, defendants merely seek to sustain that judgment on an alternative ground. *Id.* In addition, because the arbitration clause of the Eaton Redemption Agreement expressly states that any disputes concerning the construction and interpretation of the Eaton Redemption Agreement “shall be exclusively resolved by arbitration pursuant to the Federal Arbitration Act,” we find that arbitration in this case is governed by the FAA, 9 USC 1 *et seq.* Section 4.7 of the Agreement does not invoke the Michigan standards for review of arbitration decisions. Instead, it merely invokes Michigan law as to the construction and enforcement of the contract terms. In other words, the parties agreed to be bound procedurally to the FAA, but substantively to Michigan law.

Courts have absolutely no authority to reconsider the merits of an arbitration award, even when the parties allege that the award rests on factual errors or on a misinterpretation of the underlying contract. *Schoch v InfoUSA, Inc*, 341 F3d 785, 788 (CA 8, 2003); see also *Inter-City Gas Corp v Boise Cascade Corp*, 845 F2d 184, 187 (CA 8, 1988) (acknowledging “contract interpretation is left to the arbitrator”). However, even though an “arbitrator may interpret ambiguous language” in a contract without fear of judicial intervention, “the arbitrator may not disregard or modify unambiguous contract provisions.” *Inter-City Gas Corp, supra* at 187. The bottom line is “[w]e will confirm the arbitrator’s award even if we are convinced that the arbitrator committed serious error, so long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority.” *Schoch, supra* at 788 (citations and quotations omitted).

Here, plaintiffs’ argument that the arbitrators exceeded their authority is essentially a disagreement with the arbitrators’ interpretation of the “drop dead” provision in § 2.2(c) of the Eaton Redemption Agreement, which provides:

Any amounts of money received by [Monroe] in connection with the sale of any of its membership interests to any persons or entities, whether pursuant to the Detroit Offering or otherwise (collectively, the “Offering Proceeds”) shall be distributed and disbursed by [Monroe] to the following persons in the following priority, subject to the last sentence of this paragraph (c): First, [Monroe] shall pay to [plaintiffs], in equal amounts, the sum of (x) \$3,550,000.00, in the event of a Failure to Exercise, or (y) amounts due to [Monroe] from Blackwell pursuant to the terms of the Option Agreement, in the event of a Default, to the extent not previously paid, together with interest thereon in the case of either a Failure to Exercise or a Default as provided below, from and to the extent of the Offering Proceeds, immediately upon receipt by [Monroe] of such Offering Proceeds If any portion of such amounts to be paid to [plaintiffs] pursuant to this paragraph (c) and the interest thereon has not been fully paid within nine (9) months after the end of the Hold Period (the “Sale Period”), the entire remaining sum and the accrued interest thereon shall be paid in full, in a single sum by the Company, on the day following the end of the Sale Period.

Plaintiffs claim that the “drop dead” provision provides for the outstanding amounts (\$3,550,000) owed to plaintiffs to be made on a “drop dead” date occurring nine months after the expiration of the hold period. The arbitrators disagreed, concluding that no payment was presently due plaintiffs because of the nonoccurrence of a condition precedent contained in the Eaton Redemption Agreement. Although plaintiffs argue that the arbitrators exceeded their authority because their decision rendered the “drop dead” provision meaningless, this argument is an improper attempt to relitigate the merits of the arbitration decision. An inquiry under § 10(a)(4) asks “whether the arbitrators had the power, based on the . . . arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue.” *Westerbeke, supra* at 220, quoting *DiRussa v Dean Witter Reynolds, Inc*, 121 F3d 818, 824 (CA 2, 1997); see also *Blue Bell, Inc v Western Glove Works Ltd*, 816 F Supp 236, 240 (SD NY, 1993). Plaintiffs

do not claim that the arbitrators decided an issue that was not properly before them.⁴ Instead, plaintiffs' challenge to the arbitration award focuses on the underlying merits of the arbitrators' decision, which is not reviewable by this Court. *Schoch, supra* at 788. As such, we hold that there was no ground to vacate the Final Arbitration Award under the FAA.

Plaintiffs maintain that the arbitration award should be vacated under MCR 3.602(J)(1)(c) because the arbitrators exceeded their authority by ignoring and failing to enforce the "drop dead" provision and rendering the decision in violation of the rule set forth in *Detroit Automobile Inter-Insurance Exchange v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982), and its progeny. We disagree and hold that there was no ground to vacate the Final Arbitration Award under Michigan case law as well.

As with review of arbitration awards under the FAA, judicial review of arbitration awards is very limited under Michigan law. *Gordon Sel-Way, supra* at 495. MCR 3.602(J)(1)(c) provides that an arbitration award may be vacated if the arbitrator exceeded his authority. Arbitrators exceed their power "whenever they act beyond the material terms of the contract from which they primarily draw their authority" *Id.* at 496, quoting *Gavin, supra* at 434. To justify judicial action to vacate an arbitration award, errors must be evident from the face of the award and "so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Id.* at 497, quoting *Gavin, supra* at 443. Further, courts may not upset awards for reasons that concern the merits of the claim, *id.* at 500; *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 177; 550 NW2d 608 (1996); engage in contract interpretation, which is a question for the arbitrator, *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999); or review claims that the arbitrator made a factual error, *id.* at 75. Rather, "[i]t is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable." *Gavin, supra* at 429.

As discussed above, we find that the arbitrators did not ignore the "drop dead" provision, but rather disagreed with plaintiffs' interpretation of that provision. The interpretation of the "drop dead" provision presented a question for the arbitrator, and we are precluded, in this context, from interpreting the provision. *Konal, supra* at 74. Accordingly, we hold that the trial court did not err in refusing to vacate the arbitration award regarding the Eaton Redemption Agreement

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

⁴ Here, there is no dispute that the arbitrators had authority to interpret the Eaton Redemption Agreement. The arbitration clause specifically empowered the arbitrators to determine the issues of construction and interpretation of the Eaton Redemption Agreement.