

STATE OF MICHIGAN
COURT OF APPEALS

KAREN SMAZA,

Plaintiff-Appellant,

v

ARS INVESTMENTS,

Defendant,

and

LORETTA ROSS,

Defendant-Appellee.

UNPUBLISHED

March 15, 2011

No. 293933

Oakland Circuit Court

LC No. 2003-052305-CB

Before: SAWYER, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order denying her motion to vacate an arbitration award. We affirm.

Plaintiff, her sister, defendant Loretta Ross, and their mother, Delma Adle, formed a partnership, ARS Investments (ARS), in 1994. Each partner owned an equal one-third interest in the partnership, and they agreed to participate equally in all decisions and to share the profits. Disputes arose between plaintiff and Ross regarding investments that had incurred significant losses and led to a breakdown of trust between the parties regarding all aspects of the business. In August 2000, plaintiff became dissatisfied with Ross's actions and moved ARS money to bank accounts in her name to protect them. In January 2001, Ross opened a new ARS account in order to continue operations. In 2002, Ross demanded an accounting of the funds that plaintiff had put into her own accounts. In September 2003, plaintiff filed a complaint against ARS, Ross, and Adle alleging that defendants prevented plaintiff from sharing in the profits when they diverted funds for personal use and extended unreasonable loans to personal acquaintances. Plaintiff further alleged that Ross and Adle failed to pay debts, including taxes, leaving ARS in danger of collapse. Plaintiff alleged that Ross and Adle failed to safeguard ARS's business assets and misappropriated funds for personal gain. Plaintiff also alleged that Ross and Adle breached their fiduciary duties to plaintiff by knowingly and intentionally removing plaintiff from the operation and control of ARS, effectively depriving her of profits, equity interest, and

future earnings. Plaintiff requested dissolution of ARS, an accounting of ARS property, and an order of partition granting plaintiff her one-third share of ARS property.

The trial court entered an order dissolving ARS pursuant to the Uniform Partnership Act, MCL 449.1 *et seq.*, upon stipulation of the parties. The trial court noted that the only issues remaining concerned allocation and distribution of ARS assets. Subsequently, Ross filed a counter-complaint, alleging that plaintiff had done all of the ARS bookkeeping since the partnership's creation, tracked accounts receivable, maintained its checkbook, and had custody and control of ARS's books and records. Ross alleged that plaintiff failed to safeguard ARS business assets and misappropriated funds for personal gain. Ross alleged that on January 16, 2001, without the consent of Ross or Adle, plaintiff removed \$10,000 from the ARS checking account and placed it in her own account. Ross also alleged that on May 29, 2002, plaintiff removed \$131,942.87, and on June 7, 2004, removed \$45,000 from the ARS checking account and placed it into her own account. Ross further alleged that on July 18, 2003, plaintiff removed \$100,000 from the ARS checking account and gave it to her daughter-in-law. Ross alleged that plaintiff breached her fiduciary duty to Ross, Adle, and ARS by removing Ross and Adle from the operation and control of ARS and deprived Ross of profits. Ross also requested dissolution, an accounting and partition.

The trial court entered a stipulated order referring the case to binding arbitration for resolution of all claims and issues concerning the dissolved partnership and distribution of its assets to the parties.

Almost five years later, the arbitrator issued an amended award. The arbitrator stated that his intent was to make findings regarding the assets that the parties had identified. The arbitrator also noted that Adle died during the arbitration proceedings and was no longer part of the currently existing disputes. The arbitrator stated that testimony was taken from Ed Richardson, a CPA acting as an expert witness for plaintiff, from plaintiff's daughter-in-law, Angie Smaza, who assisted with ARS bookkeeping after plaintiff moved the money out of the ARS accounts, from plaintiff, from Frederick Endelman, CPA for ARS, and from Ross. Adle died before any of her testimony was taken. The arbitrator also admitted numerous exhibits, including accounting and tax records, checks, bank records, property documents, correspondence and transcripts.

The arbitrator initially concluded that the parties' actions that occurred before August 2000 were done with the general knowledge and consent of all parties. The arbitrator did not find the testimony of Richardson, Angie Smaza, or plaintiff to be credible. The arbitrator stated that Richardson's testimony was based on information that plaintiff provided to him and was unsupported and in conflict with other admitted documents and testimony. Plaintiff had problems remembering dates and what she had done with money from other withdrawals from ARS accounts, and she failed to provide any real accounting of the ARS transactions after August 2000.

The arbitrator found that the evidence established that plaintiff failed to account for payments and pay-offs after December 31, 2000. The arbitrator concluded that the evidence supported a finding that the total documented funds received by plaintiff for ARS after December 31, 2000, totaled \$632,874.93. The arbitrator also concluded that after January 1, 2001, Ross received a total of \$106,200.31 in ARS funds. The arbitrator ordered that plaintiff pay Ross \$263,337.31, which equaled one-half of the ARS funds that plaintiff maintained minus

one-half of the ARS funds that the arbitrator found that Ross maintained with credit for the escrowed funds.

Plaintiff moved to vacate the arbitration award. Plaintiff argued that the entire basis of her complaint was that defendants had misappropriated the great bulk of ARS assets before the lawsuit was filed and that the arbitrator completely ignored the pre-litigation misappropriation of funds by defendants. Instead, the arbitrator analyzed only transactions involving funds that plaintiff took out of the ARS accounts to protect the partnership from Ross's misappropriations. Plaintiff argued that the arbitrator violated MCR 3.602(J)(2)(d) when he failed to consider all the evidence concerning Ross's withdrawals and did not provide a reason for not considering Ross's withdrawals. Plaintiff also argued that the arbitrator's findings that affected the rights of non-parties were in excess of his powers. The trial court denied plaintiff's motion to vacate the arbitration award, and plaintiff appeals from that order.

Plaintiff first argues that the trial court erred in ordering the parties into arbitration and in denying plaintiff's motion to vacate the award because MCL 600.5005 prohibits arbitration of disputes regarding the fee ownership of real property. Plaintiff asserts that the only issue for the arbitrator to decide in this case was the ownership rights of the real estate and the proceeds from sales and mortgages on the real estate. This Court reviews de novo a trial court's decision to enforce, vacate, or modify an arbitration award. *Ann Arbor v AFSCME*, 284 Mich App 126, 144; 771 NW2d 843 (2009).

The parties stipulated to an order referring the case to arbitration. This stipulated order was a "type of contract" and, as such, should be construed under the same rules of construction as contracts. *In re Nestorovski Estate*, 283 Mich App 177, 183; 769 NW2d 720 (2009). In Michigan, a distinction exists between statutory and common-law arbitration. *Id.* at 197. The Michigan Arbitration Act (MAA), MCL 600.500 *et seq.*, governs statutory arbitration. In order for an agreement to qualify for statutory arbitration, it must adhere to the requirements in the statute. *In re Nestorovski Estate*, 283 Mich App at 197-198. Parties wishing to conform an agreement to MCL 600.5001 must put in writing that a circuit court may render judgment upon the award made pursuant to the agreement. *Wold Architects and Engineers v Strat*, 474 Mich 223, 231; 713 NW2d 750 (2006). Otherwise, their agreements will be treated as agreements for common-law arbitration. *Id.* Because the order submitting the parties' dispute to arbitration did not provide that a judgment could be entered in accordance with the arbitrator's decision, this case involves common-law arbitration, to which the statutory arbitration procedures do not apply. *In re Nestorovski Estate*, 283 Mich App at 198; *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 578; 552 NW2d 181 (1996). Because the common law does not limit the parties' ability to arbitrate real estate disputes, the parties were free to arbitrate a real estate dispute in this case. *In re Nestorovski Estate*, 283 Mich App at 200.

Plaintiff also argues that the arbitrator severely prejudiced her rights by taking so long to render a decision. As discussed above, the parties stipulated to an order referring the case to arbitration, effectively entering into a contract to arbitrate, which should be construed under the same rules of construction as contracts. *Id.* at 183. Time is of the essence in a contract if the contract states that time is of the essence, if it clearly appears that the parties intended time to be an essential element of their agreement, or if intent must necessarily be implied based on the nature of the contract and the surrounding circumstances. *Nedelman v Meininger*, 24 Mich App 64, 79; 180 NW2d 37 (1970). The parties' agreement to arbitrate did not contain a provision

asserting that time was of the essence, and there was nothing in the nature of the agreement or the circumstances under which the agreement was entered to indicate that the parties agreed that time was of the essence. *MacRitchie v Plumb*, 70 Mich App 242, 246; 245 NW2d 582 (1976). Because time was not a material part of the parties' agreement to arbitrate, this Court will not reverse the arbitrator's award because of the delay.

Furthermore, judicial review of a common-law arbitration award is limited to instances of bad faith, fraud, misconduct, or manifest mistake, *Ferndale v Florence Cement Co*, 269 Mich App 452, 460; 712 NW2d 522 (2006), and plaintiff argues none of those circumstances.

Plaintiff's final argument is that the arbitrator exceeded his authority under the arbitration contract because he refused to consider material evidence and failed to account for any of the parties' transactions before 2000, which she contends is evidence of his partiality for the defendants. Plaintiff bases her arguments regarding the arbitrator exceeding his authority and his showing of partiality on the arbitrator's conclusion that he was unconvinced that "the actions complained of by plaintiff occurring prior to August 2000 were done without the general knowledge and consent of all parties" and that, "while there were numerous accusations of financial improprieties made by plaintiff, Karen Smaza, the objective documentation was lacking and unconvincing."

The arbitrator did not refuse to hear material evidence as plaintiff asserts. The arbitrator did consider plaintiff's evidence but did not find it to be convincing or credible. Plaintiff has not alleged bad faith, fraud, misconduct, or manifest mistake. Rather, plaintiff argues that, because the evidence factually supported her claims, the only explanation for the arbitrator's erroneous conclusions had to be that he exceeded his authority or was partial to defendants. However, the arbitrator specifically stated that he did not find the testimony of plaintiff's witnesses or plaintiff herself to be credible or supported by the documentary evidence. As a result, the arbitrator concluded that decisions and transactions made before August 2000 had been made with the knowledge and consent of all the parties and, as such, were not disputed transactions. An arbitrator's factual conclusions are not proper subjects for judicial review. *Frazier v Ford Motor Co*, 364 Mich 648, 655; 112 NW2d 80 (1961).

The thrust of plaintiff's argument is that the arbitrator did not agree with her allegations and evidence, and she has framed that argument in terms of the arbitrator "exceeding his authority" and "partiality" in an attempt to induce this Court to review the merits of the arbitrator's decision. However, the arbitrator's credibility determinations and weighing of the evidence are not matters for appellate review. *Belen v Allstate Ins Co*, 173 Mich App 641, 646; 434 NW2d 203 (1988). Accordingly, the trial court did not err in denying plaintiff's motion to vacate the arbitration award.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Karen M. Fort Hood