

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ROBERT ANOSHKKA, Personal Representative of  
the Estate of GARY ANOSHKKA,

Plaintiff-Appellant,

v

MARY ANN ANOSHKKA,

Defendant-Appellee.

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UNPUBLISHED  
April 19, 2011

No. 296595  
Oakland Circuit Court  
Family Division  
LC No. 2000-639921-DO

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's opinion and order denying plaintiff's motion for entry of an amended judgment of divorce and remanding the case for issuance of an updated binding arbitration report and award based on changes in circumstances following the decedent's death. We reverse the trial court's order remanding the case for further arbitration based on changes in circumstances following the decedent's death and remand the case for entry of an order denying plaintiff's motion as barred by the defenses of laches and unclean hands, as well as general principles of equity.

The decedent and defendant divorced after over 14 years of marriage. The parties' consent judgment of divorce called for binding arbitration to divide the parties' marital property, debt, and alimony. The judgment also provided that "the parties hereby agree" to incorporate the terms of the binding arbitration award into an amended judgment of divorce, which shall enter and resolve all issues of division of marital property, debt, and alimony.

On January 21, 2003, the arbitrator issued a binding arbitration award. One asset subject to division by the arbitrator included a piece of real estate in Eagle River on which the parties, during their marriage, contracted to construct a home. The arbitrator awarded the Eagle River property to the parties as tenants in common. Pursuant to the award, the decedent had the right to purchase defendant's interest in the Eagle River property by paying her \$30,000 within 120 days, in which case defendant would execute and deliver a quitclaim deed conveying her interest in the property to the decedent. In the event that the decedent failed to timely pay defendant \$30,000, the award required the parties to list the Eagle River property for sale. Upon sale, defendant was to receive \$30,000, and the decedent was to receive the remaining balance

resulting from the sale. Finally, regardless of the decedent's decision whether to buy defendant's interest in the property, the arbitration award held the decedent fully responsible for all debts relating to the Eagle River property and instructed him to indemnify and hold defendant harmless with respect to such debts. Neither party objected to the award.

The arbitration award was never incorporated into an amended judgment of divorce. The decedent passed away just over two months after the arbitration award issued and before the 120-day window to buy defendant's interest in Eagle River property expired. Plaintiff was appointed as the personal representative of the decedent's estate.

On July 26, 2004, plaintiff filed a motion for entry of an amended judgment of divorce. In his motion, plaintiff argued that the judgment of divorce required that the terms of the arbitration award be incorporated into an amended judgment of divorce. No amended judgment of divorce was entered at that time. Instead, the trial court entered an order of adjournment and, apparently, took no further action. According to plaintiff, he discontinued his efforts to obtain an amended judgment of divorce in 2004 because defendant misrepresented that she held a 50 percent interest in the property, the property was in foreclosure, and large amounts of debt were owed on the property.

The estate was reopened in 2009. On October 13, 2009, plaintiff again filed a motion for entry of an amended judgment of divorce. Therein, plaintiff asserted that the Eagle River property is valued between \$250,000 and \$500,000. Plaintiff explained that, following the decedent's death, defendant deceptively obtained title to the property without compensating plaintiff. She did this by filing an action in the Keweenaw Circuit Court to quiet title following a foreclosure of the Eagle River property. Apparently, defendant had expended \$90,000 to redeem the property. In the quiet title action, defendant represented herself as the property owner, yet the arbitrator awarded her only a \$30,000 interest in the property. She never pursued obtaining an amended judgment of divorce to collect her \$30,000 interest in the property.

Subsequently, one of the estate's creditors brought an action in the Keweenaw Circuit Court to set aside the order granting title to defendant. The Keweenaw Circuit Court indicated that it would await a decision from this Court regarding plaintiff's motion to enter an amended judgment of divorce before ruling.

Apparently, even though the arbitration award made the decedent fully responsible for all debts associated with the property, the decedent was not making mortgage payments on the Eagle River property before his death. During his deposition, plaintiff indicated that he does not know why the decedent was not making the mortgage payments for the Eagle River property before his death. He also did not know that the Eagle River property had gone through foreclosure and that defendant had redeemed it from foreclosure, expending \$90,000.

On November 30, 2009, the trial court denied plaintiff's motion for an amended judgment of divorce, stating the following regarding the Eagle River property:

The court would note that the facts and circumstances surrounding the binding Arbitration Award with regard to the Eagle River property have changed a great deal since 2003. Further, neither party (not representative) fulfilled their

obligations under the Arbitration Award since it was issued. Thus, the court will remand the matter back to the arbitrator, Arnold Garber, for an updated Binding Arbitration Report based on the facts and circumstances that have taken place since 2003.

Plaintiff raises two issues on appeal. First, whether the trial court exceeded its authority when it ordered further arbitration based on facts that occurred after the decedent's death. Second, whether the trial court erred when it refused to enter an amended judgment of divorce. "We review de novo a trial court's decision on a motion to enforce, vacate, or modify an arbitration award." *Bayati v Bayati*, 264 Mich App 595, 598; 691 NW2d 812 (2004).

In their consent judgment of divorce, the parties agreed to submit the division of marital property to binding arbitration, and further agreed to incorporate the arbitration award into an amended judgment of divorce. Significantly, the parties agreed to *one* arbitration; whatever decision was rendered in that one arbitration would become binding. The parties did not agree to further arbitration based on changes in circumstances occurring after the arbitrator rendered his decision or after the decedent died. "A party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration." *Kaleva-Norman-Dickson School Dist v Kaleva-Norman-Dickson Teachers' Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975). The parties decide the scope of arbitration, and a court may not "infringe[] on the parties' recognized freedom to contract for binding arbitration." *Miller v Miller*, 474 Mich 27, 32-33; 707 NW2d 341 (2005). The trial court erred by ordering further arbitration in light of events taking place after the decedent's death, expanding the scope of arbitration for which the parties contracted.

MCL 600.5081<sup>1</sup> governs the vacation or modification of arbitration awards in domestic relation matters:

(1) If a party applies to the circuit court for vacation or modification of an arbitrator's award issued under this chapter, the court shall review the award as provided in this section or section 5080.

(2) If a party applies under this section, the court shall vacate an award under any of the following circumstances:

(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.

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<sup>1</sup> See also MCR 3.602, providing similar provisions regarding modification and vacation of statutory arbitration awards under MCL 600.5001-600.5035.

(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.

(3) The fact that the relief granted in an arbitration award could not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.

(4) An application to vacate an award on grounds stated in subsection (2)(a) shall be made within 21 days after the grounds are known or should have been known.

(5) If the court vacates an award, the court may order a rehearing before a new arbitrator chosen as provided in the agreement or, if there is no such provision, by the court. If the award is vacated on the grounds stated in subsection (2)(a) or (c), the court may order a rehearing before the arbitrator who made the award.

Here, however, no party filed a motion to vacate or modify the arbitration award. Further, no ground that would allow a court to vacate or modify an arbitration award exists in this case. Defendant does not allege that the award was the result of corruption, fraud, or undue means, nor does she allege that the arbitrator was biased, exceeded his authority, or conducted the hearing to prejudice defendant's rights. Rather, the trial court vacated the arbitration award even though no party moved for it to do so, and there were no grounds that would warrant vacating the arbitration award; therefore, we reverse the trial court's order requiring further arbitration.

Plaintiff next argues that the trial court erred when it refused to enter an amended judgment of divorce. Indeed, in their consent judgment of divorce, the parties agreed to incorporate the arbitration award into an amended judgment of divorce. A consent judgment of divorce is in the nature of a contract. *MacInnes v MacInnes*, 260 Mich App 280, 289; 677 NW2d 889 (2004). Consent judgments of divorce, like all other contracts entered between two parties acting of their own free will, are to be construed and applied as such. *Id.* As a panel of this Court stated in *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008):

If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written, unless the contract is contrary to law or public policy. In general, consent judgments are final and binding upon the court and the parties, and cannot be modified absent fraud, mistake, or unconscionable advantage. [Citations omitted.]

Here, neither party disputes that the consent judgment of divorce is unambiguous, nor is there any indication of fraud, mistake, or unconscionable advantage. Enforcing the consent judgment as written, however, requires incorporating the arbitration award, issued more than six years ago, into an amended judgment of divorce. Here, enforcement of the unambiguous terms of the consent judgment may be avoided only if doing so would be "contrary to law."

Defendant presents several affirmative defenses for why, now, over six years after the arbitration award was rendered, entry of an amended judgment of divorce is contrary to law: (1) plaintiff's claim is time-barred under applicable statutes of limitation; (2) the defense of laches bars plaintiff's request for specific performance of the arbitration award; (3) the equitable doctrine of unclean hands bars plaintiff's claim; and (4) general principles of equity bar plaintiff's claim. We address each in turn.

Defendant first argues that plaintiff is time-barred from seeking enforcement of the arbitration award. The arbitration award in this case was rendered on January 21, 2003, and plaintiff filed his motion for entry of an amended judgment of divorce on October 13, 2009. Thus, approximately six years and nine months lapsed before plaintiff initiated the instant action. That plaintiff filed a similar motion back in 2004, but did not pursue the claim to its conclusion, does not make his 2009 filing timely. Plaintiff has made no argument regarding the tolling of any limitations period that may apply.

Defendant cites to three limitation periods that allegedly set time restraints on filing a motion for entry of an amended judgment of divorce. According to defendant: (1) under MCL 600.5079(2), plaintiff was required to file a motion for entry of an amended judgment of divorce within 21 days of the arbitration award's issuance; (2) under MCR 3.602(I), an arbitration award may be confirmed by a court within one year of its entry; and (3) under MCL 600.5807(8), the limitation period for breach of contract claims is six years. Defendant, however, waived her right to assert that plaintiff's claim is time-barred by an applicable statute of limitations on appeal by failing to raise the argument in the lower court. Although defendant noted in her trial brief that, "[n]ow, more than six years after the arbitration award was issued, Plaintiff's estate brings the instant motion, purportedly asking the Court to incorporate the arbitration award into the Judgment," she did not cite to any of the statutes listed above or specifically allege that plaintiff's motion was time-barred.

Defendant next argues that the defense of laches bars plaintiff's motion for entry of an amended judgment of divorce. In this case, "plaintiff is seeking specific performance of [an] arbitration award and specific performance is a 'purely equitable remedy.'" *Rowry v University of Michigan*, 441 Mich 1, 10; 490 NW2d 305 (1992). Where the relief sought is equitable in nature, laches is an available defense, "requiring the exercise of due diligence to ensure the timely prosecution of the plaintiff's claim to avoid unduly prejudicing the defendant." *Id.* at 11.

As the Michigan Supreme Court alluded to in *Rowry*, 441 Mich at 11, the applicable statute of limitations at law may provide insight, by analogy, in determining the period of delay after which laches may operate to bar a claim in a court of equity:

"The omission to do what one is by law required to do to protect his rights, and which justifies a fair presumption that he has abandoned the same, under circumstances which misled or prejudiced an adverse party, may in equity operate as laches which bar[s] the assertion of such right later under changed conditions, even though the statute of limitations has not run." [*Id.*, quoting *Olson v Williams*, 185 Mich 294, 301; 151 NW 1043 (1915).]

As defendant notes, the limitation period at law for enforcement of an arbitration award is six years. The six-year limitation period applies in cases where no specific limitation period of shorter duration is provided by statute. As our Michigan Supreme Court stated in *Rowry*:

The first time restriction applicable to the enforcement of an arbitration award is the six-year period of limitation for breach of contract. As this Court has previously recognized, arbitration is a matter of contract. It is the agreement that dictates the authority of the arbitrators and the disputes to be resolved through arbitration. In this case, the arbitration agreement provides that “[t]he arbitrator’s decision when made in accordance with his/her jurisdiction and authority established by this Agreement, shall be final and binding upon the University, the Union, and the employee or employees.” The university has never challenged the authority of the arbitrator to resolve this labor dispute. Therefore, the university’s alleged failure to comply with the arbitrator’s decision would constitute a breach of that contractual provision and would be subject to the six-year limitation period for breach of contract. [*Rowry*, 441 Mich at 10.]

Here, the arbitrator awarded the decedent full interest in the Eagle River property less \$30,000. The parties’ consent judgment of divorce required that the award be incorporated into an amended judgment of divorce. Plaintiff’s request for enforcement of the arbitration award, therefore, is a breach of contract claim. Yet plaintiff failed to bring the action within six years of the arbitration award’s issuance.

In enacting statutes of limitation, the Legislature weighs several policy considerations to determine a reasonable period of time in which plaintiffs must pursue claims, including: “the prompt recovery of damages, penalizing plaintiffs who are not industrious in pursuing claims, security against stale demands, relieving defendants’ fear of litigation, prevention of fraudulent claims, and a remedy for general inconveniences resulting from delay.” *Nielsen v Barnett*, 440 Mich 1, 8-9; 485 NW2d 666 (1992). Although many of these policy considerations are equally relevant in equity, “[l]aches differs from the statutes of limitation in that ordinarily it is not measured by the mere passage of time.” *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982). It is the prejudice occasioned by the delay, rather than the mere fact of the delay, that is relevant in determining the applicability of laches. *Id.* Nonetheless, we find that defendant suffered prejudice from the delay of over six years in this case.

The prejudice is easily evidenced by the extreme change in circumstances surrounding the disputed property, which compelled the trial court, albeit without authority, to order further arbitration. Since the arbitration award’s issuance, the decedent (and later his estate) failed to pay the home equity loan on the Eagle River property, and the property eventually went into foreclosure. Defendant expended \$90,000 to redeem the Eagle River property. Defendant also filed an action to quiet title. Whether defendant had the authority to bring an action to quiet title, or did so after proper publication and notice to plaintiff, is not a question before this Court. Under the arbitration award, (1) defendant held an ownership interest in the subject property as a tenant in common, (2) the decedent held full responsibility for all debts associated with the subject property, and (3) ultimately, defendant was to receive \$30,000, whether from the decedent directly or after a sale of the property. Defendant has suffered prejudice in that the benefits flowing to her under the arbitration award can no longer be fulfilled.

Defendant next argues that the doctrine of unclean hands bars plaintiff's claim. Specifically, defendant contends that plaintiff cannot seek enforcement of the same arbitration award that the decedent (and later the estate) breached. We agree.

The maxim that a party who comes into equity must come with clean hands is an elementary and fundamental concept of equity jurisprudence. The clean-hands doctrine closes the doors of equity to one tainted with inequity or bad faith relative to the matter in which he or she seeks relief, regardless of the improper behavior of the defendant. If there are indications of unfairness or overreaching on an equity plaintiff's part, the court will refuse to grant him or her equitable relief. [*Richards v Tibaldi*, 272 Mich App 522, 537; 726 NW2d 770 (2006) (citations omitted).]

With regard to contractual disputes, specific performance of a contract may be granted only where the party seeking such relief has tendered full performance. *Derosia v Austin*, 115 Mich App 647, 652; 321 NW2d 760 (1982).

Here, the arbitration award held the decedent fully responsible for all debts relating to the Eagle River property and instructed him to indemnify and hold defendant harmless with regard to such debts. It also mandated that neither party take any action to incur any further liens on the property. Despite these provisions, the decedent (and later the estate) failed to make home equity loan payments on the Eagle River property and allowed it to go into foreclosure. This is in violation of the arbitration award.

Finally, defendant argues that general principles of equity bar plaintiff's claim. Namely, defendant expended \$90,000 to redeem the property after it went into foreclosure because the decedent (and later the estate) failed to pay the home equity line of credit on the property. Under such circumstances, to allow the estate to buy out defendant for \$30,000 or sell the property and keep all but \$30,000 would be inequitable. Accordingly, the trial court properly denied plaintiff's motion for entry of an amended judgment of divorce.

We acknowledge the unsatisfying position in which this leaves the parties. Nonetheless, because the parties did not agree to further arbitration, and because the arbitration award is no longer enforceable considering equitable principles, the trial court was without authority to provide a resolution.

We reverse and remand for entry of an order denying plaintiff's motion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Elizabeth L. Gleicher  
/s/ David H. Sawyer  
/s/ Jane E. Markey