

STATE OF MICHIGAN
COURT OF APPEALS

CORRINE L. MACNEILL,

Plaintiff-Appellant,

v

ROY A. MACNEILL,

Defendant-Appellee.

UNPUBLISHED
March 15, 2012

No. 301849
Oakland Circuit Court
LC No. 2006-726102-DO

Before: O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

PER CURIAM.

In this divorce action, plaintiff appeals by leave the successor circuit judge's decision to vacate the domestic relations arbitration decision.¹ We reverse, on two grounds: (1) the successor judge misconstrued the arbitrator's assessment of witness credibility as an indication that the arbitrator was prejudiced against defendant; and (2) the successor judge incorrectly determined that the arbitrator was required to reopen the proofs to receive additional evidence of defendant's change in circumstances.

I. FACTS AND PROCEDURAL HISTORY

The record indicates that the parties' divorce litigation has been protracted and fractious, with mutual allegations of dissipated and hidden assets, as well as disputes concerning misappropriation of proceeds from a Macomb County lawsuit. To complicate matters, defendant had a disabling stroke during the litigation, and defendant's original attorney also became disabled from continuing to represent defendant after the first two years of litigation and arbitration. Because this procedural history affects our decision, we review the history here.

Plaintiff filed for divorce in 2006, after a marriage of more than 30 years. The circuit court family division judge, Hon. Martha Anderson, entered a consent status quo order. Judge Anderson also ordered the parties to complete discovery by February 7, 2007, and to appear for trial February 12, 2007. The parties subsequently stipulated to adjourn the February trial date for

¹ The successor judge's opinion and order stated: "the property division of the Judgment of Divorce is based on erroneous findings of the Arbitrator, and as such must be set aside."

approximately 60 days to allow additional time for discovery and for court-ordered mediation. After resolution of a discovery dispute, the parties stipulated to a second adjournment. Judge Anderson ordered defendant to provide the information requested by plaintiff by May 7, 2007. The parties and their counsel participated in mediation with Robert Badgley, but did not settle the action.

In June 2007, Judge Anderson entered a stipulated order submitting the divorce case to binding arbitration with Badgley. The parties and counsel attended multiple arbitration hearings with Badgley from July 2007 through early January 2008. Badgley then wrote to both parties' counsel, confirming that the parties had completed their presentation of proofs in the arbitration and that plaintiff's counsel was to submit proposed findings of fact and requested relief within two weeks. Badgley further confirmed that defendant's counsel would have two weeks to respond to plaintiff's proposed findings.

As of May 2008, plaintiff's counsel had not submitted proposed findings. Plaintiff and the parties' adult son had apparently filed a civil action in Oakland Circuit Court against defendant, alleging that defendant had improperly managed assets of the parties' business entities (paving and excavating businesses). In addition, there was an action pending in Macomb Circuit Court that involved one or more of the parties' businesses. In December 2008, the Macomb Circuit Court ordered that funds defendant received in the Macomb litigation be held in trust by defendant's counsel in that action. Plaintiff's counsel in the divorce action had apparently appeared in the Macomb action. According to defendant, plaintiff's counsel held up distribution of the Macomb litigation proceeds. The Macomb Circuit Court eventually ordered that the funds that were held in trust be released to defendant.

Badgley did not issue an arbitration ruling until September 16, 2009. The record contains no definitive explanation for the delay, although both parties attribute the delay to the other's conduct. In the arbitration ruling, Badgley stated that the collateral litigation in Macomb and Oakland counties contributed to the delay. Badgley also noted that the arbitration hearings were marked with incessant discovery disputes. Specifically, Badgley found that defendant's poor record keeping partially caused the discovery problem, and that another partial cause of the problem was defendant's willful failure to cooperate. Badgley stated in August 2009 he had been informed that defendant's attorney was on medical leave; Badgley further stated that as of the date of the arbitration ruling no attorney had appeared as replacement counsel.

Badgley made specific findings about the parties' businesses, earnings, and assets, but noted that valuation was somewhat problematic. He found the evidence clearly demonstrated that defendant "was deceptive about the location and value of a variety of assets, including equipment and . . . income." Badgley further found that defendant had failed to report work that defendant had engaged in during the divorce litigation (and apparently failed to report related income from that work). Badgley specifically found that defendant was disingenuous concerning a pro stock Camaro that should have been a marital asset. Defendant testified that he did not own the Camaro and that he owed money to a friend for it. Badgley found defendant's testimony regarding the Camaro to be "transparently false" and also found that defendant had attempted to obscure both the value and ownership of the Camaro in an effort to deprive plaintiff of its value. Badgley concluded that defendant had "unnecessarily frustrated the litigation process."

Based on these findings, Badgley ruled on the division of the marital assets. Badgley awarded the businesses and related equipment to defendant. He awarded real estate in Troy to plaintiff. He also awarded the Camaro to plaintiff, “for the reason that [defendant] was deceitful and took extraordinary pains to hide the asset.” Regarding the proceeds from the Macomb litigation, Badgley stated that although counsel had agreed that the proceeds were to be held in escrow until the divorce was final, the proceeds had nonetheless been distributed to defendant. Badgley awarded these proceeds to plaintiff, but noted that it was uncertain whether the proceeds were still available. Given this uncertainty, Badgley reserved the issue of spousal support until the actual amount of the property settlement became known.

Eleven days after Badgley issued the ruling, new counsel for defendant wrote to Badgley and informed him that defendant had received the “proposed” arbitration ruling, that defendant’s prior counsel was ill, and that defendant disagreed with the ruling. Badgley responded that the ruling was final, not a proposed ruling, but that Badgley would take counsel’s letter as a motion for reconsideration. Badgley proposed to meet with counsel to discuss the situation.

On October 7, 2009, plaintiff filed a motion for entry of judgment on the arbitration ruling. In the motion, plaintiff asserted that defendant had “failed to file a timely objection to the [arbitration] ruling.” Plaintiff also filed a motion to hold defendant in contempt for failing to comply with the status quo order that required him to pay taxes on the Troy real estate. In the motion, plaintiff alleged that defendant had hidden and failed to account for those proceeds. Defendant objected to the entry of judgment and filed a motion for an evidentiary hearing to correct alleged errors in the arbitration ruling.

On October 9, 2009, Badgley issued a supplemental ruling. In the ruling, Badgley acknowledged defendant’s assertion that his disability had significantly altered his financial situation and that his prior counsel’s illness had prevented adequate representation. Regarding the Macomb litigation, Badgley found that defendant received approximately \$150,000 and that defendant might have legal arguments that the proceeds were not marital assets. Badgley determined, however, that if the arbitration were to be reopened, defendant “should place a significant portion of the money he received in escrow, as a good faith indication that he will pursue the litigation diligently to its conclusion.” Badgley concluded that defendant’s assertions were insufficient to warrant re-opening the arbitration and that a judgment on the arbitration ruling should be entered.

Defendant subsequently filed a motion to set aside the arbitrator’s ruling. Judge Anderson held hearings on the motion. The only material testimony at the hearings was from defendant, who testified that he used most of the approximately \$150,000 he received from the Macomb litigation to pay attorney fees and bills for his business and that he had only \$3,000 remaining. However, defendant and his new counsel informed Judge Anderson at the hearings that defendant had become totally disabled by a stroke in June 2008. Defendant’s counsel argued that Badgley’s 2009 arbitration ruling incorrectly assumed that defendant could continue to work in the same capacity he had worked prior to his disability. In response, plaintiff’s counsel informed the judge that months after defendant’s stroke, he and defendant’s original

counsel had met with Badgley, and that the original counsel did not advise Badgley of any change in defendant's physical condition or in defendant's ability to work.²

In November 2009, Judge Anderson entered judgment on the arbitration ruling. Judge Anderson reserved the issue of spousal support, awaiting a petition from either party, and information concerning whether plaintiff would receive any of the proceeds from the Macomb litigation. Defendant then filed a motion to vacate the judgment or for reconsideration. Additional motions from both parties followed concerning spousal support, allegations of hidden assets, and enforcement of the judgment. The parties also took additional depositions regarding spousal support and assets. Judge Anderson held a hearing on the motions in December 2009, and referred two matters back to Badgley.

On December 14, 2009, Badgley issued a supplemental ruling to clarify that plaintiff should take the Troy property subject to back taxes. In the ruling, Badgley also determined there was no need for an additional evidentiary hearing. On January 6, 2010, Judge Anderson entered an amended judgment of divorce, clarifying the tax issues on the Troy property. Judge Anderson also entered related orders enforcing the judgment. Eight days later, the Chief Judge of Oakland Circuit Court reassigned the case to the successor judge, Hon. Lisa Gorcyca.

The following month, February 2010, Judge Gorcyca entered an opinion and order striking certain of Judge Anderson's enforcement orders, setting aside the judgment of divorce, and directing the parties to a rehearing before a new arbitrator. Judge Gorcyca determined that facts and circumstances central to the divorce had changed significantly from the time of the last arbitration hearing in January 2008 until the issuance of the arbitration ruling in September 2009. In particular, Judge Gorcyca noted that both defendant and his original attorney had become disabled during that time period. Judge Gorcyca concluded that Badgley improperly refused to hear material evidence of the change in circumstances. Judge Gorcyca also concluded that Badgley's opinion appeared to "reflect partiality, that is, his unfavorable view of defendant as one who acted in bad faith and sought to delay the ruling."

Plaintiff filed a motion to reconsider, which Judge Gorcyca denied. Other motions and orders occurred which do not affect this appeal. Judge Gorcyca ordered the parties to proceed with the new arbitrator forthwith. In January 2011, this Court ordered the proceedings stayed until resolution of plaintiff's appeal.

II. ANALYSIS

A. STANDARD OF REVIEW AND CONTROLLING LAW

We review de novo the circuit court's decision to vacate the arbitration award. *Cipriano v Cipriano*, 289 Mich App 361, 368; ___ NW2d ___ (2010). Our review is controlled by the provisions of the Domestic Relations Arbitration Act, MCL 600.5070 *et seq.* The act specifies narrow grounds for vacating an arbitration award. MCL 600.5081. Among other things, the act

² Defendant's original counsel apparently became disabled in approximately March 2009.

requires a circuit court to vacate an arbitration award if “[t]here was evidence of partiality by an arbitrator.” MCL 600.5081(2)(b). In addition, the act requires that the court vacate an award if “the arbitrator refused to hear evidence material to the controversy.” MCL 5081(2)(d). Here, Judge Gorcyca vacated the arbitration award on both of these grounds.

B. THERE IS NO INDICATION OF PARTIALITY BY THE ARBITRATOR

To overturn an arbitration award on partiality grounds, the evidence of the arbitrator’s partiality must be concrete, certain, and direct. *Bayati v Bayati*, 264 Mich App 595, 601; 691 NW2d 812 (2004). The record in this case contains no direct or even circumstantial evidence of partiality by Badgley. Judge Gorcyca was correct that Badgley’s arbitration rulings reflected unfavorably on defendant, in that Badgley found defendant had acted in bad faith. However, the determination that defendant acted in bad faith is not evidence of partiality by Badgley. Both Badgley and Judge Anderson had the opportunity to observe defendant and assess his credibility. In contrast, nothing in the record indicates that Judge Gorcyca had occasion to independently assess defendant’s credibility. Badgley expressly found that defendant was deceptive about assets and that defendant had given false testimony; these findings supported a determination that defendant acted in bad faith. Judge Gorcyca incorrectly reviewed Badgley’s assessment of defendant’s credibility and recharacterized Badgley’s assessment as partiality. See *Washington v Washington*, 283 Mich App 667, 675; 770 NW2d 908 (2009) (circuit court is not authorized to reweigh evidence).

Defendant argues that Badgley’s reference to unpaid arbitration fees is additional evidence of partiality. We disagree. In keeping with the requirements of MCL 600.5072, the parties and their counsel signed the arbitration agreement that specified Badgley’s rate and acknowledged responsibility for payment of the fees. Moreover, the stipulation and order on binding arbitration required that the parties be equally responsible for payment of Badgley’s fees, and that the fees would be paid prior to the entry of a judgment of divorce. Badgley specified the amount of his fees in the original arbitration ruling and noted in the first supplemental ruling that the fees remained unpaid. Contrary to defendant’s assertion, nothing in the agreement, the order, or Badgley’s requests for payment can be deemed to constitute a pecuniary interest in the outcome of the arbitration. Badgley’s fees were a contractual matter, not a prejudicial matter.

C. THE ARBITRATOR REASONABLY REFUSED TO HEAR ADDITIONAL EVIDENCE

A circuit court may not vacate an arbitration award unless an arbitrator’s error of law was so significant that the award would have been substantially different but for the error. *Washington*, 283 Mich App at 672. Here, as both Badgley and Judge Anderson determined, defendant’s health situation and related change in income could be addressed via supplemental petitions for spousal support. Badgley and Judge Anderson both expressly provided for supplemental proceedings. The provision for supplemental proceedings demonstrates not only that Badgley was aware of the asserted change in defendant’s health and income, but that the arbitration award would have been substantially similar even if Badgley had reopened proofs on this matter. Given Badgley’s indication that defendant’s change in health would affect only spousal support, not the property award, the record contains nothing to support the conclusion that the award would have been substantially different but for the lack of a hearing on

defendant's change in circumstances. Accordingly, Judge Gorcyca erred in determining that the arbitration rulings should be set aside.³

Reversed and remanded for entry of judgment on the arbitration rulings. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ David H. Sawyer

/s/ Michael J. Talbot

³ We further note that the purpose of arbitration is to avoid protracted litigation. *Cipriano*, 289 Mich App at 367. Judge Gorcyca recognized that this divorce case was unduly protracted, but nonetheless ordered the parties to begin a new arbitration. On the record before us, we see no justification for further prolonging this litigation.