

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN LEVERETT,

Plaintiff-Appellant,

v

TOWNSHIP OF DELTA,

Defendant-Appellee.

UNPUBLISHED

March 15, 2012

No. 302557

Clinton Circuit Court

LC No. 10-010709-CZ

Before: RONAYNE KRAUSE, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals by right the order granting defendant's cross-motion for summary disposition to dismiss plaintiff's motion to vacate an arbitration award. We affirm.

Plaintiff Kevin Leverett was employed as a firefighter and paramedic by defendant Delta Township for approximately 10 years. Plaintiff resigned from his employment with defendant pursuant to a severance agreement. After leaving, plaintiff found various employment, and in late 2003, plaintiff filed an application for employment with the East Lansing Fire Department (ELFD). Upon successful completion of the first steps in ELFD's selection process, ELFD began a background investigation of plaintiff. As part of that investigation, the investigating officers met with Delta Township Deputy Fire Chief Richard Meister. After that meeting, the investigating officers issued the following summary:

On 12/1/03 we met with Deputy Chief Richard Meister of Delta Twp. FD. During our discussions with Chief Meister, limited information was provided due to Kevin's dismissal of employment approximately two years ago. He went on to say while Kevin was employed, his work and medic skills were good. However, Kevin was unable to separate his personal life from his professional life on more than one occasion, which eventually led to his dismissal. We felt this was a large deterrent for hiring, and did not pursue further.

The background investigation is the second-to-last step in ELFD's selection process. ELFD Chief Randall Talifarro testified that as the last step in the hiring process, he generally interviews the top two candidates. Because ELFD had two openings, however, Talifarro expanded interviews to the top three candidates; as the fifth-ranked candidate, plaintiff was never interviewed. The openings at ELFD were filled by other candidates.

Plaintiff alleged that defendant, through Meister, breached paragraph 12 of the parties' severance agreement, which reads:

12. **DISPARAGING OR DEROGATORY REMARKS.** The parties agree that neither they nor any person or agent acting on their behalf will make or publish in any manner any disparaging or derogatory remarks about the other.

Plaintiff also alleged that this breach constituted intentional interference with plaintiff's employment expectancy. Pursuant to paragraph 13 the severance agreement, plaintiff filed a demand for arbitration.

The arbitrator issued an opinion and award on April 6, 2010, finding for defendant, without awarding fees. The arbitrator found that Meister's statements were neither malicious nor per se wrongful, and therefore, the claim failed on that necessary element. Regarding the breach, the arbitrator remained unconvinced that Meister used the word "dismissal" or any similar word when speaking with ELFD investigators.¹ But regardless of what Meister *actually* said, the arbitrator found that ELFD's selection process itself was the proper reason for plaintiff's failure to obtain employment with ELFD. Plaintiff filed a complaint and motion to vacate the arbitration award in circuit court on July 6, 2010, 91 days after the opinion and award were issued. Defendant filed a cross-motion for summary disposition, which the trial court granted. The court concluded that plaintiff's motion to vacate was untimely under MCR 3.602(J)(1), and plaintiff's argument lacked merit. Plaintiff appealed.

Plaintiff claims that summary disposition was improper for two reasons. First, plaintiff argues that his motion to vacate the arbitration award was timely. Second, plaintiff argues that the arbitrator exceeded her powers by concluding that defendant did not breach the severance agreement, by holding plaintiff to an improper burden of proof for proving the breach, and by failing to characterize Meister's remarks as per se wrongful under plaintiff's intentional interference claim.

We review a trial court's interpretation and application of a court rule de novo. *Wilcoxon v Wayne Co Neighborhood Legal Servs*, 252 Mich App 549, 553; 652 NW2d 851 (2002). Additionally, this Court reviews a trial court's decision to grant or deny summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "In making this determination, the Court reviews the entire record to determine whether defendant was entitled to

¹ The arbitrator apparently did not arrive at any explicit conclusions regarding Meister's alleged, and seemingly at least arguably derogatory, disclosure of plaintiff's inability to keep his personal life isolated. However, we are unable to discern from plaintiff's brief, which is not a model of clarity, any argument about this. Instead, plaintiff focuses on the word "dismissal" and makes the frankly baffling assertion that pursuant to paragraph 12, Meister was not permitted to talk to ELFD agents at all. In any event, arbitration decisions are not reviewed for correctness but whether the arbitrator exceeded his or her powers, and as we discuss *infra*, because plaintiff's complaint was untimely, it ultimately does not matter whether the arbitrator did so.

summary disposition.” *Id.* Furthermore, an arbitrator exceeds his or her authority by acting outside the terms of the contract or by contravening controlling principles of law. *Krist v Krist*, 246 Mich App 59, 62; 631 NW2d 53 (2001). However, in evaluating whether an arbitrator exceeded his or her authority, the courts must be careful to refrain from reviewing the merits of a claim. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). The courts may speculate as to why an arbitrator ruled in a particular way; an alleged error of law may also be attributable to improper or unwarranted factual findings, and unless an alleged error of law is apparent from the face of the award, the award must be upheld. *DAIIE v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982).

Regarding plaintiff’s first claim of error, MCR 3.602(J)(1) states that:

A request for an order to vacate an arbitration award under this rule must be made by motion. If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint to vacate an arbitration award must be filed no later than 21 days after the date of the arbitration award.

According to a plain reading of this rule, a *complaint* is required 21 days following the arbitration award if there is no pending action between the parties. Plaintiff has not explicitly identified any such pending action beyond the bare assertion that one existed, and after thoroughly searching the record, no evidence of a pending action between the present parties could be found aside from the arbitration hearing, for which the corresponding opinion and award was entered on April 6, 2010. Even more striking, though, is plaintiff’s admission at the very beginning of his complaint to vacate that “[t]here is no other pending or resolved civil action arising out of the transaction or occurrence alleged in this complaint.” We deem this admission binding, particularly in light of plaintiff’s failure to provide even the slightest hint of evidence at what *other* claim might have been pending. Because there was no pending action between the parties, a complaint should have been filed with the trial court no later than 21 days from April 6, 2010.

However, plaintiff claims that the trial court retains the “unbridled discretion” to entertain his claim, and it appears that plaintiff believes the trial court abused its discretion by failing to do so. In support of his position, plaintiff relies on *Gavin, supra*. We find this reliance misplaced and puzzling. The *Gavin* Court held that if the delay in filing is minimal, and if there is a compelling reason for the delay, or, in absence of a compelling reason, the opposing party is not prejudiced, then the trial court cannot be said to have abused its discretion for having heard the party’s claim. See *id.* at 424-425. In *Gavin*, the delay in filing was three days. *Id.* at 413. Here, however, the plaintiff filed his complaint 70 days late, which we find substantial, not minimal. Furthermore, plaintiff has provided no compelling reason for this substantial delay. Finally, even if we concluded that the trial court had the discretion to entertain plaintiff’s claim, which we do not, the court would not have been required to do so. The court would not have abused its discretion by refusing to hear plaintiff’s untimely request.

Regarding plaintiff’s second claim of error, plaintiff asserts that his breach and intentional interference claims had merit, arguing that the arbitrator exceeded her authority by failing to conclude there was a breach of the severance agreement and by failing to conclude that

Meister's remarks constituted intentional interference. This claim of error is moot in light of plaintiff's untimeliness, but we address it briefly for the sake of completeness.

In the context of plaintiff's breach claim, his argument overlooks the arbitrator's conclusion that, as a matter of *fact*, Meister did not use the word "dismissal" or any similar word when speaking with ELFD investigators. Based on this *factual* finding, the arbitrator concluded, as a matter of law, that there was no breach of paragraph 12 of the severance agreement. Additionally, plaintiff asserts that the arbitrator's conclusion that plaintiff would not have been hired regardless of Meister's alleged breach constitutes some error of law. However, this conclusion merely reflects the arbitrator's reliance on ELFD's selection process, again as a factual matter, to determine whether the alleged breach caused plaintiff's damages. Therefore, even if there was legally a technical breach of paragraph 12 of the severance agreement, it did not cause plaintiff's damages. That being the case, plaintiff cannot recover, and the claim still fails.

In the context of plaintiff's intentional interference claim, plaintiff asserts that Meister's alleged use of the word "dismissal" constituted the intentional per se wrongful act that, in turn, supported his claim of intentional interference. "A 'per se wrongful act' is an act that is inherently wrongful or one that is never justified under any circumstances." *Formall, Inc v Community Nat Bank of Pontiac*, 166 Mich App 772, 780; 421 NW2d 289 (1988). First, plaintiff's argument ignores the fact that the arbitrator remained unconvinced that Meister used the word "dismissal," but more significantly, plaintiff has provided no coherent, well-reasoned factual or legal support for his assertions. We agree with defendant's framing of plaintiff's position, that "[i]nstead of providing this court with some basis by which [the arbitrator] committed an error of law or exceeded her authority, [plaintiff] has simply reargued his interpretation of the facts." This Court will not make a party's argument for them. See *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009).

Affirmed.

/s/ Amy Ronayne Krause
/s/ Pat M. Donofrio
/s/ Karen Fort Hood