

STATE OF MICHIGAN
COURT OF APPEALS

JEROME DEWITT and KELLY DEWITT,

Plaintiffs-Appellants,

v

STEPHEN COLLINS and CYNTHIA COLLINS,

Defendants-Appellees.

UNPUBLISHED

January 22, 2004

No. 243063

Oakland Circuit Court

LC No. 2001-036306-CZ

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

In this action requesting the trial court's confirmation of an arbitration award, plaintiffs appeal by right from the trial court's order granting defendants' motion for summary disposition, vacating the arbitration award pursuant to MCR 3.602(J)(1)(d), and remanding the case to the arbitrator for rehearing. We reverse.

This case concerns the validity of an arbitration award concerning water damage to a home plaintiffs purchased from defendants. Defendants received notice that a demand for arbitration had been made before they left the country for vacation. During their absence, notice of the arbitration hearing date was sent via mail to their home. Defendants returned home in time for the hearing but, because of a family emergency, failed to open their mail until two days after the hearing. Consequently, defendants did not attend the hearing nor did they submit any information to the arbitrator. The arbitrator ruled in favor of plaintiffs.

Defendants sent the arbitrator a request for rehearing, but the arbitrator denied the request because plaintiffs would not agree to a rehearing. Plaintiffs thereafter filed a motion to enforce the arbitration award, to which defendants filed a motion to vacate. Both parties also filed motions for summary disposition. The trial court, while noting that defendants' application to vacate the award was untimely, vacated the award pursuant to MCR 3.602(J)(1)(d), on the ground that the arbitrator conducted the hearing before defendants knew of the hearing date.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). 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). Additionally, this Court reviews the interpretation of court rules de

novo. *St George Greek Orthodox Church of Southgate, Mich v Laupmanis Assocs, PC*, 204 Mich App 278, 282; 514 NW2d 516 (1994).

In reviewing de novo a decision on a motion for summary disposition based on an agreement to arbitrate or on the lack of a material factual dispute, an appellate court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in the light most favorable to the party opposing the motion. MCR 2.116(C)(7), (C)(10), (G)(5). Summary disposition was appropriately granted if there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *Id.*

Michigan public policy favors arbitration to resolve disputes. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 128; 596 NW2d 208 (1999). The uniform arbitration act permits persons to agree to submit controversies to arbitration and to "agree that a judgment of any circuit court shall be rendered upon the award." MCL 600.5001(1); *Watts v Polaczyk*, 242 Mich App 600, 608; 619 NW2d 714 (2000). In this case, both parties signed the purchase agreement, which included the following arbitration clause:

23. Any claim or demand of Seller or Buyer . . . arising out of or related to the physical condition of any property covered by this agreement, . . . shall be settled in accordance with the rules, then in effect adopted by the American Arbitration Association and the Michigan Association of REALTORS. . . . A judgment of any circuit court shall be rendered on the award or determination made pursuant to this agreement. This agreement is specifically made subject to and incorporates the provisions of Michigan law governing arbitrations, MCL 600.5001; MSA 26A5001 is [sic] amended and the applicable court rules, MCR 2.602 [sic] as amended. . . .

Once an issue is submitted to arbitration, the uniform arbitration act and MCR 3.602 limit judicial review. *DAIIE v Sanford*, 141 Mich App 820, 825; 369 NW2d 239 (1985). MCR 3.602(J)(1) lists the grounds for vacating an arbitration award and reads as follows:

On application of a party, the court shall vacate an award if:

- (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; or
- (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.

The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

MCR 3.602(J)(2) states generally that an application to vacate an award must be made within twenty-one days after delivery of a copy of the award to the applicant.

In this case, defendants returned home from their vacation on July 21 and notice of the July 25 hearing date was waiting in their mail. Defendants claim that because of several family illnesses, they left to tend to ailing relatives and failed to look at their mail. Thus, it was defendants' decision not to open their mail that caused them to miss the hearing date.¹ Because they had actual notice of the demand for arbitration, at a bare minimum defendants were obliged to peruse their mail. More importantly, however, defendants waited until *after* the award had been granted before notifying the arbitrator of their situation. While defendants did send the arbitrator a letter requesting another hearing, defendants proceeded to wait several months after the award was granted before seeking to challenge the validity of the arbitration award in court, and they presented no justification for waiting past the applicable period to file a motion to vacate the award.

Plaintiffs assert that the trial court should not have considered defendants' application to vacate the arbitration award because it was approximately five months late, well past the twenty-one-day limit set by the court rule. While we agree, we note that the trial court did not explicitly consider defendants' application to vacate as such; instead, it considered defendants' motion as an objection to plaintiffs' motion to confirm the arbitration award. The trial court, in its opinion, acknowledged that defendants' application to vacate the award was untimely but considered defendants' objections to the entry of the award, citing *Arrow Overall v Peloquin*, 414 Mich 95, 99; 323 NW2d 1 (1982), for the premise that a party responding to a motion to confirm an arbitration award is not precluded from objecting to entry of the award, even if a motion to vacate the award is time barred.

Arrow Overall dealt with the validity of an arbitration agreement itself, which concerns jurisdiction. *Id.* at 98. However, in *Arrow Overall*, the plaintiff likened the defendant's assertion that no agreement to arbitrate existed to an application to vacate the award and maintained that the defendant should not be allowed to make that argument because the time limit imposed by the court rule (GCR 1963, 769 – the predecessor of MCR 3.602) for making an application to vacate the award had passed. *Id.* at 100-101. This Court responded:

This misperceives the procedure provided by the rule.

The rule's time limitation binds the moving party, not one who opposes

¹ Defendants make much of the fact that a family member became terminally ill and tending to this ailing family member took precedence over the present arbitration matter. However, from the record it appears that this family member became ill at the beginning of the family's vacation overseas, yet defendants remained overseas for a considerable period of time before coming back home. While we certainly understand the trial court's sympathy for defendants' situation, we cannot let sympathy overshadow this case. If defendants had not been aware of the demand for arbitration, our analysis may be different. However, defendants were aware of the demand and simply did not give it any concern.

the motion. Here the defendant is not seeking to vacate the award, but simply opposes its confirmation. Since the rule prescribes no time limitation on the interposition of defenses, it would appear proper to allow it whenever it be sought to confirm the award. [*Id.* at 101.]

While, in the present case, defendants did file an application to vacate the arbitration award, they also filed an answer and affirmative defenses to plaintiffs' motion to confirm the award. Within their answer and affirmative defenses, as within their application to vacate the award, defendants asserted lack of proper notice of the arbitration hearing date. Therefore, according to the Court's reasoning in *Arrow Overall*, the trial court could consider defendants' lack of notice objection to the confirmation of the arbitration award even though the included application to vacate the award was untimely. *Id.*

We also note the case of *DAIIE v Gavin*, 416 Mich 407; 416 NW2d 418 (1982). In that case the defendant claimed that the circuit court lacked jurisdiction to hear the plaintiff's delayed motion to vacate an arbitration award. GCR 1963, 769(2) provided that an application to vacate an award "shall be made within 20 days after delivery of a copy of the award to the applicant." Although the plaintiff filed beyond the 20-day period, the Court declined to read the 20-day period as defining the jurisdictional authority of the circuit court.

We read the rule as delineating a litigant's right to challenge an arbitration award. There is nothing in either the explicit language of the rule or the policy it is intended to effect – moving disputes in a timely fashion through the judicial process – that mandates that a circuit judge's discretionary power to permit a party to plead beyond established time limits upon a showing of excusable neglect, GCR 1963, 108.7(2), is, or should be, curtailed. [*Id.*]

Accordingly, we acknowledge that a trial court does have the authority to review a party's untimely motion *under certain circumstances*. However, under the circumstances of this case, we conclude that the trial court erred in entertaining defendants' motion and in vacating the arbitration award.

The trial court vacated the arbitration award on the ground that the arbitrator conducted the hearing before defendants knew of the hearing date. Defendants asserted that, by mailing them notice and conducting the hearing in their absence, the arbitrator "conducted the hearing so as to substantially prejudice" their rights, thus requiring the trial court to vacate the award under MCR 3.602(J)(1)(d). It is necessary to reiterate, however, that defendants had actual notice that a demand for arbitration had been made and they did arrive home from out of the country in time to receive the notice of the hearing date, but defendants neglected to open their mail. According to section 32 of the Home Buyer Home Seller Arbitration Rules adopted by the AAA and the Michigan Association of Realtors, the parties *consented to notice by mail* addressed to the parties' last known address. Therefore, while defendants may not have known the date of the arbitration hearing until they opened their mail, they did receive proper *notice* of the hearing date pursuant to the arbitration rules after they were already aware that a demand for arbitration had been made. Furthermore, no request to *postpone* the hearing was made of the arbitrator. Without a request for postponement to consider or, indeed, any indication that defendants would be unavailable, the arbitrator sent notice of the hearing date using the method prescribed by the

AAA rules and conducted the hearing in defendants' absence; the arbitrator followed AAA procedure in setting and conducting the hearing.

In sum, the arbitrator followed AAA procedure in setting the hearing and properly conducted the hearing. Under the circumstances, defendants failed to prove the existence of any grounds to justify vacating the award. Therefore, we conclude that the trial court erred in vacating the award; thus, the arbitration award should be reinstated.

Reversed and remanded to the trial court for confirmation of the arbitration award. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage