

STATE OF MICHIGAN
COURT OF APPEALS

GERALD DEMOTT and CHRISTINE DEMOTT,

Plaintiffs-Counter-Defendants-
Appellees,

v

THOMAS MCDONALD, d/b/a PEPPERS
CARPENTRY, and PEPPERS CARPENTRY,
INC.,

Defendants-Counter-Plaintiffs-
Appellants.

UNPUBLISHED
February 15, 2007

No. 266301
Oakland Circuit Court
LC No. 2002-044217-CH

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendants appeal as of right the trial court order denying their motion to vacate an arbitration award that was entered in favor of plaintiffs. We affirm, but remand for entry of an award of appellate attorney fees in favor of plaintiffs.

This case arises out of the construction of a new home that began in September 2001. Plaintiffs contracted with defendant McDonald to build and supervise the construction of the home. McDonald initially supervised the construction before leaving for Florida in December 2001; he did not return to Michigan until May 2002. During McDonald's absence, no one acted in his stead to supervise the progress of the construction, and thus plaintiffs were forced to act as their own contractors and oversee the conclusion of the project. McDonald did not resume supervision of the project upon his return from Florida because of an apparent breakdown of the parties' relationship. Plaintiffs alleged that the construction of the house that was completed under McDonald's supervision was deficient in numerous ways, including problems with the layout, framing, and enclosure of the home. Plaintiffs also alleged that some aspects of the new construction violated the building code.

Defendants subsequently claimed a construction lien on plaintiffs' property in the amount of \$35,000 for unpaid builder's or supervision fees. Plaintiffs filed suit against defendants, asserting claims of breach of contract, quiet title, slander of title, negligence, and violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* Defendants pursued a counterclaim, seeking foreclosure of the construction lien and alleging breach of contract, quantum meruit, and unjust enrichment. Plaintiffs filed a motion for partial summary disposition

with respect to defendants' construction lien, quantum meruit, and unjust enrichment claims, and the motion was granted. Defendants later filed a motion for partial summary disposition with regard to plaintiffs' claims of slander of title and violation of the MCPA, which motion the trial court denied. With unresolved claims still pending, the parties agreed, pursuant to an arbitration agreement, to submit the case to arbitration in the fall of 2004. The arbitration agreement provided that any award "shall be accompanied by a reasoned opinion which shall specify the factual and legal bases for the award" and that the award "shall be based on applicable law as applied to the facts found at the arbitration hearing." Further, the agreement provided that "[a] judgment may be entered enforcing the arbitration award," thereby making this case one of statutory arbitration governed by MCL 600.5001 *et seq.*, and MCR 3.602. See *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991).

Arbitration hearings were held, and the arbitrator found that McDonald had admitted by interrogatory answer that "no one . . . was acting as the builder" relative to plaintiffs' home while he was in Florida; McDonald had abandoned the project. The arbitrator also concluded that plaintiffs' assumption of McDonald's responsibilities as builder during his absence did not relieve McDonald from his obligations under the parties' construction contract. Further, the arbitrator decided in favor of plaintiffs on their claims for slander of title and violation of the MCPA, and he additionally found that McDonald's act of filing the construction lien against plaintiffs' home was vexatious for purposes of assessing attorney fees and costs under our Construction Lien Act (CLA), MCL 570.1101 *et seq.* The arbitrator ruled that the work done on the project during McDonald's supervision, such as layout, framing, and enclosure of the house, had numerous defects, which included building code violations. The arbitrator also concluded that McDonald committed material breaches of contract and was negligent in his performance as a licensed residential builder. McDonald's claim for unpaid builder's fees was rejected in its entirety.

The arbitration ruling awarded plaintiffs \$8,900 in damages for the cost of repairing defects and building code violations, \$34,560 in damages for the loss in value resulting from defects that could not be repaired, \$11,949 in interest, and \$17,500 for the value of services rendered and other related compensatory damages, including emotional distress. The total judgment was for \$72,909. Plaintiffs were also later awarded \$40,012 in attorney fees and costs, with the attorney fees being awarded under MCR 2.403(O), as case evaluation sanctions, under MCL 570.1118 of the CLA, under MCL 445.911 of the MCPA, and under MCL 565.108, which addresses slander of title.

Defendants filed a motion to vacate the award in the trial court, alleging a number of errors in the award itself and in the process leading to its issuance, including that the arbitrator "refused" to inspect the home in order to assess the defects in construction alleged by plaintiffs. Defendants also contended that the arbitrator's opinion was not "reasoned" in accordance with the parties' arbitration agreement because it lacked detailed explanations for the arbitrator's findings. The trial court denied the motion for the reasons plaintiffs had set forth in their response brief.

On appeal, defendants claim that the arbitrator failed to prepare a written decision containing a reasoned opinion specifying the factual and legal basis for the award as required by the arbitration agreement, thereby violating the law. Defendants also maintain that the arbitrator exceeded his authority by failing to base the award on applicable Michigan law.

This Court reviews issues regarding orders to enforce, vacate, or modify an arbitration award de novo. *Cusumano v Velger*, 264 Mich App 234, 235; 690 NW2d 309 (2004).

Statutory arbitration is governed by MCL 600.5001 *et seq.*, and MCR 3.602.¹ MCR 3.602 provides in relevant part:

(J)(1) 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.²

Defendants' primary argument on appeal is that the form of the award did not comply with the parties' agreement, requiring a reasoned opinion that shall specify the factual and legal bases for the award and that shall be based on applicable law as applied to the facts. Our Supreme Court in *Gordon, supra* at 496-497, stated:

[I]t is the parties' contract which defines and limits [the parties'] rights and duties and the arbitration clause or agreement which confers upon the arbitrators their authority to act. Since arbitrators derive their authority from the parties' contract and arbitration agreement, they are bound to act within those terms. Stated otherwise, the parties' contract is the law of the case in this context. . . . Thus, the proper role of the Court here is to examine whether the arbitrators have rendered an award which comports with the terms of the [parties'] contract. Furthermore, error, if any, must be evident from the face of the award and "so

¹ The court rule, MCR 3.602, was implemented pursuant to MCL 600.5021, which provides that "[t]he arbitration shall be conducted in accordance with the rules of the supreme court."

² We note that MCL 600.5025 also provides that "[t]he court may render judgment on the award although the relief given is such that it could not or would not be granted by a court of law or equity in an ordinary civil action."

material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise.” [Citations omitted.]³

As plaintiffs note in their brief on appeal, the phrase “reasoned opinion” is not defined in the parties’ arbitration agreement. We conclude that the arbitrator’s opinion, as reflected in our summarization of the opinion above, certainly qualified as “reasoned.” The arbitrator’s rationale in support of the award is clear, and while defendants may not agree with the findings, a claim that an arbitrator made factual errors is beyond the scope of appellate review. *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999). Moreover, the arbitrator’s opinion sufficiently specified the factual and legal bases for the award. Defendants argue that the arbitrator failed to view and inspect the home as they had requested; however, the arbitration agreement did not require a “view,” and evidence regarding defects can, and is often, established by various proofs submitted at a hearing or trial. Defendants also complain about the delay between the hearing and issuance of the arbitrator’s opinion, but this provides no legal ground for reversal. Defendants argue a multitude of other alleged shortcomings relative to the arbitrator’s opinion; however, the copious degree of specificity demanded by defendants is not mandated by the arbitration agreement, nor does the lack of including such specificity provide a basis to vacate the award under MCR 3.602.⁴ Even assuming that the opinion was not as detailed as defendants expected given the terms of the arbitration agreement, any alleged deviation was not so material that the award would have been “substantially otherwise” if details were provided. *Gordon, supra* at 496-497.

Defendants next claim that the arbitrator exceeded his authority by failing to base the award on applicable Michigan law. “Where it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside.” *Lotoszinski v State Farm Mut Automobile Ins Co*, 417 Mich 1, 6; 331 NW2d 467 (1982), quoting *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982).

Defendants first argue that the award does not comply with Michigan contract law because the arbitrator improperly interpreted the parties’ contract by making findings of duties and responsibilities on the part of McDonald that are not contained in the contract at issue. Defendants also contend that the arbitrator erroneously read a time limit for performance into the contract and incorrectly determined that McDonald was required to be on site during construction. These arguments lack merit.

³ “Parties consenting to arbitration pursuant to written agreements consent to arbitrate within the framework of the terms and conditions of such agreements.” *Port Huron Area School Dist v Port Huron Ed Ass’n*, 426 Mich 143, 151; 393 NW2d 811 (1986).

⁴ The agreement simply required the arbitrator to specify the factual and legal basis for the award; it did not require him to set forth every conceivable fact with respect to the case, nor to use a particular format.

Defendants' arguments essentially relate to contract interpretation, and in *Konal, supra* at 74, the panel stated, "Courts may not engage in contract interpretation, which is a question for the arbitrator." Moreover, the reference to a "time limit" in the award had no bearing on the arbitrator's decision. Indeed, the time of the completion of the project is mentioned in such a way that would be beneficial to defendants if it did have an effect on the outcome of the case. The award states that "[t]he house was completed in June, 2002, *within the required completion time.*" (Emphasis added.) The completion date of the house is only mentioned in connection with the arbitrator's finding that the construction ended on time. Thus, defendants' argument on this point lacks significance. Defendants' complaint that the arbitrator erroneously read a requirement into the contract that the builder be on site during the construction or that he place someone else in charge also lacks merit. While the parties' contract did not contain a provision expressly requiring McDonald to remain on site, the contract did require him to supervise the construction,⁵ which he failed to do in great part, and supervision would strongly suggest presence in order to observe the construction. Reversal is unwarranted.

Defendants also assert that the arbitrator lacked legal authority to award damages for emotional distress. However, the arbitrator found for plaintiffs on their claims that McDonald was negligent in his performance as a licensed residential builder, that he filed vexatious construction liens against their property, which slandered the title, and that he violated the MCPA. Noneconomic damages, including those for mental distress and anguish, are allowable on plaintiffs' claims of negligence and other tortious conduct, so such damages awarded were proper. *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 251 n 32; 531 NW2d 144 (1995). No further inquiry is necessary, although we do note that, as indicated above, "[t]he 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).

Defendants next contend that the arbitrator ignored the law requiring a party to mitigate or minimize damages; however, the actual substance of the argument is that the arbitrator erred in either failing to deduct \$35,000 in alleged unpaid builder's fees from the award or failing to award defendants \$35,000 on their claim for unpaid builder's fees. Defendants maintain that this failure was contrary to Michigan contract law and resulted in a windfall to plaintiffs. We reject defendants' argument. Under the construction contract, McDonald was to be paid \$50,000 in builder's or supervision fees, and the arbitrator accurately found that he abandoned the project and failed to comply with the supervision requirement, leaving plaintiffs to complete the project. Yet defendants now insist that McDonald should be awarded or credited \$35,000 for the unpaid balance of supervision fees that was never earned. There is no Michigan authority relative to contract law supporting such an absurd demand. Contrary to defendants' argument, this is not a situation in which a party contracted with a builder to construct a home, the construction was completed but with defects, the home purchaser failed to pay the full contract price for the

⁵ The contract provided, "Builder shall complete the house in a good and workmanlike manner and in accordance with the plans and specifications attached hereto and made a part hereof." This language necessarily required McDonald, as the builder, to supervise the building project in order to comply with the mandate that he have the project completed in a workmanlike manner and in accordance with specifications.

completed home, the home purchaser was awarded damages for defects, and the builder was not awarded the balance of the unpaid contract price for completed, but defective work, leaving the home purchaser with a windfall. Rather, here, McDonald did not perform as required by the contract when he entirely failed to supervise the project after December 2001, and thus he was not entitled to fees for the unperformed work. There was no windfall to plaintiffs as they took over supervision of the construction project. To rule otherwise would be to make plaintiffs pay defendants for work that plaintiffs completed. Even if one were to assume that unjust enrichment or quantum meruit principles could be contemplated, the trial court summarily dismissed those claims, and that ruling has not been appealed. Michigan law was not violated.

Defendants also argue that damages cannot be speculative under Michigan law, yet the arbitrator awarded speculative damages with respect to “the loss in value resulting from non-repairable defects.” There is no basis to find that the damages were speculative, and the thrust of defendants’ argument on this issue is that the arbitrator’s findings were insufficient, which argument we have already rejected.

Finally, defendants challenge the award of attorney fees because the arbitrator allegedly did not properly apply the MCPA, the CLA, and MCL 565.108, which governs slander of title. Defendants also argue that with regard to case evaluation sanctions, which also were cited in support of the attorney fee award, there was no apportionment of the fees as between pre- and post-evaluation fees. We find that under MCL 565.108, MCL 445.911(2) of the MCPA, MCL 570.1118(2) of the CLA, and MCR 2.403(O), the arbitrator properly assessed attorney fees and costs against defendants, especially given the facts of this case.

Finally, plaintiffs present a request for appellate attorney fees under the various provisions relied on below by plaintiffs and the arbitrator. Appellate attorney fees are recoverable under both the CLA and the MCPA for violations of the acts. *LaVene v Winnebago Industries*, 266 Mich App 470, 477; 702 NW2d 652 (2005); *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 374-375; 652 NW2d 474 (2002). Accordingly, we remand for entry of an award of plaintiffs’ actual and reasonable appellate attorney fees.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter