

STATE OF MICHIGAN
COURT OF APPEALS

HERMAN J. ANDERSON, PLLC,

Plaintiff-Appellee,

v

CHRIST LIBERTY MINISTRY, d/b/a CHRIST
LIBERTY MINISTRY CHILD CARE CENTER,
HERMAN THOMPSON and TONI THOMPSON,

Defendants-Appellants.

UNPUBLISHED

March 14, 2013

No. 307931

Wayne Circuit Court

LC No. 11-005816-CK

Before: TALBOT, P.J., and DONOFRIO and SERVITTO, JJ.

PER CURIAM.

In this dispute involving attorney fees, Christ Liberty Ministry, d/b/a Christ Liberty Ministry Child Care Center (“Christ Liberty”), Herman Thompson and Toni Thompson appeal by leave granted the trial court’s December 15, 2011, order vacating the October 19, 2011, arbitration award of no cause of action in favor of Christ Liberty and the Thompsons. We reverse and remand to the trial court for proceedings consistent with this opinion.

On August 26, 2009, Herman J. Anderson, PLLC (“Anderson”) and Toni Thompson executed a retainer agreement for litigation related to Denesha Hill and the child day care center license revocation proceedings against Christ Liberty Ministry Child Care. The agreement indicated that there was a \$1,500 non-refundable retainer fee. Additionally, Anderson charged \$175 an hour for “non-court support services” and \$250 an hour for “court related legal services.” Thompson agreed to pay Anderson \$500 per month on the first day of each month beginning October 1, 2009, during the pendency of the agreement. Anderson agreed that beginning on October 1, 2009, and on the first day of the month thereafter, it would mail or electronically deliver a “Statement for Services Rendered” to Christ Liberty. The agreement additionally stated that:

The amount of the attorney fees due as set forth on the Statement for Services Rendered shall be conclusive as to the amount owed the ATTORNEY by the CLIENT, if the CLIENT does not on or before the 9th day following the receipt of the Statement for Services Rendered, mail or deliver electronically, a statement disputing the billing, identifying by date and time expended, each disputing services and/or cost generating activity.

If the ATTORNEY and the CLIENT are unable to resolve the fee dispute, the fee dispute shall be resolved by Arbitration in the manner hereafter provided.

Regarding arbitration, the retainer agreement noted that “[t]he arbitrator shall have no authority to change any provision of this Agreement. The arbitrator’s sole authority shall be to interpret or apply the provisions of this Agreement. The decision of the arbitrator shall be final and binding.”

On May 16, 2011, Anderson filed a complaint and a motion to compel arbitration against Christ Liberty and the Thompsons for their alleged failure to pay \$39,075.42 in legal fees. Retired Wayne County Circuit Judge, the Honorable William J. Giovan was appointed as the arbitrator on July 1, 2011.

Arbitration of the matter took place on September 26, 2011, and the parties stipulated that the arbitrator’s decision would be binding. Anderson requested in a motion in limine that the arbitrator exclude any evidence presented by Christ Liberty and the Thompsons to support their claim of double, excessive, or improper billing because the evidence was allegedly time-barred based on their failure to timely challenge the amount owed in the final “Statement for Services Rendered” or by seeking arbitration of the amount owed. The arbitrator acknowledged the late submission of the motion and Christ Liberty and the Thompsons’ inability to respond. The arbitrator indicated that it would permit the submission of a response and take the motion under advisement. Anderson then testified regarding the events leading up to and including the execution of the retainer agreement. Christ Liberty and the Thompsons then moved for dismissal and alleged that Anderson failed to provide evidence of all of the elements of its breach of contract claim. The arbitrator took the motion to dismiss under advisement and concluded the arbitration.

The arbitrator’s opinion and award of no cause of action was issued on October 19, 2011. The arbitrator indicated that to demonstrate breach of contract, Anderson had the burden of proving “(1) the existence of the contract, (2) that [Anderson] performed under the contract, (3) that [Christ Liberty and the Thompsons] breached the contract, and (3) [sic] that [Anderson] suffered damages as a result of the breach.” The arbitrator found that because Anderson only presented evidence of the existence of a contract, Christ Liberty and the Thompsons’ motion to dismiss was granted.

Christ Liberty and the Thompsons moved to confirm the arbitration award. Anderson then moved to vacate the arbitration award. Anderson claimed that the arbitrator erred when he exceeded his powers and refused to hear evidence material to the controversy. The hearing on both motions took place on December 9, 2011. The trial court agreed with Anderson’s assertion that arbitration is very informal, that evidence does not have to be formally entered, and it was not Anderson’s responsibility to prove that there was a breach of contract. Accordingly, the trial court vacated the arbitration award.

On appeal, Christ Liberty and the Thompsons argue that the trial court erred when it vacated the October 19, 2011, arbitration award. We agree. “Generally, issues regarding an order to enforce, vacate, or modify an arbitration award are reviewed de novo.”¹

An arbitration award shall be vacated if “the arbitrator exceeded his . . . powers[.]” “refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party’s rights.”²

[W]here 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 of 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.³

“[A]rbitrators run an especially high risk of being found to have ‘exceeded their powers’” “by ignoring express and unambiguous contract terms[.]”⁴

Judicial review of an arbitrator’s decision is narrowly circumscribed. A court may not review an arbitrator’s factual findings or decision on the merits. Likewise, a reviewing court cannot engage in contract interpretation, which is an issue for the arbitrator to determine. Nor may a court substitute its judgment for that of the arbitrator.⁵

As a result, courts are hesitant to vacate an arbitration award “when the arbitration agreement does not expressly limit the arbitrators’ power in some way.”⁶ Accordingly, “‘as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,’ a court may not overturn the decision even if convinced that the arbitrator committed a serious error.”⁷

Anderson claims that the arbitrator exceeded his powers when it was required to prove that a breach of contract occurred because that was not the issue before the arbitrator. Anderson asserts that the total amount of attorney fees owed by Christ Liberty and the Thompsons was

¹ *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004).

² MCR 3.602(J)(2)(c), (d).

³ *Belen v Allstate Ins Co*, 173 Mich App 641, 644-645; 434 NW2d 203 (1988) (citation and quotations omitted).

⁴ *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982).

⁵ *City of Ann Arbor v American Federation of State, Co, & Muni Employees*, 284 Mich App 126, 144; 771 NW2d 843 (2009) (citations omitted).

⁶ *Id.* (citation and quotations omitted).

⁷ *Id.* at 144-145 (citation and internal quotation marks omitted).

conclusively established by their failure to timely challenge the final “Statement for Services Rendered” or seek arbitration of the amount owed. Therefore, the only issue before the arbitrator was whether Christ Liberty and the Thompsons were required pay installments of \$500 a month or the total amount due in a lump sum.

Anderson sought arbitration regarding Christ Liberty and the Thompsons’ failure to pay fees, which is a breach of the retainer agreement. “A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach.”⁸ Therefore, accepting Anderson’s assertion regarding the purpose of the arbitration as true, to obtain the requested relief, Anderson was required to prove that Christ Liberty and the Thompsons breached the retainer agreement by failing to pay. Because the arbitrator had the authority to “interpret or apply” the provisions of the retainer agreement, the arbitrator did not exceed his authority when he required proof of breach of contract. Additionally, the arbitrator found that Anderson only presented evidence of the existence of a contract. Nonetheless, the trial court reversed. Because “[a] court may not review an arbitrator’s factual findings”⁹ and there was no error on the face of the award,¹⁰ reversal is warranted.

Anderson also contends that the arbitrator committed reversible error when he refused to hear evidence material to the controversy. Specifically, Anderson asserts that the arbitrator refused to consider the evidence contained in its motion in limine which allegedly demonstrated that the amount that Christ Liberty and the Thompsons owed in attorney fees was conclusively established. First, the record does not support that the arbitrator refused to hear evidence. Due to the late submission of Anderson’s motion in limine, Christ Liberty and the Thompsons were not permitted to respond to the motion before the arbitration was held. As a result, the arbitrator took the motion under submission. Although the arbitrator did not make formal findings on the motion, there is nothing in the record to suggest that the motion in limine was not considered by the arbitrator and found to be without merit.¹¹

Second, the arbitrator found that Anderson failed to prove the requisite elements of breach of contract other than the existence of a contract. Assuming without deciding that the amount allegedly owed to Anderson was uncontroverted, such evidence does not satisfy the remaining elements of Anderson’s breach of contract claim by proving that Christ Liberty and the Thompsons breached the retainer agreement by failing to pay. As such, Anderson’s contention that the arbitrator failed to hear evidence material to the controversy lacks merit.¹² Moreover, we are not persuaded by Anderson’s assertion that the arbitrator conducted the

⁸ *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012).

⁹ *American Federation of State, Co, & Muni Employees*, 284 Mich App at 144.

¹⁰ *Belen*, 173 Mich App at 644-645.

¹¹ *Id.*

¹² MCR 3.602(J)(2)(d).

hearing to substantially prejudice its rights as it is not supported by the record evidence.¹³ Thus, the trial court erred when it reversed the arbitration award.

Reversed and remanded to the trial court for confirmation of the October 19, 2011, arbitration award. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto

¹³ *Belen*, 173 Mich App at 644-645.