

STATE OF MICHIGAN
COURT OF APPEALS

DIETRICH R. BERGMANN LIVING TRUST,
Dated June 6, 1988, DIETRICH R. BERGMANN,
Trustee,

UNPUBLISHED
September 26, 2006

Plaintiff/Counter-Defendant-
Appellee,

v

PILOT CORPORATION,

Defendant/Counter-Plaintiff-
Appellant.

No. 260665
Monroe Circuit Court
LC No. 91-017847-CK

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court order vacating an arbitration award, on second remand, and remanding the matter to a new arbitration panel for further proceedings. We vacate the circuit court order and remand for entry of an order affirming the arbitration award.

I. FACTS

In 1988, Dietrich R. Bergmann, Trustee, was the owner of real property in Monroe, Michigan. Plaintiff entered into a lease agreement with defendant, a Tennessee corporation involved in the design and construction of gasoline stations and convenience stores, to develop the property for the operation of a travel service center. The lease agreement provides for an initial 20-year term, with an option for a 30- year renewal. Defendant spent approximately \$3,000,000 to develop the site. During the building process, plaintiff initiated two lawsuits. Plaintiff brought the first lawsuit against a subcontractor of defendant for removal of dirt from the site and the second lawsuit against Detroit Edison in regard to Edison's demand for an easement on the property. This litigation by the plaintiff caused the opening of the service center to be delayed three months, until March 1990. Within six months of the opening of the service center, plaintiff served upon defendant 13 separate notices of default regarding the lease agreement and plaintiff's intention to terminate the lease. In accordance with ¶ 16 of the lease agreement, any disputes are to be resolved by a panel of three arbitrators. Defendant filed a claim for arbitration, seeking a determination that (a) no lease defaults occurred or existed, and (b) that plaintiff had breached obligations to defendant under the lease agreement, entitling

defendant to money damages. Plaintiff counterclaimed, citing 13 alleged separate defaults and seeking a forfeiture of the lease, as well as money damages.

The initial arbitration was conducted over a four-month period and involved 12 hearing dates. In June 1991, the arbitrators issued an award, determining: plaintiff shall pay defendant \$18,906 on the claim for costs relating to the earth removal (or the “dirt issue”); plaintiff shall pay defendant \$5,985 on its claim seeking return of the amount deposited plus income thereon with plaintiff; defendant shall undertake alternative risk reduction measures if and when such measures are specified by plaintiff, provided that the annual budget for such expenses does not exceed \$2,500.00, adjusted as required by the provisions of Section 10(3) of the Lease Agreement between the parties; and defendant shall pay plaintiff \$500 on the claim relating to commercial general liability insurance. In addition, the award denied any remaining claims submitted by either plaintiff or defendant and specifically denied plaintiff’s request for forfeiture of the lease.

II. INTERPRETATION OF LEASE

Plaintiff contends that the arbitration award on second remand should be vacated because the arbitration panel exceeded its authority by committing an error of law in interpreting the lease agreement between the parties. Plaintiff concurs with the trial court’s determination that the arbitration award is inconsistent because it implies the occurrence of contractual defaults by defendant while simultaneously denying plaintiff’s entitlement to enforcement costs, allegedly in contravention of language contained within the lease agreement.

A. Standard of Review

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).

B. Analysis

The ability of this Court to review an arbitration award is circumscribed. *Dohanyos v Detrex Corp*, 217 Mich App 171, 176-177; 550 NW2d 608 (1996). A reviewing court may confirm an award, vacate an award if it was obtained through duress, fraud, or other undue means, or modify an award to correct errors apparent on the face of the award. *Krist v Krist*, 246 Mich App 59, 67; 631 NW2d 53 (2001). A court may vacate an arbitration award: (1) if the award was procured by fraud, corruption, or other undue means; (2) if there was evident partiality, misconduct or corruption on the part of an arbitrator; (3) if the arbitrator exceeded his or her powers; or (4) if the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear material evidence, or otherwise conducted the hearing in a manner that resulted in substantial prejudice to a party. MCR 3.602(J)(1).

“Arbitrators derive their authority to act from the parties arbitration agreement.” *Krist, supra*, p 62. An arbitrator is determined to have exceeded the scope of his authority when he acts beyond the material terms of the contract or in contravention of controlling principles of law. *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). When presented with allegations that an arbitrator has exceeded his authority, “a reviewing court’s ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the

terms of the contract of submission, or such documentation as the parties agree will constitute the award.” *Id.* at 428-49. “[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 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.” *Id.* at 443 (citation omitted). Hence, an allegation that an arbitrator has exceeded his authority must be carefully evaluated in order to assure that the claim is not merely a ruse to induce a court to review the merits of an arbitrator’s decision. Stated in another manner, courts may not substitute their judgment for that of the arbitrator. *Gordon Sel-Way, Inc v Spence Bros Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991).

Importantly, courts cannot upset awards for reasons going to the merits of the claim, *Gordon Sel-Way, Inc, supra*, p 500, engage in contract interpretation, which is a question for the arbitrator, *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999), or review claims that the arbitrator erred in their factual findings or determinations. *Id.* at 75. Instead, “[I]t is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable” *DAIE, supra*, p 429.

In its order for the initial remand of the arbitrators’ award, the trial court indicated only “two instances in which the Court found the award to be inconsistent with the express terms of the lease.” The first instance involved the denial of plaintiff’s request for attorney and arbitration fees and cited to ¶ 15(m) of the lease agreement. The trial court determined:

This paragraph states in clear and unambiguous language that if Pilot defaulted on some obligation under the lease, Pilot is liable for Bergmann’s reasonable enforcement costs. This presents an inconsistency with the award, because it is obvious from the face of the award that Pilot did, in one respect or another, default under the lease.

The trial court based its determination that defendant had defaulted by interpreting the arbitration award to have “granted Bergmann’s claim concerning Pilot’s failure to maintain general liability insurance” and the requirement within the award that defendant “undertake alternative risk reduction measures in conformity with the lease.”

The second inconsistency referenced by the trial court between the award and the lease agreement concerned ¶ 7 of the contract. Noting that the applicability of ¶ 7, pertaining to time periods for cure of defaults, was “dependent upon a question of fact,” the trial court determined the necessity of the arbitrators to provide specific rulings regarding whether defendant had cured any alleged defaults within the requisite time periods. The trial court directed the panel to address three specific issues:

- (1) Determine what enforcement costs plaintiff was entitled to for defaults committed by defendant.
- (2) Determine whether any defaults were cured within the requisite 15 or 30-day time period of ¶ 7 of the lease agreement.

- (3) Address plaintiff's right to terminate the lease agreement if any of defendant's alleged defaults was not cured within the required time periods.

On remand, the arbitrators responded by clarifying in extensive detail their rulings on each of the alleged defaults. The arbitration panel corrected the trial court's interpretation that it had determined defendant to be in default. Rather, the panel indicated that it had "denied all of Bergmann's other claims not previously disposed of by the arbitration award as there were no defaults on the part of Pilot." In reference to the trial court's assertion that the arbitration award had indicated defendant's default on its obligation to maintain insurance, the arbitration panel explained that the monetary award to plaintiff was merely a reimbursement for an insurance binder purchased because of defendant's delay in providing verification of insurance coverage, but not because of any breach of a contractual duty.

In reference to the trial court's interpretation that the award had determined defendant to be in default of ¶ 10(3), regarding pollution and environmental impairment liability insurance, the panel reviewed the language of the paragraph and history on this issue. Noting that plaintiff served defendant with a default notice "specifying a cure deadline," and defendant's compliance within the required timeframe, the panel emphasized that "Bergmann's claim in the arbitration proceedings was not that Pilot had defaulted with respect to P&EI Liability Insurance," but that it merely sought costs incurred before issuance of the default notice. The arbitration panel agreed with defendant regarding interpretation of this contract paragraph to require only budgeting of funds for risk reduction for "measures specified by Bergmann." The panel noted, because plaintiff had failed to specify any such measures, that it required it to refund the deposit to defendant and denied the request for attorney fees. The panel opined that plaintiff's claim should fail because, in accordance with ¶ 15(m), defendant timely responded to plaintiff's demand, precluding entitlement "to enforcement costs with respect to any default that is timely cured."

The panel proceeded to review each claim determining that defendant was either not in default under the lease or that the alleged default had been "timely cured" by defendant. The arbitration panel specifically addressed its determination to deny plaintiff's requests for enforcement costs due to either an absence of breach by defendant, or based on plaintiff's failure to claim costs, or provide sufficient evidence of costs incurred, for the alleged breach. The panel addressed the issue of forfeiture, determining that, "Inasmuch as we found Pilot did not fail to perform any provision of lease, our Award denied Bergmann's claim for forfeiture."

The inquiry in this unnecessarily protracted litigation should have ended here.

[A] trial court may not hunt for errors in an arbitrator's explanation of how it determined who is liable under the arbitrated contract, and who owes what damages to whom. Without the authority to modify or vacate a facially valid award at will, MCR 3.602(J) and (K), the trial court erred when it ordered an expansion of the record rather than reviewing the award provided. [*Saveski v Tiseo Architects*, 261 Mich App 553, 558; 682 NW2d 542 (2004).]

Instead, the trial court proceeded to reject the arbitration award, finding the arbitrators' determination to be "unconscionable" and contrary to the trial court's interpretation of the lease agreement. The trial court, in its determination of errors by the panel, required an interpretation

of the parties' agreement, which was a matter exclusively within the purview of the arbitration panel and was dependent on findings of fact. *Konal, supra*, p 74. While an arbitration award may be vacated where there exists a manifest disregard of the parties' agreement "totally unsupported by principles of contract construction," it is recognized that:

[I]f the arbitrator's interpretation is in any rational way derived from the . . . agreement, the arbitration award will not be disturbed. . . An arbitration award will not be vacated just because the court believes its interpretation of the agreement is better than that of the arbitrator. [*United Paperworkers Int'l Union v Misco, Inc*, 484 US 29, 38;108 S Ct 364; 98 L Ed 2d 286 (1987).]

The panel did not interject new terms into the lease agreement. The interpretation by the panel was derived solely from the language of the contract. The interpretation of the agreement by the panel was in no way "totally unsupported by principles of contract construction." Instead, both interpretations advanced regarding the separate or conjoint readings of ¶ 7 and ¶ 15(m) were plausible and based solely on the contract language. It is irrelevant whether this Court or the trial court would consider one interpretation superior to the other. *Michigan State Employees Ass'n v Dep't of Mental Health*, 178 Mich App 581, 584; 444 NW2d 207 (1989).

Determination of the referenced issues were within the scope of the arbitration panel's authority because the lease agreement conferred authority on the arbitrators to resolve disputes arising under the contract. *Brucker v McKinlay Transport, Inc*, 454 Mich 8, 17-18; 557 NW2d 536 (1997). The proper role for the trial court was to examine whether the panel rendered an award that was consistent with the terms of the contract. *Gordon Sel-Way, Inc, supra*, p 15. The arbitrators did not exceed the scope of their authority or act beyond the material terms of the contract from which their authority was derived. Instead, the circuit court exceeded the scope of permissible review by addressing whether the interpretation of the lease agreement by the arbitration panel was right or wrong. Thus, the circuit court erred in failing to affirm the arbitration award.

Based on our ruling, any issue regarding remand of this matter to an alternative panel of arbitrators is rendered moot. *Detroit Edison Co v Public Service Comm*, 264 Mich App 462, 474; 691 NW2d 61 (2004).

We vacate the order of the trial court and remand for entry of an order affirming the arbitration award. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Bill Schuette