

STATE OF MICHIGAN
COURT OF APPEALS

HERITAGE LEASING COMPANY, L.L.C.,

Plaintiff-Appellee,

v

JOY ROAD HOLDINGS, L.L.C.,

Defendant-Appellant.

UNPUBLISHED

May 1, 2007

No. 273864

Wayne Circuit Court

LC No. 06-613575-CZ

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from a circuit court judgment in this action to enforce an arbitration award concerning the value of commercial real estate owned by defendant. The trial court rejected defendant's argument that the arbitrator/appraiser exceeded his authority. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court erred in granting summary disposition to plaintiff and confirming the appraisal as an arbitration award because the arbitrator/appraiser violated the terms of the agreement and exceeded the scope of his powers.

This Court reviews de novo a trial court's decision to enforce, vacate, or modify an arbitration award. *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). This Court also reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Pursuant to MCR 3.602(J)(1)(c), an arbitration award may be vacated if the arbitrator exceeded granted powers. *Dohanyos v Detrex Corp*, 217 Mich App 171, 174-175; 550 NW2d 608 (1996). "[A]rbitrators can fairly be said to exceed their power when they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982).

[A]n allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators' decision. Stated otherwise, courts may not substitute their judgment for that of the arbitrators and hence are

reluctant to vacate or modify an award when the arbitration agreement does not expressly limit the arbitrators' power in some way. [*Gordon Sel-Way, Inc, supra*, p 497 (citations omitted).]

Claims that an arbitrator erred in his factual findings are beyond the scope of appellate review. *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999).

Plaintiff, Heritage Leasing Company, owns a membership interest in defendant, Joy Road Holdings, LLC, which is in the business of owning commercial real estate. Defendant's operating agreement set forth the parties' rights and obligations, including the obligation that plaintiff sell its interest back to defendant upon the occurrence of certain events. The parties agree that the termination of the employment of William Langhorst, Heritage's sole owner, on November 15, 2004, triggered plaintiff's obligation to sell, and defendant's obligation to repurchase, plaintiff's interest.

With respect to the determination of price, the operating agreement provided the following method to be used in the event the parties were unable to agree on the market value:

If the Member and the Company are unable to agree upon the market value of the Property and if within twelve (12) months of the Termination Date the Property has been appraised by a real estate appraiser pursuant to this Section 8.6, then the value determined by such appraiser shall be the market value. Otherwise, the Member and the Company shall share the cost, on an equal basis, of a mutually acceptable real estate appraiser who [sic] determination will be final and binding, and pursuant to MCLA Section 600.5001, the parties agree that a judgment of any Michigan circuit court may be rendered upon determination of the appraiser.

The arbitrator/appraiser conducted an appraisal in January 2006, and determined that the market value of the two properties involved, as of November 1, 2004, was \$11,230,000 for the Joy Road property and \$3,970,000 for the Decatur Road property.

According to defendant, the arbitrator exceeded the scope of the parties' agreement by considering a lease that began in January 2005. Defendant argues that the lease was not relevant to the property value as of November 2004. Defendant compares this case to *Stowe v Mut Home Builders Corp*, 252 Mich 492; 233 NW 391 (1930). In that case, an arbitration agreement to determine the amount due on a construction contract specified that arbitrators were to determine the amount owing based on "building costs as of the date of construction, together with the company's invoices, labor, prices, etc., as shown by the records of the receiver and as shown by the fair market value for such labor and materials as of the date of building operations." Instead of determining the amount as set forth in the agreement, each arbitrator multiplied the cubical contents of the house by an arbitrary factor per cubic foot, and the resulting amounts were averaged. The circuit court confirmed the award, but the Supreme Court reversed, stating, "It is clear in this case the thing submitted to arbitration was the amount due on a written contract. This has not been determined." *Id.*, p 497.

The present case is distinguishable from *Stowe*. The provision in the parties' operating agreement that governed the determination of the property's market value did not specify a

particular methodology, but only that “the Member and the Company shall share the cost, on an equal basis, of a mutually acceptable real estate appraiser who [sic] determination will be final and binding, and pursuant to MCLA Section 600.5001, the parties agree that a judgment of any Michigan circuit court may be rendered upon determination of the appraiser.”

The parties agree that pursuant to MCL 339.2605(1), the appraiser was required to follow the Uniform Standards of Professional Appraisal Practice (USPAP), but they dispute whether consideration of the lease was consistent with those standards.

Assuming, arguendo, that an alleged error in the application of those standards is within the scope of appellate review of an arbitration award, defendant has not shown that the consideration of the lease violated the USPAP. Defendant relies on the following excerpt of Statement on Appraisal Standards No. 3, which addresses retrospective value opinions.

A retrospective appraisal is complicated by the fact that the appraiser already knows what occurred in the market after the effective date of the appraisal. *Data subsequent to the effective date may be considered in developing a retrospective value as a confirmation of trends that would reasonably be considered by a buyer or seller as of that date.* The appraiser should determine a logical cut-off because at some point distant from the effective date, the subsequent data will not reflect the relevant market. This is a difficult determination to make. Studying the market conditions as of the date of the appraisal assists the appraiser in judging where he or she should make this cut-off. In the absence of evidence in the market that data subsequent to the effective date were consistent with and confirmed market expectations as of the effective date, the effective date should be used as the cut-off date for the data considered by the appraiser.

This Statement indicates that the consideration of information concerning conditions after the effective date of the appraisal is not prohibited in all instances. Whether it is appropriate in particular circumstances depends on the appraiser’s evaluation of market conditions, a matter that is not within the scope of “legal error” that is subject to judicial review.

Defendant contends that the circuit court erred in confirming the appraisal because it failed to indicate any basis for selecting the income value approach rather than the sales approach to valuation. However, this argument is an improper attempt to obtain review of the merits of the arbitrator’s decision. *Gordon Sel-Way, Inc, supra*, p 497.

Defendant also claims that the circuit court “placed undue importance” on a September 2004 letter of intent in determining that the consideration of the lease was permissible. Our analysis whether to confirm the arbitration award does not depend on consideration of the letter, so any error by the trial court in considering it was harmless.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello