

STATE OF MICHIGAN  
COURT OF APPEALS

---

JOSEPH PUTRUSS,

Plaintiff-Appellant,

v

MARY A. & EDWARD P. O'HALLORAN  
TRUST, and EDWARD P. O'HALLORAN  
TRUST,

Defendants-Appellees.

---

UNPUBLISHED

August 5, 2010

No. 291160

Oakland Circuit Court

LC No. 2008-095241-CH

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order denying his motion to vacate an arbitration award of \$15,000 in attorney fees and costs entered against him. We affirm.

Plaintiff entered into a purchase agreement with the trustees of the defendant trusts for a parcel of property, making a \$15,000 deposit of earnest money to a broker. The purchase agreement contained a clause wherein the parties agreed that all disputes arising from the transaction would be submitted to arbitration. Plaintiff had 60 days to perform due diligence on the property, and within that time period, he determined that the property was not suitable for construction. Plaintiff refused to close on the property and demanded return of his earnest money. One of the defendant trusts initiated an arbitration proceeding, and the arbitrator ultimately ruled that plaintiff properly terminated the purchase agreement and was entitled to return of the earnest money. However, the arbitrator awarded defendants \$15,000 in attorney fees and costs associated with the arbitration proceeding after finding that plaintiff raised a number of frivolous arguments and motions during the proceeding. Plaintiff filed a complaint in the circuit court and moved to vacate or modify the arbitrator's award; the court denied plaintiff's motion. On appeal, plaintiff contends that the circuit court erred because the arbitrator acted outside the scope of his authority on several occasions.

"Generally, issues regarding an order to enforce, vacate, or modify an arbitration award are reviewed de novo." *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004). Reviewing courts "'favor awards made by tribunals of the parties' own choosing, and are reluctant to set them aside, and every presumption will be made in favor of their fairness, and the burden of proof is upon the party seeking to set them aside, and the proof must be clear and strong.'" *DAIIE v Gavin*, 416 Mich 407, 437; 331 NW2d 418 (1982), quoting *Brush v Fisher*, 70

Mich 469, 473; 38 NW 446 (1888). In the context of an arbitration award, a court will review legal errors that are “evident without scrutiny of intermediate mental indicia. . . .” *Id.* at 429. However, a court will not review an arbitrator’s findings of fact. *Id.* MCR 3.602(J)(2)(c) provides that a reviewing court should vacate an arbitration award if “the arbitrator exceeded his or her powers. . . .” “Arbitrators exceed their powers 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.’” *Saveski*, 261 Mich App at 554, quoting *DAIIE*, 416 Mich at 434.

First, plaintiff argues that the arbitrator exceeded his authority by determining that he had jurisdiction over the dispute. Plaintiff contends that the arbitrator did not have jurisdiction because defendant trusts were not parties to the purchase agreement. Instead, plaintiff asserts that he entered into a contract with trustees Michael O’Halloran and Terrance O’Halloran in their individual capacities. “An arbitration agreement is a contract by which the parties forgo their rights to proceed in civil court in lieu of submitting their dispute to a panel of arbitrators.” *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 577-578; 552 NW2d 181 (1996). The existence of a contract involves a question of law. *Bandit Indus, Inc v Hobbs Int’l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). However, whether an individual acts as an agent or representative of a third party involves a question of fact. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995).

In this case, the arbitrator determined that all of the necessary parties to the agreement were present at the proceeding and found that Michael and Terrance acted solely as representatives of their respective sub-trusts when they signed the purchase agreement with plaintiff. The quintessential issue regarding whether plaintiff contracted with defendant trusts involved a question of fact as to whether Michael and Terrance acted as representatives of the trusts. *Hertz Corp*, 210 Mich App at 246. Because we will not review an arbitrator’s findings of fact, plaintiff’s argument fails. *DAIIE*, 416 Mich at 429.

Second, plaintiff argues that the arbitrator exceeded his authority when he made the ownership of the property an issue in the proceeding contrary to MCL 600.5005, which prohibits submission of a dispute regarding the fee ownership of real estate to arbitration. *McFerren v B & B Investment Group*, 233 Mich App 505, 511; 592 NW2d 782 (1999). In this case, MCL 600.5005 was inapplicable because neither party disputed fee ownership of the property. The arbitrator did not make fee ownership of the property an issue in the proceeding; instead, the arbitrator considered ownership of the property only to determine whether the trusts were proper parties to the proceeding.

Third, plaintiff argues that the arbitrator exceeded his authority when he made rulings in regard to certain third parties who were not part of the proceeding, and others who were not parties to the purchase agreement. During the arbitration, plaintiff moved to add Michael and Terrance, the broker, and two other parties to the proceeding. The arbitrator denied plaintiff’s motions. This was the arbitrator’s only ruling with respect to third parties. “A party is not allowed to assign as error on appeal something which [he] . . . deemed proper [in the lower proceeding] since to do so would permit the party to harbor error as an appellate parachute.” *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001), quoting *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). Because plaintiff acquiesced to the arbitrator ruling on the liabilities of the third parties when he moved to add the parties to the proceeding, he cannot now assert error by the arbitrator. “Error

requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence.” *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

Fourth and finally, plaintiff argues that the arbitrator exceeded his authority when he awarded defendants attorney fees and costs pursuant to the American Arbitration Association’s (AAA) Commercial Arbitration Rules. Plaintiff contends that the arbitration agreement did not authorize the award and that the arbitrator should have applied the Michigan Home Buyer/Seller (MHBS) arbitration rules. We find that the arbitrator did not exceed his authority when he conducted the proceeding in accordance with the AAA Commercial Rules. Here, the parties’ agreement did not specify which rules applied to the proceeding and it did not preclude use of the Commercial Rules. See *Gordon Sel-Way, Inc v Spence Bros*, 438 Mich 488, 496-498; 475 NW2d 704 (1991). Moreover, plaintiff did not object during the initial phases of the proceeding when the arbitrator indicated that the Commercial Rules applied.

Similarly, we also conclude that the arbitrator did not exceed his authority when he awarded defendants \$15,000 in attorney fees and costs. In this case, the parties’ agreement did not preclude the arbitrator from making the award, and, under the Commercial Rules, the arbitrator had authority to make the award. Pursuant to the Commercial Rule R-43(c), an arbitrator “may apportion such fees, expenses, and compensation [associated with the arbitration] among the parties in such amounts as the arbitrator deems appropriate.” Here, the arbitrator deemed it appropriate to assess costs against plaintiff. Pursuant to R-43(d)(ii), “[the] award of the arbitrator may include . . . an award of attorney fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.” In this case, because both parties requested attorney fees, the arbitrator had authority under the rules to award the fees to defendants.

We decline to grant defendants’ request for an award of attorney fees and costs pursuant to MCR 2.625(A)(2); MCL 600.2591; MCR 7.216(C); and MCR 7.219(F) and (I) because we conclude that such an award is not warranted in this case.

We affirm. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ David H. Sawyer  
/s/ Richard A. Bandstra  
/s/ William C. Whitbeck