

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT L ROTY, MCLAREN RENTALS, INC,
and SAMUEL L. MCLAREN,

UNPUBLISHED
August 12, 2014

Plaintiffs-Appellants,

v

QUALITY RENTAL LLC, CLARK HEDLEY,
and EILEEN HEDLEY,

No. 313056
Shiawassee Circuit Court
LC No. 10-001444-CK

Defendants-Appellees.

Before: SAAD, P.J., and OWENS and K. F. KELLY, JJ.

PER CURIAM.

Appellants, Robert L. Roty, McLaren Rentals, Inc. and Samuel L. McLaren, appeal as of right from an order confirming an arbitration award against them and in favor of appellees, Quality Rental LLC, Clark Hedley and Eileen Hedley. We affirm.

I. BASIC FACTS

On May 4, 2007, McLaren Rentals and its sole shareholder, Samuel McLaren, entered into a purchase agreement for the sale of assets with Quality Rental. The agreement also included the goodwill and right to use the name “McLaren Rent-It.” Quality Rental paid \$325,000 of the \$500,000 purchase price and the Hedleys executed a promissory note for the \$175,000 balance. McLaren Rentals then sold and assigned the note to Roty. Clark Hedley later discovered that certain financial statements were false and that several pieces of equipment specifically listed in the purchase agreement had not been delivered. The agreement required mandatory statutory arbitration in the event of a dispute. The Hedleys stopped making payments on the note and demanded arbitration under the purchase agreement. Roty then sued Quality Rental and the Hedleys, seeking to enforce the terms of the promissory note. Roty’s claims were added to the arbitration proceeding. Arbitration took place over a five-day period.¹ The

¹ During the arbitration proceedings, defendants were referred to as “claimants” and plaintiffs were “respondents.”

arbitrator found that plaintiffs breached four separate provisions of the purchase agreement and subsequently issued an award in defendants' favor.²

Plaintiffs filed a motion to vacate the arbitration award, arguing that defendants' action was time barred under the purchase agreement and that the arbitrator exceeded her powers by making several errors in her award. Defendants filed a competing motion, seeking to confirm the award. The trial court rejected all of plaintiffs' arguments, finding that many of plaintiffs' claims of error were not reviewable, and granted defendants' motion to confirm the arbitration award. However, an issue remained on the calculation of damages. The matter was referred back to the arbitrator to determine whether or not the award was greater than the balance on the note or whether the balance was greater than the award. In the meantime, the trial court allowed an auction sale of equipment and property free from liens.

Following the arbitrator's clarification on remand, defendants filed an amended motion for entry of judgment while plaintiffs sought to vacate the arbitrator's clarification. The trial court denied plaintiffs' motion to vacate the clarification and entered a final judgment in defendants' favor. Plaintiffs now appeal as of right, arguing that the trial court erred in confirming the arbitration award where the arbitrator exceeded her powers in a number of ways.

II. STANDARD OF REVIEW

"A trial court's decision to enforce, vacate, or modify an arbitration award is reviewed de novo." *Nordlund & Assoc, Inc v Village Of Hesperia*, 288 Mich App 222, 226; 792 NW 2d 59 (2010). "Whether an arbitrator exceeded his or her authority is also reviewed de novo." *Washington v Washington*, 283 Mich App 667, 672; 770 NW2d 908 (2009).

III. TIMELINESS OF DEFENDANTS' DEMAND FOR ARBITRATION

Plaintiffs first argue that the arbitrator exceeded her powers when she failed to enforce a provision of the purchase agreement, which required that a demand for arbitration be made within 90 days of written notice of breach to the seller. We hold that the trial court did not err in confirming the arbitration award because the arbitrator's decision that the parties' purchase agreement required notice by certified mail was a factual determination interpreting the parties' contract and, therefore, not subject to judicial review.

On April 8, 2008, defendants hand-delivered a letter to plaintiffs, setting forth a variety of issues arising out of the parties' purchase agreement. Subsequent attempts to resolve the issues

² It is important to note that, although the proceedings were fully transcribed, neither attorney sought to admit the arbitration records as evidence in the trial court. This Court, however, granted plaintiffs' motion to expand the record to include the transcripts of the arbitration hearing. *Robert L Roty v Quality Rental LLC*, unpublished order of the Court of Appeals, entered February 25, 2013 (Docket No. 313056). It appears that the order was improvidently granted, as this information was not before the trial court. Therefore, we decline to consider the arbitration transcripts in rendering our opinion.

failed and defendants sent plaintiffs another letter on October 27, 2008. Defendants ultimately demanded arbitration on January 21, 2009. At issue is paragraph 13(U)(iv) of the sales agreement, which required that any claims or causes of action were required to be submitted to arbitration within 90 days after written notice was given.

At arbitration, plaintiffs argued that the April 8th letter triggered the running of the 90-day limitations period. The arbitrator disagreed. She concluded that paragraph 27(C) of the agreement controlled. That provision provided:

Any notices, report or demand required, permitted or desired to be given pursuant to any of the provision of this Agreement shall be in writing and shall be deemed to have been sufficiently given or served for all purposes, if sent by registered or certified mail, return receipt requested, and postage prepaid, with a copy by U.S. mail as follows . .

The arbitrator explained:

To construe the contract as asserted by Respondents would render paragraph 27(C) mere surplusage. Contrary to the claims of Respondent, notice is defined in the Agreement in paragraph 27(C). It consists of a written notice that is mailed by certified or registered mail with return receipt requested. There has been no dispute that such a notice was sent to Respondent in October 2008. The notice was followed by a timely demand for arbitration. Claimants' claims are not barred by the contractual statute of limitations. Under the agreement, the previous notice was not effective as notice of breach or default.

In affirming the arbitrator's decision on this issue, the trial court noted "the arbitrator's interpretation is reasonable based on the language of the contract, and is not contrary to its plain meaning. Therefore, it is not for this Court to deliberate whether the arbitrator's interpretation was erroneous, and there is no basis for finding that the arbitrator exceeded her powers with regard to this issue." We agree.

"The purpose of arbitration is to avoid protracted litigation." *NuVision, Inc v Dunscombe*, 163 Mich App 674, 684; 415 NW2d 234 (1987). Therefore, once an issue is submitted to arbitration, judicial review is limited. *DAIE v Sanford*, 141 Mich App 820, 825; 369 NW2d 239 (1985). Pursuant to MCR 3.602(J)(2)(c), an arbitration award may be vacated if "the arbitrator exceeded his or her powers . . ." Our Supreme Court has held that "arbitrators can fairly be said to exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *DAIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). Where, as here, an arbitration clause is written in comprehensive language to include all claims and disputes, an award is presumed to be within the scope of the arbitrator's powers absent express language to the contrary, including computation of damages. *Gordon Sel-Way, Inc v Spence Bros*, 438 Mich 488, 497-498; 475 NW2d 704 (1991).

Limited judicial review only makes sense because "Michigan law mandates no requirements relative to form or necessity of factual findings or legal reasoning in support of an

award.” *DAIIE v Ayyazian*, 62 Mich App 94, 102; 233 NW2d 200 (1975). In fact, “[t]here is no requirement that a verbatim record be made of private arbitration proceedings, there are no formal requirements of procedure and practice beyond those assuring impartiality, and no findings of fact or conclusions of law are required.” *Gavin*, 416 Mich at 428. Thus, review of an arbitration award is very limited: “Our courts have long been supportive of arbitration agreements and have discouraged efforts to circumvent their objectives. To that end, we have narrowly construed the authority of the judiciary to review arbitration awards. We have held that even if such an award is clearly erroneous on the facts, it is not subject to reversal by the courts.” *Huntington Woods v Ajax Paving Industries, Inc.*, 177 Mich App 351, 356; 441 NW2d 99 (1989), quoting *Lanzo Construction Co v Port Huron*, 88 Mich App 443, 449; 276 NW2d 613 (1979). The *Gavin* Court explained:

Arbitration, by its very nature, restricts meaningful legal review in the traditional sense. As a general observation, courts will be reluctant to modify or vacate an award because of the difficulty or impossibility, without speculation, of determining what caused an arbitrator to rule as he did. The informal and sometimes unorthodox procedures of the arbitration hearings, combined with the absence of a verbatim record and formal findings of fact and conclusions of law, make it virtually impossible to discern the mental path leading to an award. Reviewing courts are usually left without a plainly recognizable basis for finding substantial legal error. *It is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable, such as that involved in these cases.* In many cases the arbitrator’s alleged error will be as equally attributable to alleged “unwarranted” factfinding as to asserted “error of law”. In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and *the arbitrator’s findings of fact are unreviewable.* [*Gavin*, 416 Mich at 429 (emphasis added).]

It is important that an arbitration award not be reviewed under a “clear error” or “great weight” standard. *Gavin*, 416 Mich at 443; *Donegan v Mich Mut Ins Co*, 151 Mich App 540, 549; 391 NW2d 403 (1986).

[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*, 438 Mich at 497.]

Thus, only an error of law will invite judicial intervention. “The character or seriousness of an error of law which will invite judicial action to vacate an arbitration award under the formula we announce today must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise.” *Gavin*, 416 Mich at 443. Simply stated:

The inquiry for the reviewing court is merely whether the award was beyond the contractual authority of the arbitrator. If, in granting the award, the arbitrator did

not disregard the terms of his or her employment and the scope of his or her authority as expressly circumscribed in the contract, judicial review effectively ceases. *Thus, 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.* [*Ann Arbor v AFSCME*, 284 Mich App 126, 144; 771 NW2d 843 (2009) (emphasis added; internal quotation marks and citations omitted).]

On the issue of whether defendants timely demanded arbitration, we note that “the timeliness of the bringing of an arbitration proceeding is a procedural issue to be determined by the arbitrators rather than the courts.” *Iron County v Sundberg, Carlson & Associates, Inc*, 222 Mich App 120, 126; 564 NW2d 78 (1997) quoting *Bennett v Shearson Lehman-American Express, Inc*, 168 Mich App 80, 83; 423 NW2d 911 (1987). The trial court correctly declined to interfere with the exercise of the arbitrator’s discretion. By plaintiffs’ own admission in their appellate brief, their claims involve “errors of law concerning *interpretation* and enforcement of *the contract* documents by the Arbitrator.” Factual determinations, including the interpretation of the parties’ purchase agreement, are for the arbitrator and not subject to judicial review. There is no evidence that the award was beyond the contractual authority of the arbitrator or that the arbitrator was biased in any way. As such, judicial review is precluded.

IV. BREACH OF CONTRACT

Plaintiffs next argue that the arbitrator exceeded her powers in finding four breaches of contract. We hold that the trial court did not err in confirming the arbitration award because the arbitrator’s conclusion that plaintiffs’ breached the parties’ purchase agreement was based on factual determinations interpreting the parties’ contract and, therefore, not subject to judicial review.

A. OVERSTATED RENT INCOME – FALSE INVOICES

The arbitrator specifically found that plaintiffs violated paragraph 13(L) and (N) of the parties’ purchase agreement. On the issue of overstated rent income by the use of false invoices, the arbitrator made the following findings:

The clear testimony at the hearing was that Mr. McLaren directed a reconciliation to reflect his personal use of assets of Rent-It. There was testimony that several items were used at a residential property being worked upon by Mr. McLaren. Claimants could not reasonably expect that rental income to continue once the sale was completed. The business value arrived at by the broker was based in part by the income of the business being sold. The invoices showed was [sic] that there were two customers who rented a Bobcat S220 and a boom lift. These customers were did [sic] not rent these items. Both Laura Walker and Daniel Brown testified in support of this finding. Daniel Brown did not recall receiving rental income pursuant to the invoices. He had not heard of Concannon and was unaware of a business relationship between Rent-It and Cottage Garden. Laura Walker was responsible for posting income figures. She referred to the accounting system for “Sam’s stuff.” The postings did not reflect the usage of the

equipment during the month it was “booked.” She adjusted amounts to reflect the checks received and the invoices generated. The result was inaccurate cash flow statements. Pursuant to the Agreement, Claimants could reasonably rely on Respondents’ statements regarding cash flow.

While it can be argued, and is by Respondents, that the name on the invoice is of no import because money was transferred to McLaren Rent-It, the I [sic] find that Respondents breached Paragraphs 13L and 13N of the Agreement by failing to accurately disclose the rental income of McLaren Rent-It. It is clear that there would be no future income from these customers. A purchaser would be led to believe there were greater revenues for the company than in fact existed. Mr. McLaren would not have incentive to continue to rent the assets of McLaren Rent-It after the sale, and indeed, there is no suggestion that he did continue to rent equipment from Claimants. The record support for this finding is the testimony of Daniel Brown, Laura Walker, and Samuel McLernan [sic].

The trial court rejected plaintiffs’ claim that the arbitrator erred when she found that plaintiffs breached the sales agreement by failing to accurately disclose rental income. The trial court concluded that, contrary to plaintiffs’ assertions, “the arbitrator did not state that Plaintiffs had a duty to redact their financial records. The arbitrator simply found that the invoices were inaccurate and misleading. This is a finding of fact, and as such, is not reviewable by the Court.” The trial court added that provisions of the sales agreement clearly provide that the financial information was accurate and therefore, “there was no need for the arbitrator to read into the contract a duty to redact the financial records.” Contrary to plaintiffs’ arguments, “Defendants do not argue that the inaccurate financial statements affected their profits after closing, but that they relied on the inaccurate financial statements in negotiating the purchase price.”

B. OVERSTATED RENT INCOME – ASSETS USED TO SHOW INCOME BUT NOT INCLUDED IN THE SALE.

On this particular issue, the arbitrator held:

I rule against Claimants on this issue with the exception of the claim regarding the Bobcat S220. Exhibit “A” of the Agreement for Sale of Assets does not include the balance of the equipment to be missing. This equipment was on site at the Cottage Garden project that was personally undertaken by Samuel McLaren and the object of Claimant’s first claim. See testimony of Samuel McLaren of July 14, 2011, which describes the items, their ownership and disposition. While it is clear that these items are not on Exhibit “A,” the Bobcat S220 was on the invoices reflecting personal use by Mr. McLaren and inclusion in calculation of rental income. Together with this testimony, I am persuaded that the Bobcat S220 should have been included in the sale and it is a breach of the Agreement to withhold that item.

The trial court rejected plaintiffs’ claim that the arbitrator erred when she found that the Bobcat S220 should have been included in the sale. The trial court noted that the arbitrator clearly acknowledged that the Bobcat was not on the list of items in Exhibit A of the sales

agreement, but the list was not exhaustive. The trial court concluded that the arbitrator's "ruling was reasonably based on the language of the contract, and it is not for this Court to deliberate whether her interpretation was erroneous."

C. FAILURE TO DELIVER CERTAIN ITEMS

The arbitrator specifically found that plaintiffs failed to deliver a stake truck, a grapple bucket, a chain saw, and a floor nailer. Plaintiffs claimed that Clark Hedley specifically testified that he, in fact, received the grapple bucket. However, the trial court rejected plaintiffs' claim that Clark Hedley admitted he received a grapple bucket at the arbitration hearing. "Mr. McLaren pointed out that the grapple bucket was located in a common area in the rear of the property, to which Mr. Hedley had no access . . . Mr. Hedley did not state that the grapple bucket was delivered. Thus, Mr. Hedley's testimony does not contradict the arbitrator's finding. Furthermore, the Court cannot review the arbitrator's findings of fact."

D. LP GAS SALES

Finally, the arbitrator found that plaintiffs' failure to advise defendants that Davis Cartage, plaintiffs' largest propane customer, had switched to electric forklifts and would no longer need propane gas was a breach of the parties' purchase agreement. The arbitrator concluded:

The combined knowledge of employees and agents can be imputed to a corporation. I find that testimony of Mr. Brown very credible on this issue. He clearly stated that he was told of the change to electric forklifts. That he didn't tell Mr. McLernan [sic] because he was scared to do so is not a burden to be borne by Claimants. Mr. Brown's knowledge is imputed to the corporation and under the terms of the Agreement for Sale of Assets, Respondents had an obligation to disclose this to Claimants.

As previously discussed, an arbitrator's findings of fact and interpretation of a contract are not subject to judicial review. Each of the foregoing issues involves the arbitrator's specific findings following a five-day arbitration hearing. Additionally, the arbitrator necessarily interpreted the parties' sales agreement in making her ultimate award. Therefore, as the trial court aptly concluded on each of these issues, there was no legal error on the face of the award and plaintiffs' claims are not reviewable.

V. DAMAGES

Plaintiffs argue that, in rendering her award, the arbitrator effectively reformed the contract between the parties from a sale of assets to a sale of an ongoing business. We hold that the trial court did not err in confirming the arbitration award because the arbitrator's calculation of damages was based on factual determinations interpreting the parties' contract and, therefore, not subject to judicial review.

The trial court rejected plaintiffs' claim that the arbitrator's measure of damages was inappropriate because she awarded expectation damages instead of reliance damages.

Plaintiffs base their argument on their contention that the underlying contract is merely an agreement for the sale of assets, and not an agreement for the sale of an ongoing business. However, the Court need not address this issue.

As pointed out by Defendants, Plaintiffs' representations and warranties were relied upon by Defendants in negotiating the purchase price. It stands to reason that the value of the assets to Defendants would, to some extent, be based on the rental income they have generated in the past, regardless of whether the assets were sold as part of an ongoing business. Thus, the arbitrator did not exceed her powers by finding that Plaintiffs' breach affected the purchase price of the assets.

The trial court further noted that plaintiffs' claims regarding the actual breakdown of damages would have involved a mixed question of law and fact. The trial court declined to engage in a review of the findings of fact or "engage in scrutiny of the intermediate mental indicia of the arbitrator. These claims of error are not reviewable by the Court."

Again, an arbitrator's findings of fact and interpretation of a contract are not subject to judicial review. The arbitrator calculated damages based on her specific findings following a five-day arbitration hearing. Where, as here, "an arbitration clause is written in broad and comprehensive language, i.e., language including all claims and disputes, the computation of damages for breach of contract is presumed to be included." *Gordon Sel-Way*, 438 Mich at 497. Additionally, the arbitrator necessarily interpreted the parties' sales agreement in making her ultimate award. Therefore, as the trial court aptly concluded, there was no legal error on the face of the award and plaintiffs' claims are not reviewable.

VI. PAROL EVIDENCE

Plaintiffs argue that the arbitrator exceeded her powers in relying upon emails between plaintiffs and their broker, Vendo-Muneris & Co., when these emails were not considered by defendants prior to the sale. We hold that the trial court did not err in confirming the arbitration award because the arbitrator's use of parol evidence was immaterial.

In rendering her opinion, the arbitrator noted "Claimants assert that income from these items was included in the income figures provided to Vendo-Menuris & Co on e-mails between Mr. McLaren and Joseph Langlois of Vendo-Menuris to show the broker's request for an adjustment to income figures after these items were deleted." The trial court rejected plaintiffs' claims that the arbitrator violated the parol evidence rule because the rule did not apply. That is correct.

The parties agreed that "[a]ny claims, causes of action, or demands of whatsoever kind or nature between SELLER or PURCHASER arising out of the Agreement, shall be settled in accordance with the rules, then in effect, adopted by the American Arbitration Association and the Michigan Association of Realtors, . . ." In turn, AAA R-31 provides:

- (a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an

understanding and determination of the dispute. *Conformity to legal rules of evidence shall not be necessary.* . . .

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant. [Emphasis added.]

That the arbitrator would be operating outside of the traditional rules of evidence was clearly contemplated and agreed upon. “Rather than employ the formality required in courts, parties in arbitration are able to shape the parameters and procedures of the proceeding.” *Miller v Miller*, 474 Mich 27, 32; 707 NW2d 341 (2005). The parties did not place a limit on the type of evidence to be submitted. Moreover, the determination of whether to what extent the rules of evidence apply are best left to the arbitrator and are not subject to judicial review. *Bay Co Bldg Authority v Spence Bros*, 140 Mich App 182, 188; 362 NW2d 739 (1984).

VII. EXPERT TESTIMONY

Plaintiffs argue that the arbitrator exceeded her powers by admitting the testimony of defendants’ expert where the expert’s opinion was not based on sufficient facts or data, as required by MRE 702. We hold that the trial court did not err in confirming the arbitration award because MRE 702 did not preclude the arbitrator from hearing and relying upon defendants’ expert’s testimony. Plaintiffs’ claim of error must fail for the same reasons stated in section VI of this opinion.

VIII. LACHES AND MITIGATION OF DAMAGES

Plaintiffs argue that the arbitrator failed to apply the doctrine of laches even though defendants waited approximately 11 months after the purchase agreement was signed before demanding arbitration. Plaintiffs further argue that defendants were obligated to mitigate their damages and were not relieved of their obligation to make payments on the promissory note. We hold that the trial court did not err in confirming the arbitration award because the issues of laches and mitigation of damages were for the arbitrator to decide and not subject to judicial review.

As previously stated, “the timeliness of the bringing of an arbitration proceeding is a procedural issue to be determined by the arbitrators rather than the courts.” *Iron Co*, 222 Mich App at 126. The question of timeliness includes consideration of the doctrine of laches and the decision whether to apply the doctrine of laches was within the arbitrator’s discretion. *Id.*

And, as previously stated, where, as here, “an arbitration clause is written in broad and comprehensive language, i.e., language including all claims and disputes, the computation of damages for breach of contract is presumed to be included.” *Gordon Sel-Way*, 438 Mich at 497.

As set forth at length in Issue I, judicial review of an arbitrator’s award is extremely limited. Plaintiffs’ claims involve matters that are within the arbitrator’s discretion and are not subject to judicial review.

IX. SAMUEL MCLAREN’S PERSONAL LIABILITY

Finally, plaintiffs argue that the arbitrator exceeded her powers when she held Samuel McLaren personally liable under the purchase agreement even though he did not sign the agreement as an individual and only signed in his representative capacity for McLaren Rentals. We hold that the trial court did not err in confirming the arbitration award holding Samuel McLaren personally liable where he failed to timely object to arbitration.

The trial court noted that the issue of whether Samuel McLaren could be held liable was an issue of arbitrability. Samuel McLaren participated in the arbitration proceedings and only raised an objection *after* arbitration was complete. “Therefore, Mr. McLaren cannot now raise this issue for the first time after an unfavorable ruling by the arbitrator.” The trial court relied upon *American Motorists Ins Co v Llanes*, 396 Mich 113; 240 NW2d 203 (1976), which held that a party may not challenge an unfavorable ruling following arbitration without first questioning whether the decision was excluded from arbitration. *Id.* at 114. The Michigan Supreme Court held:

If a party to an arbitration agreement wants to object to the arbitrability of a specific issue, he should do so at the earliest opportunity. He should raise the objection before the issue is submitted for a hearing on its merits, because he may not voluntarily submit an issue to arbitration and then, if he suffers an adverse decision, move to set aside the adverse award on the ground that it was not an arbitrable issue. [*Llanes*, 396 Mich at 114-115, quoting Anno: Participation in Arbitration Proceedings as Waiver of Objections to Arbitrability, 33 ALR 3d 1242,1244,.]

“*Llanes* stands for the proposition that a party may not participate in an arbitration and adopt a ‘wait and see’ posture, complaining for the first time only if the ruling on the issue submitted is unfavorable.” *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99-100; 323 NW2d 1 (1982). Samuel McLaren could not wait until after arbitration to claim that the claims against him were not subject to arbitration.

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly