STATE OF MICHIGAN

COURT OF APPEALS

FLORENCE M. PELC, Individually and as Personal Representative of the ESTATE OF ROGER A. PELC, Deceased,

Plaintiff-Appellant,

v

CHARLES R. PETOSKEY, JR. and PRODUCTION RUBBER PRODUCTS CO., INC.,

Defendants-Appellees.

UNPUBLISHED
June 22, 2001

No. 219618
Macomb Circuit Court
LC No. 96-001107-CK

Before: K. F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Plaintiff Florence Pelc, individually and as personal representative of the estate of her deceased husband, Roger Pelc, appeals as of right from an opinion and order of the Macomb Circuit Court dated April 26, 1999. In that opinion, the court affirmed a February 2, 1999 arbitration award, which determined that defendant Charles Petoskey would pay $1.00 to plaintiff for decedent Roger Pelc's interest in a partnership that existed between Pelc and defendant Petoskey. We affirm.

Decedent Roger Pelc and defendant Charles Petoskey were business partners in two entities: Production Rubber Products Co., Inc., which engaged in manufacturing, and PPP, Co., which owned the land and building used by and leased to Production Rubber. On April 1, 1993, Pelc and Petoskey entered into a partnership agreement, which included a provision regarding the rights of the surviving partner. The pertinent provision states:

> 12. Death. Upon the death of either partner, the surviving partner shall have the right either to purchase the interest of the decedent in the partnership or to terminate and liquidate the partnership business. If the surviving partner elects to purchase the decedent's interest, he shall serve notice in writing of such election, within three months after the death of the decedent, upon the executor or administrator of the decedent, or, if at the time of such election no legal

representative has been appointed, upon any one of the known legal heirs of the decedent at the last-known address of such heir.

Paragraph 13 of the partnership agreement provides that:

> 13. Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach hereof, shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof.

Roger Pelc died on October 22, 1994. Pelc's wife, Florence, plaintiff herein, sought various monies that she claimed were due her under the partnership agreement and other agreements. On February 23, 1996 plaintiff filed a complaint against defendants and alleged, among other things, a breach of fiduciary and other duties owed to the estate and requested an accounting, dissolution, and liquidation of PPP under the Uniform Partnership Act. Defendants argued that these two counts were subject to arbitration under the partnership agreement.

In an opinion and order entered August 6, 1996, the trial court found that Counts II and V of plaintiffs' complaint (the breach of fiduciary duty claim and the request for an accounting) arose out of or were related to the partnership agreement. Thus, pursuant to paragraph 13 of the partnership agreement, the court held that these counts were subject to arbitration and ordered them dismissed without prejudice. On November 12, 1996, the court entered a stipulated order of dismissal in which the parties specifically agreed that the court "shall retain jurisdiction to interpret and enforce that Agreement [the partnership agreement] and any arbitration award relative to Counts II and V of Plaintiffs' Complaint."

Arbitration proceedings were subsequently commenced and on February 4, 1998, the arbitrator issued an interim ruling. The ruling held that defendant Petoskey was not precluded from purchasing Roger Pelc's interest in the partnership, pursuant to the provisions in paragraph 12(a), despite Petoskey having failed to provide written notice of his election to do so within three months of Roger Pelc's death.[1] The arbitrator's ruling is the subject of this appeal.

The arbitrator specifically found plaintiff's argument, that the notice provision was an unfulfilled condition precedent which resulted in defendants losing the right to purchase the partnership interest, to be without merit. The arbitrator noted that conditions precedent are not favored by law unless compelled by the plain language of the contract. The arbitrator cited *Teakle v Moore*, 131 Mich 427; 91 NW 636 (1902), as being analogous to the case at bar. Faced with a similar contractual provision, the Supreme Court in *Teakle* held that the failure to provide required notice did not preclude a claim for compensation by a contractor in that case. *Id*. at 431, 438.

In the present case, the arbitrator found that the initial sentence in paragraph 12 of the

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[1] It was undisputed that Petoskey did not provide written notice to plaintiff of his election to purchase the decedent's partnership interest.

partnership agreement "provides in absolute terms that 'the surviving partner shall have the right' to elect." The arbitrator further held that the following sentence, concerning notice, in no way restricted the right to elect, and that notice was to be given only after the election had been made. The arbitrator also compared the agreement's language with the language from another agreement of the parties where they made notice a condition precedent to the election of an option. The arbitrator concluded that the language of paragraph 12 failed to establish a condition precedent.

On February 2, 1999, plaintiff filed a motion to have the trial court vacate the arbitration award pursuant to MCR 3.602(J)(1)(c), on the basis that "the arbitrator exceeded his or her powers." The court, upon stipulation, entered an order to reinstate and reopen the case. Thereafter, the court determined that the arbitrator was correct in his interim ruling in concluding that the notice provision was not a condition precedent. Specifically, the court stated:

> In the instant matter, the notice provision could only be construed to be a condition subsequent or a dependent condition. The plain language of the provision did not require notice to be provided before the surviving partner could elect to purchase the deceased partner's interest; notice was not to be provided unless and until the surviving partner had made such an election.

The court ultimately affirmed the arbitrator's award.

This Court reviews an arbitration award de novo and will only vacate the award if it finds an error of law which is apparent on the face of the award and is so substantial that, but for the error, the award would have been substantially different. *Collins v Blue Cross & Blue Shield of Michigan*, 228 Mich App 560, 567; 579 NW2d 435 (1998).

First, we find that the trial court erred in attempting, through a stipulated agreement of the parties, to retain jurisdiction to interpret the partnership agreement and the arbitration award. To the degree that it engaged in an independent interpretation of the parties' partnership agreement and analyzed alleged errors of law that were not apparent on the face of the arbitration award, the trial court exceeded the permissible scope of judicial review. However, we agree with the trial court's conclusion that the arbitration award should be affirmed because the arbitrator did not commit an error of law that was apparent on the face of his interim ruling.

In *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 491 n 1; 475 NW2d 704 (1991), a case with a contract provision providing that "judgment may be entered on the arbitration award," the Supreme Court ruled that it fell within the definition of statutory arbitration. Similar to that arbitration clause, paragraph 13 of the instant partnership agreement provides that any controversies or claims arising out of the agreement shall be settled by arbitration in accordance with the American Arbitration Association and that judgment upon the arbitration award may be entered in any court having jurisdiction thereof. The clause falls clearly within the definition of "statutory arbitration" and is governed by the Uniform Arbitration Act, MCL 600.5001 *et seq.* (Act). *Sel-Way, supra* at 495. The Act states that statutory arbitrations are to be conducted in accordance with the rules of the Michigan Supreme Court. *Konal v Forlini*, 235 Mich App 69, 73-74; 596 NW2d 630 (1999). The court rules stipulate that a court may only: (1) confirm the award, (2) vacate the award if obtained through fraud, duress or other

undue means, or (3) modify or correct errors that are apparent on the face of the award. MCR 3.602(I), (J), and (K); *Sel-Way, supra* at 495*; Konal, supra* at 74.

The Supreme Court in *Sel-Way* also noted that the power to vacate, correct, or modify an award is very limited. *Sel-Way, supra* at 495. A statutory arbitration may only be vacated in limited circumstances; for instance, where an arbitrator evidences partiality, refuses to hear material evidence, or exceeds powers. MCR 3.602(J)(1); *Sel-Way, supra* at 495-497. Arbitrators exceed the scope of their authority "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." *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). The Court in *Sel-Way, supra* at 497, cautioned that:

> [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.

The Supreme Court has addressed the appropriate scope of judicial review for circuit courts where a parties' agreement provides for statutory arbitration of disputes arising out of the agreement. See *Brucker v McKinlay Transport, Inc*, 454 Mich 8; 557 NW2d 536 (1997). In *Brucker,* the parties entered into a stock purchase agreement that provided for arbitration if a dispute arose over accounting matters. *Id.* at 10. The provision at issue specifically provided that the decision of the arbitrator would be final and binding but that "[a]ny questions of contract interpretation shall be determined by the Circuit Court . . . ." *Id.* When arbitration proceedings commenced, the parties adopted "rules of arbitration" which stated that the arbitrator could, among other things, submit issues of contract interpretation to the court. *Id.* at 11-12.

In *Brucker*, the Supreme Court agreed with the Court of Appeals' determination in that case and held that the arbitration was statutory arbitration under MCL 600.5001 *et seq*., and further held that the arbitration agreement was invalid because it called for questions of contract interpretation to be decided by the circuit court. *Brucker, supra* at 14-18. The Supreme Court further found that the circuit courts had a limited role in arbitration and that parties could not "reach a private agreement that dictates a role for public institutions" unless that role conforms to the statute and court rules. *Id.* at 17, 18 n 10. More importantly, *Brucker* noted that "only the arbitrator can interpret the contract."[2] *Id.* at 15. While the Supreme Court struck the legally unenforceable provisions from the arbitration agreement, it held that the remaining portions of the agreement were enforceable. *Id.* at 16-19.

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[2] This Court recently reaffirmed that "Courts may not engage in contract interpretation, which is a question for the arbitrator." *Konal, supra* at 74. Applying that principle, this Court in *Konal* determined that the trial court's finding that the arbitration award in that case was ambiguous was "without legal effect because the court had no authority to interpret the award under the applicable court rules." *Id.*

The decision in *Collins, supra,* appears to be consistent with *Brucker*.[3] In *Collins,* the parties had an arbitration agreement which included a provision for limited judicial review of the arbitrator's decision:

> The decision of the arbitrator shall be final and binding; however, that limited judicial review may be obtained in a Michigan federal district court or Michigan circuit court of competent jurisdiction (a) in accordance with the standards for review of arbitration awards as established by law; or (b) on the ground that the arbitrator committed an error of law. [*Collins, supra* at 566-567.]

This Court determined that the contractual judicial review provision was consistent with the statutory provisions and court rules governing statutory arbitration awards. *Id*. at 567. Furthermore, *Collins* held that the trial court complied with the standard of review articulated in *Sel-Way, supra* at 495-497, because the provision at issue provided for no greater review than that allowed by law, notably review to correct material errors of law. *Collins, supra* at 567.

Applying the foregoing to the case at bar, this Court finds that the trial court erred to the extent that it attempted, through a stipulated agreement of the parties, to retain jurisdiction to interpret the partnership agreement and the arbitration award. *Brucker, supra; Sel-Way, supra; Konal, supra.* The court impermissibly attempted to expand the scope of review beyond that permitted by law. Compare *Collins, supra* at 566-567. Nevertheless, any error committed by the trial court in this regard was harmless because the trial court correctly concluded that the notice provision was not a condition precedent.

Plaintiff contends that the notice provision of the parties' agreement was an unfulfilled condition precedent. Furthermore, plaintiff opines that since the fulfillment of the notice provision was a condition precedent to defendant's right of election, defendant can not proceed with his election to purchase decedent's interest in the partnership.

Upon a review of the arbitration award, this Court does not find an error of law that is so substantial that, but for the error, the award would have been substantially different. *Collins, supra* at 567. Rather, the arbitrator in the instant case correctly noted that a condition precedent is not favored by the laws of this state and will not be construed as such unless that conclusion is compelled by the contract language. *Knox v Knox*, 337 Mich 109, 117-118; 59 NW2d 108 (1953); *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999).

> A "condition precedent" is a fact or event that the parties intend must take place before there is a right to performance. A condition precedent is distinguished from a promise in that it creates no right or duty in and of itself, but is merely a limiting or modifying factor. Courts are not inclined to construe stipulations of a contract as conditions precedent unless compelled by the

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[3] *Collins, supra,* was decided subsequent to *Brucker, supra,* but does not reference *Brucker* in its analysis of the extent to which parties may agree to judicial review of an arbitrator's decision.

> language of the contract. [*Mikonczyk, supra* at 350 (citations omitted in original).]

A condition precedent is something that must occur *before* there is a right to performance and thus requires specific contractual language.

The arbitrator in this case determined that the introductory language of the provision at issue did not "compel" a conclusion that the notice requirement was a condition precedent. The arbitrator explained that, pursuant to the initial sentence of paragraph 12, "the surviving partner shall have the right" to elect and that the notice, as provided in the second sentence, did not itself effect or restrict the right to elect. The arbitrator also stated that under "the very terms of paragraph 12, notice is to be given only *after* the election has been made." (Emphasis added).

An examination of the pertinent language of the parties' agreement reveals that the arbitrator is correct. The initial sentence of paragraph 12 states that, "[u]pon the death of either partner, *the surviving partner shall have the right either to purchase* the interest of the decedent in the partnership *or to terminate and liquidate* the partnership business." (Emphasis added). The next sentence then provides that "*[i]f the surviving partner elects* to purchase the decedent's interest, he shall serve notice in writing of such election, within three months after the death of the decedent . . ." (Emphasis added). Thus, notice is not required until *after* the election has been made. As noted by the arbitrator, since notice is only required after the election has been made, the notice provision does not restrict or limit the surviving partner's right to make an election. See *Reed v Citizens Ins Co of America*, 198 Mich App 443, 448; 499 NW2d 22 (1993). Therefore, because notice is not required to be given *before* the election is made, it fails to constitute a condition precedent. *MacDonald v Perry*, 342 Mich 578, 586; 70 NW2d 721 (1955); *Reed, supra* at 447.

The Supreme Court in *Knox, supra* at 118, further advised that whether a provision in a contract is a condition precedent "depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract." To help ascertain the intent of the parties, the arbitrator compared the language they utilized in the agreement with language the parties used in a 1980 agreement concerning an option to purchase. In the 1980 agreement the parties provided that, "[t]he option to purchase the Partner's interest shall be exercised only by giving written notice thereof to the Partner within 30 days after he shall have left such employment." The arbitrator correctly observed that, unlike the language at issue in the presently contested agreement, the language in the option agreement seemed to provide that the notice itself was the vehicle by which the option was to be exercised. Thus, it is significant that the parties failed to insist on wording similar to the language in their 1980 option agreement.

Lastly, the arbitrator did not err in looking to *Teakle, supra*, for guidance. *Teakle* involved a contract between the owners and contractors of a theatre that was to be built in Detroit. *Id*. at 428. The contract included a provision that, "[t]he contractors shall make no claim for additional work unless the same shall be done in pursuance of an order from the architects, and notice of all claims shall be made to the architects in writing within ten days of the beginning of such work." *Id*. at 430. The owners argued that they did not have to pay the contractors for extra work performed because there was no notice of the contractors' claim given

to the architects within ten days of the beginning of the extra work. *Id.* at 438. Our Supreme Court disagreed with the owners and determined that it was not a *prerequisite* to the validity of such a claim that notice be given in writing to the architects within ten days of the beginning of the work. *Id*. Similarly, the written notice in the instant case was not a *prerequisite* to the surviving partner making his election.

Since the arbitrator committed no error of law apparent on the face of his interim ruling, it is unnecessary to analyze whether the award would have been substantially different if an error had occurred.

Accordingly, we affirm the circuit court's decision approving the arbitrator's award.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper