STATE OF MICHIGAN

COURT OF APPEALS

LEWIS G. HARMON,	UNPUBLISHED
Plaintiff-Appellee,	September 21, 2001

v

MILLMAN-DERR CENTERS FOR EYE CARE, P.C.,	No. 221977 Oakland Circuit Court
Defendant-Appellant.	LC No. 99-015453-CL

Before: K. F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court order denying defendant's motion to vacate the arbitration award and granting plaintiff's motion to confirm the award. We affirm.

Plaintiff, an ophthalmologist, sold his practice to defendant. An asset purchase agreement and an employment agreement executed by the parties provided that any controversy or claim arising under the agreement would be determined by arbitration. Plaintiff was subsequently discharged. The arbitrator determined that plaintiff was entitled to economic damages of $105,698 and attorney fees and costs in the amount of $30,487.

Defendant first argues that the arbitrator exceeded his authority when he determined that plaintiff was the prevailing party and awarded attorney fees and costs. We disagree. Judicial review of arbitration awards is limited. *Konal v Forlini (On Remand)*, 235 Mich App 69, 74; 596 NW2d 63o (1999). Once parties invoke binding arbitration, the parties are bound by the applicable statute, MCL 600.5001 *et seq*., and court rule, MCR 3.602. *Dick v Dick*, 210 Mich App 576, 588; 534 NW2d 185 (1995). MCR 3.602(J)(1)(c) provides that an arbitration award may be vacated if the arbitrator exceeds his powers. Review of the arbitration agreement reveals that the "prevailing party in any arbitration proceeding shall be entitled to reasonable attorney fees and costs actually incurred." Accordingly, the arbitrator's award of attorney fees and costs was within his authority and proper. Defendant argues that the award was improper because plaintiff was not the prevailing party pursuant to MCR 2.625. The authority to award attorney fees and costs in this case did not arise from MCR 2.625, but rather, from the parties' own arbitration agreement. There is no indication that the parties intended that case law interpretation of MCR 2.625 would apply. Furthermore, the contract interpretation of the term "prevailing party" presented a question for the arbitrator, and we are precluded, in this context, from interpreting the provision. *Konal, supra*. Defendant's claim of error is without merit.

Defendant next argues that the arbitrator improperly relied upon his own personal and professional experience rather than the evidence before him. We disagree. Although defendant argues that the arbitrator's actions denied its due process right to a neutral decision maker, defendant cannot avail itself of the Due Process Clause because the state has not compelled the arbitration. Instead, the parties privately agreed to submit all disputes arising from their contractual agreement to arbitration. In this context, defendant's procedural due process argument is without merit. See *City of Dearborn v Freeman-Darling, Inc.* 119 Mich App 439, 442; 326 NW2d 831 (1982). In any event, the trial court did not err in denying defendant's motion to vacate the award on this basis. The arbitrator examined the evidence, found that plaintiff's testimony was credible, then noted that the testimony was consistent with the arbitrator's experience. There is no indication that the arbitrator ignored the evidence and relied solely on his experience. Defendant's argument is without merit.

Defendant next argues that the arbitrator improperly refused to hear evidence material to the controversy, MCR 3.602(J)(1)(d), by ruling that documentary evidence from Nurse Ruth Eberhard was hearsay after the hearing was complete. We disagree. Review of the record reveals that the arbitrator concluded that the document was hearsay, but nonetheless weighed the substance of the statement in the document against the testimony of plaintiff. The arbitrator also considered the substance of Nurse Eberhard's statement in light of the fact that defendant continued to allow plaintiff to perform additional procedures. The arbitrator's evaluation of the evidence and any weight is not a matter for appellate review. *Belen v Allstate Ins Co*, 173 Mich App 641, 645-646; 434 NW2d 203 (1988).

Defendant next argues that the arbitrator improperly refused to hear material evidence, MCR 3.602(J)(1)(d). We disagree. Review of the record reveals that defendant offered testimony of *post-discharge* negligence after the hearing had closed. Our review of an arbitration award is restricted to cases in which error of law appears from the face of the award, from the terms of the contract of submission, or from documentation as the parties agree will constitute the record. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 175-176; 550 NW2d 608 (1996). Any claim of error regarding this testimony is not apparent from the arbitration award or the contract of submission. Rather, the alleged error is premised on a letter, and there is no indication that the parties agreed that this document would be a part of the record. *Id.* In any event, defendant has failed to demonstrate why the evidence was not admitted or available during the hearing and failed to demonstrate that the evidence was not cumulative to the evidence submitted.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Brian K. Zahra