S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

REAL ESTATE ONE, INC., a Michigan Corporation, REAL ESTATE ONE, INC., d/b/a RALPH MANUEL ASSOCIATES, and KATHLEEN DALTON,

Plaintiffs-Appellants,

v

AMERICAN ARBITRATION ASSOCIATION, INC., a New York Non-Profit Corporation, NICOLA GILSON, MATTHEW GILSON, CRANBROOK REALTORS, INC., a Michigan Corporation, DONNA STONE, DR. WENDY GRIFFITH, NICHOLAS DeSELLIER, JANET MITCHELL, OLENA SAMOYLENKO, ALEX SPIEGEL, JANET ROBERTSON, SANDY ROBERTSON, BETH ROSE, ROSE PREMIERE AUCTION GROUP, LLC, an Ohio Limited Liability Company, SAMUEL HANLON, SHIYAN LI, LANSHUN XI, CENTURY 21 HARTFORD SOUTH, INC., a Michigan Corporation,

Defendants-Appellees.

UNPUBLISHED
February 1, 2005

No. 249970
Oakland Circuit Court
LC No. 02-045113-CZ

REAL ESTATE ONE, INC., a Michigan Corporation REAL ESTATE ONE, INC., d/b/a RALPH MANUEL ASSOCIATES, and KATHLEEN DALTON,

Plaintiffs-Appellees,

v

AMERICAN ARBITRATION ASSOCIATION, INC., a New York Non-Profit Corporation, NICOLA GILSON, MATTHEW GILSON, CRANBROOK REALTORS, INC., a Michigan

No. 250050
Oakland Circuit Court
LC No. 02-045113-CZ

Corporation, DONNA STONE, DR. WENDY GRIFFITH, NICHOLAS DeSELLIER, JANET MITCHELL, OLENA SAMOYLENKO, ALEX SPIEGEL, JANET ROBERTSON, SANDY ROBERTSON, BETH ROSE, ROSE PREMIERE AUCTION GROUP, LLC, an Ohio Limited Liability Company, SAMUEL HANLON, SHIYAN LI, LANSHUN XI, CENTURY 21 HARTFORD SOUTH, INC., a Michigan Corporation,

Defendants-Appellants.

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting a motion to dismiss filed by defendant American Arbitration Association, Inc. (AAA). Plaintiffs had asked the trial court, in pertinent part, to order AAA to refrain from processing, scheduling, and arbitrating disputes between plaintiff Real Estate One (REO) and third parties if the demand for arbitration is based on the standard arbitration clause, or a variant of it, that is used by REO in its purchase agreements. The trial court declined to grant this relief. The trial court did award REO $7,500 in sanctions against AAA for AAA's failure to comply with multiple orders to appear at show cause hearings. In a cross-appeal, AAA challenges the award of sanctions. We affirm both in the main appeal and in the cross-appeal.

Docket No. 249970

On November 4, 2002, plaintiffs filed a "verified complaint for declaratory relief, temporary restraining order, permanent injunction and stay of arbitration." In the complaint, plaintiffs stated, in part:

> 11. This Complaint for Declaratory Relief seeks to permanently enjoin AAA from scheduling arbitration, and/or attempting to arbitrate, any dispute, involving the Plaintiffs, when the Plaintiffs have not specifically agreed to arbitrate.
>
> * * *
>
> 13. The Plaintiffs seek injunctive relief[] in the context of the Gilson Arbitration[1] because it is the latest in a series of disputes filed with AAA's Home

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[1] Defendants Nicola and Matthew Gilson, disgruntled home buyers, had filed a demand for arbitration against REO and other parties on September 20, 2002.

> Buyer/Home Seller arbitration program, wherein AAA has, without any apparent thought or cognitive process, automatically scheduled arbitrations purporting to bind REO, and/or its related entities.

Plaintiffs noted that a "Home Buyer/Home Seller arbitration program" had been created by the Michigan Association of Realtors (MAR) "to be a quick and efficient means to resolve disputes between Buyers and Sellers of real estate." Plaintiffs further noted that REO drafted its standard-form purchase agreements to incorporate the arbitration program created by the MAR. They stated that the current clause used by REO in its purchase agreements is as follows:

> DISPUTE RESOLUTION. Seller and Purchaser agree that any controversy or claim relating to this Agreement, disposition of the Deposit, or the physical condition of the Property and any claim of fraud, misrepresentation or negligence shall be settled by arbitration in accordance with the Home Buyer/Home Seller Arbitration rules of the American Arbitration Association, and judgment on the award rendered by the Arbitrator may be entered in any court having jurisdiction.

Plaintiffs indicated that REO also uses the following disclaimer in its purchase agreements:

> Purchaser and Seller acknowledge that Listing and Selling Brokers and their salespeople are not parties to this Agreement. Listing and Selling Brokers and their salespeople specifically disclaim any responsibility for the condition of the Property or for the performance of the Agreement by the Parties.

Plaintiffs represented that the arbitration and disclaimer clauses in the Gilson matter were materially identical to the clauses in REO's standard-form purchase agreements but that AAA "is in the process of scheduling an arbitration hearing [purporting to bind REO and its related entities] based upon the Gilson Arbitration Clause and has repeatedly automatically scheduled arbitration hearings in the past, based upon the substantially similar REO Arbitration Clause."

Plaintiffs alleged that the REO purchase agreements, including the arbitration and disclaimer clauses, are used by approximately 30,000 REO clients and customers each year and that "AAA automatically schedules an arbitration purporting to bind REO each time it receives a demand for arbitration based upon the REO Arbitration Clause."

Plaintiffs stated:

> 29. This automatic scheduling of arbitrations, without any contractual, reasonable or permissible basis, leaves REO with two equally damaging options: 1) seek a stay of arbitration each time from this court before the scheduled arbitration or 2) seek this court's determination that the arbiter exceeded his/her authority after the arbitration has occurred.
>
> 30. Either option will result in needlessly repetitive litigation which will waste this court's scarce judicial resources.

> 31. Moreover, either option will result in the necessary and undue expenditure of REO's resources.
>
> 32. This process will be repeated, perpetually, unless stopped by this court through the remedies sought herein.

As relief, plaintiffs sought, among other things, a declaration that "merely by its promulgation of the REO Arbitration Clause, contained within REO Purchase Agreements, REO does not consent to arbitration." It further sought a "permanent injunction preventing AAA from processing, scheduling and arbitrating disputes between REO and third parties in which the claimant's demand for arbitration is based on the REO Arbitration Clause contained within its REO Purchase Agreements." Plaintiffs also sought specifically targeted relief in the context of the Gilson matter.

In an opinion and order dated December 26, 2002, the court ruled, in part:

> . . . neither the Michigan nor the federal courts have resolved the question of whether arbitral immunity applies to a request for injunctive relief against a sponsoring organization such as Defendant AAA.
>
> However, this court does not believe that it must reach the doctrine of arbitral immunity to resolve the question of whether AAA is a proper party to this lawsuit. The court would note that the Demand for Arbitration in the Gilson case refers to a written contract providing for arbitration and names the sellers as well as the realtors. It also describes the nature of the dispute as to each of those parties. Once AAA received the Demand, they scheduled a hearing according to their Rules. Thus*, the court finds that it was the naming of Plaintiff in the demand by the Gilsons that caused them to be parties to the Arbitration and not the ministerial action of AAA, which merely performed an administrative task. The appropriate remedy for Plaintiff was to seek injunctive relief against the Gilsons, who initiated the arbitration*, which they did [sic] and not against AAA. The court is thus satisfied that AAA is not a proper party to this action.
>
> *As to Plaintiff's request for injunctive relief in other pending arbitrations in which they are named as parties, the court finds that they must seek injunctive relief against the parties naming them in the Demand for Arbitration in the appropriate court, and not against AAA.* [Emphasis added.]

On February 11, 2003, plaintiffs filed an amended complaint in which they added facts and arguments relating to several other home buyers, in addition to the Gilsons. Plaintiffs asked the trial court to declare that "demands for arbitration based upon language identical to or substantially the same as the [language in the various buyers' arbitration clauses] are not arbitrable against Plaintiffs." Defendant filed a motion to dismiss, and on March 26, 2003, a successor judge ruled, in part, as follows:

I have reviewed Judge Mester's opinion and order of December 26th, 2002 in which he ruled that AAA has arbitral immunity[2]and that AAA is not a proper party to this case. I've looked at all the authorities that have been submitted and it appears to the Court that the American Arbitration Association is not a proper party to this type of action. It appears that there is a question as to what the obligation of the American Arbitration Association may be in accepting demands for arbitration insofar as whether they should make some effort to determine whether the matter that's being submitted is one that is properly submissible under their rules and regulations, however *I am satisfied from reviewing the authorities that there is a form of quasi-immunity that's granted to the American Arbitration Association which prevents a party from challenging the method by which the American Arbitration Association proceeds in these arbitration matters.* For that reason, I'm granting the American Arbitration Association's motion to be dismissed from this case.

I do find that – in doing so, I do find Judge Mester's opinion to be almost dispositive of this, but to the extent that it may not – there may be some question about it, I am ruling that the American Arbitration Association is not a proper party to this case and they are dimissed.

* * *

. . . I am satisfied from reviewing the authorities that have been submitted that the issue of whether a particular matter is properly submitted to arbitration is one that by statute and court rule is for this Court under rule 3.602 and the problem I have . . . is, for example, for me to issue a ruling that anytime a contract had a specific clause in it, AAA should refuse to accept it for arbitration, I had four cases in front of me and I think there were three different versions of that clause. Now they were pretty close, but I think for this Court to – I don't think I have the power or the authority to issue an injunctive order that could be applied or, you know, be offering it for application in future cases where the circumstances might be such that that would be inappropriate. I think the policy of the state and of the court rules is to give the parties to the alleged arbitration agreement recourse to the courts for that determination on a case-by-case basis.

* * *

. . . *I think the responsibility falls on the party who believes they are improperly made subject to arbitration to come to court on a case-by-case basis,* and that's my ruling. [Emphasis added.]

On appeal, plaintiffs contend that the doctrine of arbitral immunity is inapplicable in an action seeking only equitable and declaratory relief and that AAA, in scheduling arbitrations involving REO, acts in a clear absence of jurisdiction and therefore is not entitled to arbitral

[2] This appears to be a misstatement, because the court's December 26, 2002, opinion and order did not specifically address the question of arbitral immunity.

immunity. Plaintiffs further argue that the trial court erred in ruling that AAA was not a proper party to plaintiffs' lawsuit, contending:

> REO seeks a court order declaring that AAA must cease the future processing, scheduling and arbitrating of disputes between REO and third parties in which the claimant's demand for arbitration is based on the REO Arbitration clause, unless the claimant has first obtained a court order compelling the arbitration to proceed. This relief is directed only against AAA, and AAA is the only party against whom REO *could* seek such relief. [Emphasis in original.]

"We review a trial court's grant of injunctive relief for an abuse of discretion." *Higgins Lake Property Owners Ass'n v Gerrish Twp,* 255 Mich App 83, 105; 662 NW2d 387 (2003). Actions for a declaratory judgment are reviewed de novo. *Krochmal v Paul Revere Life Ins Co,* 262 Mich App 115, 121; 684 NW2d 375 (2004).

We conclude that we need not reach the issue of arbitral immunity to resolve this appeal. At oral argument plaintiffs acknowledged that the fundamental relief they seek in this action is injunctive relief and not declaratory relief. See, generally, MCR 2.605. In particular, plaintiffs seek a permanent injunction that compels AAA to act in a particular manner, i.e., to refrain from processing, scheduling, and arbitrating disputes between REO and third parties if the demand for arbitration is based on the standard arbitration clause, or a variant of it, that is used by REO in its purchase agreements. As noted in *Higgins Lake, supra* at 106, injunctive relief is "an extraordinary remedy." It is generally granted only when "(1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury." *Id.* (internal citations and quotations omitted). In determining whether an injunction should be granted, the following factors should be considered:

> "(a) the nature of the interest to be protected,
>
> (b) the relative adequacy to the plaintiff of injunction and of other remedies,
>
> (c) any unreasonable delay by the plaintiff in bringing suit,
>
> (d) any related misconduct on the part of the plaintiff,
>
> (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
>
> (f) the interests of third persons and of the public, and
>
> (g) the practicability of framing and enforcing the order and judgment." [*Id.,* quoting *Kernen v Homestead Dev Co,* 232 Mich App 503, 514-515; 591 NW2d 369 (1998).]

An analysis of these factors leads us to conclude that the trial court did not err in refusing to grant the requested relief. First, plaintiffs have an alternate remedy for the problem they seek to address. As noted by the initial trial judge, plaintiffs may "seek injunctive relief against the parties naming them in the Demand for Arbitration in the appropriate court, and not against

AAA." Second, and perhaps most significantly, the relief plaintiffs seek is simply impracticable with regard to framing and enforcing the requested order. As noted by the successor trial judge:

> . . . the problem I have . . . is, for example, for me to issue a ruling that anytime a contract had a specific clause in it, AAA should refuse to accept it for arbitration. I had four cases in front of me and I think there were three different versions of that clause. Now they were pretty close, but I think for this Court to – I don't think I have the power or the authority to issue an injunctive order that could be applied or, you know, be offering it for application in future cases where the circumstances might be such that that would be inappropriate. I think the policy of the state and of the court rules is to give the parties to the alleged arbitration agreement recourse to the courts for that determination on a case-by-case basis.

We agree with the trial court's caution with regard to the use of its injunctive authority, and conclude that because the interpretation of future arbitration agreements was dependent upon the specific terms of those agreements and therefore indefinite, the trial court did not abuse its discretion by denying plaintiffs' requested relief. *Higgins Lake, supra* at 105. No basis for reversal is apparent.

Plaintiffs also contend that "…at the very least a declaratory judgment should issue holding that the burden of establishing arbitrability, once it has been contested in writing by REO, should be placed on the claimant." Plaintiffs are not entitled to appellate relief on this basis because this claim for relief was not raised in and decided by the trial court, and therefore the issue is not preserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

Docket No. 250050

Along with their initial complaint, plaintiffs filed on November 4, 2002, an "ex parte petition for injunctive relief and show cause." Plaintiffs sought "an Injunctive Order prohibiting AAA from proceeding against these Plaintiffs by arbitration" and stated that "this court should schedule a show cause [sic] demanding the Defendants [sic] (and specifically AAA) appearance as to why this court should not grant the relief Plaintiff's [sic] seek as well as a permanent injunction order prohibiting Defendants [sic] conduct in this case and in the future." On November 6, 2002, the trial court issued an ex parte order enjoining AAA from "taking further steps towards the arbitration process addressed in [the] Complaint" and ordering AAA to appear on November 27, 2002, to "show cause why this Court should not grant the relief sought by Plaintiffs."

On November 20, 2002, AAA sent a letter to the trial court and to all parties explaining that they would not appear at the November 27, 2002, hearing because of arbitral immunity. At the November 27 hearing, AAA sent no representative, and the trial court stated, in part:

> And also, I want their president and . . . chief executive officer [CEO] to appear before this Court to show cause why he – why they did not have anyone present. I also want the name of every attorney who advised them they did not have to show. I want in there that the Court wants their names, so they can be referred to the New York Attorney Grievance Commission and any other state

> grievance commission for their failure to properly advise their client that an order to show cause by any Court in this country where they are doing business, they have a responsibility to respond [sic].
>
> I'm asking that other sanctions may also be applied against the Arbitration Association . . . .

On the same date, the court issued an additional order reiterating that "[t]he president and CEO of AAA are ordered to appear before this Court on December 3, 2002" for a show cause hearing with regard to plaintiffs' request for an injunction and also to "Show Cause why they should not be held in contempt of Court for failing to appear on November 27, 2002 pursuant to this Court's Order of November 6, 2002."

AAA sent a representative attorney to appear in court on December 3, 2002, but did not send the AAA's president/CEO. The hearing was adjourned until December 11, 2002, and the trial court issued an order on December 3, 2002, stating that "Plaintiff's request for sanctions as well as the court's contempt order/issues shall be addressed at the 12/11/02 hearing including AAA's failure to have the CEO/president appear on 12/3/02."

AAA's president/CEO again failed to appear at the December 11, 2002, hearing. The trial court stated at the hearing:

> . . . I want a recommendation on sanctions for triple A for their failure to comply with three orders of this Court, the highest trial court in the State of Michigan, and the question that I have is to – as to how they should be sanctioned. I – and that's the way it'll be, and we'll give you a decision by next week.

The initial judge and the successor judge subsequently issued their rulings on the underlying substantive issues involved in the case. On May 23, 2002, plaintiffs filed a motion for contempt and requested sanctions in the amount of $14,627.41. The motion hearing occurred on June 4, 2003. The trial court stated:

> The Court . . . has great respect for the Triple A organization and the part that it has played in American jurisprudence in trying to resolve disputes between parties, but this is totally unacceptable. And Mr. Hill has represented them very honorably and very eloquently since he's been in this case. Nevertheless, those two individuals[3] that were show caused had a responsibility to appear or to have someone from their association to appear to answer, and notwithstanding the Court was really concerned about the right of the Court to go forward on the jurisdictional question, nevertheless the Court must show respect for its own orders. And, therefore, will issue a sanction of 7,500 dollars.

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[3] Although the trial court refers to two individuals, the President and CEO of AAA is one in the same.

The trial court issued an order granting $7,500 in sanctions to plaintiffs "for the reasons stated on the record[.]"

On appeal, defendants argue that the trial court erred in assessing sanctions against them because AAA was not a proper party to plaintiffs' lawsuit and because AAA was entitled to arbitral immunity. We review a trial court's finding of contempt for an abuse of discretion. *In re Contempt of Dudzinski,* 257 Mich App 96, 99; 667 NW2d 68 (2003).

Even assuming, arguendo, that AAA was not a proper party to plaintiffs' lawsuit and was entitled to arbitral immunity, an issue not decided by this Court, nevertheless, AAA was not free to disregard orders of the trial court. The trial court initially ordered on November 2, 2002, that AAA appear at a November 26, 2002, hearing. AAA disregarded this order. The trial court then ordered the president/CEO of AAA to appear on December 3, 2002, and AAA disregarded this order also. AAA sent an attorney, but not an officer of AAA, to the December 3 hearing. These failures by AAA to comply with the trial court's orders constituted contempt. See, generally, *In re McRipley,* 204 Mich App 298, 301; 514 NW2d 219 (1994). As a result of this contempt, attorney fees were awardable to plaintiffs under MCL 600.1721. No abuse of discretion occurred.

Defendants argue that the trial court erred in the assessment of sanctions because the November 27, 2002, order did not comply with MCR 3.606(A)(1), which provides that if contempt is committed outside the immediate view and presence of the court, the court may "order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct[.]" Defendants contend that the hearing was not scheduled for a "reasonable time" because AAA did not receive notice of the December 3, 2002, hearing until December 2, 2002, "because of the Thanksgiving holiday and the 1:00 p.m. closing of the AAA's offices on November 27, 2002." AAA states that its president/CEO was out of the country at the time and that "[t]he one day notice that the trial court provided the AAA made it physically impossible to arrange for the AAA's president to travel back to the United States and appear in court."

Defendants' argument is without merit. First, the sanctions resulted *not solely* from the failure of the president/CEO of AAA to appear. Indeed, they derived initially from AAA's failure to comply with the November 6, 2002, order to provide a representative at the November 27, 2002, hearing. Second, AAA, despite its admission that it received notice on December 2, 2002, about the December 3, 2002, hearing, did not send an employee of AAA to stand in for the president/CEO or to explain why the president/CEO could not appear. Reversal is unwarranted.

Defendants additionally argue that the trial court erred in assessing sanctions because "the court failed to engage in the requisite balancing and because the burden of proof for finding a contempt is not satisfied." Once again, defendants' argument is without merit. As noted in *Persichini v William Beaumont Hosp,* 238 Mich App 626, 642; 607 NW2d 100 (1999), the harshness of sanctions imposed for misconduct should be balanced against the gravity of the misconduct. The trial court's order reflects that it *did* in fact engage in this balancing. It awarded only slightly more than half of the costs documented by plaintiffs as having resulted from the contempt. Moreover, the gravity of the misconduct was substantial, given the AAA's flagrant violation of court orders. Finally, it is evident from only a cursory review of the record in this case that the "clear and unequivocal" standard of proof was satisfied. See *In re Contempt*

of Robertson, 209 Mich App 433, 439; 531 NW2d 763 (1995) (explaining the standard of proof for civil contempt). It was abundantly apparent that AAA did not comply with orders of the court. Reversal is unwarranted.

Both cases are affirmed.

/s/ Kurtis T. Wilder
/s/ Bill Schuette

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Defendants-Appellants.

Before: Meter, P.J., and Wilder and Schuette, JJ.

METER, J. (*concurring*).

I fully concur in the majority's opinion but write separately to make two additional observations with respect to the issues briefed by the parties in Docket No. 249970.

I.

First, even though we need not reach issue of arbitral immunity in Docket No. 249970, I note that case law supports the successor trial judge's statement that "there is a form of quasi-immunity that's granted to the American Arbitration Association which prevents a party from challenging the method by which the American Arbitration Association proceeds in these arbitration matters." For example, in *Hospitality Ventures of Coral Springs, LC v American Arbitration Ass'n,* 755 So2d 159, 160 (Fl App, 2000), the court noted that the proper parties in a lawsuit involving the propriety of arbitration in a particular case are "the parties to the arbitration agreement, not the potential arbitrators. The law does not require potential arbitrators to expend the time and money to participate in a lawsuit where the parties are fighting over the arbitrability of a dispute." Additionally, in *Corey v New York Stock Exchange,* 691 F2d 1205, 1211 (CA 6, 1982), the court stated that a party contesting the jurisdiction of arbitrators can pursue a remedy not against the arbitrators but against the "real" party involved in the dispute.

The case most analogous to the instant case is *International Medical Grp v American Arbitration Ass'n,* 312 F3d 833 (CA 7, 2002). In that case, the plaintiff argued that because it was not a party to the insurance contract at issue that provided for arbitration, AAA should not have asserted jurisdiction over it. *Id.* at 842. The plaintiff asserted that "arbitral immunity does not apply here because it was never a party to a contract authorizing arbitration and the AAA therefore acted in the clear absence of jurisdiction." *Id.* at 843. The court stated:

> The appropriate remedy for an administrative mistake by the AAA (and we are not finding here that the AAA erred in accepting the demand and proceeding with the arbitration) would be for the wronged party to seek injunctive relief against the party initiating the arbitration in an appropriate court. The AAA need not be a

> party to that action and should be spared the burden of litigating the appropriateness of its exercise of jurisdiction. [*Id.* at 844.]

While the above cases did not involve requests for injunctive relief, I find that the reasoning in them is persuasive by analogy and supports the trial court's orders in the instant case.

II.

Second, with respect to plaintiffs' argument that "if the courts are unwilling to compel AAA to live up to its own rules by reviewing pro forma arbitration clauses, at the very least a declaratory judgment should issue holding that the burden of establishing arbitrability, once it has been contested in writing by REO, should be placed on the claimant," I note that plaintiffs, in making this argument, rely on the following statement from *Arrow Overall Supply Co v Peloquin Enterprises,* 414 Mich 95, 100; 323 NW2d 1 (1982): "[i]f a burden must be placed on one of the parties to seek a preliminary judicial determination [of the arbitrability of a dispute], it should be on the party seeking to compel arbitration." This statement constitutes non-binding obiter dictum because it was not necessary to resolve the dispute at issue in that case. See, generally, *Dressel v Ameribank,* 468 Mich 557, 568 n 8; 664 NW2d 151 (2003). I instead find persuasive the holding in *International Medical, supra* at 844: "The appropriate remedy for an administrative mistake by the AAA . . . would be for the wronged party to seek injunctive relief against the party initiating the arbitration in an appropriate court." Reversal in the instant case is thus unwarranted.

/s/ Patrick M. Meter