STATE OF MICHIGAN

COURT OF APPEALS

CUMBERLAND VALLEY ASSOCIATION, Plaintiff-Appellee,	UNPUBLISHED May 26, 2011
v	No. 294799 Oakland Circuit Court
FRANK J. ANTOSZ, JR., PHYLLIS ANTOSZ, and LETITIA ANTOSZ, Defendants-Appellants.	LC No. 2008-090259-CH

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order denying their motion to vacate an arbitration award. We affirm.

Plaintiff, a condominium association, initially filed a complaint against defendants, as owners of a condominium in the association, for unpaid assessments. Plaintiff attached a statutory lien for all unpaid assessments on defendants' condominium and filed the complaint to foreclose on the lien and sell defendants' premises as a real estate foreclosure. After three settlement attempts through mediation, the parties agreed to arbitration under the American Arbitration Association ("AAA"). An arbitration hearing was scheduled for August 14, 2009. Defendants requested a postponement because their attorney was scheduled to attend a district court hearing in Flint. The arbitrator changed the time of the arbitration hearing, apparently to accommodate defendants' attorney, but did not change the date of the hearing. Neither defendants nor their attorney attended the hearing. On August 28, 2009, the arbitrator issued an award in favor of plaintiff.

Defendants filed a motion in circuit court to vacate the arbitration award; plaintiff filed a motion to confirm the award. The circuit court confirmed the arbitration award and entered a judgment on arbitration award for foreclosure of condominium lien against defendants. Defendants filed a motion to stay enforcement of judgment pursuant to MCR 7.209(E). The circuit court denied the motion to stay.

On appeal, defendants argue that the trial court should have granted their motion to vacate the arbitration award pursuant to MCR 3.602(J)(2)(d) because the arbitrator refused to postpone the hearing on a showing of sufficient cause. Defendants argue that their attorney was on vacation during the preliminary hearing conference call, was unable to participate in the

conference call, and was unaware that an arbitration hearing had been scheduled. When the attorney returned from vacation, the scheduled hearing was only four days away. The attorney requested an adjournment because he had a district court matter scheduled for the same day. The arbitrator denied the request.

This Court reviews de novo a trial court's decision to enforce, vacate, or modify an arbitration award. *Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009). The parties agree that MCR 3.602(J)(2) applies to this dispute, and that the rule sets forth the reasons for which a trial court may vacate an arbitration award, as follows:

> On motion of a party, the court shall vacate an award if:
>
> (a) the award was procured by corruption, fraud, or other undue means;
>
> (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
>
> (c) the arbitrator exceeded his or her powers; or
>
> (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

Defendants submitted their request for a postponement on August 11, 2009. The question whether defendants had shown sufficient cause for postponement revolves around three pieces of communication. The first communication was a letter from defendants' attorney to AAA case manager Jennifer Metz dated July 20, 2009. The letter was in response to Metz's July 17, 2009, email regarding the scheduling of a preliminary hearing conference call. In the letter, the attorney advised Metz that he would be on vacation from July 29, 2009, through August 10, 2009, but that he was available before or after those dates. No mention is made of this letter in any of the other correspondence. Plaintiff's attorney stated in his August 11, 2009, email to Metz that defendants' attorney had never advised Metz or plaintiff's attorney that he was on vacation or was unavailable for the conference call. Plaintiff's attorney also stated that Metz attempted to call defendants' attorney on July 31, 2009, the date of the conference call. From the record available, it appears that neither the arbitrator nor plaintiff (nor plaintiff's counsel) received defendants' attorney's letter.

The other communications that were in dispute were the July 23, 2009, email from Metz to both parties' attorneys informing them that the preliminary hearing conference call was scheduled for July 31, 2009, and the August 3, 2009, email from Metz to both attorneys scheduling the arbitration hearing for August 14, 2009. Defendants claim that their attorney never received these emails, or received them too late to respond appropriately.

If the arbitrator never received defendants' attorney's letter regarding availability and neither defendants nor their attorney called in for the preliminary hearing conference call, the first time the arbitrator heard from defendants was on August 11, 2009, when they asked for a postponement. Moreover, Metz stated in an email that defendants' attorney had emailed Metz on August 6, 2009, during his vacation when he had claimed he could not send or receive emails.

Metz further stated that defendants' attorney had indicated that he would contact Metz on August 10, the day that the arbitrator's fees were due. Defendants' attorney did not contact Metz on that date and plaintiff paid defendants' portion of the fees to avoid further delay.

On the basis of these communications and the information before him, the arbitrator refused defendants' request for a postponement. Courts may not substitute their judgment for that of the arbitrators. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). The question whether defendants' attorney actually sent the letter stating that he was on vacation or whether defendants' attorney received the emails of July 23, 2009, and August 3, 2009, were questions of fact for the arbitrator to determine. An arbitrator's factual conclusions are not proper subjects for judicial review. See *Frazier v Ford Motor Co*, 364 Mich 648, 655-656; 112 NW2d 80 (1961). Similarly, the arbitrator's credibility determinations and weighing of the evidence are not matters for appellate review. See *Belen v Allstate Ins Co*, 173 Mich App 641, 645-646; 434 NW2d 203 (1988).

The arbitrator obviously did not believe that defendants had shown sufficient cause for an adjournment at that late date after failing to participate in the conference call and requesting a postponement four days before the scheduled hearing. Because the arbitrator's credibility determinations and weighing of the evidence are not matters for appellate review, the trial court properly denied defendants' motion to vacate the arbitration award.

Defendants argue that the trial court should have vacated the arbitration award because the preliminary hearing was held without their presence, they did not receive ten days notice of the preliminary hearing as required by AAA rules, and the arbitrator did not issue a report of preliminary hearing or a scheduling order. The preliminary hearing conference call was held on July 31, 2009, and neither defendants nor their attorney participated. As discussed above, there was a factual dispute regarding transmission of defendants' attorney's letter to Metz, and regarding Metz's email to the parties setting the conference date for July 31, 2009. Upon a review of the record, it does not appear that the arbitrator received defendants' attorney's letter stating his availability. Metz's July 17, 2009 email to both parties' attorneys stated that if the arbitrator did not receive any responses about availability for the preliminary hearing conference call, all dates and times would be deemed acceptable and the arbitrator would schedule the conference call and counsel would be expected to participate. Thus, the arbitrator properly conducted the preliminary hearing conference call without defendants or their attorney present.

Defendants also argue that they did not receive notice of the preliminary hearing in a timely manner. Defendants assert that they should have had ten days notice pursuant to the AAA rules. However, Metz informed defendants that the ten-day notice pertained to the actual in-person arbitration hearing and not to the preliminary hearing conference call. The ten-day notice provision was a procedural matter, which was for the arbitrator to resolve. See *Gregory J Schwartz & Co, Inc v Fagan*, 255 Mich App 229, 232; 660 NW2d 103 (2003). We decline to interfere with the arbitrator's resolution of the procedural issue.

Finally, defendants argue that their rights were substantially prejudiced because there was no report of the preliminary hearing or a scheduling order. However, Metz and the arbitrator sent an email to the parties on August 3, 2009, stating that the hearing would take place on August 14, 2009. In addition, the arbitrator stated in the email that "the trial notebook has all the

information that would be requested in a scheduling order" and that the award would be a standard award. Considering this evidence, the trial court did not err in denying defendants' motion to vacate the arbitration award.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Patrick M. Meter