STATE OF MICHIGAN

COURT OF APPEALS

RAGAB MORSI,

Plaintiff-Appellee,

v

ZOLTEN, INC,

Defendant-Appellant,

and

ADAM TEER,

Defendant-Appellant.

UNPUBLISHED
July 17, 2012

No. 303537
Genesee Circuit Court
LC No. 09-091338-CL

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendants, Zolten Inc. and Adam Teer, appeal as of right from an order granting summary disposition in favor of plaintiff, Ragab Morsi. We affirm, concluding that the parties clearly intended to submit plaintiff's claim to arbitration.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff worked at one of defendants' gas station. He filed suit against defendants, alleging that he was unlawfully discriminated against on the basis of his Egyptian heritage. After an unsuccessful attempt at court ordered mediation, the parties filed a stipulation for dismissal without prejudice "on the basis of the parties' agreement to Arbitrate the claims at issue in this matter." The parties agreed that Brian Barkey would serve as arbitrator. They submitted briefs and exhibits and, in a meeting prior to arbitration, expressly agreed to proceed on the basis of statutory arbitration. A formal evidentiary hearing was held and Barkey issued his initial decision and award on June 21, 2010, dismissing plaintiff's hourly wage loss claims, but sustaining plaintiff's whistleblower and overtime wage actions. Barkey entered a second award on August 23, 2010, for costs and attorney fees. Defendants refused to pay on the awards. The parties filed a stipulation to reinstate the action to allow plaintiff to file an amended complaint, requesting that the trial court enforce the arbitration award.

Plaintiff filed a motion to enforce the arbitrator's awards. Defendants responded that plaintiff's motion was premature because defendants had not been allowed to conduct discovery

to determine whether the parties agreed to arbitrate the matter. There was no written agreement to arbitrate pursuant to MCL 600.5001. The only writing was the parties' stipulation to dismiss the matter without prejudice and submit the matter to arbitration. Neither party signed the agreement. Additionally, defendants argued that common law arbitration was unilaterally revoked by defendants on July 16, 2010, well before the award rendered on August 23, 2010. Defendants also filed a motion to compel discovery.

At a January 31, 2011, hearing on the motions, plaintiff's attorney stated that she believed "that this is a common law" arbitration that "would have to be enforced under the common law rules." Defendants' attorney admitted that, prior to arbitration, a discussion was held with the arbitrator about the fact that the parties were proceeding on the basis of statutory arbitration. "I don't dispute the affidavit filed by the arbitrator, but then all three [attorneys] screwed up by not getting signed agreements that basically included the [statutory] language." Defendants' attorney claimed that he did not have adequate time to prepare for plaintiff's motion, which was really a motion for summary disposition. The trial ordered plaintiff to file a motion for summary disposition in order to afford defendants additional time to respond.

Plaintiff then filed a motion for summary disposition pursuant to MCR 2.116(C)(8)[1] and (C)(10), arguing that "once a common-law arbitration award is rendered, the arbitration award becomes binding and irrevocable." In fact, plaintiff wrote: "It is not disputed that the stipulated order does not contain the language required for statutory arbitration." Nevertheless, the parties clearly intended to submit the matter to binding arbitration. Defendants were simply suffering from buyer's remorse. In response, defendants argued that an issue of fact existed as to whether the parties agreed to arbitrate plaintiff's claims.

A hearing on plaintiff's motion was heard on March 14, 2011. Again, plaintiff's counsel reiterated that plaintiff did "not contend that this was a statutory arbitration. We are claiming that this is a common law arbitration." Because there was no revocation prior to the arbitrator's initial award, the arbitration became binding. In contrast, defense counsel argued that arbitration was not binding because there was no evidence that the *parties* agreed to arbitrate the matter; only the attorneys understood what would take place. When questioned whether there was an agreement between counsel, defense counsel readily admitted, "with respect to arbitration, yes, there was."[2]

After hearing arguments, the trial court found:

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[1] A motion under MCR 2.116(C)(8) allows the trial court to enter judgment when "the opposing party has failed to state a claim on which relief can be granted." Because plaintiff sought enforcement of the arbitration award and it was *plaintiff's* claim, it appears that plaintiff meant to cite MCR 2.116(C)(9) which allows the trial court to enter judgment when "the opposing party has failed to state a valid *defense* to the claim asserted against him or her." (Emphasis added.)

[2] The attorney that represented defendants through arbitration was different from the attorney representing them at the hearing.

> [t]here is a common law arbitration here because even though there was a later rejection, counsel did show up. The case went from facilitation to arbitration. The client showed up. The arbitration hearing was held. Nobody thought at that point that the other side's client didn't have – the other side's attorney didn't have authority of the client to proceed to the arbitration. There is third party reliance here.

However, the trial court found that the issue of costs and attorney fees were a matter for the trial court to consider, given that defendants had revoked arbitration prior to the arbitrator's award on those issues. On March 30, 2011, the trial court entered an order enforcing the arbitration agreement. Plaintiff received $2,537.90 in economic damages and $2,500.00 in noneconomic damages. The trial court retained jurisdiction to determine costs and attorney fees.

Defendants filed a claim of appeal with this Court on April 14, 2011. On June 13, 2011, this Court granted the parties' stipulated motion to remand so that the issue of costs and attorney fees could be resolved before the appeal was heard. *Ragab Morsi v Zolten, Inc*, unpublished order of the Court of Appeals, entered June 13, 2011 (Docket No. 303537).

A hearing on plaintiff's motion for costs and fees was held on July 18, 2011. The trial court issued an opinion and order on August 8, 2011, awarding plaintiff $12,500 in attorney fees. The matter is now before us on defendants' allegation that the trial court erred in granting plaintiff's motion for summary disposition.

II. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). Summary disposition is appropriate under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 563; 766 NW2d 896 (2009). The trial court must consider all evidence submitted by the parties in a light most favorable to the non-moving party. *Lanigan*, 282 Mich App at 563. A trial court must deny the motion if, after reviewing the evidence, reasonable minds might differ as to any material fact. *Id.*

A trial court's determination that an issue is subject to arbitration is also reviewed de novo. *In re Nestorovski Estate*, 283 Mich App 177, 184; 769 NW2d 720 (2009).

III. ANALYSIS

Defendants argue that the trial court erred in granting plaintiff summary disposition without giving defendants the opportunity to conduct additional discovery to establish that neither party actually agreed to arbitration. We disagree.

Michigan public policy favors arbitration to resolve disputes. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 156; 742 NW2d 409 (2007). The purpose of

arbitration is to avoid protracted litigation and it will be judicially enforced to defeat an otherwise valid claim. *Cipriano v Cipriano*, 289 Mich App 361, 376; 808 NW2d 230 (2010). When, as here, an arbitration agreement is not in conformity with or governed by a statute[3] or court rule, it is a common law agreement. *Wold Architects & Engineers v Strat*, 474 Mich 223, 231; 713 NW2d 750 (2006), and see MCL 423.9d(1). "What characterizes common-law arbitration is its unilateral revocation rule. This rule allows one party to terminate arbitration at any time before the arbitrator renders an award." *Id.* (citation omitted).

Judicial review of common law arbitration awards is limited. Courts may vacate an award due to: (1) lack of jurisdiction in the arbitrator; (2) fraud on the part of the arbitrator; (3) fraud on the part of a party; (4) gross unfairness in the conduct of the proceedings; (5) violation of public policy; or (6) want of entirety in the award. *DAIIE v Gavin*, 416 Mich 407, 441; 331 NW2d 418 (1982); *Ferndale v Florence Cement Co*, 269 Mich App 452, 460; 712 NW2d 522 (2006).

Defendants argue that there was no evidence that the parties agreed to submit their case to arbitration. A party cannot be required to arbitrate an issue he has not agreed to submit. *Nestorovski*, 283 Mich App at 203; *Omega Constr Co v Altman*, 147 Mich App 649, 655; 382 NW2d 839 (1985). However, defendants have waived a challenge to the arbitrability of the dispute by voluntarily participating in the arbitration without objection. *Nestorovski*, 283 Mich App at 183. It appears that defendants were dissatisfied with the arbitrator's award and now claim that there was no agreement to arbitrate. "[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).

Although defendants make the argument that counsel could not speak on their behalf in agreeing to arbitration, there was no reason for plaintiff's counsel to question defense counsel's ability to do so, especially when defendants fully participated in the arbitration process. Defendants also argue that they did not understand the consequences of arbitration and, therefore, the decision to proceed to arbitration was not well-informed. In the context of statutory arbitration, we have concluded that absent an allegation of fraud or deception in procuring an arbitration agreement, the failure to read or understand the agreement is not a defense. *Christy v Kelly*, 198 Mich App 215, 216; 497 NW2d 194 (1992). There is simply no reason to upset the arbitrator's award and the trial court properly entered judgment in plaintiff's favor.

Defendants claim that summary disposition was premature because plaintiff had not yet been deposed. Defendants hoped that plaintiff would reveal that he did not agree to or understand the arbitration process. Summary disposition before discovery on a disputed issue is complete is premature only if there is a fair chance that further discovery will result in factual support for the party opposing the motion. *Mackey v Dep't of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994). Therefore, the party opposing a motion for summary disposition on

[3] Statutory arbitration is governed by MCL 600.5001.

the ground that discovery is incomplete must at least assert that "a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). There is no conceivable way that defendants can demonstrate that a genuine dispute exists. Deposing plaintiff would have no bearing on the fact that the parties clearly intended to submit the matter to arbitration, as evidenced by their stipulated dismissal of the case for the purpose of arbitration as well as their full engagement in the process thereafter.

Affirmed. As the prevailing party, plaintiff may tax costs. MCR 7.219.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Amy Ronayne Krause