STATE OF MICHIGAN

COURT OF APPEALS

BLUE RIVER FINANCIAL GROUP, INC., Plaintiff-Appellee,	UNPUBLISHED July 29, 2014
v	No. 315971 Wayne Circuit Court
ELEVATOR CONCEPTS LTD., ECL HOLDINGS LLC, and DOUGLAS SCOTT, Defendants-Appellants.	LC No. 12-015335-CZ

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

Defendants appeal by right the trial court's order enforcing an arbitration award and entry of judgment for plaintiff. We affirm.

This action arises out of the sale of defendant Elevator Concepts, Ltd. (ECL), on which plaintiff claims it was due commissions. Defendant Douglas Scott was an ECL shareholder, the president of ECL, and the managing member of plaintiff ECL Holdings, LLC (ECLH). Plaintiff describes itself as "a merger and acquisition advisory firm."

On January 4, 2012, Scott signed a single party engagement agreement (the agreement) on behalf of ECL and ECLH. The Agreement provided plaintiff "exclusive right to sell and authority to act as exclusive agent to arrange the sale of [ECL] . . . " and set forth terms regarding compensation and commissions to plaintiff. The agreement also contained the following arbitration clause:

> **19. Arbitration**. Any controversy between the parties to this Agreement involving the construction or application of any of the terms, covenants or conditions of this Agreement, shall on written request of one (1) party served on the other, be submitted to binding arbitration. Such arbitration shall be under the rules of the American Arbitration Association. The arbitrator(s) shall have no authority to change any provisions of this agreement; the arbitrator's sole authority shall be to interpret or apply the provisions of this Agreement. The expenses of arbitration conducted pursuant to this paragraph shall be born [sic] by the parties in such proportion as the arbitrator(s) shall decide. The judgment of any circuit court having jurisdiction may be rendered upon the award of the arbitrator(s).

Plaintiff contends that, after entering the agreement, it introduced ECL to potential buyer Wurtec Elevator Services, Inc. (Wurtec). ECL and Wurtec ultimately entered into an asset purchase agreement. According to plaintiff, defendants violated the agreement in connection with the closing on the ECL sale, including failing to give proper notices and documents and failing to pay plaintiff's commissions.

On April 16, 2012, plaintiff filed a demand for arbitration with the American Arbitration Association (AAA). The demand identified Scott as a respondent and stated: "SCOTT was a shareholder of ECL, and the Managing Partner of ECLH in January 2012." Plaintiff alleged five causes of action against ECL, ECLH, and Scott, including breach of contract, fraud in the inducement, fraud and misrepresentation, statutory and common law conversion, and unjust enrichment. Plaintiff alleged joint and several liability.

On May 5, 2012, plaintiff served the demand for arbitration on Scott in his capacities as an ECL shareholder, managing member of ECLH, and resident agent of ECL. Following service, AAA sought to schedule a preliminary hearing in the matter. Scott (then not represented by legal counsel) and plaintiff's counsel corresponded with AAA via email regarding that hearing, which was rescheduled several times but eventually set for a telephone hearing on September 27, 2012. AAA advised the parties that hearing would proceed regardless of whether all parties participated. That preliminary hearing took place without Scott's participation.

Scott retained legal counsel, who on October 9, 2012, wrote to defendant's counsel, advising that he represented Scott individually, but not "any other party to the Arbitration." Scott's counsel requested "clarification of the claims, if any, that are being asserted against [Scott]." He stated that he was aware that arbitration was scheduled for October 17, 2012, and requested the information immediately in order "to avoid the necessity of requesting an adjournment of the hearing." Plaintiff's counsel responded via email, stating that before he would discuss the case, Scott's counsel ought to file an appearance and his client's outstanding balance with AAA should be paid.

The October 17, 2012 arbitration hearing took place. Neither defendants nor any of their representatives attended. No defendant filed an answer or response to plaintiff's demand for arbitration. There is no transcript record of any part of the arbitration proceedings. On November 16, 2012, the arbitrator issued the following award:

> I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement dated January 5, 2012, and having been duly sworn, and having duly heard the proofs and allegations of the Claimant, and the Respondents having failed to appear after due notice by mail in accordance with the Rules of the American Arbitration Association, hereby, AWARD, as follows:
>
> As against Elevator Concepts, Ltd., ECL Holdings, LLC, and Douglas Scott (Shareholder of Elevator Concepts, Ltd.) on the Claimant's Breach of Contract claim, the award of $84,403.00 in favor of Claimant and against Elevator Concepts, Ltd., ECL Holdings, LLC, and Douglas Scott, jointly and severally as to all.

> As against Elevator Concepts, Ltd., ECL Holdings, LLC, and Douglas Scott on the Claimant's Fraud Claim, the amount is $165,000.00 in favor of Claimant and against Elevator Concepts, Ltd., ECL Holdings, LLC, and Douglas Scott, jointly and severally as to all.
>
> The administrative fees of the American Arbitration Association totaling $4,375.00 and the compensation of the arbitrator totaling $1,406.25 shall be borne by Respondents, jointly and severally. Therefore, Respondents shall reimburse Claimant the sum of $5,781.25.
>
> This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

Plaintiff filed the present lawsuit and brought a motion to enforce the arbitration award and for entry of a judgment. Defendants argued in opposition that there was no agreement to arbitrate between plaintiff and Scott; therefore, the award against Scott was improper. Defendants also argued that the arbitrator had no authority to issue an award against them on plaintiff's fraud claim, including finding joint and several liability. Plaintiff contended that defendants waived any challenge to the arbitration award because they never objected to the allegations or counts in plaintiff's demand for arbitration. The trial court granted plaintiff's motion and entered a judgment for plaintiff reflective of the arbitration award. The judgment totaled $255,184.25 against defendants, jointly and severally. This appeal ensued following the trial court's denial of defendants' motion for reconsideration.

This Court reviews de novo a trial court's decision to enforce an arbitration award. *Nordlund & Assoc, Inc v Hesperia*, 288 Mich App 222, 226; 792 NW2d 59 (2010). Issues concerning proper interpretation of contracts are questions of law and also reviewed de novo. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

On appeal, defendants argue that Scott did not waive his right to challenge the arbitrator's jurisdiction. We agree that there was no waiver, but nevertheless conclude that the trial court properly enforced the arbitration award.

Our Supreme Court's holding in *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95; 323 NW2d 1 (1982), is dispositive of the waiver issue. There, the plaintiff petitioned the circuit court to confirm an arbitration award. The defendant had not appeared at the arbitration hearing but raised for the first time before the circuit court the defense that there was no valid agreement to arbitrate. *Id*. at 100. The issue in *Arrow Overall Supply* was whether the defendant waived that defense by failing to assert it before the arbitrator's issuance of an award. The Court held that "a valid agreement must exist for arbitration to be binding." *Id*. at 98. Further, the "existence of a contract to arbitrate and the enforceability of its terms is a judicial question which cannot be decided by an arbitrator. *Id*. at 99. Consequently, a party challenging the existence of an agreement to arbitrate is not required to seek a judicial determination of arbitrability before issuance of an award. *Id*. at 99-100. In so holding, the Court distinguished *American Motorists Ins Co v Llanes*, 396 Mich 113; 240 NW2d 203 (1976), which held a party could not adopt a "wait and see" attitude but must raise preliminarily disputes concerning the scope of *acknowledged* agreements. *Arrow*, 414 Mich at 99-100.

The present case is similar to *Arrow Overall Supply*. Scott challenged whether he was bound by an arbitration agreement. His argument went directly to whether the arbitrator had jurisdiction to enter an award against him. *Arrow Overall Supply* confirms that is a judicial question which Scott was not required to submit for judicial determination before the arbitration hearing. "Though it may be preferable and more orderly for a party denying the existence of an agreement to arbitrate to seek an injunction of the proceeding, it is not a mandatory requirement." *Arrow Overall Supply*, 414 Mich at 100.

Plaintiff equated the pre-arbitration actions of Scott and his attorney to "participation" in the arbitration constituting a waiver of his right to challenge arbitrability. We disagree that Scott's limited contacts with plaintiff's counsel and AAA regarding scheduling a preliminary telephone hearing equated to "participation" such that he could not later assert a jurisdictional challenge. Scott was the president of ECL and the managing member of ECLH, entities that were also named respondents to plaintiff's demand for arbitration. It does not follow that Scott's involvement in preliminary scheduling should be viewed as an acknowledgement that claims were properly brought against him personally. Nor did Scott participate when his lawyer wrote to plaintiff's counsel seeking clarification of plaintiff's bases for including claims against Scott individually and opining that the arbitration clause was limited in scope, which called into question the propriety of the claims against Scott. Also, the preliminary telephone conference and the arbitration hearing took place without defendants or any representative of defendants in attendance. Compare *Llanes*, 396 Mich at 113-115 (insurer attended and substantively participated in the arbitration hearing, but waited until after issuance of the award to challenge the scope of the agreement to which there was no dispute it was a party).

Scott had the right to assert a jurisdictional challenge post-arbitration, and he did not participate in the arbitration such that he waived that right. Nevertheless, for the reasons discussed, *infra*, that conclusion does not lead to reversal of the trial court's order. See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000) (this Court will not reverse the lower court when it reaches the right result but for the wrong reason).

Defendants contend that Scott was not a party to the agreement, and the arbitrator exceeded his authority in assigning liability to Scott. We disagree.

Michigan public policy favors arbitration to resolve disputes. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 155; 742 NW2d 409 (2007). An arbitration agreement narrows a party's legal right to pursue a claim in a particular forum. *Hendrickson v Moghissi*, 158 Mich App 290, 298; 404 NW2d 728 (1987). Its purpose is to avoid protracted litigation, and it will be judicially enforced to defeat an otherwise valid claim. *NuVision v Dunscombe*, 163 Mich App 674, 684; 415 NW2d 234 (1987). Still, arbitration is a matter of contract, and a party cannot be forced to submit to arbitration in the absence of an agreement to do so. *Arrow Overall Supply*, 414 Mich at 98-99.

Defendants argue that Scott signed the agreement only as a representative of ECL and ECLH and, therefore, he was not a party to it individually. But a written arbitration agreement is enforceable if mutuality of assent is established. *Ehresman v Bultynck & Co, PC*, 203 Mich App 350, 354; 511 NW2d 724 (1994). The purpose of a signature is to show mutuality or assent, but even without a signature, these facts may be shown in other ways. *Id*. "'In the absence of a

statute or arbitrary rule to the contrary, an agreement need not be signed, provided it is accepted and acted on, or is delivered and acted on.'" *Id*., quoting 17 CJS, Contracts, § 62, pp 731-733.

The plain language of the agreement demonstrates that the parties intended the contract to apply to Scott in his capacity as a shareholder and owner of ECL and that there was mutual assent expressed between Scott and plaintiff such that Scott was bound by the arbitration clause. The primary goal in the interpretation of a contract is to honor the intent of the parties. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003). Contract terms must be given their ordinary and plain meaning, and technical and constrained constructions should be avoided. *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Contractual terms must also be construed in context. *Freemont Ins Co v Izenbaard*, 493 Mich 859; 820 NW2d 902 (2012).

The introductory paragraph of the agreement states that ECL shareholders were parties to the agreement and bound by its mutual covenants:

> This Engagement Agreement ("Agreement") is entered into by and between Blue River Financial Group, Inc. ("Blue River") and Elevator Concepts, LTD, ("Company") located at 18720 Krause, Riverview, MI 48193 and its Shareholders, in consideration of the mutual covenants contained in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows . . . ."

Paragraph 8 of the agreement, titled "Company's Representations and Warranties," further provides that "all [ECL] owners are bound by the terms and conditions of this Agreement." The Agreement's arbitration clause states that it applies to "the parties to this Agreement."

The above terms provide that shareholder owners were parties to the agreement and bound by its terms. Also, it is undisputed that the parties contemplated Scott would be directly involved in the ECL sale process. He was the person designated through a corresponding ECL Corporate Resolution "to perform any necessary act to sell said business" and he, in fact, took part in meetings and negotiations concerning the sale. It would have been evident to Scott upon his review of the agreement that he was entering into it in his capacity as a shareholder owner and that his individual actions could become the subject of claims adjudicated through arbitration. Defendants' argument concerning MCL 600.2909 is inapplicable where the arbitrator found Scott individually liable.

Defendants also argue that the arbitrator exceeded his authority by finding liability and awarding damages for claims outside the scope of the agreed-to arbitration clause. We disagree.

MCR 3.602(J)(2) provides that upon motion a "court shall vacate an [arbitration] award" under enumerated circumstances, including where an arbitrator exceeded his powers. An arbitrator exceeds its power when it decides matters "beyond the material terms of the contract from which they primarily draw their authority," or acts contrary to law. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004)(citation omitted).

To ascertain the arbitrability of an issue, the court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract. *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 528 (2004). Doubts about the arbitrability of an issue should be resolved in favor of arbitration. *Watts v Polaczyk*, 242 Mich App 600, 608; 619 NW2d 714 (2000).

The arbitration clause states that any controversy involving the "application"[1] of any term, covenant, or condition of the Agreement would be subject to arbitration. Plaintiff's claims against defendants went to whether defendants acted in accordance with their obligations under the agreement regarding the sale of ECL and payment of commissions to plaintiff. The arbitrator awarded plaintiff damages for breach of contract and fraud. Plaintiff's contract claim plainly related to controversies involving the application of the terms, covenants, or conditions of the agreement. The fraud claims required adjudication of whether defendants' actions with respect to Wurtec, whom plaintiff introduced to defendants in reliance on the agreement, were contrary to representations, warranties, and promises defendants made under the agreement and in connection with the making of the agreement. Therefore, determination of the fraud claims also involved application of the terms, covenants, or conditions of the agreement.

Because the arbitration clause does not limit possible damage awards, there was nothing expressly preventing the arbitrator from finding defendants jointly and severally liable, or imposing treble damages. See *Ehresman*, 203 Mich App at 355 (holding arbitrators did not exceed their authority by imposing joint and several liability where the arbitration agreement did not limit the kinds of damage awards). Moreover, a court may not hunt for errors in the arbitrator's determination of who is liable under an arbitrated contract or what damages are owed to whom. *Saveski*, 261 Mich App at 558. A facially valid damage award should not be disturbed. *Id*.

We affirm. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood

[1] "Application" is defined, in part, as "the use to which something is put." *Random House Webster's College Dictionary* (1997).