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STATE OF MICHIGAN

COURT OF APPEALS

DPM SPE SOUTHGATE LLC, also known as AWG SOUTHGATE LLC,

Plaintiff/Counterdefendant-Appellant/Cross-Appellee,

v

DUNHAM'S ATHLEISURE CORPORATION, doing business as DUNHAM'S SPORTS,

Defendant/Counterplaintiff-Appellee/Cross-Appellant.

UNPUBLISHED
July 17, 2025
9:45 AM

No. 369326
Wayne Circuit Court
LC No. 23-004418-CB

Before: GADOLA, C.J., and RICK and YATES, JJ.

PER CURIAM.

Plaintiff/counterdefendant (plaintiff) appeals as of right the order denying its motion to vacate an arbitration award and granting a competing motion to confirm the arbitration award and to dismiss the complaint filed by defendant/counterplaintiff's (defendant). We affirm.

I. FACTUAL BACKGROUND

Under a lease agreement with plaintiff, defendant was obligated to pay (1) a base rent; (2) a percentage rent based on its annual sales; (3) common area maintenance (CAM) fees; (4) insurance fees; and (5) taxes. When defendant failed to keep up on rent, plaintiff filed a claim for arbitration against defendant to recover the unpaid rent. Defendant counterclaimed, seeking $180,510 in deductions for overpaying its CAM, insurance, and taxes (CIT), under Section 2.02 of the lease agreement. The matter went to arbitration and the arbitrator determined that defendant owed plaintiff $46,180.71. However, factoring in deductions and abatements, the arbitrator concluded that the amount owed was actually $275.75. With respect to defendant's counterclaim, the arbitrator determined that Section 2.02 of the lease agreement unambiguously allowed defendant to deduct its cumulative CIT costs from its percentage rent payment, which in this instance amounted to $180,510. The arbitrator awarded attorney fees to both parties, because both parties prevailed on their respective claims.

Plaintiff filed a complaint in circuit court. It argued that the arbitration award should be vacated because the arbitrator made a mistake of law in his interpretation of Section 2.02. Defendant filed a counterclaim, seeking to confirm the arbitration award and dismiss the complaint. Defendant also sought attorney fees. The trial court determined that plaintiff made the same arguments before the arbitrator that it was attempting to make in the trial court. The court thereafter denied plaintiff's motion to vacate and granted defendant's motions to confirm the award and dismiss the complaint. However, the trial court denied defendant's request for attorney fees. This appeal followed.

II. ANALYSIS

A. ARBITRATION AWARD

Plaintiff argues that the arbitrator exceeded his authority when interpreting the lease agreement by making a mistake of law. We disagree.

"Judicial review of arbitration awards is usually extremely limited." *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009). MCR 3.602(K)(2) provides that an arbitration award may be modified if:

> (a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award;
>
> (b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or
>
> (c) the award is imperfect in a matter of form, not affecting the merits of the controversy. [MCR 3.602(K)(2).]

"This Court reviews de novo a trial court's decision to enforce, vacate, or modify an arbitration award." *City of Ann Arbor v American Federation of State, Co, & Muni Employees (AFSCME) Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009). In general, "[w]hether an arbitrator exceeded his or her authority is also reviewed de novo." *Washington*, 283 Mich App at 672.

Additionally, to the extent that this case involves a review of the trial court's ruling on defendant's motion to dismiss, we review such rulings for an abuse of discretion. *Bradley v Progressive Marathon Ins Co*, 345 Mich App 126, 131; 3 NW3d 559 (2022). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Tyler v Tyler*, 316 Mich App 214, 216; 894 NW2d 611 (2016) (quotation marks and citation omitted).

Plaintiff maintains that the arbitrator exceeded his authority when he read language into the lease agreement allowing defendant to deduct its CIT costs from any percentage rent payment. MCL 600.5081 governs the vacation and modification of arbitration awards. It states, in relevant part:

> (1) If a party applies to the circuit court for vacation or modification of an arbitrator's award issued under this chapter, the court shall review the award as provided in this section or [MCL 600.5080].
>
> (2) If a party applies under this section, the court shall vacate an award under any of the following circumstances:
>
> (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.
>
> (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. [MCL 600.5081 (footnote omitted).]

MCR 3.602(J) mirrors the grounds for vacating the arbitration award enumerated in MCL 600.5081(2). However, under the court rule, "[i]f the motion to vacate is denied and there is no motion to modify or correct the award pending, the court shall confirm the award." MCR 3.602(J)(5).

As earlier noted, "[j]udicial review of an arbitrator's decision is narrowly circumscribed." *AFSCME Local 369*, 284 Mich App at 144. "A court may not review an arbitrator's factual findings or decision on the merits." *Id*. "Likewise, a reviewing court cannot engage in contract interpretation, which is an issue for the arbitrator to determine." *Id*. "A reviewing court may not substitute its judgment for that of the arbitrator." *Mich Dep't of State Police v Mich State Police Troopers Ass'n*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 363241); slip op at 4. " 'If the arbitrator in granting the award did not disregard the terms of his employment and the scope of his authority . . . judicial review effectively ceases.' " *Id*. at ___; slip op at 5, quoting *Sheriff of Lenawee County v Police Officers Labor Council*, 239 Mich App 111, 118; 607 NW2d 742 (1999).

The crux of plaintiff's argument is that the arbitrator exceeded his authority and made a mistake of law by ignoring the plain and unambiguous language of the lease agreement. "[O]ur Court has repeatedly stated that 'arbitrators have exceeded their powers whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law.' " *Washington*, 238 Mich App at 672, quoting *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). "[I]n order to vacate an arbitration award, any error of law must be so substantial that, but for the error, the award would have been substantially different." *Washington*, 283 Mich App at 672-673 (quotation marks and citation omitted). Likewise, "an allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators' decision." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). Indeed, "[a] reviewing court may not review the arbitrator's findings of fact, and any error of law must be discernible on the face of the award

itself." *Washington*, 283 Mich App at 672 (citations omitted). We "will not engage in a review of an arbitrator's mental path leading to [the] award." *Id*. (quotation marks and citation omitted; alteration in original).

The section in dispute in this matter is Section 2.02 of the lease agreement, which states:

> Tenant shall pay Landlord Percentage Rent each Lease Year equal to two and one-half percent (2.5%) of Gross Sales in excess of the following Breakpoints:
>
> Lease Years one (1) through five (5): $5,000,000
>
> Lease Years six (6) through ten (10): $5,300,000
>
> Tenant shall pay any Percentage Rent owed on an annual basis, on or before the forty-fifth (45th) day after the Lease Year in which Gross Sales for that Lease Year exceed the Breakpoint. Tenant may deduct on a cumulative basis, from any Percentage Rent payable to Landlord, any amounts paid pursuant to the Real Estate Tax, Insurance, Common Area Maintenance charges or any other additional charges in this Lease.

"The primary goal in interpreting contracts is to determine and enforce the parties' intent." *Village of Edmore v Crystal Automation Sys, Inc*, 322 Mich App 244, 262; 911 NW2d 241 (2017) (quotation marks and citation omitted). "The language of a contract is to be given its ordinary, plain meaning; technical, constrained constructions should be avoided." *Id*. Courts must "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

Plaintiff maintains that the arbitrator erroneously read language into the contract allowing defendant to combine its CIT costs. Specifically, plaintiff claims that the arbitrator misinterpreted the word "cumulative" and should have given the word its technical definition in the field of real estate taxation. Had it done so, plaintiff argues that defendant would have been prevented from combining its CIT costs over multiple lease years.

A facial review of the lease agreement and award gives us no indication of how the arbitrator defined "cumulative," or what definition he used in his interpretation. Our facial review of the agreement does not consider the arbitrator's mental indicia. *Washington*, 283 Mich App at 672. Because the arbitrator did not provide his reasoning, this Court cannot infer what that reasoning would have been. Even if that were not the case, plaintiff provides no evidence demonstrating that the arbitrator was required to utilize a technical definition of the word "cumulative." Rather, plaintiff merely presumes that the arbitrator erred in his interpretation because the technical definition of "cumulative" supports plaintiff's interpretation of the lease agreement. But the lease agreement itself does not contain a provision mandating technical definitions for its words. Thus, we cannot conclude that the arbitrator made a mistake of law in interpreting the agreement. This Court's review must end there, however, because any further inquiry would require this Court to overstep its bounds by interpreting the lease agreement. *AFSCME Local 369*, 284 Mich App at 144.

Plaintiff also argues for the first time on appeal that the arbitrator modified the terms of the lease agreement with respect to the CIT deductions. This issue is unpreserved. See *Glasker-Davis v Auvenshine*, 333 Mich App 222, 227; 964 NW2d 809 (2020) (finding that an issue needs to either be raised in or addressed by the lower court to be preserved). "Michigan follows 'the raise or waive rule of appellate review.' " *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, 347 Mich App 280, 289; 14 NW3d 472 (2023), quoting *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). "Under that rule, litigants must preserve an issue for appellate review." *Tolas Oil & Gas Exploration Co*, 347 Mich App at 289. "If a litigant does not raise an issue in the trial court, this Court has no obligation to consider the issue." *Id*. We thus decline to address the merits of this issue.

B. ATTORNEY FEES

On cross-appeal, defendant argues that the trial court erred when it denied its request for attorney fees. We disagree.

"We review for an abuse of discretion a trial court's award of attorney fees and costs." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. "We generally review de novo whether a party was a 'prevailing party,' because it is a question of law." *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 437; 830 NW2d 785 (2013). Additional "[i]ssues of statutory interpretation are also reviewed de novo." *Kemp v Farm Bureau Gen Ins Co of Mich*, 500 Mich 245, 252; 901 NW2d 534 (2017).

"As a general rule, attorney fees are not recoverable as an element of costs or damages absent an express legal exception." *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). "Attorney fees may be recovered if expressly provided for by contract." *Highfield Beach at Lake Michigan v Sanderson*, 331 Mich App 636, 670; 954 NW2d 231 (2020). Attorney fees awarded under a contract are considered damages rather than costs. *Fleet Business Credit*, 274 Mich App at 589. "Attorney fees are also recoverable if authorized by statute." *Highfield Beach at Lake Michigan*, 331 Mich App at 670. Defendant argues it was entitled to attorney fees under the Lease Agreement and under MCL 691.1705.

Defendant first argues that it was entitled to attorney fees under Section 20.01 of the lease agreement, which states:

> In the event either party hereto institutes legal action or proceedings arising out of or in any way connected with this Lease, the non-prevailing party shall reimburse the prevailing party for all reasonable attorney fees and costs incurred in connection therewith.

"In order to obtain an award of attorney fees as damages under a contractual provision requiring such a payment, the party seeking payment must sue to enforce the fee-shifting provision, as it would for any other contractual term." *Pransky v Falcon Group, Inc*, 311 Mich App 164, 194; 874 NW2d 367 (2015). Defendant maintains that plaintiff's complaint to vacate the arbitration award constituted a legal action under Section 20.01 and that defendant was entitled to attorney fees as the prevailing party. Plaintiff argues that the arbitrator ruled on the issue of attorney fees

when he awarded attorney fees to both parties. Defendant counters that the arbitration and this current case are two separate legal actions under Section 20.01.

As earlier noted, "[t]he primary goal in interpreting contracts is to determine and enforce the parties' intent." *Village of Edmore*, 322 Mich App at 262 (quotation marks and citation omitted). "The language of a contract is to be given its ordinary, plain meaning; technical, constrained constructions should be avoided." *Id*. Courts must "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp*, 468 Mich at 468.

The key question here is whether the circuit court action is a separate legal action from the preceding arbitration. "The phrase 'a legal action' undisputedly means 'a lawsuit.' " *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 203; 747 NW2d 811 (2008). Plaintiff filed its arbitration claim against defendant for a breach of the lease agreement. Defendant counterclaimed seeking its CIT deductions. In the trial court, plaintiff filed suit to vacate the arbitration award, and defendant counterclaimed in an effort to confirm the award, dismiss the complaint, and obtain attorney fees. These claims each seek different relief and are separate lawsuits. As such, this case is its own legal proceeding separate from the arbitration claim. *Id*.

The plain language of Section 20.01 establishes that the prevailing party is entitled to the reimbursement of attorney fees. The lease agreement does not define "prevailing party." However, "prevailing party" is a legal term of art and "must be construed and understood according to its peculiar and appropriate meaning." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 563; 886 NW2d 113 (2016). "For there to be a 'prevailing party,' there must have been a material and enforceable alteration of the legal relationship of the parties resulting from judicial imprimatur." *Id*. "The party need not recover the full amount of damages that he or she requested. But the party must show, at the very least, that its position was improved by the litigation." *Pontiac Country Club*, 299 Mich App at 438 (quotation marks and citation omitted).

Defendant asserts that it is the prevailing party because it succeeded in confirming the award. Defendant relies on *Ronnisch Constr Group, Inc* for support, reasoning that "[a] 'prevailing party' is '[t]he party to a suit who successfully prosecutes the action . . . , prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered.' " *Ronnisch Constr Group, Inc*, 499 Mich at 563, quoting *Black's Law Dictionary* (5th ed). However, defendant's argument ignores the *Ronnisch* Court's ensuing statement that, "[f]or there to be a 'prevailing party,' there must have been a material and enforceable alteration of the legal relationship of the parties resulting from judicial imprimatur." *Ronnisch Constr Group, Inc*, 499 Mich at 563. In *Pontiac Country Club*, 299 Mich App at 438, for example, this Court determined that, at a minimum, the prevailing party must show that its position was improved by the litigation. Thus, *Ronnisch* and *Pontiac Country Club* both require some change in the parties' positions after the litigation.

Here, there was no change in the parties' positions. Before the litigation began, plaintiff and defendant received an arbitration award in which defendant was granted over $180,000 in deductions and plaintiff received the payments that defendant owed. The trial court denied plaintiff's motion to vacate the award and did not alter it. After the litigation in the trial court concluded, defendant was still entitled to the deductions and plaintiff was entitled to defendant's

missing payments. Defendant argues that it is entitled to attorney fees because the trial court referred to it as the "prevailing party," but that argument ignores the caselaw establishing that a prevailing party must demonstrate its position improved or was altered after litigation. While defendant succeeded in *confirming* the arbitration award, it fails to demonstrate how the confirmation *improved* its position from before litigation began.

The parties' position after litigation remained the same as it was before litigation. Thus, defendant was not the prevailing party. *Id*.; *Ronnisch Constr Group, Inc*, 499 Mich at 563. Accordingly, the trial court did not err when it denied defendant's request for attorney fees. *Smith*, 481 Mich at 526.

In the alternative, defendant argues that it was entitled to attorney fees under MCL 691.1705 as the prevailing party in an action to confirm an arbitration award. MCL 691.1705 states:

> (1) On granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment that conforms with the order. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.
>
> (2) A court may allow reasonable costs of the motion and subsequent judicial proceedings.
>
> (3) On request of a prevailing party to a contested judicial proceeding under [MCL 691.1702, MCL 691.1703, or MCL 691.1704], the court may add reasonable attorney fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

"When interpreting statutes, our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Kemp*, 500 Mich at 252. "In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014). "When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted." *Id*. (quotation marks and citation omitted.)

Under the plain language of MCL 691.1705(3), only a prevailing party can request attorney fees and costs. As discussed, defendant is not the prevailing party in this matter—although defendant succeeded in confirming the arbitration award, its position did not change from before this case began. See *Pontiac Country Club*, 299 Mich App at 438. Defendant is thus not entitled to attorney fees under MCL 691.1705. Accordingly, the trial court did not err by denying defendant's request for attorney fees.

Affirmed.

/s/ Michael F. Gadola
/s/ Michelle M. Rick
/s/ Christopher P. Yates