

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

FREMONT COMMUNITY DIGESTER, LLC,

Plaintiff,

v.

Case No: 2013-134997-CZ

Hon. Wendy Potts

DEMARIA BUILDING COMPANY, INC,

Defendant.

OPINION AND ORDER RE:
PLAINTIFF FREMONT COMMUNITY DIGESTER, LLC'S MOTION FOR
SUMMARY DISPOSITION
AND
DEMARIA BUILDING COMPANY, INC'S COUNTER-MOTION FOR SUMMARY
DISPOSITION UNDER MCR 2.116(C)(7), (8), AND (10)

At a session of Court
Held in Pontiac, Michigan

On

JAN 23 2014

This case arises from an ongoing construction project in which Defendant DeMaria Building Company, Inc. is building a biogas energy production facility in Fremont, Michigan for Plaintiff Fremont Community Digester, LLC. In December 2010, the parties entered into a construction contract that includes a dispute resolution procedure requiring the parties to submit any dispute arising out of the contract to arbitration. The contract states that arbitration will be governed by the Construction Industry Rules of Arbitration, although Michigan law will apply to matters where the CIRA is silent. After issues arose during the construction, the parties entered into a May 9, 2012 agreement on how they would proceed with arbitration. The letter agreement

stated that the parties agreed to “submit certain defined disputes for resolution” by a single arbitrator, Pat Facca. The parties engaged in multiple arbitration hearings on some of their issues and Mr. Facca issued an award on November 19, 2012.

In May 2013, DeMaria asked Facca to “resume” arbitration for issues that were not decided by the November 2012 award. Fremont objected, asserting that the May 9, 2012 letter agreement applied only to certain issues, not all of the issues between the parties, and further arbitration should proceed according to the arbitration provisions of the construction contract. Fremont also contested the arbitrator’s authority to determine whether new claims or disputes between the parties would be handled according to the May 9, 2012 letter agreement. The parties briefed the issues and, on June 19, 2013, Facca issued a written opinion and order concluding that he has authority to determine his jurisdiction over new disputes citing Rule 9 of the CIRA. Facca also concluded that the new issues were subject to the procedures of the May 9, 2012 letter agreement.

Fremont filed this action seeking to vacate Facca’s June 2013 order because he exceeded his jurisdiction by deciding a matter that Fremont claims is a question of law. The matter is now before the Court on the parties’ cross-motions for summary disposition as to whether Facca’s June 2013 order should be vacated. This Court’s authority to vacate an arbitrator’s decision is limited by court rule. Specific to this dispute, the Court must vacate an arbitration decision if the arbitrator exceeded his powers. MCR 3.602(J)(2)(c).

Fremont asserts that the determination whether a particular dispute is arbitrable is a question of law for the Court. *Madison District Public Schools v Myers*, 247 Mich App 583, 594; 637 NW2d 526 (2001). However, there is no dispute that the parties agreed to submit their disputes arising from the construction contract to arbitration. Thus, the question posed to Mr.

Facca and now before this Court is not whether the new issues are arbitrable – they are plainly subject to an arbitration agreement. Instead, Fremont is contesting the nature and scope of further arbitration proceedings. Properly framed, the threshold question raised by this case and these motions is whether Facca exceeded his authority by concluding that he had jurisdiction to decide if DeMaria’s new claims are subject to the May 9, 2012 letter agreement. An arbitrator exceeds his authority when he acts beyond the material terms of the contract from which he draws his authority or in contravention of controlling principles of law. *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982).

Contrary to Fremont’s claim, Facca’s decision is not in contravention of established Michigan law. Fremont cites several cases that stand for the principal that the courts, not arbitrators, determine whether a claim is subject to an arbitration agreement. *Madison District, supra*. However, these cases are inapposite because the parties do not dispute that DeMaria’s claims are subject to an arbitration agreement. The May 9, 2012 agreement did not establish the parties’ agreement to arbitrate their claims – it merely set forth the procedure for doing so. Thus, Facca was not deciding whether the new claims were arbitrable, but how those claims would be arbitrated and whether the procedure set forth in the May 9, 2012 agreement applied to all their claims. Fremont cites no Michigan decision holding that an arbitrator lacks authority to interpret the application of an agreement governing procedure for conducting arbitration.

In addition, the parties agreed in both their construction contract and the May 9, 2012 agreement that arbitration would be governed by the CIRA. As Facca noted in his opinion and DeMaria asserts now, Rule 9 of the CIRA grants the arbitrator “the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.” The construction contract states that Michigan law will apply only where

the CIRA is silent. Fremont contends that Rule 9 conflicts with Michigan law holding that the arbitrability of an issue is a judicial determination. However, as noted above, the question here is not whether DeMaria's issues are arbitrable, but whether the procedures established in the May 9, 2012 agreement govern all arbitration between the parties. This is not a gateway determination of arbitrability, but a question of the scope and application of May 9, 2012 agreement. Because the CIRA gives Facca authority to determine the scope of the May 9, 2012 agreement, he did not exceed his authority in doing so and the Court will not vacate his decision on this ground.

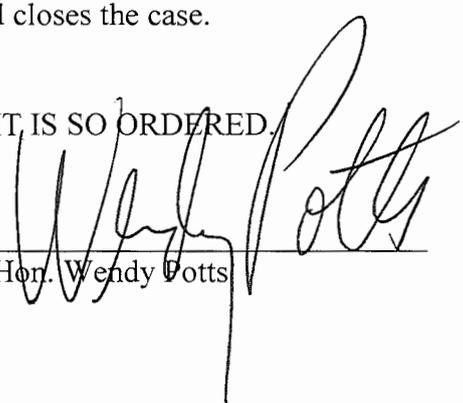
Fremont also asserts that even if Facca had jurisdiction to decide this issue, he erred in concluding that the May 9, 2012 agreement applied to all arbitration between the parties. However, Fremont's position would require this Court to second-guess Facca's opinion, which would exceed the scope of this Court's review. Judicial review of an arbitrator's decision is limited to blatant errors of law. *Gavin, supra* at 428-429. Because Fremont fails to show that Facca's decision is legally erroneous, the Court will not disturb it.

For all of these reasons, the Court grants DeMaria's motion, denies Fremont's motion, and dismisses Fremont's claims with prejudice.

This order resolves the last pending claim and closes the case.

Dated: **JAN 23 2014**

IT IS SO ORDERED.



Hon. Wendy Potts