

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

**GALASSO, PC, and
GALASSO & ASSOCIATES, CPA, PLC,
Plaintiffs,**

v.

**Case No. 15-144936-CK
Hon. James M. Alexander**

**JAMES GRUDA, ET AL,
Defendants.**

_____ /

OPINION AND ORDER CONFIRMING ARBITRATION AWARD

This matter is before the Court on cross motions to confirm and vacate in part and confirm in part the arbitration award. This case began as two separate actions and is procedurally confusing.

On January 12, 2015, Galasso, PC and Galasso & Associates, CPA, PLC filed their Complaint against James Gruda; Michelle Gruda; Gruda Products, Inc; MHC Products, Inc; CH Properties, LLC; and The Stone House Bar, Inc. seeking to recover for amounts owing for legal, tax, and accounting services. This action was given case number 2015-144936-CK. According to the Proof of Service, each of these Defendants was served on January 15, 2015.

Despite the existence of said pending case, over a month later, on February 20, 2015, James and Michelle Gruda filed a **separate** action against Galasso & Associates, CPA, PLC; Galasso, PC; and Joseph Galasso, Jr, individually. This action was given case number 2015-145644-CZ. In this action, the Grudas alleged that the Galasso parties fraudulently obtained a note and mortgage on the Gruda's property.

The same day, the Grudas' companies (Gruda Products, Inc; MHC Products, Inc; CH Properties, LLC; and The Stone House Bar, Inc) filed a Counter-Complaint in the original action alleging that the Galasso companies fraudulently filed UCC-1 Financing Statements listing the Gruda companies as debtors. This, the Gruda companies claimed, caused them damage in the form of the inability to obtain certain financing.

On April 15, 2015, the parties executed a Stipulated Order Consolidating Cases. This Order provides that "Case No. 2015-145644-CZ shall be consolidated with and all future pleadings and filings shall be done under Case No. 2015-144936-CZ." In other words, this Order provides that Case No. 2015-144936-CZ absorbed Case No. 2015-145644-CZ.

In October 2015, this matter was before the Court on the Galasso parties' motion for summary disposition. In its Opinion on the same, the Court summarized this case and noted procedural flaws as follows:

Plaintiffs allege that, by January 2004, Defendants owed more than \$80,000 in past due fees. As a result, on January 2, 2004, Defendants Michelle and James Gruda (individually) executed a Promissory Note Line of Credit in the principal sum of \$80,000 – payable to Plaintiffs and Joseph Galasso, Jr. (individually). Contemporaneous with the Note, the Gruda Defendants also executed a Real Estate Mortgage based on the same.

A large part of this suit involves a dispute over the validity and enforceability of this Note and Mortgage. In any event, the present case was initially filed as two separate actions, which were then consolidated. In January 2015, Plaintiffs filed the present collection action, seeking some \$114,621.55 owed for professional service fees from Defendants.

Defendants then filed a Counterclaim – alleging that Plaintiffs fraudulently filed UCC Financing Statements indicating that Defendant businesses were debtors to Plaintiffs, which damaged the Defendant businesses because it made it impossible for them to obtain financing.

On March 6, 2015, individual Defendants James and Michelle Gruda (the Gruda Defendants) then separately filed a **Second** Amended Complaint (Case No. 15-145644-CZ) against Plaintiffs and Joseph Galasso, Jr., individually, on claims titled: (Count I) a declaration that the Note is unenforceable; (Count II) a

discharge of mortgage and quiet title; (Count III) violation of the Michigan Rules of Professional Conduct; (Count IV) intentional fraud; (Count V) innocent misrepresentation; and (Count VI) waiver.

As stated, it appears that the Gruda Defendants filed and served their **Second** Amended Complaint on March 6, 2015. But on April 10, 2015, Plaintiffs filed an Answer to the Gruda Defendants' **First** Amended Complaint. There appears to be no Answer to the Gruda Defendants' **Second** Amended Complaint. The difference between the two is that the **Second** Amended Complaint added and changed some claims.¹

In addition to not answering the **Second** Amended Complaint, it appears that Plaintiffs' present motion only seeks dismissal of the claims alleged in the Gruda Defendants' **First** Amended Complaint. Plaintiffs do not address the Gruda Defendants' **Second** Amended Complaint claims for: (Count IV) intentional fraud; (Count V) innocent misrepresentation; and (Count VI) waiver.

The Galasso parties only presented two issues in its summary motion. First, they sought a declaration that the Note and Mortgage were unenforceable because they were not supported by consideration. Second, the Galasso parties sought dismissal of the Gruda parties' claim for violation of the Michigan Rules of Professional Conduct because violations of the professional conduct rules do not give rise to a private cause of action.

With respect to the Galasso parties' lack-of-consideration argument, the Court reasoned and concluded:

In support of their argument that there was valid consideration for the Note, Plaintiffs argue that "pre-existing debt is actually valuable consideration that can support the execution of a negotiable instrument such as a promissory note," citing *Ann Arbor Constr Co v Glime Constr Co*, 369 Mich 669, 675; 120 NW2d 747 (1963) (reasoning "pre-existing debt is sufficient consideration moving to the accommodated party to support the signature of an accommodating party whether the note replaces the original debt or is given as collateral security.").

Plaintiffs further argue that the existence of the note itself is evidence of consideration. Indeed, "[e]very negotiable instrument is deemed prima facie to have been issued for valuable consideration; and every person whose signature

¹ The First Amended Complaint, filed on February 26, 2015, alleged claims titled: (Count I) a declaration that the Note is unenforceable; (Count II) discharge of mortgage and quiet title; (Count III) failure to provide invoices upon request; and (Count IV) violation of MRPC.

appears thereon to have become a party thereto for value.” *In re Booth's Estate*, 326 Mich 337, 343; 40 NW2d 176 (1949) (quotation and citation omitted).

“To have consideration there must be a bargained-for exchange.” *Gen Motors Corp v Dep't of Treasury, Revenue Div*, 466 Mich 231, 238; 644 NW2d 734 (2002). And “Courts do not generally inquire into the sufficiency of consideration.” *Id.* at 239.

Indeed the Note states, in relevant part (emphasis in original):

FOR VALUE RECEIVED, on 2nd day of January 2004, the undersigned, Michelle Gruda and James B. Gruda, jointly and severally . . . promises to pay to the order of Galasso & Associates, CPA, PLC, Joseph P. Galasso, Jr., Attorney at Law, P.C. and Joseph P. Galasso, Jr. . . . the principal sum of EIGHTY THOUSAND DOLLARS (\$80,000), plus such other monies advanced directly or indirectly, plus interest at a rate of 5 percent (5%) as hereinafter provided.

By its own terms, the Note acknowledges that it was supported by consideration by declaring “for value received.” Plaintiffs also attach the Affidavit of Joseph Galasso, Jr. and the relevant account records dating back to 1994. This evidence also supports the argument that the Gruda Defendants owed monies prior to the January 2004 Note and Mortgage.

In response to Plaintiffs’ motion, the Gruda Defendants argue that there was no consideration to support the Note and Mortgage because they, individually, had no pre-existing debt to Plaintiffs. The Gruda Defendants also argue that any invoices sent to the Gruda business entities were paid in full by January 2004.

But it is well-established that “[s]ummary disposition cannot be avoided by conclusory assertions that are at odds either with prior sworn testimony of a party or, as here, actual historical conduct of a party.” *Aetna Casualty & Sur Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548; 509 N.W.2d 520 (1993); citing *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972).

The Court finds that this is precisely the case here. The Gruda Defendants executed the Note and Mortgage – specifically acknowledging that that they owed a debt to Plaintiffs and valuable consideration supported the Note. To now argue (via conclusory assertions contained in their Affidavits) that there was no consideration is at odds with their prior actions and may not serve as a basis to avoid summary disposition.

For all of the foregoing reasons, the Court concludes that viewing all evidence in the light most favorable to Defendants, there are no material questions

of fact in dispute, and Plaintiffs are entitled to judgment as a matter of law. As a result, the Court GRANTS Plaintiff's motion for summary disposition and DISMISSES the Gruda Defendants' (Count I) seeking a declaration that the Note is unenforceable; and (Count II) discharge of mortgage and quiet title.

And with respect to the Galasso parties' request for dismissal of the Gruda parties' claim for a violation of the Michigan Rules of Professional Conduct, the Court concluded: "Simply, there is no right to a private cause of action for violations of Michigan's Rules of Professional Conduct, and as a result, the Gruda Defendants' claim for the same must be DISMISSED."

Via orders entered in January and February, 2016, the parties then referred the remaining claims to binding arbitration. On May 10, 2016, the Arbitrator, Joel Applebaum, denied the Galasso parties' motion for summary disposition, which sought dismissal of the Gruda parties' fraud and misrepresentation claims. The Galasso parties based their request on the argument that said claims were barred by the six-year statute of limitations found in MCL 600.5813.

In his Opinion, Mr. Applebaum concluded that:

there are genuine issues of material facts as to when the individual Defendants discovered or should have discovered the existence of the Note and the Mortgage or whether, by allegedly engineering that Defendants execute signature pages without providing copies of the entire contracts for review, such action constitutes fraudulent concealment.

Mr. Applebaum also opined that the counter-claim savings statute, MCL 600.5823, could act to save said claims.

Then on July 12, 2016, Mr. Applebaum issued his final Award of Arbitrator. It provided, in relevant part, that the Promissory Note, Mortgage, and Professional Services Agreement were declared void and unenforceable based on the Gruda parties' fraud and misrepresentation claims.

The Galasso parties now request this Court to enter an Order (1) vacating said Award "to the extent that it voids, invalidates, or deems to be unenforceable the Promissory Note, Mortgage, and Professional Services Agreement"; (2) confirming the Award in the Galasso parties' favor; and (3)

holding that James and Michelle Gruda are personally liable for the liabilities of their Affiliated Entities based on the terms of the Professional Service Agreement.

The Gruda parties, on the other hand, seek to confirm the Award.

Michigan courts have long recognized that “Judicial review of an arbitration decision is very limited. A court may not review an arbitrator’s factual findings or decision on the merits.” *Byron Center Public Schools Bd of Educ v Kent County Educ Ass’n*, 186 Mich App 29, 31; 463 NW2d 112 (1990), citing *Port Huron Area School Dist v Port Huron Ed Ass’n*, 426 Mich 143, 150; 393 NW2d 811 (1986).

Under MCR 3.602(I), this Court has three options in reviewing an arbitration award. The Court may (i) confirm, (ii) vacate, or (iii) correct or modify the award. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991).

Our Supreme Court has reiterated that:

Courts . . . favor awards made by tribunals of the parties’ own choosing, and are reluctant to set them aside, and **every presumption will be made in favor of their fairness**, and the burden of proof is upon the party seeking to set them aside, and **the proof must be clear and strong.**” *DAIIE v Gavin*, 416 Mich 407, 437; 331 NW2d 418 (1982) (emphasis added); quoting *Brush v Fisher*, 70 Mich 469, 473, 478; 38 NW 446 (1888).

The Galasso parties suggest that the arbitrator exceeded his powers. The Uniform Arbitration Act provides, at MCL 691.1703(1):

On motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if any of the following apply:

...

(d) An arbitrator exceeded the arbitrator’s powers.

Arbitrators exceed their power when they “act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law.” “[W]here it clearly appears on the face of the award or

the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside.” *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554-555; 682 NW2d 542, 544 (2004); quoting *DAIIE v Gavin*, 416 Mich 407, 434, 443; 331 NW2d 418 (1982).

The Galasso parties first argue that the arbitrator was wrong on the law when he let the Gruda parties’ fraud and misrepresentation claims survive summary despite falling outside the 6 year statute of limitations (the alleged wrongs occurred in 2004 and 2006) found in MCL 600.5813. And, the Galasso parties argue, our Supreme Court has held that the discovery rule does not apply to the accrual of actions for fraud, citing *Boyle v Gen Motors Corp*, 468 Mich 226, 231-232; 661 NW2d 557 (2003).

But, on the face of the final award, it isn’t clear why the Arbitrator believed the Gruda parties’ fraud and misrepresentation claims survived. It could be that the Arbitrator determined that the discovery rule applied or it could be that he believed that counterclaim saving statute saved said claims.

Said statute, MCL 600.5823, provides: “To the extent of the amount established as plaintiff’s claim the periods of limitations prescribed in this chapter do not bar a claim made by way of counterclaim unless the counterclaim was barred at the time the plaintiff’s claim accrued.”

The Galasso parties argue that this statute cannot apply to save the Gruda claims because said fraud and misrepresentation claims were not “counterclaims” – but were original claims in a separate action.

Our Supreme Court noted problems with challenging arbitration awards based on an alleged error of law:

Arbitration, by its very nature, restricts meaningful legal review in the traditional sense. As a general observation, courts will be reluctant to modify or vacate an award because of the difficulty or impossibility, without speculation, of determining what caused an arbitrator to rule as he did. The informal and sometimes unorthodox procedures of the arbitration hearings, combined with the absence of a verbatim record and formal findings of fact and conclusions of law, make it virtually impossible to discern the mental path leading to an award. Reviewing courts are usually left without a plainly recognizable basis for finding substantial legal error. It is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable, such as that involved in these cases. In many cases the arbitrator's alleged error will be as equally attributable to alleged "unwarranted" factfinding as to asserted "error of law". In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and the arbitrator's findings of fact are unreviewable. *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 429; 331 NW2d 418, 428 (1982).

In this case, it is unclear why the Arbitrator declared the Note, Mortgage, and Professional Services Agreement void. In addition to fraud and misrepresentation claims, the Gruda parties alleged declaratory and discharge claims. It is not apparent, under which claims, the Arbitrator ruled as he did. As a result, the Court cannot say that the Final Arbitration Award is conclusively based on any error in law.

The Galasso parties next argue that, because the Court previously determined that the Note and Mortgage were supported by consideration, the Arbitrator was precluded by collateral estoppel from ruling that the same were void and unenforceable due to fraud. The Court disagrees.

"Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Porter v City of Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). Our Supreme Court has held:

Generally, for collateral estoppel to apply three elements must be satisfied: (1) "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment"; (2) "the same parties must have had a

full [and fair] opportunity to litigate the issue”; and (3) “there must be mutuality of estoppel.” *Monat v State Farm Ins Co*, 469 Mich 679, 682-685; 677 NW2d 843 (2004), quoting *Storey v Meijer, Inc*, 431 Mich. 368, 373 n 3; 429 N.W.2d 169 (1988).

In this case, however, the Arbitrator did not determine that the Note and Mortgage were void because they were not supported by consideration (which would be contrary to the Court’s prior ruling). Rather, the Arbitrator simply determined that these instruments were void and unenforceable. Because the Arbitrator did not decide any issue previously decided by the Court, the Galasso parties’ collateral estoppel argument also fails.

For the foregoing reasons, the Court concludes that the Arbitrator did not exceed his powers, and did not act in contravention of controlling law. This Court is bound to make every presumption in favor of the decision’s fairness absent clear and strong proof. The Galasso parties have failed to carry their burden to set aside the award.

The Court, therefore, GRANTS the Gruda parties’ motion to confirm the arbitration award and DENIES the Galasso parties’ motion to vacate in part the same.

The Gruda parties must prepare (and both sides must approve as to form) a judgment consistent with this Opinion by **November 3, 2016**. If approval as to form cannot be secured, all parties shall appear for a hearing on that date at 8:30 am.

IT IS SO ORDERED.

October 11, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge