

STATE OF MICHIGAN
SAGINAW COUNTY CIRCUIT COURT

THE CARTER-JONES LUMBER COMPANY,

Plaintiff,

v.

A-TEAM FRAMING, LLC,

Defendant.

Case No. 16-029846-CK

Judge: M. Randall Jurrens (P27637)

**OPINION AND ORDER DENYING
DEFENDANT’S MOTION TO
VACATE ARBITRATION AND
GRANTING PLAINTIFF’S MOTION
TO CONFIRM ARBITRATION**

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This matter is before the court on competing motions to confirm or, conversely, vacate an arbitration award issued in plaintiff’s favor against defendant.

For the reasons stated in this opinion, the court concludes that defendant’s vacatur motion fails to justify relief and that plaintiff is entitled to judgment confirming the arbitration award.

Background

As manifested in a preexisting writing, the parties agreed to arbitrate any dispute with, and subject to the Construction Industry Rules of, the American Arbitration Association (AAA).

When a dispute arose, the claim was submitted to arbitration and the arbitrator issued an interim award on March 8, 2016 and a final award on April 13, 2016.

On May 13, 2016, plaintiff filed a complaint¹ requesting a judgment confirming the arbitration award and, subsequently, on June 29, 2016, filed a Motion to Confirm Arbitration Award and Issue Confirming Judgment². On July 5, 2016, defendant filed its Objections and Motion to Vacate Arbitration. On July 6, 2016, plaintiff filed a reply to defendant's objections and vacatur motion.

The competing motions were heard July 11, 2016, and the court took the matter under advisement with a request that counsel provide any omitted documentary evidence of the parties' agreement(s) and the arbitration process. On July 26, 2016, plaintiff filed a supplemental brief with copies of the requested documents³.

Analysis

Plaintiff's complaint and motion request confirmation of an arbitration award pursuant to Michigan's revised uniform arbitration act (RUAA), *MCL 691.1681 et seq.*⁴

In turn, defendant objects to confirmation and seeks vacatur of the award on several grounds, including absence of an agreement to arbitrate, arbitrator partiality, lack of input in arbitrator selection, absence of legal counsel, inability to call witnesses, arbitrator

¹ With a copy of the Final Award of Arbitrator attached.

² Attached to the motion were attached copies of an October 28, 2014 Installed Sales Independent Contractor Agreement, the Final Arbitration Award, MCL 691.1702, and a proposed form of Judgment Confirming Arbitration Award.

³ Attachments to plaintiff's supplemental brief included copies of an October 28, 2014 Independent Contractor Agreement, a January 7, 2015 Independent Contractor Agreement, an October 21, 2015 cover letter from the AAA enclosing a List for Selection of Arbitrator (with accompanying biographical data of the prospective arbitrators), General Arbitrator Oath Form completed by arbitrator Brian Buzby, a January 7, 2016 Report of Preliminary Hearing and Scheduling Order issued by arbitrator Buzby, the Interim Award of Arbitrator, Respondent A-Team Framing LLC Closing Statement submitted by Heidi Wesener, the Final Award of Arbitrator, and a proposed Judgment Regarding Arbitration Award.

⁴ Plaintiff, as well as defendant, assumes the applicability of the RUAA. However, the face of the Interim Award indicates that defendant, a Michigan limited liability company, traveled to Ohio to assist plaintiff, an Ohio based corporation, perform a rough carpentry subcontract on an Ohio construction project. Under the circumstances, the court questioned at oral argument whether state law was preempted by federal law governing arbitration where interstate commerce is involved, the Federal Arbitration Act (FAA), *9 USC 1 et seq.*; *Burns v Olde Discount Corp.*, 212 Mich App 576, 580; 538 NW2d 686 (1995).

However, even assuming the FAA applies, it has been held that Michigan arbitration law is almost identical to the FAA in all relevant respects (including, particularly, grounds for vacatur, *9 USC 10*), and that Michigan's rules governing arbitration ostensibly mirror the FAA. *Savers Property and Casualty Ins Co v National Union Fire Ins Co*, 748 F3d 708, 717 (CA 6, 2014).

Accordingly, for purposes of the present analysis, the court will join in counsels' embrace of Michigan arbitration law.

inattentiveness, violation of public policy, inconvenient forum, and the award being ineligible for full faith and credit.⁵

Since courts afford every presumption in favor of an arbitration award, the burden of proof is upon the party seeking to set it aside, and the proof must be clear and strong. *Brush v Fisher*, 70 Mich 469, 473; 38 NW 446 (1888).

Here, defendant's motion merely offered conclusory statements and references to MCR 3.602(J)⁶ and MCL 600.5081⁷, unaccompanied by a brief citing the authority on which it is based, *MCR 2.119(2)*. And, other than referencing MCR 2.113(F), defendant added nothing of substance at oral argument.

With due respect, this is inadequate. A party may not merely announce its position and leave it to the court to discover and rationalize the basis for its claims, nor may a party give issues cursory treatment with little or no citation of supporting authority. Argument must be supported by citation to appropriate authority or policy. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Accordingly, the court considers defendant's arguments effectively abandoned, irrespective of the merits. *Innovation Ventures, LLC v Liquid Manufacturing, LLC*, __ Mich __, __; __ NW2d __ (2016) (Docket No. 150591), slip op at 24-25.

Nonetheless, the court, in an exercise of discretion, is inclined to address several of defendant's concerns.

Vacatur Standards

Judicial review of arbitration awards is usually extremely limited. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009). A reviewing court may not review the arbitrator's findings of fact, *DAIIE v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982), or discretionary decisions by the arbitrator, *Iron Co v Sundberg, Carlson & Associates, Inc*, 222 Mich App 120, 126; 564 NW2d 78 (1997). Any error of law must appear on the face of the award itself, *Gavin* at 428–429, and, additionally, the error must compel a substantially different award, *Gavin* at 443. By narrowing the grounds upon which an arbitration decision may be invaded, the efficiency and reliability of arbitration as an expedited, efficient, and informal means of private dispute resolution is preserved. *Gordon Sel-Way, Inc. v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991).

According to the RUAA, *MCL 691.1703(1)*, vacatur of an arbitration award is required if:

⁵ This list is condensed from defendant's generally, but not entirely, similar affirmative defenses and objections/motion to vacate.

⁶ In light of a 2014 amendment to MCR 3.602, the rule's continuing applicability to cases involving the RUAA is unclear (“[T]his rule applies to all other forms of arbitration . . .”, *MCR 3.602(A)*).

⁷ MCL 600.5081 is a portion of Chapter 50B of the Revised Judicature Act governing domestic relations arbitration.

- (a) The award was procured by corruption, fraud, or other undue means.
- (b) There was any of the following:
 - (i) Evident partiality by an arbitrator appointed as a neutral arbitrator.
 - (ii) Corruption by an arbitrator.
 - (iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.
- (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding.
- (d) An arbitrator exceeded the arbitrator's powers.
- (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under section 15(3) not later than the beginning of the arbitration hearing.
- (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in [MCL 691.1689] so as to prejudice substantially the rights of a party to the arbitration proceeding.

Procedurally, in recognition of the limitations on judicial review, although confirmation of an arbitration award is properly initiated through the filing of a complaint, *Jaguar Trading Ltd. Partnership v Presler*, 289 Mich App 319; 808 NW2d 495 (2010), the RUAA, *MCL 691.1702* and *691.1703*, contemplates that both confirmation and vacatur requests proceed by motion (i.e. by summary proceeding)⁸.

Finally, courts must carefully evaluate claims of arbitrator error to ensure that they are not being used as a ruse to induce the court to review the merits of the arbitrator's decision. *Gordon Sel-Way, Inc v Spence Bros, Inc.*, 438 Mich 488, 497; 475 NW2d 704 (1991).

Agreement to Arbitrate

Defendant asserts the arbitration award should be vacated because there is no proof it agreed to binding arbitration.

First, at oral argument defendant asserted that, as a procedural matter, plaintiff's complaint is fatally flawed by not attaching a copy of the parties' arbitration agreement as required by MCR 2.113(F)(1) ("If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit . . .").

However, notwithstanding the contractual genesis of arbitration, *Kaleva-Norman-Dickson Sch Dist No 6 v Kaleva-Norman-Dickson Sch Teachers' Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975), this is not a claim directly based on a written instrument but, rather, an action to confirm an arbitration award. Accordingly, the court is not aware of any obligation to attach to the complaint a copy of the underlying agreement to arbitrate. To the extent that the parties'

⁸ This runs contrary to defense counsel's expectation (voiced at oral argument) to engage in discovery and, presumably, ultimately, a [jury] trial.

contract containing the arbitration agreement provides the underlying necessary basis of the arbitrator's authority, a copy of an October 28, 2014 Installed Sales Independent Contractor Agreement signed by "Heidi Wesener", as "Owner", was attached to plaintiff's motion to confirm⁹ (as well as plaintiff's supplemental brief), and a copy of a January 7, 2015 Installed Sales Independent Contractor Agreement containing the handwritten signature of plaintiff's supervisor and Wesener's electronic signature was attached to plaintiff's supplemental brief. Even if the court were to summarily dismiss plaintiff's complaint as legally deficient, *MCR 2.116(C)(8)*, *Ferrell v Vic Tanny Int'l, Inc*, 137 Mich App 238, 242-243; 357 NW2d 669 (1984)), plaintiff would be entitled to amend its pleadings, *MCR 2.116(I)(5)*. Considering a copy of the parties' underlying contract is now part of the court's file, it stands to reason that plaintiff could easily cure any defect in the complaint. *Two Hundred Eighty-Five West Hickory Grove, LLC v Hatchett*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2016 (Docket No. 324300)¹⁰.

Second, defendant asserts it "did not stipulate nor agree to any binding arbitration in the matter" (Affirmative Defense 9).

However, under the RUA, *MCL 691.1703(1)(e)*, any challenge to an award on the basis that there is no valid agreement to arbitrate must be raised "not later than the beginning of the arbitration hearing"¹¹.

There is no evidence defendant raised a "no valid agreement to arbitrate" defense at any time before or during the arbitration hearing. A party may not participate in arbitration and adopt a "wait and see" posture, complaining for the first time only if the arbitrator's ruling is unfavorable." *American Motorists Ins Co v Llanes*, 396 Mich 113, 114; 240 NW2d 203 (1976).

Accordingly, whatever the merit of defendant's claim that it "did not stipulate and agree to any binding arbitration in the matter"¹², the argument was effectively waived by defendant's participation in the arbitration hearing.

⁹ The court notes that defendant did not file a written response to plaintiff's motion to confirm arbitration award, which asserted: "1. On October 28, 2014, the Defendant, A-Team Framing, LLC and Plaintiff, The Carter-Jones Lumber Company executed an Installed Sales Independent Contractor Agreement (Exhibit 1)".

¹⁰ Although unpublished opinions of the Court of Appeals are not binding precedent, *MCR 7.215(C)(1)*; *In re Application of Indiana Michigan Power Co.*, 275 Mich App 369, 380; 738 NW2d 289 (2007), they may be considered instructive or persuasive. *Id.*

¹¹ According to the official Comment to the Uniform Arbitration Act promulgated by the National Conference of Commissioners on Uniform State Laws:

The purpose of the language requiring a party participating in an arbitration proceeding to raise an objection that no arbitration agreement exists "not later than the beginning of the arbitration hearing" is to insure that the party makes a timely objection at the start of the arbitration hearing rather than causing the other parties to go through the time and expense of the arbitration hearing only to raise the objection for the first time later in the arbitration process or in a motion to vacate an award. [Only a] person who refuses to participate in or appear at an arbitration proceeding retains the right to challenge the validity of an award on the ground that there was no arbitration agreement in a motion to vacate.

Arbitrator Partiality

Defendant alleges “a conflict of interest between plaintiff’s counsel and the arbitrator resulting in partiality for Plaintiff and bias toward Defendant” (Objections/Motion to Vacate, ¶ 2(a)).

“Partiality or bias which will allow a court to overturn an arbitration award must be certain and direct, not remote, uncertain, or speculative.” *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1986).

Here, while defense counsel has offered conclusory statements that the arbitrator was biased, no evidence of partiality has been demonstrated. One can only speculate as to the “conflict of interest between plaintiff’s counsel and the arbitrator” and how it “result[ed] in partiality for Plaintiff and bias toward Defendant”. There is certainly nothing in the arbitration record, including, particularly, the reasoned awards authored by the arbitrator, suggesting a lack of impartiality.

In any event, a party with actual or constructive knowledge of facts suggesting partiality of an arbitrator when the matter is arbitrated must raise this issue in the arbitration proceeding or the issue will be deemed waived. *Gordon Sel-Way, Inc. v Spence Bros, Inc.*, 177 Mich App 116; 440 NW2d 907 (1989), rev’d on other grounds, 438 Mich 488 (1991).

Similarly, while the AAA Construction Industry Rules, incorporated into the parties’ agreement by reference¹³, require that arbitrators be “impartial and independent and shall perform his or his duties with diligence and in good faith” (Rule 20(a)), “[a]ny party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object” (Rule 42).

¹² In any event, there appears to be no merit to the claim defendant did not agree to arbitrate. The October 28, 2014 Independent Contractor Agreement (containing an agreement to arbitrate) concludes with the handwritten signature of the plaintiff’s “Installed Manager”, Wes Heator, and the handwritten signature of the defendant’s “Owner”, “Heidi Wesener”. The January 7, 2015 Independent Contractor Agreement (containing the same arbitration clause) again concludes with Wes Heator’s handwritten signature and, as authorized by the last paragraph of the agreement and by the Uniform Electronic Transactions Act, *MCL 450.831 et seq.*, contains the electronic signature of defendant’s owner, Heidi Wesener. Accordingly, contrary to defendant’s assertion, it appears that it “did [] stipulate [and] agree to [] binding arbitration in the matter”.

Moreover, even if only one party (or no party) signed the agreement, it would not be fatal. A written agreement (a “record” recognized under the RUAA, *MCL 691.1686* and *MCL 691.1681(2)(f)*), would be 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 72-73.

¹³ An arbitration agreement may incorporate the American Arbitration Association Rules by reference. *Hetrick v David A. Frieman, DPM, PC*, 237 Mich App 264, 269; 602 NW2d 603 (1999). When the parties incorporate these rules into their contract by reference, they are controlling. *Id.*

Accordingly, there is no evident partiality by the arbitrator that would justify vacatur of the arbitration award.

Arbitrator Selection Process

Defendant seeks vacation of the arbitration award because of an alleged lack “of any input in the selection of the arbitrator” (Objections/Motion to Vacate, ¶ 2(b)).

The RUA, *MCL 691.1691(1)*, provides that “[if] the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails.”

Here, the parties’ agreement provided that disputes would be resolved through “arbitration with the American Arbitration Association”, and there is no indication the process of selecting an arbitrator adopted by the parties was not properly observed. *Oakland-Macomb Interceptor Drain Drainage District v Ric-Man Construction, Inc.*, 304 Mich App 46; 850 NW2d 498 (2014). Rather, it appears the AAA provided defendant with a List for Selection of Arbitrator (with accompanying biographical data of the prospective arbitrators) and directions to “strike two names from the list” and “indicate [] order of preference” of the remaining candidates, or else “all names submitted shall be deemed acceptable”, followed by completion of the General Arbitrator Oath Form by the ultimately selected arbitrator, Brian Buzby.

Moreover, even assuming a party has cause to object to the selection of the arbitrator, the objection is effectively waived by participation in the arbitration proceeding without objection. *Brush v Fisher*, 70 Mich 469, 476-477; 38 NW 446 (1888).

In the end, contrary to defendant’s assertion, it appears that defendant participated in an arbitration hearing conducted by an arbitrator who had been selected with defendant’s [opportunity for] input according to the parties’ preexisting agreement. Defendant cannot now be heard to object to the selection process.

Lack of Legal Counsel

Defendant seeks vacation of the arbitration award because it had “no legal counsel to represent its interests” (Objections/Motion to Vacate, ¶ 2(c)).

Under the RUA, *MCL 691.1696*, “[a] party to an arbitration proceeding may be represented by a lawyer”.

Under the AAA Construction Industry Rules, Rule 27, “[a]ny party may participate without representation (pro se), or by counsel or any other representative of that party’s choosing, unless such choice is prohibited by applicable law.”

Here, the Interim Award of Arbitrator observed that defendant “was unrepresented by counsel, which the Arbitrator allowed in [defendant’s] favor”, and thus, [] incurred no attorney’s fees”.

It appears, then, that defendant's lack of legal counsel was a matter of choice, not an arbitrator's denial of a right to be represented by a lawyer.¹⁴

Nonetheless, defendant's attorney seemed to suggest at oral argument that because his client, a limited liability company, chose to be represented in the arbitration proceedings by its non-lawyer owner, the arbitration award should be nullified because it is the product of the unauthorized practice of law. However, assuming, without concluding, that representing a separate legal entity in arbitration proceedings constitutes the unauthorized practice of law (particularly under Ohio law where the arbitration occurred), defendant has produced no authority that the remedy for the offense, which the client itself enabled (and complains of only after obtaining an unfavorable result), must be vacatur of the award.

Accordingly, defendant has not demonstrated that proceeding with its non-lawyer owner representing its interests constitutes grounds to vacate the arbitration award.

Opportunity to be Heard

Defendant alleges it "was not able to call witnesses in its defense" (Objections/Motion to Vacate, ¶ 2(d)).

The RUAA, *MCL 691.1695(4)*, provides that "a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing".

Similarly, the AAA Construction Industry Rules, Rule 33, states, "each party has the right to be heard and is given a fair opportunity to present its case."

Here, the Interim Award of Arbitrator recorded that after plaintiff's proofs were presented, "A-Team, in turn, called Tom Alfano, who testified about the challenges A-Team faced and offered his view that, in the end, A-Team was justified in walking off the Project, was improperly terminated, and now has certain claims for payments and amounts due."

Further discrediting the claim that the arbitrator refused to hear material evidence, defendant's own written closing statement recognizes testimony and exhibits presented during the arbitration hearing and is entirely silent on the present proposition that it was unable to call witnesses.

Accordingly, the defendant has failed to demonstrate any misconduct by the arbitrator justifying vacatur of the award.

Arbitrator Inattentiveness

Finally, defendant alleges "[t]he arbitrator was falling asleep, incoherent and disinterested during the arbitration proceedings" (Objections/Motion to Vacate, ¶ 2(e)).

¹⁴ The court notes that parties are commonly allowed to participate in arbitration without legal counsel, *Fette v Peters Const Co*, 310 Mich App 535, 538 n 2; 871 NW2d 877 (2015).

However, contrary to its burden, defendant has not produced evidence of arbitrator misconduct prejudicing its rights. Rather, review of the reasoned awards, both the Interim and Final Award of Arbitrator, demonstrates an understanding of the evidence that can only be achieved by diligent attention.

Conclusion

Plaintiff seeks confirmation of an arbitration award. Defendant objects and moves to have the award vacated.

In addition to the benefits of informality, efficiency, and economy of arbitration, participants are also entitled to finality (subject only to narrow grounds for judicial review). Here, defendant has failed to demonstrate any error justifying judicial intervention.

Accordingly, the court is denying defendant's motion to vacate arbitration and granting plaintiff's motion to confirm arbitration award.¹⁵

IT IS SO ORDERED.

Date: August 3, 2016

_____/s/_____
M. Randall Jurrens, Circuit Judge (P27637)

¹⁵ The court is simultaneously issuing a Judgment Regarding Arbitration Award (SCAO form MC 285).