STATE OF MICHIGAN
BERRIEN COUNTY TRIAL COURT
CIVIL DIVISION - BUSINESS COURT
JOHN E. DEWANE, PRESIDING JUDGE, CIVIL DIVISION, AND BUSINESS COURT JUDGE
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Dan Fette and
Berrien County Board of Public Works,
Plaintiffs and Counter-Defendant,

v

File No.: 13-0288-CZ-D
Hon. John E. Dewane

Peters Construction Co.,
Defendant and Counter-Plaintiff

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OPINION AND ORDER CONFIRMING AWARD AND DENYING VACATUR
AND
JUDGMENT

OPINION

1. BACKGROUND.

In their First Amended Complaint, Plaintiffs seek an order vacating an arbitration award (Award) issued by Arbitrator Lawrence J. Lacey on September 20, 2013, under the American Arbitration Association's (AAA) Construction Industry Arbitration Rules (Rules).[1] By First Amended Counterclaim, Defendant seeks confirmation of the Award. The matter is before me at this time on Plaintiffs' motion under MCR 3.602(J) to vacate the Award and Defendant's motion under MCR 3.602(I) to confirm the Award. For the reasons hereinafter set forth, I grant Defendant's motion, deny Plaintiffs' motion, confirm

[1] American Arbitration Association Construction Arbitration Rules and Mediation Procedures Amended and Effective October 1, 2009. Plaintiffs' Brief in Opposition filed on December 13, 2013, Exhibit 11.

the Award, deny sanctions and enter Judgment for Defendant in the amount of $45,301.12.

The construction contract between Plaintiffs and Defendant contained an Arbitration Agreement (Agreement) which provided:

> All claims, disputes and other matters in question arising out of, or relating to, the CONTRACT DOCUMENTS or the breach thereof, except for claims that have been waived by the making and acceptance of final payment as provided in Section 20 shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award entered by the arbitrators shall be final, and judgment may be entered upon it in any court having jurisdiction thereof.[2]

2. ARBITRATION.

On November 11, 2012, Defendant, as the Claimant[3], filed a Demand for Arbitration, seeking $45,301.12 additional compensation a sub-contractor, Lowe Construction Co., incurred for delays and cost overruns due to unforeseen conditions while installing a 30 inch steel casing pipe under railroad tracks.[4] Plaintiff, as the Respondent[5], filed an Answering Statement[6] denying that the amount sought for delays and cost overruns were recoverable, but not denying the reasonableness of the amount claimed.[7]

On January 16, 2013, after appointment by AAA, Arbitrator Lacey signed the Arbitrator's Oath.[8]

On February 12, 2013, Arbitrator Lacey issued a Scheduling Order requiring exchange of witness lists and proposed exhibits by March 8, 2013.[9] Plaintiff[10] and Defendant [11]complied with the Scheduling Order. At least 11 of the 19 exhibits exchanged by Defendant were also exchanged by Plaintiff, including the letter from Lowe to Defendant dated September 12, 2011, with an attachment substantiating damages.[12]

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[2] Plaintiffs' Brief in Opposition filed on December 13, 2013, Exhibit 1.
[3] Rules, R-4(a)(i).
[4] Demand for Arbitration, AAA File No.: 54 441 E 01084 12, Plaintiffs' Brief in Opposition filed on December 13, 2013, Exhibit 2.
[5] Rules, R-4(a)(ii).
[6] Rules, R-4(c)(i).
[7] Answer, AAA File No.: 54 441 E 01084 12, Plaintiffs' Brief in Opposition filed on December 13, 2013, Exhibit 3.
[8] Plaintiffs' Brief in Opposition filed on December 13, 2013, Exhibit 15.
[9] *Id*., Exhibit 4.
[10] Affidavit of Mark Howard, Exhibit 7.
[11] *Id*., Exhibit 6.
[12] *Id*., ¶ 17.

On August 13, 2013, Arbitrator Lacey held the arbitration hearing.[13] As is not unusual because of the informal nature of arbitration proceedings, no record was made.[14] In accordance with the Rules[15], Defendant, as Claimant, presented evidence to support its claim in the form of testimony by Jason Sandusky, its vice president.[16] No other witness testified on behalf of Defendant as Claimant, and Arbitrator Lacey did not admit any of Defendant's exhibits at the hearing.[17] Defendant denies Plaintiff's allegation that Defendant rested without presenting any evidence of the elements of a prima facie case or any evidence on damages[18], but Plaintiffs admit that Jason Sandusky testified. Plaintiffs moved for dismissal arguing that Defendant failed to produce any evidence in support of its claim.[19] Arbitrator Lacey denied Plaintiff's motion without comment.[20] Plaintiffs, as Respondents, then presented witnesses and exhibits to Arbitrator Lacey.[21] Plaintiffs then renewed their motion to dismiss which Arbitrator Lacey took under advisement.[22] On 19, 2013, Arbitrator Lacey denied Plaintiffs' motion stating: "The Arbitrary [sic] finds that the project could not have been built as designed and that an alternative design for placing the casing and water pipe under the rail road was approved by the owner."[23] On September 20, 2013, Arbitrator Lacey issued the Award. The parties did not request a reasoned award. Rules, 44(c). Therefore, as is not unusual in arbitrations[24], Arbitrator Lacey made no findings of fact or conclusions of law and offered no reason for the Award in which he merely stated:

> I . . . having duly heard the proofs and allegations of the Parties, do hereby, FIND and AWARD, as follows:
>
> > Respondents shall pay to Claimant Forty Five Thousand Three Hundred One Dollar and Twelve Cents ($45,301.12).

3. THIS LAWSUIT.

On October 11, 2013, Plaintiffs filed a complaint seeking to vacate the Award. On November 12, 2013, Defendant filed a Counterclaim seeking to confirm the Award. On November 25, 2013, Plaintiffs filed a first Amended Complaint seeking the same relief. On December 4, 2013, Defendant filed a First Amended Counterclaim seeking the same relief.

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[13] First Amended Complaint, ¶ 9; Answer to First Amended Complaint, ¶ 9.
[14] *Detroit Automobile Inter-Insurance Exchange v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982).
[15] R-32(a).
[16] First Amended Complaint, ¶ 14; Defendant's Answer to First Amended Complaint, ¶ 14, is spurious, and I deem it an admission.
[17] Id., ¶¶ 19 & 20; Defendant's Answer to First Amended Complaint, ¶¶ 19 & 20, are spurious, and I deem them admissions, Affidavit of Daniel Fette, ¶ 6.
[18] *Id*., ¶ 22; Defendant's Answer to First Amended Complaint , ¶ 22.
[19] *Id*., ¶ 23; Defendant's Answer to First Amended Complaint , ¶ 23.
[20] *Id*., ¶ 24; Defendant's Answer to First Amended Complaint , ¶ 24, is spurious, and I deem it an admission.
[21] *Id.*, ¶ 25; Defendant's Answer to First Amended Complaint, ¶ 25.
[22] *Id*., ¶ 26; Defendant's Answer to First Amended Complaint, ¶ 26.
[23] *Id*., ¶ 27; Defendant's Answer to First Amended Complaint, ¶ 27
[24] *Gavin*, 428-429.

On November 20, 2013, Defendant filed a Motion to Confirm. On December 13, 2013, Plaintiffs filed a Motion to Vacate.

I now grant Defendant's motion, deny Plaintiffs' motion, confirm the Award and deny all claims for sanctions.

4. **APPLICABLE LAW AND COURT RULE**.

When Defendant filed its Demand for Arbitration on November 11, 2012, arbitration of disputes under the Agreement was governed by Chapter 50 of the RJA, 1961 PA 236, MCL 600.5001-600.5035. Effective July 1, 2013, MCL 600.5001-600.5035 were repealed by 2012 PA 370. Effective July 1, 2013, the Uniform Arbitration Act (UAA), 2012 PA 371, MCL 691.1681 *et seq*. governs such arbitrations. However, § 33 of the UAA; MCL 691.1731 provides: "This act does not affect an action or proceeding commenced or right accrued before this act takes effect." The UAA uses the term "arbitration proceeding" on multiple occasions beginning with the Definitions Section, MCL 691.1681(2)(a). There can be no doubt that when Defendant filed the Demand for Arbitration, it commenced an "arbitration proceeding" as which was a "proceeding" as that term is used in MCL 691.1731. Since the arbitration proceeding was commenced before July 1, 2013, the UAA does not apply. MCL 600.5001 *et seq.* continued to govern the arbitration proceeding to its conclusion.

MCL 600.5021 provides that an "arbitration shall be conducted in accordance with the rules of the supreme court." Those rules are found in MCR 3.602 which "governs statutory arbitration under MCL 600.5001–600.5035."[25]

MCR 3.602(J)(2) provides:

> On motion of a party, the court shall vacate an award if:
>
> > (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; or
> >
> > (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.
>
> The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

[25] MCR 3.602(A).

5. PLAINTIFFS' CLAIMS.

Plaintiffs claim that the Award should be vacated:

1. Under MCR 3.602(J)(c) because the arbitrator exceeded his powers derived from the Agreement by violating the Rules, specifically R-32 which provides that the claimant shall present evidence to support its claim and the respondent shall then present evidence supporting its defense and R-33 which provides that all evidence be taken in the presence of all of the parties.[26] Since Defendant presented no evidence on damages, the arbitrator exceeded his authority by rendering an award based on documents not submitted into evidence.[27]

2. Under MCR 3.602(J)(2)(d) because the arbitrator conducted the hearing to prejudice substantially Plaintiffs' rights because the arbitrator must have based the damages on documents submitted into evidence outside the presence of the parties, not only violating R-33 but also depriving Plaintiff of the opportunity to challenge the documents. [28]

Plaintiffs also make similar claims under the UAA which I do not consider because the UAA does not apply.

6. DEFENDANT'S CLAIMS.

Defendant claims that, because Plaintiffs allege an error of law, my review to determine whether the arbitrator exceeded his powers is restricted by *Detroit Automobile Inter-Insurance Exchange v Gavin*, 416 Mich 407; 331 NW2d 418 (1982), and I can only vacate or refuse to confirm the award if an error of law clearly appears on the face of the award or the stated reasons for the decision.[29] Since the face of Award states that the arbitrator arrived at the award after hearing the proofs and allegations of the parties, and then states the amount of damages, no error of law clearly appears on the face of the Award or in the reason for the decision. Defendant also claims that to the extent that Plaintiffs claim procedural errors, I am precluded from vacating or refusing to confirm the Award on that basis because an arbitrator cannot exceed his powers on procedural matters since procedural matters are the sole province of the arbitrator.

Defendant also makes claims under the UAA which I do not consider because the UAA does not apply.

7. AAA RULES.

R-32. Conduct of Proceedings

[26] *Id*., Count I, ¶¶ 37 & 38.
[27] *Id*., Count I, ¶ 47.
[28] *Id*., ¶¶ 49 & 50.
[29] *Gavin*, 443.

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence supporting its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must still afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and when involving witnesses, provide that such witness submit to examination.

(c) The arbitrator may entertain motions, including motions that dispose of all or part of a claim, or that may expedite the proceedings, and may also make preliminary rulings and enter interlocutory orders.

(d) The parties may agree to waive oral hearings in any case.

R-33. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered. The arbitrator may request offers of proof and may reject evidence deemed by the arbitrator to be cumulative, unreliable, unnecessary, or of slight value compared to the time and expense involved. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where: 1) any of the parties is absent, in default, or has waived the right to be present, or 2) the parties and the arbitrators agree otherwise.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently. Parties who request that an arbitrator sign a subpoena shall provide a copy of the request and proposed subpoena

to the other parties to the arbitration simultaneously upon making the request to the arbitrator.

8. ANALYSIS.

A. Error of Law.

If the error of law doctrine having its genesis in *Gavin* applied to the facts of this case, Defendant would prevail on its claim that the Award must be confirmed because the arbitrator's alleged error does not clearly appear from the face of the Award or the reasons for the decision. However, contrary to Defendant's claim, the facts of this case do not invoke *Gavin's* error of law doctrine.

Gavin involved two no-fault motor vehicle insurance policies containing uninsured motorist coverage with anti-stacking provisions. Under both policies, disputes arising out of the uninsured motorist coverage "shall be settled by arbitration in accordance with the rules of the American Arbitration Association and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof." *Gavin*, 416. The *Gavin* Court went on to state: "[b]ecause the foregoing arbitration clause of the insurance contracts include the provision that 'judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof' the arbitration is governed by MCL 600.5001 *et seq.;* MSA 27A.5001 *et seq.,* and is said to be statutory. Section 5021 of the statute specifies that statutory arbitration is to be governed by the rules of the Supreme Court." *Gavin*, 417 (footnote omitted).

In arbitration proceedings in 1977 and 1978, the arbitrators failed to apply the anti-stacking provisions. By the time *Gavin* reached the Supreme Court in 1982, it had decided in *Bradley v Mid-Century Insurance Company*, 409 Mich 1; 294 NW2d 141 (1980) that the anti-stacking provisions were enforceable and benefits could not be stacked. In rejecting the argument that errors of law in an arbitration proceeding were not subject to judicial review, the *Gavin* Court stated:

> The [parties] contracted for the purpose of guaranteeing to themselves the benefits to which they are entitled under the law governing their contractual relationship: the constitution, the common law, any relevant codes and statutes, and, perhaps pre-eminent among all, the provisions of their own contracts. We are not ready to assume that the parties in these cases agreed to forego observance of a plainly applicable provision of their written contract, one which is dispositive of the only matter genuinely in dispute between them, in exchange for a speedy, thrifty, and final resolution of their differences in a way which disregards the law substantially determinative of their rights and duties. The process of dispute resolution and the procedural advantages of arbitration are the servants of the law governing the issues in dispute, not the reverse.

> We think the defendant's argument inappropriately assigns to the procedural advantages of arbitration the pre-eminence to which substantive legal correctness is entitled. *Gavin*, 427.

The *Gavin* Court observed that in a statutory arbitration where the parties may invoke the use, benefit and authority of the judicial process, the judiciary cannot give effect to an agreement that ignores the law. *Gavin*, 433. The Court concluded:

> Thus, in discharging their duty, arbitrators can fairly be said to exceed their power 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. *Gavin*, 434.

The Court then restated with approval the following passage from *Howe v Patrons' Mutual Fire Ins Co of Michigan*, 216 Mich 560, 570; 185 NW 864 (1921):

> Where 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." *Gavin*, 443.

Justifying the scope of judicial review of errors of law, the *Gavin* Court voiced confidence "that in doing so we not only properly define the function of courts of equity in such cases, but we secure to litigants who come to the courts for judicial confirmation and enforcement of arbitration results, that which we believe they agreed to: an arbitration award rendered according to the law which governs their dispute." *Gavin*, 445.

B. Procedural error.

Judicial review of alleged procedural errors in arbitration under a collective bargaining agreement is precluded. *Roseville Community School District v Roseville Federation of Teachers*, 137 Mich App 118, 125; 357 NW2d 829 (1984). But such a labor arbitration is not a statutory arbitration because it is not subject Chapter 50 of the RJA.[30]

In a statutory arbitration, MCL 600.5021 defers to MCR 3.602(J)(2)(c) which tasks me to determine if the arbitrator exceeded his authority. For purposes of determining that an arbitrator in a statutory arbitration exceeded his powers*, Gavin* focused solely on an error of substantive law and, although expanding the scope of judicial review, restricted judicial review to such an error appearing of the face of the award or the reasons for the decision. Here, Plaintiffs are not claiming an error of substantive law which, as in *Gavin*, is likely to be discernable from the face of the award or the reasons for the decision. Rather, Plaintiffs claim that the arbitrator failed to follow the procedural rules

[30] MCL 600.5001(3).

adopted by the parties in the Agreement thereby exceeding his authority and conducting the hearing to prejudice substantially Plaintiffs' rights.

Gavin not only does not govern judicial review of these procedural issues, but common sense dictates that, unlike an error of substantive law, which in *Gavin* could be discerned from the amount of the award, the grounds for vacating an award under MCR 3.602(J)(2)(c) and (d) for failure to follow procedural rules or for conducting the hearing to prejudice substantially a party's rights will seldom appear on the face of the award or in the reasons for the decision, virtually precluding judicial review on these grounds if *Gavin* applies. For example, it is unlikely that an arbitrator would state in the award that, although the submission agreement called for using the Rules, these Rules had been ignored. Indeed, it is unlikely that an arbitrator would make any reference to the Rules at all in an award unless the arbitrator premised the award on a failure of a party to follow the Rules. Therefore, meaningful review on the grounds asserted by Plaintiffs is unlikely, if not impossible, if restricted to the face of the award or the reasons for the decision.

An aggrieved party should be afforded an opportunity to allege and prove that the arbitrator failed to follow the required procedural rules if their use is a material term of the contract from which the arbitrator draws his/her authority. If a party carries this burden, and if the failure is outcome determinative in that there is no other explanation for the award, the award should be vacated.

Even though the restriction to the face of the award or reasons for the decision should not apply to procedural issues, judicial review should still be guided by the principles upon which *Gavin* was founded: "secure to litigants who come to the courts for judicial confirmation and enforcement of arbitration results, that which we believe they agreed to."

Where, as is more often than not the case, no record is made, relief should granted only when the alleged failure to follow the procedural rules and the failure's outcome determinative effect are clearly apparent to the judge from the allegations and supporting evidence without probing the merits of the arbitrator's decision or the arbitrator's mental processes. Here, even without the *Gavin* restriction to the face of the award or the reasons for the decision, Plaintiffs' claims fail. Plaintiffs have not alleged facts upon which I can conclude that the arbitrator failed to follow the Rules, much less that the alleged failure was outcome determinative.

C. Arbitration procedure.

Defendant presented evidence in the form of the testimony of Jason Sandusky, its vice president. Thus, the arbitrator complied with R-32(a). Whether the evidence supported Defendant's claim, either on its two liability theories or on damages, requires me to probe the merits of the arbitrator's decision, which I am precluded from doing. *Dohanyos v Detrex Corporation (After Remand),* 217 Mich App 171,177-178; 550 NW2d 608 (1996) citing *Gordon Sel-Way, Inc v Spence Brothers, Inc*, 438 Mich 488, 497; 475

NW2d 704 (1991). Moreover, R-32(a) vests the arbitrator with discretion to vary this procedure, and R-32(b) vests the arbitrator with discretion to direct the order of proof. Whether the arbitrator abused this discretion requires me to probe both the merits of the exercise of discretion and the arbitrator's mental processes, which I am precluded from doing. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 558; 682 NW2d 542 (2004).

Plaintiffs' claim that the arbitrator must have based the damages on documents submitted into evidence outside the presence of the parties likewise requires me to probe both the merits of the arbitrator's and the arbitrator's mental processes, which I am precluded from doing. This claim also calls on me to speculate on the reasons for the arbitrator's decision, which I am also precluded from doing.[31] Moreover, that claim is not outcome determinative because the arbitrator had evidence of damages from the evidence submitted by Plaintiffs on which he could base damages. The arbitrator may have also concluded as I did from the answering statement, that the amount damages was not at issue.

The testimony of Jason Sandusky was taken in the presence of the arbitrator and all of the parties. The testimony of Plaintiffs' witnesses was taken and Plaintiffs' exhibits were received in the presence of the arbitrator and all of the parties. Thus, the arbitrator complied with R-33(b).

Plaintiff admittedly had a full opportunity to mount a vigorous defense.[32] The Plaintiffs' rights were not substantially prejudiced MCR 3.602(J)(2)(d), Plaintiffs had the right to be heard and were given a fair opportunity to present their case [R-32(a)].

As a final observation, the Rules provide that "[t]he arbitrator shall interpret and apply these Rules insofar as they relate to the arbitrator's powers and duties".[33] Under the circumstances present in this case, I should not second guess the arbitrator's interpretation and application of the Rules.

9. CONCLUSION.

Therefore, I conclude that Plaintiffs have failed to establish that the arbitrator exceeded his powers derived from the Agreement. However, I find that Plaintiffs' claim was warranted by a good faith argument for clarification of the law where there is no clear appellate law on the scope of review of procedural issues. *Schroeder v Terra Energy, Limited*, 223 Mich App 176, 195; 565 NW2d 887 (1997).

[31] *Henderson v Detroit Automobile Inter-Insurance Exchange*, 142 Mich App 203, 206; 369 NW2d 210 (1985)
[32] First Amended Complaint, ¶ 25.
[33] Rules, R-8.

ORDER CONFIRMING AWARD AND DENYING VACATUR

I deny Plaintiffs' Motion to Vacate. I grant Defendant's Motion to Confirm. I deny all claims for sanctions.

I so order.

JUDGMENT

Pursuant to MCR 3.602(L), judgment is entered in favor of Defendant and against Plaintiffs in the amount of $45,301.12.

This judgment shall earn interest at the statutory rate set in MCL 600.6013(8) from November 12, 2013, until paid in full.

As the prevailing party, Defendant may tax its taxable costs under MCR 2.625.

This Judgment disposes of the last pending claim and closes this case.

I so order.

/s/
_____
John E. Dewane
Presiding Judge, Civil Division
Business Court Judge
February 21, 2014