

2013 IL App (1st) 120384-U

No. 1-12-0384

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SIXTH DIVISION
March 15, 2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VERMILION COAL COMPANY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 08 CH 45138
)	
BLACK BEAUTY COAL COMPANY,)	Honorable
)	Richard J. Billik,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The arbitrator did not ignore the plain terms of the parties' lease or deny plaintiff a full hearing on relevant issues and, thus, did not exceed his authority in rendering the arbitration award.

¶ 2 This appeal arose from a dispute involving the interpretation and enforcement of the terms of a lease, whereby plaintiff Vermillion Coal Company leased land to defendant Black Beauty Coal Company to operate a coal mine. The parties disputed the propriety of certain fees

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and taxes defendant deducted from its royalty payments to plaintiff. Plaintiff asserted that defendant's deductions constituted a default under the lease and tried to terminate the lease.

¶ 3 The matter proceeded to arbitration, and the award rendered by the umpire arbitrator concluded, *inter alia*, that plaintiff was not entitled to terminate the lease because the lease provision concerning the deductions was ambiguous and—although defendant was not entitled to deduct the disputed fees and taxes—defendant's actions were not done in bad faith and did not constitute a material breach of the lease and an event of default. Plaintiff moved to vacate portions of the arbitration award, and the parties filed cross-motions for summary judgment, which both asked the court to enter judgment as a matter of law in their favor regarding the issue of whether the arbitrator exceeded his authority. The circuit court granted defendant's motion in part (a fee request was denied), denied plaintiff's motion, and denied the relief sought by plaintiff's complaint.

¶ 4 On appeal, plaintiff contends that the umpire arbitrator exceeded his authority by ignoring the plain terms of the lease and denying plaintiff a full hearing on its remedies for defendant's default. For the reasons that follow, we affirm the judgment of the circuit court, which granted summary judgment in favor of defendant and thereby confirmed the arbitration award.

¶ 5 I. BACKGROUND

¶ 6 Plaintiff originally leased coal mining rights to Laswell Coal Company (Laswell) in 1994, but defendant assumed Laswell's obligations under the lease pursuant to a 1999 assignment. The lease obligated defendant to pay 5% of its gross sales, plus wheelage fees, to plaintiff, but "less any sales tax and/or severance imposed thereon." According to the record, Laswell had always

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deducted the Black Lung Excise Tax (BLET) and Abandoned Mine Land Fee (AMLF) as severance taxes from the computation of the royalty owed to plaintiff, and defendant continued that practice when it assumed the lease in 1999. Before assuming the lease, defendant required plaintiff to execute an estoppel certificate that confirmed there was no dispute or default under the lease. Furthermore, when plaintiff refinanced its debt through a new lender, the new lender required defendant to subordinate its interest in the lease and the corresponding document acknowledged that no default existed under the lease. After assuming the lease, defendant expanded the production capacity of the leased land by investing \$50 million in a new portal. None of defendant's monthly reports to plaintiff failed to comply with the reporting requirements of the lease.

¶ 7 In 2002, a dispute arose between plaintiff and defendant concerning whether defendant could deduct from the calculation of plaintiff's royalty the BLET and AMLF as severance taxes. Plaintiff filed a lawsuit, but defendant moved to compel arbitration pursuant to the mandatory arbitration clause contained in section 24.1 of the lease. The litigation was stayed and the matter referred to arbitration. Each party appointed an arbitrator, and a third arbitrator was appointed pursuant to the terms of the lease as the umpire arbitrator. In August 2004, the arbitration panel issued a scheduling order that identified the issues to be raised at the arbitral hearing and "bifurcated remedies for any breach including accounting, damages, or termination."

¶ 8 After a two-week arbitration hearing, the panel issued its interim decision and award authored by the umpire arbitrator, and each of the party-appointed arbitrators submitted a dissent. The umpire arbitrator found in plaintiff's favor on the threshold issue, concluding that the BLET

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and AMLF could not be deducted from the gross selling price when calculating plaintiff's royalty. Specifically, the umpire arbitrator reviewed applicable case law and used the plain and ordinary meaning of the word "severance" to construe that term as used in the parties' lease. The umpire arbitrator concluded that the BLET and AMLF were not severance taxes but, rather, federal special purposes taxes and, thus, were not deductible according to the terms of the lease. The umpire arbitrator also found that:

"[w]hile the determination by this arbitration forum has interpreted the word 'severance' favorably for [plaintiff] Vermillion and the deduction now constitutes a breach for monetary compensation, the deductions were not fraudulent nor did they constitute a breach of such level to be a repudiation. The deductions in the computation process did not constitute a total breach."

Although both party-appointed arbitrators filed separate dissenting opinions, the decision of the umpire arbitrator was controlling pursuant to the terms of the parties' arbitration agreement.

¶ 9 After the issuance of the interim award, the parties negotiated a payment of \$372,329.44 by defendant to plaintiff as compensation for the previously deducted BLET and AMLF. Defendant made that payment in September 2005. Thereafter, plaintiff voluntarily dismissed certain matters in the arbitration and both parties filed motions for costs and attorney fees. In January 2007, the arbitration panel issued its final award, granting plaintiff \$380,955.01 in costs in addition to the interim award amount, with both party arbitrators filing dissents and the umpire arbitrator's decision controlling.

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¶ 10 Plaintiff's attempt to vacate portions of the award in federal court were ultimately dismissed for lack of jurisdiction. Plaintiff then filed a complaint to vacate, in part, the award in the Circuit Court of Cook County. Defendant moved to dismiss the complaint, asserting, in part, accord and satisfaction, but the trial court denied that motion. Thereafter, the parties filed cross motions for summary judgment, and the trial court granted defendant's motion in part and denied it in part, denied in full plaintiff's cross motion, and denied the relief sought by plaintiff's complaint.

¶ 11 Plaintiff timely appealed, and argues that the arbitration award should be vacated because the umpire arbitrator exceeded his authority by ignoring the plain terms of the lease and denying plaintiff a full hearing on its remedy of termination of the lease.

¶ 12

II. ANALYSIS

¶ 13 Summary judgment is appropriate when the pleadings, affidavits, depositions, and admissions on file, when viewed in a light most favorable to the nonmovant, present no genuine issue as to any material fact and show that the moving party is entitled to a judgment as a matter of law. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). When parties file cross-motions for summary judgment, the court is invited to decide the issue of summary judgment as a matter of law. *William Blair & Co., LLC v. FL Liquidation Corp.*, 358 Ill. App. 3d 324, 334 (2005).

¶ 14 The review of an arbitration award is more limited than review of a trial court's decision. *Galasso v. KNS Cos., Inc.*, 364 Ill. App. 3d 124, 130 (2006). Where parties have agreed to settle their dispute by an arbitrator, they have agreed to accept the arbitrator's view and, thus, a

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reviewing court should not overrule an award simply where its interpretation differs from that of the arbitrator. *Id.* at 130. The limited circumstances under which a reviewing court may modify or vacate an arbitration award are when the award was procured by corruption or fraud; the arbitrator was not impartial; the arbitrator exceeded his authority; the arbitrator unreasonably refused to postpone the hearing or hear material evidence; or there was no arbitration agreement. 710 ILCS 5/12(a) (West 2010). The issue of whether an arbitration panel has exceeded its authority is one of law, which we review *de novo*. *TruServ Corp. v. Ernst & Young LLP*, 376 Ill. App. 3d 218, 222 (2007).

¶ 15 A presumption exists that the arbitrator did not exceed his authority, and a reviewing court should construe the arbitration award, if possible, so as to uphold its validity. *Galasso*, 364 Ill. App. 3d at 130. A reviewing court lacks the authority to determine the merits of an award simply where it disagrees with the arbitrator's interpretation of the contract at issue. *Id.*

"If the award resolves a matter submitted by the parties for arbitration and contains the honest decision of the arbitrators after a full and fair hearing, a court will not set it aside for errors of fact or law. [Citations.] Even where an arbitrator commits gross errors of judgment in law or a gross mistake of fact, a court should not vacate the arbitration award unless the mistakes or errors are apparent on the face of the arbitration award. [Citations.] To vacate an award based on a gross error of law, a reviewing court must be able to conclude from the face of the award that the arbitrators were so mistaken as to the law that, if apprised of the mistake, they would have ruled differently. [Citations.] Alternatively, an

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arbitration award may be subject to vacatur for misapplication of the law where it is shown that the arbitrators deliberately disregarded what they knew to be the law. [Citation.]" *TruServ Corp.*, 376 Ill. App. 3d at 224-25.

¶ 16 A. Interpretation of the Contract

¶ 17 Plaintiff contends the umpire arbitrator exceeded his powers when he ignored the clear terms of the parties' contract and concluded that plaintiff prematurely declared a default and sought termination of the lease based on defendant's deduction of the BLET and AMLF from the royalty calculations. Specifically, plaintiff argues that, under the terms of the lease, defendant's improper deductions constituted a default of the due and punctual payment of plaintiff's full royalty fee. Plaintiff further argues that the default entitled plaintiff to exercise its remedy to issue a notice of default and terminate the lease if the default was not cured within 30 days. According to plaintiff, the umpire arbitrator improperly reformed the parties' contract when he ignored section 22.1 of the lease, which allows plaintiff to terminate the lease in the event of a default, and created an exception for situations involving good faith conduct. We disagree.

¶ 18 The terms of the lease provided that the parties agreed "to cooperate with each other and that each owes the other a duty of good faith dealing." The lease provided, in relevant part, as follows:

"Section 22.1 Default; Termination by Lessor. If any one or more of the following events (herein sometimes called Events of Default shall occur:

(a) If default shall be made in the due and punctual payment of any rent, royalty or any part thereof, when and as the same may become due

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and payable *** and such default shall continue for thirty (30) days after notice by Lessor to Lessee[.]

then and in any such event, Lessor at any time thereafter while such default or condition is continuing, may give written notice to Lessee specifying the occurrence giving rise to such Event of Default, or Events of Default, and stating that the lease shall terminate on the date specified in such notice, which shall be at least twenty (20) days after the giving of such notice. Upon the date specified in such notice, this lease and the estate and interest hereby demised shall terminate and all rights of the Lessee under this lease shall cease."

* * *

Section 22.4 No Waiver, etc. by Lessor. No failure by Lessor to insist upon the strict performance of any covenant, agreement, term or condition of this lease or to exercise any right, power or remedy consequent upon a breach thereof, and no acceptance of full or partial performance or payment of royalties during the continuance of any such breach, shall constitute a waiver of or consent to any such breach ***.

Section 22.5 Injunction Against Breach. In the event of any breach or threatened breach by Lessee of any of the covenants, agreements, terms or conditions of this lease, Lessor shall have the right to invoke any rights, powers

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and remedies allowed at law, in equity or by statute or otherwise, whether or not specifically provided in this lease.

Section 22.6 Lessor's Remedies Cumulative, etc. Each right, power and remedy of Lessor provided for in this lease shall be cumulative and concurrent and shall be in addition to every other right, power or remedy provided for in this lease or now or hereafter existing at law or in equity or by statute or otherwise, and the exercise or beginning of the exercise by Lessor of any one or more of the rights, powers or remedies provided for in this lease *** shall not preclude the simultaneous or later exercise by Lessor of any or all other rights, powers or remedies provided for in this lease or by statute or otherwise.

* * *

ARBITRATION

Section 24.1 If there should arise any matters in dispute hereunder, on which Lessor and Lessee cannot finally agree, such matter or matters shall be referred to a board of arbitrators consisting of three (3) disinterested, competent persons, one selected by Lessor and one by Lessee, as hereinafter provided, and the two thus selected shall select the third, who shall have the power of an umpire and be known as umpire-arbitrator. The decision and award of such arbitrators, or any two of them, or, in case of disagreement among all the arbitrators, of the third or umpire-arbitrator, shall be conclusive and binding upon Lessor and Lessee and promptly complied with.

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The party desiring arbitration shall give written notice to the other party, stating definitely the point or points in dispute and naming the person selected as arbitrator ***.

*** Both Lessor and Lessee shall have full opportunity to be heard, orally and in writing, on any question thus submitted. In arriving at a decision and award, said arbitrators shall be bound by any relevant state and federal law applicable to the substantive issue or issues so submitted for arbitration, and shall make such decision and award in writing, and deliver a copy to both Lessor and Lessee, and shall as a part thereof decide by whom the costs of arbitration shall be borne and paid and the amount of such costs including reasonable compensation for the arbitrators. The binding arbitration provision herein set forth shall not serve to limit or diminish the right of either party to this Lease Agreement to seek injunctive relief for breach hereof."

¶ 19 According to the record, the issues presented to the arbitration panel included the propriety of the BLET and AMLF deductions as severance taxes, breach of contract, fraud, and anticipatory repudiation. The umpire arbitrator construed the terms and provisions of the parties' lease and applied his conclusions concerning the applicable principles of law to the facts of this case. The umpire arbitrator noted the parties' contractual provision concerning cooperation and the duty of good faith dealing, and found that the parties had a good faith, *bona fide* dispute concerning the meaning of the contract provision that allowed defendant to deduct any severance

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tax from plaintiff's royalty calculation. Although the umpire arbitrator ultimately construed the term "severance" in plaintiff's favor, the umpire arbitrator found that defendant's deductions were based on a good faith misunderstanding and belief that the BLET and AMLF were severance taxes and, thus, deductible from the royalty calculation. Accordingly, the umpire arbitrator concluded that defendant's conduct was not a breach or repudiation of the contract, did not constitute an event of default under the contract, and did not entitle plaintiff to terminate the contract. The umpire arbitrator noted that the parties' contract "prudently provided for an arbitration process to resolve disputes of the kind that spawned the problem here, [the dispute] has been resolved by the contract interpretation here and the lease should proceed in furtherance of its objectives subject, of course, to a consideration of monetary compensation." The umpire arbitrator noted that if defendant failed to comply with the arbitration award, such failure would constitute an event of default and then plaintiff's notice to exercise its option to terminate the lease would become timely.

¶ 20 We reject plaintiff's assertion that the umpire arbitrator changed or reformed the lease or took away plaintiff's remedy for a default. Plaintiff does not agree with the umpire arbitrator's application of the law, conclusion that defendant's deductions did not constitute a breach of the contract or an event of default, and interpretation of the lease to require arbitration of the parties' *bona fide* dispute before plaintiff could exercise the option to terminate the lease. Although plaintiff claims on appeal that the umpire arbitrator exceeded his authority by ignoring plain and clear contract provisions, our review of the record establishes that the contract terms are not so plain and clear as to dictate the result sought by plaintiff.

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¶ 21 Contrary to plaintiff's assertion on appeal, the contract does not specifically define a "default" or an "event of default." Moreover, the contract is not clear concerning whether a royalty payment is considered due and payable for purposes of section 22.1's default provision when a dispute has arisen concerning the calculation of the royalty payment, the lessor and lessee cannot agree on the matter, and the matter must be referred to arbitration pursuant to Section 24.1's arbitration provision. As a result, in addition to construing the term "severance" to resolve the parties' dispute, the umpire arbitrator also had to interpret the contract to resolve the discrepancy created by the seemingly conflicting provisions that allow plaintiff to terminate the contract over a default but also require the parties to submit contract disputes on which they cannot agree to arbitration. The umpire arbitrator followed the contract language and interpreted the contract in a manner that would give effect to Section 22.1's default provisions without rendering section 24.1's arbitration provisions meaningless or ineffectual. Specifically, the arbitrator concluded that *bona fide* contract disputes between the parties were subject to arbitration and an event of default would occur if defendant failed to comply with the arbitration award that resolved the parties' dispute.

¶ 22 "If the arbitrators interpret the contract and issues submitted to them, then the parties are bound by that decision as long as the interpretation is a reasonably possible one." *Shearson Lehman Brothers, Inc., v. Hedrich*, 266 Ill. App. 3d 24, 28-29 (1994). Here, the umpire arbitrator's conclusion that the parties' contract provided for the arbitration of their good faith dispute before plaintiff could exercise the option to terminate the lease is a reasonably possible construction of the contract. Accordingly, this court cannot vacate or refuse to confirm the award

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because plaintiff has failed to demonstrate that the umpire arbitrator's construction of the lease was one that " 'all fair and reasonable minds would agree *** was not possible under a fair interpretation of the contract.' " *Rauh v. Rockford Products Corp.*, 143 Ill. 2d 377, 392 (1991), quoting M. Pirsig, *Some Comments on Arbitration Legislation and the Uniform Act*, 10 Vand. L. Rev 685, 706 (1957).

¶ 23 Plaintiff's disagreements with the umpire arbitrator's conclusions of law and interpretation of the contract are an insufficient basis for this court to find that the umpire arbitrator exceeded his authority in ruling on this matter. The parties chose the arbitration process as the mode of settling this dispute finally and without appeal. This court cannot set aside this arbitration award, which decided the matters submitted by the parties, was rendered after a full and fair hearing of the parties, and is based on the umpire arbitrator's interpretation of the contract provisions, application of the law, and conclusions of law and fact.

¶ 24 Plaintiff cites *First Merit Realty Services, Inc. v. Amberly Square Apartments, L.P.*, 373 Ill. App. 3d 457, 463-64 (2007), where the court vacated an arbitration award because the panel exceeded its authority when it (1) ignored the clear contract provision that allowed the property owner to sever its business relationship with the property management company, and (2) apparently reformed a contract based on parol evidence. Plaintiff also cites *Hedrich*, 266 Ill. App. 3d at 29, where the court found that the arbitrators impermissibly ignored unambiguous contract language when they awarded the defendants an amount of compensation that clearly was not based on the precise and unambiguous mathematical formula provided in the parties' contract. However, neither *First Merit* nor *Hedrich* advances plaintiff's arguments on appeal

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because, as discussed above, the umpire arbitrator in the instant case did not ignore plain and clear contract terms or reform any contract provisions when he interpreted multiple contract provisions concerning the deduction of severance taxes, the submission of disputes to mandatory arbitration, and what constitutes an "event of default" to warrant the termination of the lease.

¶ 25 B. Hearing on Remedies

¶ 26 Plaintiff contends that the umpire arbitrator exceeded his authority by denying plaintiff a full opportunity to be heard on the issue of plaintiff's remedies. Specifically, plaintiff complains that the arbitrators never conducted the second phase of the bifurcated hearing and thereby deprived plaintiff of the opportunity to present evidence concerning its remedy of termination for defendant's default. We disagree.

¶ 27 The record establishes that the arbitration panel provided the parties with the proper opportunity to present their claims and defenses. The arbitration panel bifurcated the proceedings to address the issue of liability before addressing any issues concerning accounting, damages or termination. The umpire arbitrator's interpretation of the lease and conclusion that defendant's conduct did not constitute an "event of default" foreclosed any further consideration of termination of the lease as a potential remedy for an alleged default. After the conclusion of the liability phase of the hearing, the parties negotiated a payment of \$372,329.44 as compensation to plaintiff for the previously deducted amounts for BLET and AMLF. Thereafter, plaintiff filed a motion for costs and attorney's fees, which was granted at least in part in the amount of \$380,955.01. The factual record does not provide a basis for this court to find that the umpire arbitrator prevented the introduction of material evidence offered by plaintiff.

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Accordingly, we reject plaintiff's assertion that the arbitrator exceeded his powers and the award should be vacated on that basis.

¶ 28

III. CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court, which granted summary judgment in favor of defendant and thereby confirmed the arbitration award, is affirmed.

¶ 30 Affirmed.