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2016 IL App (3d) 140931-U

Order filed February 17, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

TOWNSHIP OF LOCKPORT UTILITY)	Appeal from the Circuit Court
BOARD and TOWNSHIP OF LOCKPORT,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiffs/Counter-Defendants/)	
Appellants,)	
)	
v.)	Appeal No. 3-14-0931
)	Circuit No. 00 MR 357
AQUA SERVICE MANAGEMENT CO., an)	
Illinois Corporation,)	
)	The Honorable
Defendant/Counter-Plaintiff/)	John Anderson,
Appellee.)	Judge, Presiding.
)	

JUSTICE McDADE delivered the judgment of the court.

Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* Where issues presented on appeal were argued in denied motions for summary judgment but were not included in the pleadings submitted for the subsequent binding arbitration, the issues were waived and are otherwise moot as the arbitrator's decision assumes all issues have been addressed and is conclusive. Affirm.

¶ 2 This case involves a contract entered into between Aqua Services Management Co. (Aqua), defendant/counter-plaintiff, and the Township of Lockport Utility Board (TLUB), plaintiff/counter-defendant, for the management of the Township of Lockport's (the Township) water and sewer system. On June 6, 2000, TLUB filed for declaratory judgment seeking a determination that Aqua had abandoned the contract. The Township, brought in later as a counter-defendant in Aqua's counterclaim and then joined as a plaintiff by TLUB, asserts that the trial court erred in denying its and TLUB's motions for summary judgment filed prior to the agreed binding arbitration. It also appeals the denial of its motion to modify the order confirming the arbitration award. We affirm.

¶ 3 FACTS

¶ 4 On December 1, 1995, Aqua entered a contract with TLUB to manage the water and sewer system of the Township. The contract stated that the water and sewer system was owned by TLUB. It had an initial term of ten years, which could be terminated by either party in the event such other party failed to pay any amount owed under the agreement within 15 days of written notice or upon written notice of a material breach and a contractually agreed 60-day opportunity to cure such material breach. The TLUB members who agreed to enter into this contract were serving a term that began in May 1993 and was set to expire in May 1997. None of those board members had a term of office that extended beyond May 1997. Both TLUB and Aqua represented and warranted that they had full authority to execute the contract.

¶ 5 On June 6, 2000, TLUB filed a complaint for declaratory judgment against Aqua. Naming itself plaintiff and Aqua as defendant, it sought a finding that Aqua had abandoned its duties under the contract and had stated that "the Board now has 'a whole different manager'" and

that "management is going to [another entity]." TLUB also alleged that Aqua had refused to perform emergency repairs and had announced that it lacked the resources to send bills out in a timely fashion. On July 7, Aqua answered TLUB's complaint listing the Township as the plaintiff and denying several of TLUB's assertions.

¶ 6 On July 27, TLUB moved to file an amended complaint again naming itself as plaintiff and requesting a declaration that the contract was void as well as properly terminated as the contract failed to comply with Illinois law. TLUB alleged that ordinances with respect to Aqua being appointed as a collector for the water and sewer management pursuant to section 205-115 of the Illinois Township Code (60 ILCS 1/205-115 (West 2014)) had not been passed and a term in the contract allowed for the water and sewer management to be transferred to Aqua in violation of section 205-120 of the Illinois Township Code (60 ILCS 1/205-120 (West 2014)). The trial court granted the motion for leave to file the amended complaint listing TLUB as the plaintiff.

¶ 7 On August 25, 2000, Aqua filed an answer to the first amended complaint against the Township and a counterclaim seeking damages against TLUB for breach of contract. Both TLUB in its answer to Aqua's counterclaims and the trial court in its September 2000 order listed TLUB as plaintiff.

¶ 8 Aqua claims, nevertheless, that it continued to perform its duties as ascribed under the contract between the date of TLUB's original complaint and October 31, 2000. It notes that through its president it sent TLUB at least nine letters detailing ongoing issues with the water and sewer management maintenance that were the responsibility of TLUB. Aqua claimed then and still claims that such issues hindered its ability to perform its own duties.

¶ 9 On October 31, however, the acting supervisor of TLUB sent Aqua a letter responding to all of Aqua's aforementioned letters. The response stated that TLUB had addressed the issues alleged and it accused Aqua of having abandoned its duties under the contract and complained that Aqua's president was not attending TLUB's board meetings. In a letter dated November 2, Aqua responded stating that the issues it had raised regarding the water and sewer management had not been adequately resolved and were the responsibilities of TLUB.

¶ 10 On November 8, TLUB notified Aqua in a letter that it was putting Aqua's past due payment into an escrow account due to the "continuation of estimated meter readings, [Aqua's] lack of attending monthly [board] meetings, and the lack of revenue that the water department is receiving." Aqua filed a motion to compel discovery on November 29. The trial court, listing the Township as plaintiff, granted the motion on December 4 and extended discover to February 9, 2001.

¶ 11 On December 12, TLUB passed resolution 2000-01, in which it declared its contract with Aqua was void and discharged Aqua. This left a remainder of about five years of Aqua's management service due to TLUB pursuant to the contract's initial terms.

¶ 12 On January 10, 2001, listing the Township as plaintiff, Aqua moved to voluntarily dismiss its counterclaim, for a continuance, and for leave to file affirmative defenses. The court granted the motions on January 17 also listing the Township as plaintiff. Discovery was conducted. On January 19, TLUB filed its answer in response to Aqua's affirmative defenses, listing itself as plaintiff.

¶ 13 On March 21, Aqua motioned for leave to file its first amended counterclaim and first amended affirmative defenses now listing TLUB as plaintiff. It named the Township as an

additional counter-defendant and asserted even more defenses to TLUB's declaratory judgment cause of action. Aqua then amended its counterclaim on May 10 to bring claims for fraud in the inducement, breach of contract, and conversion against both TLUB and the Township. TLUB subsequently sought, and was granted, leave to amend its first amended complaint to add the Township as a named plaintiff.

¶ 14 TLUB and the Township filed two motions for summary judgment. On June 4, 2001, they moved for summary judgment arguing that the contract was void *ab initio* and *ultra vires* because the length of the contract term exceeded the term of the sitting TLUB board members. That motion was denied on August 5, 2002. After years of granted continuances and complaint amendments, TLUB and the Township motioned again for summary judgment on December 16, 2009. They argued that the Township had no liability under the contract and that TLUB gave proper notice to terminate the contract. Regarding liability, it pointed to paragraph 17 of the contract that states:

“No obligation of the Township of Lockport. The parties hereby agree that any and all obligations of TLUB shall be those of TLUB only and the Township of Lockport shall have no liability or obligation under this agreement.”

¶ 15 On the following day, December 17, Aqua filed a cross-motion for summary judgment arguing summary judgment in its favor was proper as it did not receive the contractually-required notice of material breach or an opportunity to cure said breach prior to contract termination. Both motions were denied on June 17.

¶ 16 On March 12, 2012, the parties filed a joint motion and agreement to refer the case to alternative dispute resolution. The court granted the motion and referred the matter for binding arbitration. On November 22, 2013, the matter along with various pleadings, documents, and exhibits were presented in a hearing format that included opening and closing statements and the testimony of witnesses to a panel of three arbitrators. On December 5, 2013, the majority found in favor of Aqua and awarded it damages.

¶ 17 On April 7, 2014, Aqua filed a motion to confirm the arbitration award and on May 2, 2014, the court issued a final judgment order so confirming. On May 6, TLUB, individually, brought a motion to modify the court's order to conform to the terms of the contract as the Township was to have no liability or obligation under the contract. After a hearing on October 28, the trial court denied the motion on November 14, 2014. It found that (1) the decision of the arbitrators was against both TLUB and the Township; (2) the trial court lacked authority to act pursuant to the Illinois Uniform Arbitration Act; and (3) the Township and TLUB lacked a meaningful distinction within the context of the proceedings.

¶ 18 TLUB and the Township timely appealed.

¶ 19 After we filed our order in this appeal, TLUB and the Township petitioned the court for a rehearing. They argued that this court erred in affirming the trial court's order and in finding that the limitation of liability clause in the agreement was unenforceable because it violated public policy. They assert that they did not have the opportunity to address this matter in their prior briefing because neither party argued the unenforceability of the contract term. We agreed that the issue of enforceability was not directly argued by the parties. Though our initial order presented the analysis solely in *dicta*, we nonetheless asked for additional briefing on the issue.

After review, we deny the petition for rehearing with slight modification to the order including the deletion of the enforceability analysis as it has no bearing on our finding that the issue of liability has been waived.

¶ 20

ANALYSIS

¶ 21

On appeal, TLUB and the Township first argue that the trial court erred in denying both of their motions for summary judgment filed prior to the joint motion with Aqua for alternative dispute resolution. Aqua contends that TLUB and the Township waived this argument by completely neglecting to raise it during the arbitration or in a timely statutory motion. It further argues that TLUB and the Township never asserted the issues addressed in the summary judgment motions in the initial complaint or any other amendments thereto.

¶ 22

Issues not raised at trial and in a timely post-trial motion are waived and not appropriate for review on appeal. See *Calabrese v. Benitez*, 2015 IL App 3d 130827, ¶¶ 15-17. Moreover, “denial of a motion for summary judgment is not subject to review on appeal after a trial has been held, as any error in the denial merges into the subsequent judgment.” *Wade v. Rich*, 249 Ill. App. 3d 581, 592 (1993). These rules have been extended to arbitration hearings. See *First Health Group Corp. v. Ruddick*, 393 Ill. App. 3d 40, 49 (2009); see also *Tri-City Jewish Center v. Blass Riddick Chilcote*, 159 Ill. App. 3d 436, 439 (1987). Parties can waive issues by failing to raise them at arbitration, even if that issue would otherwise subject the arbitration award to an attack on those grounds. *Ruddick*, 393 Ill. App. 3d at 49.

¶ 23

Here, after TLUB and the Township’s motions for summary judgment were denied, they did not at that time appeal those denials. Instead they filed a joint motion with Aqua for the matter to be referred to binding arbitration. During the arbitration, both parties submitted

documents including pleadings and exhibits to the arbitrators and presented their cases during a hearing that included opening and closing statements as well as witnesses who were subject to cross-examination.

¶ 24 TLUB and the Township have failed to provide this court with a record of the arbitration proceedings. Therefore, resolving all doubts we may have against TLUB and the Township (see *Foutch v. O'Bryant*, 99 Ill.2d 389, 391-92 (1984)), we do not find the issues addressed in TLUB and the Township's motions for summary judgment were presented during the arbitration. TLUB and the Township's argument that the dissenting arbitrator's *sua sponte* assertion of the issue that the contract was void *ab initio* preserved this issue for appeal is without merit. The arbitrators' majority decision clearly notes that the issue argued by the dissenting arbitrator:

“(1) was not plead in any of the pleadings presented to the arbitrators, (2) no proof was offered at the hearing as to the board's term or its makeup, (3) this issue was not argued at any time during the hearing of this case, (4) no case law or brief was submitted advancing this proposition, and (4) [sic] to raise this issue *sua sponte* when it was never addressed at the hearing would be unfair to Aqua.”

Therefore, TLUB and the Township waived the arguments included in the denied summary judgment motions.

¶ 25 TLUB and the Township's second main argument on appeal is that the trial court erred in denying the motion to modify the order imposing liability upon the Township. TLUB and the Township assert that the trial court did have authority to decide the issue of liability because that issue had not been presented to the arbitrators. Moreover, the issue of whether the Township was

liable was not in dispute as the contract clearly stated that it would not be held liable. Additionally, because the issue had not been presented, the rule under the Illinois Uniform Arbitration Act (Arbitration Act) requiring any request for modification or correction of an error apparent on the face of the arbitrator's decision to be submitted within 90-days of the decision's issuance did not apply.

¶ 26 Aqua contends the trial court's denial of the Township's motion was proper as the motion sought relief based upon substantive issues that were never presented to the arbitrators, the motion was untimely asserted and thus waived, the decision was not ambiguous, and the Township did not timely seek clarification of the alleged ambiguity but is attempting to collaterally attack the arbitrator's decision. Aqua also reasserted two arguments from its earlier response to Lockport's second motion for summary judgment: (1) TLUB waived the provision by voluntarily joining the Township and (2) that the intent of the term relinquishing the Township's liability under the contract was really to establish the identity of the legal entity performing the Township's obligations under the Agreement.

¶ 27 Our review of an arbitrator's award is extremely limited. *American Federation of State, County & Municipal Employees v. Department of Central Management Services*, 173 Ill. 2d 299, 304 (1996). "Whenever possible a court must construe an award to uphold its validity * * *." *Garver v. Ferguson*, 76 Ill. 2d 1, 10, (1979).

¶ 28 Under the Arbitration Act, "upon application made within 90-days after delivery of a copy of the award to the applicant," only gross errors as identified in section 13 that are apparent upon the face of an arbitrator's award can be modified or corrected by a reviewing court. *Id.* at 11; 710 ILCS 5/13 (West 2014). *Sweet v. Steve's Cartage Co.*, 51 Ill. App. 3d 913 (1977). Such

errors must be so extreme that if the arbitrators were informed of the error they would have ruled differently. *Sloan Electric. v. Professional Realty & Development Corp.*, 353 Ill. App. 3d 614, 620 (2004). However, when a party fails to adhere to the Arbitration Act and challenge an award within 90 days of the decision, relief is foregone and the party is bound to the award even if the award contains an error on its face. See *Schroud v. Van C. Argiris & Co.*, 78 Ill. App. 3d 1092, 1095 (1979). The Arbitration Act, however, does not bar relief of issues regarding arbitration decisions sought after the 90 day time limit when the issue was not submitted to arbitration. See *Kenny v. Kenny Industries, Inc.*, 406 Ill. App. 3d 56 (2010). This rule does not negate the status of issues that have been waived when denied in a motion for summary judgment and then not argued during a later hearing. See *Ruddick*, 393 Ill. App. 3d at 49.

¶ 29 Here the arbitrator's decision was issued on December 5, 2013. On April 7, 2014, more than 120 days later, Aqua filed its motion to confirm the arbitrator's decision. At no time was a motion in opposition to the arbitrator's decision or Aqua's motion for confirmation filed by either TLUB or the Township. We have previously found that the issue of the Township's liability was not submitted for arbitration. However, again that issue was asserted in TLUB and the Township's motion for summary judgment prior to arbitration. The motion was denied and the issue was then not submitted to arbitration. It was waived.

¶ 30 Moreover, we find that the issue is moot. While citing *Godfrey Township Utility Board v. Hand*, 79 Ill. App. 2d 192 (1967), TLUB moved to amend its first amended complaint for declaratory judgment to add the Township as a party to the proceedings and argued here on appeal that it was because it "does not have authority to sue in its own name, but instead, in the name of and for [and] on behalf of" the Township. Additionally, the joint motion TLUB and the Township filed with Aqua listed both entities as plaintiffs and stated that "the *parties* wished to

refer the matter to binding arbitration." It did not parse out that the arbitration would involve only TLUB and Aqua. Since an arbitrators' decision need not explain how they came to the conclusion, we presume that the arbitrators considered all the parties involved in the arbitration in making its finding for Aqua and imposing liability solely upon the Township. *Sloan Electric v. Professional Realty & Development Corp.*, 353 Ill. App. 3d 614, 624 (2004).

¶ 31 We decline to discuss the merits of TLUB and the Township's contentions that the arbitration finding is not against both entities and that the entities are meaningfully distinct per the terms of the contract, as it has no substantive effect on the outcome of this appeal. Further we are reminded of our supreme court's instruction to refrain from review of cases or issues "merely to establish a precedent or guide future litigation." *In re Marriage of Donald B. & Roberta B.*, 2014 IL 115463, ¶ 23 (citing *Madison Park Bank v. Zagel*, 91 Ill. 2d 231, 235 (1982)). Thus we ultimately find that the issue has been waived and is otherwise moot as the arbitrator's decision assumes all issues have been addressed and is conclusive.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 34 Affirmed.