COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP624 **Cir. Ct. No. 2008CV230**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

TERRY L. MCLAUGHLIN,

PLAINTIFF-RESPONDENT,

V.

PAUL J. HOFFMAN,

DEFENDANT-APPELLANT,

HOFFMAN OFFICE, LLC,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Paul Hoffman appeals an order confirming an arbitration award and denying his motion to vacate the award, and a judgment for

the arbitration award. Hoffman argues the arbitrator exceeded the limits of his authority when applying the terms of the parties' contract. We reject Hoffman's argument and affirm.

BACKGROUND

¶2 Terry McLaughlin worked at Hoffman, LLC, owned by Hoffman, until resigning in February 2007. At that time, McLaughlin and Hoffman each owned fifty percent interests in Hoffman Office, LLC, which was created solely to own the office building that housed Hoffman LLC.[1] The Hoffman Office operating agreement provided Hoffman the right to purchase McLaughlin's interest upon his resignation, with section 7.6 setting forth the process for determining the purchase price.

¶3 Following McLaughlin's resignation, Hoffman filed an action in federal court alleging McLaughlin stole company documents and employees to benefit McLaughlin's new company. McLaughlin, for his part, filed two state court actions based on Hoffman's failure to complete the purchase of McLaughlin's share of Hoffman Office, as well as another company with a similar operating agreement. Ultimately, McLaughlin and Hoffman resolved their disputes through mediation, with the exception of setting the purchase price for McLaughlin's interest in Hoffman Office. They executed a global settlement agreement, which included a section whereby they agreed to submit the Hoffman Office purchase price issue to binding arbitration.

[1] We will refer to Paul Hoffman, Hoffman Office, LLC, and Hoffman, LLC, respectively, as Hoffman, Hoffman Office, and Hoffman LLC.

¶4 The settlement agreement stated Hoffman would purchase McLaughlin's interest, the value of which would be determined by Mark Frankel, who had conducted the mediation. The settlement agreement also incorporated an attached arbitration agreement. The arbitration agreement, signed June 6, 2008, provided, in relevant part:

> 1. Dispute to be Arbitrated. Arbitrator Frankel will determine the [p]urchase [p]rice ... for the sale of McLaughlin's ... interest in [Hoffman Office]. In making this determination, ... Frankel shall apply the applicable provisions of the Operating Agreement .... Frankel shall give the weight he determines is appropriate to any historical precedent presented by the [p]arties. ... Frankel may also, in his discretion, adjust the [p]urchase [p]rice to reflect any equitable considerations that he determines are appropriately considered.
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> 2. Submissions. On or before June 6, 2008, the [p]arties will submit confidential statements to ... Frankel [regarding] the appropriate [p]urchase [p]rice ... and [regarding] any equitable adjustment that should be made to that [p]urchase [p]rice.
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> 3. Hearing. On June 11, 2008, the [p]arties and their counsel will meet [separately] with ... Frankel. ....
>
> 4. Decision. Once ... Frankel is satisfied [the parties have fully presented their arguments], he will render a decision. Either or both sides may request that this decision be in writing. The decision will be binding upon the [p]arties ....

¶5 In support of his position at arbitration, Hoffman submitted two appraisals to Frankel; one found a $3,550,000 fair market value as of September 12, 2005, and the other found a $4,717,000 lease-fee value as of February 1, 2007. Factoring in assets, liabilities, and a sixty percent reduction under the operating agreement's vesting schedule, Hoffman proposed valuing McLaughlin's share at either $202,508.75 or $435,908.75, depending on the appraisal used. However, Hoffman further argued the purchase price should be set at zero, in consideration of the equities.

¶6 McLaughlin submitted no appraisal, but argued the 2007 appraisal should be used as a starting point, with proposed modifications to both the capitalization rate and square-foot lease value, to reach a $7,404,568 fair market value. McLaughlin asserted this would result in a value of $1,913,531 for his share after the debts, assets, and a thirty percent vesting reduction were factored in. Frankel rendered an oral decision at the hearing, of which there is no record. He subsequently signed a written arbitration award that did not set forth how he arrived at the purchase price.[2] The award set the purchase price for McLaughlin's half share at $1,159,340.50.

¶7 Hoffman moved for reconsideration and, after both parties submitted written arguments, Frankel issued a written decision denying Hoffman's request to recalculate the purchase price.[3] The decision indicates Frankel rejected adoption of either of Hoffman's appraisal values because neither appraisal satisfied the operating agreement's requirements. The decision further explains Frankel substantially based his purchase price determination on the 2007 appraisal, although he applied a different capitalization rate. Frankel further justified his determination upon his discretion granted by the arbitration agreement to adjust the purchase price based on equitable considerations. McLaughlin moved the circuit court to confirm the arbitration award and Hoffman moved to vacate it. The court confirmed the award and Hoffman now appeals.

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[2] An arbitrator need not provide reasons for the award or explain how the arbitrator arrived at it. ***McKenzie v. Warmka***, 81 Wis. 2d 591, 600-01, 260 N.W.2d 752 (1978).

[3] We make no judgment whether Frankel had the authority to reconsider his final, binding arbitration award in the absence of any provision therefor in the arbitration agreement. Neither party addresses this issue on appeal.

DISCUSSION

¶8 Judicial review of arbitration awards is very limited. ***Milwaukee Prof'l Firefighters v. City of Milwaukee***, 78 Wis. 2d 1, 21, 253 N.W.2d 481 (1977). The function of the court is a supervisory one, the goal being merely to ensure the parties receive the arbitration for which they bargained. ***Id.*** at 22. "The court will not relitigate issues submitted to arbitration. The parties contracted for the arbitrator's decision, not the court's." ***Joint Sch. Dist. No. 10 v. Jefferson Educ. Ass'n***, 78 Wis. 2d 94, 117, 253 N.W.2d 536 (1977). Further, the decision of an arbitrator cannot be interfered with for mere errors of judgment as to law or fact. ***Id.*** The scope of our review of an arbitrator's decision is the same as the circuit court's and is conducted without deference to the circuit court's decision. ***City of Madison v. Local 311, Int'l Ass'n of Firefighters***, 133 Wis. 2d 186, 190, 394 N.W.2d 766 (Ct. App. 1986).

¶9 WISCONSIN STAT. § 788.10(1)(d)[4] provides that the circuit court shall vacate any arbitration award "[w]here the arbitrators exceeded their powers ...." Hoffman contends Frankel exceeded his authority as arbitrator by failing to apply "the applicable provisions" of the Hoffman Office operating agreement. Specifically, Hoffman now argues Frankel was required to direct both parties to obtain new appraisals.

¶10 According to section 7.6(a) of the Hoffman Office operating agreement, the purchase price consists of the seller's share of the fair market value of the real estate plus any other assets' value, minus the seller's share of debt.

[4] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Under section 7.6(b), the purchase price is then reduced if necessary according to a vesting schedule based on the duration of the seller's employment at Hoffman LLC.

¶11 Section 7.6(a) also specifies the process for determining the fair market value of the real estate. First, the agreement states the value will be as agreed upon among the members each year in writing, or as determined by appraisal. Second, the agreement provides that if the members have not set a value within two years of the triggering date, here the resignation, then the fair market value shall be set by the buyer and seller agreeing upon a single appraiser. Third, failing agreement on a single appraiser, the parties are to each retain their own appraiser. If the amount of the lower appraisal is ninety percent or more of the higher appraisal, then the two values are averaged. Fourth, if the two appraisals vary by more than ten percent, then the two appraisers shall select a third appraiser to value the property. The third appraisal is then averaged with the nearest of the two prior appraisals to determine the final fair market value.

¶12 The operating agreement applies to the parties and how *they* value their interests. Frankel's authority to determine the purchase price, however, derives from the arbitration agreement. The arbitration agreement requires Frankel to apply "the applicable provisions" of the operating agreement, but it leaves to his discretion the determination of which provisions are applicable. Frankel ultimately concluded the fair market valuation process of section 7.6(a) could not be applied because there were no appraisals satisfying any of the various alternative valuation procedures. Thus, he valued the property based on the available evidence the parties submitted.

¶13 Hoffman does not challenge Frankel's conclusion that neither of the first two valuation alternatives of section 7.6(a) of the operating agreement were applicable, but argues Frankel was then required to direct the parties to obtain appraisals under the third alternative. This position is in stark contrast to Hoffman's position at arbitration, where he argued Frankel was required to adopt the value from one of Hoffman's submitted appraisals because McLaughlin had not obtained one.

¶14 Additionally, Hoffman would have known the third alternative, requiring appraisals from both parties, could not be complied with prior to arbitration. The arbitration agreement was signed just three business days prior to the arbitration hearing, with the written submissions due the same day as signing. Indeed, it was Hoffman who suggested the hearing date. Neither Hoffman nor McLaughlin suggested at arbitration that Frankel should seek further appraisals after the matter was submitted to Frankel. Thus, Hoffman has shown by his own conduct that the arbitrator was not limited to precisely applying the fair market valuation procedures of section 7.6(a). *See* ***Employers Ins. of Wausau v. Certain Underwriters at Lloyd's London***, 202 Wis. 2d 673, 680, 552 N.W.2d 420 (Ct. App. 1996) ("How the parties framed the issue to be arbitrated, the conduct of the parties, and the original contract to arbitrate, determine the scope of the arbitrator's authority.").

¶15 Hoffman further argues that Frankel's interpretation of the arbitration agreement would render superfluous the phrase "shall apply the applicable provisions of the operating agreement." We disagree. Other relevant provisions were still applicable. The operating agreement required Frankel to determine the amounts of assets, debts, and which of several proffered vesting

schedules applied, and adjust the purchase price accordingly. Those matters, like the property's fair market value, were disputed by the parties.

¶16 Hoffman also asserts, without citation, and apart from any developed argument, that he reasonably believed at arbitration his appraisals satisfied the operating agreement provisions. Yet, he fails to explain how either of them could possibly do so. Clearly, they do not. As Frankel noted in his written decision, the parties never agreed to a value or on an appraiser, and, further, the 2007 valuation was not an appraisal of fair market value.

¶17 Additionally, Hoffman complains Frankel's fair market valuation was excessive, as compared to Hoffman's appraisals as well as several years' of town tax record estimations of fair market value. This argument ignores the standard of review. Further, the tax valuations are not part of the record. Hoffman invites us to take judicial notice of that information, but he does not provide the records, much less explain where they might be accessed. *See* WIS. STAT. § 902.01. We will not substitute our judgment for that of the arbitrator. The parties contracted for the arbitrator to determine a purchase price, and that is what they received.

¶18 Finally, Hoffman asserts that in determining a fair market value, Frankel "inserted his own capitalization rate discovered through independent internet research using the Google search engine ...." Hoffman's cited record, however – Frankel's written decision on reconsideration – mentions neither independent research nor the internet. Because Hoffman's argument on appeal significantly relies upon his quoted, but unsupported assertion, we reject it.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.