COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP360

Cir. Ct. Nos. 2008CV2963
2009CV11559
2011CV1100
2011CV1869

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

IN THE MATTER OF ATTORNEYS FEES IN: BUTTONWOOD TREE VALUE PARTNERS, LP V. ARTHUR O. SMITH; I. WISTAR MORRIS III V. BRUCE M. SMITH; ALLEN DRAGGE, JR. TRUST V. BRUCE M. SMITH; 1974 SUZANNE D. ICAZA TRUST V. BRUCE M. SMITH

HALE & WAGNER, S.C., TAYLOR AND MCNEW, LLP AND WILKS, LUKOFF & BRACEGIRDLE, LLC,

APPELLANTS,

V.

SHEPHERD, FINKELMAN, MILLER & SHAH, LLP, AND GREENFIELD & GOODMAN, LLC,

RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed*.

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 CURLEY, P.J. Hale & Wagner, S.C.; Taylor and McNew, LLP; and Wilks, Lukoff & Bracegirdle, LLC (hereafter referred to collectively as "McNew")[1] appeal the order denying their "Motion to Approve the Distribution of Attorney's Fees and to Resolve any Objection to that Distribution." McNew, along with the respondents—Shepherd, Finkelman, Miller & Shah, LLP, and Greenfield & Goodman, LLC—represented plaintiffs in a class action lawsuit. The class action ultimately settled, and, pursuant to the settlement agreement and final judgment, any disputes regarding attorney fees were to be settled via binding arbitration "not … subject to any appeal or review of any sort whatsoever." The attorney fees issue did go to arbitration, and the arbitrator awarded a lump sum of $8.1 million to plaintiffs' attorneys. Not surprisingly, the plaintiffs' attorneys disagreed on how that award should be distributed. McNew, apparently anticipating that the respondents would attempt to litigate the matter in a separate action, filed the aforementioned motion that is the subject of this case. McNew sought approval not only for the arbitrator's award, but also for the way that his firm had decided to distribute the award—which, contrary to an earlier agreement among the firms, completely excluded the respondents. McNew also sought, among other things, to preclude the respondents from filing any action to recover their fees. The trial court denied the motion on the basis that it had no jurisdiction over the matter.

[1] As we will see, the law firm of Taylor and McNew, LLP, and Attorney R. Bruce McNew (hereafter "Bruce McNew"), are the principal actors in this case. We therefore refer to the firm, and to appellants generally, as "McNew" throughout the case.

¶2 We agree with the trial court that it had no jurisdiction over the matters described in McNew's motion. We therefore affirm the order.

BACKGROUND

¶3 This case derives from the merger of two companies located in Milwaukee: A.O. Smith Corporation, a public-traded company, and Smith Investment Company, a privately-held corporation whose directors and officers include several members of the Smith family. In February 2008, A.O. Smith Corporation announced that it had received a merger proposal from Smith Investment Company.

¶4 One of the shareholders of the Smith Investment Company who was not a Smith family member, Buttonwood Tree Value Partners, opposed the merger. Members of Buttonwood believed that the merger was orchestrated for the benefit of Smith family members, but not for members of Smith Investment Company as a whole. Consequently, Buttonwood filed a shareholder class action claim against various members of the Smith Investment Company and A.O. Smith. In addition to local counsel, Buttonwood retained two law firms—Shepherd, Finkelman, Miller & Shah, LLP (hereafter "Shepherd") and Greenfield & Goodman, LLC (hereafter "Greenfield")—to represent it and the class of similarly-situated shareholders in the claim.

¶5 After Buttonwood filed its class action claim, another Smith Investment Company shareholder, I. Wistar Morris, III, also filed an action opposing the merger, and the two cases were consolidated. Morris hired Taylor & McNew, LLP, to represent him. After the Buttonwood and Morris actions were consolidated, the three firms—Shepherd, Greenfield, and McNew—agreed to litigate the case jointly. Pursuant to a joint prosecution agreement dated June 1,

2009, McNew would serve as lead counsel, Shepherd would do any work that McNew assigned and serve as local counsel, and Greenfield would be available for consultation. The joint prosecution agreement also stipulated that attorney fees would be divided sixty-percent to McNew and forty-percent to Shepherd and Greenfield, collectively.

¶6 Unfortunately, the relationship between the plaintiffs' lawyers broke down soon after the cases were consolidated. As best as we can tell, the breakdown appears to have derived in part from the fact that Bruce McNew's communications with co-counsel were disrespectful and condescending. McNew ultimately informed Greenfield and Shepherd that he no longer viewed them "as part of the team working on behalf of the proposed class." He also told them that they would not be compensated in accordance with the June 1, 2009 agreement, but that he would be willing to discuss their fees should the case prove successful. Thereafter, on April 30, 2010, the trial court entered a stipulation and order providing that the firm Hale & Wagner would substitute for Shepherd as local Wisconsin counsel for the Class and allowing Greenfield to withdraw.

¶7 A couple of months after the firms parted ways, the parties to the class action executed a settlement agreement. The agreement provided, among other things, that if the parties were unable to reach an agreement regarding attorney fees, the issue would be decided by "binding arbitration." The agreement further provided that "any award entered by the Arbitrator … shall be final, conclusive and binding on the Parties and shall not be subject to any appeal or review of any sort whatsoever." McNew filed a motion asking the court for its final approval, and several months later, on October 14, 2011, the trial court

entered an order and final judgment approving the settlement agreement.[2] The judgment, which repeated the settlement agreement nearly verbatim, provided, in pertinent part:

> Immediately after entry of this Judgment, the Parties shall submit their dispute over the amount of fees and expenses to be awarded to Plaintiffs' Counsel to binding arbitration…. The Fee and Expense Award Arbitration shall be conducted in accordance with the terms of the Stipulation and in accordance with Delaware Court of Chancery Rules … to the extent that they are applicable, and to the extent that they do not control some aspect of the Fee and Expense Award Arbitration, in the manner the Arbitrator so directs…. Notwithstanding anything to the contrary herein, *any award entered by the Arbitrator ... shall be final, conclusive and binding on the parties and shall not be subject to any appeal or review of any sort whatsoever*.

(Emphasis added.)

¶8 Pursuant to the terms of the settlement agreement and the final judgment, an arbitrator conducted a hearing regarding attorney fees on January 18, 2012. On January 25, 2012, the arbitrator awarded $8.1 million in fees to plaintiffs' counsel. The counsel remaining on the case—including McNew, Hale, and Bruce McNew's current firm, Wilk, Lukoff & Bracegirdle—subsequently divided the arbitration award among themselves. They did not, however, share any part of the award with Shepherd and Greenfield. Following the arbitration award, Shepherd and Greenfield tried, but failed, to negotiate fees for the work they performed on the case before they withdrew.

[2] The Honorable William Pocan entered the order and final judgment.

¶9 On October 29, 2013, McNew filed the motion at issue here, "Plaintiffs' Counsels' … Motion to Approve the Distribution of Attorney's Fees and to Resolve any Objection to that Distribution." In the motion, McNew asked the trial court to enjoin Shepherd and Greenfield from filing any action to recover attorney fees, and further asked the trial court to resolve in McNew's favor counterclaims against Shepherd and Greenfield that had yet to be filed. Shepherd and Greenfield, opposing the motion, argued that the October 2011 final judgment divested the trial court of jurisdiction over any attorney fees issues.

¶10 The trial court denied the motion,[3] reasoning that the court was not the proper forum for the dispute and that the settlement agreement did not address any disputes arising from the joint prosecution agreement:

> It is my opinion here that this is not the proper forum for this dispute. The moving parties have not conclusively demonstrated that they are entitled to the relief they request.
>
> ….
>
> I think when I look at this particular case before me … the Court is going to deny that request. Final judgment was entered more than two years ago. No motion to reopen has been filed. The respondents [Shepherd and Greenfield] are not parties to this case, nor are they counsel of record. The respondents concede they are not challenging the Court's final judgment. The respondents concede they are not seeking additional fees from any defendant in this case. The respondents concede they are not challenging the settlement. And the Settlement Agreement does not address the rights and obligations … to this joint prosecution agreement.

[3] The Honorable Michael D. Guolee denied the motion at issue here.

¶11 The next day, on January 14, 2014, McNew filed a new lawsuit against Shepherd and Greenfield, a declaratory judgment action seeking the same relief sought in the aforementioned motion denied by the trial court. McNew also, on February 12, 2014, appealed the trial court's order denying the aforementioned motion. We now turn to that appeal.

ANALYSIS

¶12 Our appeal solely concerns the very narrow issue of whether the trial court erroneously denied McNew's motion on the basis that, pursuant to the settlement agreement and final judgment, it did not have jurisdiction to grant McNew's requests.[4] "Whether a settlement agreement is binding and thus enforceable by a court is a question of law we decide de novo." ***Waite v. Easton-White Creek Lions, Inc.***, 2006 WI App 19, ¶5, 289 Wis. 2d 100, 709 N.W.2d 88. In construing a settlement agreement, we apply contract-construction principles. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶13, 257 Wis. 2d 421, 651 N.W.2d 345. "When the terms of a contract are plain and unambiguous, we will construe" the settlement agreement "as it stands." *See* ***id.***, ¶14. Moreover, as a general matter "only mutual mistake or fraud will excuse a party from the terms of an executed unambiguous written agreement." *See* ***Nauga, Inc. v. Westel Milwaukee Co.***, 216 Wis. 2d 306, 315, 576 N.W.2d 573 (Ct. App. 1998).

[4] Our appeal only concerns whether the trial court had the authority to grant the relief requested in McNew's motion. We view this as a separate matter from the issue of whether Shepard and Greenfield were entitled to any attorney fees under the June 1, 2009 joint prosecution agreement discussed above.

¶13 The settlement agreement before us very clearly states that any arbitration award concerning the parties' attorney fees shall not be reviewable by the courts:

> Immediately after the Parties have executed this Stipulation, they shall attempt to negotiate a stipulated amount of fees and expenses to be awarded to Plaintiffs' Counsel…. Unless the Parties submit a stipulated amount of fees and expenses to be awarded … immediately after entry of the Judgment the Parties shall submit their dispute regarding the amount of fees and expenses to be awarded to Plaintiffs' Counsel to binding arbitration…. The Fee and Expense Award Arbitration shall be conducted in accordance with the Settlement Agreement and this Stipulation and in accordance with Delaware Court of Chancery Rules … to the extent that they are applicable, and to the extent that they do not control some aspect of the Fee and Expense Award Arbitration, in the manner the Arbitrator so directs…. Notwithstanding anything to the contrary herein, *any award entered by the Arbitrator ... shall be final, conclusive and binding on the parties and shall not be subject to any appeal or review of any sort whatsoever*.

(Emphasis added.)

¶14 Moreover, as noted above, the relevant portion of final judgment repeats the settlement agreement almost verbatim:

> Immediately after entry of this Judgment, the Parties shall submit their dispute over the amount of fees and expenses to be awarded to Plaintiffs' Counsel to binding arbitration…. The Fee and Expense Award Arbitration shall be conducted in accordance with the terms of the Stipulation and in accordance with Delaware Court of Chancery Rules … to the extent that they are applicable, and to the extent that they do not control some aspect of the Fee and Expense Award Arbitration, in the manner the Arbitrator so directs…. Notwithstanding anything to the contrary herein, *any award entered by the Arbitrator ... shall be final, conclusive and binding on the parties and shall not be subject to any appeal or review of any sort whatsoever*.

(Emphasis added.)

¶15 Yet despite the fact that the settlement agreement and judgment both clearly state that the courts may not review any arbitration award concerning attorney fees, McNew argues that the trial court should have done so anyway. McNew cites to ***Herro, McAndrews & Porter, S.C. v. Gerhardt***, 62 Wis. 2d 179, 182, 214 N.W.2d 401 (1974), which held that "courts have the inherent power to determine the reasonableness of attorney's fees," to support his contention that the trial court did in fact have the authority to approve the arbitration award. ***Herro*** is distinguishable, however, because the parties there did not contract to send the calculation of attorney fees to binding arbitration. *See* ***id.*** at 185. In the case before us, in contrast, the parties *did* contract to calculate attorney fees before an arbitrator, and, more importantly, contracted to divest the courts of jurisdiction over any disputes arising from the arbitrator's award. Moreover, McNew does not argue that the terms of the agreement were not plain or that they were ambiguous. *See* ***Peppertree Resort Villas, Inc.***, 257 Wis. 2d 421, ¶14. Nor does he argue that there was any fraud or mutual mistake involved in the agreement's execution. *See* ***Nauga***, 216 Wis. 2d at 315. We therefore must construe the agreement "as it stands." *See* ***Peppertree Resort Villas, Inc.***, 257 Wis. 2d 421, ¶14. As it stands, the agreement and judgment bar any judicial review of the arbitrator's award regarding attorney fees.

¶16 In short, we agree with the trial court that it did not, pursuant to the settlement agreement and final judgment, have jurisdiction to grant McNew's requests. In other words, the trial court did not have jurisdiction to enjoin Shepherd and Greenfield from filing any action to recover attorney fees, and did not have jurisdiction to resolve any counterclaims McNew might eventually file against Shepherd and Greenfield. The trial court's decision to deny McNew's motion must therefore be affirmed. Furthermore, because we have decided the

matter on these grounds, we need not consider the parties' arguments regarding the merits of McNew's motion. *See* ***Patrick Fur Farm, Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 ("we decide cases on the narrowest possible grounds").

By the Court.—Order affirmed.

Not recommended for publication in the official reports.