COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2013

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. 2011AP1862 **Cir. Ct. No. 2011CV2061**

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

BOARDMAN, SUHR, CURRY & FIELD, LLP,

PETITIONER-RESPONDENT,

V.

BRUCE R. BOSBEN, APEX ENTERPRISES, INC. AND MFP HOLDINGS, LLC P/K/A MAIN FIRE PROTECTION, LLP,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

Before Sherman, Kloppenburg and Gundrum, JJ.

¶1 PER CURIAM. Bruce Bosben, Apex Enterprises, Inc., and MFP Holdings, LLC, appeal a circuit court order affirming an arbitration award relating

to legal fees charged to them by Boardman, Suhr, Curry & Field, LLP. We affirm for the reasons discussed below.

BACKGROUND

¶2 The Boardman law firm represented Apex, its subsidiary MFP, and their principal Bosben through the initial phases of a civil lawsuit. The law firm filed counterclaims and affirmative defenses on its clients' behalf, prevailed on a summary judgment motion and successfully defended that decision on appeal before the clients discharged the law firm due to a dispute over its legal fees.

¶3 The law firm proposed resolving the fee dispute through the State Bar of Wisconsin Fee Arbitration Program. It is undisputed that counsel for Apex and MFP filed a formal response consenting to arbitration. Just prior to the arbitration hearing, Bosben claimed that he had not authorized counsel to consent to arbitration for Bosben in his personal capacity, but the chair of the arbitration panel found that Bosben himself had consented to arbitration through various correspondences aside from the companies' formal response.

¶4 Also prior to the hearing, the panel chair denied: Bosben's motion for an adjournment to seek separate counsel; Apex's motion to stay the arbitration until counterclaims and affirmative defenses that Boardman had worked on had been decided; and Apex's request to allow its successor counsel to testify by telephone.

¶5 During the hearing, the panel chair received an exhibit detailing the law firm's entire billing history for the case, but refused to allow counsel for Apex to cross-examine the law firm's witness regarding those fees that had already been paid. The panel chair also excluded testimony about the current status of the

counterclaims raised in the ongoing lawsuit. The panel ultimately awarded the law firm the full amount of its unpaid fees and expenses, plus interest.

¶6 The law firm then petitioned the circuit court to confirm the arbitrator's award pursuant to WIS. STAT. § 788.09 (2011-12),[1] while Bosben, Apex and MFP moved to vacate it pursuant to WIS. STAT. § 788.10. The circuit court denied the motion to vacate and confirmed the award, after which Bosben, Apex and MFP filed the present appeal.

STANDARD OF REVIEW

¶7 Threshold issues of arbitrability—namely, whether parties have consented to arbitration or whether the subject matter of a dispute falls within the scope of an arbitration agreement—are subject to independent judicial determination. ***Cirilli v. Country Ins. & Financial Servs.***, 2009 WI App 167, ¶¶10-13, 322 Wis. 2d 238, 776 N.W.2d 272. However, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration if there is any construction of the arbitration clause that would cover the grievance on its face and no other provision expressly precludes it. ***Id.***, ¶14.

¶8 Once the arbitrability of a matter has been established, an arbitrator's award is presumptively valid in this state due to the strong public policy favoring arbitration as a method for settling disputes. ***Milwaukee Bd. of Sch. Dirs. v. Milwaukee Teachers' Educ. Ass'n***, 93 Wis. 2d 415, 422, 287 N.W.2d 131 (1980). Consequently, judicial review of an arbitration award is very limited in nature,

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

designed primarily to ensure that the parties to the agreement received the arbitration process for which they bargained. ***Racine Cnty. v. International Ass'n of Machinists and Aerospace Workers Dist. 10, AFL-CIO***, 2008 WI 70, ¶11, 310 Wis. 2d 508, 751 N.W.2d 312. By statute, a court may overturn an arbitrator's award only when the award was procured by corruption, fraud, or undue means, or when the arbitrator exhibited partiality, engaged in corruption or misconduct prejudicing the rights of a party, or exceeded his or her powers. WIS. STAT. § 788.10(1).

¶9 An arbitrator does not exceed his or her powers merely by making a mistake as to fact or law. *See* ***Sands v. Menard, Inc.***, 2010 WI 96, ¶48, 328 Wis. 2d 647, 787 N.W.2d 384. Rather, a party challenging the scope of an arbitrator's exercise of power must demonstrate by clear and convincing evidence that the arbitrator demonstrated perverse misconstruction, positive misconduct or manifest disregard of the law, or that the award itself was illegal or contrary to strong public policy. ***Id.*** An appellate court reviews an arbitration decision de novo to determine as a question of law whether the challenger has satisfied the necessary burden of proof to vacate the award. ***Id.***

DISCUSSION

¶10 Bosben first challenges the arbitrability of his individual responsibility for any of the legal fees on the grounds that he never agreed in writing to be personally bound by the arbitration. The parties dispute whether the question of Bosben's consent is one of fact or law, but we need not address that procedural point because we are satisfied in either event that Bosben did provide the necessary consent. That is, we conclude as a matter of law that Bosben's agreement in an email to participate in arbitration constituted consent in writing,

and we see nothing in the record to dispute the fact that Exhibit B, attached to correspondence dated 6/15/2010 from the law firm to the panel chair, was an accurate printout of an email sent by Bosben. Because we see nothing in the arbitration agreement that would require all of the parties to consent in a single document, it is not necessary to decide whether counsel was also authorized to consent to arbitration on Bosben's behalf when he filed the affirmative response on behalf of the companies.

¶11 Bosben next contends that the panel chair engaged in misconduct by refusing to stay the hearing to await the outcome of the underlying lawsuit, to allow Bosben to obtain separate counsel, or to allow a witness who was out of state to return and testify. Bosben has not, however, demonstrated by clear and convincing evidence that any of these adjournment decisions constituted misconduct as opposed to a reasonable exercise of discretion. *See* ***Kemp v. Fisher***, 89 Wis. 2d 94, 101, 277 N.W.2d 859 (1979).

¶12 As to awaiting the outcome of the underlying litigation, Boardman's participation in the remaining issues was largely limited to framing the initial affirmative defenses and counterclaims. How those claims would be litigated would depend upon successor counsel. The bulk of Boardman's work was focused on the summary judgment motion, and could be fairly evaluated based upon the outcome on appeal.

¶13 As to postponing the arbitration to allow Bosben to obtain successor counsel, the arbitrator did not accept Bosben's premise that he had not consented to arbitration in his personal capacity. Therefore, even if it was true that counsel for Apex and MFP did not represent Bosben, the panel chair could reasonably

conclude that Bosben already had sufficient time to have obtained separate counsel if he wished to do so.

¶14 As to postponing the matter until a proposed witness returned from out-of-state, Bosben has not explained what diligent measures he took to procure the witness's physical presence. Therefore, the panel chair could reasonably have concluded that there was a lack of good cause to allow the witness to testify telephonically or to postpone the matter until the witness returned.

¶15 Finally, Bosben contends that the panel chair engaged in misconduct by "inexplicably" refusing to allow cross-examination relating to the reasonableness of legal fees that had already been paid after allowing Boardman to enter its entire billing record into evidence. The explanation, however, appears to be straightforward. Boardman did not submit any of its already-paid bills to arbitration. Therefore, the panel chair could reasonably view cross-examination about them as outside the scope of the arbitration. As to the billing record itself, Bosben has not indicated that he ever objected to its admission, much less explained how he was prejudiced by the ruling.

¶16 In sum, Bosben has not shown that the attorney fee dispute was not arbitrable or presented clear and convincing evidence to overcome the presumption that the arbitration award was valid.

By the Court.—Order affirmed.

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