COURT OF APPEALS
DECISION
DATED AND RELEASED

April 24, 1997

NOTICE

No. 96-0839

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

IN RE ARBITRATION AWARD DATED MAY 4, 1995:

ED FETT,

Movant-Respondent,

v.

THOMAS A. LUKSETICH,

Respondent-Appellant.

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

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

DYKMAN, P.J. Thomas Luksetich appeals from a circuit court order vacating an arbitration award. The arbitrator had decided that the general partners of Dodger Lanes Partnership–Edward Fett, Thomas Luksetich, Floyd Kunkel and Thomas Osterhaus–were equally liable for the outstanding debts of the partnership. The circuit

court vacated the decision because the arbitrator did not hold a hearing before rendering his decision. We conclude that Fett waived his right to a hearing, and therefore the circuit court erred in vacating the arbitrator's award. Accordingly, we reverse.

BACKGROUND

Dodger Lanes Partnership was created in 1984. Fett, Luksetich, Kunkel and Osterhaus were the sole general partners. They were also limited partners, along with several others. The four general partners contributed varying amounts of capital to the partnership, with Luksetich contributing $36,000, Kunkel $24,000, Osterhaus $24,000 and Fett $6,000, for a total of $90,000.

The general partners decided to sell Dodger Lanes in 1991. The partnership's liabilities exceeded its assets, so all four needed to make additional capital contributions. Fett and Luksetich agreed that each general partner's contribution to the deficiency should be proportionate to that partner's capital contribution to the partnership as a general partner. They disagreed, however, as to whether the partners contributed capital as general or limited partners. Fett contended that the four partners contributed capital as general partners, and therefore he was liable for only 6 2/3% ($6,000/$90,000) of the deficiency. Luksetich maintained that the four partners contributed capital as limited partners, not general partners. Because each contributed an equal amount ($0.00) as a general partner, Luksetich believed that they were equally responsible for the partnership's liabilities.

Fett and Luksetich agreed to submit their dispute to binding arbitration. The arbitration agreement, dated November 10, 1994, provided in relevant part:

> 1. Joseph W. Boucher of Madison, Wisconsin is appointed as the sole arbitrator with full authority to hear and resolve the dispute on a final and binding basis pursuant to applicable law;

> ….
>
> 3. The rules of evidence commonly followed in the State of Wisconsin shall apply to the arbitration proceeding and all matters related thereto, but Arbitrator Boucher will have the discretion to conduct the Hearing on an informal basis. However, any testimony of the Partners or of other parties who may be witnesses shall be under oath administered by the Arbitrator. Evidence may be submitted by testimony and by documents duly identified. The matter of prehearing and posthearing briefs shall be decided by the Partners in consultation with the Arbitrator prior to the Hearing and possible use of a Court Reporter and sharing the costs of such Reporter. The Partners may also agree to submit their respective cases by documents, briefs or other statements of position in lieu of a Hearing in consultation with the Arbitrator; and
>
> 4. The Arbitrator shall set the time, place and date for the Hearing or for any submission of positions in lieu of a Hearing in consultation with the Partners.

On January 5, 1995, Boucher sent a letter to the parties indicating that although he had received much of the information he had requested, he still needed more. In the letter, Boucher indicated: "I will see that this is completed by February 1, 1995, assuming I get all information necessary."

Luksetich responded to Boucher's letter and forwarded additional written submissions on January 16. Luksetich wrote:

> Based upon your most recent correspondence concerning getting this matter resolved by February 1, 1995 based upon my written submissions, I am assuming that, pursuant to Paragraph 4 of the Arbitration Agreement, we are submitting our positions in lieu of a hearing. I have no objection to that procedure and I am submitting my written position with this letter.

Luksetich never sent a copy of this correspondence to Fett.

On February 23, Luksetich attempted to terminate the arbitration agreement because Fett had not submitted his materials as of that date. On February 27, Boucher responded that he did not believe Luksetich had the right to terminate the

agreement without Fett's consent, but agreed to terminate his role as arbitrator if he did not receive Fett's material by March 15, 1995.

Boucher again corresponded with the parties on March 21. Boucher's letter stated:

> I was on vacation from March 7 through March 20. Upon my return on March 20, I had received the requested information in a timely fashion from Mr. Fett. I will now review it and get back to you on or about Tuesday, March 28 with a response based upon the information I have received from Mr. Fett. This is assuming the information is responsive. As I say, I have not read it yet.

On March 30, Boucher again updated the parties on his progress:

> I am writing to let you know that, despite my best intentions to have a decision to you by the end of this week, I was not able to do so. We are extraordinarily busy at this time, and I have not yet had a chance to thoroughly review the file. I will, however, have a decision by April 11, 1995….

On May 3, Boucher sent the parties his decision. He concluded that the $90,000 contributed by the four partners was contributed as limited partners, not general partners. Therefore, he concluded, each general partner was equally responsible for the outstanding liabilities of the partnership.

On July 31, Fett filed a motion to vacate, modify or correct the arbitration award with the circuit court. Fett argued that the arbitrator, by failing to conduct a hearing: (1) exceeded and imperfectly executed his powers; and (2) was guilty of misconduct in refusing to hear evidence pertinent and relevant to the controversy. The circuit court agreed that the arbitrator exceeded and imperfectly executed his powers, and therefore vacated the award under § 788.10(1)(d), STATS. Luksetich appeals.

DISCUSSION

On review of an arbitration award, our role is limited. An arbitrator's award is presumptively valid and will be disturbed only when its invalidity is demonstrated by clear and convincing evidence. ***Milwaukee Bd. of Sch. Dirs. v. Milwaukee Teachers' Educ. Ass'n,*** 93 Wis.2d 415, 422, 287 N.W.2d 131, 135 (1980). We review the arbitrator's award without deference to the circuit court's decision. *See* ***Lukowski v. Dankert***, 184 Wis.2d 142, 149, 515 N.W.2d 883, 886 (1994).

When reviewing an arbitration award, the court takes on a supervisory role to ensure that the parties received the arbitration for which they bargained. ***Id.*** In reviewing an arbitration award, the courts are guided by the statutory standards of §§ 788.10 and 788.11, STATS., and by standards developed at common law. ***Id.*** at 150-51, 287 N.W.2d at 886. The statute providing the grounds on which a court must vacate an arbitrator's award, § 788.10, provides:

> (1) In either of the following cases the court … must make an order vacating the award upon the application of any party to the arbitration:
>
> (a) Where the award was procured by corruption, fraud or undue means;
>
> (b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

The circuit court vacated Boucher's arbitration award under § 788.10(1)(d), STATS. Fett argues that the arbitrator violated both paragraphs (c) and (d)

of § 788.10(1) by making a decision without holding a hearing. We do not need to decide whether the arbitrator's failure to conduct a hearing violated § 788.10(1), however, because we conclude that Fett waived his right to object to the lack of a hearing.

On January 5, 1995, the arbitrator wrote to Fett and Luksetich that "I will see that this is completed by February 1, 1995, assuming I get all information necessary." On March 21, 1995, the arbitrator wrote: "I will now review [the information I received from Fett] and get back to you on or about Tuesday, March 28 with a response based upon the information I have received from Mr. Fett." And on March 30, 1995, the arbitrator wrote that "despite my best intentions to have a decision to you by the end of this week, I was not able to do so…. I will, however, have a decision by April 11, 1995 …."

Based on this correspondence, Fett should have known that the arbitrator intended to decide the dispute based on the written submissions, without a hearing. Yet Fett never notified the arbitrator of his objection to the decision-making process. On March 30, 1995, without having scheduled a hearing, the arbitrator informed Fett that he would "have a decision by April 11, 1995." Fett had ample notice that the arbitrator intended to proceed without a hearing, but remained silent. And after the dispute was decided, Fett voiced his objection not to the arbitrator, but to the circuit court.

The doctrine of waiver applies to arbitration proceedings. ***City of Manitowoc v. Manitowoc Police Dep't***, 70 Wis.2d 1006, 1020-21, 236 N.W.2d 231, 239 (1975). "A party cannot attack procedural irregularities after an award when he was aware of them earlier but remained silent until an unfavorable outcome." ***Id.*** at 1021, 236 N.W.2d at 239. And "a party cannot complain to the courts that the arbitrator acted outside the scope of his or her authority if the objection was not first raised before the arbitrator." ***DePue v. Mastermold, Inc.***, 161 Wis.2d 697, 705, 468 N.W.2d 750, 753 (Ct.

App. 1991). Because Fett failed to complain of the process used to the arbitrator, he has waived the right to raise this argument before the courts.

Fett argues that he never had the opportunity to object because any objections would have been made at a hearing. But Fett must have known that he could not have complained of the lack of a hearing at a hearing that would never be held. The arbitrator could have been notified that he was proceeding contrary to Fett's intentions at any time prior to making his decision. Fett had the opportunity to object to the lack of a hearing, but did not do so.

Fett also contends that if he would have objected to the arbitrator after the decision was rendered, he would have risked losing his right of review before the circuit court because the arbitrator might have responded to the objection after the three month time frame set forth in § 788.13, STATS.,[1] had expired. But this is not the situation before us. If Fett had made his objection to the arbitrator upon receiving the decision, the arbitrator most likely would have responded within three months. If the arbitrator delayed in making his ruling, Fett could have brought his motion to vacate before receiving the ruling and argued that he adequately preserved the issue. Or Fett could have brought his motion after the arbitrator made his ruling and argued that the arbitrator's delay tolled the § 788.13 limitation period. But instead, Fett never voiced his objection to the arbitrator. Under ***Manitowoc*** and ***DePue***, he has waived his right to voice his objection before us or the circuit court. Accordingly, we reverse the circuit court's order.

[1] Section 788.13, STATS., provides: "Notice of a motion to vacate, modify or correct an award must be served upon the adverse party or attorney within 3 months after the award is filed or delivered, as prescribed by law for service of notice of a motion in an action…."

By the Court.—Order reversed.

Not recommended for publication in the official reports.