

STATE OF MICHIGAN
COURT OF APPEALS

DARLYN TRIPLETT and
GERTRUDE SZYNDLAR,

UNPUBLISHED
December 18, 1998

Plaintiffs-Appellees,

v

No. 205576
Wayne Circuit Court
LC No. 95-536551 CL

BALLY’S TOTAL FITNESS CORPORATION and
VIC TANNY INTERNATIONAL, INC.,

Defendants-Appellants.

Before: O’Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendants appeal as of right from an order denying their motion to vacate an arbitration award in favor of plaintiffs. We affirm.

Defendants first argue that the trial court should have vacated the arbitration award because the arbitrator exceeded his authority by relieving plaintiffs of their burden of proving the existence of a contract to pay commissions, the specific rate at which the commissions were to be paid, and the specific amount of damages resulting from the alleged breach of contract. We disagree.

When reviewing a claim that an arbitrator has exceeded his authority, the reviewing court must determine whether the arbitrator exceeded his powers by acting beyond the material terms of the contract from which the arbitrator draws his authority. *Gordon Sel-Way, Inc v Spence Brothers, Inc*, 438 Mich 488, 496; 475 NW2d 704 (1991). The error, if any, must be evident from the face of the award and must be “so material and substantial as to have governed the award, and but for which the award would have been substantially otherwise.” *Id.* at 497; *Detroit Automobile Inter-Insurance Exchange v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982).

We find no error on the face of the arbitration award or in the terms of the arbitration agreement indicating that the arbitrator exceeded his authority. Additionally, without a record of the arbitration hearing, this Court cannot review whether the arbitrator relieved plaintiffs of their burden of proving the

elements of their contract claim. Therefore, we conclude that the circuit court properly denied defendants' motion to vacate the arbitration award.

Defendants next argue that the arbitration proceedings denied them due process of law because the arbitrator reversed the burden of proof and required that defendants explain the rates at which commissions were earned on the sales contracts. However, the Due Process Clause applies only to state actions, and does not apply to the actions of private parties. *City of Dearborn v Freeman-Darling, Inc*, 119 Mich App 439, 442; 326 NW2d 831 (1982). Therefore, because this case involved a private arbitration, the Due Process Clause is not applicable.

Defendants also argue that the circuit court erred in denying their request for an evidentiary hearing to determine whether the arbitrator refused to hear material evidence. We disagree.

While there is no requirement that a verbatim record be made of a private arbitration, reviewing courts can only act upon a written record. *Gavin, supra*, 416 Mich 428. Therefore, "from the perspective of the record alone, a reviewing court's ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract submission, or such documentation as the parties agree will constitute the record." *Id.* at 428-429. We conclude, based on *Gavin*, that the trial court properly denied defendants' request for an evidentiary hearing.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gibbs
/s/ Michael J. Talbot