

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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VIJAYAKUMAR VEMULAPALLI and  
SASIKALA VEMULAPALLI,

UNPUBLISHED  
December 22, 2009

Plaintiffs-Appellants,

v

No. 287566  
Genesee Circuit Court  
LC No. 04-080506-PZ

CITY OF FLINT,

Defendant-Appellee.

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Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted from an order vacating an arbitration award granting them \$6,024,128.10. We reverse and remand for reinstatement of the arbitration award.

Plaintiffs are the owners of the 19-story Genesee Towers office building in Flint. The building was damaged by flooding in August of 2001, apparently caused by the negligent installation of a new water meter. Due to the flooding damage, all remaining tenants left the building in 2002. The building has apparently not been inhabited or returned to habitable condition since that time. On December 24, 2004, plaintiffs filed their complaint, alleging that defendant had effectively taken the property without just compensation. Plaintiffs alleged that defendant's employees caused the building to become vacant and significantly lowered its value through a variety of actions and inactions, including failure to properly replace a water meter, refusal to issue a certificate of occupancy, public statements that the building was unsafe and would be condemned, refusal to allow tenants to remain in the building, failure to inspect repairs followed by citations for lack of inspection, and a general policy that defendant did not intend to allow plaintiffs to reopen the building.

In August 2006, the parties stipulated to an order adjourning trial and allowing defendant to file a counterclaim for condemnation of the building pursuant to the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq.* Defendant filed its condemnation counterclaim on September 26, 2006, and offered plaintiffs \$1,540,000 for the property. According to plaintiffs, defendant never tendered the amount of its good-faith offer or assumed title and possession of the property as required by the UCPA. Rather than bringing their claims to trial, the parties agreed to submit the matter to binding arbitration as a condemnation action.

The arbitration order provided that the arbitrator would have the authority to fashion a remedy as requested in the counter-complaint as available under Michigan law. The arbitration was subject to a high/low agreement where the award would be no lower than defendant's appraisal value (\$1,540,000) and no higher than plaintiff's appraisal value (\$7,338,840), plus interest, costs, and attorney fees under the UCPA. The parties stipulated that the arbitration proceeding was subject to the Michigan Arbitration Act, MCL 600.5001 *et seq.*, and that the circuit court would retain jurisdiction solely for the purpose of enforcing the arbitration award, enforcing the terms of the agreement, enforcing subpoenas, and determining evidentiary issues.

Paragraph 4 of the stipulated order for condemnation arbitration stated, in relevant part:

4. The arbitration will be governed by the following procedures:

\* \* \*

d. The arbitrator will determine all issues required under the Uniform Condemnation Procedures Act, including the imposition of costs and fees, as if the case had been originated in the City of Flint as a formal condemnation under the UCPA.

e. The date of the taking shall be the date of the filing of the Plaintiffs/Counterdefendants' complaint on December 27, 2004 or September 26, 2006 [the date defendant filed its counterclaim for condemnation under the UCPA].

The parties proceeded to arbitration, and on October 31, 2007, defendant moved the arbitrator to limit evidence of alleged prior acts by defendant and to set the date of the taking at September 26, 2006. Defendant argued that plaintiffs' inverse condemnation claim had been dismissed by the parties and that the arbitration was supposed to involve only the compensation plaintiffs should receive for condemnation under the UCPA. Defendant argued that plaintiffs had waived their opportunity to bring evidence showing conduct by defendant that lowered the value of the property before condemnation in September 2006. Plaintiffs opposed this motion, arguing that evidence of property value was liberally admitted in condemnation cases, that defendant's actions led to serious diminution of the property's value, and that evidence of defendant's actions was relevant to showing the true fair market value of the property.

The arbitrator denied defendant's motion to limit evidence and to set the date of the taking to September 2006 in his November 1, 2007, opinion and order. The arbitrator found that the date of the taking was a question of fact that could not be set as a matter of law before arbitration began. Citing *In re Urban Renewal, Elmwood Park Project, City of Detroit v Cassese*, 376 Mich 311; 136 NW2d 896 (1965), the arbitrator pointed out that a city may not take deliberate actions that reduce the value of private property in order to reduce the amount of compensation paid upon condemnation of that property. The arbitrator found that Michigan law supported plaintiffs' argument that they should be allowed to offer evidence regarding the value of the property at their proposed December 27, 2004, taking date, including previous actions by defendant that lowered the value of the land.

The arbitrator issued his written opinion and award on November 23, 2007. Defendant had argued that the only issue to be arbitrated was the value of the property on September 24, 2006, the date of the taking. The arbitrator pointed out that the order that referred the case to arbitration had two proffered dates of the taking, so there was a question of fact regarding the date of the taking and what evidence would be admitted.

The arbitrator's opinion did not rely upon any of plaintiffs' allegations that defendant's actions somehow resulted in an unconstitutional taking of the property. Instead, the arbitrator found that the uninhabitable nature of the property was caused by plaintiffs' failure to repair the flood-related damage. The arbitrator reviewed defendant's assessed values of the property from 1986 to 2007 and noted that the assessed values were not reduced in several years when the property's value would ordinarily have diminished. In 1997, plaintiffs bought the subject property at auction for \$500,000. The major tenant left the building in 1998. The property was damaged by flooding in 2001, and all remaining tenants left the building in 2002. The arbitrator noted that despite those events, the assessed value of the property did not go down during those years. Instead, defendant's assessor reduced the assessed value of the property by one-half in 2004. The arbitrator concluded that this reduction was based upon the fact that the property was being considered for condemnation. The arbitrator noted that Michigan case law does not allow a city to take deliberate acts to reduce the value of private property in order to facilitate condemnation. The arbitrator found that the taking took place December 24, 2004, explaining as follows:

[T]he date of taking, by the deliberate action of the City of Flint's Assessor's Office in reducing the Assessed Value and True Cash Value by one half for the subject property, solely because it was being considered for condemnation, in this case was December 27, 2004.

After determining the date of the taking, the arbitrator compared the parties' experts' appraisals of the building. The arbitrator noted that one of the comparable properties relied upon by defendant's expert had been sold at a mortgage foreclosure sale and so was not comparable to the subject property. The arbitrator found plaintiffs' expert's appraisal of \$7,338,840 "as is" was overly optimistic in light of the local economy. Relying on the evaluation of plaintiff's expert and the true cash value of the property as determined by defendant's assessor's office, the arbitrator believed that the fair market value should be \$7,228,200, less the cost of repairs required to make the property tenantable. Plaintiffs' expert estimated that such repairs would cost \$2,311,160; defendant's expert estimated the cost of repairs at \$3,291,000. The arbitrator noted that he had personally inspected the building and that it seemed to be structurally sound. The arbitrator believed that the reasonable cost for repairs should be \$2,350,000, so the net figure of plaintiffs' compensation for the building would be \$4,878,200. After the inclusion of attorney fees and expert witness fees, the award totaled \$6,024,128.10.

Defendant moved to vacate the arbitration award and plaintiffs moved for judgment on the award. Defendant argued that the arbitrator exceeded the scope of his authority under the arbitration order by treating the case as one for inverse condemnation rather than a condemnation under the UCPA and considering evidence relating to inverse condemnation. Plaintiffs' counsel disagreed, arguing that the arbitration order required the arbitrator to pick either the December 2004 or September 2006 date as the date of the taking and that the arbitrator determined

compensation based on the fair market value of the building as in a UCPA case and did not award compensation for lost business or rent as would be allowed in an inverse condemnation case. After considering the parties' arguments, the circuit court found that the arbitrator did not exceed his powers but expressed dismay at the amount awarded plaintiffs, stating:

This really is a travesty when a man buys a building for \$400,000 and runs it into the ground and then gets an arbitrator's ruling for millions which the taxpayers are going to pay for. It looks like plaintiff has finally struck the pot of gold. Unfortunately, the taxpayers are in the pot.

The circuit court affirmed the arbitration order, but subsequently granted defendant's motion for reconsideration. The court noted that the stipulated order for arbitration did not give the arbitrator any authority to consider plaintiffs' original complaint for inverse condemnation or to consider it as a counterclaim. The court found that both parties had effectively agreed that issues relating to inverse condemnation were "off the table." The court further found that the arbitrator exceeded his authority by considering plaintiffs' inverse condemnation claims rather than reviewing the matter solely as one for condemnation under the UCPA, explaining:

This court determines that the arbitrator was under the belief that because the [original] complaint had not been dismissed in this court's case that he was under some unstated authority to rule on it. However, it was also clear to this Court, for all the reasons stated above, that the arbitrator's belief was incorrect and without any factual or legal basis. The sole authority given to the arbitrator was the stipulated order for condemnation arbitration, which even the arbitrator acknowledged converted the case to one involving straight condemnation. Because that order provided no basis for any determination of inverse condemnation the arbitrator was under no authority to do so.

The circuit court disagreed with plaintiffs that any consideration of their inverse condemnation claims was harmless because it had no practical effect on the award amount, explaining:

Inverse condemnation requires a showing of two elements. The moving party must first establish "that the government's actions were a substantial cause of the decline of its property." Second, the plaintiff must "establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." Based on the arbitrator's finding of those elements it is clear that instead of merely determining a fair market value for the building, that he found that the City abused its powers against [plaintiffs] to their detriment. Accordingly, because the arbitrator had no authority to make those determinations, the City was necessarily denied a fair arbitration process.

Accordingly, [plaintiffs'] argument that the award would have been the same is pure speculation. There is no way to determine how the arbitrator would

have ruled if he had treated this case correctly as a straight condemnation case. This court finds analogous the case of *McClain v Alger*.<sup>11</sup> In that case the Michigan Court of Appeals was faced with a lower court error which “taint(ed)the verdicts in a manner inconsistent with plaintiff’s right to substantial justice.” The Court determined that “since we cannot speculate as to what the outcome would have been but for this error, reversal is required.” Similarly, this Court determines that a new arbitration is required.

Additionally, the Michigan Supreme Court has held that before a court vacates an arbitration award, there “must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise.” In this case, because the arbitrator considered an issue without any authority and allowed that issue to taint his award and findings of fact, this court determines that a material and substantial error was made and a new arbitration is required. [Citations omitted.]

On appeal, plaintiffs argue that the trial court erred in finding that the arbitrator erred because he exceeded his powers and improperly evaluated the inverse condemnation claim.

Judicial review of an arbitrator’s award is limited by MCR 3.602. *Brucker v McKinlay Transport, Inc*, 454 Mich 8, 15; 557 NW2d 536 (1997). That rule provides that a court “shall vacate an award if . . . the arbitrator exceeded his or her powers . . . .” MCR 3.602(J)(2)(c). An arbitrator exceeds his powers when he acts beyond the material terms of the contract from which he draws his authority, or acts in contravention of controlling principles of law. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554-555; 682 NW2d 542 (2004). However, modification or vacation of an arbitrator’s award must be based on an obvious, “facial” error; “a trial court may not hunt for errors in an arbitrator’s explanation of how it determined who is liable under the arbitrated contract, and who owes what damages to whom.” *Saveski*, 261 Mich App 558. Failing to limit review in this fashion “would allow a dissatisfied court to delve deeper and deeper into an arbitrator’s factual and legal support until it finally unearthed a perceived error that could justify the court’s desired outcome.” *Id*. We review de novo a trial court’s decision to vacate an arbitration award. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003).

“Generally, the parties’ agreement determines the scope of arbitration.” *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007). Ambiguities or conflicts in the terms should be resolved in favor of arbitration. *Id*.

The stipulated order for arbitration stated that defendant’s counterclaim for condemnation under the UCPA would be submitted for arbitration and that the arbitrator would determine all issues under the UCPA, including imposition of costs and fees, as if the case had been brought as a formal condemnation under the UCPA. The final paragraph of the stipulated order stated that the pending action (i.e., the remaining inverse condemnation claim) would be dismissed upon

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<sup>1</sup> 150 Mich App 306, 318; 388 NW2d 349 (1986).

surrender of possession to defendant. While the arbitration agreement limited the subject of the arbitration to determining plaintiffs' compensation and other remedies for condemnation under the UCPA, it did not preclude the arbitrator from reviewing the history of the dispute or considering evidence that predated the filing of defendant's condemnation counterclaim when determining the proper amount of compensation for the condemned property.<sup>2</sup>

Moreover, review of the arbitrator's decision does not show that the arbitrator exceeded the scope of the stipulated order by somehow treating the matter as one for inverse condemnation rather than a condemnation action under the UCPA. While the arbitrator's opinion noted plaintiffs' claims of inverse condemnation and stated that this case involved a "hybrid" between inverse condemnation and "pure" condemnation, review of the entire opinion shows that the arbitrator did not rely on the inverse condemnation allegations and instead found that the uninhabitable condition of the building was caused by plaintiffs' decision not to repair the flood damage. The arbitrator specifically found that "any damage to the tenancy of the subject property was proximately caused by [plaintiffs'] failure to repair the flood[-]related damage to the subject property."

The arbitrator did not award damages for defendant's alleged interference with plaintiffs' use of their property,<sup>3</sup> but instead tried to determine the fair market value of the building in its present condition to provide plaintiffs proper compensation for condemnation. In determining the fair market value, the arbitrator relied upon the appraisal testimony from the parties' experts, defendant's past tax assessments of the property, and repair estimates from the parties' experts. The circuit court's conclusion that the award may have been affected by the inverse condemnation arguments is pure speculation with no basis derived from the face of the award. The arbitrator did note that defendant's assessor substantially decreased the assessed value of the building for 2004 when it became apparent that defendant would condemn the property. This evidence was relevant to the credibility of defendant's appraisal of the property's fair market value and was properly considered by the arbitrator. It does not mean that the arbitrator was improperly basing his decision on the inverse condemnation argument. The arbitrator's award was designed to compensate plaintiffs for the loss of the property under the UCPA.<sup>4</sup>

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<sup>2</sup> Paragraph 4(e) of the stipulated order stated that "[t]he date of the taking shall be the date of the filing of the Plaintiffs/Counterdefendants' complaint on December 27, 2004 or September 26, 2006." The fact that the arbitrator was given a choice between a December 2004 and September 2006 date of taking shows that he was expressly authorized to consider evidence predating September 26, 2006.

<sup>3</sup> An inverse condemnation claim requires the plaintiff to prove that the government interfered with the plaintiff's use of his property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 549; 688 NW2d 550 (2004).

<sup>4</sup> The arbitrator specifically stated that he had to "rely on the intent of the UPCA, and that is to make certain that when governmental entities seek to take private property for public use, that just compensation is paid to the owner of the property."

As noted in *Krist v Krist*, 246 Mich App 59, 67; 631 NW2d 53 (2001), an arbitrator's factual findings are not subject to appellate review. The arbitrator reached a tenable decision in this case based on the arbitration agreement and the evidence presented, and the court erred in vacating the arbitration award. There was no "facial" error in the arbitration award. *Saveski*, 261 Mich App 558.

Reversed and remanded for entry of judgment based on the arbitration award. We do not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ Stephen L. Borrello  
/s/ Douglas B. Shaprio