STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM BENSON,

Plaintiff/Counter-Defendant-Appellee,

and

CLASSIC INVESTMENTS LIMITED PARTNERSHIP,

v

B. H. VANDERBEKE,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
November 3, 2009

No. 285318
Oakland Circuit Court
LC No. 02-043197-CZ

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant appeals by right several of the trial court's rulings in this case that plaintiff initiated to appeal an arbitration award. The appeal of the arbitration award, however, then evolved into a court-supervised dissolution of the parties' partnership, Classic Investments Limited Partnership (Classic). We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

I. Summary of Factual Background

Plaintiff and defendant, and a third person, formed Classic in 1986. Plaintiff, a licensed commercial real estate broker, acquired a 20% interest in the partnership and was its first general partner. Defendant and the third partner each acquired a 40% interest in Classic as limited partners. According to § 1.02 of the parties' partnership agreement, the purpose of Classic was to acquire real estate for investment; specifically, "the purchase and ownership of a 132,982 square foot building located at 1480 N. Rochester Road, Rochester Hills, Michigan (the "Building")." The subject real estate actually consisted of two buildings with a shared infrastructure. Classic originally bought the fee interest in the south half of the building and acquired the lessee's interest in a long-term lease of the north half of the building; the purchase was financed with capital contributions and a $1.4 million mortgage.

Between 1990 and 1992 the partnership experienced considerable turmoil. Plaintiff, as general partner, sold the Classic property on a land contract to a third party, who began to renovate the building to start a health club. This enterprise failed and the third party went bankrupt, and as a result, the Classic property was encumbered with $1.8 million in liens. Believing plaintiff responsible for not performing "due diligence" before entering the sales agreement, defendant took several actions. He purchased the third partner's interest in Classic and replaced plaintiff as Classic's general partner. In early 1994, defendant caused Classic to file for a petition under Chapter 11 of the Bankruptcy Code. During the bankruptcy proceedings, defendant resolved various claims filed against Classic, loaned money to Classic to pay off the original mortgage and in return took a note from Classic, and eliminated certain commissions plaintiff had earned up to that time while serving as Classic's general partner.

While the bankruptcy proceedings were still pending, plaintiff, through a corporation of which he was sole shareholder, Benson Associates, Inc., began courting Michael Lathers, the president of Bodytechniques, Ltd., who was interested in the south half of the building to house a health club. Plaintiff would later testify that defendant was fully aware of his efforts to find tenants for the building and that defendant did not object. Defendant would later testify that neither plaintiff nor his real estate company had any authority to act as the partnership's leasing agent. On December 9, 1994, plaintiff presented to and Lathers signed on behalf of Bodytechniques an agreement that Bodytechniques would pay Benson Associates certain commissions for its efforts in securing a lease for Bodytechniques. On December 16, 1994, Lathers, on behalf of Bodytechniques, and defendant, as general partner on behalf of Classic, signed a lease agreement. The December 16, 1994, lease eliminated reference to Bodytechniques' paying Benson Associates a commission and instead included an amended ¶ 42, which provided that Bodytechniques would pay a 6% commission to Classic. This paragraph also provided that Classic "agrees to indemnify [Bodytechniques] from any and all claims by parties for real estate commissions arising from this transaction."

Bodytechniques initially made three commission payments to Benson Associates before defendant instructed it to cease. Benson Associates thereafter sued Bodytechniques and defendant for breach of the December 9, 1994, commission contract; plaintiff sued defendant individually for tortious interference with the contract. After trial, the jury awarded Benson Associates $237,059.55 jointly and severally against Bodytechniques and defendant for breach of contract, and $45,000 against defendant individually for tortious interference. This Court affirmed the judgment entered by the trial court in that case, which together with interest, attorney fees, and mediation sanctions, accumulated to just under $1 million.[1] During the course of this litigation, defendant satisfied this judgment and contended the payment was at least in part on behalf of Classic to satisfy Classic's obligation to indemnify Bodytechniques pursuant to ¶ 42 of the December 16, 1994, lease between Classic and Bodytechniques.

[1] See *Benson Assoc, Inc v Bodytechniques, Inc*, unpublished opinion per curiam of the Court of Appeals issued June 11, 2002 (Docket Nos. 228852; 235835).

On May 17, 1999, defendant initiated a capital call to raise funds for Classic to purchase the north half of the Rochester Road building. Plaintiff opposed this action because defendant had not sought and obtained his permission and because he believed it unwise to do so because there still remained several years on Classic's long-term lease of that part of the building. Defendant proceeded as Classic's general partner to purchase the fee interest in the north one half of the building for $914,000; he contended that plaintiff's failure to meet the capital call effectively reduced his limited partnership interest in Classic from 20 percent to 7.9 percent.

On August 19, 1999, plaintiff, believing that defendant had breached the partnership agreement and abused his authority as general partner, demanded arbitration pursuant to ¶ 7.02 of the partnership agreement, which provides, in part, that "[a]ny controversy or claim arising out of, or relating to [the Classic partnership agreement, or] the breach thereof . . . shall be settled by arbitration, in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction." Specifically, plaintiff claimed that defendant (1) abused his authority by using partnership funds to pay his personal attorney fees arising from the Benson Associates litigation, (2) disposed of a partnership asset, the long-term lessee's interest in the north half of the building, and purchased an asset without authorization, the fee interest in that property, (3) loaned money to the partnership at an unreasonable interest rate (11%) instead of obtaining commercial financing, (4) mismanaged the property by allowing Classic's tenant, Bodytechniques, to become seriously delinquent in its rent, (5) improperly diluting plaintiff's partnership interest, and (6) and various other actions by defendant were contrary to the partnership agreement.

The arbitrator issued his award regarding plaintiff's claims on July 30, 2002. In general, the arbitrator ruled in favor of defendant. First, the arbitrator ruled that the purchase of the fee interest of north half of building was within the contemplation of the partnership agreement and accomplished based on existing market conditions, i.e., Classic had not overpaid for the property. However, the arbitrator ruled that funds defendant advanced to purchase the fee should be considered as a loan to Classic bearing interest at 11 percent, not a capital contribution, keeping plaintiff's partnership interest at 20 percent. The arbitrator ruled that 11 percent was "not an unconscionable interest rate" but should be calculated as simple interest without compounding. The arbitrator also ruled that the loan, with interest, must be repaid before plaintiff received any capital distribution from Classic. With respect to plaintiff's claims of mismanagement, the arbitrator ruled that while defendant's actions had not been perfect, some of plaintiff's claims were speculative, and the arbitrator made no award. With respect to the partnership's paying legal fees in connection with the Benson Associates litigation, the award reads:

> The final claim asserted by the Claimant is that Respondent breached his fiduciary duty to Benson by properly [sic] paying his and Body Techniques' attorney fees out of partnership assets. The detail provided by Claimant is not sufficient to enable the Arbitrator to determine whether the fees were paid for partnership billings or on behalf of Respondent for his own legal bills. Since the burden of proof is on the Claimant, and since it is the opinion of the Arbitrator that the Claimant has failed to prove whose fees were paid, the arbitrator has determined that there shall be no award of attorney fees improperly paid by Respondent to its counsel made to claimant.

Finally, the arbitrator ruled each party was responsible for its own costs and attorney fees, neither having fully prevailed, and that all claims not expressly granted were denied.

On August 20, 2002, plaintiff filed this action to vacate in part or modify the arbitration award. Subsequently, plaintiff learned that defendant had caused Classic to enter an agreement on July 3, 2002, to sell the Rochester Road real estate for $6 million. Plaintiff filed his first amended complaint on October 2, 2002, adding a claim (Count II) alleging defendant lacked authority to enter the sales agreement because plaintiff had not consented in writing, that defendant's action would damage plaintiff and Classic, and requested court-supervised dissolution of Classic (Count III). Defendant moved to strike the amended complaint and for an order allowing the sale of the real estate. Before the trial court heard the motions, defendant filed his consent for the trial court to decide his authority as general partner of the partnership to sell the property.

On December 26, 2002, the trial court issued its first opinion and order, which has not been appealed. First, the court declined to dismiss plaintiff's count I—regarding the arbitration award—finding that while plaintiff was not entitled to modification of the award under MCR 3.602(K) (modification of award), he might be entitled to relief under MCR 3.602(J) (vacating award). As to plaintiff's claim that defendant was not entitled to sell the property, the trial court agreed with defendant, i.e., that as the owner of the majority interest in Classic, he could liquidate the business, including selling Classic's real property. Therefore, the court dismissed plaintiff's Count II. As to plaintiff's Count III, court-supervised dissolution of the partnership, the court noted that defendant had conceded plaintiff might be entitled to some relief. The court therefore ruled that Classic's real estate could be sold provided it first be distributed in kind to the partners as tenants in common, who then could complete the sale to the purchaser. The court further ordered that "the proceeds of the sale, less the costs associated therewith, must be placed into escrow pending the resolution of any disputes over its distribution." Pursuant to this ruling, the sale of the building proceeded; an initial payment of $l,425,905.29 was placed in escrow on January 8, 2003, and a final payment of $4,412,043.75 followed on or about June 9, 2003.

On January 15, 2003, defendant filed a counterclaim, which in Count I requested that the trial court affirm the arbitration award with the exception of the arbitrator's ruling that plaintiff's partnership interest in Classic had not been reduced for failing to comply with the capital call to purchase the north half of the building. In Count II, defendant sought a declaratory ruling that (a) the portion of the Benson Associates' judgment for which Bodytechniques is liable was a fair and bona fide obligation of Classic pursuant to the indemnity clause in ¶ 42 of the 1994 lease,[2] and (b) that pursuant to ¶ 4.02 of the partnership agreement, defendant was entitled to a 6% commission on the sale price of Classic's real estate.

Defendant now appeals a series of trial court opinions and orders resolving the parties' disputes and culminating in a final order entered April 17, 2008, for the distribution of the

[2] Documents in the record show that on February 6, 2003, defendant's attorney delivered to plaintiff's attorney a check for $918,341.98—drawn on his client's trust account—in satisfaction of the Benson Associates' judgment with interest accrued to February 7, 2003.

escrowed funds. In the first order appealed, entered December 12, 2005, the trial court modified the arbitration award to the extent it ruled that plaintiff had not proved defendant improperly paid his own attorney fees with partnership funds. The trial court also granted plaintiff summary disposition on defendant's counterclaims finding that (a) defendant lacked standing to assert a claim against Classic on behalf of Bodytechniques for indemnity regarding the Benson Associates' judgment, and (b) defendant could not assert a claim for a real estate sales commission on the sale of Classic's building because defendant was not a licensed real estate broker, citing MCL 339.2501 and MCL 339.2512a. Defendant also appeals the trial court's rulings of December 15, 2006, (a) that interest on funds defendant advanced to purchase the north half of the building stopped accruing on the date the court resolved the parties' arbitration disputes (December 12, 2005), and (b) that defendant as Classic's general partner was not entitled to management fees specified under the partnership agreement because defendant was not a licensed real estate broker. Defendant further asserts on appeal that the trial court erred in its March 31, 2008 order by (a) calculating interest on plaintiff's claims, (b) ruling that interest on defendant's loans to the partnership referred to by the parties as loans "A", "B", and "C", stopped accruing interest on the date that the Classic building was sold, and (c) by ruling those loans earned simple, not compound interest. Last, defendant asserts on appeal that because of the various errors in the prior orders, the final order of distribution necessarily requires recalculation. After payment of certain expenses, the final order of distribution awarded plaintiff $900,385.50 and defendant $3,970,637.31, and awarded each party their respective partnership share of escrow fund income after March 31, 2008.

II. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 152; 742 NW2d 409 (2007). This Court also reviews de novo questions of law, including the construction and application of statutes, court rules, and the interpretation of unambiguous contracts. *Id*.; *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 348; 764 NW2d 304 (2009); *Greater Bethesda Healing Springs Ministry v Evangel Bldrs & Constr Mgrs, LLC*, 282 Mich App 410, 412; 766 NW2d 874 (2009). Further, "[t]his Court reviews de novo a trial court's decision to enforce, vacate or modify an arbitration award." *City of Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 144; __ NW2d __ (2009). To the extent the trial court is permitted or required to make findings of fact, this Court reviews the court's findings for clear error. MCR 2.613(C).

A trial court may make equitable decisions in the course of deciding the disposition of funds on the winding up of a partnership or joint venture. *Kranz v Kranz*, 323 Mich 680, 686; 36 NW2d 179 (1949); MCL 449.5. A trial court's equitable decision presents a question of law that this Court also reviews de novo. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371; 761 NW2d 353 (2008). In general, an appellate court should not reverse an equitable decision a trial court reached after a full and fair hearing unless it is convinced that the trial court's decision is so contrary to the rights of the parties that it is unfair and inequitable. *Rinke v Rinke*, 330 Mich 615, 630; 48 NW2d 201 (1951).

III. The December 12, 2005 Order

A. The Arbitration Award

Defendant first argues that the trial court erred by vacating the arbitrator's determination that plaintiff had not sustained his burden of proof that defendant improperly paid his own personal legal expenses with partnership funds in connection with the Benson Associates litigation. The arbitrator ruled that plaintiff's claim in this regard would not be granted and declined to grant plaintiff any relief. The parties' arguments on appeal and the basis for the trial court's ruling below center on a stipulation of the parties' counsel during the course of the arbitration proceedings to the effect that defendant paid legal fees at issue with partnership money pursuant to the indemnity clause in ¶ 42 of Classic's lease with Bodytechniques. The trial court agreed with plaintiff's argument that "the arbitrator exceeded its powers by ignoring the parties' stipulation." Consequently, the trial court ruled that "this stipulation mandated a finding that the Partnership should not have paid for the attorney fees of Defendant and Bodytechniques and, therefore, Defendant is liable to Plaintiff for 20% of those fees. Thus, the award must be modified to this extent."

Because the parties' agreement to arbitrate partnership disputes was in writing and provided for the enforcement of an award in any court having jurisdiction, proceedings under it are classified as so-called statutory arbitration subject to the uniform arbitration act, MCL 600.5001 *et seq*. See *Wold Architects and Engineers v Strat*, 474 Mich 223, 229-231; 713 NW2d 750 (2006); *Rooyakker & Sitz, supra* at 153-155. Judicial review of statutory arbitration awards is limited and governed by MCR 3.602. MCL 600.5021; MCR 3.602(A); *Brucker v McKinlay Transport, Inc*, 454 Mich 8, 18; 557 NW2d 536 (1997). Here, the trial court purported to act pursuant to MCR 3.602(J)(2)(c), which provides: "On motion of a party, the court shall vacate an award if: . . . (c) the arbitrator exceeded his or her powers . . . ."

Specifically, the trial court ruled that the arbitrator exceeded his authority by ignoring a stipulation of the parties. But an arbitrator only exceeds his power when he acts beyond the material terms of the contract from which his authority to arbitrate flows, or acts contrary to controlling principles of law. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554, 557; 682 NW2d 542 (2004), quoting *Detroit Auto Inter-Insurance Exchange v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). Further, an arbitrator's alleged error of law must appear on the face of the award, and but for the error, the award would have been substantially different. *Id*. at 555 (citations omitted). "This standard precludes review on the basis that the award was against the great weight of the evidence or that it was not supported by substantial evidence." *Belen v Allstate Ins Co*, 173 Mich App 641, 645-646; 434 NW2d 203 (1988), citing *Donegan v Michigan Mutual Ins Co*, 151 Mich App 540, 549; 391 NW2d 403 (1986). Unwarranted fact finding by the arbitrator is not an error of law for which relief may be granted. *Donegan, supra* at 546, quoting *Gavin, supra* at 429. As our Supreme Court succinctly stated, "the arbitrator's findings of fact are unreviewable." *Gavin, supra* at 429. Thus, even if the arbitrator had substantial evidence to support a conclusion contrary to what he reached or if the arbitrator failed to accord certain evidence weight, such would not provide a basis to modify or vacate the arbitrator's award. *Belen, supra* at 645-646; *Donegan, supra* at 549. As this Court summarized recently in the context of reviewing a domestic relations arbitration award, a party seeking to establish that an arbitrator exceeded his authority, "must show that the arbitrator either (1) acted beyond the material terms of the arbitration agreement or (2) acted contrary to controlling law." *Washington v Washington*, 283 Mich App 667, 672, 675; ___ NW2d ___ (2009).

Here, the arbitration clause in the parties' agreement broadly covered any controversy or claim arising out of or relating to the agreement. Plaintiff himself submitted to the arbitrator his claim that the payment of the legal fees in question was improper. The broad language of the parties' agreement and plaintiff's own actions defeat any claim that the arbitrator acted beyond the material terms of the arbitration agreement. Further, the stipulation at issue related to evidence before the arbitrator, statements of legal services. The stipulation regarding the legal bills did not compel the arbitrator to rule in a specific way. Defendant argued before the arbitrator that using partnership funds to pay the legal fees at issue was a legitimate expense of Classic pursuant to its agreement to indemnity Bodytechniques. That a different conclusion might be drawn from the legal billings and the parties' stipulation is not justification for the trial court to substitute its judgment for that the arbitrator. *Belen, supra* at 645-646; *Donegan, supra* at 549. "A court may not review an arbitrator's factual findings or decision on the merits." *AFSCME Local 369, supra* at 144. Stated otherwise, a court may not substitute its judgment for the judgment of the arbitrator, nor use MCR 3.602(J)(2)(c) as a ruse to review the merits of the arbitrator's decision. *Gordon Sel-Way, Inc v Spence Bros*, 438 Mich 488, 497; 475 NW2d 704 (1991). Moreover, the arbitrator's ruling declining to grant relief to plaintiff regarding payment of the litigation expenses at issue was not contrary to a controlling principle of law. *Saveski, supra* at 554-555. The trial court's order must be reversed and the arbitrator's decision affirmed. On remand, the final order of distribution must accordingly be recalculated.

B. Defendant's Counterclaims

Defendant filed his two counterclaims after the trial court had issued its order of December 26, 2002, assuming jurisdiction to supervise the dissolution of Classic and resolve any conflicts regarding the distribution of the proceeds from the sale of the partnership's real estate. Consequently, defendant's two counterclaims are, in context, no more than defendant's claims on partnership assets upon dissolution of the partnership. See MCL 449.1805.

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Defendant first claims that he personally paid that portion of the Benson Associates' judgment for which Bodytechniques was liable as a legal obligation of Classic pursuant to the indemnity clause in ¶ 42 of the 1994 lease agreement and for which defendant asserts he was legally responsible as general partner. See MCL 449.15 (partners jointly liable for all debts and obligations of the partnership), and MCL 449.1403(b) ("a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership"). The trial court accepted plaintiff's argument that defendant was asserting a claim of Bodytechniques for which defendant lacked standing and was not the real party interest. On appeal, plaintiff further argues that even if defendant has standing, the indemnity clause is unenforceable as a fraud perpetrated by defendant and Bodytechniques.[3] We conclude the trial

[3] We note in passing that even if defendant perpetrated a fraud, it was on Benson Associates, a separate legal entity and not a partner in Classic. Moreover, any fraudulent acts defendant perpetrated while acting as general partner would be binding on the partnership and plaintiff's partnership interest in Classic. See MCL 449.13; MCL 449.15(a); MCL 449.2106.

court erred by finding defendant lacked standing or was not the real party in interest to assert his own claim to reimbursement of money he paid purporting to satisfy a legal obligation of Classic. Nevertheless, we affirm the trial court's ruling on an alternative basis. This Court will affirm a trial court when it reaches the correct result, albeit for the wrong reason. See *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

MCR 2.201(B) provides that an action must be prosecuted in the name of the real party in interest. A real party in interest is one who is vested with a right of action in a given claim. *MOSES, Inc v Southeast Michigan Counsel of Gov'ts*, 270 Mich App 401, 415; 716 NW2d 278 (2006). Here, defendant was the real party in interest with respect to his claim for reimbursement of contributions on behalf of the partnership, i.e., paying an alleged legal obligation of the partnership. MCL 449.18(b); MCL 449.1404; MCL 449.1805(3). Moreover, defendant possessed constitutional standing to assert his claim because he had a sufficient interest in the outcome of litigation to ensure vigorous advocacy and had a legal or equitable right, title, or interest in the subject matter of the controversy, i.e. the escrowed proceeds from the sale of the partnership's sole asset. See *Bowie v Arder*, 441 Mich 23, 42; 490 NW2d 568 (1992). Further, defendant alleged (a) an economic loss (injury-in-fact), (b) there existed a connection between his alleged loss and right to reimbursement from escrowed partnership assets, and (c) the trial court had the authority by express consent of the parties to grant relief on the merits. See *Miller v Allstate Ins Co*, 481 Mich 601, 607 n 3; 751 NW2d 463 (2008).

Nevertheless, the undisputed facts on which defendant bases his claim establish that it must fail. "Upon the winding up of a limited partnership, the assets shall be distributed as follows: . . . (3) Except as provided in the partnership agreement, to partners first for the return of their contributions and secondly respecting their partnership interests, in the proportions in which the partners share in distributions." MCL 449.1805(3). A "contribution" is "any cash, property, services rendered, . . . which a partner contributes to a limited partnership in the capacity of a partner." MCL 449.1101(3). Here, defendant did not contribute cash, property, or services directly to the partnership. Rather, he caused funds in his attorney's client trust account to be paid in satisfaction of a judgment for which he was fully and personally liable. While defendant can make an argument that Classic was also legally liable to Bodytechniques under the lease indemnity clause for a large portion of the judgment paid, he made his payment after the partnership had ceased business operations and its sole asset had been sold and the proceeds deposited in escrow until the trial court decided how they were to be distributed. A "partnership shall indemnify every partner in respect of payments made . . . by him or her in the ordinary and proper conduct of its business, or for the preservation of its business or property." MCL 449.18(b); MCL 449.2106. The payment defendant made was not in the ordinary course of business, or to preserve partnership property. Defendant's claim fails on its merits. We therefore affirm that part of the trial court's December 26, 2002, order dismissing this claim.

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In his second counterclaim, defendant asserts that ¶ 4.2 of the parties' partnership agreement entitles him to a six percent commission of the purchase price of the Rochester Road property. The pertinent part of ¶ 4.2 of the parties' agreement reads: "In the event of the sale of any property owned by the Partnership, the General Partner shall be entitled to a commission equal to six percent of the sales price, which commission shall be due and payable at closing." It is undisputed that partnership property was sold for $6 million and that defendant was Classic's

general partner at the time of sale, serving as such since November 6, 1992. The language of the partnership agreement clearly and unambiguously provides that defendant, as general partner, be paid six percent of the sale price of partnership property. When the words used in a contract are clear and unambiguous, they must be enforced as written unless a provision is unlawful or violates public policy. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003); *Burkhardt v Bailey*, 260 Mich App 636, 656-657; 680 NW2d 453 (2004). Here, the trial court accepted plaintiff's argument that because defendant was not a licensed real estate broker, defendant "may not invoke the courts to recover the fee." See MCL 339.2501; MCL 339.2512a.

Defendant argues that MCL 339.2501(g),[4] defining "real estate broker" does not apply to him and the single act of selling the partnership's sole asset, the Rochester Road property. Specifically, defendant argues the statute only applies when one is acting as a real estate broker "for others." Defendant argues that because he acted as general partner for Classic and was its 80% owner, he essentially was acting for himself regarding the sale of the property. The trial court rejected this argument on hearing defendant's motion for reconsideration, ruling that to accept it would disregard the separate legal status of the partnership. Plaintiff argues that defendant misreads the statute because the phrase "for others" does not appear in the statute's first clause, which applies on the facts of this case. MCL 339.2501(g) provides:

> "Real estate broker" means an individual, sole proprietorship, partnership, association, corporation, common law trust, or a combination of those entities who *with intent to collect or receive a fee, compensation, or valuable consideration*, sells or offers for sale, buys or offers to buy, provides or offers to provide market analyses, lists or offers or attempts to list, or negotiates the purchase or sale or exchange or mortgage of real estate, or negotiates for the construction of a building on real estate; who leases or offers or rents or offers for rent real estate or the improvements on the real estate *for others*, as a whole or partial vocation; who engages in property management as a whole or partial vocation; who sells or offers for sale, buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the goodwill of an existing business *for others*; or who, as owner or otherwise, engages in the sale of real estate as a principal vocation. [Emphasis added.]

Defendant also argues that the exception provided by MCL 339.2503(1) applies to the single sale of the partnership's property. This statute provides in pertinent part:

> This article does not apply to an individual, *partnership*, association, or corporation, *who as owner* or lessor or as attorney-in-fact acting under a duly executed and recorded power of attorney from the owner or lessor, or who has been appointed by a court, *performs an act as a real estate broker* or real estate

[4] 2008 PA 90 redesignated MCL 339.2501(a)-(e) as (e)-(i), effective July 1, 2008.

> salesperson with reference to property owned by it, *unless performed as a principal vocation* not through a licensed real estate broker. [Emphasis added.]

Plaintiff argues this exemption from the licensing requirement of the statute cannot apply because defendant was not the owner of the property but only an 80% owner of the partnership.

Although plaintiff's argument regarding the § 2503(1) exemption to the licensure requirement of Article 25 of the Occupational Code has merit, the undisputed facts of this case indicate that the real estate sale in this case was not pursued "with intent to collect or receive a fee, compensation, or valuable consideration." MCL 339.2501(g). Rather, the sale of the partnership's property was for the purpose of winding up the partnership. Further, the 1986 partnership agreement provided that if any property owned by the partnership were sold, the general partner would receive the stated commission. In addition, the partnership agreement does not require that the general partner perform any particular function to earn the commission, the only implied necessity appears to be the signing of any sales agreements or documents transferring title on behalf of the partnership.

Plaintiff raises an alternative argument to affirm the trial court's ruling. Specifically, that a sale of partnership property did not occur. Pursuant to the trial court's order of December 26, 2002, which has not been appealed, Classic's real estate was distributed in kind to the partners as tenants-in-common. Although Classic, acting through defendant as general partner, entered a sales agreement on July 3, 2002, the sale did not close until after the property had been distributed to the partners as tenants-in-common. Under the plain terms of the provision in ¶ 4.02 of the parties' agreement, a commission was not "due and payable" until "closing," at which point the individual partners sold their interests as tenants in common. Consequently, under the plain terms of the parties' agreement, payment of the six percent commission was not triggered. We therefore affirm the trial court on this alternative basis. *Hess*, *supra* at 596.

IV. The December 15, 2006 Order

A. Interest Abatement

Defendant argues first that the trial court erred by ruling that funds defendant advanced to purchase the north half of the building stopped accruing interest on the date that the court resolved the parties' disputes regarding the arbitrator's award. The court reasoned that after it had ruled on the arbitration issues, defendant had no reason to oppose distribution to him of sufficient funds from the escrow account to pay the loan principle and interest accrued to December 12, 2005. Defendant argues on appeal that the trial court clearly erred by finding that defendant refused to accept repayment of the loan at issue. Defendant argues his attorney communicated to plaintiff's attorney defendant's willingness to accept repayment but only on the condition that accepting it would not constitute a waiver of defendant's position that the capital call reduced plaintiff's partnership interest. Further, defendant notes that any release of the escrowed funds would have required the trial court's approval based on the court's original December 2002 order which provided the proceeds of the sale of the building "must be placed into escrow pending the resolution of any disputes over its distribution." Defendant asserts that it is inequitable to allow plaintiff to benefit from his refusal to agree to a partial distribution of escrowed funds. We disagree.

Both parties point to correspondence by their counsel attempting to resolve this and other issues. The parties offered to resolve this issue but included other conditions and provisos with their offers. Given the record evidence defendant cited, we cannot find the trial court clearly erred by finding defendant primarily responsibility for failing to reach agreement after the court's December 2005 decision to release sufficient escrowed funds repay this loan. Moreover, in light of this finding and the apparent difference between the 11% interest the arbitrator established and the interest earned by the escrow fund, we are unable to say that the trial court's decision was inequitable or unfair. *Rinke*, *supra* at 630. Consequently, we affirm the trial court's ruling abating interest.

B. Management Fees

Next, defendant argues that the trial court erred in its December 15, 2006, ruling that defendant, as Classic's general partner, was not entitled to management fees specified in the parties' partnership agreement because he was not a licensed real estate broker. We agree.

The parties partnership agreement in ¶ 4.02 provides in pertinent part that the general partner "perform all duties customarily performed by a property manager" and be paid a "management fee" of three percent of annual gross partnership rentals, subject to certain provisos, and a $20,000.00 limitation. As noted *supra*, clear and unambiguous contract terms must be enforced as written unless they are unlawful or a clear violation of public policy. *Wilkie*, *supra* at 51; *Burkhardt*, *supra* at 656-657. Defendant argues that the trial court erred in ruling his property management activity required a license under the Occupational Code because he was not managing the "property of others" within the meaning MCL 339.2501(e) when he was managing the building on behalf of the partnership as its general partner. The trial court accepted plaintiff's argument that because defendant was not a licensed real estate broker, he could not be paid a property management fee. The pertinent parts MCL 339.2501 provide:

> (e) "Property management" means the leasing or renting, or the offering to lease or rent, of real property of others for a fee, commission, compensation, or other valuable consideration pursuant to a property management employment contract.
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> * * *
>
> (g) "Property management employment contract" means the written agreement entered into between a real estate broker and client concerning the real estate broker's employment as a property manager for the client; setting forth the real estate broker's duties, responsibilities, and activities as a property manager; and setting forth the handling, management, safekeeping, investment, disbursement, and use of property management money, funds, and accounts.
>
> (h) "Real estate broker" means an individual, sole proprietorship, partnership, association, corporation, common law trust, or a combination of those entities . . . who engages in property management as a whole or partial vocation . . . .

Although the pertinent statutory terms are somewhat circular, we conclude defendant's contention that he did not manage "property management" as defined by the Occupational Code has merit because he did not do so "pursuant to a property management employment contract."

Defendant did not manage the partnership property pursuant to a "written agreement entered into between a real estate broker and client . . . ." MCL 339.2501(g). Rather, defendant performed certain duties as general partner, including "all duties customarily performed by a property manager," pursuant to a contract with other partners who formed the profit-making partnership at issue. None of the contracting partners should be characterized as "clients" of the general partner, within the plain meaning of that term. Similarly, the partnership itself could not be a "client" of the partners who were at the same time creating that entity by their contract. In fact, there simply is no written contract between a "real estate broker" and a "client". Instead, there only is a partnership agreement setting forth the various rights and responsibilities of the limited partners and general partner. Consequently, defendant's activities as general partner including performing duties that a property manager might, do not, for that reason, satisfy the definition of "real estate broker" as one "who engages in property management as a whole or partial vocation." MCL 339.2501(h). The clear and unambiguous provisions of the partnership agreement regarding management fees payable to the general partner are not unenforceable because they are contrary to law or public policy. *Wilkie*, *supra* at 51; *Burkhardt*, *supra* at 656-657. The trial court erred by granting plaintiff's motion "that the Partnership accounts be adjusted so that 20% of the management fees paid to Defendant are credited to Plaintiff."

Moreover, even if defendant were required to be licensed to engage in property management for the partnership as its general partner, the trial court still erred by granting plaintiff's motion crediting plaintiff 20% of management fees previously paid to defendant. The pertinent enforcement statute provides:

> A person engaged in the business of, or acting in the capacity of, a person required to be licensed under this article, shall not maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article at the time of the performance of the act or contract. [MCL 339.2512a.]

Similarly worded statutes under the Occupational Code have been interpreted to prohibit an unlicensed entity from *initiating* a legal action for compensation, or *asserting* a counterclaim in an action brought against the unlicensed entity by an allegedly injured party, and even precluding the unlicensed entity *asserting* an affirmative claim for equitable relief. *Stokes v Millen Roofing Co*, 466 Mich 660, 673; 649 NW2d 371 (2002); *Parker v McQuade Plumbing & Heating, Inc*, 124 Mich App 469, 471; 335 NW2d 7 (1983). But, as this Court noted regarding an unlicensed contractor, a similarly worded statute "nowhere prohibits an unlicensed contractor from defending a breach of contract suit on its merits." *Parker*, *supra* at 471. "The statute removes an unlicensed contractor's power to *sue*, not the power to defend. It was intended to protect the public as a shield, not a sword." *Id*. (emphasis in original).

So, in this case, MCL 339.2512a was enacted to shield the public from actions by unlicensed entities for compensation. Consequently, the trial court erred by permitting plaintiff to use it as a sword against another partner to write the terms of the parties' contract. The trial court's order regarding management fees paid to defendant must be reversed. On remand, the final order of distribution must accordingly be recalculated.

V. The March 31, 2008 Order

Defendant first argues that the trial court erred by agreeing with plaintiff that the alleged improper payment of legal fees and management fees should be deducted from the various loans the partnership owed to defendant as of the time of the alleged improper payments. To the extent we have held in Part III (A) that the arbitrator's award granting no relief to plaintiff regarding payment of legal fees should be affirmed and held in Part IV (B) that defendant properly collected management fees pursuant to the partnership agreement, we agree. On remand, the final order of distribution must be adjusted accordingly.

Next, defendant argues that the trial court erred by ruling that interest on defendant's so-called "A", "B" and "C" loans to the partnership, ceased accruing as of the date of the sale of the partnership's building. The trial court ruled in this regard as follows:

> The parties also raise a dispute over interest on Defendants A, B, and C loans. Defendant seeks interest at 11% until the time of distribution, while Plaintiff argues that interest at that rate ceased upon the sale of the property. The Court agrees with Plaintiff. This is based primarily on the fact that the money has been held in escrow since the property was sold, earning a substantially smaller rate of interest. The burden of this reduced interest must be shared proportionally by the parties and, therefore, the 11% rate ceased at the time the property was sold.

The parties' arguments on this issue mirror their arguments regarding the loan created by the arbitrator's award discussed in Part IV (A), *supra*. For the reasons discussed with regard to that loan, we find no clear error on the part of the trial court. Furthermore, based on the trial court's reasoning, we are unable to say that its decision was inequitable or unfair. *Rinke*, *supra* at 630. Consequently, we affirm the trial court's ruling abating interest.

Finally, with respect to the March 31, 2008, opinion and order, defendant argues that the trial court erred by ruling that the "A", "B" and "C" loans earned simple, not compound interest. The trial court reasoned that its ruling was "[c]onsistent with the arbitrator's award . . . ." Defendant argues this ruling was without authority and contrary to the plain terms of the loans. Yet, defendant also cites no authority and fails to point the Court to record support for his position. Defendant's failure in this regard constitutes an abandonment of the issue. See *Spires v Bergman*, 276 Mich App 432, 444; 741 NW2d 523 (2007), and *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

Moreover, plaintiff argues that the arbitrator's ruling regarding interest applied to all loans defendant made to the partnership, not just the arbitrator created capital call loan. We find plaintiff's argument meritorious. The arbitrator's ruling on interest related to plaintiff's claim that defendant failed to "obtain commercially reasonable financing for the partnership," which the arbitrator found to have "some merit." Nevertheless, the arbitrator ruled that "the interest rate of eleven (11%) percent for *advances* made by Respondent to the partnership is not an unconscionable rate." (Emphasis added). The arbitrator's language clearly refers to more than one "advance" made by defendant, which in fairness to plaintiff, "should be calculated on a simple interest basis and not compound."

Even if not required by the arbitrator's ruling, we would be unable to conclude that the trial court's decision was inequitable or unfair. *Rinke*, *supra* at 630. For these reasons, we

affirm the trial court's ruling that the "A", "B" and "C" loans earned only simple, not compound interest.

VI. Conclusion

In summary, we reverse the trial court's order vacating in part the arbitrator's award and affirm the award in its entirety. We reverse the trial court's ruling crediting plaintiff for alleged improper payment of legal fees in connection with the Benson Associates litigation. We reverse the trial court's ruling that defendant was not entitled to collect property management fees in accordance with ¶ 4.02 of the partnership agreement. Consequently, we also reverse the trial court's order treating attorney fee payments and management fee payments as loans by Classic to defendant bearing interest. We must also reverse the trial court's final order of distribution and remand to the trial court for proceedings as necessary to recalculate the final order of distribution to incorporate these rulings. In all other respects, we affirm the trial court.

We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello