

STATE OF MICHIGAN
COURT OF APPEALS

DANIEL BELLO HERNANDEZ,
Plaintiff-Appellant,

UNPUBLISHED
February 19, 2013

v

GAUCHO, LLC, d/b/a GAUCHO
STEAKHOUSE, ELIANE C. TURNER, and
MARK A. TURNER,

No. 307544
Wayne Circuit Court
LC No. 08-015861-CZ

Defendants-Appellees.

Before: JANSEN, P.J., and WHITBECK and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order of June 24, 2011, denying his motion to confirm an arbitration award and granting defendants' motion to vacate the same arbitration award.¹ We affirm.

I

Defendants Mark and Eliane Turner are the controlling members of defendant Gaucho, LLC, which does business as Gaucho Steakhouse in Northville Township. In May 2006, defendants offered plaintiff the position of executive chef, as well as a future five-percent ownership interest in the company. After the steakhouse had been in operation for several months, plaintiff was terminated from the position of executive chef. Plaintiff alleges that he was a five-percent owner of the company at the time of his termination, but never received the share of the profits to which he was entitled. In contrast, defendants argue that plaintiff was merely offered a *future* five-percent interest in the company, which he had not yet acquired by

¹ Whether plaintiff was entitled to claim an appeal of right in this case was the subject of an earlier motion in this Court. Defendants argued that this Court lacked jurisdiction and moved to dismiss the appeal. On March 19, 2012, this Court denied defendants' motion to dismiss. *Hernandez v Gaucho, LLC*, unpublished order of the Court of Appeals, entered March 19, 2012 (Docket No. 307544). Defendants again argue in their brief on appeal that this appeal should be dismissed for lack of jurisdiction.

the time of his termination. Plaintiff alleges that defendants converted or otherwise wrongfully retained his recipes, trade secrets, proprietary information, and kitchen equipment.

Plaintiff sued defendants in the Wayne Circuit Court in November 2008, setting forth a variety of claims. A default was entered against defendants. However, after defendants averred that they had never been served with process, the default was set aside. Thereafter, on June 16, 2010, the circuit court entered a stipulated order stating that the parties had agreed to submit the matter to statutory binding arbitration. The stipulated order provided, among other things, that “[t]he Arbitrator shall have full and complete authority, jurisdiction and discretion to decide all issues presented herein, without limitation, to the same extent as [the circuit c]ourt would have in like circumstances,” that “[t]he Arbitrator’s authority shall extend to determination of the arbitration process itself, the admissibility of evidence, witness testimony, the requirement of summaries or memorand[a], discovery and scheduling,” and that “[t]he Arbitrator shall have full power and authority to make any ruling and to award monies and relief pursuant to Michigan law as is applicable in the instant matter.” The stipulated order also outlined the procedure for conducting depositions during the arbitration proceedings, gave the arbitrator power to compel the appearance of witnesses, noted that discovery requests should be reasonably honored by both parties, and granted the arbitrator significant discretion in settling discovery disputes. Although the circuit court noted that it was “retain[ing] jurisdiction” for the purpose of entering judgment on the ultimate arbitration award, the stipulated order stated that “[t]his Order resolves the last pending claim and closes the case.”

On May 24, 2011, the arbitrator issued a written, signed document entitled “Binding Arbitration Award,” which summarized the relevant factual background of the case, set forth numerous findings of fact, and awarded plaintiff \$107,500 in damages, costs, and attorney fees. The award was purportedly based on the default of defendants, who had allegedly failed to provide discovery and ignored discovery requests during the pendency of the proceedings. It is undisputed that the arbitrator never conducted an arbitration hearing, heard any testimony, or took any other proofs.

Plaintiff filed a motion in the circuit court to confirm the award. Defendants filed a motion in the circuit court to vacate the award. At oral argument, the circuit court was not only concerned by the fact that the arbitrator never took any evidence, but also by several ex parte communications between the arbitrator and the attorneys. On June 24, 2011, the circuit court granted defendants’ motion to vacate the arbitration award and denied plaintiff’s motion to confirm the arbitration award.

Plaintiff moved for reconsideration of the circuit court’s decision. On November 16, 2011, the circuit court entered an order denying plaintiff’s motion for reconsideration. The court ruled that the stipulated order of June 16, 2010, submitting the matter to binding arbitration, did not authorize the arbitrator to issue an award based solely on defendants’ purported default. The court further ruled that, even if the arbitrator had been authorized to enter a “default award,” the arbitrator still would have been required to hold a hearing and take proofs on the issue of damages, costs, and fees. The court also found that, although there was no actual bias by the arbitrator, there was nonetheless an “appearance of impropriety” caused by the ex parte communications with counsel. The court directed the parties to submit to new arbitration

proceedings before a different arbitrator “under the same terms and conditions agreed upon in [the] Stipulated Order for Binding Arbitration entered by this Court on June 16, 2010.”

II

We review de novo the circuit court’s decision to confirm, vacate, or modify a statutory arbitration award. *Tokar v Alberty*, 258 Mich App 350, 352; 671 NW2d 139 (2003). We similarly review de novo issues concerning our own jurisdiction, *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009), as well as all other questions of law, *In re Rudell Estate*, 286 Mich App 391, 403; 780 NW2d 884 (2009).

III

Defendants argue that the order appealed from was not a final order appealable by right. Consequently, they argue, this appeal should be dismissed for lack of jurisdiction. We disagree.

Pursuant to MCR 7.203(A)(1), this Court has jurisdiction of an appeal of right from a final order of the circuit court “as defined in MCR 7.202(6)[.]” MCR 7.202(6)(a)(i) defines the general final order in a civil case as the “first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order[.]” Because the stipulated order of June 16, 2010, provided that the circuit court was “retain[ing] jurisdiction” for the purpose of entering judgment on the ultimate arbitration award, it does not appear to have constituted a final order appealable by right. See *Green v Ziegelman*, 282 Mich App 292, 301 n 6; 767 NW2d 660 (2009).

However, the order of June 24, 2011, by which the circuit court granted defendants’ motion to vacate the arbitration award and denied plaintiff’s motion to confirm the award, was a final order appealable by right. The order of June 24, 2011, was the “first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties,” MCR 7.202(6)(a)(i), and did not state that the circuit court was retaining jurisdiction, *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 148 n 1; 742 NW2d 409 (2007); see also MCR 3.602(N) (stating that a circuit court order confirming or vacating an arbitration award is appealable as would be an order or judgment in any other civil action). Of course, plaintiff’s claim of appeal was not filed with this Court until December 7, 2011, more than five months after entry of the order dated June 24, 2011, and well outside the 21-day window of MCR 7.204(A)(1)(a). However, the circuit court did not issue its order denying plaintiff’s motion for reconsideration until November 16, 2011. Accordingly, plaintiff’s claim of appeal, submitted on December 7, 2011, was timely filed. MCR 7.204(A)(1)(b).

IV

Plaintiff argues that the circuit court erred by vacating the arbitration award. Plaintiff contends that the court should have confirmed the arbitration award because defendants “defaulted” by failing to participate in the proceedings and provide discovery. Defendants respond by arguing that the arbitrator was not entitled to issue an award without taking any proofs and solely on the basis of their purported default. Accordingly, defendants argue, the circuit court correctly vacated the arbitration award. Defendants further contend that the arbitrator was minimally required to hold a hearing on the issue of damages, costs, and fees.

It is well settled that an arbitrator can hear testimony, take evidence, and ultimately issue an award in the absence of one of the parties if that party, although on notice concerning the proceedings, has defaulted or failed to appear. See 4 Am Jur 2d, Alternative Dispute Resolution, § 166, p 222; see also MCL 691.1695(3)² (providing that “[t]he arbitrator may hear and decide the controversy on the evidence produced although a party who was duly notified of the arbitration proceeding did not appear”). But an arbitration award must be supported by “at least some evidence,” and an arbitrator must “base his award on evidence in the record[.]” *Storer Broadcasting Co v American Fed of Television & Radio Artists*, 600 F2d 45, 48, 48 n 13 (CA 6, 1979). The general rule is that an arbitrator may not issue an award solely on the basis of the default or absence of one of the parties, but must take sufficient evidence from the non-defaulting party to justify the award. See *Mercurio v American Express Centurion*, 363 F Supp 2d 936, 939 n 6 (ND Ohio, 2005). Indeed, under the Michigan Court Rules, the circuit court must vacate an arbitration award if it is shown that the arbitrator “refused to hear evidence material to the controversy[.]” MCR 3.602(J)(2)(d).

In the present case, it is undisputed that the arbitrator never heard any testimony or took any other proofs. Instead, the arbitration award was based solely on the purported default of defendants. After extensive research, we have located no authority to support plaintiff’s contention that an arbitrator may issue an award, complete with findings of fact and an award of money damages, that is not based on any evidence, but rather solely on the default of one of the parties.

Although it has not yet taken effect, § 15 of the new Uniform Arbitration Act seems to answer the principal question presented in this case. Quite simply, even when the arbitrator is entitled to proceed in the absence of a defaulting party, he or she is still required to “hear and decide the controversy *on the evidence . . .*” MCL 691.1695(3) (emphasis added). In the instant case, it is clear that the arbitrator did not consider any evidence before rendering a decision. This was not in comportment with the general principles of arbitration, which require an arbitrator to hear testimony and take proofs, even in the absence of a defaulting party, and to issue an award that is based on evidence in the record.

Regardless of the arbitrator’s exact reasons for doing so, the arbitrator essentially “refused to hear evidence material to the controversy,” MCR 3.602(J)(2)(d), before issuing his award. Accordingly, the circuit court properly granted defendants’ motion to vacate the arbitration award and properly denied plaintiff’s motion to confirm the award. We affirm the circuit court’s decision to vacate the arbitration award and to direct the parties to undertake new arbitration proceedings before a different arbitrator. See MCR 3.602(J)(2)(d); MCR 3.602(J)(4).

² The Michigan Legislature has recently adopted the Uniform Arbitration Act (UAA), MCL 691.1681 *et seq.* 2012 PA 371. However, the UAA will not take effect until July 1, 2013.

V

Given our conclusion, we need not consider defendants' supplemental argument that the arbitrator should have granted them a hearing limited to the issue of damages, costs, and attorney fees.

Affirmed. As the prevailing party, defendants may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen

/s/ William C. Whitbeck

/s/ Stephen L. Borrello