STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

JOE ALAMAT, D.D.S., M.D.,

Plaintiff,

v

Case No. 21-187142-CB
Hon. Michael Warren

GREGORY THOMAS, D.D.S., M.S., and JOHN HACKENBERGER, D.D.S.,

Defendants,

and

SUMMIT LINCOLN DEVELOPMENT, LLC,

Nominal Party.

OPINION AND ORDER DENYING
MOTION TO VACATE ARBITRATION AWARD AND CONFIRMING AWARD

At a session of said Court, held in the County of Oakland, State of Michigan
October 27, 2021

PRESENT: HON. MICHAEL WARREN

OPINION

I
Overview

Plaintiff Joe Alamat, D.D.S., M.D. ("Alamat") and Defendants Gregory Thomas D.D.S., M.S. ("Thomas") and John Hackenberger, D.D.S. ("Hackenberger") are owners of

Summit Lincoln Development, LLC ("Summit Lincoln"). Summit Lincoln is a single-asset business entity; the single asset is a medical office building located in Clinton Township.

Thomas and Hackenberger also own and operate Summit Oral & Maxillofacial Surgery, P.C. ("Summit Oral"). The Plaintiff was a member of Summit Oral until his removal in 2017. Summit Oral leased space from Summit Lincoln under a commercial property lease dated December 29, 2010 (the "Lease"). The term of the Lease was fifteen years, commencing on January 1, 2011 and continuing through December 21, 2025.

In June, 2018 the Defendants voted to remove the Plaintiff as a manager of Summit Lincoln. The Defendants, as the remaining managing members of Summit Lincoln, voted to release Summit Oral from the Lease. An existing tenant, John A. Dorby, DDS, PC ("Dorby"), subsequently rented the space at a rate less than previously paid by Summit Oral.

The Plaintiff filed a Complaint and Demand for Arbitration in May, 2020 ("Arbitration Demand").[1] The Plaintiff alleged that the Defendants improperly removed him as a manager and improperly released Summit Oral from the Lease. The Arbitration Demand alleged claims of Member Oppression under MCL 450.4515 (Count I); Breach of Fiduciary Duty (Count II); Breach of Contract (Count III); and Unjust Enrichment (Count

[1] The Arbitration Demand was made pursuant to Section 7.1 of the Summit Lincoln Operating Agreement.

IV).[2] The Plaintiff sought an award of damages in the amount of $157,949, for his portion of the lost rental income to Summit Lincoln.[3]

II
The Arbitration Award

In a written award dated March 10, 2021 (the "Award"), the Arbitrator, after considering the testimony of witnesses and exhibits presented by the parties at the arbitration hearing, found in favor of the Defendants on Counts I-III of the Demand.[4] The Arbitrator rejected the Plaintiff's assertion that he was improperly removed as a manager because he was not given notice of the special meeting during which the Defendants voted to remove the Plaintiff. The Arbitrator found that that testimony showed that the Plaintiff "received sufficient notice of the special meeting, but nevertheless decided not to attend."[5] Additionally, the Arbitrator determined that the Defendants did not engage in a "continuing course of conduct" that interfered with the Plaintiff's rights as a member, did not breach their fiduciary duty, and did not breach the Summit Lincoln Operating Agreement ("Operating Agreement").[6]

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[2] Arbitration Demand attached as Exhibit 7 to Plaintiff's Motion.

[3] *Id.* The Plaintiff also sought the purchase, at fair value of his interest in Summit Lincoln.

[4] The Arbitrator had previously dismissed the unjust enrichment claim (Count IV). Pl's Motion, Exhibit 8, Arbitration Award, p 2 n 2.

[5] *Id.* at p 3.

[6] *Id.* at pp 3-4.

Before the Court is the Plaintiff's Motion to Vacate Arbitration Award. Oral argument is dispensed as it would not assist the Court in its decision-making process.[7]

At stake in the Motion is whether the Arbitrator exceeded his power in finding no liability in favor of the Defendants? Because the answer is "no," the Motion to Vacate the Arbitration Award will be denied.

III
Standard of Review

"Judicial review of arbitration awards is limited." *Konal v Forlini*, 235 Mich App 69, 74 (1999). "A court may not review an arbitrator's factual findings or decision on the merits," may not second guess the arbitrator's interpretation of the parties' contract and may not "substitute its judgment for that of the arbitrator." *Ann Arbor v American Federation of State, Co, & Muni Employees (AFSCME) Local 369*, 284 Mich App 126, 144 (2009).

On motion by a party to an arbitration proceeding, a circuit court shall vacate an arbitration award where the arbitrator has exceeded his or her powers. MCL 691.1703(1)(d). See also MCR 3.602(J)(2)(c). "Arbitrators exceed their powers whenever

[7] MCR 2.119(E)(3) provides courts with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously set the time for asserting and raising arguments, and legal authorities to be in the briefing – not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties' have received the process due.

they act beyond the material terms of the contract from which they draw their authority or in contravention of controlling law." *Miller v Miller*, 474 Mich 27, 30 (2005) citing *DAIIE v Gavin*, 416 Mich 407, 433-434 (1982). However, a court "may not review the arbitrator's findings of fact and any error of law must be discernable on the face of the award itself." *Washington v Washington*, 283 Mich App 667, 672 (2009) (citations omitted). This means that "only a legal error that is evident without scrutiny of intermediate mental indicia will suffice to overturn an arbitration award. Courts will not engage in a review of an arbitrator's mental path leading to the award." *Id.* (quotation marks and citations omitted). Additionally, the error of law must be "so substantial that, but for the error, the award would have been substantially different." *Collins v Blue Cross Blue Shield of Mich*, 228 Mich App 560, 567 (1998) citing *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497 (1991).

Claims of arbitrator error must be carefully evaluated to ensure that they are not being used "as a ruse to induce the court to review the merits of the arbitrator's decision." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497 (1991).

IV
The Arbitrator did not exceed his power in rendering an award in favor of the Defendants

A
The Arbitrator's application of the business-judgment rule is not in contravention of controlling law

The Plaintiff argues that the Arbitrator misapplied the business judgment rule to his claims of member oppression, breach of fiduciary duty, and breach of contract.

Generally, in the absence of bad faith or fraud, courts are reluctant to interfere in the conduct of corporate affairs. *In re Butterfield Estate*, 418 Mich 241, 255 (1983). "Under the business-judgment rule, courts refrain from interfering in matters of business judgment and discretion unless the directors or officers 'are guilty of willful abuse of their discretionary powers' or act in bad faith." *Franks v Franks*, 330 Mich App 69, 100 (2019) quoting *Reed v Burton*, 344 Mich 126, 130 (1955).

Regarding the claim of member oppression, under MCL 450.4515 a member of an LLC may have a cause of action where "acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member." MCL 450.4515(1). "'Willfully unfair and oppressive conduct' means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interest of the member as a member." MCL 450.4515(2). Willfully unfair and oppressive conduct "does not include conduct or actions that are permitted by the articles of

organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure." *Id.* The "'harm' that is actionable under MCL 450.4515 is the 'substantial interference with the interest of the member as a member.'" *Frank v Linkner*, 500 Mich 133, 151 (2017).

The Arbitrator in this case concluded that the Defendants did not interfere with the Plaintiff's rights as a member when they voted to remove him as a manager because:

> [The Defendants] relied on the [Operating Agreement] to properly remove [the Plaintiff] as a manger [sic], and acted honestly and fairly in doing so, not in a manner designed to deliberately disadvantage [the Plaintiff]. Actions permitted by the [Operating Agreement] do not constitute a willfully unfair and oppressive course of conduct. MCL 450.4515(2).[8]

The Plaintiff does not challenge the Arbitrator's ruling in this regard and therefore, it will not be addressed by this Court.[9]

Next, the Arbitrator concluded:

> Further, [the Defendants'] decision to release Summit Oral from the Lease was not undertaken in an attempt to interfere with [the Plaintiff's] interest as a shareholder. The decision to release Summit Oral from the Lease is covered by the business judgment rule because it was made in good faith and is attributable to a rational business purpose. *See Franks v Franks*, 330 Mich App 69, 100 (2019). Accordingly, this Arbitrator finds no liability for [the Defendants] on Count I of [the Plaintiff's] Complaint and Demand for Arbitration.[10]

[8] Pl's Motion, Exhibit 8, pp 4-5.

[9] Pl's Motion p 13 n 6.

[10] Pl's Motion, Exhibit 8, p 5.

The Plaintiff argues that the Arbitrator made an error of law in misapplying the business-judgment rule. In support of this argument, the Plaintiff cites language from *Franks v Franks*, 330 Mich App 69 (2019) where the Court of Appeals, considering a claim of shareholder oppression under MCL 450.1489, explained:

> [A] shareholder necessarily overcomes the business-judgment rule by presenting evidence to establish the elements of a claim under the shareholder-oppression statute because that statute identifies wrongful conduct and provides a remedy for it. . . . Accordingly, the business-judgment rule does not prohibit a court from reviewing the totality of the evidence when evaluating defendant's business decisions . . . to determine whether evidence showed that defendants formulated their policy in bad faith and as part of a plan to commit acts amounting to [oppression.]"[11] [*Franks*, 330 Mich App at 100-101 (citations omitted).]

The Plaintiff argues that he presented evidence of oppression under the statute and therefore, the Arbitrator erred in "allowing Defendants to take shelter under the business judgment rule."[12] This Court disagrees.

As was previously stated, the Arbitrator determined that, "[the Defendants'] decision to release Summit Oral from the Lease was not undertaken in an attempt to

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[11] Although *Franks* involved a claim for shareholder oppression under § 489 of the Business Corporation Act and this case involves a claim for member oppression under § 515 of the Michigan Limited Liability Act, both sections have essentially the same definition of "willfully unfair and oppressive conduct." See MCL 450.4515 (2) and MLC 450.1489(3). Moreover, courts interpret the Business Corporation Act and the Limited Liability Act in a consistent manner. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 159; 792 NW2d 749 (2010).

[12] Pl's Motion, p 14. To the extent that the Plaintiff argues that the Arbitrator was precluded from considering the business-judgment rule because the Plaintiff presented at least *some* evidence of oppression, this is contrary to the above-quoted language in *Franks*. The Arbitrator was permitted to "review the totality of the evidence when evaluating defendants' business decisions "to determine their conduct amounted to oppression. *Franks*, 330 Mich App at 101.

interfere with [the Plaintiff's] interest as a shareholder."[13] Thus, there was a determination that the Plaintiff did not establish oppression under the statute and under the language relied on by the Plaintiff in *Franks,* the Plaintiff did not overcome the application of the business-judgment rule.

The Plaintiff cites evidence, including his financial expert's opinion that the decision to release Summit Oral from the Lease "financially injured Summit Lincoln and [the Plaintiff]," in support of his claim that evidence of oppression was presented to the Arbitrator.[14] However, the Arbitrator, after considering the evidence presented by the parties, determined that there was no oppression. This Court cannot review the Arbitrator's determination.[15]

The Plaintiff also alleges that the Arbitrator inappropriately applied the business-judgment rule to the breach of fiduciary duty claim and the breach of contract claim.[16]

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[13] Pl's Motion, Exhibit 8, p 5.

[14] Pl's Motion, p 14.

[15] "In many cases the arbitrator's alleged error will be as equally attributable to alleged 'unwarranted' factfinding as to asserted 'error of law.' In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and the arbitrator's findings of fact are unreviewable." *DAIIE v Gavin*, 416 Mich 407, 429 (1982).

[16] In footnote 8 of his Motion the Plaintiff additionally states that the Arbitrator erred in concluding that Defendants did not owe him a fiduciary duty under MCL 450.4404. However, the Arbitrator's decision on this question is supported by law. See *Frank v Linkner*, 310 Mich App 169, 180 (2015), aff'd in part and rev'd in part on other grounds, 500 Mich 133 (2017), where the court concluded that under MCL 450.4404, "the duty is owed to the company, not to the individual members." See also *Dawson v DeLisle*, unpublished per curiam opinion of the Court of Appeals, issued July 21, 2009 (Docket No. 283195), p 4 ("The LLCA's requirement that a manager discharge duties 'in the best interests of the limited liability company,' MCL 450.4404(1), indicates that a manager's fiduciary duties are owed to the company, not the individual members.")

Whether the Arbitrator applied the business-judgment rule to these claims is unclear. However, even if the Arbitrator considered the business-judgment rule in making his findings on the breach of fiduciary duty claim and the breach of contract claim, there is no legal error. As the Plaintiff asserts, the business-judgment rule only applies in the "absence of bad faith or fraud." See *In re Butterfield Estate*, 418 Mich at 255. The Plaintiff again argues that evidence was presented that the Defendants did not act in good faith. However, as has already been explained, this Court cannot review the Arbitrator's determination, made based upon the evidence presented by the parties, that the Defendants made "prudent business decisions" and reasonably terminated the Lease. *DAIIE v Gavin*, 416 Mich at 429.

For the above-stated reasons, there is no basis to vacate the award based on the misapplication of the business-judgment rule.

B
The Arbitration Award sufficiently addressed the issue of fairness

The Plaintiff next argues that the Arbitrator erred in failing to consider whether the decision to release Summit Oral from the Lease was "fair" to Summit Lincoln. In support of this argument the Plaintiff relies on what he calls the "entire fairness rule." The Plaintiff argues that in order to escape liability for a "self-dealing" transaction Defendants bear the burden of proving that the transaction was fair to Summit Lincoln.[17]

[17] It appears that the Plaintiff makes this argument as to all the claims in the Complaint.

In support of his argument the Plaintiff cites MCL 450.4409 which states, in relevant part:

> (1) Except as otherwise provided in an operating agreement, a transaction in which a manager or agent of a limited liability company is determined to have an interest shall not, because of the interest, be enjoined, be set aside, or give rise to an award of damages or other sanctions, in a proceeding by a member or by or in the right of the company, if the manager or agent interested in the transaction establishes any of the following:
>
> (a) The transaction was fair to the company at the time entered into.
>
> (b) The material facts of the transaction and the manager's or agent's interest were disclosed or known to the managers and the managers authorized, approved, or ratified the transaction.
>
> (c) The material facts of the transaction and the manager's or agent's interest were disclosed or known to the members entitled to vote and they authorized, approved, or ratified the transaction.
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> ***
>
> (4) Satisfying the requirements of subsection (1) does not preclude other claims relating to a transaction in which a manager or agent is determined to have an interest. Those claims shall be evaluated under principles of law applicable to a transaction in which a similarly situated person does not have an interest.

The Plaintiff also cites two Michigan cases, *Fill Bldgs, Inc v Alexander Hamilton Life Ins Co of America*, 396 Mich 453 (1976), and *Castle v Shoham*, unpublished per curiam opinion of the Court of Appeals, issued August 7, 2018 (Docket No. 337969) in support of his argument that the Arbitrator was required to consider the fairness of the transaction to Summit Lincoln and did not do so.

In *Fill*, the Michigan Supreme Court addressed the question of whether a lease was valid and enforceable where the sole shareholder of the lessor corporation was also the principal stockholder of the lessee. At issue was a statute which provided, in relevant part:

> No contract of any corporation made with any director of such corporation or with a partnership or other group or association of which any such director shall be a member or with any other corporation of which such director may be a member or director and no contract between corporations having common directors shall be invalid because of such respective facts alone. When the validity of any such contract is questioned, the burden of proving the fairness to the contracting parties of any such contract shall be upon such director, partnership, other group or association, or corporation who shall be asserting the validity of such contract. [*Fill Bldgs*, 396 Mich at 456-457 quoting MCL 450.13(5).][18]

The court determined that, while the lease served the interests of the lessor, the evidence that the lease served the interests of the lessee corporation was unconvincing and upheld the trial court's finding that "fairness" as required by the statute was not established. *Id.* at 461-462.

In *Castle v Shoham*, unpublished per curiam opinion of the Court of Appeals, issued August 7, 2018 (Docket No. 337969), the trial court, considering a claim of member oppression under MCL 450.4515, found that certain conduct was not evidence of oppression because the transaction at issue was fair under MCL 450.4409(1). *Id.* at p 5.

[18] MCL 450.13 was superseded by MCL 450.1545 which was superseded by MCL 450.1545a.

The Court of Appeals found that the trial court failed to recognize that a finding of fairness under MCL 450.4409(1) did not preclude other claims relating to a transaction in which a manager is determined to have an interest. *Id.* citing MCL 450.4409(4). Further, the Court of Appeals explained:

> Looking at the specific language of the statute, then, it appears that a transaction in which a manager has an interest will not be enjoined, set aside, or give rise to damages *simply because of the manager's interest* so long as the manager proves that the transaction was fair to the company. This does not mean, though, that the transaction will be found sound in all cases as long as the manager establishes it was fair; rather, it means that so long as the fairness is established, the manager's interest in the transaction, standing alone, will not serve as a basis for setting aside or enjoining the transaction or awarding damages. . . . Thus, a finding of "fair" under MCL 450.4409(1)(a) is not conclusive as to whether to the entire transaction was evidence of or amounted to willfully unfair and oppressive conduct, contrary to what the trial court held. [*Id.* at p 5.]

The Court of Appeals in *Castle* found that the first step was to determine whether the self-dealing transaction at issue, the payment of management fees, was fair to company. If there was a determination that the transaction was fair, the next consideration was whether it "nevertheless constituted 'willfully unfair and oppressive conduct." *Id.* at p 6. The Court of Appeals determined that the trial court erred in finding that the management fee was fair because defendant failed to prove "a reasonable basis for the management fee it imposed and thereby failed to establish that the overall management fee was fair."[19] *Id.* at p 8.

[19] While the Court of Appeals in *Castle* could review the factual findings of the trial court for clear error, this Court cannot review the factual findings of the Arbitrator in this case. *DAIIE v Gavin*, 416 Mich at 429; *Washington*, 283 Mich App at 672.

In this case, the Plaintiff argues that the Arbitration Award should be vacated because the Arbitrator did not address whether the transaction was fair to Summit Lincoln. However, this argument is without merit.

First, the Arbitrator was not required to make specific findings and legal conclusions on the issue of fairness. See *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 557 (2004). "[T]here are no specific requirements addressing the form or necessity of factual findings or legal reasoning in support of an arbitration award. . . . Specific findings are unnecessary where implicit findings can be established from the relief granted by the arbitration award." *Barnaby v Barnaby*, unpublished per curiam opinion of the Court of Appeals, issued July 20, 2004 (Docket No. 247780), p 1 citing *DAIIE v Ayvazian*, 62 Mich App 94, 99-100, 102 (1975)

Second, although the Arbitrator did not specifically reference MCL 450.4409 or "fairness," the finding of "fairness" is implicit in the Award. The Arbitrator determined that the decision to release Summit Oral from the lease was "attributable to a rational business purpose;" that "[the Defendants] made prudent business decisions geared toward securing long term revenue for Summit Lincoln;" and the Defendants were empowered to make decisions concerning the business affairs of Summit Lincoln

including "the reasonable termination of the Lease in order to secure long-term financial benefits for the members. . . ."[20] These conclusions are sufficient to establish "fairness."[21]

C
The Arbitrator did not exceed his power in finding no breach of the Operating Agreement

The Arbitrator determined that there was no breach of the Operating Agreement. The Arbitrator found that the Defendants, as a majority of the members of Summit Lincoln, had the ability to remove the Plaintiff as a manager, and that:

> [a]s the remaining managers, [the Defendants] were empowered to make decisions concerning the ongoing business affairs of Summit Lincoln, and in this case, that included the reasonable termination of the Lease in order to secure long-term financial benefits for the members, including [the Plaintiff].
>
> [The Defendants] properly removed [the Plaintiff] as a manager and continued to steward the ongoing business affairs of Summit Lincoln *in line with the Agreement*. This Arbitrator therefore finds no liability for [the Defendants] on Count III of [the Plaintiff's] Complaint and Demand for Arbitration.[22]

[20] Pl's Motion, Exhibit 8, pp 5-7.

[21] The Arbitrator make findings on factors that were considered by the courts in *Fill* and *Castle* when addressing the issue of "fairness." As was explained previously, the court in *Fill* looked at whether the lease at issue "served the interests of" the lessee corporation and the court in *Castle* tied fairness of the management fee to the question of whether there was a reasonable basis for the fee. *Fill Bldgs, Inc v Alexander Hamilton Life Ins Co of America*, 396 Mich 453, 461-462 (1976) and *Castle v Shoham*, unpublished per curiam opinion of the Court of Appeals, issued August 7, 2018 (Docket No. 337969), p 8.

[22] Pl's Motion, Exhibit 8, pp 7-8 (emphasis added).

The Plaintiff argues that the Arbitrator erred in finding that there was no breach of the Operating Agreement because the written arbitration award did not specifically address Section 3.29.3 of the agreement which states:

> "[e]ach Member understands and acknowledges that the conduct of the Company's business may involve business dealings and undertakings with Members, Managers and their respective affiliates. In any of those cases, those dealings and undertakings shall be at arm's length and on commercially reasonable terms."[23]

As was explained previously, "Michigan law mandates no requirements relative to form or necessity of factual findings or legal reasoning in support of an award," *DAIIE v Ayvazian*, 62 Mich App at 102, and the Arbitrator "was not required by law to produce specific findings of fact and legal conclusions." *Saveski*, 261 Mich App at 557. The Plaintiff points to no authority which requires the Arbitrator's award to include a discussion of every claim made in the demand for arbitration.[24] See *City of Holland v French*, unpublished per curiam opinion of the Court of Appeals, issued June 18, 2013 (Docket No. 309367), p 10 ("We have located no support for the notion that in this case or in general, an arbitrator must discuss in writing each claim made by the parties.")

Here, the Arbitrator, in finding that there was no breach of the Operating Agreement, determined that the Defendants' management of Summit Lincoln was "in line with the Agreement." Implicit in this conclusion is that the Defendants did not breach

[23] Pl's Motion, Exhibit 1, § 3.29.3.

[24] In this case the Breach of Contract claim in the Demand for Arbitration alleged that the Defendants breached at least seven sections of the Operating Agreement. See Pl's Motion, Exhibit 7, p 7.

the terms of the Operating Agreement, including Section 3.29.3. Further, as discussed previously, the Arbitrator determined that the decision to release Summit Oral from the Lease was "attributable to a rationale business purpose" and "made prudent business decisions" in the interest of Summit Lincoln. The Arbitrator did not exceed his powers in finding in favor of the Defendants on the breach of contract claim.

ORDER

Based on the foregoing Opinion, the Plaintiff's Motion to Vacate the Arbitration Award is DENIED. Because no motion to modify or correct the Arbitration Award is pending, the Arbitration Award is CONFIRMED. MCR 3.602(J)(5).

This Order resolves the last pending claim and closes the case.