

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

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| JAMES G. (CASEY) WALSH, III, et al., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | Case No. 1116-CV29191 |
| v. |) | |
| |) | Division 8 |
| DIOCESE OF KANSAS CITY-ST. JOSEPH, |) | |
| et al., |) | |
| |) | |
| Defendants. |) | |

**ORDER CONFIRMING ARBITRATION AWARD AND DENYING
DEFENDANTS' MOTION TO VACATE, MODIFY OR CORRECT AWARD**

Before the Court are the Plaintiffs' Motion to Confirm Arbitration Award, filed July 1, 2014, and the Defendants' Motion in Opposition thereto and the Defendants' Motion to Vacate, Modify, or Correct Award, filed June 20, 2014, the Plaintiffs' Motion in Opposition thereto and the Defendants' Reply. These matters came before the Court for argument on July 23, 2014, and thereafter were taken under advisement. After review of the various pleadings and consideration of argument made by counsel, the Court hereby grants Plaintiffs' Motion in all respects and denies the Defendants' Motion.

I. Factual Background

In 2008, the parties entered into a settlement agreement for various claims made against Defendants. The documents comprising the Settlement Agreement included a Memorandum of Understanding (Defendants' Motion, Exh. E), individual Settlement and Arbitration Agreements (Defendants' Motion, Exh. F), and individual Mutual Settlement Agreements and General Releases (Defendants' Motion, Exh. G).

On October 6, 2011, the Plaintiffs filed suit to enforce claimed breaches of the 2008 Settlement Agreement. On June 6, 2012, the Court granted Summary Judgment,

directing the parties to “arbitrate the claimed breaches of the 2008 Settlement Agreement.” The documents comprising the various Settlement Agreements included the following language: “Any dispute concerning this Agreement shall be presented solely to the Arbitrator, who shall have sole discretion to **resolve all such disputes**. The decision of the Arbitrator regarding any such dispute shall be **final and binding**” (emphasis added).

The arbitration hearing related to liability took place in 2013 and an interim Award was entered on September 13, 2013. Thereafter, in early 2014, evidence was presented to the Arbitrator related to damages. On March 23, 2014, an Award was entered which was subsequently modified, and a Modified Final Award in Arbitration (the “Award”) was entered on April 14, 2014. The Defendants seek to vacate, modify or correct the Award; the Plaintiffs seek to confirm it.

II. Legal Standard

“Missouri has adopted the Uniform Arbitration Act (UAA), fashioned after the federal act, found in Sections 435.350-470, RSMo” *Sheffield Assembly of God Church, Inc. v. American Ins. Co.*, 870 S.W.2d 926, 929 (Mo. App. W.D. 1994). Section 435.405 provides for vacating an award in arbitration in limited, specific circumstances. In this case, Defendants base their application to vacate the award on Section 435.405(3), which requires the Court to vacate awards where “[t]he arbitrators exceeded their powers.”

Otherwise, this Court’s decision will be affirmed unless it is not supported by substantial evidence, or it is against the weight of the evidence, or it erroneously declares or applies the law. *Cargill, Inc. v. Poepelmeyer*, 328 S.W.3d 774, 775-76 (Mo. App.

S.D. 2010). “The function of arbitration is to be a speedy, efficient and less expensive alternative to court litigation.” *Estate of Sandefur v. Greenway*, 898 S.W.2d 667, 669 (Mo. App. W.D.1995) (quoting *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)). “In order to facilitate this purpose, judicial review of arbitration awards is limited.” *Sheffield*, 870 S.W.2d at 929. “[C]ourts construe arbitration proceedings liberally, and every reasonable intendment in favor of the award is indulged.” *Heineman v. Charno*, 877 S.W.2d 224, 227 (Mo. App. W.D. 1994). “Insofar as [the award] draws its essence from the agreement of the parties, the award must be enforced.” *Franklin Elec. Co. v. Int’l Union, United Auto. Aerospace & Agr. Implement Workers of America*, 886 F.2d 188, 192 (8th Cir.1989).

“[A]n allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators’ decision.” *National Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334, 350 (Mo. App. S.D. 1995). “In ascertaining whether arbitrators have exceeded their powers, courts bear in mind that construction of contracts in arbitration proceedings is a task for the arbitrators, not the courts.” *Stewart*, 910 S.W.2d at 349. Additionally, “arbitrators do not exceed their powers if their interpretation, even if erroneous, nevertheless is rationally grounded in the agreement.” *Id.* “[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” *Osceola County Rural Water System, Inc. v. Subsurfco, Inc.* 914 F.2d 1072, 1075 (8th Cir. 1990) (quoting *United Paper Workers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

III. Discussion

A. The Award is confirmed because the remedy of monetary damages is drawn from the “essence” of the settlement agreement.

The “essence” of the Settlement Agreement can be boiled down to the professed desire by both sides to protect those children in the care of the Diocese, in whatever form or fashion, from sexual abuse, and to compensate those individuals previously victimized. These ends were to be advanced in both economic and non-economic terms. Economically, the Defendants agreed to pay the sum of ten million dollars (\$10,000,000.00); the non-economic terms were manifested in nineteen (19) separate and distinct commitments by the Defendants. These commitments were set forth in a document entitled “NON-MONETARY COMMITMENTS BY THE DIOCESE.”

Subsequent to the underlying Settlement Agreements being reached, Plaintiffs brought suit claiming breaches of certain non-economic commitments in the Settlement Agreement, a dispute heard by Arbitrator Hollis Hanover. The Arbitrator ultimately concluded that the Defendants breached non-economic conditions 2, 3, 14, 15 and 18. He found no violation of conditions 1 and 10. The Plaintiffs voluntarily abandoned pursuing claimed breaches of conditions 8 and 16 and the parties agreed to a negotiated settlement for claimed breaches of conditions 5 and 9. (See Award p. 4)

The Award is detailed and extensive but its findings and the Arbitrator’s view of the Diocese’s behavior can be best summarized by recitation of a short passage from page 4 of the Award:

Based on its behavior as revealed in this record, it is my opinion and finding that the Diocese, with its leadership and higher level personnel and their unavoidable biases and ingrained priorities, was and is constitutionally incapable of placing the preservation and protection of the clergy culture in a subordinate position to any

other consideration, including the timely reporting to law enforcement of a priest involved in the use of diocesan children as pornography models.

The Arbitrator heard evidence touching on liability issues on no fewer than five (5) days and no fewer than three (3) additional days on damages. The Award is a scathing indictment of the defendant, the Diocese of Kansas City-St. Joseph and there can be no doubt that the Diocese, through its leadership and higher level personnel, failed in numerous respects to abide by the terms of the non-monetary commitments.

It is undisputed that those portions of the Settlement Agreement dealing with arbitration are devoid of a provision for specific remedies (either monetary awards or in any other form) in the event of breach. Relying on the absence of such language, counsel for the Diocese simply asks that the monetary award be vacated. Counsel for Defendant Finn suggests that the only monetary damages that could have been awarded were the “reasonable attorneys’ fees and costs” mentioned in the Settlement Agreement. This argument fails to grasp the substantive differences between the Plaintiffs’ actual damages and the attorney fees incurred by counsel in litigating this case.

As the Settlement Agreement is silent with respect to the issue of remedies, in this limited instance, that portion of the Settlement Agreement is ambiguous. Since the Settlement Agreements are silent as to the issue of remedies, it must fall to the Arbitrator to devise one in order to reach a fair solution to address the demonstrated breaches by the Defendants.

“Actual damages are compensatory and are measured by the loss or injury sustained.” *Stiffelman v. Abrams*, 655 S.W.2d 522, 531 (Mo. banc 1983). Actual damages are conceptually distinct from attorney fees. *See id.* (noting that “[t]he damages allowed under § 198.093 are for actual damages (leaving out of the moment punitive

damages and attorney's fees).”). Only in limited circumstances may attorney fees be considered part of a plaintiff's actual damages. For example, in *Miller v. Higgins*, 452 S.W.2d 121 (Mo. banc 1970), the Missouri Supreme Court awarded attorney fees as special damages in a fraud case. The *Miller* Court noted that these fees were not incurred as part of the plaintiff's effort to litigate his claim; rather they were incurred in an effort to mitigate damages and avoid future losses due to fraud. *Id.* at 125.

This case does not present such a situation. The attorney fees recognized in the Agreement were not intended to compensate the Plaintiffs for the loss or injury they sustained; rather, these fees were specifically included as part of the “Expenses of Arbitration.” As such, these attorney fees stand separate and apart from the other remedies that the Plaintiffs recovered due to the breach of the Settlement Agreement.

The attorneys' fees and costs provision does not explicitly limit the consequences in the event of breach and does not otherwise constrain the Arbitrator to a certain set of remedies when endeavoring to “resolve . . . disputes” (Settlement Agreements). This Court does not find that such language otherwise limits the remedies available to the Arbitrator. “[I]n Missouri, attorneys' fees generally are only recoverable when a statute specifically authorizes recovery or when they are provided for in contract.” *Supplemental Medical Services v. Medi Plex Health Care*, 293 S.W.3d 128, 132 (Mo. App. E.D. 2009) quoting *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647,657 (Mo. banc 2009) The attorneys' fees provision is merely the enumeration of one particular consequence in the event disputes arise over the Settlement Agreement.

A general arbitration provision such as the one in the Settlement Agreement herein gives the Arbitrator wide latitude and discretion “when it comes to formulating

remedies. The draftsmen (of the contract) may never have thought of the specific remedy to be awarded to meet a particular contingency.” *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960). “Because ‘contracts often lack specific provisions for specific kinds of remedies[,]’ it falls to the arbitrator to devise one.” *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 855 (8th Cir.2001) quoting *Amalgamated Transit Union, Local No. 1498 v. Jefferson Partners*, 229 F.3d 1198, 1201 (8th Cir. 2000) “[The arbitrator’s] remedy need not be specifically authorized by the agreement. And, so long as his remedy represents a fair solution to the dispute, the remedy awarded should be affirmed.” *General Tel. Co. of Ohio v. Communications Workers of America, AFL-CIO*, 648 F.2d 452, 457 (6th Cir. 1981). The Arbitrator “is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies,” *United Paper Workers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 41 (1987) (quoting *Enterprise Wheel*, 363 U.S. at p. 597).

This brings us back to the question posed at the hearing on July 23, 2014, as to what was the essence of the Settlement Agreements and whether the imposition of monetary damages draws its essence from the Settlement Agreement.

Beyond the Defendants’ assurance that they will, in fact, abide by the terms of the non-economic commitments to protect children from sexual abuse as being sincere, what can the Plaintiffs, and by extension an arbitrator, really do to ensure compliance? In short, how can the Settlement Agreement and Arbitration Agreement be effectively policed?

“An arbitrator’s award draws its essence from the [parties’ agreement] as long as it is derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties’ intention.” *Boise Cascade Corp. v. Paper Allied-Industrial, Chemical and Energy Workers*, 309 F.3d 1075, 1081 (8th Cir.2002), quoting *Johnson Controls, Inc., Sys & Servs. Div. v. United Ass’n of Journeymen*, 39 F.3d 821, 825 (7th Cir.1994) Further, “[i]f an arbitrator attempts to interpret a written agreement that is silent or ambiguous without considering the parties’ intent, his award will fail to draw its essence from the [agreement].” *Boise Cascade* 309 F.3d at 1081, (quoting *Bureau of Engraving, Inc. v. Graphic Communications Int’l Union Local 1B*, 164 F.3d 427, 429 (8th Cir.1999)).

As the arbitration provisions are silent as to remedies available in the event of breach and although monetary damages may be considered small comfort to the Plaintiffs and certainly provide no solace to children subjected to sexual abuse in the future (in that horrific but, in the opinion of the Arbitrator, the unfortunately likely turn of events), there are few options available to address these breaches.

The Arbitrator found that the Plaintiffs agreed to economic settlement terms, which were significantly less than they may have otherwise received, in exchange for the Defendants agreeing to the non-economic portion of the Settlement Agreements. It is clear that the non-economic terms, as a bargained-for and significant part of the Settlement Agreements, came at a cost. The Diocese paid less in damages for agreeing to the non-economic terms demanded by the Plaintiffs. When the Diocese breached the non-economic commitments, it effectively received the benefit without paying for it.

In the Award, the Arbitrator discussed the breaches at length and the damages arising out of them. The parties were given full opportunity to argue and brief their respective positions with respect to available and appropriate remedies. The Arbitrator specifically found, and the settlement documents speak to the Plaintiffs' position, that it was their sincere desire to do whatever was in their power to ensure that the abuse heaped on them would not be foisted on a new generation of children. This was obviously the intent of the Plaintiffs in settling their claims

The Arbitrator determined that, in the absence of specific provisions setting forth what remedies were, or were not available, a monetary award was the most appropriate remedy in light of the parties intent as is reflected in a number of the non-monetary commitments by the Diocese and the course of negotiations and settlement borne out by the record.

Clearly then, the Arbitrator tied the monetary damages to the breach of the non-economic commitments, which all pertained to protecting children from sexual abuse or re-dressing past instances of abuse, which is the essence of the Settlement Agreement. As such, the only reasonable conclusion this Court can draw is that the remedy of monetary damages draws itself from the "essence" of the Settlement Agreement and, therefore, the Award is hereby confirmed.

To the extent that the Defendants' Motion touches separately on the award of costs and attorneys' fees, the Court finds that such are specifically contemplated under the various terms associated with the arbitration provisions and clearly, the Plaintiffs were the prevailing party at the arbitration. The Arbitrator did not exceed his authority in making such an award. Therefore, the award of costs and attorneys' fees is confirmed.

B. The Arbitrator did not void the non-economic portions of the Settlement Agreement.

This leaves the requests, brought in the alternative, by the Defendants to modify or correct the Award. Defendants allege that the Arbitrator voided the non-economic terms of the Settlement Agreement and seek this Court's Order prohibiting the Plaintiffs from "arbitrat[ing] into perpetuity." To the extent that it is necessary and appropriate, the Court finds that the Arbitrator did not void the non-economic portions of the Settlement Agreement. Specifically the Award states that:

Plaintiffs have **not sought to declare the contract void** and to collect what, in my opinion, would be a far larger award. They have instead opted to seek damages for these noted breaches and **maintain the contract in force** for the protection of children in the future. I here honor their preference . . ." (Award p. 17) (emphasis added).

As stated above, the Defendants are represented by experienced counsel, and there can be no doubt that each was fully aware of the consequences of their actions in agreeing to the settlement as it was finally presented to each. The Defendants agreed to be bound by the provision of the Settlement Agreement, including those related to the arbitration process. There are no provisions related to the number of permissible arbitrations or the duration the arbitration provisions must apply for. As such, the Defendants remain bound by the terms of the Settlement Agreements and they are not voided.

C. The Defendants' request to correct the Award is denied.

Finally, the Defendants request that this Court correct what they perceive to be errors in the Award. This request was first made of the Arbitrator and he specifically made such corrections as he deemed appropriate resulting in the Modified Final Award in Arbitration dated April 14, 2014. As discussed above, the Arbitrator held hearings on

liability issues on no fewer than five (5) days and no fewer than three (3) additional days on damages. The parties jointly selected Mr. Hanover as the Arbitrator and vested him with “discretion to resolve all such disputes. The decision of the Arbitrator regarding any such dispute shall be **final and binding.**” (emphasis added) Accordingly, the parties agreed to be finally bound by the decisions made by the Arbitrator and this Court is not free to impose its version of how the Award should read, especially in light of the fact that the Court did not hear the evidence or view the witnesses while testifying. Put simply, this Court is in no position, either legally or practically to amend the factual findings found in the Award and, therefore, declines to do as much. As “[a]rbitration proceedings are preferred by the courts which give every favorable intendment in favor of the award . . . judicial review of arbitration awards is strictly limited.” *Estate of Sandefur v. Greenway*, 898 S.W.2d 667, 669 (Mo. App. W.D. 1995) “[t]he parties to an arbitration agreement cannot, absent an abuse of power by the arbitrators, relitigate a matter on the law or facts.” *Id.* (quoting *Lorenzini v. Group Health Plan, Inc.*, 753 S.W.2d 106, 108 (Mo.App.1998)) Despite the Defendants’ protestation that they do not “seek a reconsideration of the merits” (Motion to Vacate at 1), that is essentially what is sought and the Defendants’ request to correct the Award is denied.

D. Interest is entered at the statutory rate from April 14, 2014.

The only remaining issue is the Plaintiffs’ request for interest to be paid on the Award dating from April 14, 2104. The Award specifically held that “no separate amount in interest is awarded plaintiffs by this award.” (Award at 18) Although it is not specifically identified, the Court understands this pronouncement to apply only to pre-

judgment interest as the Complaint for Declaratory Relief to Compel Arbitration Over Breach of Contract which initiated this matter made no prayer for interest.

However, “an arbitration award fixes definite or ascertainable amounts owing.” *National Ave. Bldg. Co. v. Stewart*, 972 S.W.2d 649, 653 (Mo. App. S.D. 1998) In *National*, also a case where the arbitrator did not include interest in his Award, the judgment of the trial court denying an award of interest was found to be in error for “omitting such interest when it confirmed the award.” *Id.* “As a rule, parties should comply with an arbitration award without a need for court proceedings.” *Cannon General Contractors, Inc. v. Mock*, 302 S.W.3d 772, 774 (Mo. App. S.D. 2010) (*quoting National*, 972 S.W.2d at 653). Since “post-award interest is like post-judgment interest—a penalty for delayed payment . . . [interest] should be added to a judgment confirming the award.” *Id.* (citation omitted). Accordingly, interest on the Award is entered at the statutory rate from April 14, 2014, the date the Award was entered, on the principal amount declared owing, six hundred fifty thousand dollars (\$650,000.00).

E. Conclusion

The Defendants’ Motion to Vacate, Modify, or Correct Award and all relief sought is denied in its entirety. The Plaintiffs’ Motion to Confirm Arbitration Award is sustained and the Modified Final Award in Arbitration entered on April 14, 2014 is hereby confirmed with interest on the Award ordered at the statutory rate, dating from April 14, 2014.

IT IS SO ORDERED.

Date

Hon. Bryan E. Round