

No. 41565-8-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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DANIEL OMER

Plaintiff/Respondent

v.

THE ALPS CREDIT UNION,

Defendant/Appellant

11 JUN -8 AM 11:26  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY  DEPUTY

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BRIEF OF RESPONDENT

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## **I. INTRODUCTION**

The Defendants/Appellants are seeking judicial review of an award made by The Honorable Robert H. Peterson acting as Arbitrator pursuant to a CR 2A Agreement to submit this case to *binding arbitration*. While judicial review is limited to the face of the award, a brief review of the claims and relevant facts help provide context to this controversy.

Defendant/Appellant Endeavor, Inc. d/b/a Endeavor Consultants, Inc. (“Endeavor”) is an entity run by Defendant Gordon Englert (“Englert”), who filed Chapter 7 Bankruptcy subsequent to the commencement of this action and is not a judgment debtor of the subject judgment. Defendant/Appellant The Alps Credit Union (“The Alps”) is an entity run by Kevin Wessell (“Wessell”). Englert and Wessell have devised a scheme and repeated multiple times to defraud property owners out of the equity in their real property.

Under the scheme, Endeavor teaches classes on real estate investing for a fee which can be financed through in-house credit. The classes are taught in part by Englert. During the class, Englert identifies a student to use as a Straw Man. The Straw Man — a person with little or no income and a poor credit history seeking to get rich quick — would then unknowingly become part of the scheme. In this case, the Straw Man was John Taylor, an individual with no real estate or construction

experience, no education beyond high school and a bank record which shows in excess of 20 overdrafts in a two year period. The Straw Man uses documents prepared at the direction of Endeavor to purchase vacant real property owned free and clear of any mortgage. The property is purchased via seller financing with a Promissory Note secured by a Deed of Trust in second position to a construction loan. Endeavor directs the Straw Man to use The Alps as the lender for the construction loan.

“The Alps Credit Union,” however, is a misleading name. It is not a Credit Union governed by the laws or regulations of any state in the United States. It is not a bank. It is an entity registered in Sweden, without any physical presence in Sweden. Its only bank account is based in Hong Kong. Kevin Wessell and a small handful of people are the only individuals authorized to draw a check on the account. The Alps did not order a credit report for the Straw Man or have any other assurances he could repay the obligations. The only information they had was provided by Endeavor. The face of the Arbitration Award reflects Judge Peterson’s finding that Endeavor is an agent for The Alps.

Under the scheme, The Alps makes a construction loan to the Straw Man in an amount much greater than the purchase price of the land at 18% interest, with a default interest rate of 30%. The Straw Man makes draws on the construction loan, but at Endeavor’s request all draws are

sent directly to Endeavor. Endeavor then applies the first part of the loan proceeds to pay down the Straw Man's account balance for attending the Endeavor classes. A small amount of the loan proceeds, if any, make it to the Straw Man to begin construction on the property. Either at Endeavor's request, or simply because the Straw Man does not have the ability to do so, the Straw Man stops making payments on both the construction loan and the Promissory Note to purchase the property, which triggers the 30% default interest rate on the construction loan.

Once the debt owed reaches the approximate value of the property, The Alps, which holds a first position Deed of Trust, accelerates the debt and conducts a non-judicial foreclosure of the property. In the end, The Alps has purchased real property for far less than market value without ever making contact with the seller of the property. The majority of the money paid by The Alps goes directly to Endeavor. Both Endeavor and The Alps can claim they had no contact with the seller of the property because they used a Straw Man. The seller of the property is deprived of his equity in the real property with no recourse against the "judgment proof" Straw Man who has no assets.

The seller of the property in this case, Plaintiff/Respondent Daniel Omer ("Omer"), brought an action against Endeavor and The Alps, among other Defendants. Omer, Endeavor and The Alps entered into a CR 2A

Agreement to submit the claim to binding arbitration as provided for by RCW 7.04A. At arbitration, Judge Peterson asked questions of the witnesses and counsel. Given the secretive nature of Endeavor's business and The Alps' account, new evidence came to light in arbitration. Among the many questions Judge Peterson asked was whether Omer was a third party beneficiary of the contract between The Alps and Taylor. Later, pursuant to CR 15(b), counsel for Omer moved to amend the Complaint to conform to the evidence, adding a third party beneficiary breach of contract cause of action. Judge Peterson granted the motion.

After hearing all the evidence, Judge Peterson issued an award in favor of Omer. Omer sought confirmation of the arbitration award in Superior Court, and Endeavor and The Alps brought a motion to vacate the arbitration award. The court granted the motion to confirm the arbitration award, denied the motion to vacate the award, and entered judgment against Endeavor and The Alps. Endeavor and The Alps now seek judicial review of the Superior Court's decision confirming the binding arbitration award. Because review of an RCW 7.04A arbitration award is limited to the face of the award, and the face of the award does not contain any errors of law, the Superior Court's decision should be affirmed.

## **II. STATEMENT OF THE CASE**

Omer accepts Endeavor and The Alps' statement of facts.

## **III. ARGUMENT**

### **A. Standard of Review.**

“An appellate court limits review of an arbitrator's award to that of the court that confirmed, vacated, modified, or corrected that award.”

*S & S Const., Inc. v. ADC Properties LLC*, 151 Wn. App. 247, 254, 211 P.3d 415, 419 (Div. II 2009) *review denied*, 168 Wn.2d 1002, 226 P.3d 780 (2010).

“Judicial review of an arbitration award is limited to the face of the award. ... In the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified.” *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327, 1330 (1998). The appellate court should engage in the same inquiry as the trial court as to whether the face of the arbitration award contains an error of law. *Id.*

### **B. The Trial Court Correctly Confirmed The Arbitration Award And Correctly Denied The Motion To Vacate The Arbitration Award.**

#### **1. The Face Of The Arbitration Award Does Not Contain Any Errors Of Law.**

The Superior Court’s review of an arbitration award pursuant to RCW 7.04A binding arbitration is limited to the question of whether the face of the award contains an error of law. “Judicial scrutiny of an arbitration award is strictly limited; courts will not review an arbitrator’s decision on the merits.” *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 402, 766 P.2d 1146, 1147 (Div. II 1989).

“In the absence of an error of law on the face of the award, the arbitrator’s award will not be vacated or modified.” *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327, 1330 (1998). “The basis for vacation must appear on the face of the award. The arbitrator’s reasons for the award are not part of the award itself, and [the court] does not consider the evidence before the arbitrator.” *Expert Drywall, Inc. v. Ellis-Don Const., Inc.*, 86 Wn. App. 884, 888, 939 P.2d 1258, 1260 (Div. I 1997).

The arbitration award “consists of a statement of the outcome, much as a judgment states the outcome. A statement of reasons for the award is not part of the award.” *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 403, 766 P.2d 1146, 1148 (Div. II 1989). In *Westmark*:

The award was contained in two sentences of the arbitrator’s three-page letter... “I find that the plaintiff is entitled to judgment against the defendants in the sum of \$24,789.92, by way of reimbursement.” [and] “I am finding that the balance due the plaintiff for management fees is offset by shortfall in rentals.”

*Id.*

In the present case, the arbitration award in Judge Peterson's letter to counsel is one sentence: "Plaintiff is awarded judgment against Endeavor, Inc. and Alps Credit Union jointly and severally in the sum of \$52,115 plus interest at 8% per annum from November 1, 2007." CP 597. This statement does not contain an error of law. In fact, Endeavor and The Alps do not argue that it contains an error of law. Therefore, because there is no error of law on the face of the award, the Court's inquiry may stop here. Washington's longstanding policy that binding arbitration should be binding should not be abandoned here, and the Superior Court's decision to confirm the arbitration award should be affirmed.

2. **The Parties Gave Judge Peterson Full Authority To Arbitrate The Case, Including The Authority To Grant Or Deny Motions Made In Arbitration.**

The parties gave Judge Peterson full authority to arbitrate the case. The parties executed a written CR 2A Agreement to arbitrate, which provided at paragraph 1, the parties appoint "Judge Peterson to conduct an arbitration hearing pursuant to RCW 7.04A for the purpose of deciding the claims in Pierce County Superior Court Cause No. 08-2-15380-6." CP 486.

The Agreement was also clear that arbitration would be binding, providing at paragraph 2:

**Binding Arbitration.** The decision of the arbitrator shall be binding on the Parties, except that the Parties shall retain their right to appeal as provided in RCW 7.04A.280. The parties recognize that notwithstanding RCW 7.04A.230, the parties will have no choice but to accept the decision of the arbitrator as the final step in the resolution of the dispute between the parties.

CP 486.

The CR 2A Agreement did not contain any language to limit the arbitrator's authority. It did not restrict the arbitrator to resolve only specific causes of action, nor was the arbitrator's authority to hear motions from the parties restricted. The CR 2A Agreement globally referred to "the claims in Pierce County Superior Court Cause No. 08-2-15380-6." The Complaint contains a broad request for relief, including, "such other and further relief as the court deems just and equitable." CP 13. While the authority of an arbitrator to act comes from the enabling agreement to arbitrate, an arbitrator's powers in conducting an arbitration pursuant to RCW 7.04A are statutory. That statutory authority is broad in scope, and provides, in part:

An arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under RCW 7.04A.220 or for vacating an award under RCW 7.04A.230.

RCW 7.04A.210.

In an arbitration conducted pursuant to RCW 7.04A, the arbitrator has the same authority as the Superior Court Judge to decide the controversy. The “arbitrator becomes the judge of both the facts and the law.” *Davidson v. Hensen*, 85 Wn. App. 187, 192, 933 P.2d 1050, 1053 (Div. II 1997) *aff’d*, 135 Wn.2d 112, 954 P.2d 1327 (1998). Included in the broad authority of the Arbitrator is the authority that a Judge would have in a Superior Court trial to hear, grant, or deny motions made pursuant to CR 15(b). That rule provides, in part:

**Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respect as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues *may be made upon motion of any party at any time*, even after judgment. ...

CR 15(b) (emphasis added).

Here, Judge Peterson, acting as the arbitrator, listened to the evidence presented by witnesses for all parties concerning a breach of contract between The Alps and Taylor, and subsequent harm to the third party beneficiary, Omer. Although that evidence only fully came to light through the live testimony of the parties at the arbitration hearing, no party objected to the admission of any of the evidence concerning the breach or resulting harm. CP 579. Judge Peterson inquired as to whether or not a

third party beneficiary cause of action had been pled. Plaintiff's counsel made a CR 15(b) motion to amend to conform to the evidence, which Judge Peterson granted over defense counsel's objection. Defense counsel did not ask for a continuance of the arbitration hearing. *Id.*

Judge Peterson clearly had the authority to grant the amendment. The parties consented to arbitration to be conducted pursuant to RCW 7.04A, in which the arbitrator becomes the judge of both the facts and law and has the authority normally granted to the trial court to issue an award in the case. Under CR 15(b), the decision to grant a motion to recover "on a theory which has not been pleaded ... is addressed to the sound discretion of the trial court." *Morgan Bros., Inc. v. Haskell Corp., Inc.*, 24 Wn. App. 773, 780, 604 P.2d 1294 (1979). In fact, even if the trial court could not grant a motion to conform to the evidence, or could not enter a judgment as a remedy based on a third party breach of contract theory, it "is not a ground for refusing to confirm an award." RCW 7.04A.210.

While the powers of the arbitrator are controlled by statute, the parties may limit the scope of the arbitrator's authority. *Endeavor and The Alps* cite a number of cases from the insurance context in which the contract between the insured and the carrier provided for specific, limited issues or limits to be placed on arbitration. Those cases are easily distinguishable from the present case. In *Price v. Farmers Ins. Co. of*

*Washington*, 133 Wn.2d 490, 496, 946 P.2d 388, 391 (1997), cited by *Endeavor and The Alps*, the Court first acknowledges that “arbitration is a statutorily recognized special proceeding. The rights of the parties are controlled by the statute.” *Price* at 496. In *Price*, the enabling agreement to arbitrate limited the arbitrator to the question of the calculation of damages. *Price* at 498. Questions outside the calculation of damages, therefore, were not covered by the arbitration agreement. *Id.* No such limit was placed on the agreement to arbitrate in the present case.

In *Sullivan v. Great Am. Ins. Co.*, 23 Wn. App. 242, 594 P.2d 454 (Div. III 1979), also cited by *Endeavor and The Alps*, an action between the insured and insurer concerning uninsured motorist coverage was limited by the policy limits between the parties. An arbitration award against the insurer in excess of the policy limits was, therefore, beyond the scope of the arbitration agreement. *Sullivan* at 247. Again, no such agreement between the parties exists here to change the normal statutory authority granted to the arbitrator. Because the parties agreed “to conduct an arbitration pursuant to RCW 7.04A for the purpose of deciding the claims in Pierce County Superior Court Cause No. 08-2-15380-6,” the general statutory rules governing arbitration apply, and Judge Peterson had the authority to grant the CR 15(b) motion to amend to conform to the evidence.

The Alps Defendants' argument that had it known a third party beneficiary claim would have been advanced it "might not have agreed to binding arbitration" cannot be the basis to vacate an arbitration award. Surprise is not a sufficient ground to object to an amendment to the Complaint at the time of trial in absence of a motion to continue. *Smith v. Michigan Lumber Co*, 43 Wash. 402, 404, 86 Pac. 652 (1906). The Alps Defendants made no such motion to continue. CP 580.

Because the parties agreed to binding arbitration governed by RCW 7.04A, the parties granted the arbitrator the authority to grant or deny motions relating to the controversy. This arbitration was conducted pursuant to statute and the Superior Court's confirmation of the arbitration award should be confirmed.

**3. Judge Peterson Did Not Engage In Misconduct To Prejudice Either Party.**

Endeavor and The Alps' argument that Judge Peterson engaged in misconduct as defined by RCW 7.04A.230(1) is without merit. "Judicial review of arbitration awards is strictly limited to the grounds set forth by the Washington Uniform Arbitration Act, RCW 7.04A." *S & S Const., Inc. v. ADC Properties LLC*, 151 Wn. App. 247, 254, 211 P.3d 415, 419 (WA Ct. App. 2009) *review denied*, 168 Wn.2d 1002, 226 P.3d 780 (2010).

RCW 7.04A.230(d) allows for vacation of an arbitration award if the arbitrator exceeded the arbitrators powers. For the reasons discussed above, Judge Peterson did not exceed the powers granted to him in the enabling agreement to arbitrate, ruling out vacating the award on that ground.

Endeavor and The Alps also argue grounds to vacate the judgment exist under RCW 7.04A.230(b) which requires “evident partiality” or “misconduct.” However, the Defendants/Appellants do not allege that Judge Peterson had any prior or unauthorized contact with the parties and do not allege Judge Peterson had any personal interest in the outcome. The only evidence of “partiality” is that Judge Peterson decided a motion, and ultimately the case, against Endeavor and The Alps. Obviously, in every case, a judge is put in a position to rule in favor of one party and against another. Alone, this cannot possibly be evidence of partiality. Judge Peterson is a well respected neutral with over 25 years of experience acting as a judge or arbitrator, including 13 years as a Pierce County Superior Court Judge, four of which were as the Presiding Judge. His actions were well within the scope of his duty. CP 581.

4. **Public Policy Requires Binding Arbitration To Be Binding.**

“Washington public policy strongly favors finality of arbitration awards.” *S & S Const., Inc. v. ADC Properties LLC*, 151 Wn. App. 247, 254, 211 P.3d 415, 419 (Div. II 2009) *review denied*, 168 Wn.2d 1002, 226 P.3d 780 (2010). Arbitration “is designed to settle controversies, not to serve as a prelude to litigation.” *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 402, 766 P.2d 1146, 1147 (Div. II 1989).

The longstanding policy of Washington courts is that binding arbitration is binding. The parties voluntarily entered into a CR 2A Agreement to arbitrate in order to resolve this controversy outside traditional litigation, which serves as a benefit to both the parties and the courts. If binding arbitration is disturbed lightly, its public policy goals will not be met.

C. **The Trial Court Correctly Struck Portions Of The Declaration Of Kevin Wessell That Went Beyond The Face Of The Arbitration Award.**

In support of Endeavor and The Alps’ motion to vacate the arbitration award and opposition to Omer’s motion to confirm the arbitration award, Kevin Wessell submitted a Declaration providing a narrative of what was said by the arbitrator and witnesses during

arbitration. Such testimony is not appropriate on the limited question of confirming or vacating the arbitration award.

The basis for vacation must appear on the face of the award. The arbitrator's reasons for the award are not part of the award itself, and [the court] does not consider the evidence before the arbitrator.

*Expert Drywall, Inc. v. Ellis-Don Const., Inc.*, 86 Wn. App. 884, 888, 939 P.2d 1258, 1260 (Div. I 1997).

Endeavor and The Alps have not cited any authority in which live or declaration testimony was allowed in Superior Court on confirming or vacating an arbitration award. Simply put, once the arbitrator's award has been issued, the parties cannot come back into Superior Court to retry the case through live or declaration testimony on a motion to vacate or confirm the award. The trial court correctly struck those portions of the Declaration of Kevin Wessel which provided a narrative of what was said in the arbitration proceeding, and its decision should be affirmed.

#### **IV. CONCLUSION**

Endeavor and The Alps consented to binding arbitration as a means to resolve this dispute. Binding arbitration is intended to be binding. Now, dissatisfied with the arbitration award, they are seeking a second bite at the apple through litigation. The arbitration was properly conducted pursuant to RCW 7.04A, the parties did not limit the

arbitrator's authority and the arbitrator did not commit misconduct. The Superior Court correctly confirmed the arbitration award, denied Endeavor and The Alps' motion to vacate the award and struck those portions of Kevin Wessell's Declaration containing a narrative of the arbitration proceeding. Mr. Omer respectfully requests this Court affirm the decision of the trial court in full.

RESPECTFULLY SUBMITTED this 8 day of June, 2011.

SMITH ALLING, P.S.

By   
Douglas V. Alling, WSBA #1896  
Russell A. Knight, WSBA #40614  
Attorney for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 8 day of June, 2011, served a true and correct copy of the foregoing document, via the methods noted below, properly addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8 day of June, 2011, at Tacoma, Washington.

  
\_\_\_\_\_  
Russell A. Knight

11 JUN -8 AM 11:26  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
IDENTITY