[Cite as *BIGResearch, L.L.C. v. PENN, L.L.C.*, 2012-Ohio-2992.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

BIGResearch, L.L.C.,	:	
Plaintiff-Appellee,	:	
(Prosper Business Development Corporation,	:	
Intervenor Plaintiff-Appellant),	:	
		No. 11AP-855
v.	:	(C.P.C. No. 10CVH-05-7420)
PENN, L.L.C.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	
	:	
BIGResearch, L.L.C.,		
	:	
Plaintiff-Appellant,		
	:	No. 11AP-856
v.		(C.P.C. No. 10CVH-05-7420)
	:	
PENN, L.L.C.,		(REGULAR CALENDAR)
	:	
Defendant-Appellee.		
	:	

D E C I S I O N

Rendered on June 29, 2012

James E. Arnold & Associates, LPA, James E. Arnold, Gerhardt A. Gosnell, II and *Damion M. Clifford,* for appellant BIGResearch, L.L.C.

Gordon P. Shuler, for appellant Prosper Business Development Corporation.

Carlille, Patchen & Murphy LLP, Carl A. Aveni II, H. Ritchey Hollenbaugh, and *Maria Marinao Guthrie,* for appellee PENN, L.L.C.

APPEALS from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Intervenor-appellant, Prosper Business Development Corporation ("Prosper"), and plaintiff-appellant BIGResearch, L.L.C. ("BIG"), filed separate appeals from a judgment of the Franklin County Court of Common Pleas confirming an arbitration award issued in December 2010. These cases have been consolidated for briefing and oral argument.

{¶ 2} The case presents issues concerning the duration and scope of an arbitrator's authority to resolve disputes submitted by business entities. Appellants Prosper and BIG challenge the authority of an arbitrator to award arbitration costs and attorney fees to defendant-appellee PENN, L.L.C. ("PENN") approximately two years after the issuance of the arbitrator's initial award. Under the circumstances of this case, we find that the arbitrator had jurisdiction and authority through the date of his conclusive final award on December 27, 2010 to assess arbitration costs and to award attorney fees. We further find that it was within the authority of the arbitrator to award attorney fees despite the absence of specific authority to do so in the governing arbitration clauses. We therefore affirm the trial court's judgment confirming the December 2010 arbitration award.

I. FACTS AND PROCEDURAL HISTORY

A. The Underlying Business Dispute and Illinois Litigation

{¶ 3} On October 30, 2000, Prosper and PENN entered into an operating agreement to form a third business entity, BIG. The parties intended BIG to be a profit-making business engaged in internet-related advertising, research and publishing. Initially, Prosper and PENN each held a 50 percent membership interest in the new entity. Subsequently, new investors were added, reducing the shares of Prosper and PENN to 47.39 percent each.

{¶ 4} The operating agreement established a three-member Board of Members ("the board"), consisting of Philip Rist and Gary Drenik, representing Prosper, and Jeffer Ali, representing Penn. The agreement vested Prosper with authority to make day-to-day decisions as to the management of BIG. In addition, Section 11.01 of the agreement provided that arbitration would be used to resolve "all disagreements among any of the parties relating to the management or conduct of the affairs of the Company."

{¶ 5} By February 2002, discord between BIG and PENN became evident. Dissatisfaction among the two entities grew, and, in February 2004, the parties discussed possible mechanisms by which PENN and BIG would sever their connections. Those discussions ended acrimoniously and without resolution. PENN and BIG, however, effectively terminated their active business relationship at that time.

{¶ 6} In May and July 2004, the board ostensibly adopted resolutions amending the original operating agreement. On May 4, 2004, the board took a vote on four proposed resolutions, although board member Ali, Penn's president, did not participate in the vote. BIG deemed the resolutions adopted based on the votes of Rist and Drenik, the remaining board members, both of whom were associated with Prosper. In July 2004, the board adopted four additional resolutions, again based on the majority vote of the board members voting without Ali's participation. On September 22, 2004, and pursuant to procedures established in the resolutions, BIG deemed Penn's interest in BIG to have been forfeited.

{¶ 7} On May 6, 2004, PENN formally demanded arbitration to determine the validity of the May resolutions. PENN asserted, inter alia, that the resolutions violated Section 5.01 of the original operating agreement, which required unanimous approval of the board to make "major financial decisions."

{¶ 8} The parties did not immediately engage in arbitration, however, and on September 8, 2005, PENN filed suit in Illinois to compel arbitration. On December 18, 2007, the parties entered into a written settlement agreement in which they reaffirmed the exclusive arbitration clause contained in the original BIG operating agreement. The parties thereafter selected an arbitrator, who conducted proceedings and held a three-day evidentiary hearing in May 2008.

B. The Arbitration Award of September 15, 2008

{¶ 9} On September 15, 2008, the arbitrator issued a 31-page written opinion captioned "Arbitration Award" containing an extensive recitation of facts and conclusions of law. In summary, the arbitrator found two of the May resolutions to have been properly adopted by majority vote; i.e., those two resolutions had not required a unanimous vote of all members of the board. The arbitrator concluded that two other May resolutions and all four July resolutions constituted "major financial decisions" of the board. Because changes of that nature required a unanimous vote under the operating agreement and because Penn's board member had not participated in the vote on these resolutions, the arbitrator found the latter resolutions to be invalid, null, and void. BIG had relied on these resolutions in declaring Penn's ownership interest to be forfeited. Accordingly, the arbitrator concluded that PENN had not forfeited its ownership interest in BIG but, rather, that PENN remained a member of BIG at all times. The arbitrator concluded that PENN was therefore entitled to receive a share of BIG's past profits, if any existed.

{¶ 10} The arbitrator further concluded, however, that he did not have evidence to determine the total amount of past profits due to Penn, although he noted that BIG had paid through year-end 2006 a total of $2,539,435.55 to Prosper and to a separate Prosper affiliate, Sino Marketing, Ltd. The arbitrator noted that no evidence had yet been produced regarding BIG's distributions in 2007 and 2008 because the issue of whether PENN possessed an ownership interest at all during these times had been a disputed matter. He ordered BIG to make redistribution to PENN of 47.39 percent of all prior distributions of profits made by BIG to its other investors and expressly stated that the "arbitrator retains jurisdiction to make a final determination of the amount of profits that are to be redistributed, if any." The arbitrator further ordered BIG to provide to PENN a statement from an outside accounting firm showing all distributions it had made to other investors, including any Prosper entity, for the period from BIG's inception to the date of the award.

{¶ 11} The arbitrator further declared BIG to be the non-prevailing party and, as such, liable to PENN for the costs of the arbitration pursuant to the arbitration clause of the original operating agreement. The arbitrator expressly defined "costs of the

arbitration" to include all fees and charges of the arbitrator, court reporter charges, hearing room and associated charges, and witness fees paid as required by statute, but not travel expenses, expert witness fees, or attorney fees. The arbitrator again referenced his continuing jurisdiction in the dispute, stating that he "retain[ed] jurisdiction in this matter to make a final determination of the costs of arbitration to be assessed against BIGResearch." Moreover, the arbitrator denied all claims that PENN had made against Prosper, denied all claims that Prosper had made against Penn, and denied BIG's claims against Penn.

C. Production of Additional Documents and PENN's Second Statement of Claims

{¶ 12} On March 30, 2009, PENN filed with the arbitrator a second statement of claims on its own behalf and derivatively on behalf of BIG. It alleged that BIG had provided to it a copy of BIG's 2007 tax return and that both BIG and Prosper had produced additional documents dating from as early as 2003 and as late as 2008. PENN asserted that the records disclosed for the first time that, between January 1, 2007 and September 15, 2008, Prosper and its related company, Sino Marketing, Ltd., had received distributions totaling $1,000,000 in an 18-month period. PENN sought additional relief based on the newly disclosed information. PENN further alleged facts justifying the inference that BIG and Prosper's failure to disclose these documents prior to the September 2008 award constituted a violation of a discovery order the arbitrator had previously issued.

D. The Arbitrator's Order of May 5, 2010

{¶ 13} Following Penn's filing of its second statement of claims, the parties filed motions and briefs relating to jurisdictional issues and other matters. On May 5, 2010, the arbitrator issued an additional order. The arbitrator noted that a special audit master had prepared a financial report subsequent to the September 2008 award and concluded that BIG had distributed $1,488,000.00 to Prosper between 2001 and 2008. The special audit master further concluded that implementation of the September 2008 award "would have resulted in a payment to PENN of $772,998.67 leaving Prosper with a windfall of $715,001.40 of distributions in excess of its equal member Penn." The

arbitrator observed that "[s]uch an unjust result is contrary to the clear intent of the Award," as "[t]he intent of the Award [was] to restore Penn as Prosper's membership equal before and during the purported forfeiture period up to the date of the award." The arbitrator reiterated that BIG should pay PENN the same amount it had previously distributed to the Prosper entities. But the arbitrator concluded that he could not at that time order Prosper to pay PENN sums to equalize the profit distributions because he had denied Penn's claims against Prosper on September 15, 2008.

{¶ 14} The arbitrator therefore granted what he characterized as "partial relief," stating in its order that Prosper could resolve the matter of profits redistribution by "voluntarily" choosing to tender $777, 917.13 to Penn, effectively leaving both Prosper and PENN with an identical net qualified distribution for the period preceding the September 15, 2008 award. In the event that Prosper did not choose to voluntarily equalize BIG's distributions by transferring funds to PENN within ten days from the date of the award, BIG would be ordered to pay PENN the sum of $1,488,000.00. That amount represented the amount the arbitrator found to be "improper distributions" BIG had made to Prosper prior to the arbitrator's September 2008 award.

{¶ 15} The arbitrator's justification for exercising continued jurisdiction was twofold: (1) he had not previously "made [a] final determination regarding the prior distribution of profits and damages," and (2) he had not previously determined the claims presented by PENN in its second statement of claims filed March 30, 2009. The arbitrator observed that his September 2008 award was final as to claims against Prosper that had been stated as of the date of that award. The arbitrator further noted that "[t]he final hearing on [Penn's] Second Statement of Claims may expand the responsibility for the redistribution damages and other compensation, but that is only speculation at this stage in the proceedings" and that "the import of the failure to disclose documents, the ramification of those documents, and the consequences for the non-disclosure are all matters for future determination." The arbitrator specifically stated that a "reallocation of arbitration costs between all parties * * * will be made, as necessary, in the Final Award on Penn's Second Statement of Claims."

E. Proceedings in the Court of Common Pleas and November 1, 2010 Judgment Entry

{¶ 16} On May 17, 2010, BIG filed a pleading in the court of common pleas naming PENN as the sole opposing party and asking the court to vacate the arbitrator's May 5, 2010 award. Thereafter, the arbitrator and the trial court simultaneously conducted additional proceedings.

{¶ 17} On November 1, 2010, the court entered judgment modifying the arbitration award. Prosper had not chosen to implement the arbitrator's "voluntary" option of paying PENN $777,917.13, and the court reasoned that a BIG payment to PENN of $1,488,000.00 would render BIG insolvent, a result prohibited by Delaware law.[1] Accordingly, the court modified the arbitrator's award and ordered Prosper to return $702,917.13 in previously received distributions to BIG, plus interest, and further ordered BIG to distribute that same sum to PENN within 10 days of the entry of its judgment.

{¶ 18} Prosper had not been found liable for the payment of any damages, costs, or fees prior to the court's November 1, 2010 order. On that same date, Prosper moved to intervene in the trial court proceedings, and the court granted the motion.

F. The Arbitration Award of December 27, 2010

{¶ 19} On December 27, 2010, the arbitrator issued a written arbitration award that noted that he had conducted a "final hearing" on October 5, 2010. The arbitrator found that Prosper had intentionally withheld evidence, including its 2007 tax return and other financial records, directly causing BIG to incur additional expenses. The award included a section entitled "Final Arbitration Award," in which the arbitrator ordered Prosper, "as a sanction for its improper conduct," to reimburse BIG and PENN for all costs of arbitration incurred subsequent to the arbitrator's invoice dated September 5, 2008, and ordered Prosper to pay the arbitrator's final bill, as well as any prior unpaid balance owed by BIG and/or Penn. The arbitrator further ordered BIG to pay PENN $25,000 as "partial reimbursement" of Penn's attorney fees, noting that BIG had directly

[1] Both PENN and BIG were limited liability corporations established in Delaware, and BIG's operating agreement provided that it should be interpreted consistent with Delaware law. The court observed that 6 Del. C. 18-607(A) precludes the paying of a distribution to a member where that payment would render the payor insolvent and that the Delaware statute further precludes a member from receiving a payment that would render the payor insolvent.

benefitted from Penn's actions to set aside the illegal actions of the board, which the arbitrator found to have been acting "under the direct influence of Prosper and its principals."

G. Further Proceedings in the Court of Common Pleas and September 9, 2011 Judgment Entry

{¶ 20} On March 15, 2011, PENN filed a motion in the pending common pleas court case asking the court to confirm the December 2010 arbitration award as well as the arbitrator's "interim orders." On March 25, 2011, Prosper filed a motion to vacate the December award. On that same date, BIG filed its own motion to partially vacate the December 2010 award, challenging the arbitrator's order that BIG pay PENN $25,000 attorney fees. On September 9, 2011, the common pleas court entered a final appealable order entering judgment resolving all remaining matters and confirming the December 2010 arbitrator's award. BIG and Prosper timely appealed.

{¶ 21} BIG has asserted and PENN has not disputed that, subsequent to the trial court's September 9, 2011 judgment, Prosper returned $730,490.43 to BIG and that BIG then made a distribution in the same amount to Penn. We are therefore not required to address the arbitrator's award of past profits to Penn. BIG and Prosper contend, however, that the trial court erred in confirming the December 27, 2010 award. Prosper asserts that the court erred in confirming the arbitrator's order that it pay PENN arbitration costs incurred after the date of the initial award in September 2008. BIG asserts that the court erred in confirming the arbitrator's order that BIG pay $25,000 in attorney fees to Penn.

II. LEGAL ANALYSIS

A. Governing Principles and Standard of Review

{¶ 22} The law in Ohio concerning judicial review of arbitration awards is well-established. " '[I]t is the policy of the law to favor and encourage arbitration and every reasonable intendment will be indulged to give effect to such proceedings and to favor the regularity and integrity of the arbitrator's acts.' " *Reynoldsburg City School. Dist. Bd. of Edn. v. Licking Heights Loc. School Dist. Bd. of Edn.*, 10th Dist. No. 11AP-173, 2011-Ohio-

5063 ("*Reynoldsburg II*"[2]) ¶ 19, quoting *Lake Cty. Bd. of Mental Retardation Dev. Disabilities v. Professional Assn. for the Teaching of the Mentally Retarded*, 71 Ohio St.3d 15, 17 (1994). Arbitration awards are presumed valid, and a reviewing court may not merely substitute its judgment for that of the arbitrator. *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.*, 49 Ohio St.3d 129, 131 (1990). " 'Judicial review of an arbitrator's decision is quite narrow.' " *Telle v. Estate of Soroka*, 10th Dist. No. 08AP-272, 2008-Ohio-4902, ¶ 9, citing *MBNA Am. Bank. N.A. v. Jones*, 10th Dist. No. 05AP-665, 2005-Ohio-6760. "When determining whether the arbitrator exceeded his powers, the reviewing court must confirm the arbitration award if it finds that the arbitrator's award draws its essence from the [underlying contractual agreement] and it is not unlawful, arbitrary or capricious." *Reynoldsburg II*, ¶ 22, citing *Miami Twp. Bd. of Trustees v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 81 Ohio St.3d 269 (1998), syllabus. A trial court may not evaluate the actual merits of an award and must limit its review to determining whether the award is defective within the confines of R.C. Chapter 2711. *Telle*, at ¶ 9.

{¶ 23} Moreover, a court of appeals reviewing a trial court's judgment concerning an arbitration award must confine itself to evaluating the order issued by the trial court pursuant to R.C. Chapter 2711; we may not review the substantive merits of the arbitrator's award absent evidence of material mistake or extensive impropriety. *Reynoldsburg II* at ¶ 22, citing *Warren Edn. Assn. v. Warren City Bd. of Edn.*, 18 Ohio St.3d 170, 173 (1985). These principles guide our review.

{¶ 24} This court has recognized that a trial court's judgment confirming an arbitration award is subject to review using an abuse-of-discretion standard. *See Telle*, ¶ 11, citing *MBNA Am. Bank. N.A.*, ¶ 11. Prosper and Big nevertheless argue that, in reviewing the trial court's December 27, 2010 judgment, we may reverse the court in the absence of an abuse of discretion. Prosper argues that we should review the trial court's decision confirming the arbitration award to determine whether it committed an error of

[2] This court has decided two cases captioned *Reynoldsburg City School. Dist. Bd. of Edn. v. Licking Heights Loc. School Dist. Bd. of Edn.*, both of which are referenced in this decision. The citation for the first, decided in 2008, is *Reynoldsburg City School. Dist. Bd. of Edn. v. Licking Heights Loc. School Dist. Bd. of Edn.*, 10th Dist. No. 08AP-415, 2008-Ohio-5969. We refer to this case as *Reynoldsburg I*. The citation for the

law. BIG argues that we should examine the trial court order de novo, citing *Barnesville Exempted Village School Dist. Bd. of Edn. v. Barnesville Assn. of Classified Employees*, 123 Ohio App.3d 272, 274 (7th Dist.1997), and *United Ohio Ins. Co. v. Cent. Mut. Ins. Co.*, 2d Dist. No. 2010 CA 21, 2011-Ohio-2432, ¶ 15.

{¶ 25} Prosper and BIG have not persuaded us to restate, abandon or overrule our precedent which is consistent with the general principles of judicial review stated above—a standard of judicial review that has been characterized as "among the narrowest known to the law." *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89, 91 (1978). In *Telle*, we observed that we would have affirmed the trial court under either standard of review—abuse of discretion or error as a matter of law. *Id.* at ¶ 11. That observation also applies to the case at bar. As discussed below, Prosper has failed to show a trial court abuse of discretion or an error of law leading to improper confirmation of the arbitrator's decision. On the contrary, we agree with the trial court that it was within the arbitrator's authority to issue the orders set forth in his December 2010 award.

B. Prosper's Assignment of Error

{¶ 26} Prosper's sole assignment of error posits that:

> THE TRIAL [COURT] ERRED AS A MATTER OF LAW WHEN IT CONFIRMED THE ARBITRATION AWARD DATED DECEMBER 27, 2010, ASSESSING COSTS OF ARBITRATION AGAINST APPELLANT PROSPER BUSINESS DEVELOPMENT CORPORATION, AND, IN THE SAME DECISION AND JUDGMENT, DENIED PROSPER'S MOTION TO VACATE THE SAME AWARD.

{¶ 27} R.C. 2711.10 permits the court of common pleas to vacate an arbitrator's award only for enumerated reasons. R.C. 2711.10(D) authorizes a trial court to vacate an award where the arbitrator "exceeded [his] powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Prosper argues that the trial court erred in failing to find that the arbitrator exceeded his powers in his December 2010 award. We separately address Prosper's arguments in support of its assignment of error.

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second, decided in 2011, is *Reynoldsburg City School. Dist. Bd. of Edn. v. Licking Heights Loc. School Dist. Bd. of Edn.*, 10th Dist. No 11-AP-173, 2011-Ohio-5063. We refer to this case as *Reynoldsburg II*.

1. Arbitrator's Authority as to Disputes Arising after December 18, 2007

{¶ 28} Prosper's first substantive argument is that the trial court erred in finding that the arbitrator had authority to resolve any disputes between the parties that arose after December 18, 2007, the date the parties settled the Illinois lawsuit. Prosper observes that the parties executed two documents containing mandatory arbitration provisions—the original operating agreement executed in 2000, and the settlement agreement resolving the Illinois lawsuit executed in December 2007. The text of the two clauses is similar. Prosper nevertheless argues that the two clauses produce different results.

{¶ 29} Section 11.01 of the 2000 operating agreement states, in part:

> *If a disagreement arises* concerning the management or conduct of the affairs of the Company, or any provision of this Agreement (or the performance of obligations hereunder, *including without limitation* an alleged breach of this Agreement, * * *) the disagreement, upon written request of any party to this Agreement, shall be submitted for binding arbitration in proceedings conducted in Columbus, Ohio.

(Emphasis added.)

{¶ 30} The December 18, 2007 settlement agreement provided, in part:

> Penn and the BigResearch Parties shall submit *all disputes between the parties, including, without limitation, disputes raised in the Arbitration Demands and the Lawsuit,* to arbitration in accordance with the terms of Article XI of that certain Operating Agreement of BigResearch LLC attached to the Lawsuit as Exhibit A. Except as modified in this Agreement, Section 11.01 of the Operating Agreement shall remain in effect and binding on the parties."

(Emphasis added.)

{¶ 31} Prosper acknowledges that the arbitration clause in the 2000 operating agreement provided an arbitrator authority to determine *all* disputes between the parties: past, present, and future. It argues that the arbitration clause in the 2007 settlement agreement, in contrast, authorized the arbitrator to resolve only disputes existing on the date of the settlement agreement, December 18, 2007. We reject this argument, as did both the arbitrator and the trial court.

{¶ 32} The December 2007 settlement agreement by its terms covered "all disputes" among Penn, Prosper and BIG. In this case, it is clear from the arbitrator's awards that he construed the 2007 arbitration clause as providing him authority to consider and resolve claims submitted to him after execution of the settlement agreement, as well as claims that the parties had expressly made prior to that date. The trial court found that interpretation of the arbitration clause to be neither arbitrary nor otherwise subject to attack under Ohio law. We agree.

{¶ 33} It is true that there is no express language in the December 18, 2007 settlement agreement permitting a yet-to-be-chosen arbitrator to thereafter exercise authority over claims that had not yet arisen or been articulated. But the arbitrator did not make a material mistake or an extensive impropriety in determining that he had the authority to resolve claims of that nature, and this court should not second-guess that substantive decision. *Reynoldsburg II* at ¶ 22 ("On appellate review, * * * the substantive merits of the award are not reviewable absent evidence of material mistake or extensive impropriety."). Had it been the intent of the parties to limit the arbitrator's authority to disputes and claims that had already been raised in prior arbitration demands, the parties could have expressly so provided. They did not. They instead expressly provided in the December 2007 settlement agreement that the arbitrator would be empowered to determine "all disputes between the parties, including, *without limitation*, disputes raised in the Arbitration Demands and the Lawsuit." (Emphasis added.) Prosper's interpretation requires elimination of the words "without limitation" from the contractual text. And Prosper would have us read this language to provide that the arbitrator had authority to determine only all *current* disputes, i.e., disputes that had been identified by the date of execution of the settlement. We refuse to rewrite the settlement agreement by eliminating some words and inserting others. To do so would change the meaning of the clause.

{¶ 34} Accordingly, the trial court did not commit an error of law nor abuse its discretion in finding that the governing arbitration agreements authorized the arbitrator to resolve claims arising after September 2007.

2. Arbitrator's Authority as to Prosper Subsequent to the September 15, 2008 Award

{¶ 35} On September 15, 2008, the arbitrator denied all claims against Prosper. Prosper argues that it was entitled to rely on the finality and enforceability of that award and that the arbitrator thereafter lacked authority to assess it arbitration costs. In support, Prosper cites a 2002 opinion from the Supreme Court of Ohio holding that an arbitrator has no power to modify or revoke a final award once made. *Miller v. Gunckle*, 96 Ohio St.3d 359, 2002-Ohio-4932.

{¶ 36} The trial court rejected this argument, concluding that the arbitrator's September 2008 award did not constitute a complete and final dismissal of Prosper from the case and observing that Prosper continued to vigorously participate in the arbitration proceedings after the September 2008 award. The trial court did not abuse its discretion nor err as a matter of law in making that conclusion.

{¶ 37} This court has previously recognized, consistent with *Miller*, that an arbitrator's powers expire when the issues submitted for arbitration have been decided and a final award has been made: "Once the issues submitted to arbitration are decided and an award is made, the arbitrator's powers expire." *Reynoldsburg City School Dist. Bd. of Edn. v. Licking Hts. Loc. School Dist. Bd. of Edn.*, 10th Dist. No. 08AP-415, 2008-Ohio-5969 ("*Reynoldsburg I*"), ¶ 22, citing *Fraternal Order of Police v. Athens*, 4th Dist. No. 01 CA18 (Nov. 14, 2001). Similarly, the First District Court of Appeals has held that an arbitrator may not make factual findings with respect to events that occurred after the conclusion of arbitration. *Accu-med Servs., Ltd. v. Omnicare, Inc.*, 1st Dist. No. C-020789, 2004-Ohio-655, ¶ 24.

{¶ 38} The question in the case at bar, then, is whether the arbitrator's September 2008 award was a final award that concluded the arbitration, thereby precluding the arbitrator from making subsequent awards against Prosper. We answer this question in the negative. The Supreme Court of Ohio observed in *Miller* that it is the decision of the submitted issues—plural rather than singular—that causes an arbitrator's powers to expire. *Miller* at ¶ 23. It would be inappropriate to read *Miller* to conclude that issuance of a partial award deciding some, but not all, pending issues terminates an arbitrator's powers.

{¶ 39} Our conclusion that an arbitrator is not divested of jurisdiction at the time the arbitrator issues a partial award is consistent with our own precedent in *Reynoldsburg I,* decisions from the Fourth and Eighth Ohio district courts of appeals, and with federal precedent interpreting the analogous Federal Arbitration Act, 9 U.S.C. 1, et seq. In *Reynoldsburg I,* we found that an arbitrator had "finally decided" an attorney-fees issue on August 23, 2002, and that the arbitrator *c*ould not thereafter change that decision or adjust the attorney-fees award. *Id.* at ¶ 22. But we further found that a monetary award made in the same case nearly two years later, on March 1, 2004, was a final order capable of confirmation under R.C. 2711.09. *Id.* at ¶ 28 ("[W]e conclude that the March 1, 2004 order awarding Reynoldsburg $31,022.09 is a final order capable of confirmation under R.C. 2711.09."). *Reynoldsburg I* therefore supports the premise that an arbitrator may make final resolution of different claims on different dates within the context of one arbitration; i.e., an arbitrator may make partial final awards as to some claims while retaining jurisdiction to later resolve other claims. Similarly, in determining whether an application to vacate an award had been timely filed, the Eighth District has held that the final arbitration award was the award that actually decided the merits rather than a preliminary award. *Donini v. Fraternal Order of Police,* 4th Dist. No. 08CA3251, 2009-Ohio-5810, ¶ 9. The court noted that "nothing in R.C. chapter 2711 suggests that the Ohio General Assembly intended to mandate piecemeal challenges in common pleas court to every single issue an arbitrator may decide." *Id. See also Reserve Recycling, Inc. v. E. Hoogewerff, Inc.*, 8th Dist. No. 84673, 2005-Ohio-512, ¶ 20.

{¶ 40} The vacatur provision of the Federal Arbitration Act, 9 U.S.C. 10(a)(4), is similar to R.C. 2111.10(D) in that both provide for the vacatur of an arbitration award where an arbitrator "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." In determining whether an award is final for purposes of appeal to the courts, federal courts have recognized a general rule that "[w]here an arbitrator believes the assignment is completed, the award is final and appealable," but "where the evidence establishes that the arbitrator does not believe the assignment is completed, the award is not final and appealable." *McKinney Restoration Co. Inc. v. Illinois Dist. Council, No. 1,* 932 F.3d 867, 872 (7th Cir.2004). *See also Olson v. Wexford Clearing Servs. Corp.*, 397 F.3d 488, 491

(7th Cir.2005), quoting *IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.*, 266 F.3d 645, 651 (7th Cir.2001) (finality of an arbitration award depends on whether the award itself " 'is incomplete in the sense of having left unresolved a portion of the parties' dispute' "), Thus, federal courts have acknowledged, as did we in *Reynoldsburg I*, that an arbitrator may determine the submitted issues in successive written awards. In the case at bar, the arbitrator clearly documented in both his September 2008 and May 2010 awards that he had not resolved all of the issues before him and did not consider the arbitration to be concluded.

{¶ 41} We therefore find that both the September 2008 award and the May 2010 award were partial final awards, neither of which resolved all the issues that had been submitted to the arbitrator. The issuance of those partial awards did not conclude the arbitration nor terminate the arbitrator's jurisdiction to resolve remaining issues and new claims subsequently filed by the parties. The arbitrator's authority did not terminate until the December 2010 final concluding award.

{¶ 42} Prosper argues that the arbitrator had no jurisdiction to consider Penn's second set of claims filed on March 30, 2009. PENN filed those claims after examining evidence that the arbitrator ultimately found to have been wrongfully withheld by Prosper prior to the September 15, 2008 award. But under the mandatory arbitration clauses, PENN could have made a new and separate demand for arbitration of claims based on conduct occurring after the September 2008 award. The arbitration clauses in both the operating agreement and the settlement agreement authorized, and indeed mandated, arbitration of those claims. If it was an error for the arbitrator to resolve the second set of claims in the absence of a new formal demand for arbitration, that procedural error does not rise to the level of a gross procedural impropriety and does not warrant vacation of the arbitrator's awards. " 'When disputing parties agree to submit their controversy to binding arbitration, they agree to accept the result, even if it is legally or factually wrong. * * * Binding arbitration precludes judicial review unless the arbitrators were corrupt or committed gross procedural improprieties. R.C. 2711.10.' " *Beldon v. Webb*, 122 Ohio App.3d 199, 202 (10 Dist.1997), citing *Huffman v. Valletto*, 15 Ohio App.3d 61, 63 (8th Dist.1984). *See also Olah v. Ganley Chevrolet, Inc.*, 8th Dist. No. 86132, 2006-Ohio-694

(only gross procedural error by an arbitrator warrants vacation of the arbitrator's award). Moreover, Prosper vigorously participated in defending against the second set of claims in the pending arbitration, and it would have been highly impractical for the parties to initiate an entirely new arbitration to resolve the second set of claims rather than incorporate them into the existing arbitration.

{¶ 43} The trial court did not err in rejecting Prosper's argument that the arbitrator lacked authority after the September 15, 2008 award to issue subsequent orders resolving additional claims. That award, although deemed final by the arbitrator in terms of resolving certain determinative issues raised in Penn's first arbitration demand, was not a final resolution of the entire arbitration and did not preclude the arbitrator from making monetary awards against Prosper in resolving Penn's second set of claims.

3. Assessment against Prosper of Arbitration Costs Incurred Subsequent to September 2008

{¶ 44} In his December 2010 order, the arbitrator ordered Prosper to pay for all costs of arbitration incurred subsequent to the arbitrator's invoice dated September 5, 2008, as well as the arbitrator's final bill and any prior unpaid balances owed by BIG and Penn. Prosper cites a provision in the mandatory arbitration clause in the original operating agreement that provided "the costs of the arbitration shall be paid by the non-prevailing party." It argues that the arbitrator found in September 2008 that BIG was the non-prevailing party and suggests that only BIG could thereafter be assessed arbitration costs. Prosper contends that the arbitrator could not thereafter charge it, a different party, additional arbitration costs.

{¶ 45} We find that the trial court did not abuse its discretion nor commit an error of law in confirming the arbitrator's order that Prosper pay arbitration costs arising after September 2008. The arbitrator considered the proceedings after September 2008 to include proceedings relative to Penn's second statement of claims. Those claims alleged misconduct on the part of Prosper in withholding relevant documents from the other parties to the arbitration and from the arbitrator himself. Ultimately, the arbitrator found those claims to be well-taken. Accordingly, it was neither arbitrary nor capricious for the arbitrator to treat Prosper as a non-prevailing party liable for purposes of assessing arbitration costs incurred during the post-September 2008 period. As discussed above,

the arbitrator had the authority to resolve some issues in a partial final order while retaining other issues for subsequent determination. It is not illogical, arbitrary or capricious for an arbitrator to find one party to be the non-prevailing party as to some claims and another party to be the non-prevailing party as to other claims.

{¶ 46} Prosper further argues that the arbitrator lacked express authority under the governing arbitration agreements to issue sanctions and that the award of arbitration costs was a sanction. PENN argues in response that arbitration would become a toothless exercise if an arbitrator had no authority to issue sanctions when he finds a party to have blatantly disregarded the ground rules set by the arbitrator, including discovery rules. It is clear from the arbitrator's May 2010 award that he would have resolved Penn's initial claims differently in September 2008 had Prosper timely complied with the discovery order. The result of accepting Prosper's argument would be to allow Prosper to benefit from its own misconduct in violating the discovery rules established by the arbitrator.

{¶ 47} Moreover, in the December 2007 settlement agreement, the parties expressly provided that the "arbitrator shall have the authority to determine all issues relating to discovery." The arbitrator found in his December 2010 award that, prior to the first evidentiary hearing held in May 2008, Prosper had intentionally and wrongfully withheld evidence demonstrating its own self-dealing and attempts to make BIG judgment proof, including information concerning BIG's distributions to Prosper and other members. The arbitrator found that this conduct not only violated his discovery orders but also resulted in additional arbitration expenses. It is not unreasonable for the arbitrator to conclude that the appropriateness of issuing sanctions for violating a discovery order was an "issue relating to discovery" falling within the scope of the December 2007 mandatory arbitration clause.

C. BIG's Assignment of Error

{¶ 48} BIG's sole assignment of error posits that:

> THE LOWER COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN AFFIRMING THE ARBITRATOR'S DECEMBER 27, 2010 ORDER THAT AWARDED DEFENDANT-APPELLEE, PENN, LLC $25,000 IN LEGAL FEES.

{¶ 49} As did Prosper, BIG also contends that the trial court erred in confirming the arbitrator's December 2010 order. BIG specifically contends that the trial court erred in confirming the arbitrator's order that BIG pay PENN $25,000 in attorney fees. It argues that no evidence existed to support that amount of attorney fees. It further argues that an award of attorney fees contradicts the arbitrator's earlier finding that BIG's operating agreement forbade an award of attorney fees. Finally, BIG argues, as did Prosper, that the arbitrator's award of May 5, 2010 constituted his full and final award and that his jurisdiction therefore terminated on that date, invalidating the December 2010 award. We address these arguments in order.

1. Arbitrator's authority to award attorney fees.

{¶ 50} BIG argues that language contained in the arbitrator's 2008 award defining "costs of arbitration" precluded the arbitrator from ordering BIG in 2010 to pay attorney fees to Penn. In his 2008 award, the arbitrator found BIG be the non-prevailing party and awarded the costs of the arbitration in favor of PENN and against BIG. The arbitrator did not include attorney fees as part of those costs expressly stating " 'costs of arbitration' do not include travel expenses, expert witness fees or attorney fees." (Order at 31.) But the fact that the arbitrator did not include attorney fees in the definition of "costs of arbitration" in making his September 2008 award does not logically compel the conclusion that the arbitrator could not thereafter make a separate award of attorney fees. In fashioning an appropriate remedy, the arbitrator had authority to award both. In short, the arbitrator did not conclude in September 2008 that the operating agreement forbade an award of attorney fees.

{¶ 51} An arbitrator has "broad authority to fashion a remedy, even if the remedy contemplated is not explicitly mentioned in the labor agreement." *Queen City Lodge. No. 69,* 63 Ohio St.3d 403, 407 (1992). And this court has observed that the arbitrator's broad power to create an appropriate remedy may, in appropriate circumstances, include the authority to order the payment of attorney fees. We recognized in 2001 that an arbitrator had authority to award attorney fees where the arbitration agreement provided at least colorable support for the arbitrator's award of attorney fees. *Victoria's Secret Stores, Inc. v. Epstein Contracting, Inc.*, 10th Dist. No. 00AP-209 (Mar. 8, 2001). In the case at bar, the parties in their December 2007 settlement agreement had provided that the

"arbitrator shall have the authority to determine all issues relating to discovery," providing colorable support to the arbitrator's authority to award attorney fees. And we observed in *Victoria's Secret* that equitable reasons may support an award of attorney fees to a prevailing party in an arbitration as that award contributes to making the prevailing party whole for the expenses arising from the breach of contract. *Id.* at 5. We expressly noted that the "American Rule," which establishes that each party in a civil case is generally responsible for their own attorney fees, does not apply in arbitration proceedings. *Id.*

{¶ 52} BIG argues that the record before the arbitrator lacked evidence to support the award and its amount. It is true that, in a civil action in an Ohio court of law, an award of attorney fees is dependent upon the completion of prescribed procedures and analyses, e.g., a lodestar analysis. *See generally Miller v. Grimsley*, 10th Dist. No. 09AP-660, 2011-Ohio-6049, citing *Bittner v. Tri-Cty. Toyota, Inc.*, 58 Ohio St.3d 143, 2011-Ohio-6049. BIG has not, however, cited any precedent extending those procedures to arbitrations. And in agreeing to arbitration, the parties trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. *DePalmo v. Schumacher Homes, Inc.*, 5th Dist. No. 2001CA272, 2002-Ohio-770, citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985).

{¶ 53} At the time the arbitrator awarded attorney fees, the arbitration proceedings had been underway for over three years. During those three years, Penn's counsel had vigorously litigated the issues both in writing and in person, a fact with which the arbitrator, a former civil court trial judge and an attorney with 33 years of experience, was well familiar.[3] In reviewing the $25,000 award of attorney fees to Penn, the trial court characterized the award as "modest." It further determined that the arbitrator acted within his authority and that the award was neither arbitrary nor plainly wrong. The trial court did not abuse its discretion or commit an error of law in finding the arbitrator's

[3] In its September 9, 2011 final judgment, the trial court observed that the arbitrator had again entered public service in Indiana as chief deputy prosecutor for Marion County and further observed that one "might be tempted to speculate that he undertook public service rather than face further work as an arbitrator in this case of *Bleak House* proportions."

award of attorney fees in the amount of $25,000 was neither arbitrary, capricious, nor unlawful.

2. Interim Nature of May 5, 2010 Award

{¶ 54} Finally, like Prosper, BIG contends that the arbitrator's jurisdiction ended at the time a partial final award was issued. BIG argues that the May 2010 award constituted the arbitrator's full and final award and that his jurisdiction therefore terminated on that date, invalidating the December 2010 award. We rejected Prosper's analogous argument in section II(B)(2) of this opinion.

{¶ 55} Similarly, the arbitrator did not consider the May 2010 award to be a final resolution of all the submitted disputes. In the May 2010 order, the arbitrator expressly stated that he intended to resolve the claims presented in Penn's second set of claims as well as issues remaining from the original claims, ordering that a "final hearing on the Second Statement of Claims is required." He expressly reserved certain issues for later determination, stating "A prevailing party shall be determined for each matter *yet to be resolved*, i.e., amount of profit redistribution, financial discovery disputes and assessment of costs of arbitration." (Emphasis added.) Both the arbitrator and the trial court deemed the December 2010 award to be the final conclusion of the arbitration—not the May 2010 award. Until that final conclusion, the arbitrator retained authority to craft his final resolution of the dispute including an award of attorney fees.

III. CONCLUSION

{¶ 56} The trial court found that the arbitrator had not exceeded his authority and that the December 2010 award was not unlawful, arbitrary or capricious; therefore, the court confirmed it. We have reviewed the trial court's order and conclude that the trial court did not abuse its discretion nor commit an error of law in doing so. Therefore, both Prosper's and BIG's assignments of error are not well-taken.

{¶ 57} For the foregoing reasons, both assignments of error raised by the appellants are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed

BROWN, P.J., and BRYANT, J., concur.

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