# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

**Diversified Enterprises, Inc.**
**Plaintiff Below, Petitioner**

**vs) No. 101516** (Raleigh County No. 08-C-104-K)

**CIT Technology Financing Services, Inc.**
**Defendant Below, Respondent**

**FILED**
**April 18, 2011**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

## MEMORANDUM DECISION

Petitioner Diversified Enterprises, Inc. files this timely appeal from the circuit court's judgment order confirming and adopting a binding arbitration award in favor of Respondent CIT Technology Financing Services, Inc. ("Respondent CIT") Petitioner seeks a reversal of the judgment order and a remand for further proceedings. Respondent CIT has filed a timely response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

In October of 2002, petitioner entered into a sixty month lease to purchase a piece of heavy equipment from IFC Credit Corporation ("IFC"). The equipment lease agreement contained the following arbitration provision:

> 21. Arbitration. At our sole selection, we may subject any matter arising out of or relating to this transaction, including any claim, counterclaim, setoff or defense, to binding arbitration by The American Arbitration Association at any site of our choice. The decision of the arbitrator(s) shall be final and binding and may be entered as required by any court having jurisdiction thereof.

IFC assigned its rights in the lease to First Portland Corporation, d/b/a First Corp. ("First Portland"), a subsidiary of IFC. Approximately a year later, First Portland assigned

its rights in the lease to Respondent CIT. Thereafter, a dispute arose over petitioner's payments on the lease. Respondent CIT hired a collection agency, Dynamic Recovery Services, Inc. ("Dynamic") to pursue debt recovery against petitioner. Petitioner filed a declaratory judgment action in the circuit court against Respondent CIT and its collection agency, Dynamic, alleging causes of action for breach of contract and violations of the Fair Debt Collection Practices Act. Petitioner alleged that payments it made under the lease were improperly credited and that Respondent CIT and Dynamic had engaged in harassment.

On June 18, 2009, petitioner and Respondent CIT entered into an additional agreement regarding arbitration of the underlying case. The terms of this agreement included that: (1) Stephen Thompson would be the sole arbitrator; (2) such arbitration would be binding in all respects and enforceable by the circuit court; and (3) that those signing the agreement had authority from their clients to sign the agreement. The letter accompanying this agreement indicated that although the arbitration clause in the lease provided for an American Arbitration Association ("AAA") arbitrator, the parties' chosen arbitrator Mr. Thompson was not a AAA arbitrator and that the arbitration would be binding "even though it will not be conducted under the auspices of AAA or by a AAA arbitrator." The circuit court stayed the declaratory judgment action pending the outcome of the arbitration.

The arbitrator allowed the parties to submit briefs and documentation in support of their respective positions. The arbitrator and the parties participated in multiple telephonic conference calls. A formal hearing was not held. The arbitrator rendered his decision and award, finding that Respondent CIT was entitled to the following recovery: $66,742.79 in unpaid rental charges and late charges; $18,849.98 in attorney's fees and Respondent CIT's portion of arbitration costs; prejudgment interest at the rate of 9.75% per annum through April 19, 2010, on the $66,742.79 "which was due and owing as of the date of the filing of this action and prior to 1-1-08"; and post-judgment interest on all amounts at a "collective simple rate of 7.0% until paid."

Respondent CIT filed a motion asking the circuit court to enter the arbitration award as a final judgment. Petitioner opposed this motion and raised the same arguments as in this appeal. Finding that petitioner had not offered a showing of good cause against entry of the judgment, the circuit court entered a judgment order confirming and adopting the arbitration award and dismissing petitioner's claims against Respondent CIT, with prejudice. Petitioner appeals that judgment order.

## Alleged Errors in Arbitration Award

"Awards by arbitration are to be favorably and liberally construed and are not to be set aside unless they appear to be founded on grounds clearly illegal." Syl. Pt. 3, *Hughes v.*

*National Fuel Company.*, 121 W.Va. 392, 3 S.E.2d 621 (1939), overruled on other grounds by *The Board of Education of the County of Berkeley v. W. Harley Miller, Inc*., 160 W.Va. 473, 489 n.7, 236 S.E.2d 439 (1977). As this Court recognized in *Clinton Water Association v. Farmers Construction Company*, 163 W.Va. 85, 87, 254 S.E. 2d 692 (1979), "It has long been the rule in this State that where parties have undertaken arbitration, their award is binding and may only be attacked in the courts on the basis of fraud or on those grounds set out in W.Va. Code, 55-10-4." That statute provides that an arbitration award shall not be set aside

> except for errors apparent on its face, unless it appears to have been procured by corruption or other undue means, or by mistake, or that there was partiality or misbehavior in the arbitrators, or any of them, or that the arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

W.Va. Code §55-10-4, in relevant part.

Petitioner argues that the circuit court should not have entered the judgment order confirming and adopting the arbitration award because of the following alleged errors by the arbitrator: the failure to hold a formal arbitration hearing; the improper imposition of interest; and the favored treatment of Respondent CIT.

Petitioner initially argues that the arbitrator erred in dispensing with a formal arbitration hearing and deciding the matter based upon the parties' submissions of evidence and briefs. Petitioner contends that the requirement in the equipment lease arbitration clause that the binding arbitration would be conducted by the AAA must be read as also requiring the use of AAA rules. Petitioner argues that such rules provide for a formal hearing to permit the parties to present evidence and argue their positions. Petitioner acknowledges that the AAA rules provide for a waiver of such hearing, but the waiver must occur by written agreement. Petitioner notes that the parties' letter agreement of June 18, 2009 did not expressly waive such formal arbitration hearing. Although this letter agreement contained the the parties' agreement to use a non-AAA arbitrator, petitioner contends that it did not alter the implicit condition that the AAA rules apply or that a formal arbitration hearing be held. As such, petitioner argues that the arbitrator lacked the authority to dispense with a formal arbitration hearing.

Respondent CIT responds that the parties mutually selected the non-AAA arbitrator and jointly agreed that the arbitration would be conducted using flexible procedures unbound by the AAA standards and rules. Because this matter was based upon a simple lease dispute, the parties further agreed during the arbitration to present their respective legal and factual

positions through written briefs and joint telephonic conference calls. Respondent CIT states that at no time during the arbitration process did petitioner ever request a hearing or even suggest that it needed a more formal opportunity to present evidence. Further, Respondent CIT notes that petitioner has not directed this Court to any evidence that the use of non-formal procedures prevented it from submitting for consideration by the arbitrator.

Petitioner also argues that the arbitrator applied improper prejudgment interest which should have been a "red flag" to the circuit court that the entire arbitration award was faulty. Respondent CIT disputes that the interest was improperly calculated. Finally, petitioner argues that the arbitrator's misconduct should have precluded the circuit court's entry of the judgment order based upon the arbitration award.

The Court notes that petitioner's allegations of arbitrator misconduct are nonspecific and vague and appear to be predicated, at least in part, upon petitioner's subjective belief that the arbitrator favored Respondent CIT. Petitioner specifically acknowledges, however, that the arbitrator did not "intentionally cater to the desires of Respondent CIT at [petitioner's] expense." Nonetheless, petitioner contends that there is sufficient evidence of misconduct to warrant setting aside the arbitration award and remanding for full adjudication on the merits. The Court disagrees and finds that the petitioner fails to establish such misconduct by the arbitrator. Further, this Court recognizes that petitioner's arguments regarding this alleged misconduct appear to be based, in part, upon dissatisfaction with actions of the counsel who represented petitioner during the arbitration. Such arguments are not germane to the issue of alleged misconduct by the arbitrator.

After careful consideration of the record and arguments of counsel, this Court concludes that there was no error in the circuit court's entry of judgment in favor of Respondent CIT based upon the binding arbitration award. Accordingly, we affirm.

Affirmed.

**ISSUED:** April 18, 2011

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh