Affirmed and Memorandum Opinion filed April 8, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00613-CV

LONG LAKE, LTD., Appellant

V.

JULIE HEINSOHN, Appellee

On Appeal from the 164th District Court
Harris County, Texas
Trial Court Cause No. 2007-49889

MEMORANDUM OPINION

This case, which arises from a dispute concerning the allegedly defective construction of a residence, was arbitrated pursuant to the Federal Arbitration Act, and the trial court confirmed the award. Appellant contends the trial court erred in confirming the award, but because the record is incomplete, appellant's arguments present nothing for our review. We therefore affirm the trial court's judgment. We deny appellee's motion for expedited consideration and her request for attorneys' fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

Julie Heinsohn sued Long Lake, Ltd. in district court for alleged fraud in a real estate transaction. The case was stayed while the dispute was arbitrated pursuant to the Federal Arbitration Act. The arbitrator issued an order awarding Heinsohn damages of approximately $147,395, which included $50,100 for the costs to cure the defect and $50,100 in attorneys' fees. Long Lake moved to vacate part of the award, arguing that the damages awarded for Heinsohn's attorneys' fees and her costs to cure the construction defect were really impermissible diminution-in-value damages. Pursuant to Texas Property Code section 438.001, Long Lake asked the trial court to vacate the award of these damages on the grounds that they were awarded in manifest disregard of Texas law. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 458, § 1.01, 2003 Tex. Gen. Laws 1703, 1721–22 (expired Sept. 1, 2009) ("[A] court shall vacate an award in a residential construction arbitration upon a showing of manifest disregard for Texas law."). In support of the motion, Long Lake relied on the affidavit of Pascal Paul Piazza, one of its attorneys, who stated that Heinsohn's expert witness Charles Cotrone testified at the arbitration only as to the diminution in the value of Heinsohn's home.

The day after filing the motion, Long Lake filed two volumes of documents it entitled "Record: Pleadings/Instruments" and three volumes of material Long Lake referred to as "Record: Exhibits." The covering document to each volume is unsigned. Volumes 1 and 2 of "Record: Exhibits" contain identical tables identified as "Claimant's Exhibit List." Each table contains a column listing forty-two exhibits followed by columns labeled "Offer," "Obj.," "Admit," and "N/Admit"; each cell in these columns is blank. Volume 3 of "Record: Exhibits" contains two copies of a table labeled "Long Lake, Ltd.'s Exhibits." One column in the table describes exhibits numbered 43 through 58, and the remaining three columns, labeled "Offer," "Objection," and "Admitted," are blank.

Heinsohn moved to confirm the arbitrator's award, and in response to Long Lake's motion, pointed out that the arbitration proceedings were not transcribed and no official record of those proceedings exists. The trial court denied Long Lake's motion to vacate and confirmed the arbitrator's award.

On appeal, Heinsohn moved for expedited consideration. In addition, she asks that we award her attorneys' fees pursuant to Texas Rule of Appellate Procedure 45, which permits us to award damages for frivolous appeals of civil cases.

II. ISSUES

In two issues and seven sub-issues, Long Lake challenges the trial court's order confirming the arbitrator's award and denying Long Lake's motion to vacate the award.

III. ANALYSIS

A. Long Lake's Arguments

According to Long Lake, the arbitrator wanted to award damages to Heinsohn for diminution in the value of her home, but because he knew that such an award was contrary to Texas law, he simply relabeled half of such damages as "costs to cure" and half of them as "attorneys' fees." In effect, these allegations challenge the sufficiency of the evidence supporting the arbitrator's awards of attorneys' fees and costs of cure.

Although there are many reasons why Long Lake's contentions do not provide grounds for vacating the award, we need not address them all. *See* TEX. R. APP. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal."). It is sufficient to point out that these allegations cannot be evaluated without a complete record of the arbitration proceedings, and none exists. *See Gumble v. Grand Homes 2000, L.P.*,

No. 05-06-00639-CV, 2007 WL 1866883, at *3 (Tex. App.—Dallas June 29, 2007, no pet.) (explaining that absent a record of the arbitration proceedings, the court cannot evaluate an argument that the arbitrator failed to apply exclusive remedies for residential construction defects); *GJR Mgmt. Holdings, L.P. v. Jack Raus, Ltd.*, 126 S.W.3d 257, 263 (Tex. App.—San Antonio 2003, pet. denied) (stating that without a record, the court has "no way of judging" whether allegations of arbitrator's gross mistake were supported).

It is well-established that an arbitration award has the effect of a judgment of a court of last resort. *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002). As such, it is entitled to great deference, and every reasonable presumption is indulged to uphold the arbitrator's decision. *Id.* A non-prevailing party seeking to vacate an arbitrator's award therefore bears the burden to produce a complete record establishing the claimed basis for relief. *Anzilotti v. Gene D. Liggin, Inc.*, 899 S.W.2d 264, 267 (Tex. App.—Houston [14th Dist.] 1995, no writ). Without a transcription of the arbitration proceedings, courts must presume that adequate evidence supports the award. *See, e.g., In re Chestnut Energy Partners, Inc.*, 300 S.W.3d 386, 401 (Tex. App.—Dallas 2009, pet. filed); *Statewide Remodeling, Inc. v. Williams*, 244 S.W.3d 564, 568–69 (Tex. App.—Dallas 2008, no pet.); *Jamison & Harris v. Nat'l Loan Investors*, 939 S.W.2d 735, 737 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *Grand Homes 96, L.P. v. Loudermilk*, 208 S.W.3d 696, 706 (Tex. App.—Fort Worth 2006, pet. denied); *Kline v. O'Quinn*, 874 S.W.2d 776, 783 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *House Grain Co. v. Obst*, 659 S.W.2d 903, 906 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

Long Lake argues that these cases are outdated and inapposite because they were decided before the legislature enacted section 171.093 of the Civil Practice and Remedies Code,[1] or rely on cases decided before the statute was enacted. This statute provides that

[1] *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 5.01, 1997 Tex. Gen. Laws 327, 335 (eff. Sept. 1, 1997).

"[t]he court shall hear each initial and subsequent application [to confirm or vacate an arbitration award] in the manner and with the notice required by law or court rule for making and hearing a motion filed in a pending civil action in a district court." TEX. CIV. PRAC. & REM. CODE ANN. § 171.093 (Vernon 2005). This statute does not dispense with the requirement of a record; to review an arbitration award to determine whether an arbitrator failed to apply exclusive remedies there must be a record of the arbitration proceedings. As the above-cited cases illustrate, the lack of a complete record of the arbitration proceedings has precluded review both before and after section 171.093 was enacted.

Contrary to Long Lake's arguments, the absence of a record of the arbitration proceedings is not cured by the documents and the affidavit Long Lake filed in the trial court. *See Shulte v. Hoffman*, 18 Tex. 678, 681–82, 1857 WL 5022, at *3 (1857) ("To set aside an award there must be something more than the party's own affidavit that the arbitrators did not give due weight and consideration to the evidence before them."); *Statewide Remodeling*, 244 S.W.3d at 569 ("Neither the attorneys' recollection of what testimony was or was not before the arbitrator nor the attachments to the motion to vacate provide a complete record of the arbitration proceedings.").

Long Lake further asserts that Texas Rule of Appellate Procedure 34.6(c)(4) required the trial court to presume that the record before it was complete, but the Rules of Appellate Procedure do not apply to a civil proceeding in a district court. *See* TEX. R. APP. P. 1.1; TEX. R. APP. P. 3.1(b). Long Lake's reliance on rules applicable to motions for summary judgment is similarly unavailing because Long Lake did not file a motion for summary judgment. In sum, the absence of a complete record of the arbitration proceedings precludes review of Long Lake's arguments. We therefore overrule the issues Long Lake presents on appeal.

B. Heinsohn's Requests for Relief

If a court of appeals determines an appeal is frivolous, it may, after notice and a reasonable opportunity for response, award just damages to the prevailing party. TEX. R. APP. P. 45. Heinsohn argues that because there is no complete record of the arbitration proceedings, Long Lake's appeal is frivolous, and she asks that we exercise our discretion to require Long Lake to pay her attorneys' fees.

We exercise such discretion "with prudence, caution, and after careful deliberation," imposing sanctions only when the circumstances are truly egregious. *Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co.*, 164 S.W.3d 438, 448 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Such circumstances include failure to present a complete record, raising unpreserved errors that were not asserted in the trial court, failure to file a response to a request for appellate sanctions, and filing an inadequate brief. *Tate v. E.I. Du Pont de Nemours & Co.*, 954 S.W.2d 872, 875 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

Here, Long Lake failed to provide a complete record of the arbitration proceedings and failed to respond to Heinsohn's request for sanctions, but its arguments, although novel, were adequately briefed and it has not attempted to raise new issues on appeal. We are not persuaded that the record in this case evidences such egregious circumstances that sanctions against Long Lake are warranted. *See Baker Hughes*, 164 S.W.3d at 448.

Heinsohn also filed an unverified motion asking us to expedite our ruling. We deny the motion as moot.

IV. CONCLUSION

Because the record does not support either party's requests for relief, we overrule each of the issues presented by Long Lake, deny Heinsohn's request for attorneys' fees and her motion to expedite the appeal, and affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.