In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00162-CV

GE COMMERCIAL DISTRIBUTION FINANCE CORPORATION, Appellant

V.

MOMENTUM TRANSPORTATION SERVICES, L.L.C., Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 06-03-02273 CV

MEMORANDUM OPINION

We are asked to consider whether the trial court erred in vacating an arbitration award that is subject to the Federal Arbitration Act ("FAA").[1] GE Commercial Distribution Finance Corporation ("GE") appeals the trial court's order that vacated the judgment confirming the arbitration award. The trial court also placed the case on its trial docket. We conclude the trial court erred by vacating the arbitration award. Therefore, we reverse the trial court's

[1]*See* 9 U.S.C.A. §§ 1-16 (West 2009).

order vacating the arbitration award and order the trial court to confirm the Final Award of Arbitration.

Background

In a rather complex commercial relationship, several companies, including GE, acted as creditors in financing the business of Momentum Transportation Services, L.L.C. ("Momentum"), who retailed trailers. Momentum acted as a dealer for several different manufacturers. Deutsche Financial Services Corporation ("DFS") and Textron Financial Corporation ("Textron") were two of the companies that also acted as creditors in financing Momentum's inventory. Momentum had separate Wholesale Financing Agreements with DFS and Textron.

Momentum's Wholesale Financing Agreement with DFS, dated January 27, 2000, contains a broad arbitration clause. The Textron agreement has no arbitration clause. Over two years after DFS contracted to finance Momentum's inventory, DFS changed its name to GE, and then two years after that date, DFS merged into another corporation, which also became known as GE.[2]

Momentum's agreement with DFS was not exclusive. At various times, Momentum purchased some of its inventory from Universal Trailer Corporation, ("UTC") and financed that inventory with another creditor, Textron. Momentum and UTC did not have a written

[2]From the record it appears that after Deutsche Financial Services Corporation changed its name to GE Commercial Distribution Finance Corporation, GE merged with another corporation, Transamerica Commercial Finance Corporation. While Transamerica was the surviving entity, it then changed its name to GE.

agreement. In May 2005, UTC terminated its agreement with Textron, and notified Momentum that it could finance future purchases and certain existing inventory through GE. However, UTC notified Momentum that Momentum could continue to finance UTC manufactured products through Textron until July 31, 2005, and Momentum chose to do so.

Subsequently, Momentum decided to exit the retail-trailer market. In June 2005, Momentum instructed GE, in a "Letter of Direction" to pay off Momentum's debt to Textron. The Letter of Direction states that the terms of Momentum's "Security Agreement" with GE governed the transaction.[3] In September 2005, Momentum executed a "Voluntary Surrender" agreement that allowed GE to dispose of certain inventory by selling it back to the manufacturers. The Voluntary Surrender states, in part:

> Reference is made to that certain Agreement for Wholesale Financing by and between [Momentum] and [GE] dated as of 1/27/2000, and all amendments, agreements and other documents executed in connection therewith (collectively, the "Agreement"). . . .
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[3]The relevant portions of the "Letter of Direction" read as follows:

> We hereby authorize and direct [GE] to pay [Textron] the sum of $434,655.26, which shall be an additional amount of the outstanding indebtedness owed to [GE] under our financing agreement(s) with [GE] (collectively, "Security Agreement"). The above amount represents the total sum now outstanding under our financing relationship with Lenders.
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> We further affirm that by [GE]'s payment made hereunder, [GE] will obtain a first and prior security interest in all of the applicable collateral described in the Security Agreement or any other agreement between us, and that we will pay [GE] therefore under the terms and conditions of the Security Agreement and any other written agreements between us [.]

> [Momentum] agrees that neither this Voluntary Surrender nor [GE]'s taking of possession of any Collateral shall constitute or is in any way a waiver of (i) any right or remedies of [GE] under the Agreement, existing as a matter of law or in equity, or otherwise inuring to the benefit of [GE], or (ii) [GE]'s right to any deficiency or to collect any indebtedness due from [Momentum] or any guarantors. [GE] has reserved all of its rights and remedies. THEREFORE, DEALER AGREES THAT THE SURRENDER AND TRANSFER OF THE COLLATERAL IS UPON THE EXPRESS CONDITION THAT [MOMENTUM] SHALL CONTINUE TO BE BOUND BY THE TERMS OF THE AGREEMENT INCLUDING, WITHOUT LIMITATION, LIABILITY TO [GE] FOR ANY DEFICIENCY REMAINING AFTER THE TRANSFER AND DISPOSITION OF SUCH COLLATERAL.
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> . . . Any claims between the parties concerning the subject matter herein will be conducted pursuant to the terms of the Agreement for Wholesale Financing. . . .

According to Momentum, each manufacturer was contractually obligated to repurchase its inventory from GE. Further, Momentum contends that the manufacturers agreed to repurchase their respective inventory dollar-for-dollar, representing one hundred percent of Momentum's wholesale cost. Following the surrender, each of the manufacturers, except UTC, bought back its inventory dollar-for-dollar.

UTC did not agree to repurchase its inventory from GE on a dollar-for-dollar basis. Instead, UTC repurchased its trailers from GE at eighty-five percent of Momentum's original purchase price. As a consequence, Momentum's outstanding debt to GE was not completely satisfied by UTC's repurchase payment. When GE demanded that Momentum pay its remaining debt to GE, Momentum refused. Subsequently, GE refused to release liens on

those portions of Momentum's inventory that GE claimed were subject to GE's Wholesale Financing Agreement.

The dispute between the parties led to litigation. In March 2006, Momentum filed suit in Montgomery County against GE, and among its claims, asserted that GE had breached its contract and had failed to file lien termination statements. GE filed a motion to compel arbitration of Momentum's claims. GE also pursued its own claim for arbitration with the American Arbitration Association ("AAA"), seeking to recover the balance of Momentum's remaining debt. Momentum subsequently added UTC as an additional defendant in its Montgomery County lawsuit.

On November 2, 2006, the trial court granted GE's motion to abate and compelled the case to arbitration. On November 16, 2006, the trial court referred Momentum's claims against UTC to the AAA to be handled along with GE's and Momentum's arbitration.

At that point, Momentum filed claims in the arbitration proceeding against both GE and UTC. Momentum alleged that GE (1) failed to file termination statements, (2) breached its contract, (3) violated the Texas Occupation Code, (4) breached its fiduciary duty, and (5) conspired with UTC to harm Momentum. Momentum also sought to enforce its rights as an alleged third-party beneficiary to the contract between GE and UTC. Momentum asserted the same claims in the arbitration proceedings as it had asserted against GE in its lawsuit.

On April 7, 2008, following a five-day arbitration hearing, the arbitrator issued an award. The arbitrator found against Momentum on its claim that it was a third-party

beneficiary of the contract between GE and UTC. However, Momentum successfully defended against GE's claim to recover the balance of its alleged debt to GE. The arbitrator ordered that GE and Momentum take nothing on their claims against each other because they had "acted in concert" with each other.

In July 2008, Momentum asked the trial court in Montgomery County to vacate the arbitration award. Instead, on August 13, 2008, the trial court entered a final judgment confirming the arbitrator's award. Within thirty days, Momentum asked the trial court to set aside its judgment, or in the alternative, requested that the trial court grant a new trial. On November 7, 2008, after a non-evidentiary hearing, the trial court set aside the August 13, 2008 judgment. Subsequently, in March 2009, the trial court conducted an evidentiary hearing to again address whether to confirm the award. Afterward, the trial court again vacated the arbitration award. The trial court's March order states that the parties' dispute was not appropriate for arbitration, and the trial court placed the case on its trial docket. Subsequently, GE filed an interlocutory appeal from the court's March order.[4]

GE raises three issues in its appeal. Issue one contends that the trial court did not have plenary power to set aside the judgment confirming the arbitrator's award. Issue two asserts that the trial court had no statutory basis to vacate the arbitrator's award. Issue three argues that, even if the trial court properly vacated the award, the parties' disputes remain within the scope of the parties' arbitration agreement, and they, therefore, should be arbitrated.

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[4]UTC also filed a notice of appeal in this case, but it later filed a motion to dismiss its appeal. We granted UTC's motion. Thus, UTC is no longer a party to this appeal.

Review of Interlocutory Orders

Before we address the issues raised by GE in its brief, we must first determine whether we have jurisdiction over GE's appeal from the trial court's interlocutory order vacating the award. Unless specifically authorized by statute, our jurisdiction to consider issues in an appeal extends only to final judgments. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 2008) (providing rights of appeal from certain types of interlocutory orders).

Following the submission of the parties' case, we asked the parties to identify the statute that allows us to review the interlocutory ruling at issue here. GE contends that section 171.098(a)(5) of the Texas Civil Practice and Remedies Code grants a right to appellate review of the order vacating the arbitrator's award because the trial court did not direct a rehearing and placed the case on its trial docket.[5] After this case was submitted, in *East Texas Salt Water Disposal Company, Inc. v. Werline*, the Texas Supreme Court clarified that a party may appeal a trial court's order vacating an arbitration award under the circumstances presented here. No. 07-0135, 2010 Tex. LEXIS 214, at **12-13 (Tex. Mar. 12, 2010).[6] We hold that GE has a right of interlocutory appeal from the trial court's order.

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[5]Section 171.098(a)(5) provides: "A party may appeal a judgment or decree entered under this chapter or an order: . . . (5) vacating an award without directing a rehearing." TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(5) (Vernon 2005).

[6]We also note that as of September 1, 2009, the Legislature has amended section 51.016 of the Texas Civil Practice and Remedies Code to allow a party to pursue an interlocutory appeal of an order of a district court "under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C.

Therefore, we conclude that we have jurisdiction to review the issues presented by GE in this appeal.

Standard of Review

The parties' Wholesale Financing Agreement provides that the FAA it to govern "all arbitration(s) and confirmation proceedings hereunder." We review de novo a trial court's decision to confirm or vacate an arbitration award under the FAA. *Myer v. Americo Life, Inc.*, 232 S.W.3d 401, 407 (Tex. App.–Dallas 2007, no pet.); *see also In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (applying de novo standard to review the trial court's resolution of whether an arbitration provision under the FAA was enforceable). In a de novo review, the trial court's decision is given absolutely no deference. *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998).

Under the FAA, the grounds upon which a trial court can vacate an arbitration award are limited to the grounds in sections 10 and 11. *See* 9 U.S.C.A. §§ 9-11 (section 11, applying to the modification or correction of arbitration awards, does not apply in this case); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008). Section 10(a) permits a court to vacate an arbitration award:

> (1) where the award was procured by corruption, fraud, or undue means;

Section 16." TEX. CIV. PRAC. & REM. CODE ANN. § 51.016 (Vernon Supp. 2009). This provision of the amended statute does not apply to the present appeal, as this appeal was initiated before September 1, 2009. *See id*., Historical and Statutory Notes.

> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
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> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
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> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C.A. § 10(a).

Momentum asserted four grounds to vacate the arbitration award in its amended motion to vacate. Specifically, Momentum argued the trial court could vacate the award on the following grounds: (1) the dispute between Momentum and GE did not fall within the scope of the arbitration agreement, but rather, arose out of a dispute between Momentum and Textron, whose contract with Momentum did not have an arbitration provision; (2) the arbitrator refused to hear material evidence; (3) the award was obtained by corruption, fraud, or other undue means because an officer of GE sat on AAA's board of directors; and (4) the arbitrator, by failing to exercise honest judgment, committed a gross mistake in resolving the dispute. We review de novo each of the arguments presented to the trial court to determine whether the trial court properly vacated the arbitrator's award. *See Myer*, 232 S.W.3d at 407; *see also In re Labatt Food Serv.*, 279 S.W.3d at 643.

Analysis

Existence of the Arbitration Agreement

We must first determine whether GE is a party to the wholesale finance agreement. *See Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 61 (Tex. 2008) (explaining that after determining whether a contract's arbitration clause is enforceable, court then turns to whether the claims advanced in the suit fall within the scope of the arbitration provision). Momentum claims that the agreement for wholesale financing is a contract between it and DFS, not GE. Thus, Momentum's argument implicates a claim that the arbitrator exceeded his powers by conducting the arbitration. *See* 9 U.S.C.A. § 10(a)(4); *Hall St. Assocs*, 525 U.S. at 583. Additionally, Momentum asserts that neither Momentum's Letter of Direction nor its Voluntary Surrender incorporate the terms of the Wholesale Financing Agreement which contains the arbitration provision.

"[A] duty to arbitrate can arise only by agreement." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. TriMas Corp.*, 531 F.3d 531, 535 (7th Cir. 2008) (citing *United Steelworkers of Am. v. Warrior & Gulf*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)). Under the FAA, state law governs the question of whether a litigant has agreed to arbitrate. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130-31 (Tex. 2005).

In reviewing the existence of an arbitration clause between Momentum and GE, we note that Momentum alleges a claim in its suit that is based upon the contract containing the arbitration agreement. Momentum's petitions assert a claim against GE for breaching a Wholesale Financing Agreement dated January 27, 2000. The wholesale finance agreement between DFS, the entity that GE contends was its predecessor, is dated January 27, 2000. We conclude that Momentum asserted claims based on Momentum's contract with DFS, which later became GE. "[A] litigant who sues based on a contract subjects him or herself to the contract's terms[,]" including arbitration. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 755-56 (Tex. 2001). Because Momentum based its claims against GE on the DFS/Momentum contract, we conclude that Momentum subjected itself to the arbitration provision contained in the contract. *See id*.

Further, GE demonstrated in the trial court through a series of self-authenticating public records that it was DFS's corporate successor. *See* TEX. R. EVID. 803(8), 902(1), 902(8). These public records show that DFS changed its name to GE and then merged into another corporation. The merged corporation subsequently changed its name to GE. "A corporate name change has no effect on the identity of the company or its rights and liabilities." *Zuniga v. Wooster Ladder Co.*, 119 S.W.3d 856, 862 (Tex. App.–San Antonio 2003, no pet.); *see also N. Natural Gas Co. v. Vanderburg*, 785 S.W.2d 415, 421 (Tex. App.–Amarillo 1990, no writ). Additionally, all privileges, powers, rights, and duties of merging entities generally transfer to the surviving corporation. *Allen v. United of Omaha*

Life Ins. Co., 236 S.W.3d 315, 322 (Tex. App.–Fort Worth 2007, pet. denied) (citing *Bailey v. Vanscot Concrete Co.*, 894 S.W.2d 757, 759 (Tex. 1995)); *In re Cap Rock Elec. Coop., Inc.*, 35 S.W.3d 222, 227-28 (Tex. App.–Texarkana 2000, orig. proceeding); *see also generally* TEX. BUS. ORGS. CODE ANN. § 10.008 (Vernon Pamph. 2009) ("Effect of Merger"); DEL. CODE ANN. tit. 8, § 259(a) (2010) ("Status, rights, liabilities, of constituent and surviving or resulting corporations following merger or consolidation").

GE also asserts that Momentum agreed to arbitrate claims because it executed the Voluntary Surrender. The Voluntary Surrender document expressly states, "Any claims between the parties concerning the subject matter herein will be conducted pursuant to the terms of the Agreement for Wholesale Financing." Momentum's claims also concern the voluntary surrender of its collateral.

For each of the above reasons, we conclude that GE and Momentum are parties to the contract containing the arbitration agreement. Reserving the question of whether the claims arbitrated were within the scope of the parties's agreement to arbitrate, we conclude that the arbitrator had the power to require the parties to arbitrate the claims in issue, as both GE and Momentum were parties to the Wholesale Financing Agreement's provision that required arbitration of the parties' disputes.

Scope of the Arbitration Agreement

Having determined that GE and Momentum were parties to a contract containing an arbitration agreement, we next consider whether Momentum's claims fall within the scope

of their agreement to arbitrate disputes. Because Momentum's and GE's disputes concern the inventory Momentum purchased from UTC, and because Momentum financed its UTC inventory through Textron, Momentum argues that its dispute with GE falls outside the scope of the arbitration provision in the Momentum/DFS contract. Resolving whether the parties' disputes fall within the scope of the arbitration clause revolves around the language of the Wholesale Financing Agreement's arbitration provision, which provides as follows:

> **Arbitrable Claims**. Except as otherwise specified below, all actions, disputes, claims and controversies under common law, statutory law or in equity of any type or nature whatsoever (including, without limitation, all torts, whether regarding negligence, breach of fiduciary duty, restraint of trade, fraud, conversion, duress, interference, wrongful replevin, wrongful sequestration, fraud in the inducement, usury or any other tort, all contract actions, whether regarding express or implied terms, such as implied covenants of good faith, fair dealing, and the commercial reasonableness of any Collateral disposition, or any other contract claim, all claims of deceptive trade practices or lender liability, and all claims questioning the reasonableness or lawfulness of any act), whether arising before or after the date of this Agreement, and whether directly or indirectly relating to: (a) this Agreement and/or any amendments and addenda hereto, or the breach, invalidity or termination hereof; (b) any previous or subsequent agreement between [GE] and [Momentum]; (c) any act committed by [GE] or by any parent company, subsidiary or affiliated company of [GE] . . . , or by any employee, agent, officer or director of [GE] whether or not arising within the scope and course of employment or other contractual representation of [GE] provided that such act arises under a relationship, transaction or dealing between [GE] and [Momentum]; and/or (d) any other relationship, transaction or dealing between [GE] and [Momentum] . . . will be subject to and resolved by binding arbitration.

When determining whether claims fall within the scope of an arbitration clause, we look to the factual allegations of the complaint rather than the legal causes of action asserted, and we are required to resolve all doubts about the arbitration clause's scope in favor of

coverage. *See In re FirstMerit Bank, N.A.*, 52 S.W.3d at 754. The Wholesale Financing Agreement's arbitration clause encompasses *all* actions, disputes, and controversies, and further it expressly includes claims that concern "the commercial reasonableness of any Collateral disposition[.]" After broadly defining the scope of the claims included, the provision is further broadened because it extends to claims arising before or after the date of the agreement, as well as to claims that "directly and indirectly" relate to subsequent agreements. Finally, the Voluntary Surrender, signed by Momentum, expressly states that claims concerning the subject matter of the Voluntary Surrender agreement would be "conducted pursuant to the terms of the Agreement for Wholesale Financing."

Momentum's claims arise from GE's disposition of Momentum's collateral, initially purchased from UTC, for less than the inventory's wholesale price. Because Momentum's claims concern the subject matter of the collateral affected by its Voluntary Surrender, we hold that Momentum's claims are within the scope of the parties' arbitration agreement. Additionally, and even without regard to the terms of the Voluntary Surrender, all of Momentum's claims against GE arose directly or indirectly from its relationship with GE or with GE's corporate predecessors. We conclude that under the terms of both the Voluntary Surrender and the Wholesale Financing Agreement, Momentum's claims fall within the broad scope of the parties' arbitration agreement.

Refusal to Hear Material Evidence

An arbitration award may be vacated if the arbitrator "refus[es] to hear evidence pertinent and material to the controversy[.]" 9 U.S.C.A. § 10(a)(3). In the trial court, Momentum argued that the arbitrator refused to hear material evidence, namely testimony from its accountant.

To justify a court's vacating of an award, the excluded evidence must be "pertinent and material to the controversy." *Id.* For example, an arbitrator is not bound to hear all the evidence tendered by the parties as long as each party is given an adequate opportunity to present evidence and arguments. *Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 234 (Tex. App.–Houston [14th Dist.] 1993, writ denied). "'An evidentiary error must be one that is not simply an error of law but which so affects the rights of a party that it may be said that he was deprived of a fair hearing.'" *Id.* (citing *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1023 (5th Cir. 1990) (quoting *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir. 1968))). Additionally, "[a]rbitrators have a great deal of discretion to exclude evidence as redundant, or otherwise unnecessary to the decision-making process." *Weinberg v. Silber*, 140 F.Supp.2d 712, 719 (N.D. Tex. 2001), *aff'd*, 57 F.App'x 211 (5th Cir. 2003). Thus, a party seeking to vacate an arbitration award should describe the evidence that the arbitrator excluded to enable the reviewing court to determine its materiality. *See id.*

Momentum did not attach as evidence affidavits that sufficiently describe the knowledge of its accountant, the witness Momentum complains that the arbitrator excluded. Instead, Momentum attached the affidavit of its president, Joe Napoleon, which describes the scheduling problems that led the arbitrator to exclude the testimony of its certified public accountant. Napoleon's affidavit does not sufficiently describe the testimony the accountant might have offered; instead, Napoleon generally asserts that the accountant's "testimony was material because she was involved in Momentum's business decisions through all critical times and points during the events made the basis of [Momentum's] case against GE." Given this general description, we are unable to evaluate whether the accountant's testimony was either pertinent or material, within the meaning of section 10(a)(3), to the issues that were resolved by the arbitrator. *See* 9 U.S.C.A. § 10(a)(3). In addition, we cannot evaluate whether the accountant's testimony would have been redundant or otherwise unnecessary to the arbitrator's decision-making process. *See Weinberg*, 140 F.Supp.2d at 719.

Although the arbitrator did not hear the testimony of Momentum's accountant, the arbitrator conducted a five-day hearing. Momentum's witnesses at the hearing included, among others, an economist and its president. There is no evidence in the record that demonstrates that Momentum's accountant had knowledge of relevant facts regarding the dispute that Momentum was unable to present to the arbitrator through its other witnesses. We conclude that Momentum has failed to demonstrate that the arbitrator refused to hear evidence pertinent and material to the controversy. *See* 9 U.S.C.A. § 10(a)(3).

Impartiality of the Arbitrator

In the trial court, Momentum claimed that "GE's prominent role in the operation of the AAA indicates that the award was the result of fraud or undue means." Evidence of partiality or corruption of an arbitrator constitute permissible grounds for vacatur of an arbitration award. 9 U.S.C.A. § 10(a)(2). Further, an award procured by corruption, fraud, or undue means supports a trial court's vacatur of an arbitration award. 9 U.S.C.A. § 10(a)(1). Momentum's partiality claim is premised on the service of a vice-president and general counsel employed by General Electric Company on AAA's board of directors. Momentum contends that the presence of General Electric's vice-president on the board suggests a conflict of interest and creates an "appearance of impropriety and fraud." Momentum concludes that the "award in question was obtained by fraudulent and/or undue means and should be vacated."

On this record, we find no evidence that the arbitrator deciding the dispute was aware of the makeup of AAA's board of directors or that he had any undisclosed relationship with GE. "'Evident partiality' within the meaning of section 10(a)(2) means more than mere appearance of bias." *Babcock & Wilcox Co.*, 863 S.W.2d at 234; *see also Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 283 (5th Cir. 2007) (citing *Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 732 (5th Cir. 1987)). A "party alleging evident partiality must establish specific facts which indicate improper motives on the part of the [arbitrator]." *Sheet Metal Workers Int'l Ass'n Local Union No. 420 v. Kinney Air*

Conditioning Co., 756 F.2d 742, 746 (9th Cir. 1985). We find no specific facts to demonstrate that the arbitrator was partial to any specific party, including GE.

Moreover, the party in the case before us is GE Commercial Distribution Finance Corporation, not General Electric Company, the employer of the AAA board member. Even if the corporations are in some way related–a matter that does not appear from the record–Texas law generally presumes that two separate corporations are distinct entities. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 798 (Tex. 2002). "The party seeking to ascribe one corporation's actions to another by disregarding their distinct corporate entities must prove this allegation." *Id*. Momentum introduced no evidence in the trial court to show that the activities of General Electric Company's vice-president and general counsel should be attributed to GE Commercial Distribution Finance Corporation, the party in this suit. Accordingly, Momentum failed to show that either section 10(a)(1) or 10(a)(2) permitted the trial court to vacate the arbitrator's award. *See* U.S.C.A. § 10(a)(1), (2).

Gross Mistake

Momentum also argued to the trial court that the "arbitrator acted in an arbitrary and capricious manner and thus[,] committed a gross mistake" and "fail[ed] to exercise honest judgment[.]" On appeal, Momentum recasts its argument to assert that the arbitrator "exceeded his powers" by deciding an issue that was not before him.

We may not expand the grounds for vacatur of an arbitration award beyond those that are listed in the FAA. *See Hall St. Assocs.*, 552 U.S. at 583; *Citigroup Global Mkts.*, 562 F.3d at 350. Additionally, a trial court may not vacate an arbitration award even if the award was based on mistakes of law or fact. *Universal Computer Sys., Inc. v. Dealer Solutions, L.L.C.*, 183 S.W.3d 741, 752 (Tex. App.–Houston [1st Dist.] 2005, pet. denied); *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 429 (Tex. App.–Dallas 2004, pet. denied); *Anzilotti v. Gene D. Liggin, Inc.*, 899 S.W.2d 264, 266 (Tex. App.–Houston [14th Dist.] 1995, no writ).

We disagree that the arbitrator exceeded his powers in resolving the dispute between Momentum and GE. The arbitration clause allowed him to resolve any claims arising out of the relationship of the parties, and the claims that Momentum advanced, which were rejected by the arbitrator, are all claims that were clearly within the scope of the parties' agreement to arbitrate. Based on our review of the record, we do not agree that the arbitrator resolved claims outside the scope of the parties' arbitration agreement. Instead, the arbitrator, after hearing evidence and considering conflicting claims and relevant law, found that "Momentum agreed to this 85% repurchase arrangement." Even if the arbitrator possibly applied equitable principles to contract issues, a resolution that arguably constitutes a mistake of law, an arbitrator's mistake of law does mean that the arbitrator exceeded his power. *See Universal Computer Sys., Inc.*, 183 S.W.3d at 752.

Conclusion

We conclude that we have jurisdiction over this appeal pursuant to section 171.098(a)(5) of the Texas Civil Practice and Remedies Code. Because Momentum and GE were parties to a valid arbitration provision and the claims that were resolved by the arbitrator were within the scope of the parties' arbitration agreement, the claims were properly arbitrated. We hold the trial court erred in granting Momentum's motion to vacate the arbitration award. Because we have resolved issue two in GE's favor, we need not consider GE's third issue. *See* TEX. R. APP. P. 47.1.

It is also unnecessary to address GE's first issue because GE abandoned it at oral argument and in its subsequent correspondence provided to this Court. Nevertheless, significant judicial resources were expended in evaluating GE's contention that the trial court did not possess plenary power on the date it entered its order vacating the arbitration award. We reverse the order vacating the arbitration award, remand this cause to the trial court, and we instruct the trial court to enter a judgment confirming the Final Award of Arbitration. We direct that all costs of the appeal be borne by the party incurring same. *See* TEX. R. APP. P. 43.4 (directing that a court of appeals may tax costs other than to the prevailing party "for good cause").

REVERSED AND REMANDED.

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HOLLIS HORTON
Justice

Submitted on December 3, 2009
Opinion Delivered April 8, 2010
Before Gaultney, Kreger, and Horton, JJ.