



NUMBER 13-16-00117-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IOC COMPANY, LLC,

Appellant,

v.

CITY OF EDINBURG, TEXAS,

Appellee.

**On appeal from the 332nd District Court
of Hidalgo County, Texas.**

MEMORANDUM OPINION

**Before Justices Rodriguez, Benavides, and Longoria
Memorandum Opinion by Justice Benavides**

This appeal concerns the trial court's orders: (1) granting appellee's, the City of Edinburg (the City), motion to vacate an adverse arbitration award rendered in favor of appellant, IOC Company, LLC (IOC); and (2) denying IOC's motion to confirm the same arbitration award. By one issue, IOC contends that the trial court erred in vacating rather

than confirming the arbitration award. We reverse and render.

I. BACKGROUND

A. The Parties and the Agreements

IOC is a Texas limited liability company that is in the business of highway and road construction. The City is a municipality located in Hidalgo County.

On April 1, 2008, IOC and the City entered into an agreement regarding engineering and architectural construction for paving and drainage improvements for Canton Road located in the City (the Canton Road Project). The Canton Road Project agreement contained a section which required “any controversy or claim arising out of or relating to [the Canton Road Project], or the breach thereof” which could not be resolved by mutual agreement to be settled by arbitration.

On June 2, 2009, IOC and the City entered into a second, separate agreement related to engineering and architectural construction for paving and drainage improvements for Sugar Road located in the City (the Sugar Road Project). The Sugar Road Project agreement contained separate mediation and arbitration clauses. The mediation clause called first for a “quick resolution of any and all disputes, if any” under the contract, and the agreement provided that if the dispute failed to resolve at mediation, the parties were required to submit the dispute to arbitration.

B. The Arbitration Proceeding and Award

Subsequently, claims and disputes by IOC against the City arose related to both the Canton Road Project and the Sugar Road Project. Both matters were consolidated and arbitrated by the same arbitrator, who conducted bifurcated evidentiary hearings for each contract during the months of February 2014 and April 2014. The hearings were

closed on June 18, 2014.

1. The Canton Road Project

According to the record, IOC sought recovery for damages “in the form of additional compensation due to the City’s claims breach of contract, essentially consisting of delays, interferences, and disruptions” caused by the City during its work on the Canton Road Project. IOC also sought recovery of attorneys’ fees, prejudgment interest, and reimbursement of arbitrator compensation and costs.

In response to IOC’s claims, the City contested IOC’s entitlement to recovery of damages under section 271.153 of the local government code. See TEX. LOCAL GOV’T CODE ANN. § 271.153 (West, Westlaw through Ch. 49, 2017 R.S.) (placing limitations on adjudication awards against local governmental entities for breach of contract). Further, the arbitrator’s award notes that the City “strongly denie[d] it was responsible for owner-caused delays” and claimed that it was “not responsible for relocating utility lines, encumbrances[,] and obstructions that hindered, delayed[,] or disrupted IOC’s ability to timely, efficiently . . . perform the required scope of work” under the Canton Road Project construction plan. Further, the City argued that any delays that IOC suffered were caused by third parties “over whom it had no control or responsibility.”

The arbitrator found that the City materially breached the Canton Road agreement “without excuse” and was liable to IOC “for damages in the form of additional compensation arising from City-caused delays, disruptions and interference.” The arbitrator found that IOC did not materially breach the agreement. To support these findings, the arbitrator made specific findings that:

- (1) The City failed to timely and properly provide IOC with the lands necessary for it to perform the scope of work
- (2) The City failed to provide IOC timely and proper access to the areas in which it was to perform the scope of work
- (3) The City failed to provide IOC with unhindered and unobstructed access to the areas in which it was to perform the scope of work
- (4) The City failed to timely, reasonably[,] and properly manage the removal of obstacles, conflicts[,] and obstructions in the areas in which IOC was to perform the scope of work The City had the duty and responsibility to manage the removal of these in the areas in which IOC was to perform the scope of work.
- (5) The City's preceding failures delayed IOC's ability to timely and efficiently perform the scope of work
- (6) The City is responsible for owner-caused delays to IOC's ability to timely and efficiently perform the scope of work
- (7) The City's preceding failures disrupted and interfered with IOC's ability to timely and efficiently perform the scope of work.
- (8) The number and quality of the utility lines (underground and above ground), power poles, splicing operations, gas lines and meters[,] and manholes which singularly and cumulatively delayed and disrupted IOC's work performance are significant and compelling. These are City-caused delays, disruptions[,] and interferences.
- (9) The City also failed to timely acquire permits and easements from the local drainage and irrigation districts which also delayed and disrupted IOC's work performance.

The arbitrator further concluded that section 271.153 of the local government code was not a bar to IOC's recovery and found that as a result of the City-caused delays and the City's material breach of the Canton Road agreement, IOC incurred damages of \$1,362,630, consisting of \$480,682 in labor costs; \$475,639 in equipment costs; \$200,075 in material escalation costs; \$28,500 in extended field costs; and \$177,734 in mark-up costs. Furthermore, the arbitrator found the City liable for to IOC for \$158,000

in reasonable attorneys' fees.

2. The Sugar Road Project

The record shows that the arbitrator found IOC's claims and damages sought under the Sugar Road Project agreement "mirror[ed] those described for the Canton Road Project" agreement. The arbitrator also found that the City asserted the same defenses as in the Canton Road Project dispute, "although the City emphasize[d] several provisions in the Canton Road Agreement" to support its defense in the Sugar Road Project dispute.

The arbitrator found that the City materially breached the Sugar Road Project agreement without excuse and was liable to IOC for damages. The arbitrator further found that IOC did not materially breach the agreement. To support these general findings and conclusions, the arbitrator made specific findings that:

- (1) The City failed to timely and properly provide IOC with the lands necessary for it to perform the scope of work
- (2) The City failed to provide IOC timely and proper access to the areas in which it was to perform the scope of work
- (3) The City failed to provide IOC with unhindered and unobstructed access to the areas in which it was to perform the scope of work
- (4) The City failed to timely, reasonably[,] and properly manage the removal of obstacles, conflicts[,] and obstructions in the areas in which IOC was to perform the scope of work The City had the duty and responsibility to manage the removal of these in the areas in which IOC was to perform the scope of work.
- (5) The City's preceding failures delayed IOC's ability to timely and efficiently perform the scope of work

- (6) The City is responsible for owner-caused delays to IOC's ability to timely and efficiently perform the scope of work
- (7) The City's preceding failures disrupted and interfered with IOC's ability to timely and efficiently perform the scope of work.
- (8) The number and quality of the gas lines, manholes, utility poles, and subgrade access problems delayed and disrupted IOC's work performance are significant and compelling. In addition, the City stopped IOC's performance of work in one area south of Owassa Street which further delayed and disrupted IOC's work. These are City-caused delays, disruptions[,] and interferences.

The arbitrator found that section 271.153 of the local government code did not bar IOC's claim for additional compensation under the Sugar Road Project agreement, and that as a result of the City-caused delays and the City's material breach of the Sugar Road agreement, found that IOC incurred damages of \$673,092, consisting of \$219,191 of labor costs; \$290,944 of equipment costs; \$60,163 of material costs; \$15,000 in extended field cost; and \$15,000 in mark-up costs. Furthermore, the arbitrator found the City liable to IOC for \$127,827 in reasonable attorneys' fees.

Finally, the arbitrator ordered that administrative fees and expenses of the American Arbitration Association totaling \$11,450 shall be borne by the City and the compensation and expenses of the arbitrator totaling \$28,911.48 shall likewise be borne by the City, requiring the City to reimburse IOC \$25,905.74 representing IOC's portion of "said fees and expenses in excess of the apportioned costs previously incurred by IOC."

C. Trial Court Proceedings

On August 14, 2014, the City filed a petition and application to vacate the entire arbitration award. IOC subsequently answered the City's petition, moved to deny the City's application to vacate, and filed its own petition and motion to confirm the arbitrator's

award and for entry of final judgment.

In its brief in support of vacating the arbitration award, the City argued that the award should be vacated under the following grounds: (1) under civil practice and remedies code section 171.088(a)(1), see TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(1) (West, Westlaw through Ch. 49, 2017 R.S.); (2) under civil practice and remedies code section 171.088(a)(3)(A), see *id.* § 171.088(a)(3)(A); (3) under civil practice and remedies code section 171.091, see *id.* § 171.091 (West, Westlaw through Ch. 49, 2017 R.S.); and (4) pursuant to Texas common law. In support of its arguments, the City attached several exhibits to its motion, including, in relevant part: (1) copies of both contracts at issue; (2) depositions from Isael Posadas, the then-city engineer for the City, who testified about the Canton Road and Sugar Road Projects; (3) depositions from Oscar Cuellar, the managing member of IOC, who testified about the Canton Road and Sugar Road projects; and (4) a transcript of each arbitration proceeding.

On January 27, 2015, the trial court held a hearing on both parties' motions, and subsequently granted the City's motion to vacate and denied IOC's motion to confirm. This appeal followed.

II. VACATUR/CONFIRMATION OF ARBITRATION AWARD

By one issue, IOC asserts that the trial court erred in vacating rather than confirming the arbitration award.

A. Standard of Review

Texas law favors arbitration, and thus, judicial review of an arbitration award is extraordinarily narrow. *E. Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 271 (Tex. 2010). We review a trial court's ruling to vacate or confirm an arbitration award de

novo, and we review the entire record. *O’Grady v. Nat’l Union Fire Ins. Co. of Pittsburgh, P.A.*, 506 S.W.3d 121, 124 (Tex. App.—Corpus Christi 2016, pet. denied) (mem. op.).

The Texas Supreme Court has long held that an award of arbitrators upon matters submitted to them is given the same effect as the judgment of a court of last resort, and all reasonable presumptions are indulged in favor of the award, and none against it. *Id.* at 125 (citation omitted). When a non-prevailing party seeks to vacate an arbitration award, it bears the burden in the trial court of bringing forth a complete record that establishes its basis for vacating the award. *Id.*

B. Discussion

As a preliminary matter, IOC contends that the City based its motion to vacate on three grounds: (1) under Texas common law; (2) under section 171.088(a)(1) of the civil practice and remedies code; and (3) under section 171.088(a)(3)(A). IOC further argues that the City’s first ground in support of vacatur is untenable under the Texas Supreme Court’s 2016 decision in *Hoskins v. Hoskins*, which held that under the Texas Arbitration Act (TAA), section 171.088 provides exclusive grounds for a vacatur of an arbitration award. 497 S.W.3d 490, 497 (Tex. 2016); *see also Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008) (holding that statutory grounds for prompt vacatur under the Federal Arbitration Act (FAA) are exclusive). The City responds to IOC’s argument by acknowledging the *Hoskins* opinion, and urges us to affirm the trial court’s vacatur award solely under sections 171.088(a)(1) and 171.088(a)(3)(A) of the TAA. Accordingly, we will address each ground in turn and will not address any arguments supporting vacatur based on common law grounds. See TEX. R. APP. P. 47.1.

1. Section 171.088(a)(1)—Other Undue Means

On an application of a party, a trial court shall vacate an arbitration award if “the award was obtained by corruption, fraud, or other undue means.” See TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(1). Courts have defined behavior amounting to “undue means” as that which is “immoral, illegal, or bad-faith conduct.” *Las Palmas Med Ctr. v. Moore*, 349 S.W.3d 57, 69 (Tex. App.—El Paso 2010, pet. denied) (citing *LeFoumba v. Legend Classic Homes, Ltd.*, No. 14-08-00243-CV, 2009 WL 3109875 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (mem. op.)); see also *In re Arbitration Between Trans. Chem., Ltd. & China Nat’l Machinery Import & Export Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997) (defining “undue means” under the FAA as behavior that is “immoral, if not illegal” or “otherwise in bad faith”). Furthermore, a mere mistake of law is insufficient to vacate an arbitration award on the basis of undue means. See *Las Palmas*, 349 S.W.3d at 69.

The City first argues that the award in this case should be vacated because it was obtained by “undue means” because the arbitrator: (1) “flagrantly disregarded well[-]established statutes that limit the award against local governments”; and (2) “disregarded unambiguous contractual provisions, including but not limited to, provisions regarding requests for additional compensation, change orders, and differing site conditions.”

The City’s first argument concerns the applicability of section 271.153 of the local government code to the arbitration award. Section 271.153(a)(1) permits a party, like IOC, to recover in a breach of contract action against a local governmental entity, like the City, “the balance due and owed by the local governmental entity under the contract as it may have been amended, including any amount owed as compensation for the increased

cost to perform the work as a direct result of owner-caused delays or acceleration.” TEX. LOCAL GOV'T CODE ANN. § 271.153(a)(1). The City directs us to testimony from the Sugar Road Project arbitration proceeding by Jens Baker. Baker testified on behalf of IOC that he reviewed documentation and interviewed personnel involved in the project to identify and determine fault for delays and inefficiencies during the contract. Baker explained that delays in this project were caused by the City, “manhole issues” created by AT&T, and “unforeseen site conditions” attributed to Texas Gas. Of these delays, Baker testified at the arbitration proceeding that some of the delays were exclusively attributable to either the City, AT&T, Texas Gas, or some combination of those parties. After this testimony, however, IOC’s attorney argued that “the City is responsible for everything, and they are the ones that have control over Texas Gas and all the utilities.”

After reviewing the entire record in this case, we cannot conclude that the City met its burden to establish that IOC obtained its award based upon undue means—that is, conduct amounting to immoral, illegal, or bad-faith conduct. See *Las Palmas*, 349 S.W.3d at 69. Even if the arbitrator made minor errors or misapplied section 271.153 of the local government code to the facts of this case, as the City argues, such a mistake of law is not enough to amount to undue means. See *id.* Accordingly, we conclude that the City failed to meet its burden to vacate the arbitration award under section 171.088(a)(1)’s “undue means” provision.

2. Section 171.088(a)(3)(A)—Exceeding Powers

On application of a party, the trial court shall vacate an award if the arbitrator exceeded his powers. See TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(3)(A). An arbitrator exceeds his powers when he decides matters not properly before him. *In re*

Guardianship of Cantu de Villarreal, 330 S.W.3d 11, 23 (Tex. App.—Corpus Christi 2010, no pet.). When determining whether an arbitrator has exceeded his power, any doubts concerning the scope of what is arbitrable should be resolved in favor of arbitration. *Id.* It is only when the arbitrator departs from the agreement and, in effect, dispenses his own idea of justice that the award may be unenforceable. *Id.*

The arbitrator in this case derived his authority from both agreements. The Canton Road Project agreement stated that “any controversy or claim arising out of or relating to [the Canton Road Project], or the breach thereof” would be submitted to arbitration; and the Sugar Road Project agreement stated that “any and all disputes” under the contract that failed to resolve by mediation would be submitted to arbitration.

IOC asserted its claims and disputes under both agreements through arbitration proceedings. The record does not show that the City disputed IOC’s efforts to do so or that such claims were not subject to the arbitration clause. Instead, the City argues first that the arbitrator “ignored the plain language” of the contract, which would entitle the City to immunity from certain damages under section 271.153 of the local government code. See TEX. LOCAL GOV’T CODE § 271.153. Secondly, the City argues that the arbitrator ignored a provision of the Canton Road Project agreement which mandated that the contractor was to give the City written notice of any extra costs related to the contract.

The record shows that both contracts in this case gave the arbitrator wide and full authority to decide any and all controversies, claims, or disputes, arising out of the Canton Road and Sugar Road agreements. Accordingly, IOC’s breach of contract claims and requests for damages were properly before the arbitrator. Although the arbitrator may have resolved the disputes in a way that the City finds unfavorable, and the decision may

have been reached erroneously based on an alleged mistake of law or fact, this does not mean that “the arbitrator acted outside the scope of his authority.” See *Barton v. Fashion Glass & Mirror, Ltd.*, 321 S.W.3d 641, 647 (Tex. App.—Houston [14th Dist.] 2010, no pet.); see also *Framing v. BBL Builders*, No. 05-15-01430-CV, 2016 WL 3346041, at *4 (Tex. App.—Dallas 2016, pet. filed) (adopting the holding in *Barton* with regard to situations where an arbitrator exceeds his authority). Therefore, we conclude that the City failed to meet its burden to vacate the arbitration award under section 171.088(a)(3)(A) of the civil practice and remedies code.

3. Modification of the Arbitration Award

In its briefing, the City argues that if this Court were to find that the arbitration award was proper, then the damages must be reduced pursuant to section 271.153(a)(1) of the local government code.

Section 171.091 of the civil practice and remedies code contains a provision for modifying an award and specifies the grounds upon which a modification may be ordered. See TEX. CIV. PRAC. & REM. CODE ANN. § 171.091 (West, Westlaw through Ch. 49, 2017 R.S.). The City did not file a motion to modify at the trial court, and therefore, such a request is not properly before this Court for our review. See TEX. R. APP. P. 33.1(a)(1).

4. Summary

Having concluded that the City failed to meet its burden to vacate the arbitration award in this case under either sections 171.088(a)(1) or 171.088(a)(3)(A), we sustain IOC’s sole issue on appeal.

III. CONCLUSION

We reverse the trial court's orders: (1) granting the City's motion to vacate the arbitration award; and (2) denying IOC's motion to confirm the arbitration award. We render judgment: (1) denying the City's motion to vacate the arbitration award; and (2) granting IOC's motion to confirm the arbitration award.

GINA M. BENAVIDES,
Justice

Delivered and filed the
20th day of July, 2017.