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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1308**

Jennifer Drew, claimant,  
Respondent,

vs.

James A. Herron,  
Appellant.

**Filed April 15, 2013  
Affirmed  
Larkin, Judge**

Ramsey County District Court  
File No. 62-CV-12-1762

Russell A. Norum, Minneapolis, Minnesota (for respondent)

James A. Herron, St. Paul, Minnesota (pro se appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and  
Rodenberg, Judge.

**UNPUBLISHED OPINION**

**LARKIN**, Judge

In this pro se appeal, appellant challenges the district court's confirmation of an arbitration award of \$8,950 to respondent. Appellant makes the following arguments on appeal: the district court erred by confirming the arbitrator's award without review, the

award is not supported by the evidence, the arbitrator was partial toward respondent, and appellant signed the arbitration agreement without informed consent. Appellant also requests misconduct sanctions for spoliation. Respondent requests attorney fees. We affirm the district court's confirmation of the arbitration award, but we deny the parties' requests for sanctions and fees.

## **FACTS**

In June 2010, appellant James Herron and respondent Jennifer Drew entered into a real estate purchase agreement, whereby appellant agreed to sell respondent residential property located at 1837 Minnehaha Avenue West in St. Paul. Prior to selling the property to respondent, appellant installed a new roof on the house. According to a residential real property arbitration agreement executed along with the purchase agreement, the parties agreed to settle any dispute arising out of the purchase agreement by arbitration.

On July 18, 2011, respondent filed an arbitration claim with the National Center for Dispute Settlement, claiming \$18,830.11 in damages for faulty construction and misleading advertising. Respondent sought \$13,800 for roof, fascia boards, and gutter repairs and replacements, \$450 for insulation work, \$3,574.63 for air-conditioning repairs and replacement, and \$1,005.48 for garage-door opener replacement and installation. Appellant opposed respondent's claim, arguing that (1) he could not defend himself because of spoliation of evidence, (2) he could have made any necessary repairs more affordably, (3) the air-conditioning system was operational at the time of the sale, and (4) respondent had prior notice of the defective garage-door opener.

Following an arbitration hearing, an arbitrator awarded respondent \$8,950, including \$6,000 for roof replacement, \$1,000 for renailling fascia boards, \$450 for repairing or replacing insulation, and \$1,500 in arbitration fees. The roof-replacement award was based on the arbitrator's finding that the roof shingles had been installed incorrectly, causing a major defect in the roof. In so finding, the arbitrator relied on the testimony and reports of city inspector Ken Eggers, inspector Thomas Stone, and roofer George Hulinsky, which the arbitrator found to be credible and believable. The arbitrator considered appellant's spoliation defense but concluded that respondent did not have a legal obligation to allow appellant to inspect and repair her roof and that appellant was not prejudiced "to the extent claimed" by respondent's failure to do so. The arbitrator declined to award respondent the remainder of her claim for roof repair and replacement, finding that the expenses were either unnecessary or for upgrades.

The award for renailling fascia boards was based on the arbitrator's finding that the fascia boards were improperly attached. In so finding, the arbitrator once again relied on the testimony and reports of Eggers, Stone, and Hulinsky. But because it was unnecessary to replace the fascia boards entirely, the arbitrator only awarded \$1,000 for the costs of adding additional nails to attach and reattach existing boards. The arbitrator also awarded respondent \$450 to repair or replace insulation based on his finding that the attic insulation was not properly installed. The arbitrator denied respondent's remaining claims, finding that respondent failed to prove her claim for gutter repair or replacement, that the air conditioning was operational at the time of the sale, and that respondent had prior notice that the garage-door opener did not function.

On March 2, 2012, respondent moved the district court to confirm the arbitration award and enter judgment against appellant in the amount of \$8,950. By memorandum dated May 2, respondent argued that the arbitrator considered all of the evidence, that the arbitrator did not commit misconduct or act with partiality, and that the award was not procured by corruption, fraud, or other undue means. By affidavit dated May 21, appellant argued that the arbitrator failed to consider his spoliation argument, improperly credited Hulinsky's testimony, misunderstood respondent's fascia claim, and improperly conducted the arbitration hearing without breaks.

At the conclusion of a hearing on respondent's motion, the district court adopted the arbitrator's findings and confirmed the award of \$8,950, finding no basis to vacate the award. The district court also awarded respondent \$325 in filing costs. This appeal follows.

## D E C I S I O N

### I.

“[T]he scope of judicial review of an arbitration award is extremely narrow.” *Peggy Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 606 (Minn. 2002). “[W]here arbitration is appropriate, arbitrators are the final judges of both law and fact; every reasonable presumption is to be exercised in favor of the finality and validity of the arbitration award.” *Id.* The party seeking to vacate an arbitration award has the burden of proving the invalidity of the award. *Nat'l Indem. Co. v. Farm Bureau Mut. Ins. Co.*, 348 N.W.2d 748, 750 (Minn. 1984).

The district court shall confirm an arbitrator's award upon application of a party unless the opposing party presents grounds for vacating, modifying, or correcting the award. Minn. Stat. § 572B.22 (2012). The district court shall vacate an award if:

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

(2) there was: (A) evident partiality by an arbitrator appointed as a neutral; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 572B.15, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under section 572B.15, subsection (c), not later than the commencement of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 572B.09 so as to prejudice substantially the rights of a party to the arbitration proceeding.

Minn. Stat § 572B.23(a) (2012).

The district court concluded that there was no basis on which to vacate the arbitrator's award and every reason to adopt the award. Appellant challenges this decision on several grounds. Appellant first argues that the district court "[e]rrred by adopting the arbitrator's decision without review to first determine if it was completely irrational or evidences a 'manifest disregard for law,' was based on false information and lacked evidentiary support." Appellant's argument is without merit. The transcript from the confirmation hearing indicates that the district court fully reviewed the arbitrator's

award and provided appellant with an opportunity to establish grounds to set it aside. After acknowledging the arbitrator's specific, detailed findings and providing appellant with an opportunity to challenge the arbitrator's award, the district court concluded that the award addressed "all of the issues that appear to have been in controversy," there was a reasonable basis for the award, and there was no reason to set the award aside. Specifically, the district court stated, "this arbitration award is laid out in great detail and, having gone through it, and I did well before this hearing, I see nothing that would allow it to be set aside." In sum, the record does not support appellant's contention that the district court confirmed the arbitrator's decision without review.

Second, appellant argues that discrepancies in the record, conflicts of interest, and spoliation of evidence "create a *prima facie* lack of probable cause for the underlying litigation and subsequent judgment" and that respondent's claim was part of "a scheme to improperly access the Contractors Recovery Fund." Appellant does not contend that he was prevented from presenting evidence of such discrepancies, conflicts of interest, spoliation, or scheme during the arbitration hearing or that the arbitrator refused to consider the evidence he presented. *See* Minn. Stat. § 572B.23(a)(3) (requiring the district court to vacate an award if an arbitrator "refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 572B.15, so as to prejudice substantially the rights of a party to the arbitration proceeding"). Instead, appellant appears to contend that the record does not support the arbitrator's award. But "[w]hether the record supports an arbitrator's findings is not an issue for [appellate] review." *Liberty Mut. Ins. Co. v. Sankey*, 605 N.W.2d 411, 413 (Minn. App. 2000),

*review denied* (Minn. Apr. 18, 2000). “When reviewing an arbitration award, the district court’s role is not to develop additional facts relating to the claim,” but “[r]ather, its role is limited to determining whether any of the statutory grounds for vacating the award exists.” *In re the Claims for No-Fault Benefits Against Progressive Ins. Co.*, 720 N.W.2d 865, 873 (Minn. App. 2006), *review denied* (Minn. Nov. 22, 2006). Because appellant’s challenge is based on the arbitrator’s findings as opposed to one or more of the statutory grounds for vacating an award, it does not provide a basis to vacate the award.

Appellant also generally argues that this court should review the evidence de novo to determine whether the district court would have reached the same conclusion if all persons associated with this case had behaved ethically. Once again, it is not this court’s role to review the arbitrator’s decision on the merits. *Sankey*, 605 N.W.2d at 413. On appeal, we do not independently weigh the evidence, assess witness credibility, or find facts. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Rather, the function of this court is limited to identifying errors and then correcting them. *Id.* Thus, appellant’s request for de novo review of the evidence is misplaced.

Appellant also devotes a significant amount of his argument to the purported misconduct of respondent’s attorney in bringing suit, but he does not establish that “the award was procured by corruption, fraud, or other undue means” or that there was partiality, corruption, or misconduct by the arbitrator. *See* Minn. Stat. § 572B.23(a)(1), (2). In other words, the record does not reflect unethical behavior that would provide a basis to vacate the award.

Third, appellant argues that “[t]he arbitrator’s decision evidences a ‘manifest disregard for the law’ and shows bias in support of misrepresentations.” Specifically, appellant contends that the arbitrator “failed to consider important evidence and failed to treat both sides equally and manifested one-sided thinking in his award.” We construe those arguments as an assertion that there was “evident partiality by an arbitrator” and that the arbitrator “refused to consider evidence material to the controversy.” *See* Minn. Stat. § 572B.23(a)(2), (3). But besides alleging that there “was not an impartial arbitrator” at the hearing on the motion to confirm the award, appellant does not provide any persuasive support for his assertion that the arbitrator was partial toward respondent.

Moreover, appellant has not shown that the arbitrator refused to consider material evidence. The record shows that the arbitrator was impartial and considered appellant’s evidence and arguments. As the district court pointed out during the motion hearing, the arbitrator did not award respondent everything she asked for, and the arbitrator heard and considered appellant’s spoliation argument. The record shows that the arbitrator heard evidence from both parties regarding respondent’s claims, considered appellant’s defenses and the credibility of the witnesses, and ultimately awarded less than half of the amount that respondent requested.

Finally, appellant appears to argue that he signed the arbitration agreement without informed consent and that his rights to due process, a fair hearing, and an appeal therefore were violated. Appellant contends that he never would have signed the arbitration agreement if he had known that “arbitration could and would be used to exploit matters, that the arbitration process could and would be poisoned by unethical



persons misrepresentations to bias the results, or how arbitration could and did circumvent his right to a fair hearing.” Generally, this court will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because appellant did not raise the consent issue at the arbitration hearing or in the district court, this court does not consider it.

In conclusion, appellant has failed to establish an authorized ground to vacate the award under Minn. Stat. § 572B.23(a). We therefore conclude that the district court did not err by confirming the award. And we deny appellant’s reply-brief request for misconduct sanctions for spoliation, which is not properly before this court. *See* Minn. R. Civ. App. P. 127 (“Unless another form is prescribed by these rules, an application for an order or other relief shall be made by serving and filing a written motion for the order or relief. . . . The motion shall state with particularity the grounds and set forth the order or relief sought.”).

## II.

Respondent requests that this court “award reasonable attorney fees and other reasonable expenses of litigation incurred as a result of this judicial proceeding.” “A party seeking attorneys’ fees on appeal shall submit such a request by motion under Rule 127.” Minn. R. Civ. App. P. 139.06, subd. 1. Because respondent has not filed a motion under Minn. R. Civ. App. P. 127 for attorney fees on appeal, her request is not properly before this court. *See Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 363 (Minn. App.

2001) (holding that respondents, who failed to file a rule 127 motion for attorney fees on appeal, were not currently entitled to such fees), *review denied* (Minn. Feb. 19, 2002).

**Affirmed**