AFFIRMED; Opinion Filed September 13, 2017.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00509-CV

QUICKSET CONCRETE, INC., Appellant
V.
ROESCHCO CONSTRUCTION, INC., Appellee

On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-11847

MEMORANDUM OPINION ON REHEARING

Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Lang

On August 15, 2017, this Court issued an opinion affirming the trial court's judgment. Appellant Quickset Concrete, Inc. filed a timely motion for rehearing on August 22, 2017. We deny appellant's motion for rehearing. In addition, we withdraw our August 15, 2017 opinion and vacate the judgment of that date. This is now the opinion of the Court.

This is an appeal from the trial court's judgment confirming an arbitration award of damages to appellee RoeschCo Construction, Inc. ("RCC"). In two issues, appellant asserts the trial court erred by denying its "Motion for New Trial and Motion to Modify Arbitration Holding" because: (1) there was an evident miscalculation in the arbitration award; and (2) the arbitrator exceeded his authority. RCC argues in response that appellant "has waived its right to a modification of the arbitration award" because it "failed to timely file a motion to vacate or modify the arbitration award."

We decide against appellant on its issues. Because the law to be applied in this case is well settled, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.2, 47.4.

I. Factual and Procedural Context

This case involves a construction contract dispute. Appellant was a subcontractor for RCC on two construction projects, one of which, the "Trinity Strand Project," is the subject of this case. On June 24, 2013, the parties signed a Master Subcontract Agreement ("MSA") which the parties agree governs the two subcontracts. The MSA provided that:

> Subject to the limiting provisions set forth below, all claims, disputes and other matters in question between the Contractor and the Subcontractor that are not subject to Section 3F of this Subcontract, arising out of, or relating to this Subcontract or the breach thereof shall be decided by arbitration which shall be held in Dallas, Texas in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise. The award rendered by the arbitrator(s) shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

Appellant stopped work on the Trinity Strand Project in March 2014 before the project was completed. Appellant claimed RCC "breached the contract by wrongfully deducting $29,000 from work performed and in creating a negative pay application and other grounds." RCC also claimed appellant breached the contract.

On October 8, 2014, appellant filed suit. In its "First Amended Original Petition," appellant requested monetary damages based on breach of contract and quantum meruit. On November 3, 2014, RCC filed its "Original Answer Subject to Its Motion to Abate and Compel Arbitration" and a separate "Motion to Abate and Compel Arbitration." In its "Motion to Abate and Compel Arbitration," RCC sought enforcement of the arbitration provision in the MSA. On January 8, 2015, the trial court signed an "Agreed Order Granting Motion to Abate," which abated the case "pending the outcome of an arbitration between the parties."

The arbitration proceeding took place in January 2016. On March 1, 2016, the arbitrator rendered his written "Award of Arbitrator." In this award the arbitrator found, among other things, that "Appellant was not justified in abandoning the Trinity Strands Project" and that "RoeschCo is the 'Prevailing Party' as defined" in the contract. The arbitrator awarded $91,240.00 in damages to RCC. On March 8, 2016, RCC filed in the trial court a "Motion to Lift Abatement and Application to Confirm Arbitration Award."

On March 16, 2016, appellant filed, with the American Arbitration Association (AAA), "Claimant's Motion to Correct Award." In that motion appellant argued that it was the prevailing party, "was entitled to recover its legal fees and costs," and that the arbitrator should "correct the award" and "enter judgment" for appellant as requested. On March 21, 2016, RCC responded to this motion by filing a "Response to Quick Set Concrete, Inc.'s Motion to Correct Award." Then, on March 23, 2016, appellant filed with the AAA its "Reply to Response of RoeschCo Construction Inc."

Appellant did not file a response in the trial court to RCC's motion to confirm the arbitration award. So, on March 21, 2016, the trial court signed a final judgment. In that judgment, the trial court found appellant had not filed an application to vacate the arbitration award, the allegations in RCC's "Application to Confirm the Arbitration Award" were true and correct, and that RCC was damaged by appellant in the amount of $91,240.00 as found in the arbitration award.

On March 24, 2016, appellant filed in the trial court a "Motion for New Trial." In that motion appellant argued that its "motion to correct award was timely filed," albeit with the AAA, and requested that, "[i]f the arbitrator does not rule in Plaintiff's favor . . . the Court modify and correct the award and enter judgment for Plaintiff." On March 31, 2016, the arbitrator signed an "Order on Motion to Correct Award" that denied appellant's motion. In that order, the arbitrator

stated: "I find the relief requested is not authorized by AAA Construction Rule 48, is outside of my authority as arbitrator, and appears in fact to seek a substantive change in the Award having duly been entered by me in this arbitration case." The arbitrator also stated that the "Award dated March 1, 2016, is reaffirmed and remains in full force and effect."

On April 8, 2016, appellant filed with the trial court its "First Amended Motion for New Trial and Motion to Modify Arbitration Holding." That motion advised the trial court the arbitrator declined to modify the arbitration award and requested the trial court correct the arbitrator's "miscalculation." After RCC responded to the motion, the trial court held a hearing where both parties presented evidence. The trial court rendered an order denying appellant's motion. This appeal was timely perfected.

II. Motions to Vacate or Modify Arbitration Awards

A. Applicable Law

Chapter 171 of the Texas Civil Practice and Remedies Code is referred to generally as the Texas Arbitration Act ("TAA"). *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001–.098 (West 2011). That act states in part that the making of an agreement that provides for or authorizes an arbitration in Texas pursuant to the act "confers jurisdiction on the [trial] court to enforce the agreement and to render judgment on an award under this chapter." *Id.* § 171.081; *see also id.* § 171.082 ("The filing . . . of an application for an order under this chapter, including a judgment or decree, invokes the jurisdiction of the [trial] court."). Additionally, the act provides that the trial court "shall stay a proceeding that involves an issue subject to arbitration if an order for arbitration or an application for that order is made." *Id.* § 171.025.

Pursuant to section 171.054 of the TAA, "[t]he arbitrators may modify or correct an award" on certain grounds, including an "evident miscalculation," or to clarify the award. *Id.* § 171.054(a). However, such modification or correction "may be made only: (1) on application

of a party; or (2) on submission to the arbitrators by a court, if an application to the court is pending [for confirmation of an award or certain other requests], subject to any condition ordered by the court." *Id.* § 171.054(b); *see also In re Akin Gump Strauss Hauer & Feld, LLP*, 252 S.W.3d 480, 489 & n.11 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (construing section 171.054(b) to provide that while a motion for confirmation of an award is pending before the trial court, "presumably parties are free to request the trial court to submit to the arbitration panel issues that need clarification"). Further, section 171.054(c) states "[a] party may make an application under this section not later than the 20th day after the date the award is delivered to the applicant." CIV. PRAC. & REM. CODE § 171.054(c).

Subchapter D of the TAA is titled "Court Proceedings." Pursuant to that subchapter, "[u]nless grounds are offered for vacating, modifying, or correcting an award," the trial court, on application of a party, "shall confirm the award." *Id.* § 171.087. Also, section 171.086, titled "Orders That May be Rendered," states in part that "[d]uring the period an arbitration is pending before the arbitrators or at or after the conclusion of the arbitration, a party may file an application for a court order," including an order requesting the trial court to confirm, vacate, modify, or correct an arbitration award. *Id.* § 171.086(b)(6). Further, section 171.091 provides in relevant part:

> (a) On application, the court shall modify or correct an award if:
>
> (1) the award contains:
> (A) an evident miscalculation of numbers; or
> (B) an evident mistake in the description of a person, thing, or property referred to in the award;
> (2) the arbitrators have made an award with respect to a matter not submitted to them and the award may be corrected without affecting the merits of the decision made with respect to the issues that were submitted; or
> (3) the form of the award is imperfect in a manner not affecting the merits of the controversy.

Id. § 171.091.

Pursuant to the provisions described above, "confirmation is the default result unless a challenge to the award has been or is being considered." *Hamm v. Millennium Income Fund, L.L.C.,* 178 S.W.3d 256, 262 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (citing CIV. PRAC. & REM. CODE § 171.087); *see also New Med. Horizons II, Ltd. v. Jacobson*, 317 S.W.3d 421, 427 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *In re Guardianship of Cantu de Villarreal*, 330 S.W.3d 11, 18 (Tex. App.—Corpus Christi 2010, no pet.). "Additionally, the TAA provides that (1) if the court denies a motion to vacate, to modify, or to correct an arbitration award, it must confirm the award and (2) if the court grants a motion to modify or to correct an award, it must confirm the award as modified or corrected." *Hamm*, 178 S.W.3d at 263 (citing CIV. PRAC. & REM. CODE §§ 171.088(c) (pertaining to vacating of award), 171.091(c)). "Taken together with the section requiring confirmation unless statutory grounds not to do so are shown, sections 171.088(c) and 171.091(c) also indicate that motions to modify, to vacate, and to correct an arbitration award should be heard either before or simultaneously with motions to confirm the award." *Id*. Finally, the TAA provides that "a judgment confirming (or modifying or correcting) an arbitration award is a final judgment like any other." *Id*.

B. Application of Law to the Facts

1. Appellant's Motion for Rehearing

As a threshold matter, we begin by addressing a jurisdictional argument asserted for the first time by appellant in its motion for rehearing. *See, e.g., Torres v. Haynes*, 432 S.W.3d 370, 371 (Tex. App.—San Antonio 2014, no pet.) ("Points of error concerning the trial court's jurisdiction to proceed to judgment present questions of fundamental error and are exempt from the general rule that points of error raised for the first time in a motion for rehearing are too late to be considered."). According to appellant, the trial court "should not have entered a final judgment because it had no jurisdiction over the parties and the proceeding on March 21, 2016."

Specifically, appellant contends "[t]he [trial] court affirmed the final judgment that was void when it was signed because the arbitration proceeding was not terminated, the award was not final, and the [trial] court had not lifted the abatement stay order." Appellant argues in part (1) "[t]he arbitrator had exclusive jurisdiction" for at least twenty days after appellant's March 16, 2016 motion to correct was filed with the AAA; (2) "[t]he [trial] court and the arbitrator could not have jurisdiction at the same time"; (3) the term "pending the outcome of an arbitration between the parties" in the agreed abatement order described above "meant pending the final outcome and termination of the arbitration proceeding"; (4) "[a]ctions taken in violation of a stay are void"; and (5) "a party should not be permitted to file a motion to enforce an arbitration award until that award becomes final and the arbitration terminated." In support of its position, appellant cites (1) AAA rule number 51, *see* American Arbitration Association Construction Industry Arbitration Rules and Mediation Procedures, R. 51, and (2) several sections of Chapter 172 of the Texas Civil Practice and Remedies Code, *see* CIV. PRAC. & REM. CODE §§ 172.001–.215.

Chapter 172 is titled "Arbitration and Conciliation of International Commercial Disputes" and applies to "international arbitration and conciliation." *See* CIV. PRAC. & REM. CODE § 172.001. Appellant contends provisions from that chapter govern as to when the arbitration in question was "terminated" and when the arbitration award became "final." However, appellant does not explain, and the record does not show, how chapter 172 is applicable in this case. Further, rule 51 provides in part (1) "within 20 calendar days after the transmittal of an award," a party "may request that the arbitrator correct any clerical, typographical, technical, or computational errors in the award"; (2) "[t]he arbitrator shall dispose of the request within 20 calendar days after the transmittal by the AAA to the arbitrator of the request and any response thereto"; and (3) "[i]f applicable law provides a different procedural time frame, that procedure

shall be followed." *See* American Arbitration Association Construction Industry Arbitration Rules and Mediation Procedures, R. 51. As described above, chapter 171 provides for the filing of an application for a court order confirming an arbitration award "[d]uring the period an arbitration is pending before the arbitrators or at or after the conclusion of the arbitration." CIV. PRAC. & REM. CODE § 171.086(b). Appellant cites no authority, and we have found none, to support the position that a stay of a proceeding during arbitration, which is specifically authorized by section 171.025 of the TAA, deprives a trial court of jurisdiction to render orders provided for in the act. *See id.* § 171.025; *see also id.* §§ 171.081–.082, 171.086. Further, while the arbitrators "may modify or correct an award" on certain grounds, such modification or correction "may be made only: (1) on application of a party; or (2) on submission to the arbitrators by a court, if an application to the court is pending [for confirmation of an award or certain other requests], subject to any condition ordered by the court." *Id.* § 171.054(b); *see also In re Akin Gump*, 252 S.W.3d at 489 & n.11 (construing section 171.054(b) to provide that while a motion for confirmation of an award is pending before the trial court, "presumably parties are free to request the trial court to submit to the arbitration panel issues that need clarification"). Based on the above-described provisions of chapter 171, we conclude the trial court did not lack jurisdiction as to the judgment in question. *See* CIV. PRAC. & REM. CODE §§ 171.081–.091.[1]

2. Appellant's Issues on Appeal

Now, we turn to the two issues asserted by appellant in its appellate brief. As described above, appellant contends the trial court erred by denying appellant's "Motion for New Trial and

[1] Appellant asserts three additional arguments in its motion for rehearing: (1) "[e]ntry of the final judgment was void because no notice of a hearing was provided to [appellant]"; (2) "RCC waived reliance on *Hamm v. Millennium Income Fund, LLC*"; and (3) the affirming of the trial court's judgment is "contrary to public policy in Texas." Although appellant mentions its same jurisdictional argument described above in addressing each of those contentions, it does not assert any specific additional challenges to jurisdiction respecting the judgment in question. Because those three arguments were not asserted in appellant's original brief on appeal or its appellate reply brief, we conclude those arguments present nothing for this Court's consideration. *See Torres*, 432 S.W.3d at 371 (points of error raised for first time in motion for rehearing are generally too late to be considered); *see also Rollins v. Beaumont*, No. 05-04-01859-CV, 2005 WL 2100278, at *1-2 (Tex. App.—Dallas Sept. 1, 2005, no pet.) (mem. op.) (rejecting argument that lack of adequate notice of hearing deprives trial court of jurisdiction or results in "void" judgment).

Motion to Modify Arbitration Holding" because (1) there was an evident miscalculation by the arbitrator and (2) the arbitrator "exceeded his authority in assessing RCC's legal fees and arbitration costs against Appellant who should have been found to be the prevailing party." RCC contends the trial court did not err because the trial court had no discretion but to deny appellant's "Motion to Modify Arbitration Holding" since appellant did not file its motion before the trial court ruled on RCC's "Motion to Lift Abatement and Application to Confirm Arbitration Award." We agree with RCC on this point.

The threshold question is whether appellant timely filed a motion to vacate or modify the arbitration award. The parties agree the TAA applies. Under the TAA, "[a] motion to vacate, to modify, or to correct an arbitration award must be raised or considered before or simultaneously with a motion to confirm the award." *Hamm*, 178 S.W.3d at 269. Further, "a party that moves to vacate, to modify, or to correct an arbitration award, and adduces evidence in support, only after the award has been confirmed and final judgment rendered has waived that challenge—or, at least, a trial court does not abuse its discretion if it overrules such a post-judgment motion." *Id*. at 268.

RCC filed a motion to confirm the arbitration award in the trial court on March 8, 2016. Appellant was aware of the filing of this motion, had an opportunity to challenge the award, and failed to do so. While appellant filed a "Claimant's Motion to Correct Award" with the AAA on March 16, 2016, before the trial court confirmed the arbitration award, appellant did not challenge the arbitration award in the trial court until after the award was confirmed and final judgment rendered. *Cf. Sydow v. Verner, Liipfert, Bernhard, McPherson & Hand, Chartered*, 218 S.W.3d 162, 171 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (concluding appellant *did* "timely place[] the issue of prejudgment interest before the court when he applied to have amended award confirmed (and when he responded to [the appellee's] application to confirm the

original award)," despite also filing a motion to reconsider in the arbitration forum); *Brown v. Potter Concrete Residential, Ltd.*, No. 05-13-00585-CV, 2014 WL 2993809, at *2 (Tex. App.—Dallas June 30, 2014, pet. denied) (mem. op.) ("Although the Browns did not specifically move to vacate the award, they did file a response arguing the applications to confirm should be denied.").

On this record, we conclude the trial court did not abuse its discretion by denying appellant's untimely "Motion for New Trial and Motion to Modify Arbitration Holding."

III. Conclusion

For the foregoing reasons, we decide each of appellant's issues against it. The trial court's judgment is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

QUICKSET CONCRETE, INC., Appellant

No. 05-16-00509-CV   V.

ROESCHCO CONSTRUCTION, INC., Appellee

On Appeal from the 193rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-14-11847.
Opinion delivered by Justice Lang, Justices Fillmore and Schenck participating.

We **WITHDRAW** our opinion and **VACATE** our judgment of August 15, 2017. This is now the judgment of the Court.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 13th day of September, 2017.