REVERSE and RENDER; and Opinion Filed October 31, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00329-CV

RAMANA JONES, M.D., Appellant
V.
CARLOS & PARNELL, M.D., P.A., Appellee

On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-05163

MEMORANDUM OPINION

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

Dr. Ramana Jones appeals the trial court's order denying confirmation of an arbitration award. We reverse the trial court's order and render judgment confirming the arbitration award.

FACTUAL & PROCEDURAL BACKGROUND

Dr. Jones joined Carlos & Parnell, M.D., P.A. ("C&P") in 1999. She became a shareholder in 2003. On December 31, 2012, Dr. Jones terminated her employment with C&P. Pursuant to the shareholder agreement ("Shareholder Agreement"), Dr. Jones offered to sell her shares in C&P back to the practice under the terms provided therein. C&P responded that it did not have the funds to purchase her shares, that doing so would render C&P insolvent, and further asserted that Jones had breached the Shareholder Agreement and, instead, owed C&P. The parties proceeded to arbitrate their dispute pursuant to an arbitration clause in the Shareholder Agreement. After a five-day arbitration hearing, the arbitrator awarded nothing to C&P and

awarded Dr. Jones (a) $265,000 for her shares of C&P, (b) $74,126.91 for wages C&P withheld from 2009 through 2011 as shareholder loans, (c) attorney fees and costs, (d) pre- and post-judgment interest, and (e) the fees associated with the arbitration.

On May 5, 2015, approximately one month after the arbitration award was signed, Dr. Jones applied to the trial court to confirm the arbitration award. On June 30, 2015, C&P moved to vacate the arbitration award, and on July 1, 2015, C&P amended its motion to vacate, arguing the arbitration award should be vacated, modified, or corrected. On October 6, 2015, the trial court conducted a hearing on both the motion to confirm and the motion to vacate.

Fifteen months later on December 30, 2016, the trial court entered a final judgment, in which it denied C&P's motion to vacate, granted Dr. Jones's motion to confirm, and confirmed the arbitration award. The trial court also awarded Dr. Jones attorney's fees and costs for the prosecution of the confirmation proceeding, as well as post-judgment interest and attorney's fees for appeals of the final judgment. On January 30, 2017, C&P filed a motion, requesting the trial court either (a) order a new trial denying confirmation or (b) vacate or modify the arbitration award based on the following grounds: (i) the arbitrator exceeded his powers, (ii) the arbitrator evidenced partiality that prejudiced C&P's rights, and (iii) the trial court erred by awarding Dr. Jones attorney's fees for the prosecution of the confirmation of the arbitration award. On March 10, 2017, the trial court heard C&P's motion, and on March 15, 2017, the trial court entered an order that granted C&P's motion and vacated the December 20, 2016 final judgment. The March 15, 2017 order stated the trial court did not confirm the arbitration award and ordered the case to be reset on the trial court's trial docket.

On March 20, 2017, Dr. Jones filed a motion requesting the trial court clarify its March 15, 2017 order. At a March 24, 2017 hearing on Dr. Jones's motion for clarification, the trial court judge stated orally that her order was intended to deny confirmation of the arbitration

award, vacate the arbitration award, and remand the case to another arbitration. On March 31, 2017, C&P moved to appoint a new arbitrator. On April 3, 2017, Dr. Jones filed her notice of appeal, and on April 7, 2017, she responded to C&P's motion to appoint a new arbitrator.

C&P'S MOTION TO DISMISS FOR LACK OF JURISDICTION

C&P moved to dismiss this appeal on the ground that this Court lacks jurisdiction, arguing there is no final judgment or appealable order at issue and that there is no statute that authorizes an interlocutory appeal.

The legislature determines, by statute, whether a particular type of pretrial ruling may be appealable before a final judgment is rendered. *Walker Sand, Inc. v. Baytown Asphalt Materials, Ltd.*, 95 S.W.3d 511, 514 (Tex. App.—Houston [1st] 2002, no pet.). Section 171.098(a)(3) of the Texas Civil Practice & Remedies Code provides a party may appeal an order denying confirmation of an award. TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(3) (West 2011).

C&P argues this statute is inapplicable because the March 15, 2017 order was not a final judgment. Section 171.098(a)(3) provides for appeals from "a judgment" *or* "an order . . . denying confirmation of an award." CIV. PRAC. & REM. § 171.098(a)(3). The language of the challenged order here states that the trial court "set[] aside [the final judgment dated December 30, 2016] and does not confirm the Arbitration Award."

C&P urges that further language in the March 15, 2017 order indicating the court's intent to reset the case on its trial docket, together with the trial court's subsequent, oral indication that it did not intend to set the case for trial but to select a new arbitrator, precludes finality to support the appeal. It is the substance and function of the order viewed in the context of the record that controls our interlocutory jurisdiction. *Walker Sand, Inc.*, 95 S.W.3d at 515. Here, the trial court

unequivocally denied confirmation in its March 15,2017 order.[1] Thus, we have jurisdiction over Dr. Jones's appeal and deny C&P's motion to dismiss.

DISCUSSION

I. Standard of Review

Arbitration of disputes is strongly favored under both federal and Texas law. *Cambridge Legacy Grp., Inc. v. Jain*, 407 S.W.3d 443, 447 (Tex. App.—Dallas 2013, pet. denied). We review a trial court's decision denying confirmation of an arbitration award de novo. *See id.* Absent some effective alteration to the judicial review standards as discussed below, all reasonable presumptions are indulged to uphold the arbitrator's decision, and none are indulged against it. *Id.*

We begin with C&P's contention that the arbitration award is subject to expanded review by virtue of the parties' agreement. C&P urges that the award is subject to plenary review and denial of confirmation for any legal error because the parties' arbitration agreement provided for arbitration "in accordance with the National Health Lawyers Association Alternative Dispute Resolution Services Rules of Procedure for Arbitration," which, in turn, provide: (1) that "[a]n arbitrator may award any relief authorized by contract or applicable law that appears to be fair under the circumstances;" and (2) "[a]n award must be in writing and signed by the arbitrator, in compliance with applicable state and federal law." C&P also cites to us to a scheduling order from the arbitration proceedings, which notes the parties agreed that Texas Rules of Civil Procedure "will provide guidance" for discovery issues, and that the laws of the State of Texas "govern[] the subject matter of this arbitration."

[1] C&P's proposed construction of the order and section 171.098 would not only ignore the plain language of the order and the statute's disjunctive treatment of "judgments" or "orders," but frustrate the evident legislative purpose. "Prolonged judicial review of an arbitration award adds expense and delay and thereby diminishes the benefits of arbitration as an efficient, economical system for resolving disputes." *CVN Grp., Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002).

The arbitration award here is subject to both the federal and Texas arbitration acts ("FAA" and "TAA," respectively). *See* 9 U.S.C. § 2; TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (West 2011). After more than a decade of disagreement among the lower federal courts, the United States Supreme Court recently rejected the notion that the parties to an arbitration agreement might supplement the narrow statutory review standards available as a procedural matter under the FAA. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578, 585–86 (2008). The Supreme Court's opinion left open the question of whether state arbitration laws like the TAA might be available to provide for the contractually expanded review notwithstanding the FAA's broad reach and preemptive force. *Id.* at 590. After *Hall Street*, the Texas Supreme Court held that parties proceeding under the TAA may in fact agree to expand the scope of judicial review by constraining the arbitrator's authority to commit errors of law of a type that would be remedial in an ordinary appeal. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 87, 97 & 101 (Tex. 2011) *cert. denied*, 565 U.S. 963 (2011) (contract did not specify whether state or federal law applied).

We conclude that the parties here did not in fact agree to expand the default review standards. In *Nafta Traders*, the supreme court held that an arbitration award is not susceptible to full judicial review merely because the parties have agreed to arbitrate. *Id.* at 101. Instead, absent "clear agreement," the default under the TAA, and the only course permitted by the FAA, is restricted judicial review. *Id.*

Far from "clearly" agreeing to alter and expand the TAA's statutory review standards, the Shareholder Agreement merely references pre-existing arbitration rules of the National Health Lawyers Association, which in turn empowered the arbitrator to render "any relief authorized by contract or applicable law *that appears to be fair under the circumstances*" and to "sign" the award, in compliance with applicable state and federal law. Neither of these provisions purports

to constrain the arbitrator's authority to make a mistake of law of a type that would be remedial in an ordinary appeal or, concomitantly, to subject any such error to plenary review.[2] The fact that the parties selected Texas law as the substantive law to be applied by the arbitrator, or further agreed that the arbitrator would look to the Texas Rules of Civil Procedure for "guidance" with respect to discovery matters, is similarly unremarkable. Being directed to apply a particular law (or, even less controlling, being "guided" by it) is far different from so clearly depriving the arbitrator of the power to make any error in that application as to open the resulting award to second guessing by a court in a subsequent confirmation proceeding.[3] Were it otherwise, virtually every arbitration would be little more than a warm up for the resulting litigation, albeit an expensive and time-consuming one.

In any case, even if parties have committed to alternative review standards to permit plenary review of legal error or discovery issues, *Nafta Traders* also made clear that a reviewing court must have a sufficient record of the arbitral proceedings, and complaints must have been preserved, all as if the award were a court judgment on appeal. *Id.* C&P has not produced the record of the arbitration, making that searching inquiry impossible.

II. Analysis

Dr. Jones raises two issues: (1) whether C&P failed to provide any evidence to support its arguments that the arbitration award should be vacated, and hence, denied the confirmation she

[2] The agreement in *Nafta Traders* provided: "The arbitrator shall be required to state in a written opinion the facts and conclusions of law relied upon to support the decision rendered. The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law." 339 S.W.3d at 88.

[3] Those federal courts that allowed modification of the FAA's standard of review before *Hall Street* uniformly held that a choice-of-law provision is insufficient to demonstrate the parties' clear intent to depart from the FAA's default rules. *See Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 340–43 (5th Cir. 2004).

timely requested; and (2) whether the trial court erred by vacating the award of post-arbitration attorney's fees to Dr. Jones.[4] We begin with the issues raised by C&P to vacate the award.

A. Did the Arbitrator Exceeded His Powers?

The TAA authorizes review and vacatur of an arbitration award where the arbitrator exceeds his authority. TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(b) (West 2011). This is an exceedingly narrow standard of review. Unless the power to err has been denied to them in the agreement as in *Nafta Traders*, arbitrators cannot be said to have exceeded their authority by allegedly misunderstanding the law or facts. *E.g.*, *City of Laredo v. Mojica*, 399 S.W.3d 190, 196–97 (Tex. App—San Antonio 2012, pet. denied). Rather, arbitrators exceed their power under the TAA when they decide matters not properly before them or where the resulting award is not rationally inferable from the parties' agreement. *Humitech Dev. Corp. v. Perlman*, 424 S.W.3d 782, 792 (Tex. App.—Dallas 2014, no pet.) *abrogated on other grounds by Hoskins v. Hoskins*, 497 S.W.3d 490, 493 n.4, 494 (Tex. 2016).

Dr. Jones argues C&P failed to provide any evidence to support its arguments that the arbitration award should be vacated because the arbitrator exceeded his powers. C&P responds that the arbitrator exceeded his powers by making findings about causes of action not sufficiently pleaded and by failing to follow state law.

As for C&P's assertions regarding alleged failures to follow state law, we have already concluded parties did not contract to expand the default review standards, which prevents us from vacating an award even if it is alleged to be based upon a mistake in law or fact. *See Jain*, 407 S.W.3d at 448.[5]

[4] In her brief on appeal, Dr. Jones argues the trial court failed to apply the appropriate deferential standard of review. Because we conclude the trial court could not have denied confirmation of the arbitration award on any of the grounds raised in C&P's motion for new trial, we need not address this argument. TEX. R. APP. P. 47.1.

[5] C&P also raises an argument that the trial court improperly leveled discovery sanctions against C&P in violation of the Texas Rules of Civil Procedure. This argument was made to the trial court as part of C&P's overall contention that the arbitrator was biased against C&P.

Moreover, C&P, as the non-prevailing party seeking to vacate an arbitration award, bore the burden in the trial court of bringing forth a complete record that establishes some basis for vacating the award. *See Centex/Vestal v. Friendship W. Baptist Church*, 314 S.W.3d 677, 684 (Tex. App.—Dallas 2010, pet. denied). C&P admits the transcript of the arbitration proceeding is not in the record and concedes that there were pre-trial proceedings that took place with no court reporter present. When, as here, a party brings a record showing only a portion of the arbitration proceedings, we presume any remaining evidence supports the arbitration award. *See id.* at 685. Thus, we presume the remaining evidence supports the arbitrator's award in favor of Dr. Jones on a fraud claim. Accordingly, we cannot conclude the trial court could have vacated the arbitration award on the ground the arbitrator exceeded his powers.

B. Did the Arbitrator Engage in Misconduct or Willful Misbehavior?

Both the FAA and the TAA contemplate a court may vacate an arbitration award where the arbitrator was guilty of misconduct. *See* 9 U.S.C. § 10 (a)(3) ("misconduct . . . or . . . any other misbehavior by which the rights of any party have been prejudiced"); CIV. PRAC. & REM. § 171.088(a)(2)(C) ("misconduct or willful misbehavior of an arbitrator").

Dr. Jones argues C&P has no evidence of misconduct or willful misbehavior on the part of the arbitrator as would be necessary to deny confirmation or vacate the award. Beyond its arguments seeking to expand the standard of review and establish alleged mistakes in law or fact, which have been addressed above, C&P argues the arbitrator engaged in misconduct that C&P admits would not appear in any record for appeal. Accordingly, we cannot conclude the trial

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However, we note the NHLA rules specifically provide that "[a]n arbitrator may require a party to pay the fees and expenses incurred by the arbitrator and/or the attorney fees of other parties, or any portion thereof, as a result of the party's lack of cooperation or abuse of the process." Accordingly, we reject any argument by C&P that the arbitrator exceeded his powers by finding that "[a] part of the basis for the reasonableness and necessity of the fees and costs includes the limitations and untimely access to [C&P's] records and discovery issues." In addition, we note an award of expenses including attorney's fees to obtain an order compelling discovery is authorized by rule of civil procedure 215.1(d) and is not a sanction. *See* TEX. R. CIV. P. 215.1(d); *MacDonald Devin, PC v. Rice*, No. 05-14-00938-CV, 2015 WL 6468188, at *4 (Tex. App.—Dallas Oct. 27, 2015, no pet.) (mem. op.) (citing *Blake v. Dorado*, 211 S.W.3d 429, 434 (Tex. App.—El Paso 2006, no pet.)).

court could have vacated the arbitration award on any ground the arbitrator engaged in misconduct or willful misbehavior. *See Jain*, 407 S.W.3d at 447.

C. Did the Arbitrator Refuse to Hear Evidence Material to the Controversy?

Both the FAA and the TAA contemplate a court may vacate an arbitration award where the arbitrator refuses to hear evidence material to the controversy. *See* 9 U.S.C. § 10 (a)(3) ("misconduct . . . in refusing to hear evidence pertinent and material to the controversy"); CIV. PRAC. & REM. § 171.088(a)(e)(C) ("refused to hear evidence material to the controversy").

Dr. Jones argues there is no evidence in the record to support C&P's allegations regarding the arbitrator's refusal to hear evidence material to the controversy. C&P points to the scheduling order and the arbitration award to argue it had a short amount of time in which to file its answer and counterclaim and that the arbitrator struck its amended answer and refused to allow any evidence by C&P on the additional defenses asserted in its amended answer. C&P also asserts the arbitrator refused to allow C&P to take Dr. Jones's deposition, but it does not provide any support for this contention. Regardless of C&P's assertions regarding the arbitrator's decisions to refuse to hear any evidence, C&P has directed this Court to nothing in the record to establish that any evidence the arbitrator may have refused to hear was "material to the controversy." *See* 9 U.S.C. § 10 (a)(3) ("misconduct . . . in refusing to hear evidence pertinent and *material to the controversy*"); CIV. PRAC. & REM. § 171.088(a)(e)(C) ("refused to hear evidence *material to the controversy*"). Accordingly, we cannot conclude the trial court could have vacated an arbitration award on the ground that the arbitrator refused to hear evidence that was material to the controversy. *See Jain*, 407 S.W.3d at 447.

D. Was the Arbitrator Evidently Partial?

Under the FAA and the TAA, an arbitrator exhibits evident partiality if he does not disclose facts which might, to an objective observer, create a reasonable impression of the

arbitrator's partiality. *Amoco D.T. Co. v. Occidental Petroleum Corp.*, 343 S.W.3d 837, 843 (Tex. App.—Houston [14th Dist.] 2011, pet. denied); *Karlseng v. Cooke*, 286 S.W.3d 51, 56 (Tex. App.—Dallas 2009, no pet.).

Dr. Jones argues that the trial court cannot have denied confirmation of the arbitration award on the ground that the arbitrator was biased against C&P or its counsel because C&P produced no evidence of bias and because C&P failed to raise any objection as to partiality to the arbitrator during the arbitration proceedings.

A reviewing court must have a sufficient record of the arbitration proceedings and the party challenging the award must have properly preserved its complaint "just as if the award were a court judgment on appeal." *Quinn v. Nafta Traders, Inc.*, 360 S.W.3d 713, 719 (Tex. App.—Dallas 2012, pet. denied). When ruling on motions to confirm, alter, or vacate an arbitration award based on reversible error, the trial court serves an appellate function. *Id.* As such, our rules for preserving complaints for appeal will also apply to our review of arbitration awards and generally require a party to present a complaint to the arbitrator by timely request, objection, or motion with sufficient specificity as a prerequisite to judicial review. *Id.*

C&P contends that it did not waive any claim of bias because it was unaware of the arbitrator's bias until the arbitration award was issued. In its motion for new trial or vacatur or modification of the arbitration award, C&P summarized its arguments regarding the arbitrator's partiality, which we quote here omitting only certain references to the record:

> 1) The arbitrator failed to state on what claims his Award was based;
>
> 2) he made "findings" on claims that were either never pleaded (fraud) or that are not recognized by law (shareholder oppression);
>
> 3) he accused the Defendant of waste and misapplication of corporate assets when no such claim was pleaded;
>
> 4) he made a finding of fraud in the inducement when such a claim was never pleaded, and incredibly, would necessarily have to mean the Plaintiff committed

fraud in the inducement upon herself when she signed the Agreement the subject of this suit, as she was a shareholder in the Defendant when she signed the Agreement and she approved the Agreement before she signed it;

5) he made diametrically opposed findings to support his conclusions, first finding that the Defendant never intended to honor the Agreement as it did not have funds available to buy Plaintiff's shares and also finding that when the Agreement was signed the "PA could fulfill the contract terms";

6) the basis for his fraud in the inducement finding was that the Defendant filed a counterclaim in the arbitration proceedings, post-litigation conduct that by definition cannot support a fraud in the inducement finding;

7) he made a finding of fraud in the inducement based on representations that the Defendant allegedly made to Plaintiff in about the 2010 Shareholder Agreement the subject of this suit, when in fact at that time Plaintiff was already a shareholder in the Defendant and any such representations would have been made by the Plaintiff to herself, which cannot be a basis of a fraud in the inducement finding;

8) he refused to allow the Defendant to take the Plaintiff's deposition pretrial even though he allowed pre-trial depositions;

9) he refused to allow Defendant to amend its pleadings and, in effect, gave Defendant 11 days to file any answer and counterclaim and refused an amendment of pleadings that was more than 30 days before trial;

10) he awarded sanctions despite none being warranted and despite no proper motion to compel being filed and which failed to comply with *Transamerica* and its progeny; and

11) he committed unprofessional conduct during the arbitration proceedings and was overtly rude to Defendant and its counsel.

C&P also points out that the arbitrator found that C&P "did not fully comply with the [pre-hearing discovery] order" and took that "into consideration in the admission, weighing of evidence and its credibility and sufficiency in this award" and in the awarding of fees and costs.

However, even assuming this argument was not waived, none of the findings C&P points to are evidence that the arbitrator failed to "disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality." *See Amoco D.T.*, 343 S.W.3d at 843. The arguments above are either unsupported by evidence in the record or consist of

allegations of mistakes in law or fact that cannot be the basis for vacating an arbitration award. *See Jain*, 407 S.W.3d at 447.[6]

In light of our conclusions on this and the other potential grounds for the trial court's decision to deny confirmation of the arbitration award, we sustain Dr. Jones's first issue.

E. Post-Arbitration Attorney's Fees

In its final judgment confirming the arbitration award, the trial court awarded Dr. Jones attorney's fees and costs for the prosecution of the confirmation of the arbitration award, as well as post-judgment interest and attorney's fees for an appeal to this Court, and for a potential appeal to the supreme court. In her second issue, Dr. Jones argues she is entitled to attorney's fees pursuant to the following language in the Shareholder Agreement.

> In the event suit be instituted for breach or default of any of the conditions of this Agreement, the party prevailing in any such action, in law or equity shall be entitled to reasonable attorney's fees and court costs.

If an arbitration award includes an award of attorney's fees, a trial court may not award additional attorney fees for enforcing or appealing the confirmation of the award, unless the arbitration agreement provides otherwise. *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 436 (Tex. App.—Dallas 2004, pet. denied). We note the arbitration award included $118,246.56 in attorney's fees and that the quoted language from the Shareholder's Agreement does not provide for a further award of attorney's fees for enforcing or appealing the confirmation of an arbitration award by the trial court. Accordingly, we overrule Dr. Jones's second issue. *See id*.

[6] C&P points us to two cases in which partiality was discovered after the proceedings and the trial court found no waiver. *See Mariner Fin. Grp., Inc. v. Bossley*, 79 S.W.3d 30, 33 (Tex. 2002); *Amoco D.T.*, 343 S.W.3d at 845. In both of these cases, the arbitrators partiality arose from an undisclosed conflict of interest that was discovered after the award. In contrast, C&P asserts in its brief that the arbitrator engaged in misconduct both before and during the actual hearing in the form of unfavorable decisions and unprofessional conduct.

CONCLUSION

We conclude the trial court erred in granting C&P's motion for new trial and in denying confirmation of the arbitration award. Accordingly, we reverse the trial court's order denying confirmation of the arbitration award and render judgment confirming the arbitration award.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RAMANA JONES, M.D., Appellant

No. 05-17-00329-CV V.

CARLOS & PARNELL, M.D., P.A., Appellee

On Appeal from the 191st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-15-05163.
Opinion delivered by Justice Schenck, Justices Lang and Evans participating.

In accordance with this Court's opinion of this date, the order of the trial court denying confirmation of the arbitration award is **REVERSED** and judgment is **RENDERED** confirming the arbitration award.

It is **ORDERED** that appellant RAMANA JONES, M.D. recover her costs of this appeal from appellee CARLOS & PARNELL, M.D., P.A.

Judgment entered this 31st day of October, 2017.