Affirmed; Opinion Filed February 28, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00887-CV

THE HOLMES BUILDERS AT CASTLE HILLS, LTD. AND THBGP, INC., Appellants
V.
ALFRED H. GORDON AND LAWANDA P. GORDON, Appellees

On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-00364

MEMORANDUM OPINION

Before Justices Lang-Miers, Myers, and Boatright
Opinion by Justice Myers

The Holmes Builders at Castle Hills, Ltd. and THBGP, Inc. appeal the trial court's entry of judgment on the arbitration award in favor of Albert H. Gordon and Lawanda P. Gordon. Appellants bring five issues contending the trial court erred by (1) failing to dismiss the Gordons' claims as barred by res judicata; (2) failing to dismiss the Gordons' claims as barred by limitations; (3) failing to vacate the arbitration award because appellants' warranty excluded each element of recovery awarded by the arbitrator; (4) failing to vacate the arbitration award because it violated the Texas Property and Casualty Insurance Guaranty Act; and (5) awarding the Gordons their attorney's fees and failing to award appellants their attorney's fees. We affirm the trial court's judgment.

BACKGROUND

In 2008, the Gordons hired The Holmes Builders to build their home. The parties signed a construction contract, which included a limited warranty attached to the contract. Both the construction contract and the warranty contained arbitration provisions for any dispute arising from the contract or the warranty. The provision stated the dispute would be "submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) or, if applicable, by similar state statute, and not by or in a court of law."

Soon after the Gordon's moved in, defects in the foundation became apparent. A survey showed the house was one-and-a-half inches out of levelness. Appellants worked with the foundation and engineering contractors for several years to repair the damage to the foundation, the home, and the landscaping.

On June 15, 2012, the Gordons filed suit against appellees and the foundation subcontractors. The next week, the Gordons nonsuited appellants and instituted an arbitration action against them. Appellants intervened in the lawsuit, seeking contribution from the subcontractors in the event appellants were found liable in the arbitration proceeding. The litigation with the subcontractors was settled by a written agreement dated August 23, 2013. In the settlement agreement, the subcontractors agreed to pay the Gordons and appellants in exchange for their agreement not to pursue claims or contribution against the subcontractors. Also in the settlement agreement, appellants promised to repair the foundation and to undertake "reasonable and necessary cosmetic and other repairs caused by foundation distress to [bring] the home and landscaping to 'as new' condition by June 1, 2014." The Gordons agreed to dismiss the arbitration proceeding upon satisfactory completion of the repairs.

On August 1, 2014, while the repairs under the settlement agreement were under way, appellants' insurer was designated an "impaired insurer" and was placed in liquidation. This

stayed any further action under the settlement agreement for 180 days. At that time, some foundation work as well as some cosmetic and landscape repairs remained. When the stay from the receivership expired, the Gordons demanded appellants complete the work under the settlement agreement. Appellants completed the foundation work, but they did not complete the cosmetic and landscape repairs.

At the conclusion of the arbitration proceeding, the arbitrator found the Gordons "prevailed on two causes of action: breach of contract for violation of a mediated settlement agreement dated August 23, 2013, and breach of Respondent The Holmes Builders at Castle Hills Ltd.'s express warranty to repair." The arbitrator awarded the Gordons $448,450.33 for damages, costs, expert fees, and attorney's fees.

The Gordons filed in district court a petition to confirm the arbitration award. Appellants opposed the petition, asserting the arbitration award was erroneous because the Gordons' claims were barred by res judicata and limitations, the damages awarded were not based on the underlying contract, and the award violated the Texas Property and Casualty Insurance Agreement. The trial court confirmed the arbitration award, entering judgment for the Gordons.

STANDARD OF REVIEW

Arbitration of disputes is strongly favored under both federal and Texas law. *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995) (per curiam); *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 to vacate or confirm an arbitration award de novo based on the entire record. *Cambridge*, 407 S.W.3d at 447. However, all reasonable presumptions are indulged to uphold the arbitrator's decision, and none are indulged against it. *Id.* An arbitration award has the same effect as a judgment of a court of last resort, and it is presumed valid and entitled to great deference. *Id.*

Review of an arbitration award is so limited that even a mistake of fact or law by the arbitrator in the application of substantive law is not a proper ground for vacating an award. *Id.*

Under both the Federal Arbitration Act (FAA) and the Texas Arbitration Act (TAA), there are no common-law grounds for vacating an arbitration award. Instead, under both acts, vacatur is limited to the grounds expressly provided by statute. *See* 9 U.S.C. § 10(a); TEX. CIV. PRAC. & REM. CODE ANN. § 171.088 (West 2011); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) ("We now hold that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification."); *Hoskins v. Hoskins*, 497 S.W.3d 490, 491, 494 (Tex. 2016) (statutory grounds for vacatur of arbitration award are exclusive; common-law ground of manifest disregard of law is not a ground for vacatur under the TAA). Both acts provide for vacating an arbitration award if the arbitrators "exceeded their powers." 9 U.S.C. § 10(a)(4) ("In any of the following cases the United States court . . . may make an order vacating the award . . . where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made"); CIV. PRAC. § 171.088(a)(3)(A) ("On application of a party, the court shall vacate an award if . . . the arbitrators . . . exceeded their powers . . . ."). The party seeking to vacate the arbitration award has the burden of proving the grounds for vacatur. *Cambridge*, 407 S.W.3d at 449.

Unless the arbitration award is vacated, modified, or corrected on a ground provided in the arbitration acts, the trial court, on application of a party, must enter an order confirming the award. *See* 9 U.S.C. § 9; CIV. PRAC. § 171.087.

EXCEEDING POWERS

Arbitrators derive their authority from the arbitration agreement, which limits their authority to deciding the matters submitted therein either expressly or by necessary implication. *Cestex/Vestal v. Friendship W. Baptist Church*, 314 S.W.3d 677, 684 (Tex. App.—Dallas 2010,

pet. denied). Arbitrators exceed their powers when they decide matters not properly before them or where the resulting award is not rationally inferable from the parties' agreement. *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829 (Tex. App.—Dallas 2009, no pet.).

Although arbitrators ordinarily have the power to interpret the facts and law and to apply them with little judicial review, the parties, in an agreement under the TAA, may expressly agree to limit that power and to provide for expanded judicial review of the arbitrator's decision. In *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011), the parties' arbitration provision stated, "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." *Id.* at 88. The supreme court concluded this provision provided an express limitation on the power of the arbitrator "to that of a judge, whose decisions are reviewable on appeal." *Hoskins*, 497 S.W.3d at 494 (quoting *Nafta Traders*, 339 S.W.3d at 93).

Appellants argue the arbitration provision in this case contains a provision similar to that in *Nafta Traders* that limits the power of the arbitrator and provides for expanded judicial review. The arbitration provision was part of the construction contract and stated:

> 17. MEDIATION AND BINDING ARBITRATION. It is the policy of the State of Texas to encourage the peaceable resolution of disputes through alternative dispute resolution procedures. The parties to this Contract specifically agree that this transaction involves interstate commerce and that any dispute (whether contract, warranty, tort, statutory or otherwise), including, but not limited to, (a) any and all controversies, disputes or claims arising under, or relating to, this Contract, and any amendments thereto, the Property, or any dealings between the Owner and Contractor, (b) any controversy, dispute or claim arising by virtue of any representations, omissions, promises or warranties alleged to have been made by Contractor or Contractor's representative; and (c) any personal injury or property damage alleged to have been sustained by Owner on the Property or in the subdivision shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) or, if applicable, by similar state statute, and not by or in a court of law. All decisions respecting the arbitrability of any dispute shall be decided by the arbitrator. . . . The mediation and, if necessary,

> the arbitration shall be conducted pursuant to any procedures set forth in the applicable warranty documents. If there is any conflict between this Contract and such procedures, the provisions of this Contract shall control. . . .
>
> In any arbitration proceeding between the parties:
>
> (a) All applicable Federal and State law (including Chapter 27 of the Texas Property Code) shall apply;
>
> (b) All applicable claims, causes of action, remedies and defenses that would be available in court shall apply;
>
> (c) The proceeding shall be conducted by a single arbitrator selected by a process designed to ensure the neutrality of the arbitrator; . . .
>
> (g) Any award rendered in the proceeding shall be final and binding and judgment upon any such award may be entered in any court having jurisdiction.[1]

Appellants argue that paragraphs (a) and (b) limit the power of the arbitrator by prohibiting him from making errors of law and provided for all remedies available in court, including judicial review and appeal. To determine whether a provision in an arbitration agreement restricts the arbitrator's power, we read the arbitration agreement without the provision. If the omission of the provision leaves the arbitrator with more power than he would have with the provision included, then the provision restricts the arbitrator's power. For example, In *Nafta Traders*, the arbitration provision expressly limited the power of the arbitrator by stating the arbitrator "did not have authority" to make a reversible error: "The arbitrator *does not have authority* (i) to render a decision which contains a reversible error of state or federal law . . . ." *Nafta Traders*, 339 S.W.3d at 88. If that provision had not been included in the arbitration agreement, the arbitrator would have had the usual power to render a decision containing an error of law. But with the provision included, the arbitrator lacked that power.

The arbitration provision in this case states, "(a) All applicable Federal and State law . . . shall apply" and "(b) All applicable claims, causes of action, remedies and defenses that would be

[1] The warranty attached to the contract contained a similar arbitration provision. Neither arbitration provision required the use of a particular organization to provide arbitration services, nor do they require the use of a particular organization's arbitration procedures.

available in court shall apply." For paragraphs (a) and (b) to constitute restrictions on the arbitrator's authority, their absence would have to give the arbitrator more authority than he had with the provisions included. Arbitration is a form of alternate dispute resolution, meaning it is a procedure outside traditional in-court litigation for resolving legal disputes. In traditional litigation, the parties seek remedies under federal and state laws by bringing claims and defenses before a court. The arbitration acts permit the parties to resolve these same legal disputes by seeking remedies through their claims and defenses under relevant law, but the arbitration acts allow the parties to choose the time, place, procedures, and adjudicators for resolving the disputes. Even if the agreement in this case did not include paragraphs (a) and (b), "[a]ll applicable federal and state law . . . [would] apply," and "[a]ll applicable claims, causes of action, remedies and defenses that would be available in court [would] apply" because nothing in the agreement indicates they would not apply. The absence of paragraphs (a) and (b) from the contract would not give the arbitrator any more power than he had with those provisions included. Therefore, we conclude that paragraphs (a) and (b) do not limit the arbitrator's power. Unlike the arbitration provision in *Nafta Traders*, these statements did not limit the power of the arbitrator, and they "contained no restriction (either directly or indirectly) on the arbitrator's authority to issue a decision unsupported by the law." *Hoskins*, 497 S.W.3d at 495.

ERRORS OF LAW

In their first and second issues, appellants contend the trial court "committed reversible error in failing to dismiss [the Gordons'] claims as barred by" (1) the doctrine of res judicata and (2) limitations. As discussed above, the trial court had no authority to dismiss the Gordons' underlying claims due to errors of law by the arbitrator. Instead, the court's only authority was either to confirm the arbitration award or to vacate, modify, or correct the award on a ground

provided by the arbitration acts. The only statutory ground appellants identify is that the arbitrator exceeded his powers.

An arbitrator's failures to apply the statute of limitations and the doctrine of res judicata are errors of law. They are not acts exceeding the powers of the arbitrator. The arbitrator had authority to apply both legal doctrines in this case. Whether his application was correct does not go to his authority and whether he exceeded his powers. *See Lujan v. Tex. Bell Jeb Apartments LLC*, 03-13-00558-CV, 2015 WL 4072121, at *2 (Tex. App.—Austin June 30, 2015, pet. denied) (mem. op.) (arbitrator's allegedly incorrect application of statute of limitations in a motion for summary judgment did not exceed the arbitrator's power or authority); *Ancor Holdings*, 294 S.W.3d at 830 (complaint that arbitrator incorrectly applied res judicata and collateral estoppel "is not a complaint that the arbitrator exceeded her powers").

We conclude the trial court did not err by failing to dismiss the Gordons' claims as barred by the doctrine of res judicata or limitations. We overrule appellants' first and second issues.

DAMAGES

In their third issue, appellants contend the trial court erred by failing to vacate the arbitration award because appellants' warranty specifically excluded each element of recovery awarded by the arbitrator.

Appellants assert in their brief, "In making his Award, the Arbitrator in the instant cause made clear that the Award was based on the Express Warranty of the Contract." Appellants argue each of the listed damages was barred by the warranty's various exclusions.

The warranty guaranteed that the home was "free from defects" for varying periods of time, but it contained numerous exclusions from coverage, including:

1. Any and all claims for consequential and incidental damages. . . .

> 4. Defects in . . . driveways; walkways; patios; . . . landscaping including sodding, seeding, shrubs, trees and plantings; . . . or any other improvements not part of the Home itself.
>
> 5. Loss or damage to real property which is not part of the Home covered by the Limited Warranty and which may or may not be included in the original purchase price of the Home. . . .
>
> 12. Loss or damage caused by, or resulting from, seepage of water.
>
> 13. Loss or damage caused by, or resulting from, soil movement for which compensation is provided by legislation or which is covered by other insurance. . . .
>
> 19. Bodily injury or damage to personal property. . . .
>
> 21. Costs of shelter, transportation, food, moving, storage or other expenses related to inconvenience or relocation during repairs.

The arbitrator did not award any amount for repair of the foundation. Instead, appellants assert that all amounts awarded for damages were for repairs to the house and the landscaping resulting from the shifting foundation and from the repairs to the foundation:

> $13,730.93 as Claimants' out-of-pockets [described by the Gordons in briefing to the arbitrator as "Out of pocket expenses paid by Claimants for repairs to and cleanup of property after discontinuation of repair work]
>
> $324,463.91 as the reasonable estimate for repairs [described by appellants in their appellate brief as "work to be done as a consequence of the problems with the foundation."]
>
> $1,831.00 for storage of breakables not paid by Respondent [appellants]
>
> $9,609.72 for removal/storage of contents during remediation process
>
> $12,418.44 for drape removal [described by the Gordons in their briefing to the arbitrator as "Cost to remove and reinstall window coverings for protection during cosmetic repairs"]
>
> $18,000 for landscaping [described by the Gordons in their briefing to the arbitrator as "The reasonable cost to repair the physical damage to landscaping caused by foundation defects and attempted repairs" and as "The cost of landscaping repairs to return the property to 'as new' condition"]

Appellants' argument hinges on their assertion that the warranty was the arbitrator's sole ground for awarding the damages. However, the arbitrator stated in the award, "The Arbitrator finds that Claimants [the Gordons] pleaded, presented evidence of, and prevailed on two causes of

action: breach of contract for violation of a mediated settlement agreement dated August 23, 2013, and breach of Respondent The Holmes Builders at Castle Hills, Ltd.'s express warranty to repair." Thus, the damages awarded were not based solely on the warranty but were also based on the settlement agreement.

In the settlement agreement, the parties agreed:

> E. Upon receipt of Approval, Holmes shall commence and complete reasonable and necessary cosmetic and other repairs caused by foundation distress to the home and landscaping to "as new" condition by June 1, 2014 (the "As New Repairs"). Upon satisfactory completion of the As New Repairs, the Arbitration shall be dismissed and Plaintiffs shall release Holmes from any and all claims.
>
> F. If the . . . As New Repairs are not satisfactorily completed by June 1, 2014, Plaintiffs [may] reinstitute the Arbitration.

Appellants do not dispute that the settlement agreement was subject to arbitration under the arbitration clauses,[2] in which the parties agreed to arbitrate "any and all controversies, disputes or claims arising under, or relating to, this Warranty [or this Contract], the property, or any dealings between the Owner and Contractor." The arbitrator could conclude that all of the damages listed above were for amounts falling within the description of "reasonable and necessary cosmetic and other repairs caused by foundation distress to the home and landscaping" necessary to return "the home and landscaping to 'as new' condition." Therefore, the award was supported by the settlement agreement and was rationally inferable from the parties' agreement.

We conclude the trial court did not err by failing to vacate the arbitration award because the warranty specifically excluded each element of recovery awarded by the arbitrator. We overrule appellants' fourth issue.

[2] Appellants do dispute whether the settlement agreement should have been admitted as a basis for appellants' liability or the Gordons' damages, and that is the subject of their fourth issue.

TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ACT

In their fourth issue, appellants contend the trial court erred by failing to vacate the arbitration award because the award was in direct violation of the Texas Property and Casualty Insurance Guaranty Act. *See* TEX. INS. CODE ANN. §§ 462.001–.351 (West 2009 & Supp. 2017).

When an insurer becomes impaired, the Texas Property and Casualty Insurance Guaranty Association pays the "covered claims" on policies issued by the impaired insurer. *See id.* §§ 462.004(2) (defining "Association"), 462.201 (defining "covered claim"), 462.302 (providing for the Association to pay covered claims). However, section 462.303 provides that certain actions by the insurer and the insured are not binding:

> (a) The association is not bound by:
>
> > (1) a judgment taken before the designation of impairment in which an insured under a liability insurance policy or the insurer failed to exhaust all appeals;
> >
> > (2) a judgment taken by default or consent against an insured or the impaired insurer; or
> >
> > (3) a judgment, settlement, or release entered into by the insured or the impaired insurer.
>
> (b) A judgment, settlement, or release described by Subsection (a) is not evidence of liability or of damages in connection with a claim brought against the association or another party under this chapter.

Id. § 462.303. The term "another party under this chapter" is not defined in chapter 462. Appellants asserted in the arbitration proceeding that the arbitrator was barred from basing their liability or damages on the settlement agreement. The arbitrator overruled appellants' objection to his consideration of the settlement agreement, stating that the receivership or insolvency of appellants' insurer "would not appear to excuse [appellants'] obligations under the mediated settlement agreement if enforceable."

Whether section 462.303(b) barred enforcement of the settlement agreement was an issue properly before the arbitrator to decide because it involved a controversy, dispute, or claim arising

under, or relating to, the construction contract or warranty, the property, or any dealings between appellants and the Gordons. Therefore, the arbitrator did not exceed his powers by deciding whether section 462.303(b) barred enforcement of the settlement agreement. *See Ancor Holdings*, 294 S.W.3d at 829 (arbitrators exceed their powers when they decide matters not properly before them). If he decided the matter incorrectly, then that error was one of law, which is not a ground for vacating or modifying an arbitration award. *See id.* at 830 (complaint that arbitrator decided an issue incorrectly or made mistakes of law is not a complaint that arbitrator exceeded its powers); *see also Cambridge*, 407 S.W.3d at 448 ("our review is so limited that we may not vacate an award even if it is based upon a mistake in law or fact").

We conclude the trial court did not err by failing to vacate the arbitration award for being in direct violation of the Texas Property and Casualty Insurance Guaranty Act. We overrule appellants' fourth issue.

ATTORNEY'S FEES

In their fifth issue, appellants contend that the Gordons should not have been awarded their attorney's fees and that appellants should have been awarded their attorney's fees. The construction contract provided that the arbitrator could award the prevailing party its attorney's fees and litigation costs. The arbitrator awarded the Gordons "$60,000 reasonable and necessary attorneys' fees," "$6,300 expert fees," and "$2,096.33 other costs." Appellants argue that the Gordons should not have been awarded their attorney's fees because they should not have been the prevailing party, and that appellants should have been awarded their attorney's fees because they should have been the prevailing party. Appellants' argument depends on their prevailing on one of their previous issues. Because we have overruled their other issues, this issue also lacks merit.

We overrule appellants' fifth issue.

CONCLUSION

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

THE HOLMES BUILDERS AT CASTLE HILLS, LTD. AND THBGP, INC., Appellants

No. 05-16-00887-CV V.

ALFRED H. GORDON AND LAWANDA P. GORDON, Appellees

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Trial Court Cause No. DC-16-00364.
Opinion delivered by Justice Myers.
Justices Lang-Miers and Boatright participating.

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

It is **ORDERED** that appellees ALFRED H. GORDON AND LAWANDA P. GORDON recover their costs of this appeal from appellants THE HOLMES BUILDERS AT CASTLE HILLS, LTD. AND THBGP, INC.

Judgment entered this 28th day of February, 2018.