Opinion issued March 8, 2012.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-01034-CV

FCA CONSTRUCTION COMPANY, LLC, Appellant

V.

J&G PLUMBING SERVICES, LLC, Appellee

On Appeal from the 164th District Court
Harris County, Texas
Trial Court Case No. 2010-58685

MEMORANDUM OPINION

FCA Construction Company, LLC appeals from the trial court's confirmation of an arbitration award in favor of J&G Plumbing Services, LLC. In two issues, FCA contends that the trial court should have vacated the arbitration

award on grounds of (1) "evident partiality" under section 171.088 of the Texas Civil Practices and Remedies Code and (2) "gross mistake" under Texas common law. We affirm the trial court's judgment.

Background

FCA hired J&G as a plumbing subcontractor on the construction of a fitness center in Humble, Texas. Disputes arose between them, and FCA ultimately terminated J&G and hired a new plumbing subcontractor. The subcontract between FCA and J&G contained a arbitration provision, and the parties submitted their dispute to final and binding arbitration. They selected William Andrews as their arbitrator. Before the arbitration began, Andrews sent counsel for FCA and J&G a letter disclosing his existing relationship with Grady Schneider, LLP, counsel for J&G. The letter stated:

> Last year, Grady & Schneider, with my assistance, represented the husband of my wife's niece in the trial of a serious personal injury case. The case was tried to verdict and has since settled. Currently, Grady & Schneider is representing at least two of our clients in commercial and/or construction cases we have referred to them. Over the past ten years, our firm referred several clients to this firm. I personally know the two named partners, Keith Grady and Peter Schneider.
>
> The above disclosure will not impact or impair my ability to serve as a fair and impartial arbitrator in this matter.

After receiving this disclosure, FCA nevertheless agreed to have the arbitration heard by Andrews.

After three days of arbitration hearings, Andrews entered a final arbitration award. Andrews awarded FCA nothing on its claims against J&G. He awarded J&G $89,625 on its wrongful termination and breach of contract claims against FCA, plus $40,000 in reasonable attorney's fees. The trial court confirmed the arbitration award.

Standard of Review

Review of an arbitration award is "extraordinarily narrow." *E. Tex. Salt Water Disposal Co., Inc. v. Werline*, 307 S.W.3d 267, 271 (Tex. 2010); *see also IPCO-G.&C. Joint Venture v. A.B. Chance Co.*, 65 S.W.3d 252, 256 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (stating that review is "extremely narrow"). Every reasonable presumption must be indulged to uphold the arbitrator's decision, and none is indulged against it. *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 245 (Tex. 2002); *New Med. Horizons II, Ltd. v. Jacobson*, 317 S.W.3d 421, 428 (Tex. App.—Houston [1st Dist.] 2010, no pet.). Review of an arbitration award is so limited that even a mistake of fact or law by the arbitrator is not a proper ground for vacating an award. *Universal Computer Sys., Inc. v. Dealer Solutions, L.L.C.*, 183 S.W.3d 741, 752 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Generally, whether a trial court should have vacated an arbitration award is a question of law, which we review de novo. *Swonke v. Swonke*, No. 01-09-00059-CV, 2011 WL 1584809, at *4 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no

pet.) (mem. op. on reh.) (citing *Henry v. Halliburton Energy Servs., Inc.*, 100 S.W.3d 505, 508 (Tex. App.—Dallas 2003, pet. denied); *Thomas James Assocs., Inc. v. Owens*, 1 S.W.3d 315, 319–20 (Tex. App.—Dallas 1999, no pet.)).

Evident Partiality

Section 171.088(a)(2)(A) of the Texas Civil Practices and Remedies Code (CPRC) instructs a trial court to vacate an arbitration award if "the rights of a party were prejudiced by . . . evident partiality by an arbitrator appointed as a neutral arbitrator[.]" TEX. CIV. PRAC. & REM. CODE § 171.088 (West 2011). The Texas Supreme Court announced the standard for evaluating whether a purportedly neutral arbitrator selected by the parties exhibits "evident partiality" in *Burlington North Railroad Co. v. TUCO Inc.*, 960 S.W.2d 629, 636 (Tex. 1997). The Court recognized that the most capable arbitrators are often those "with extensive experience in the industry, who may naturally have had past dealings with the parties." *Id.* at 635. Thus, the Court rejected a "per se" disqualification where the arbitrator has a business relationship with a party. *Id.* "Instead, the competing goals of expertise and impartiality must be balanced." *Id.*

This balancing should be performed by the parties before the arbitration, not by the courts after the arbitration. *Id.* "The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far

better informed of the prevailing ethical standards and reputations within their business." *Id.* at 635–36 (quoting *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 151, 89 S. Ct. 337, 340 (1968)). But the parties' ability to accurately balance these interests is dependent on access to relevant information which might reasonably affect the arbitrator's partiality. *TUCO*, 960 S.W.2d at 636. Thus, the standard Texas courts apply in determining whether a purportedly neutral arbitrator selected by the parties exhibits "evident partiality" is whether the arbitrator "does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality." *Id.* When an arbitrator has failed to disclose such facts, "evident partiality" is established by the non-disclosure itself, regardless of whether the undisclosed information necessarily establishes partiality or bias. *Id.*

FCA does not contend that Andrews failed to disclose any facts. Instead, FCA urges us to adopt a second standard for establishing evident partiality under section 171.088(a)(2)(A), adopted by the El Paso Court of Appeals in *Las Palmas Medical Center v. Moore*, 2010 WL 3896501, *12 (Tex. App.—El Paso 2010, pet. denied).[1] In *Las Palmas*, the El Paso court looked to federal law to determine that "evident partiality" can be shown by "actual bias" in addition to nondisclosure. *Id.*

[1] FCA also cites to *Babcock & Wilson Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 233–34 (Tex. App.—Houston [14th Dist.] 1993), but that case interprets federal law rather than section 171.088 of the CPRC.

The "actual bias" test adopted in *Las Palmas* requires a party asserting "actual bias" to produce "specific facts" demonstrating that "a reasonable person would have concluded that the arbitrator was partial to one party." *Id.* This Court has not addressed whether "evident partiality" can be established based on a showing of "actual bias." We need not decide that issue here because FCA had not met its burden of demonstrating "actual bias" under that test.

FCA's argument that there was "actual bias" in the arbitration proceeding is as follows:

> As reflected by the transcript, Arbitrator Andrews was anything but "fair and impartial" during the course of the arbitration proceeding. Indeed, Arbitrator Andrews abandoned his role as a neutral arbitrator, and instead assumed an adversarial role against FCA by cross-examining its witnesses and voicing displeasure when these witnesses refused to recant their testimony. Arbitrator Andrews did not subject any of J&G's witnesses to cross-examination, and certainly never challenged their veracity.

The record demonstrates that Andrews participated actively in the hearing, questioning witnesses, managing the presentation of evidence, and controlling the procedure of the hearing. Andrews questioned witnesses from both sides and made decisions on evidence and procedure that were sometimes favorable to one side and sometimes favorable to the other side. To the extent Andrews may have asked more questions of FCA's witnesses, we will not impute partiality on that basis alone, especially because FCA's witnesses testified first—Andrews may simply have had more questions at the earlier stages of the evidence. FCA does not

identify its basis for categorizing Andrews's questioning of its witnesses as "cross-examination" or explain how Andrews's questioning of J&G's witnesses does not constitute such "cross-examination." Nor does FCA identify what statements by Andrews constituted "voicing displeasure when [FCA's] witnesses refused to recant their testimony." As the fact-finder, Andrews is free to determine which witnesses' testimony was credible and which witnesses' testimony was not. *See Ouzenne v. Haynes*, No. 01-10-00112-CV, 2011 WL 1938430, *2 (Tex. App.—Houston [1st Dist.] May 12, 2011, no pet.) (mem. op.).

Thus, even if we were to adopt the El Paso court's "actual bias" test, FCA's allegations do not arise to the level of producing "specific facts" from which a reasonable person would conclude that the arbitrator was partial to one party.

Moreover, FCA has identified no Texas or federal authority for the proposition that we may infer bias based on an arbitrator's questioning of one side's witnesses more extensively than the other side's. *Cf. Ballantine Books, Inc. v. Capital Distrib. Co.*, 302 F.2d 17, 21 (2nd Cir. 1962) (rejecting "evident partiality" complaint under federal standard when arbitrator allegedly "usurped" role of opposing party's counsel by questioning party's witnesses throughout proceeding); *Matter of Arbitration Between Advest, Inc. & Asseoff*, 92 CIV. 2269 (KMW), 1993 WL 119690, at *2 (S.D.N.Y. Apr. 14, 1993) (rejecting "evident partiality" complaint under federal standard when arbitrator "had to be admonished

for taking over the direct examination of [party's] witnesses and asking them leading questions designed to fortify the [party's] case.").

We overrule FCA's first issue.

Gross Mistake

Texas common law allows a trial court to set aside an arbitration award if the arbitrator's decision is tainted by fraud, misconduct, or "gross mistake as would imply bad faith and failure to exercise honest judgment."[2] *IPCO-G.&C. Joint Venture*, 65 S.W.3d at 256. Gross mistake results in a decision that is arbitrary or capricious; an honest judgment made after due consideration given to conflicting claims is not arbitrary or capricious, even if the judgment is erroneous. *Universal Computer Sys.*, 183 S.W.3d at 752 (quoting *Bailey & Williams v. Westfall*, 727 S.W.2d 86, 90 (Tex. App.—Dallas 1987, writ ref'd n.r.e.)). This Court may not vacate an arbitration award merely because the award is based on a mistake of fact or law. *Id.*

FCA essentially contends that the contract language and undisputed facts establish its right to recover on its breach of contract claim and defeat J&G's right to recover. FCA asserts that Andrews committed "gross mistake" by concluding otherwise. FCA's breach of contract claim rested on allegations that J&G failed to

[2] Neither party argues that gross mistake is not a valid grounds for vacating the arbitration award.

complete work by specific dates and failed to keep the project clear of liens filed by its subcontractors and suppliers. J&G claimed, on the other hand, that its alleged breaches were not material breaches or events of default that entitled FCA to terminate the subcontract; therefore, J&G asserted that FCA breached the contract by improperly terminating J&G. J&G also asserted that its failure to pay subcontractors and suppliers was caused by FCA's improper termination of the subcontract.

The crux of the Andrews's decision was the materiality of J&G's alleged breaches of the subcontract. Andrews concluded that J&G's alleged breaches were not material. As a result, he concluded that (1) the alleged breaches did not entitle FCA to breach of contract damages and did not justify FCA's termination of J&G and (2) FCA's termination of J&G was wrongful and material, entitling J&G to breach of contract damages. FCA asserts that Andrews's conclusion that J&G's breaches were not material was "absurd" and contrary to the express terms of the subcontract and unspecified evidence presented at the hearing. In support of this position, FCA points out that the subcontract expressly provides that "[t]ime is of the essence of the Subcontractor's obligations under the Contract Documents."

In his arbitration award, Andrews concluded that FCA "place[d] undue reliance" on this contract language, treating it as "a fail-safe for proof of facts required to establish a material breach of contract by J&G." Andrews further

determined that the "credible evidence adduced at the hearing does not support finding J&G materially breached the Subcontract" and that "FCA continually waived this date as its own substantial completion date with the Owner of the Project was extended on more than one occasion." Andrews discussed the evidence supporting his conclusion, including the lack of a customary project schedule, the absence of documentation that would be expected before making the decision to terminate a subcontractor, the "sketchy and vague" testimony of FCA's witnesses, and FCA's failure to rely on late performance in its notice of default to J&G. Instead, the notice alleged that J&G had defaulted by failing to "supply sufficient skilled workers, sufficient equipment, or materials of proper quality as determined by [FCA]"—an alleged default Andrews found to be contrary to the evidence.

If we were to adopt FCA's contention that the "time is of the essence" provision of the subcontract precluded Andrews from determining that J&G's failure to comply with deadlines for completion of work, we would be replacing Andrews's construction of the subcontract with our own. But "[i]t is not our province to determine the proper construction of the parties' [subcontract]." *Universal Computer Sys.*, 183 S.W.3d at 753. "Instead, our review is limited to whether [Andrews's] failure to adopt [FCA's] interpretation of the [subcontract] constitutes bad faith or a failure to exercise honest judgment." *Id.*; *see also Chambers v. O'Quinn*, No. 01-05-00635-CV, 2006 WL 2974318, *5 (Tex. App.—

Houston [1st Dist.] Oct. 19, 2006, no pet.) (mem. op.) ("alleged error in the application of substantive law by the arbitrator during the proceedings in arbitration is not reviewable by the court on a motion to vacate an award.").

The record contains conflicting evidence as to the interpretation of the subcontract and the materiality of J&G's breach, as discussed in the arbitration award. The parties were given an opportunity to brief the materiality issue for Andrews, and J&G submitted substantial legal analysis of the materiality issue and the effect of the "time is of the essence" language in the contract. Additionally, FCA does not address Andrews's conclusion that FCA waived compliance with the substantial completion deadline in the subcontract as its own substantial completion deadline was extended, nor does it address the evidence that the substantial completion date was linked to the opening date for the gym, which was moved back during the project.

FCA's complaint that the arbitrator disregarded FCA's unspecified "detailed testimony and voluminous exhibits" is likewise an attack on whether Andrews correctly determined the facts and the law, but does not tend to show bad faith or a failure by Andrews to exercise honest judgment. *See Ouzenne*, 2011 WL 1938430, at *2. "[C]ontentions that an arbitrator disregarded even uncontroverted testimony may show a mistake of fact or law, but do not rise to the level of gross mistake." *Id.* (citing *Graham–Rutledge & Co. v. Nadia Corp.*, 281 S.W.3d 683, 689 (Tex.

App.—Dallas 2009, no pet.)). Additionally, judging the credibility of the witnesses and choosing who to believe or disbelieve is the sole province of Andrews, as the fact-finder. *See id.* (citing *Xtria L.L.C. v. Intern. Ins. Alliance, Inc.*, 286 S.W.3d 583, 597 (Tex. App.—Texarkana 2009, pet. denied)).

Moreover, Andrews's decision rests largely on customs and practices in the construction industry. Having a dispute adjudicated by a decision maker with industry expertise is one of the advantages offered by arbitration. *See TUCO*, 960 S.W.2d at 635. That advantage is undercut if courts may second-guess the arbitrator's assessment of such issues, particularly when the court has heard no evidence on the customs and practices of the industry. *Cf. Monday v. Cox*, 881 S.W.2d 381, 385 (Tex. App.—San Antonio 1994, writ denied) ("The courts are not permitted to second-guess the correctness of an arbitrator's decision on the merits.").

FCA's complaints are essentially arguments that Andrews erred in applying the law and in determining the facts. But mistake of fact or law is not a basis upon which we may vacate an arbitration award. *Universal Computer Sys.*, 183 S.W.3d at 752; *Chambers*, 2006 WL 2974318, at *5. FCA has not established that Andrews acted in bad faith or failed to exercise honest judgment. *See Universal Computer Sys.*, 183 S.W.3d at 753.

We overrule FCA's second issue.

Conclusion

We affirm the trial court's judgment.

Harvey Brown
Justice

Panel consists of Justices Jennings, Sharp, and Brown.