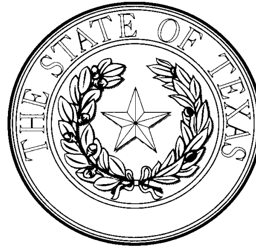
Opinion issued July 19, 2016.



In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00230-CV

GEORGE DAVIS, MD, ANTENEH ROBA, MD, LEVON VARTANIAN, MD, WOODROW DOLINO, MD, NORTHWEST HOUSTON EMERGENCY SPECIALIST GROUP, PLLC, ESG MD, PLLC, AND ESG MLP, LLC, Appellants

V.

ALAN BENTZ, MD, Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Case No. 2012-44569

MEMORANDUM OPINION

Doctors George Davis, Anteneh Roba, Levon Vartanian, and Woodrow Dolino expelled fellow physician Alan Bentz from three companies that the five

doctors had founded and owned together. They also invoked provisions of the company agreements authorizing them to purchase the membership interests of expelled members. Bentz contested his expulsion and claimed that his membership interests were worth more than the remaining doctors offered to pay.

An arbitrator awarded Bentz his share of the distributions made during the pendency of the parties' disputes and the "Fair Market Value" of his membership interests, as defined by the company agreements. He sought judicial confirmation of the award, which the other doctors and the companies opposed.

The trial court confirmed the arbitration award and entered a final judgment. The other doctors and the companies appeal the trial court's judgment, arguing that the arbitration award is void in whole or part on three grounds:

(1) the arbitrator exceeded his authority by determining the Fair Market Value of Bentz's membership interests because the company agreements require their value to be determined by appraisal outside of arbitration;

(2) the arbitrator exceeded his authority by awarding past distributions to Bentz, which is inconsistent with "the essence" of the company agreements; and

(3) the award of both the Fair Market Value of Bentz's membership interests and distributions made during the pendency of the parties' disputes violates a fundamental Texas public policy against double recoveries.

We hold that the record is insufficient to permit review of the first issue. And while the record before us suffices to permit review of the second and third issues,

they do not present a basis for reversal under the narrow scope of judicial review accorded to arbitration awards. We therefore affirm the trial court's judgment.

Background

Davis, Roba, Vartanian, Dolino, and Bentz founded three companies—Northwest Houston Emergency Specialist Group, PLLC; ESG MD, PLLC; and ESG MLP, LLC—to provide and manage physician and medical services.

The parties' dispute arose when the other four doctors attempted to expel Bentz from the companies. The company agreements, which are identical except for the names of the companies, provide for the expulsion of company founders but only for cause. Bentz disputed that there was cause for his expulsion.

Upon expulsion, the company agreements grant any remaining members an option to purchase an expelled member's interests in the companies at Fair Market Value. The four doctors invoked this provision. But the parties could not agree on the Fair Market Value of Bentz's interests. Section 2.09(a) of the company agreements defines Fair Market Value as the price at which the membership interests "would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts, including, without limitation, that membership is restricted" to those qualifying as an "authorized person" under Section 301.004 of the Texas Business Organizations Code. Section 2.09(c) of the agreements further provides that Fair

Market Value "shall be determined on the basis that" an owner of membership interests does not have the right to withdraw, terminate, or liquidate the membership before the companies terminate and, therefore, "under the assumption" that the sole distributions that he will receive are his "proportionate share" of "cash distributions" made by the companies from time to time and his "proportionate share of the properties" owned by the membership when the companies terminate.

The company agreements provide two mechanisms for the resolution of disputes. Under Section 9.01, disputes about the Fair Market Value of membership interests are subject to an appraisal process in which the disputants obtain separate appraisals and a neutral appraiser then decides which is controlling. Under Section 9.02, all other disputes are subject to arbitration.

A neutral appraiser decided that the appraisal obtained by the other four doctors and the companies was controlling. That appraisal valued Bentz's membership interests at two different amounts depending on the methodology used: $257,969 when using an asset-based analysis and $526,796 when using an income-based analysis.

After the neutral appraiser decided that the other four doctors' appraisal controlled, the parties' other disputes about Bentz's expulsion were arbitrated. An evidentiary hearing was held over the course of several days. The majority of these proceedings was not transcribed. None of the witness testimony, for example, is in

the record. But there are indications that the arbitrator received testimony and documents into evidence.

The arbitrator made three rulings relevant to this appeal. First, he found that Bentz was not improperly expelled. Second, he ruled that "[a]ll Parties have acknowledged and I hereby find that the appropriate Fair Market Value of Dr. Bentz's Membership Interests is $526,796" and awarded him that sum plus prejudgment interest. Third, he concluded that Bentz remained a member of the companies during the pendency of the parties' disputes and thus was entitled to his share of the distributions made during that time. Accordingly, the arbitrator awarded Bentz $249,210 from each of the other four doctors for past distributions and prejudgment interest in addition to the award for the Fair Market Value of his membership interests.

Bentz sought judicial confirmation of the arbitration award. The other four doctors and the companies opposed confirmation and requested that the trial court vacate the award in whole or in part or modify it. The trial court confirmed the award and entered a final judgment. After the trial court denied their motions for reconsideration, the other doctors and the companies appealed.

Standard of Review

When, as here, the parties' contracts contain arbitration provisions that do not specify whether the Federal Arbitration Act or the Texas Arbitration Act governs

but include a choice-of-law provision that specifies the application of Texas law, both statutes apply. *In re Devon Energy Corp.*, 332 S.W.3d 543, 547 (Tex. App.—Houston [1st Dist.] 2009, orig. proceeding); *Roehrs v. FSI Holdings*, 246 S.W.3d 796, 803 (Tex. App.—Dallas 2008, pet. denied). Under both statutes, we review de novo a trial court's confirmation of an arbitration award. *Port Arthur Steam Energy LP v. Oxbow Calcining LLC*, 416 S.W.3d 708, 713 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *Royce Homes, L.P. v. Bates*, 315 S.W.3d 77, 85 (Tex. App.—Houston [1st Dist.] 2010, no pet.). We examine the entire record in making this review. *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 446 S.W.3d 58, 75 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); *Royce Homes*, 315 S.W.3d at 85.

Both federal and Texas law favor arbitration. *E. Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 271 (Tex. 2010); *In re FirstMerit Bank*, 52 S.W.3d 749, 753 (Tex. 2001). Therefore, the scope of review of an award is very narrow. *Forged Components, Inc. v. Guzman*, 409 S.W.3d 91, 103 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Jones v. Brelsford*, 390 S.W.3d 486, 492 (Tex. App.—Houston [1st Dist.] 2012, no pet.). A reviewing court may not vacate or modify an award simply because it would have reached a different result. *Forest Oil*, 446 S.W.3d at 75; *Royce Homes*, 315 S.W.3d at 85. The court must indulge every reasonable presumption to uphold an arbitrator's award and indulge none against it. *Forest Oil*, 446 S.W.3d at 75; *Forged Components*, 409 S.W.3d at 103. Even a mistake of law or fact by the

arbitrator is not grounds for vacating or modifying an award. *Forest Oil*, 446 S.W.3d at 75; *Forged Components*, 409 S.W.3d at 103–04.

Instead, both the federal and Texas statutes permit a court to vacate or modify an arbitration award only under limited circumstances. 9 U.S.C. §§ 10(a), 11; TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.087–.088, 171.091 (West Supp. 2015). A reviewing court may not vacate or modify an arbitration award governed by the Federal Arbitration Act or the Texas Arbitration Act on any grounds other than those specified in the statutes. *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 584–90 (2008); *Hoskins v. Hoskins*, No. 15–0046, 2016 WL 2993939, at *3–5 (Tex. May 20, 2016). Relevant to this appeal, both Acts permit a court to vacate an award when the arbitrator has exceeded his authority and to modify an award when the arbitrator has decided a matter not submitted to arbitration. 9 U.S.C. §§ 10(a)(4), 11(b); TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.088(a)(3)(A), 171.091(a)(2) (West Supp. 2015).

Because an arbitrator's authority to decide disputes derives from the parties' contractual agreement, an arbitrator exceeds his authority when his award encompasses matters that the parties did not submit. *New Med. Horizons II, Ltd. v. Jacobson*, 317 S.W.3d 421, 429 (Tex. App.—Houston [1st Dist.] 2010, no pet.). Likewise, the arbitrator cannot simply disregard the parties' agreements and mete out justice as he sees fit. *Forest Oil*, 446 S.W.3d at 81. Thus, a contractual

interpretation that is not grounded in the essence of the agreement—its letter or purpose—is beyond the arbitrator's authority. *Id.* at 81–82. But the proper inquiry focuses on whether the ultimate result, however explained, is rationally inferable from the contract. *Id.* at 82. And the arbitrator's chosen remedy lies outside his authority only if there is no way to rationally explain it as a logical means to advance the aims of the contract. *Id.* An arbitrator does not exceed his authority merely by misinterpreting a contract. *Id.* at 81.

Finally, to engage in the limited review of an arbitration award that is permitted under federal and Texas law, we "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." *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 102 (Tex. 2011). Without a sufficient record, meaningful review is impossible. *Thomas Petroleum, Inc. v. Morris*, 355 S.W.3d 94, 98 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). Thus, a party who seeks to vacate or modify an award must supply a record that shows the basis for vacatur or modification. *Eurocapital Grp. v. Goldman Sachs & Co.*, 17 S.W.3d 426, 429 (Tex. App.—Houston [1st Dist.] 2000, no pet.). If the party cannot show error based on the available record, then we must presume that the arbitration award is correct. *Quinn*, 339 S.W.3d at 102.

Fair Market Value of Membership Interests

The four doctors and the companies maintain that the arbitration award against them is void because the arbitrator exceeded his authority by ruling on matters beyond the scope of the arbitration agreement. In particular, they contend the arbitrator improperly decided and awarded the Fair Market Value of Bentz's interests in the companies. While disputing this contention, Bentz argues that the arbitration award must be affirmed because the record is insufficient to permit judicial review. The other doctors and the companies reply that the error about which they complain is discernable from the record, including the face of the arbitration award, the company agreements, and the controlling appraisal regarding the Fair Market Value of Bentz's interests.

The arbitrator awarded Bentz $526,796 as the Fair Market Value of his interests in the companies. The other four doctors and the companies contend that Section 9.01 of the company agreements excludes this valuation from the scope of any arbitration proceeding. Consequently, they argue, the record shows that the arbitrator exceeded his authority by awarding this sum to Bentz.

Under Section 9.01, the valuation of a member's interests in the companies is excluded from the scope of arbitration. Instead of submitting this issue to arbitration, that section provides that, when the value of membership interests is disputed, the

disputants will have the interests valued by appraisers of their selection. Then a neutral appraiser will review these valuations and select which is controlling.

The parties agree that the necessary appraisals were made. The neutral appraiser decided that the valuation made by the companies' appraiser was controlling. But the controlling valuation failed to provide a single Fair Market Value. Instead, it provided two values depending on whether the valuation was made under an income- or asset-based approach. Under the former, Bentz's membership interests were valued at $526,796. Under the latter, his interests were valued at $257,969.

The arbitrator awarded the income-based valuation as the Fair Market Value of Bentz's interests. The other doctors and the companies contend that, by selecting this approach over the asset-based one, the arbitrator exceeded his authority, because Section 9.01 explicitly carves out valuations from arbitration. In support of this contention, they cite *Katz v. Feinberg*, 290 F.3d 95 (2d Cir. 2002) (per curiam), in which the court held that the arbitrator exceeded his authority by deciding the value of an owner's interest in a company—an issue that the parties' agreement committed to accountants rather than arbitration. *Id.* at 96–98. Like the agreement here, the agreement in *Katz* distinguished between disputes over the valuation of interests in the company, which were not subject to arbitration, and all other disputes, which were subject to arbitration. *Id.*

But *Katz* is a very different case than this one. In *Katz*, the arbitration panel rejected a valuation that the parties' agreement committed to accountants rather than arbitration and then substituted its own higher valuation. 290 F.3d at 96. The panel did so based on the agreement's general arbitration clause; but, as the court noted, a more specific provision of the agreement addressed the valuation of the interest, committed that valuation to accountants, and provided that their decision would be final and not subject to arbitration. *Id.* at 96–98. In contrast, the arbitrator in this dispute did not set aside and recalculate the value of Bentz's interests in the companies. Instead, the arbitrator applied a valuation that all parties acknowledged was the Fair Market Value of Bentz's membership interests and that had been calculated outside of the arbitration as required under the company agreements. While Section 9.01 requires that the value of disputed membership interests be determined via an appraisal procedure separate from any arbitration, it does not bar an arbitrator from referencing, relying on, or applying that separate valuation.

The other doctors and the companies argue that the parties did not submit any issues regarding the controlling appraisal or valuation to the arbitrator and that he therefore lacked the authority to choose between the range of values the controlling appraisal assigned to Bentz's membership interests. In support of this argument, they rely on a partial transcript of the arbitral proceedings in which the parties and arbitrator discussed the scope of the arbitrator's authority concerning the valuation

of the membership interests and entertained the possibility of entering a stipulation on the arbitrator's jurisdiction to award its Fair Market Value. The other doctors and the companies contend that this partial transcript, which concludes without resolving the scope of the arbitrator's authority one way or another, shows that the parties did not agree to submit this issue to the arbitrator. But the arbitrator stated in his decision that it was based on unspecified "stipulations" that "were entered by the parties" and that "[a]ll Parties have acknowledged . . . that the appropriate Fair Market Value of Bentz's Membership Interests is $526,796"—one of the two figures stated in the controlling appraisal. Without a complete record, this Court cannot determine whether the other doctors and the companies ever acknowledged the accuracy of this figure or stipulated to its award, and we must presume that the missing portions of the record support the arbitrator's statement that they did. *Prudential Sec., Inc. v. Shoemaker*, 981 S.W.2d 791, 793 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (missing parts of record are presumed to support judgment).

In short, the limited record neither shows that the arbitrator exceeded his authority by awarding $526,796 as the Fair Market Value of Bentz's interests nor permits the Court to evaluate the contention that he did so. Under *Quinn*, this is dispositive of this issue. 339 S.W.3d at 102. Accordingly, the four doctors and companies have not shown that the trial court erred in confirming this aspect of the arbitration award.

Essence of the Parties' Contracts

The other doctors and the companies also contend that the arbitrator exceeded his authority in another way, one that is susceptible to review even on this record. They argue that the award's inclusion of damages for distributions is so at odds with the company agreements that the arbitrator cannot be said to have drawn his decision from the essence of these agreements and, therefore, made an award he was unauthorized to render. Bentz counters that an inquiry into whether an arbitrator's award is contrary to the essence of the company agreements is limited to examining if the award is derived from the agreements and not whether the arbitrator correctly interpreted them. Because the arbitrator's award is grounded in the agreements, Bentz contends, the trial court's judgment confirming the award must be affirmed.

The crux of the other doctors and companies' position is that, properly understood, the company agreements provide an expelled member the Fair Market Value of his membership and no more. They maintain that the agreements do not permit an expelled member to continue to receive distributions during the pendency of a dispute about his expulsion or the valuation of his membership interests. The arbitrator disagreed and awarded Bentz both the Fair Market Value of his interests and distributions. The arbitrator explicitly grounded his decision to do so on the language of the agreements and the interplay between their provisions. He reasoned that

- the agreements do not provide that a member's interest is terminated, forfeited, or lost upon expulsion and also do not provide that expulsion immediately extinguishes any right to distributions;
- by virtue of providing an option, but no obligation, to purchase the membership interest of an expelled member, the agreements show that a member retains his interest even after expulsion unless purchased;
- if a membership interest was extinguished merely by expulsion, the purchase-option provision would be nonsensical, as there would be nothing to purchase and the option would never be exercised; and
- the agreements provide that a disposition of a membership interest is not effective until all provisions have been satisfied, including payment for the purchase of the Fair Market Value of the purchased interest.

In other words, the arbitrator concluded that Bentz remained a member—called in the agreements a Disputing Member, but a member nonetheless—even after his expulsion until the companies announced they were exercising their option to purchase and paid the purchase price. Based on his interpretation of these contractual provisions, the arbitrator concluded that Bentz retained his membership interests despite expulsion—at least until his interests were purchased under the agreements—and remained entitled to distributions in the interim.

This interpretation of the company agreements is grounded in their language and structure. The arbitrator did not disregard the parties' contracts and mete out justice as he saw fit. Therefore, the arbitrator's award is not at odds with the essence of their agreements, and we cannot substitute our judgment for the arbitrator's in interpreting the parties' contracts. *See Forest Oil*, 446 S.W.3d at 75, 81–82; *Royce*

Homes, 315 S.W.3d at 85. The doctors and the companies have not shown that the trial court erred in confirming this aspect of the award.

Distributions Causing a Double Recovery

The other doctors and the companies contend that, because the income-based valuation of Bentz's membership interests takes into account potential distributions, the award of actual distributions results in a double recovery. While errors of law generally are not grounds for vacating an arbitration award, they argue that award of a double recovery is a basis for vacatur because double recoveries violate fundamental Texas public policy. However, the Federal Arbitration Act and the Texas Arbitration Act state the exclusive grounds for vacating or modifying arbitration awards. *Hall Street Assocs.*, 552 U.S. at 584–90; *Hoskins*, 2016 WL 2993929, at *3–5. Neither Act authorizes vacatur or modification based on violations of fundamental public policy. 9 U.S.C. §§ 10–11; TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.088, 171.091 (West Supp. 2015). Therefore, assuming without deciding that Bentz received a double recovery when the arbitrator awarded him both the Fair Market Value of his membership interests and past distributions and that doing so violated fundamental Texas public policy, this Court cannot vacate or modify the award on this basis.

Conclusion

We hold that the record is not sufficient to permit us to review whether the arbitrator's award of the Fair Market Value of Bentz's membership interests was beyond the arbitrator's authority. We hold that the arbitrator's award of past distributions is not at odds with the essence of the parties' contracts and that we cannot vacate or modify the arbitrator's award based on ostensible violations of fundamental public policy. We therefore affirm the trial court's judgment.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Brown.