Affirmed and Memorandum Opinion filed August 16, 2022.

In The

Fourteenth Court of Appeals

NO. 14-20-00776-CV

AVISHAI RON, Appellant

V.

SUZANNE SONDRUP RON, INDIVIDUALLY AND AS TRUSTEE OF THE SUZANNE RON 2012 FAMILY TRUST, Appellee

On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 2017-19071

M E M O R A N D U M O P I N I O N

In this appeal from the trial court's order confirming an arbitration award, one party contends that the arbitrator exceeded his powers by rewriting the parties' contract and making an equitable award based on matters that were not submitted for arbitration. We affirm.

I. BACKGROUND

Suzanne and Avishai ("Avi") Ron were married for more than 20 years and have three children. At the time of these events, the youngest child was still a minor.

Avi is a real estate investor who formed numerous business entities to acquire, hold, develop, operate, manage, and market real estate. Avi often manages these entities through general partnerships.

As part of their pre-divorce tax and estate planning, Avi and Suzanne executed a partition agreement in 2012. This agreement partitioned some of these community-held ownership interests into separate property. As part of this transaction, Avi and Suzanne formed the Suzanne Ron 2012 Family Trust. Avi settled the Trust by conveying his separate share of various partitioned assets. The issues in this appeal pertain to "Trust Real Estate Assets" or "TREAs," which are entities in which the Trust holds a limited-partnership interest. Avi manages the TREAs, either directly or through his management of a TREA's general partner. Suzanne is the primary beneficiary of the Trust; the children are additional beneficiaries. Suzanne was the original trustee of the Trust, but the trustee was subject to removal by trust protector Gary Stein.

Suzanne petitioned for divorce in 2014. On April 13, 2017, the 245th District Court of Harris County (the Family Court) signed a final decree of divorce in Cause No. 2014-4967 (the Divorce Decree). In the divorce decree, the trial court awarded Suzanne custody of the minor child and required the child's primary residence to be located within Harris County, Texas, or certain counties in northern California. The trial court also divided the Rons' various business interests, but because some of Avi's valuable business interests could not be assigned, the trial court ordered Avi to pay Suzanne a $19 million equalization judgment. Avi appealed the divorce decree to our court to challenge the equalization judgment.

A. The Mediated Settlement Agreement

Before the final divorce decree was signed, however, Suzanne, individually and on behalf of the Trust, filed this suit—"the Trust Suit"—in the 125th District Court.[1] In the Trust Suit, Suzanne alleged that Avi stole money from entities managed by Avi but owned, in part, by Suzanne or the Trust. Against Avi and various companies owned or controlled by Avi, Suzanne alleged violations of the Texas Theft Liability Act and of the Texas Fraudulent Transfer Act, conversion, breach of fiduciary duty, breach of partnership agreements and of rights to distributions, aiding and abetting, and conspiracy. Shortly after filing the Trust Suit, Stein removed Suzanne as trustee, appointing Murray Fogler in her place.

In yet another suit pending in 2017, Avi sued his co-manager of the California limited liability company, Au Sommett, LLC (the Au Sommett Suit). Avi sought third-party discovery from Suzanne to obtain her records and communications with his co-manager. Suzanne resisted discovery.

In October 2017, the Rons participated in mediation with Alan Levin to attempt to resolve all of their disputes. Avi, Suzanne, and their respective attorneys ultimately signed a mediated settlement agreement (MSA), which:

- reduced the outstanding balance of the equalization judgment to $8.5 million;
- provided that Avi would purchase Suzanne's share of the Trust's ownership interests in certain TREAs, and would pay for these assets their "stipulated values," that is, the values assigned to these assets in the divorce action;

[1] Shortly before the final judgment was rendered in this case, the suit was transferred to the 269th District Court.

- provided that Avi would purchase Suzanne's share of the Trust's interest in two other assets "at the previously stipulated values plus 10%";[2]
- required the funding of separate spin-off trusts for each of the couples' three children;
- permitted Suzanne to live with the couples' minor child anywhere in the continental United States and required Avi's visitation rights to be determined by a forensic psychologist;
- required the parties to dismiss with prejudice Avi's appeal from the divorce decree and Suzanne's Trust Suit, and required Avi to release Suzanne from any discovery or claims related to the Au Sommett Suit;
- provided that Suzanne would be reappointed as the Trust's trustee and that Stein would resign as the trust protector;
- released the parties' claims against each other as of the date of the MSA; and
- required the parties "to submit any dispute related to this Agreement to Alan Levin for binding arbitration."

Although Fogler was still the trustee at that time, he did not participate in the mediation, but Suzanne participated in the mediation on behalf of both herself and the Trust.

B. The Distribution Agreement

A few days after the parties signed the MSA, they entered into another agreement via email between their respective counsel. This "Distribution

[2] Although the parties agreed that Avi would purchase a third asset for a price that was 10% more than its previously stipulated value, the purchase of that asset was on a different schedule and was addressed separately in the arbitration award.

Agreement" provided that "As of the effective date, Avi is responsible for all expenses, capital calls, utilities, insurance, taxes etc on the assets he is buying" and "he is entitled to the corresponding rents, distributions, etc."[3]

C. The Arbitration Order

As permitted by the MSA, Suzanne immediately took up residence in Utah with the Rons' minor child; however, she refused to perform the asset transfers required by the MSA. Avi therefore filed a motion in the Trust Suit to compel Suzanne and the Trust to arbitration. While the motion to compel arbitration was pending, Suzanne filed suit in Utah and purported to resign as the Trust's trustee; to appoint Josh Tillotson as trustee; and to appoint Robert Collins as trust protector.

Avi amended his pleadings to include counterclaims against Suzanne and the Trust and third-party claims against Tillotson and Collins. Avi's liability theories included breach of the MSA, tortious interference with contract, fraud, fraud in the inducement, conspiracy, corporate veil-piercing, and reverse veil-piercing.

The trial court granted Avi's motion and compelled to arbitration

- Suzanne's and the Trust's affirmative claims in the Trust Suit;
- all claims in the Trust Suit against Suzanne, the Trust, and Tillotson;
- Avi's counterclaims for breach of the MSA;
- Avi's claims for fraud and fraudulent inducement;

[3] The parties also entered into an "Equalization Agreement," in which they agreed that Avi would purchase the children's shares of the Trust's interest in the TREAs, but the arbitrator set aside that agreement, finding that Suzanne, effectively acting as trustee of the Trust, did not act in the children's best interest in agreeing to sell their interests to further her own goals. The parties do not challenge the trial court's confirmation of that part of the arbitrator's award.

- "All claims by or against Suzanne, the Trust and Avi which are transactionally-related to the claims pending before this Court and/or the MSA"; and
- "Claims by or against third party beneficiaries of the MSA which are transactionally-related to the claims pending before this Court and/or the MSA."

Suzanne then sought a writ of mandamus to compel the trial court to vacate the arbitration order. We agreed only with Suzanne's arguments that the court in which the divorce action was filed had continuing exclusive jurisdiction to determine Avi's visitation with the minor child and that child's residence. *See In re Ron*, 582 S.W.3d 486, 487 (Tex. App.—Houston [14th Dist.] 2018 [mand. denied]). We denied mandamus relief as to the remainder of the trial court's order. *See id.*

D. The Rule 11 Agreement

Suzanne had signed the MSA without specifying that she signed both individually and in her capacity as the Trust's trustee, so to eliminate questions of whether the Trust was bound by the MSA's arbitration clause, Avi, Tillotson, and Rons' two adult children entered into a Rule 11 Agreement regarding arbitration.[4] They agreed to submit to Levin's arbitration Avi's and the Trust's rights and obligations relating to the MSA, "whether it is held to be enforceable or unenforceable." This broad issue expressly included questions of

- the identity of the parties to the MSA;

[4] *See* TEX. R. CIV. P. 11.

- "the enforceability or lack of enforceability of the MSA (including, without limitation, claims of fraud in the inducement, fraudulent omission, estoppel and ratification)";
- the MSA's terms, if determined to be wholly or partially enforceable;
- "the relief a party may be entitled to receive through the MSA";
- "the parties' legal and equitable rights and obligations under the MSA";
- which party has the right to financial gains, distributions, or other benefits resulting from the ownership interests of the entities referenced in the MSA, and conversely, which party is responsible for taxes or other liabilities associated with the ownership interests of those entities; and
- the scope and arbitrability of the Rule 11 Agreement.

The parties agreed that, with certain modifications not at issue in this appeal, the arbitration would be governed by the American Arbitration Association's standard Commercial Arbitration Rules.

E. The Arbitration Award

Levin issued a final arbitration award in which he held that the MSA and Distribution Agreement were binding and enforceable, at least as to Suzanne's 75% interest in the Trust, but Levin also made two additional awards to Suzanne. Avi moved to modify or partially vacate those aspects of the award, but the trial court denied the motion and confirmed the award. On appeal, Avi challenges the trial court's judgment as it applies to those two aspects of the arbitration award, namely, the amount Avi was ordered to pay in connection with (1) Avi's purchase of Capcor Orchard Green, Ltd.; and (2) the Distribution Agreement.

1. Amounts Payable Respecting Capcor Orchard Green, Ltd.

When Avi and Suzanne divorced, the stipulated value of Capcor Orchard Green, Ltd., was $368,000.00; however, two months before the mediation, Avi signed a contract of sale regarding Capcor's only asset, for which the Trust's share of the sales proceeds would be $980,618.00, which was $612,618.00 more than Capcor's previously stipulated value. Avi did not disclose the contract's existence at the mediation, and Suzanne learned of it only after the sale closed.

Levin held that "Avi had a duty to disclose" this information. Because he did not, Levin held that Avi was to pay $980,618.00 for the Trust's interest in Capcor, which "represents an add-on difference of $612,618.00." Because Suzanne owned only a 75% interest in the Trust, Levin ordered Avi to pay her 75% of both Capcor's previously stipulated value and the "add-on difference," with the remaining 25% to be paid per stirpes into the Ron children's individual spin-off trusts.

2. Amounts Payable Respecting the Distribution Agreement

Levin held that the Distribution Agreement bound Suzanne but was not binding on the Rons' children. Avi does not challenge that part of the arbitration award, but he disagrees with the amount that he was required to pay to Suzanne.

Although Levin held that Suzanne was bound to the Distribution Agreement under which Avi was entitled to all distributions made from the TREAs on or after the MSA's effective date, he decided "primarily as a matter of equity that further adjustment and formation is appropriate." He ordered Avi to pay an additional $1 million into the Trust solely for Suzanne's benefit.

Regarding the amounts payable respecting Capcor and the Distribution Agreement, Avi argues on appeal that Levin exceeded his authority by ruling on matters the parties did not agree to arbitrate and by improperly rewriting the parties'

agreements. Avi therefore maintains that the trial court erred in confirming those aspects of the arbitration award. Having been reinstated as trustee, Suzanne has responded through counsel to Avi's appellate brief on behalf of herself and the Trust.

II. ISSUES PRESENTED

In three overlapping issues, Avi contends that the trial court erred in confirming two aspects of the arbitration award in which, according to Avi, the arbitrator modified the parties' contracts, granted relief on issues the parties did not agree to arbitrate, and resolved matters not submitted for arbitration.

III. GOVERNING LAW

Because neither the MSA nor the Rule 11 Agreement specifies whether the Federal Arbitration Act (FAA) or the Texas Arbitration Act (TAA) applies, but the MSA provides that it is governed by Texas law, we conclude that both the FAA and TAA apply. *See Accord Bus. Funding, LLC v. Ellis*, 625 S.W.3d 612, 617 (Tex. App.—Houston [14th Dist.] 2021, no pet.) (citing *Natgasoline LLC v. Refractory Constr. Servs., Co*., 566 S.W.3d 871, 878 (Tex. App.—Houston [14th Dist.] 2018, pet. denied)).

We review de novo the trial court's decision to confirm the arbitration award. *See Southwinds Express Constr., LLC v. D.H. Griffin of Tex., Inc.*, 513 S.W.3d 66, 70 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Our review is extraordinarily narrow, for we must indulge every reasonable presumption in favor of upholding the arbitration award. *In re M.E.H.*, 631 S.W.3d 244, 256 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

IV. SCOPE OF THE ARBITRATOR'S AUTHORITY

Avi begins by asserting that Levin exceeded his authority by resolving matters beyond the scope of the agreements to arbitrate. Avi accordingly contends that the

trial court erred in denying his motion to partially vacate or to modify the challenged portions of the arbitration award.

Under the FAA, a trial court may vacate an arbitration award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). An arbitration award may be modified or corrected "[w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted" or "[w]here the award is imperfect in matter of form not affecting the merits of the controversy." *Id.* § 11(b)–(c). The Texas Arbitration Act contains language to the same effect as these provisions of the FAA. *See* TEX. CIV. PRAC. & REM. CODE § 171.088(a)(3)(A) ("On application of a party, the court shall vacate an award if . . . the arbitrators . . . exceeded their powers . . . ."); *id.* § 171.091(a)(2) ("On application, the court shall modify or correct an award if . . . the arbitrators have made an award with respect to a matter not submitted to them and the award may be corrected without affecting the merits of the decision made with respect to the issues that were submitted . . . .").

"In determining whether an arbitrator has exceeded his authority, the proper inquiry is not whether the arbitrator decided an issue correctly, but rather, whether he had the authority to decide the issue at all." *Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc.*, 518 S.W.3d 422, 431 (Tex. 2017). In this case, the arbitrator was authorized to decide a broad array of issues that included both contract and tort claims and defenses. The MSA required binding arbitration of "any dispute *related to* this agreement,"[5] and matters "related to" a contract can include torts. *See, e.g.*, *Fowler v. Epps*, 352 S.W.3d 1, 4 (Tex. App.—Austin 2010), *judgm't vacated on*

[5] Emphasis added.

other grounds, 351 S.W.3d 862 (Tex. 2011) (real estate sales contract allowing recovery of attorney's fees to prevailing party "in any legal proceeding related to this contract" encompassed claims for DTPA violations, common-law fraud, fraud in a real estate transaction, and negligent misrepresentation). In connection with the MSA, Avi, Suzanne, and the Trust all asserted claims of breach of contract, fraud, and fraudulent inducement. Suzanne and the Trust also asserted claims against Avi for breach of fiduciary duty for failing to disclose material information. The Rule 11 Agreement between Avi, the Trust, and the Rons' two adult children further provided that the arbitrator would decide "which party has the right to financial gains, distributions or other benefits resulting from the ownership interests of the entities referenced in the MSA." Finally, the Rule 11 Agreement stated that "[i]ssues related to the scope of this Agreement and arbitrability of this Agreement shall be reserved for determination by the arbitrator."

Because none of the parties' agreements limited the relief available, the scope of the arbitrator's authority also included "broad discretion in fashioning an appropriate remedy." *Forest Oil Corp.*, 446 S.W.3d at 82. All three parties sought declaratory relief, damages, and equitable relief such as rescission or equitable reformation. Among other remedies, Suzanne pleaded in the trial court for actual damages, fee forfeiture, and profit disgorgement. Avi and the Trust further agreed in their Rule 11 Agreement that the American Arbitration Association's standard commercial arbitration rules would apply, under which "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties . . . ."[6] Thus, the arbitrator was authorized to grant both legal and equitable relief.

[6] Am. Arbitration Ass'n, Commercial Arbitration Rules & Mediation Procedures R-47(a) (2013), *avail. at* www.adr.org/commercial (last visited August 11, 2022).

A. Amounts Payable Respecting Capcor Orchard Green, Ltd.

Regarding Capcor, Avi maintains that, despite finding the MSA enforceable and that the Capcor's previously stipulated value was $368,000, Levin "simply rewrote the MSA to change the stipulated value to $980,618." In characterizing Capcor's purchase price in the arbitration award as $980,618, Avi relies on this section of the arbitration award:

> With an effective date of August 9, 2017, Avi executed an Agreement of Purchase and Sale relating to this property. At the time of the mediation, Avi had actual, contractual knowledge that his distribution from the sale would be approximately $ 980,618.00. *Avi chose to remain silent* notwithstanding that closing was imminent. The Arbitrator FINDS and RULES that *Avi had a duty to disclose* in this unique situation. He is therefore ORDERED to pay $980,618.00 for the purchase of the Trust's interest in Capcor Orchard Green, Ltd. This represents an add-on difference of $612,618.00 . . . .[7]

The italicized language describes the reason for the arbitrator's award of an "add-on difference." The Trust alleged that Avi's failure to reveal the existence of the contract to sell Capcor's only asset constituted "fraud by nondisclosure because Avi was a fiduciary of the Trust," and Suzanne similarly asserted that Avi breached his fiduciary duties by "the misdirection of distributions due to the Trust" and by "the failure to disclose transactions." Here, the arbitrator agreed that Avi breached a duty to disclose.

Avi insists that Levin did not find that Avi breached a fiduciary duty, presumably because the words "breach of fiduciary duty" appear in the arbitration award only in Levin's statement that he denied the claim of "Breach of Fiduciary Duty (except as addressed herein)." But because a fiduciary owes a beneficiary a duty of full disclosure, Levin's finding that Avi breached a duty to disclose does

[7] Underlining in original; italics added.

address the claim of breach of fiduciary duty. *See Estate of Townes v. Townes*, 867 S.W.2d 414, 417 (Tex. App.—Houston [14th Dist.] 1993, writ denied). Avi does not contend that the duty to disclose to which the arbitrator referred arises from any source other than this fiduciary relationship. *See Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) ("Generally, no duty of disclosure arises without evidence of a confidential or fiduciary relationship.").

That the arbitrator found that Avi breached his fiduciary duty of disclosure is further supported by the nature of the relief awarded for the breach. The "add-on difference" represents the difference between the amount of the distribution payable to Avi as a result of the undisclosed sale of Capcor's only asset and Capcor's purchase price, that is, its previously stipulated value. The difference between those two amounts is Avi's profit, and the disgorgement of profits is a form of relief available for a breach of fiduciary duty. *See ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010).

Although Avi asserts that the arbitrator changed Capcor's purchase price, the separate nature of the profit-disgorgement award can be seen in the section of the arbitration award titled "Summary of Trust Interests in Entities to be purchased by Avi pursuant to the Previously Stipulated Values (including the 10% enhancements)." In that section, the arbitrator lists Capcor's purchase price as $368,000.00 and shows his calculation of the "Addition for Capcor Orchard Green, Ltd. adjustment for failure to disclose."

We conclude that the arbitrator did not rewrite the MSA so as to change Capcor's purchase price, and that the "add-on difference" instead was a profit-disgorgement award based on the arbitrator's finding that Avi breached his fiduciary duty of full disclosure. Because the arbitrator did not exceed his authority in deciding

the breach-of-fiduciary duty claim or in making the profit-disgorgement award, we overrule Avi's issues as they pertain to the trial court's confirmation of this part of the arbitration award.

B. Adjustment of Distribution Amounts

Although the arbitrator held that Suzanne was bound to the Distribution Agreement under which Avi was entitled to all distributions made from the TREAs on or after the MSA's effective date, the arbitrator decided "primarily as a matter of equity that further adjustment and reformation is appropriate." He ordered Avi to pay an additional $1 million into the Trust solely for Suzanne's benefit. Avi contends that the arbitrator exceeded his powers in making such an award inasmuch as it was based on Avi's discourtesy in the arbitration proceeding or due to his misconduct years earlier in the divorce suit—matters that Avi maintains were outside the parties' arbitration agreements. Avi points to footnote 17 of the arbitration award as the basis for this $1 million payment, while Suzanne and the Trust maintain that footnote 17 was inadvertently left in after the text it accompanied was deleted. We agree with the latter contention.

In the arbitrator's draft award, which was circulated to the parties, the $1 million payment is discussed in the following passage:

> Notwithstanding the above finding that Suzanne is bound to the Distribution Agreement, the Arbitrator has concluded, *owing to Avi's less than stellar behavior before, during and after the May 2019 trial of this dispute*[17], and as a matter of equity, that a further adjustment and reformation is appropriate. Avi is ORDERED, at the Global Closing, to deposit an additional $1,000,000 into the Trust solely for the benefit of Suzanne who, at the conclusion of the Global Closing, will be the only remaining beneficiary of the Trust. Avi will be allowed to retain the balance of the distributions . . . .

(emphasis added). The accompanying footnote 17 read as follows:

> See Amended Findings of Fact and Conclusions of Law from Judge Moore of the 245th Judicial District Court of Harris County, Texas, dated July 26, 2017, at p.29, in addition to his numerous violations of this Arbitrator's Orders and his discourteous and inappropriate conduct at various times during the proceeding.

In the final version of the arbitration award, the language italicized in the draft excerpt above was deleted; however, Levin failed to delete the accompanying footnote, and as a result, it was left appended to an empty space and bracketed by commas as follows:

> Notwithstanding the above finding that Suzanne is bound to the Distribution Agreement, the Arbitrator has concluded, [17], primarily as a matter of equity that a further adjustment and reformation is appropriate.

Thus, the arbitrator explains the $1 million payment "primarily as a matter of equity." While a more detailed explanation might have been desirable, "[a] mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598, 80 S. Ct. 1358, 1361, 4 L. Ed. 2d 1424 (1960). The parties did agree to submit to arbitration the question of "which party has the right to financial gains, distributions, or other benefits resulting from the ownership interests of the entities referenced in the MSA," and the arbitrator acted within the scope of his authority in answering the question as he did.

We overrule Avi's issues pertaining to the trial court's confirmation of this part of the arbitration award.

V. CONCLUSION

Finding no error in the confirmation of the arbitration award, we affirm the trial court's judgment.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Spain and Poissant.