

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-07-519 CV

**REZIK SAQER, M.D. and INTEGRA MEDICAL CLINICS L.L.P.
f/k/a INTEGRA HEALTH CLINICS, L.L.P., Appellants**

V.

**FADI GHANEM, M.D., INDIVIDUALLY and d/b/a
FADI GHANEM, M.D., P.A., MATERNAL & FAMILY CLINIC
and HUSSAMADDIN AL-KHADOUR, M.D., Appellees**

**On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 06-04-03594-CV**

MEMORANDUM OPINION

Appellants appeal the trial court’s judgment confirming an arbitration award rendered in favor of appellees. We find the appellants failed to establish grounds for vacating or modifying the arbitration award and affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants, Rezik Saqer, M.D. (“Saqer”) and Hazem El-Zufari, M.D. (“El-Zufari”) entered into a limited partnership with Fadi Ghanem, M.D. (“Ghanem”) and Hussamaddin Al-Khadour, M.D. (“Al-Khadour”) to practice medicine as Integra Medical Clinics, L.L.P. f/k/a Integra Health Clinics, L.L.P. (“Integra”). Saqer and Ghanem were senior partners and each owned a 33% interest in Integra. El-Zufari and Al-Khadour were junior partners and each owned a 17% interest in Integra. Not long after the commencement of operations, problems arose between the four physicians, and Saqer eventually offered to purchase the interests of Ghanem and Al-Khadour in Integra. Saqer’s offer was accepted and the three partners executed a Letter Agreement (“Letter Agreement” or “Agreement”) to accomplish Saqer’s purchase and resolve their disputes. The Agreement contained a dispute resolution provision that required arbitration of any disputes.

Following the execution of the Agreement, additional disputes arose among the former partners, leading counsel for Ghanem and Al-Khadour to call for arbitration. Thereafter, Saqer, El-Zufari, and Dr. Harlan Borcharding, D.O. (“Borcharding”), a doctor who had previously practiced at a family clinic with El-Zufari and had transferred his practice to Integra’s facility, filed suit in Montgomery County district court and sought a temporary restraining order. The district court granted the temporary restraining order and set the temporary injunction for hearing. Ghanem and Al-Khadour filed a motion to

terminate the hearing and sought to compel arbitration pursuant to the dispute resolution provision in the Agreement. The district court compelled the case to arbitration. Because the claims of El-Zufari and Borcharding were ultimately nonsuited or assigned, Saqer and Integra were the sole claimants in the arbitration proceedings (collectively referred to hereinafter as “Saqer”).¹ Saqer asserted in the arbitration proceedings that Ghanem and Al-Khadour breached various provisions of the Letter Agreement. Ghanem and Al-Khadour alleged that Saqer breached various duties and provisions of the Agreement. Ghanem and Al-Khadour moved for the equivalent of summary judgment within the arbitration proceeding based on Saqer’s alleged breach. The arbitrator granted Ghanem and Al-Khadour’s partial motion for summary judgment and issued an interim award. The arbitrator found that Saqer breached the provision of the Letter Agreement that obligated him to assume a \$235,000 line of credit that Woodforest National Bank had extended to Integra, and to remove Ghanem and Al-Khadour as obligors and extinguish their personal guaranties from the line of credit within thirty days of the execution of the Agreement. The arbitrator ordered Saqer to pay \$235,000 either to Ghanem and Al-Khadour or to Woodforest National Bank and specified that in either case the funds would be applied to the operating line of credit.

¹The claims of El-Zufari were non-suited in December of 2006. The claims of Borcharding remained before the 359th District Court because Borcharding was not a partner in Integra and not a signatory to the Letter Agreement. The claims of Borcharding were ultimately nonsuited. Thereafter, Borcharding’s claims were pursued through arbitration by Saqer because Borcharding had assigned his accounts receivables to Integra.

The arbitrator postponed awarding attorneys' fees on the claim until after the final arbitration hearing.

Following evidentiary hearings, the arbitrator issued a final arbitration award. The arbitration award granted Ghanem and Al-Khadour attorneys' fees in the amount of \$77,550 "in connection with the granting of the Partial Summary Judgment with respect to [the] Woodforest National Bank line of credit" In addition, the arbitrator found that Saqer breached the Agreement by filing suit against Ghanem and Al-Khadour because the Agreement required any dispute between the parties to be resolved by arbitration. The arbitrator ordered that Ghanem and Al-Khadour "take nothing by this claim except reimbursement for fees and costs as ordered herein." The arbitration awarded Ghanem and Al-Khadour attorneys' fees in the amount of \$63,254 "in connection with the breach by Integra and Saqer of the Letter Agreement by filing suit against Ghanem and Al-Khadour. . . ." Finally, the arbitrator's award also granted Ghanem and Al-Khadour reimbursement for arbitration fees and expenses in the amount of \$20,066.72.

Saqer moved to stay enforcement of the arbitration award, and Ghanem and Al-Khadour applied to the district court to confirm the arbitration award and moved for the entry of final judgment. Saqer filed a motion to vacate the arbitration award on the basis that the arbitrator exceeded his powers in awarding attorneys' fees against Saqer on the breach of contract claims because Ghanem and Al-Khadour failed to plead and prove they met the

conditions precedent for recovery of attorneys' fees on their breach of contract claims. Saqer filed his First Amended Motion to Vacate the arbitration awards, in which he added a claim that the arbitrator exceeded his power by awarding attorneys' fees on the breach of contract claims because he awarded the attorneys' fees without an award of actual damages. The district court denied the motion to vacate, confirmed the arbitration award, and issued its final judgment confirming the award on August 28, 2007. This appeal followed.

ISSUES AND STANDARD

On appeal Saqer asserts four reasons why the arbitrator's award should be vacated and the trial court's final judgment reversed. In his first issue, Saqer argues that the two awards of attorneys' fees should be vacated because the arbitrator exceeded his authority by awarding attorneys' fees on the two breach of contract claims without awarding actual monetary damages for those claims. In his second issue, Saqer argues that the attorneys' fees awarded to appellees for Saqer's breach of the dispute resolution provision of the Agreement should be vacated because appellants were within their rights to file suit in state district court rather than to arbitrate. In his third issue, Saqer argues that the arbitration award of attorneys' fees against him for failing to assume the Woodforest National Bank operating line of credit should be vacated because the affidavit submitted in support of those attorneys' fees was legally insufficient. Finally, Saqer argues in issue four that the arbitration award of

attorneys' fees against him should be vacated because appellees did not satisfy the conditions precedent for recovery on their breach of contract claims.

We review a trial court's confirmation of an arbitration award de novo. *Hisaw & Assocs. Gen. Contractors, Inc. v. Cornerstone Concrete Sys., Inc.*, 115 S.W.3d 16, 18 (Tex. App.--Fort Worth 2003, pet. denied). However, our review of an arbitration award is extremely narrow. *Id.* An arbitration award has the same effect as the judgment of a court of last resort; therefore, we must indulge every reasonable presumption to uphold the award. *Id.*; *Pheng Invs., Inc. v. Rodriguez*, 196 S.W.3d 322, 328 (Tex. App.--Fort Worth 2006, no pet.). The arbitrator's award is "conclusive on the parties as to all matters of fact and law." *Pheng*, 196 S.W.3d at 328 (footnote omitted). "Absent an allegation of a statutory or common law ground to vacate or modify an arbitration award, a reviewing court lacks jurisdiction to review the arbitrator's decision." *Providian Bancorp. Servs. v. Thomas*, 255 S.W.3d 411, 415 (Tex. App.--El Paso 2008, no pet.) (quoting *Lee v. El Paso County*, 965 S.W.2d 668, 671-72 (Tex. App.--El Paso 1998, pet. denied)); *see also Hisaw & Assocs.*, 115 S.W.3d at 19.

ISSUES ONE AND FOUR

"Unless grounds are offered for vacating, modifying, or correcting an award under Section 171.088 or 171.091 [of the Texas Arbitration Act], the court, on application of a party, shall confirm the award." TEX. CIV. PRAC. & REM. CODE ANN. § 171.087 (Vernon

2005). The statutory grounds for vacating an award are: (1) the award was procured by corruption, fraud, or other undue means; (2) the rights of a party were prejudiced by evident partiality, corruption, misconduct, or wilful misbehavior by an arbitrator; (3) the arbitrator exceeded his powers, refused to postpone the hearing after a showing of sufficient cause, refused to hear evidence material to the controversy, or conducted the hearing contrary to sections 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that substantially prejudiced the rights of a party; or (4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding to compel or stay arbitration, and the party did not participate in the arbitration hearing without raising objection. *See id.* § 171.088; *see also J.J. Gregory Gourmet Servs. Inc. v. Antone's Import Co.*, 927 S.W.2d 31, 33 (Tex. App.--Houston [1st Dist.] 1995, no writ).

The statutory grounds for modifying or correcting an award are: (1) the award contains an evident miscalculation of numbers or an evident mistake in the description of a person, thing, or property referred to in the award, (2) 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, or (3) the form of the award is imperfect in a manner that does not affect the merits of the controversy. TEX. CIV. PRAC. & REM. CODE ANN. § 171.091. Saqer does not argue here that there were grounds on which the trial court should have modified the award under section

171.091. Saqer relies instead on statutory and common law grounds for vacating an award.

We will address Saqer's statutory argument first.

In issues one and four, Saqer argues that the arbitrator exceeded his authority in awarding attorneys' fees. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(3)(A). We will address these issues together. Saqer points to the Texas Arbitration Act, which provides in pertinent part:

- (c) The arbitrators shall award attorney's fees as additional sums required to be paid under the award only if the fees are provided for:
 - (1) in the agreement to arbitrate; or
 - (2) by law for a recovery in a civil action in the district court on a cause of action on which any part of the award is based.

TEX. CIV. PRAC. & REM. CODE ANN. § 171.048(c) (Vernon 2005). It is undisputed that the Letter Agreement does not specifically provide for the payment of attorneys' fees. The dispute resolution provision of the Letter Agreement provides, in pertinent part:

All other issues related to any Partnership or Membership matters not covered by this Agreement (and all disputes arising under or interpretations of this Agreement) shall be resolved by binding arbitration. An arbitrator shall be chosen by agreement between counsel for Ghanem and counsel for Integra/Integrated. The arbitrator shall be paid in an equal share by all Parties involved in the dispute. All Parties agree to waive any court action on any matter and allow all disputes to be resolved through binding arbitration. The arbitration rules shall be simple and informal and will include a written submission of all disputes to the arbitrator (7) days before the scheduled arbitration hearing.

Saqer contends that because the Agreement does not provide for attorneys' fees, the only applicable basis for the arbitrator's award of attorneys' fees is Chapter 38 of the Texas

Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 2008). Section 38.001 provides that “[a] person may recover reasonable attorney’s fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . (8) an oral or written contract.” *Id.* The statute further provides that “[t]o recover attorney’s fees under this chapter . . . (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and (3) payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented.” *Id.* § 38.002(2)-(3). Saqer contends that section 38.001 and the case law interpreting that statute establish that damages must exist on a claim before attorneys’ fees may be awarded. Saqer appears to be arguing in issues one and four that the arbitrator’s award of attorneys’ fees did not comply with Chapter 38; therefore, the awards were not in compliance with section 171.048(c) of the Act, and the arbitrator exceeded his authority in awarding the fees. For the reasons set forth herein, we need not address the merits of whether the arbitrator’s award of attorneys’ fees complied with Chapter 38.

Generally, even if an arbitrator did err in awarding attorneys’ fees under Chapter 38 of the Texas Civil Practice and Remedies Code, it does not necessarily mean the arbitrator exceeded his authority. *See Providian Bancorp. Servs.*, 255 S.W.3d at 417 (citing *Anchor Paving Co. v. Trinh*, No. 01-99-01199-CV, 2000 WL 567645, at *3 (Tex. App.--Houston [1st Dist.] May 11, 2000, pet. denied)). “[T]he authority of arbitrators is derived from the

arbitration agreement and is limited to a decision of the matters submitted therein either expressly or by necessary implication.” *Barsness v. Scott*, 126 S.W.3d 232, 241 (Tex. App.--San Antonio 2003, pet. denied) (citing *Gulf Oil Corp. v. Guidry*, 160 Tex. 139, 327 S.W.2d 406, 408 (1959)). Arbitrators exceed their authority only when they decide matters not properly before them. *Id.* Generally, a mistake of fact or law is insufficient to vacate an arbitration award. *Vernon E. Faulconer, Inc. v. HFI, Ltd. P’ship*, 970 S.W.2d 36, 39 (Tex. App.--Tyler 1998, no pet.); *see also J.J. Gregory Gourmet Servs.*, 927 S.W.2d at 33; *Anchor Paving*, 2000 WL 567645, at *3 (“An arbitrator exceeds his authority when he decides matters not presented to him by pleading or by agreement, not when he makes a legal mistake.”).

Appellants’ assertion that a court could not or would not award attorneys’ fees is also not, by itself, an appropriate ground for the trial court to refuse to confirm the arbitrator’s award. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.087; *see also Providian Bancorp Servs.*, 255 S.W.3d at 417 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.090). Section 171.090 of the Texas Arbitration Act specifically provides that “[t]he fact that the relief granted by the arbitrators could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.” TEX. CIV. PRAC. & REM. CODE ANN. § 171.090.

The Houston Court of Appeals in *Anchor Paving Co.* declined to find that section 171.048(c) “trumps” section 171.090. *See Anchor Paving Co.*, 2000 WL 567645, at *3. We note that section 171.048 is in subchapter C of the Act, which deals with arbitration proceedings, while section 171.090 is in subchapter D, which deals with court proceedings. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.048, 171.090. Additionally, we find it significant that section 171.088(a)(3)(D), which sets forth the statutory grounds for vacating an award, does not include a violation of section 171.048 as one of the listed procedural violations by the arbitrator that could mandate vacating the award. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(3)(D) (providing that an arbitration award shall be vacated upon application of a party if the arbitrator “conducted the hearing contrary to Sections 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that substantially prejudiced the rights of a party . . .”). Therefore, we do not agree with Saquer’s position that the arbitrator necessarily exceeded his authority by awarding attorneys’ fees even if they may not have been allowable pursuant to Chapter 38.

To determine whether the arbitrator exceeded his authority in awarding attorneys’ fees, we look to whether that issue was properly before the arbitrator. Whether an issue is properly before the arbitrator is a question of law. *City of Beaumont v. Int’l Ass’n of Firefighters, Local Union No. 399*, 241 S.W.3d 208, 213 (Tex. App.--Beaumont 2007, no pet.). The language in the Agreement at issue here does not specifically provide for

attorneys' fees; however, the language in the Agreement is very broad. The Agreement states,

[a]ll other issues related to any Partnership or Membership matters not covered by this Agreement (and all disputes arising under or interpretations of this Agreement) shall be resolved by binding arbitration. . . . All Parties agree to waive any court action on any matter and allow all disputes to be resolved through binding arbitration. The arbitration rules shall be simple and informal

“An arbitration agreement that provides that ‘any’ controversy between the parties will be arbitrated, by its plain language, covers *any* controversy.” *Kosty v. S. Shore Harbour Cmty. Ass’n, Inc.*, 226 S.W.3d 459, 465 (Tex. App.--Houston [1st Dist.] 2006, pet. denied).

Moreover, courts have considered the scope of the submissions to the arbitrators, in addition to the language of the agreement, as an indicator of the arbitrator’s authority. *See id.*; *see also Thomas v. Prudential Secs., Inc.*, 921 S.W.2d 847, 851 (Tex. App.--Austin 1996, no writ). In *Thomas*, the Austin Court of Appeals held that when both parties submitted a request for attorneys’ fees the issue of attorneys’ fees, was properly before the arbitrator. *Thomas*, 921 S.W.2d at 851. The Court explained,

Significantly, both parties sought the recovery of attorney fees from the panel, ‘suggesting that awarding fees was contemplated by the parties to be within the scope of the agreement to arbitrate.’ The explicit terms of the parties’ agreement do not control our analysis here, because ‘the parties may agree to arbitration of disputes that they were not contractually compelled to submit to arbitration.’ We conclude that both parties’ claims for attorney fees reflect their unified intention to authorize the panel’s award of attorney fees.

Id. (citations omitted). It is undisputed that Saqer, Ghanem, and Al-Khadour all requested attorneys' fees in connection with the claims they submitted to the arbitrator. Because the arbitration agreement contains broad language, and because all parties submitted a request for attorneys' fees, we conclude that the matter of attorneys' fees was properly before the arbitrator. *See Kosty*, 226 S.W.3d at 465; *see also Thomas*, 921 S.W.2d at 851.

Saqer argues that the arbitrator misapplied the law to the extent he concluded that appellees would have been entitled to attorneys' fees on their breach of contract claims. This is a legal question that the arbitrator considered and answered. The arbitrator could have found that attorneys' fees were appropriate based on the broad language of the agreement or based on statute. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.001(8), 38.002, 171.048(c). Either way, the issue of attorneys' fees was submitted to and determined by the arbitrator. *See Cooper v. Bushong*, 10 S.W.3d 20, 26 (Tex. App.--Austin 1999, pet. denied); *see also Monday v. Cox*, 881 S.W.2d 381, 384-85 (Tex. App.--San Antonio 1994, writ denied) (attorneys' fees, which were not specifically mentioned in agreement, were submitted to arbitrator by DTPA claim); *Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 235-36 (Tex. App.--Houston [14th Dist.] 1993, writ denied) (because issue of attorneys' fees was submitted to arbitrator, issue was decided by arbitrator). The trial court was not permitted to second-guess this decision. *See Cooper*, 10 S.W.3d at 26. We find that the arbitrator did not exceed his authority in awarding attorneys' fees.

“Statutory arbitration is cumulative of the common law. The common law grounds to set aside an arbitration award include fraud, misconduct, or gross mistake that implies bad faith and failure to exercise honest judgment.” *J.J. Gregory Gourmet Servs.*, 927 S.W.2d at 33 (citations omitted). “Manifest disregard of the law is a judicially-created ground for vacating arbitration awards. It is more than mere error or misunderstanding in applying the law.” *Pheng*, 196 S.W.3d at 331 (footnotes omitted). To vacate an award under this standard, the moving party must show that the arbitrator clearly recognized the law but chose to ignore it or refused to apply it correctly. *See id.*

Saquer asserts for the first time on appeal that the arbitrator manifestly disregarded the law. Saquer did not present this claim to the trial court in his motions to vacate. Because we find that Saquer failed to preserve this issue for appellate review, we decline to address the merits of this common law argument. *See* TEX. R. APP. P. 33.1(a). We overrule issues one and four.

ISSUES TWO AND THREE

In issue two, Saquer asserts that he was within his rights to file suit in state district court rather than to arbitrate; therefore, the arbitration award for attorneys’ fees related to that claim should be vacated and the final judgment of the district court reversed. In issue three, Saquer argues that the affidavit the appellees submitted in conjunction with their claim for attorneys’ fees against Saquer for his failure to assume the operating line of credit was legally insufficient. These are issues that were properly before the arbitrator. As set forth above,

the trial court was not permitted to second-guess the arbitrator's decision on the merits. *See Cooper*, 10 S.W.3d at 26. Neither of these complaints provides a sufficient legal basis for vacating or modifying the arbitration award. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.088, 171.091. We may not impinge upon the jurisdiction of the arbitrator by reviewing these claims. *See J.J. Gregory Gourmet Servs.*, 927 S.W.2d at 33 (“Absent a statutory or common law ground to vacate or modify an arbitration award, a reviewing court lacks jurisdiction to review other complaints, including the sufficiency of the evidence supporting the award.”). We overrule issues two and three.

Because Saqer has failed to establish any grounds for vacating or modifying the arbitrator's award, we hold the trial court did not err in confirming the arbitration award.²

AFFIRMED.

CHARLES KREGER
Justice

Submitted on July 29, 2008
Opinion Delivered December 18, 2008

Before McKeithen, C.J., Gaultney and Kreger, JJ.

²We need not consider the appendices to appellees' brief in rendering this decision. Therefore, we decline to rule on the pending motion to strike certain exhibits from appellees' brief.