

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00472-CV

**CC WILLIAMS CONSTRUCTION CO., INC., CATHIE WILLIAMS
AND CLEVE WILLIAMS, Appellants**

V.

LUIS RICO AND LILLIAN RICO, Appellees

**On Appeal from the 75th District Court
Liberty County, Texas
Trial Cause No. CV 0901340**

MEMORANDUM OPINION

Luis Rico and Lillian Rico entered into a contract with CC Williams Construction Co., Inc., Cathie Williams and Cleve Williams for the construction of a house. The parties subsequently attended arbitration to resolve certain disputes. The arbitrator ruled in favor of the Williamses. The Williamses filed petitions to confirm the arbitration award. The Ricos filed applications to set aside and vacate the award, which the trial court granted. On appeal, the Williamses challenge the trial court's failure to confirm the arbitration award and its decision to set aside and vacate the award. We reverse the trial

court's orders setting aside and vacating the arbitration award, and order the trial court to confirm the arbitration award.

Jurisdiction

We first address the Ricos' contention that the Williamses cannot appeal the trial court's orders setting aside and vacating the arbitration award.

Section 171.098 of the Civil Practice and Remedies Code provides, in pertinent part, that a party may appeal a judgment or decree denying confirmation of an award or vacating an award without directing a rehearing. Tex. Civ. Prac. & Rem. Code Ann. § 171.098(a)(3), (5) (West 2011). In this case, the trial court signed two orders. In one order, the trial court vacated the arbitration award. In another order, the trial court set aside the award and ordered a trial on the merits. "An order denying confirmation can be appealed, just as subsection (3) provides, including a denial of confirmation in the form of a vacatur with rehearing; and an order vacating an arbitration award without directing rehearing can be appealed, just as subsection (5) provides." *E. Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 271 (Tex. 2010). Accordingly, the Williamses may appeal from the trial court's orders. *See id.*; *see also GE Commercial Distrib. Fin. Corp. v. Momentum Transp. Servs., L.L.C.*, No. 09-09-00162-CV, 2010 Tex. App. LEXIS 2486, at **8-9 (Tex. App.—Beaumont Apr. 8, 2010, no pet.) (mem. op.).

The Arbitration Award

In three issues, the Williamses contend that the trial court erred by failing to confirm the arbitration award and by setting aside and vacating the award. The Ricos contend that the trial court properly vacated the award pursuant to section 171.088(a)(1) and (3) of the Civil Practice and Remedies Code and Texas common law.¹ The Williamses argue that the Ricos failed to sufficiently plead and prove their grounds for vacatur.

We review a trial court's decision as to vacatur or confirmation of an arbitration award de novo, and we review the entire record. *Centex/Vestal v. Friendship W. Baptist Church*, 314 S.W.3d 677, 683 (Tex. App.—Dallas 2010, pet. denied). “Because Texas law favors arbitration, however, our review is ‘extremely narrow.’” *Id.* “An arbitration award has the same effect as a judgment of a court of last resort; accordingly, all reasonable presumptions are indulged in favor of the award and the award is conclusive on the parties as to all matters of fact and law.” *Id.* “Review of an arbitration award is so

¹ The Ricos also cite section 438.001 of the Property Code, which states: “on application of a party, a court shall vacate an award in a residential construction arbitration upon a showing of manifest disregard for Texas law.” Act of June 2, 2003, 78th Leg., R.S., ch. 458, § 1.01, 2003 Tex. Gen. Laws 1703, 1721-22. Section 438.001 is subject to the Texas Sunset Act and expired September 1, 2009, when the Legislature abolished the Residential Construction Commission. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 458, § 1.01, sec. 401.006, 2003 Tex. Gen. Laws 1703, 1705 (expired Sept. 1, 2009); Tex. Sunset Advisory Comm’n, Texas Residential Construction Commission: Final Report 2-a (July 2009). The arbitration award is dated January 2010, when section 438.001 was no longer in effect.

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.*

“[A] trial court may set aside an arbitration award only in limited circumstances.” *CVN Group v. Delgado*, 95 S.W.3d 234, 245 (Tex. 2002). “Absent specific common-law or statutory grounds for vacating, modifying, or correcting an award, the reviewing court must confirm it.” *Id.*; see Tex. Civ. Prac. & Rem. Code Ann. § 171.087 (West 2011).

In the trial court, the Ricos relied on section 171.088(a)(1) of the Civil Practice and Remedies Code, which provides for vacatur when “the award was obtained by corruption, fraud, or other undue means[.]” Tex. Civ. Prac. & Rem. Code Ann. § 171.088(a)(1) (West 2011). The Ricos argued that the Williamses filed an insurance claim for hurricane damage to the home, the Ricos were the “loss payee,” the Williamses failed to repair the home, the Williamses failed to disclose the amount of the insurance award, and the Williamses’ failure to disclose the amount of the insurance award amounted to fraud and resulted in a double recovery to the Williamses. The Ricos argued that the arbitrator could not credit them with the sum of the insurance award, did not give proper credit for the insurance award, and ignored their evidence of overages.

The Ricos also relied on section 171.088(a)(3), which provides for vacatur when the arbitrator exceeded his powers, refused to postpone the hearing after a showing of sufficient cause for the postponement, refused to hear evidence material to the

controversy, or conducted the hearing in a manner that substantially prejudiced the rights of a party. *Id.* § 171.088(a)(3) (West 2011). The Ricos argued that the arbitrator refused to hear evidence material to the controversy, *i.e.*, evidence of the insurance award, and should not have made an award without this information. They argued that the arbitrator awarded the Williamses all the relief requested without a contractual basis, which the Ricos contend evidences the arbitrator’s bias and prejudice against them.

Next, the Ricos relied on the common law ground that allows a vacatur when a binding arbitration award is “tainted with ‘fraud, misconduct, or such gross mistake as would imply bad faith, or a failure to exercise honest judgment.’” *Statewide Remodeling, Inc. v. Williams*, 244 S.W.3d 564, 568 (Tex. App.—Dallas 2008, no pet.) (quoting *Brown v. Eubank*, 443 S.W.2d 386, 391 (Tex. Civ. App.—Dallas 1969, no writ)). According to the Ricos, the arbitrator ignored the contract terms, and the arbitrator’s alleged failure to consider the insurance award and the evidence of overpayments amounted to “bad faith and a failure to exercise honest judgment.”

The record demonstrates that the parties submitted their arbitration exhibits to the trial court during the hearing on the Ricos’ applications to set aside and vacate the arbitration award. According to the Williamses, no transcript was made of the arbitration proceeding.

Nevertheless, “when a non-prevailing party seeks to vacate an arbitration award, it bears the burden in the trial court of bringing forth a complete record that establishes its

basis for vacating the award.” *Centex/Vestal*, 314 S.W.3d at 684; *see also Williams*, 244 S.W.3d at 568. Neither the attorneys’ recollection of the testimony before the arbitrator nor the attachments to the motion to vacate provide a complete record of the arbitration proceedings. *Williams*, 244 S.W.3d at 569. “The general rule is that without an arbitration transcript, we must presume the arbitration evidence adequately supported an award.” *Centex/Vestal*, 314 S.W.3d at 684; *see also Williams*, 244 S.W.3d at 568.

The record does not indicate that the Ricos provided the trial court with a complete record, *i.e.*, a transcript of the arbitration proceedings. *See Williams*, 244 S.W.3d at 569 (Finding that the trial court did not err by requiring non-prevailing party to provide a transcript of arbitration proceedings, even when no such transcript was made and the party provided affidavits, exhibits, and an attorney’s testimony regarding what occurred at the arbitration proceeding). The Ricos’ grounds for vacatur all depend on the evidence offered and considered by the arbitrator and the manner in which the arbitrator conducted the proceedings, none of which the record contains. *See Centex/Vestal*, 314 S.W.3d at 687. From the record before us, we cannot determine whether the award resulted from corruption, fraud, or other undue means, whether the arbitrator refused to hear evidence material to the controversy, or whether the award was tainted with fraud, misconduct, or gross mistake. We, therefore, presume that the arbitration evidence supported the award. *Id.* at 684; *see Williams*, 244 S.W.3d at 568.

Under these circumstances, we conclude that the trial court erred by refusing to confirm the arbitration award and by setting aside and vacating the award. *See Centex/Vestal*, 314 S.W.3d at 687. We sustain the Williamses' three issues. We reverse the trial court's orders setting aside and vacating the arbitration award and remand this cause to the trial court with instructions to enter a judgment confirming the arbitration award.² *See GE Commercial Distrib. Fin. Corp.*, 2010 Tex. App. LEXIS 2486, at *27.

REVERSED AND REMANDED.

STEVE McKEITHEN
Chief Justice

Submitted on March 23, 2011
Opinion Delivered May 19, 2011

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

² The Williamses ask this Court to dismiss the Ricos' claims against Clive and Cathie because at the hearing on the applications to set aside and vacate the arbitration award, the trial court indicated an intent that Cathie and Clive be dismissed from the lawsuit. However, we have ordered the trial court to confirm the arbitration award, in which the arbitrator denied the Ricos' claims against Clive and Cathie personally.