COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00327-CV

TY HOWERTON — APPELLANT

V.

DR. MICHAEL N. WOOD AND CINDY WOOD — APPELLEES

FROM THE 48TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 048-259642-12

MEMORANDUM OPINION[1]

Appellant Ty Howerton appeals from the trial court's final judgment that confirmed an arbitration award entered in favor of appellees Dr. Michael N. Wood and Cindy Wood (the Woods). We affirm the trial court's judgment.

[1]*See* Tex. R. App. P. 47.4.

I. BACKGROUND

This appeal arises from a home renovation that went horribly wrong. In 2010, the Woods bought a home in Mansfield, Texas, for $1.35 million and hired Federal Resources, Inc. (FRI), Howerton's company, to be the general contractor for their extensive renovation plans. Howerton originally agreed to perform the renovations for approximately $625,000, "subject to adjustments for changes." The general-contractor agreement between FRI and the Woods included an arbitration clause, mandating arbitration before a "single arbitrator" for "any and all claims or disputes between the Contractor and the Client arising out or relating to the Contract Documents." The agreement included a clause placing proper venue for "an arbitration or subsequent legal action" in "Tarrant County, Texas." The parties did not attempt to contractually expand or limit the judicial review of any resulting arbitration award. *See generally Hoskins v. Hoskins*, 497 S.W.3d 490, 495–96 (Tex. 2016) (holding parties may not expand judicial review of arbitration award under Texas arbitration law); *Denbury Onshore, LLC v. Texcal Energy S. Tex., L.P.*, No. 14-15-00439-CV, 2016 WL 7108246, at *4–5 (Tex. App.—Houston [14th Dist.] Dec. 6, 2016, no pet.) (discussing effect of parties' contractual expansion of judicial review of arbitration award under federal and Texas arbitration law). The Woods and Howerton, as "President" of FRI, signed the agreement.

To help the Woods obtain financing for their construction loan, Howerton enlisted Brian Ramon, Howerton's "associate" and the owner of a foundation-

repair business, to co-sign the construction loan with Frost Bank. Ramon signed the construction-loan agreement as the "Owner" of FRI, identified as the "Contractor" in the agreement with Frost Bank.

During the renovations, the Wood family, which included the Woods' four children, lived in the home's detached, one-bedroom pool house. The Woods believed they would be in the pool house for four months, but their stay ultimately lasted three and a half years. The project had major problems from the beginning, which Howerton characterizes as "substantial overruns," leading Howerton to tell the Woods that it would cost an additional $850,000 to finish the project. But by November 2011, all work on the project had stopped, the Woods had paid Howerton approximately $900,000, and the Woods discovered that Howerton had not been paying the subcontractors and suppliers out of those funds. In February 2012, the Woods discovered that Howerton had pleaded guilty on August 31, 2010, to conspiracy to commit wire fraud by receiving money from others based on his assertion to them that he would invest the money in property while actually using the money for his own purposes.[2] *See* 18 U.S.C.A. §§ 1343, 1349 (West 2015). On July 10, 2012, Howerton was sentenced to sixty months in federal prison and ordered to pay $7,905,767 in restitution.

[2]Apparently, this was the reason Howerton needed Ramon's help to finance the Woods' construction loan: Howerton could not sign these documents based on his guilty plea and the terms of his pretrial release, which prohibited him from being involved in bank loans.

Shortly before Howerton was sentenced, the Woods filed suit against Howerton, FRI, Ramon, and Ramon's foundation-repair business raising claims for breach of contract, breach of warranty, fraud, violations of the Deceptive Trade Practices Act (DTPA), violations of the Construction Trust Fund Act, breach of fiduciary duty, knowing participation in a breach of fiduciary duty, negligence, and violations of the Theft Liability Act. The defendants, all represented by counsel, moved to compel arbitration based on the clause in the general-contractor agreement. The Woods agreed to proceed to arbitration. Accordingly, the trial court entered an agreed order compelling arbitration, appointing an arbitrator, and staying the judicial proceedings pending the outcome of the arbitration.

The arbitrator held a five-day hearing in September and October 2014, and entered an award in favor of the Woods on November 12, 2014. Howerton was represented by counsel at the arbitration hearing and testified by telephone on the last day of the hearing. The arbitrator found in the Woods' favor on each of their claims and determined that the awarded damages attributable to FRI could be recovered from Howerton and Ramon jointly and severally.

The Woods then filed an application for the trial court to confirm the arbitration award. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.087 (West 2011) Howerton, who was still represented by counsel, filed a pro se motion to vacate

or modify the arbitration award.[3] One month after Howerton filed his motion, his counsel moved to withdraw on the grounds that he had not been paid, which the trial court granted. Ramon then moved to vacate the arbitration award as well.

The trial court held a hearing on the post-arbitration motions in August 2015 and took judicial notice of the arbitration record. On September 11, 2015, the trial court denied Howerton's and Ramon's motions and granted the Woods' motion to confirm the award. The Woods elected to recover under their DTPA claim; therefore, the trial court entered judgment, awarding the Woods damages against Ramon, Howerton, and FRI, jointly and severally, in the amount of $2,572,980 plus attorneys' fees, the arbitrator's fee, and costs. *See id.* § 171.092 (West 2011). Howerton appeals from the trial court's judgment and argues that the trial court erred by denying his motion to vacate or modify and by confirming the arbitration award.[4]

II. SCOPE AND STANDARD OF THIS COURT'S REVIEW

A. WHICH ACT APPLIES

In the trial court and on appeal, the Woods argued that the Federal Arbitration Act (the FAA) applies to a review of the arbitration award. Howerton seemed to argue that the Texas General Arbitration Act (the TGAA) applied to

[3]Howerton similarly is proceeding without counsel in this appeal.

[4]Ramon is not a party to this appeal.

the arbitration and, thus, to the scope of our review. The trial court did not rule on which act applied. But this dispute is much ado about nothing.

The FAA governs a contract involving interstate commerce if the contract contains a valid arbitration provision and does not specify that the FAA will not apply. *See* 9 U.S.C.A. § 2 (West 2009); *Brand FX, LLC v. Rhine*, 458 S.W.3d 195, 202 (Tex. App.—Fort Worth 2015, no pet.); *In re Scott*, 100 S.W.3d 575, 579 (Tex. App.—Fort Worth 2003, orig. proceeding); *In re Nasr*, 50 S.W.3d 23, 25 (Tex. App.—Beaumont 2001, orig. proceeding). Here, the parties' general-contractor agreement did not state that the FAA would not apply, and the Woods proffered evidence that the agreement involved interstate commerce.[5] But the FAA preempts application of the TGAA only if Texas law is inconsistent with the FAA. *See Nafta Traders*, 339 S.W.3d at 97–98; *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 780 (Tex. 2006) (orig. proceeding). The Woods do not argue that the TGAA and the FAA are materially different regarding the grounds upon which vacatur or modification of an arbitration award may be sought. Indeed, they are substantially similar. *Compare* 9 U.S.C.A. §§ 10(a), 11 (West 2009),

[5]Specifically, the Woods introduced into evidence at the arbitration hearing receipts showing that supplies for the Woods' renovation were bought from Lowe's and Home Depot—both national home-improvement stores—and bought paint from Sherwin Williams—a national paint supplier—and from a Kentucky business. *See, e.g.*, *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 97 n.64 (Tex.), *cert. denied*, 565 U.S. 963 (2011); *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (orig. proceeding); *Associated Glass, Ltd. v. Eye Ten Oaks Invs., Ltd.*, 147 S.W.3d 507, 511 (Tex. App.—San Antonio 2004, no pet.).

with Tex. Civ. Prac. & Rem. Code Ann. §§ 171.088, .091 (West 2011). Thus, both the FAA and the TGAA apply. *See Nafta Traders*, 339 S.W.3d at 97 n.64; *In re D. Wilson Constr.*, 196 S.W.3d at 778–80. Because the substantive principles applicable to the analysis in this appeal and the available grounds to review an arbitration award are the same under both the FAA and the TGAA, we may find guidance in court decisions arising under either act. *See Rich v. Cantilo & Bennett, L.L.P.*, 492 S.W.3d 755, 759 n.2 (Tex. App.—Austin 2016, pet. denied); *Cedillo v. Immobiliere Jeuness Establissement*, 476 S.W.3d 557, 563 n.3 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

B. OUR REVIEW

An arbitration award is conclusive on the parties as to all matters of fact and law submitted to the arbitrator and has the effect of a judgment of a court of last resort. *See CVN Grp., Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002). Accordingly, judicial review of an arbitration award is extraordinarily narrow, and we may vacate an arbitration award only in very unusual circumstances. *See Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013); *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 472 (5th Cir. 2012); *E. Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 271 (Tex. 2010).

To protect the strong deference accorded to arbitration awards, we review a trial court's ruling to vacate or confirm an arbitration award de novo based on the entire record. *See Denbury Onshore*, 2016 WL 7108246, at *3; *Royce Homes, L.P. v. Bates*, 315 S.W.3d 77, 85 (Tex. App.—Houston [1st Dist.] 2010,

no pet.). All reasonable presumptions are indulged in favor of the award, and the challenging party bears the burden to establish an allowable ground for vacatur. *See Denbury Onshore*, 2016 WL 7108246, at *3; *Amoco D.T. Co. v. Occidental Petroleum Corp.*, 343 S.W.3d 837, 841 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). We must focus on the integrity of the process, not the propriety of the result. *See Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 826 (Tex. App.—Dallas 2009, no pet.). Ultimately, our review is a determination of whether the "[a]ward [is] so deficient that it warrant[s] sending the parties back to square one." *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 842 (11th Cir. 2011).

III. GROUNDS TO VACATE OR MODIFY

In five issues, Howerton challenges several aspects of the confirmed arbitration award. Although his issues are separately listed, his argument is proffered in a narrative style with facts and arguments pertaining to one issue included in a portion of his brief ostensibly directed to a separate issue. As such, we will address each identifiable argument without specific reference to an individual issue number.

A. POSTPONEMENT

Howerton repeatedly complains that he was not allowed to fully participate in the arbitration hearing because he was in federal prison and was denied a postponement after showing sufficient cause. An arbitration award is subject to vacatur if the arbitrator refuses to postpone the hearing even though sufficient

cause for the postponement was shown. *See* 9 U.S.C.A. § 10(a)(3); Tex. Civ. Prac. & Rem. Code Ann. § 171.088(a)(3)(B); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 171.045 (West 2011). We may look to grounds a trial court would find sufficient to support a motion for continuance in determining sufficient cause for a postponement. *See In re Guardianship of Cantu de Villarreal*, 330 S.W.3d 11, 26 (Tex. App.—Corpus Christi 2010, no pet.); *Hoggett v. Zimmerman, Axelrad, Meyer, Stern & Wise, P.C.*, 63 S.W.3d 807, 811 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

On the first day of the hearing, September 11, 2014, Howerton's counsel, Robert Frisch, stated that Howerton could not appear by telephone that day because of a personnel issue at the federal correctional institution housing Howerton and requested to continue the hearing "another couple of weeks" or a postponement "to allow [Howerton] to testify at a later date . . . by conference call." Frisch and the arbitrator referred to an order that had been entered "concerning [Howerton's] right to participate" and his possible invocation of his Fifth Amendment rights.[6] The arbitrator affirmed that Howerton would be able to testify subject to the restrictions in the order. The arbitrator implicitly denied the

[6]It appears that when Howerton refused to answer many questions at his deposition, an order was entered reserving Howerton's request to appear telephonically at the arbitration hearing to be finally decided "at the time of the final hearing with due consideration given to Howerton's prior refusal to answer questions propounded by [the Woods] and purported assertion of his 5th Amendment rights." The order required Howerton to "waive his 5th Amendment rights" and "agree to answer fully under oath all questions" in order to be allowed to testify at the hearing.

postponement request, heard two days of testimony from the Woods' witnesses, and recessed the hearing for one month. Howerton was present by telephone for the second day of arbitration on September 12, 2014.

When the arbitration hearing resumed the next month for the third day of the hearing on October 13, 2014, Frisch again asked for a continuance because the federal correctional institution would not agree to arrange for Howerton to testify by telephone that day for logistical reasons. Frisch also asked for a continuance "until after the first of the year" because Howerton was not paying him, had threatened him, and was unwilling or unable to prepare. The arbitrator denied the motion and heard testimony that day and the next. On the final day of arbitration, October 15, 2014, Howerton appeared by telephone. Howerton waived his Fifth Amendment rights and was allowed to testify, although prison officials made Howerton get off the telephone during his testimony.[7] Howerton's prior 177-page deposition was admitted into evidence for the arbitrator's consideration.

These circumstances, while unusual, do not show sufficient cause such that the arbitration award must be vacated. *See Hoggett*, 63 S.W.3d at 811; *Atrium Westwood VIII Venture v. Barrick Westwood Ltd. P'ship*, 693 S.W.2d 699, 700 (Tex. App.—Houston [14th Dist.] 1985, no writ). A trial court may grant a continuance only upon "sufficient cause supported by affidavit, or by consent of

[7]Howerton's testimony consisted of twenty-seven pages of the reporter's record.

the parties, or by operation of law." Tex. R. Civ. P. 251; *see also* Tex. R. Civ. P. 252. Howerton's postponement requests were not verified or supported by affidavit; thus, we may presume that the arbitrator did not abuse his discretion by denying his requests. *See Cheng Copeland, PLLC v. Chenevert*, No. 01-15-01076-CV, 2016 WL 3222936, at *4 (Tex. App.—Houston [1st Dist.] June 9, 2016, no pet.) (mem. op.). Further, Frisch vigorously questioned witnesses at the arbitration hearing, introduced evidence, and ably represented Howerton's interests even though he was not being paid and Howerton was uncooperative. Contrary to Howerton's assertion, he was not "deprived of his right to be heard and present a meaningful defense." "To constitute misconduct requiring vacation of an award, an error in the arbitrator's determination must be one . . . which so affects the rights of a party that it may be said that he was deprived of a fair hearing." *Laws v. Morgan Stanley Dean Witter*, 452 F.3d 398, 399 (5th Cir. 2006). Howerton's rights were not so affected that he was deprived of a fair hearing. We overrule this argument.

B. NOTICE

Howerton argues that he did not receive timely notice of the arbitration hearing. This is an allowable ground to challenge an arbitration award. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.088(a)(3)(D); *Grp. 32 Dev. & Eng'g, Inc. v. GC Barnes Grp., LLC*, No. 3:14-CV-2436-B, 2015 WL 144082, at *3 (N.D. Tex. Jan. 9, 2015); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 171.044 (West 2011).

However, Howerton must show that his rights were substantially prejudiced by the late notice or that the late notice rendered the arbitration fundamentally unfair. *See* Tex. Civ. Prac. & Rem Code Ann. § 171.088(a)(3)(D); *Grp. 32 Dev.*, 2015 WL 144082, at *3. Howerton was represented by counsel at each stage of the arbitration process, and counsel did not withdraw until after the arbitrator issued his award. Counsel's presence for the entirety of the arbitration hearing vitiates Howerton's argument that the arbitration award must be vacated based on an alleged late notice. *See Miss Universe L.P. v. Monnin*, 952 F. Supp. 2d 591, 603–08 (S.D.N.Y. 2013); *Borden v. Hammers*, 941 F. Supp. 1170, 1173 (M.D. Fla. 1996). We overrule this argument.

Howerton also contends that he did not receive notice of and was not allowed to participate in the trial court's hearing on the motion to confirm the award. Howerton was entitled to notice and the right to be heard on the post-arbitration motions as in civil cases generally. *See* 9 U.S.C.A. § 6 (West 2009); Tex. Civ. Prac. & Rem. Code Ann. § 171.093 (West 2011). But the judgment confirming the arbitration award states that timely notice was given to all parties, including Howerton. And although the trial court held a nonevidentiary hearing, it only heard arguments regarding Ramon's motion to vacate and its timeliness. The trial court specifically stated that it would review Howerton's application to vacate or modify separately from Ramon's. Because the trial court considered Howerton's motion on the basis of his pleadings and the arbitration record, his failure to attend the hearing was not so prejudicial such that the judgment

confirming the award must be reversed. *See Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 430 (Tex. App.—Dallas 2004, pet. denied). We overrule this argument.

C. MISCONDUCT AND PARTIALITY OF ARBITRATOR

Howerton asserts that the arbitrator was not impartial and committed misconduct because he disregarded evidence favorable to Howerton and ruled contrary to the admitted evidence. An arbitrator's evident partiality, misconduct, or refusal to consider material evidence are grounds justifying vacating an arbitration award. *See* 9 U.S.C.A. § 10(a); Tex. Civ. Prac. & Rem. Code Ann. § 171.088(a).

But the record is devoid of any indication that the arbitrator refused to consider material evidence, was partial, or committed misconduct. Howerton's supporting assertions regarding this argument are nothing more than his belief that the arbitrator credited and weighed the evidence differently than Howerton would have wished. In short, Howerton challenges the propriety of the result of arbitration, not the integrity of the process. This is insufficient to show that the arbitrator acted in such a manner that Howerton's rights were prejudiced or that he was denied a fundamentally fair hearing. *See Pheng Invs., Inc. v. Rodriquez*, 196 S.W.3d 322, 330 (Tex. App.—Fort Worth 2006, no pet.) (op. on reh'g); *see also Barton v. Fashion Glass & Mirror, Ltd.*, 321 S.W.3d 641, 647 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *Centex/Vestal v. Friendship W. Baptist Church*, 314 S.W.3d 677, 686 (Tex. App.—Dallas 2010, pet. denied); *cf. Forsythe*

Int'l, S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1023 (5th Cir. 1990) (recognizing if arbitrator's decision "rests on an adequate basis, then complaints that the [arbitrator] failed to address all issues presented will not render the proceedings 'fundamentally unfair' or justify disturbing the award"). Howerton failed to carry his burden to establish vacatur on these grounds, and we overrule this argument.

IV. APPELLATE RECORD

Howerton also asserts that he was denied sufficient access to the appellate record, stating that he never received "transcripts of the arbitration, numerous filings of counsel, findings of facts and conclusions of law by the district court,[8] and transcripts from the hearing to confirm the arbitration award." He admits that he received a "tranche of records" in April 2016—approximately thirty days before his brief was due—but asserts he "has not had adequate time to review" them. Indeed, our case-management record shows that Howerton received a copy of the reporters' records,[9] but failed to affirmatively request a copy of the clerk's records. We have carefully considered Howerton's arguments in light of the entire record and the narrow grounds upon which the award and judgment may be attacked; therefore, Howerton has not been harmed.

[8]The trial court did not enter findings and conclusions.

[9]Even though he admittedly received the reporters' records, he did not reference them in his brief or attempt to supplement his brief after having time to review the records.

See Magnuson v. Citibank (S.D.) N.A., No. 2-06-465-CV, 2008 WL 426245, at *4–5 (Tex. App.—Fort Worth Feb. 14, 2008, pet. denied) (mem. op.) (declining to address whether indigent appellant's lack of access to the reporter's record to file post-trial motions denied him due process, equal protection, or access to the courts because appellant did not show harm under rule 44.1). We overrule this argument.

V. CONCLUSION

Having addressed and overruled each argument raised in Howerton's brief, we affirm the trial court's judgment. *See* Tex. R. App. P. 43.2(a).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and PITTMAN, JJ.

DELIVERED: February 23, 2017