COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00277-CV

JERRY M. GILBERT — APPELLANT

V.

RAIN AND HAIL INSURANCE D/B/A ACE INSURANCE COMPANY, LLP — APPELLEE

FROM THE 89TH DISTRICT COURT OF WICHITA COUNTY
TRIAL COURT NO. 177,882-C

MEMORANDUM OPINION[1]

Jerry M. Gilbert appeals from the trial court's judgment confirming an arbitration award in favor of Appellee Rain and Hail Insurance d/b/a Ace Insurance Company, LLP (R&H). We affirm.

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

I. Background

Gilbert is a wheat farmer. He made two claims—one in 2011 and another in 2012—on a Multiple Peril Crop Insurance Common Copy Insurance Policy issued to him by R&H. In his first claim, Gilbert alleged that heavy rains prevented him from planting a portion of his wheat crop, and in his second, he alleged that a wild-oat infestation damaged his wheat crop. After investigating, R&H denied both claims in August 2012.

In its denial letter, R&H pointed Gilbert to paragraph 20 of the policy, entitled "Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review," which provided in pertinent part:

> (a) If you and we fail to agree on any determination made by us . . . the disagreement may be resolved through mediation . . . . If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in section[] 20(c) . . . .
>
> (1) All disputes involving determinations made by us . . . are subject to mediation or arbitration. . . .
>
> . . . .
>
> (b) Regardless of whether mediation is elected:
>
> (1) The initiation of arbitration proceedings must occur within one year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;
>
> (2) If you fail to initiate arbitration in accordance with section 20(b)(1) and complete the process, you will not be able to resolve the dispute through judicial review;
>
> (3) If arbitration has been initiated in accordance with section 20(b)(1) and completed, and judicial review is sought, suit must be

> filed not later than one year after the date the arbitration decision was rendered; . . .
>
> . . . .
>
> (c) Any decision rendered in arbitration is binding on you and us unless judicial review is sought in accordance with section 20(b)(3). Notwithstanding any provision in the rules of the AAA, you and we have the right to judicial review of any decision rendered in arbitration.

In November 2012, Gilbert sued R&H, asserting claims for breach of contract, bad faith, and mental anguish based on its denial of his claims. R&H filed a plea in abatement asking the trial court to abate the trial court proceedings and to order the parties to arbitration. The trial court granted the plea, and Gilbert appealed. This court dismissed his appeal for want of jurisdiction. *Gilbert v. Rain & Hail Ins.*, No. 02-13-00468-CV, 2014 WL 670703, at *1–2 (Tex. App.—Fort Worth Feb. 20, 2014, no pet.) (mem. op.).

When Gilbert refused to initiate arbitration, R&H filed its own demand for arbitration with AAA in October 2015. Gilbert sent numerous e-mails to R&H's attorneys and to AAA expressly refusing to participate in the proceedings. He also objected to the arbitration on the grounds that R&H had failed to timely initiate arbitration and that this court's opinion dismissing his appeal effectively reversed the trial court's order compelling arbitration. After a telephonic hearing at which Gilbert did not appear, the arbitrator overruled Gilbert's objections.

Roughly two months later, the arbitrator held an evidentiary hearing on Gilbert's two claims on the policy. Although he was notified of the hearing,

Gilbert did not appear, having again sent e-mails refusing to participate. In his May 2016 award, the arbitrator found that (1) no other fields near Gilbert's were not successfully planted with wheat, (2) there was no excessive precipitation that would have prevented Gilbert from planting wheat during the planting period, and (3) wild-oat infestation was not a covered peril under the policy. The arbitrator thus denied Gilbert's claims and ordered Gilbert to reimburse R&H $2,400 for arbitration fees and expenses.

R&H moved to confirm the arbitration award. The trial court's final judgment confirmed the award and ordered that Gilbert take nothing on his claims. The court declined to confirm, however, the $2,400 reimbursement that the arbitrator had ordered Gilbert to pay to R&H.

II. Applicable Law and Standard of Review

The policy at issue is a federal crop-insurance policy reinsured by the Federal Crop Insurance Corporation (FCIC) under the provisions of the Federal Crop Insurance Act (FCIA). 7 U.S.C.A. §§ 1501–1524 (West 2010 & Supp. 2016) ("Federal Crop Insurance Act"); *see id.* § 1503 (creating the FCIC to carry out the purposes of the FCIA). The FCIC is authorized to "insure, or provide reinsurance for insurers of, producers of agricultural commodities grown in the United States under 1 or more plans of insurance determined by the [FCIC] to be adapted to the agricultural commodity concerned." *Id.* § 1508(a)(1). The FCIC has promulgated regulations prescribing the terms and conditions for common

crop-insurance policies like the one here. *See* 7 C.F.R. § 457.8 (2016). Paragraph 20 of Gilbert's policy tracks the regulatory language. *See id.*

The Federal Arbitration Act (FAA) governs arbitrations under federal crop-insurance policies. *See, e.g.*, *In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp.2d 992, 995 n.2, 997 (D. Minn. 2002); *Nobles v. Rural Cmty. Ins. Servs.*, 122 F. Supp.2d 1290, 1293, 1295–1300 (M.D. Ala. 2000); *Jody James Farms, JV v. The Altman Grp., Inc.*, No. 07-15-00060-CV, 2016 WL 6092370, at *1–5 (Tex. App.—Amarillo Oct. 17, 2016, no pet. h.). We review de novo a trial court's decision to confirm or vacate an arbitration award under the FAA. *Amoco D.T. Co. v. Occidental Petroleum Corp.*, 343 S.W.3d 837, 844 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). Our review of an arbitration award is extraordinarily narrow, and we must indulge all reasonable inferences in favor of the award, whatever that award was. *See id.* at 841. A party seeking to vacate an award bears the burden of presenting a complete record that establishes grounds for vacatur. *Id.*

An arbitration award governed by the FAA must be confirmed unless it is vacated, modified, or corrected under certain limited grounds. *See* 9 U.S.C.A. §§ 9–11 (West 2009). An FAA award can be vacated only when (1) it was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing for sufficient cause, in refusing to hear pertinent and material evidence, or any other misbehavior that prejudiced any party's

rights; or (4) the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award was not made. 9 U.S.C.A. § 10(a); *see Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584, 128 S. Ct. 1396, 1403 (2008).

III. Analysis

Gilbert raises several arguments on appeal. He asserts that the trial court should not have confirmed the arbitration award and should have allowed him to try his claims to a jury because the award (1) was illegal because R&H failed to initiate arbitration proceedings within a year of denying his claims and (2) was rendered in defiance of this court's prior opinion. Gilbert also challenges the award's substance. We liberally construe these complaints as arguing that the arbitrator exceeded his powers. *See* 9 U.S.C.A. § 10(a)(4); *see also* Tex. R. App. P. 38.1(f), 38.9. Gilbert also complains that R&H arbitrated without him, a complaint we interpret as arguing that the arbitrator committed procedural misconduct. *See* 9 U.S.C.A. § 10(a)(3); *see also* Tex. R. App. P. 38.1(f), 38.9.

A. The arbitrator did not exceed his powers

An arbitrator exceeds his powers by deciding matters that are not properly before him. *Forged Components, Inc. v. Guzman*, 409 S.W.3d 91, 104 (Tex. App.—Houston [1st Dist.] 2013, no pet.). "To determine whether an arbitrator exceeded his powers, we must examine the language in the arbitration agreement." *Allstyle Coil Co., L.P. v. Carreon*, 295 S.W.3d 42, 44 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (quoting *Glover v. IBP, Inc.*, 334 F.3d 471, 474

(5th Cir. 2003)). Where the parties have bargained for an arbitrator's construction of their agreement, an arbitrator's decision "'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits." *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (quoting *E. Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62, 121 S. Ct. 462, 466 (2000)). The relevant inquiry "is whether the arbitrator had the authority, based on the arbitration clause and the parties' submissions, to reach a certain issue, not whether the arbitrator correctly decided the issue. *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829 (Tex. App.—Dallas 2009, no pet.) (citing *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1323 (5th Cir. 1994)). We may not vacate an arbitration award under section 10(a)(4) of the FAA based on the arbitrator's errors in interpreting or applying the law or facts. *IQ Holdings, Inc. v. Villa D'Este Condo. Owner's Ass'n, Inc.*, No. 01-11-00914-CV, 2014 WL 982844, at *4 (Tex. App.—Houston [1st Dist.] Mar. 13, 2014, no pet.) (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671, 130 S. Ct. 1758, 1767 (2010) ("It is not enough for petitioners to show that the [arbitration] panel committed an error—or even a serious error.")).

The policy states that if R&H and Gilbert failed to agree on "any determination made by [R&H]" and a resolution could not be reached through mediation or the parties did not agree to mediation, "the disagreement must be resolved through arbitration in accordance with the rules of the American

Arbitration Association (AAA)." Here, R&H made two determinations—that both of Gilbert's claims should be denied—and Gilbert disagreed with them. Because this dispute fell within the arbitration provision's language, Gilbert was required to arbitrate.

Gilbert points to paragraph 20(b)(1), arguing that because R&H did not initiate the arbitration within a year of denying his claims, arbitration was not permitted, and therefore he could pursue his claims in court. But paragraph 20(b)(1) cannot be read in isolation. Paragraph 20(b) in its entirety sets out a multistage dispute-resolution process that requires a party to arbitrate before seeking judicial review. If arbitration is not initiated within the one-year period prescribed by paragraph 20(b)(1), an insured waives his right to judicial review. In order to seek judicial review, Gilbert was required to arbitrate his claims first in accordance with the policy, which he did not do. More to the point, Gilbert misreads paragraph 20(b)(1) as putting the burden on R&H to initiate arbitration. In fact, a plain reading of that provision together with paragraph 20(b)(2) shows that it is the disappointed insured, not R&H, who must do so if R&H has denied a claim: the "initiation of arbitration proceedings must occur within one year of the date we denied your claim"; "[i]f you fail to initiate arbitration . . . you will not be able" to seek judicial review.[2]

[2]The record reveals that R&H initiated arbitration only after Gilbert refused to abide by the trial court's order abating the case so that the parties could follow the policy's arbitration procedures. If we accept Gilbert's argument that R&H somehow waived arbitration by not itself getting the ball rolling within a year—

Gilbert also asserts that this court agreed that it was "too late for [a]bitration" and sent the case "back for another hearing." That was not our holding. *See Gilbert*, 2014 WL 670703, at *1–2. As explained in our opinion, we dismissed Gilbert's appeal for lack of jurisdiction because there was no final judgment or appealable interlocutory order. *Id.*

In addition, Gilbert complains that the arbitrator's order denying his objections to mediation was "4 ½ years after claims" and "overruled [his] policy." The policy incorporates the AAA rules, which provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, Rule 7 (amended and effective Oct. 1, 2013), *available at* http://adr.org/aaa/faces/rules. Thus, to the extent Gilbert is challenging the arbitrator's power to consider and overrule Gilbert's objections to arbitration, we conclude that the arbitrator did not exceed his authority by doing so. *See Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012). ("[T]he express adoption of [the AAA rules] presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.").

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which it did not have to do—then anyone could avoid a binding arbitration clause by simply waiting out the express period and then filing suit instead.

Lastly, Gilbert challenges the arbitrator's factual findings and contends that R&H should have paid his claims because R&H "accepted" them. But we cannot vacate an arbitration award based on the arbitrator's errors in interpretation or application of the law or facts. *See IQ Holdings, Inc.*, 2014 WL 982844, at *4, *6. Moreover, when read in their entirety, R&H's 2011 and 2012 letters to Gilbert referring, in the subject line, to its "acceptance of claim" were not the equivalent of agreeing that his claims would be paid; the first sentence of each letter recites that R&H had "received notification of a possible loss" under the policy and instructed Gilbert on the steps he needed to follow in order for R&H to "finalize [his] claim." In context, the subject-line reference to "acceptance of claim" meant only that R&H had received the claim.

For these reasons, we hold that the arbitrator did not exceed his authority in issuing the award. We therefore overrule Gilbert's arguments related to the arbitrator's powers.

B. The arbitrator did not engage in procedural misconduct

An arbitrator is guilty of misconduct "in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C.A. § 10(a)(3). "To constitute misconduct requiring vacation of an award, an error in the arbitrator's determination must be one that is not simply an error of law, but 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) (quoting *El Dorado Sch. Dist. No. 15 v. Cont'l Cas. Co.*, 247 F.3d 843, 848 (8th Cir. 2001)).

AAA kept Gilbert informed during all stages of the arbitration proceedings, including notifying him of the telephonic hearing on his objections and of the final evidentiary hearing. Gilbert was given every opportunity to participate in the proceedings but explicitly chose not to. Accordingly, the arbitrator did not engage in misconduct by conducting the arbitration in Gilbert's absence, and we overrule this complaint.

IV. Conclusion

Having overruled each of Gilbert's complaints, we affirm the trial court's judgment.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

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

DELIVERED: February 23, 2017