NUMBER 13-18-00555-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

WALTER ZAWISLAK, M.D., ET AL., **Appellants,**

v.

RAMONA SUAREZ AND MDJ PROPERTIES, LP, **Appellees.**

On appeal from the 275th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Hinojosa, Perkes, and Tijerina
Memorandum Opinion by Justice Perkes

Appellants Walter Zawislak, M.D., Olga Langley, M.D., Tanya Flores, and Elsa Wellness & Therapy, Inc. d/b/a Jump Start Therapy & Medical Clinic (Jumpstart) contend that the trial court erred by confirming the arbitration award in favor of appellees Ramona Suarez and MDJ Properties, LP (MDJ) because the arbitrator conducted the hearing in a manner that substantially prejudiced appellants' rights. Alternatively, appellants submit

that a partial vacatur was appropriate because the arbitrator exceeded his authority by awarding attorney's fees to Suarez. We affirm.

I. BACKGROUND

The underlying dispute in this case stems from a soured business relationship and includes claims, counterclaims, third-party claims, and third-party counterclaims amongst shareholders, executives, and directors of a closely held corporation, as well as related third-party individuals and entities.[1] After actively litigating the case for over two years, the parties entered a two-page agreement to submit "all issues raised by the pleadings" to binding arbitration. The only other terms and conditions of the arbitration agreement involved selecting an arbitrator; prohibiting the parties from conducting additional discovery, naming new experts, and adding new parties; and submitting an agreed order to compel arbitration to the trial court.

After a three-day hearing, the parties submitted written closing arguments to the arbitrator. The arbitrator found all the claims to be meritless except for two. He awarded MDJ $55,589.90 in damages on its breach of contract claim against Jumpstart and, as the prevailing party, awarded MDJ $20,000 in attorney's fees. He also found that "just as Counter-Plaintiffs used Jumpstart's funds to pay their attorney fees for this litigation, Ramona Suarez, as a shareholder, is likewise entitled to indemnification for her fees" and awarded her $61,050 in attorney's fees "on her claim for indemnity" against Jumpstart.

Appellants filed a motion to vacate the entire award, generally alleging that the arbitrator conducted the hearing in a manner that substantially prejudiced their rights.

[1] Some of the parties in the underlying litigation are not a party to this appeal.

Alternatively, appellees sought a partial vacatur of the attorney's fees awarded to Suarez, arguing the arbitrator exceeded his authority because the award was outside the scope of the agreement to arbitrate. Appellees filed a competing motion to confirm the award.

The trial court confirmed the award in its entirety. The trial court's judgment states that "[n]o written record of the proceedings was made by either party," and appellants do not otherwise dispute this fact. This appeal ensued.

II. STANDARD OF REVIEW

"Arbitration is strongly favored by Texas law, and judicial review of an arbitration award is extraordinarily narrow." *Black v. Shor*, 443 S.W.3d 154, 161 (Tex. App.—Corpus Christi–Edinburg 2013, pet. denied) (citing *E. Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 271 (Tex. 2010)). Because "an award of arbitrators upon matters submitted to them is given the same effect as the judgment of a court of last resort[,] [a]ll reasonable presumptions are indulged in favor of the award, and none against it." *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002) (quoting *City of San Antonio v. McKenzie Constr. Co.*, 150 S.W.2d 989, 996 (Tex. 1941)). "Review is so limited that a mistake of fact or law or failure to correctly apply the law will not justify vacating an arbitrator's award." *Xtria L.L.C. v. Intern. Ins. Alliance*, 286 S.W.3d 583, 591 (Tex. App.—Texarkana 2009, pet. denied). Although we review a trial court's decision to confirm an award under a de novo standard, we give "strong deference to the arbitrator with respect to issues properly left to the arbitrator's resolution." *Shor*, 443 S.W.3d at 162 (quoting *Xtria*, 286 S.W.3d at 591). We are concerned with the integrity of the process, not the propriety of the result. *Id.* (citing *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*,

294 S.W.3d 818, 826 (Tex. App.—Dallas 2009, no pet.)).

III. VACATUR UNDER THE TEXAS ARBITRATION ACT

The arbitration agreement fails to specify whether the Federal Arbitration Act (FAA) or Texas Arbitration Act (TAA) applies. *See* 9 U.S.C. §§ 1–16; TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001–.098. On appeal, because the parties have not taken a position on this issue but have instead variously referred to different sections of the TAA, we will apply the TAA to this case. *See Shor*, 443 S.W.3d at 162. Under the Texas arbitration scheme, § 171.088(a) of the Texas Civil Practice and Remedies Code provides the following statutory grounds for when a trial court "shall" vacate an arbitration award:

> (1) the award was obtained by corruption, fraud, or other undue means;
>
> (2) the rights of the party were prejudiced by:
>
> > (A) evident partiality by an arbitrator appointed as a neutral arbitrator;
> >
> > (B) corruption in an arbitrator; or
> >
> > (C) misconduct or willful misbehavior of an arbitrator;
>
> (3) the arbitrator:
>
> > (A) exceeded his powers;
> >
> > (B) refused to postpone the hearing after a showing of sufficient cause for the postponement;
> >
> > (C) refused to hear evidence material to the controversy;
> >
> > (D) conducted the hearing, contrary to sections 171.044–.047 of the civil practice and remedies code, 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 under [statutes to compel arbitrations], and the party did not participate in the arbitration hearing without raising the

objection.

TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a).

III. DUE PROCESS COMPLAINT

By their first issue, appellants submit that the entire award should be vacated because the arbitrator violated their right to be heard and present evidence material to the controversy. *See id.* §§ 171.047(1), (2); .008(a)(3)(D). To support their argument, appellants cite solely to the affidavits of appellants Zawislak and Flores that are attached as appendices to appellants' brief. These affidavits, however, are not part of the appellate record; they were not attached to appellants' motion to vacate, introduced during the confirmation hearing, or made part of any post judgment motion for relief. *See* TEX. R. APP. P. 34.1 ("The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record."). Rather, they were executed on the same day appellants filed their brief in this Court.

With limited exceptions not material here, an appellate court cannot consider documents cited in a brief and attached as appendices if they are not formally included in the record on appeal. *Sabine Offshore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979) (per curiam); *Hogg v. Lynch, Chappell & Alsup, P.C.*, 480 S.W.3d 767, 773 (Tex. App.—El Paso 2015, no pet.); *Cantu v. Horany*, 195 S.W.3d 867, 870 (Tex. App.—Dallas 2006, no pet.); *see also Pisharodi v. Saldana*, No. 13-09-00552-CV, 2011 WL 319810, at *3 (Tex. App.—Corpus Christi–Edinburg Jan. 27, 2011, pet. denied) (mem. op.). Instead, our review must "focus on the record that was before the court" when it made its decision. *See In re Bristol–Myers Squibb Co.*, 975 S.W.2d 601, 605 (Tex. 1998). As previously noted, the parties failed to have the arbitration hearing recorded; therefore,

just like the trial court, we must presume that the arbitrator conducted the hearing in a manner consistent with the appellants' rights. *See In re Guardianship of Cantu de Villarreal*, 330 S.W.3d 11, 24 (Tex. App.—Corpus Christi—Edinburg 2010, no pet.) (explaining that the non-prevailing party "bears the burden in the trial court of bringing forth a complete record that establishes its basis for vacating the award" and that without a transcript of the arbitration hearing, appellate courts "will presume the evidence was adequate to support the award" (citing *In re Chestnut Energy Partners, Inc.*, 300 S.W.3d 386, 397 (Tex. App—Dallas 2009, pet. denied))); *see also CVN Group*, 95 S.W.3d at 238 ("All reasonable presumptions are indulged in favor of the award, and none against it." (quoting *McKenzie Constr. Co.*, 150 S.W.2d at 996)). Accordingly, we overrule appellants' first issue.

IV. ATTORNEY'S FEES

Appellants also contend the arbitrator exceeded his authority in awarding attorney's fees to Suarez because "no such allowance for attorney's fees are expressly provided for in the Arbitration Agreement," and Suarez did not otherwise prevail on a cause of action that provides for the recovery of attorney's fees under the law. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.048(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 recovery in a civil action in the district court on a cause of action on which any part of the award is based."). "To determine whether an arbitrator exceeded his powers, we must examine the language in the arbitration agreement." *Allstyle Coil Co., 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)). "When determining whether an arbitrator has exceeded his powers, any doubts concerning the scope of what is arbitrable should be resolved in favor of arbitration." *In re Guardianship of Cantu de Villarreal*, 330 S.W.3d at 23 (citing *Myer v. Americo Life, Inc.*, 232 S.W.3d 401, 408 (Tex. App.—Dallas 2007, no pet.)).

The arbitration agreement provides, without limitation, that "all issues raised by the pleadings in the case will be submitted to binding arbitration." In her live pleading at the time the parties entered into the agreement, Suarez claimed that she was "entitled to attorney's fees . . . under and pursuant to Jumpstart's bylaws" and prayed for "costs of suit and indemnification." The arbitrator found that "just as Counter-Plaintiffs used Jumpstart's funds to pay their attorney fees for this litigation, Ramona Suarez, as a shareholder, is likewise entitled to indemnification for her fees" and awarded her $61,050 in attorney's fees "on her claim for indemnity" against Jumpstart. Therefore, as an "issue raised by the pleadings," the arbitrator did not exceed his authority in deciding Suarez's right to recover attorney's fees based on her indemnification claim. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.048(c)(1); .088(a)(3)(A). We overrule appellants' second issue.

V. CONCLUSION

The judgment is affirmed. We also considered appellees' motion for sanctions against appellants for filing a frivolous appeal. *See* TEX. R. APP. P. 45. The motion is denied.

GREGORY T. PERKES
Justice

Delivered and filed the
27th day of August, 2020.