STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1973

Wenmar, Inc.,
Respondent,

vs.

ECOsmarte Planet Friendly, Inc.,
Appellant.

Filed September 8, 2009
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-08-8982

Edward W. Gale, Thomas C. Atmore, Leonard, O'Brien, Spencer, Gale & Sayre, Ltd., 100 South Fifth Street, Suite 2500, Minneapolis, MN 55402 (for respondent)

Gregory M. Hanson, Law Office of Gregory M. Hanson, 2104 Hastings Avenue, Suite 270, Newport, MN 55055 (for appellant)

Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant challenges a district court's judgment confirming an arbitration award in respondent's favor. Because the arbitrator did not make an evident miscalculation, and because there was no evident partiality by the arbitrator, we affirm.

FACTS

This case arises from a business dispute between appellant ECOsmarte Planet Friendly, Inc. and respondent Wenmar, Inc. Pursuant to a contract between the two parties, disputes were to be settled by "final and binding" arbitration. On September 20, 2007, respondent filed an arbitration claim against appellant and several of its employees, including appellant's CEO, Larry Couture.[1] The parties agreed to have an attorney act as an arbitrator.

On March 24, 2008, the arbitrator issued an award in respondent's favor in the amount of $410,559.74. On April 8, respondent filed a motion to confirm the award. On April 14, appellant filed a motion to vacate/reduce the arbitration award. Ultimately, on September 11, the district court entered an order for judgment confirming the award. Judgment was entered on September 12, and appellant filed notice of appeal on November 10, claiming that (1) the arbitrator's award was based on an evident miscalculation, and (2) there was evident partiality by the arbitrator. This appeal follows.

[1] Pursuant to an agreement between appellant, respondent, and Couture, Couture was later dismissed as a party to the dispute.

D E C I S I O N

An appeal from an arbitration decision is subject to "an extremely narrow" standard of review. *Hunter, Keith Indus., Inc. v. Piper Capital Mgmt. Inc.*, 575 N.W.2d 850, 854 (Minn. App. 1998). This court exercises "every reasonable presumption" in favor of the arbitration award's validity and finality. *Id*. We recognize that an arbitrator "is the final judge of both law and fact." *Cournoyer v. Am. Television & Radio Co.*, 249 Minn. 577, 580, 83 N.W.2d 409, 411 (1957). And we will not set aside an arbitration award for mistake of law or fact absent a showing of impropriety by the arbitrator. *Id.* Binding arbitration is governed by statute, and "[s]tatutory interpretation is a question of law, which we review de novo." *Sands v. Comm'r of Pub. Safety*, 744 N.W.2d 24, 26 (Minn. App. 2008).

I. The arbitration award is not based on an evident miscalculation.

A district court has the authority to correct an award that is based upon an evident miscalculation. Minn. Stat. § 527.20, subd. 1(1) (2008) ("[T]he court shall modify or correct the award where . . . [t]here was an evident miscalculation of figures."). This court has previously addressed the meaning of evident miscalculation as it is used in Minn. Stat. § 572.20, subd. 1(1):

> [A]n evident miscalculation or mistake is limited to technical errors and irregularities in the award which do not affect the merits. We observe that "evident" means "[e]asily seen or understood; obvious." *The American Heritage Dictionary* 617 (4th ed. 2000). Thus, we conclude that an evident miscalculation is an error that is obvious on the face of the award, and the correction of which does not require the court to go outside of the four corners of the award. For example, an evident miscalculation could involve an obvious

> mathematical error in adding a column of numbers. Similarly, an evident mistake in the description of any person, thing or property could involve a mistake in identifying the wrong year or serial number of a vehicle that is the subject of an award. But if it is necessary to go outside of the award to ascertain the intent of the arbitrator, then the relief sought is for clarification of the award.

All Metro Supply, Inc. v. Warner, 707 N.W.2d 1, 6 (Minn. App. 2005) (quotation omitted).

Appellant argues the arbitrator made an evident miscalculation, but is unable to point to any mathematical errors in the arbitrator's decision. Instead, appellant maintains that the arbitrator made an evident miscalculation because he failed to "reduce the start-up costs awarded by not applying the set-off for inventory procured and sold by Respondent." Appellant contends this is an evident mistake because "[t]he set-off is a necessary adjustment to the damages under both the UCC and Minnesota case law." This statement makes it clear that appellant is really arguing that the arbitrator made an error of law by failing to make a legally mandated set-off. This is not the type of "obvious mathematical error" this court spoke of in *All Metro*. To provide the relief requested by appellant, we would first have to look outside the "four corners" of the arbitration award in order to ascertain the applicable legal rule regarding set-offs for inventory sold, and then apply that rule to the facts of this case. We would, in effect, be second-guessing the arbitrator's legal determinations. This is a step that long-established precedent prevents us from taking. *Cournoyer*, 249 Minn. at 580, 83 N.W.2d at 411.

Because appellant has not pointed to any obvious mathematical errors, the district court correctly refrained from adjusting the award.[2]

II. There was no evident partiality by the arbitrator.

This court has the authority to vacate an arbitration award "only upon proof of one or more of the grounds stated in Minn. Stat. § 572.19." *AFSCME Council 96 v. Arrowhead Reg'l Corr. Bd.*, 356 N.W.2d 295, 299 (Minn. 1984). Minn. Stat. § 579.19 (2008) provides that a "court shall vacate an award where . . . [t]here was evident partiality by an arbitrator." This court reviews a denial of a motion to vacate on the grounds of evident partiality under a de novo standard. *See Pirsig v. Pleasant Mound Mut. Fire Ins. Co.*, 512 N.W.2d at 343-44 (Minn. App. 1994) ("Whether the conduct challenged constitutes 'evident partiality' is reviewed de novo . . . . [E]vident partiality is a legal question."). But "[t]he party challenging the award must establish facts that create a reasonable impression of partiality." *Id.* at 343.

Appellant argues the arbitrator displayed evident partiality because he (1) had post-arbitration ex parte contact with respondent's counsel, and (2) was "acquainted" with individuals who, at best, had a tangential relationship with respondent and respondent's counsel. Regarding appellant's claim of improper ex parte contact by the arbitrator, we note that the complained of contact occurred *after* the award had been granted. This fact severely undercuts appellant's claim that it had an impact on the

[2] We do note that in the memorandum of law accompanying the district court's order confirming the award it stated that the award "appears to contain clear and substantial errors in calculation of damages." We disagree for the reasons previously stated in the opinion.

award. Second, the contact itself was in no way related to the merits of appellant's case. In response to a motion challenging his partiality, the arbitrator was asked by the district court judge's law clerk if he would be submitting an affidavit addressing whether his conduct constituted evident partiality. In response to this call, the arbitrator contacted respondent's counsel to ask for submittals relating to the arbitration so that he could prepare an affidavit to submit to the district court. Appellant suggests the arbitrator could have obtained these documents by requesting copies directly from the law clerk. Given the budgetary constraints facing our district courts at this time, we decline to mandate a practice that would require judicial law clerks to take valuable time away from substantive legal research in order to photocopy documents for parties.

Although ex parte contacts are disfavored, the ex parte contact in this case had no bearing on the substantive issues addressed in the arbitration. *See Crosby-Ironton Fed'n of Teachers, Local 1325 v. Indep. Sch. Dist. No. 182*, 285 N.W.2d 667, 670 (Minn. 1979) (stating that an award may be subject to vacation "where Ex parte contacts are made . . . *in regard to the issues under dispute* without notifying all other parties to the dispute") (emphasis added).

In its brief, appellant makes extremely vague allegations about allegedly improper ties between the arbitrator and shareholders in respondent's law firm.[3] Put simply, the vague assertions of impropriety contained in appellant's brief are insufficient to create even the mere appearance of bias. *See Egan & Sons Co. v. Mears Park Dev. Co.*, 414

[3] In its brief, appellant fails to even name the shareholder(s) that the arbitrator supposedly had a professional relationship with.

N.W.2d 785, 786 (Minn. App. 1987), *review denied* (Minn. Jan. 20, 1988) ("[W]here the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed." (emphasis removed)). Even if they were sufficient to create an appearance of bias, the affidavits submitted by respondent and the arbitrator clearly and directly refuted appellant's allegations. Each of the current shareholders in the firm representing respondent filed an affidavit stating that they had never met, spoken with, or known the identity of the arbitrator. With respect to the former shareholder, it was noted that he had left the firm more than four years before the arbitrator was selected in this case. In sum, we conclude that neither the arbitrator's contact with respondent's counsel, nor his supposed ties to the shareholders in the law firm representing respondent are sufficient to constitute evident partiality.

Appellant also argues on appeal that the district court erred because there was a motion to vacate pending under Minn. Stat. § 572.19 at the time it entered judgment in respondent's favor. Because this issue was not raised below, we decline to address it on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts will generally not consider matters not argued and considered in the court below).

Because the arbitrator did not make an evident miscalculation, and because there was no evident partiality by the arbitrator, we affirm the district court's decision confirming the arbitration award.

Affirmed.