STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0356

Daniel Van Hee,
Appellant,

Jennifer Van Hee,
Appellant,

vs.

Kris Hunt,
Respondent,

Roxanne Tuma,
Respondent,

Michael Krautkramer,
Respondent,

Zak Zeug,
Respondent.

Filed September 22, 2009
Affirmed; motion denied
Schellhas, Judge

Scott County District Court
File No. 70-CV-08-3243

Daniel Van Hee, Jennifer Van Hee, 33440 Cedar Cliff Road, Redwood Falls, MN 56283 (pro se appellants)

Stanford P. Hill, Bassford Remele, P.A., 33 South Sixth Street, Suite 3800, Minneapolis, MN 55402 (for respondent Kris Hunt)

Timothy C. Cook, Hammargren & Meyer, P.A., 7301 Ohms Lane, Suite 360, Minneapolis, MN 55439 (for respondent Roxanne Tuma)

Benjamin J. King, Christian, Keogh, Moran & King, 65 South Park Avenue, P.O. Box 156, Le Center, MN 56057 (for respondent Michael Krautkramer)

John H. Brennan, 11200 West 78th Avenue, Suite 300, Eden Prairie, MN 55344 (for respondent Zak Zeug)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellants challenge the denial of their application to vacate an arbitration award, arguing that the arbitrator exhibited evident partiality to respondents by ignoring relevant evidence. We affirm.

FACTS

Appellants Daniel Van Hee and Jennifer Van Hee executed a purchase agreement in February 2006 for the purchase of a home in New Prague, Minnesota. The closing on appellants' purchase occurred in April 2006. In July 2006, appellants began building a dirt-bike track on the land by filling in part of the area with dirt. After appellants began building the track, officials from the City of New Prague informed Daniel Van Hee that he needed a permit in order to fill in the area with dirt because it was a protected wetland. The city officials instructed Daniel Van Hee to remove the dirt from the area and restore the wetland to its previous condition.

Appellants claim they were unaware of the wetland because the September 23, 2005 Sellers Property Disclosure Statement, which they received before closing on the

purchase of the property, did not contain any information regarding the existence of the wetland on the property. On March 15, 2007, appellants filed a demand for arbitration, alleging that respondent-sellers Michael Krautkramer and Roxanne Tuma and respondent-realtors Kris Hunt and Zak Zeug failed to disclose that the property contained restrictions, specifically wetlands. Appellants sought $39,500 in damages.

At the arbitration hearing on October 11, 2007, several persons testified. The arbitration order summarized the testimony as follows. Daniel Van Hee testified that the wetland was not disclosed before the purchase of the property and that he did not inform respondents of his intent to build a track on the land. Ron Mannz, a retired civil engineer, testified on behalf of appellants that wetlands are usually considered an easement and are generally indicated as such on the deed. Hunt testified that he was unaware of the wetland but that he believed that a wetland is an attraction to buyers because it prevents the construction of neighboring houses. Hunt also testified that the wetland area was visible upon viewing the property. Hunt's witness, Rachel Vandenboom,[1] testified that: there was nothing in the documents to alert an agent to restrictions on the relevant property; there was no box to check on the Disclosure Statement to disclose wetlands; and most buyers would want wetlands on their property. Krautkramer testified that: he did not see the wetland as a restriction; he did not know about appellants' intended use of the land for dirt biking; and although he was aware of the wetland, the deed contained nothing regarding wetlands when he purchased the property. Further, Krautkramer acknowledged that he built a porch on the house, which required a variance that the

[1] Vandenboom's background and qualifications are not contained in the record on appeal.

contractor obtained, and he "innocently failed to disclose the porch as an 'alteration' on the Disclosure Statement." Tuma testified that: she knew of the wetland; she thought it added value; and she and Krautkramer filled out the disclosure statement "as best they could." Tuma testified that she knew they would leave the wetland area "as is" and that she thought the wetland added value to the property.

On October 25, 2007, the arbitrator denied appellants' claim against Hunt and Zeug in its entirety but awarded $250 to appellants from Krautkramer and Tuma for time spent on title and deed work. Appellants filed an application to vacate the arbitration award in district court, arguing that the arbitrator exhibited evident partiality. At the hearing before the district court on November 6, 2008, Daniel Van Hee argued that the award should be vacated because the arbitrator exhibited evident partiality because she used "respondents' opinions to formulate her decision" and she "never noted . . . the nondisclosure of all the material facts."

On February 2, 2009, in an amended judgment, the district court denied appellants' application to vacate the arbitration award. This appeal follows.

D E C I S I O N

I

We first address appellants' motion filed with this court. On July 23, 2009, appellants moved this court to accept additional evidence of the arbitrator's alleged bias and partiality. Appellants' "additional evidence" consists of appellants' statement that the arbitrator has not responded to Daniel Van Hee's request for information regarding any ties between the arbitrator and respondents and their counsel, and an e-mail to Daniel

Van Hee from Susan Peters of the National Center for Dispute Settlement in which Peters states that any arbitrator who provides services in the same sector over a long period of time will likely hear cases in which one of the parties has previously been before the arbitrator. Based on Peters's general statement in her e-mail and the fact that the arbitraror did not answer appellants' request for disclosure, appellants infer that the arbitrator may have ties to counsel of the parties in this case.

"The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. The general rule is that an appellate court "may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). An exception to the general rule allows an appellate court discretion to consider documentary evidence of a conclusive, uncontroverted nature "which supports the result obtained in the lower court." *In re Livingood*, 594 N.W.2d 889, 895-96 (Minn. 1999) (quotation omitted). The exception to the rule against admission of new evidence on appeal described in *Livingood* does not apply to appellants' motion, because appellants seek consideration of the new evidence to reverse, rather than affirm, the district court, and the evidence is not conclusive on the issue of the arbitrator's alleged bias and partiality.

Because appellants have not cited any authority that would allow this court to consider the purported "additional evidence" of the arbitrator's alleged bias and partiality, we deny appellants' motion.

II

We turn next to appellants' argument that the district court erred by not vacating the arbitration award.

"Every reasonable presumption must be exercised in favor of the finality and validity of the arbitration award, and courts will not overturn an award merely because they disagree with the arbitrator's decision on the merits." *State, Office of State Auditor v. Minn. Ass'n of Prof'l Employees*, 504 N.W.2d 751, 754-55 (Minn. 1993) (citation omitted). "Thus, the scope of judicial review of an arbitration award is extremely narrow." *Id*. at 755. This court is "bound to accept" the arbitrator's findings, *id.* at 758, but whether challenged conduct constitutes evident partiality is a legal question, which we review de novo, *Aaron v. Ill. Farmers Ins. Group*, 590 N.W.2d 667, 669 (Minn. App. 1999). "The party challenging the award must establish facts that create a reasonable impression of partiality." *Id.* at 669 (quotation omitted).

Appellants argue that the arbitrator exhibited partiality toward respondents by relying solely on respondents' testimony, by failing to examine "key documentary evidence," and by disregarding the relevant caselaw.

An arbitration award will be vacated "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). Minnesota Statutes, section 572.19, subdivision 1(2) (2008), provides in relevant part that upon application of a party, the court shall vacate an award where "[t]here was *evident partiality* by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any

party." (Emphasis added.) "'[E]vident partiality' generally arises when a neutral arbitrator has contacts with a party or another arbitrator that *might* create an impression of possible bias." *Aaron*, 590 N.W.2d at 669 (emphasis added).

Here, in the arbitration award, the arbitrator addressed the testimony given at the hearing and discussed both the testimony of appellants and their witnesses. The arbitrator did not rely solely on respondents' testimony in making her decision. Appellants argue that, because they submitted evidence of the sellers' disclosure statement and the porch variance, the arbitrator's decision in favor of respondents creates an impression of partiality. But the arbitrator both acknowledged and considered the testimony regarding respondents' failure to disclose the porch variance and the wetland when she summarized the following testimony: (1) the wetland was not formally disclosed to appellants, though it was visible at all times; (2) wetlands were generally considered to be a benefit to the property; and (3) Krautkramer failed to disclose that he received a variance to build a porch. Appellants' argument lacks merit.

Although we acknowledge that the arbitrator did not cite any caselaw in the award, this was a fact-based case and the arbitrator did not needlessly discredit any of the testimony, nor did she weigh evidence in an unfair manner. The arbitrator found that:

> No evidence was presented that Respondents Hunt and Zeug knew about the wetlands on the property other than by visual observation.
>
> The deed to this property does not show any evidence of the wetlands, even as an easement, which is unusual, although the area could be seen by visual observation. The Respondents received a variance to build a porch; however, their contractor took care of all the paperwork. Before purchase, Claimants

> could have discussed with any of the Respondents the intention to use the property for dirt biking. Alternatively, after the purchase and before bringing in dirt, Claimants could have asked a city official if they needed a permit, which most homeowners do before making any improvement to their property.

Thus, the arbitrator acknowledged respondents' failure to disclose both the wetland and the variance and implicitly credited the testimony of respondents: that wetlands are generally regarded as beneficial; respondents' failures to disclose were "innocent"; and appellants did not disclose their intended use of the land. We defer to the arbitrator's findings. *See Minn. Ass'n of Prof'l Employees*, 504 N.W.2d at 758 (stating "we are bound to accept" the arbitrator's findings).

Moreover, Minnesota caselaw directs a finding of evident partiality in only a limited number of circumstances, such as when an arbitrator has contacts that might create an impression of bias, or if a substantial relationship exists between a party and the arbitrator. *See Aaron*, 590 N.W2d at 669 (stating that evident partiality generally arises when an arbitrator "has contacts with a party or another arbitrator that might create an impression of possible bias"); *Egan & Sons Co. v. Mears Park Dev. Co.*, 414 N.W.2d 785, 786 (Minn. App. 1987) (affirming the vacation of an arbitration award on grounds of evident partiality because the arbitrator had a "substantial relationship" with a general partner of a business entity that was a party to the case, and the relationship was not disclosed), *review denied* (Minn. Jan. 20, 1988).

Here, appellants have presented no evidence that the arbitrator's contacts with the parties created an impression of bias. And there is no evidence that the arbitrator has a substantial relationship with any of the parties.

We conclude that appellants have failed to show that the arbitrator exhibited evident partiality in granting the arbitration award in respondents' favor. Based upon the information contained in the arbitration award and the relevant caselaw, the district court did not err in affirming the arbitration award.

Affirmed; motion denied.