STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1137

Jovani Nassar, et al.,
Appellants,

vs.

U. S. Home Corporation d/b/a Lennar Homes,
Respondent.

Filed February 18, 2014
Affirmed
Minge, Judge[*]

Hennepin County District Court
File No. 27-CV-12-21299

John A. Nelson, Nelson Legal, P.A., Wayzata, Minnesota; and

Kevin S. Carpenter, Kevin S. Carpenter, P.A., St. Cloud, Minnesota (for appellants)

Robert H. Torgerson, Stephen E. Schemenauer, Stinson Leonard Street LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Schellhas, Judge; and Minge, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

MINGE, Judge

Appellants challenge the district court's confirmation of an arbitration award arguing that the arbitrator exceeded his authority in several respects. Because appellants have not established a clear violation of the arbitrator's authority, we affirm.

FACTS

In 2009, appellants Jovani Nassar and Sonia Morales purchased a home from respondent U.S. Home Corporation d/b/a Lennar Homes, Inc. Appellants subsequently experienced drainage problems on their property and discovered that respondent had failed to grade their property and the two adjacent properties properly. Because the parties' purchase agreement called for arbitration of all disputes related to the property, appellants commenced arbitration proceedings against respondent through the American Arbitration Association (AAA). The owners of the adjacent properties were not joined in the arbitration.

The arbitrator heard testimony and received exhibits on June 11-12, 2012, then held the record open for the parties to submit additional exhibits or other written materials. Approximately one week later, respondent submitted a repair plan prepared by James R. Hill, Inc. ("Plan"). The substance of the Plan had been covered in testimony at the hearing. The parties discussed the possibility of appellants submitting a response to the Plan, but appellants ultimately elected not to submit anything further. The arbitrator closed the record on June 26.

On July 24, the arbitrator issued his decision, finding that appellants' property is not properly graded with an adequate swale, but that the Plan, which calls for modifications to the grade on appellants' property and to the swale within the drainage easements on appellants' property, "will accomplish an adequate repair." The arbitrator further found that appellants are not entitled to rescission but essentially ordered respondent to cover the cost of the repair. The arbitrator ordered appellants to "present the [Plan] to the [c]ity and request that the [c]ity approve it" and set a deadline of August 3 for making that request, "unless good cause exists justifying a delay." The arbitrator retained jurisdiction over the dispute "to fashion an alternative remedy if [appellants'] properly request approval for the [Plan] and the [c]ity refuses to approve it."

On August 2, appellants' counsel sent an e-mail letter to respondent's counsel, stating that the arbitrator "exceeded his authority by ordering [respondent] to perform work on [appellants'] property in accordance with the [P]lan." The letter further stated that appellants had "requested an opportunity to respond to the [P]lan, which the Arbitrator declined," referencing and attaching a report from Paul Ellringer at Air Tamarack, Inc. That report concludes that the Plan does not meet minimum building code requirements. Appellants' counsel sent the arbitrator a copy of the letter and attached report but did not request that the arbitrator reopen the record or provide other relief.

The arbitrator responded to appellants' August letter. The arbitrator first stated that, to the extent appellants sought modification of the award "on the specific ground that the [Plan] does not comply with applicable [c]ode," their request was denied because

he had "found based on competing evidence that the [Plan] . . . , if followed, would comply with [c]ode." And to the extent appellants disagree with the award, the arbitrator stated, "either party now has the right to seek confirmation or vacation of the [a]ward from a district court."

On October 23, appellants filed a motion requesting that the district court vacate the arbitration award. Appellants argued that the arbitrator "exceeded his powers by fashioning an incomplete remedy for [their] property." The district court denied the motion and confirmed the arbitration award. This appeal follows.

D E C I S I O N

The arbitration process is favored in law. *Ehlert v. W. Nat'l Mut. Ins. Co.*, 296 Minn. 195, 199, 207 N.W.2d 334, 336 (1973). "A judicial 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). Arbitrators make the final determination of all questions submitted to them, both legal and factual,[1] *Grudem Bros. Co. v. Great W. Piping Corp.*, 297 Minn. 313, 316, 213 N.W.2d 920, 922-23 (1973), and courts must exercise "[e]very reasonable presumption . . . in favor of the finality and validity of the arbitration award," *State, Office of State Auditor v. Minn. Ass'n of Prof'l Emps.*, 504 N.W.2d 751, 754 (Minn. 1993). "[C]ourts will not overturn

[1] Appellants assert that a court may vacate an arbitration award if the arbitrator "errs as a matter of law in making an award," citing *Star Windshield Repair, Inc. v. W. Nat'l Ins. Co.*, 744 N.W.2d 237, 239 (Minn. App. 2008), *rev'd*, 768 N.W.2d 346 (Minn. 2009). That case involved review of a no-fault arbitration decision, which is subject to judicial review under a materially different standard than that applicable here. *See id.* (stating that no-fault arbitrators leave the interpretation of law to the courts and that any legal determinations they are authorized to make are subject to de novo review).

an award merely because they disagree with the arbitrator's decision on the merits." *Id.* at 754-55; *see also Metro. Airports Comm'n v. Metro. Airports Police Fed'n*, 443 N.W.2d 519, 524 (Minn. 1989) (stating that the arbitrator is "the final judge of both law and fact"). A district court must confirm an award unless a party establishes one of the statutory bases for vacation or modification of the award. Minn. Stat. § 572B.22 (2012); *see also* Minn. Stat. § 572B.23(a) (2012) (listing bases for vacation of award).

Appellants argue that the arbitration award must be vacated because the arbitrator exceeded his authority. *See* Minn. Stat. § 572B.23(a)(4). The burden is on the party challenging the award to prove that the arbitrator exceeded his powers. *Hilltop Constr., Inc. v. Lou Park Apartments*, 324 N.W.2d 236, 239 (Minn. 1982). The scope of an arbitrator's authority is determined from the parties' arbitration agreement. *Children's Hosp., Inc. v. Minn. Nurses Ass'n*, 265 N.W.2d 649, 652 (Minn. 1978). Accordingly, this court independently interprets the arbitration agreement to determine whether the arbitrator exceeded his authority. *Id.*; *In re Progressive Ins. Co.*, 720 N.W.2d 865, 869-70 (Minn. App. 2006), *review denied* (Minn. Nov. 22, 2006).

Appellants argue that the arbitrator exceeded his authority by (1) requiring them to obtain the city's approval of the Plan, (2) ordering a repair that disproportionately burdens their property without appropriate compensation, (3) denying their request to supplement the record in response to the Plan, and (4) declining to award them costs and disbursements and ordering them to pay respondent's arbitration fees and expenses. We address each argument in turn.

I. Requiring appellants to seek approval of the Plan

Appellants argue that the arbitrator exceeded his authority by ordering them to seek approval of the Plan, asserting that this made their recovery contingent on the city's approval, which "is beyond the scope of relief for the same claim if it were venued in district court." Appellants misstate the requirement that the arbitrator imposed on them. The arbitrator did make appellants' recovery contingent on the city's approval of the Plan but required only that appellants cooperate in the repair by seeking approval of the Plan. The arbitrator recognized realities: Appellants own the property. In dealing with third parties, including the city, they may reasonably be expected to participate in making requests. Indeed, property owners would usually want to be a part of such proceedings. The arbitrator also recognized that city approval was not a certainty. He simply retained jurisdiction over the dispute "to fashion an alternative remedy if [appellants'] properly request approval for the [Plan] and the [c]ity refuses to approve it."

Moreover, "the power to fashion a remedy is a necessary part of the arbitrator's jurisdiction unless withdrawn from him by specific contractual language between the parties or by a written submission of issues which precludes the fashioning of a remedy." *City of Bloomington v. Local 2828 of Am. Fed'n of State, Cnty. & Mun. Emps.*, 290 N.W.2d 598, 603 (Minn. 1980). Here, the parties' arbitration agreement contains no language limiting the available remedies and incorporates the AAA Home Construction Mediation procedures, which empower the arbitrator to grant "any legally available remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties." AAA Rules ARB-43. Minnesota law similarly provides that

"an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding." Minn. Stat. § 572B.21(c) (2012). We conclude that this and appellants' other challenges to the fairness, propriety, or legal support for the remedy fashioned by the arbitrator fail to establish that the arbitrator exceeded his authority.

II. Ordering a repair on appellants' property

Appellants also contend that the arbitrator exceeded his authority by ordering repairs that were limited to work to be performed solely on their property. They contend that the repair will not be effective without also correcting the grade on the adjacent lots. But ordering a repair on the adjacent properties, when the owners of those properties were not party to the arbitration, would have exceeded the arbitrator's authority. Instead, the arbitrator acted within his authority by ordering a repair that affects only the parties to the arbitration and will, as the arbitrator found, be an adequate remedy. The arbitrator explicitly stated that the arbitration award did not affect any claims appellants might have against their neighbors regarding drainage easements or rights. Finally, because our scope of review does not extend to examining the record to determine the adequacy of support for a particular factual finding, we do not reach appellants' claim that the arbitrator erred in determining that the Plan would adequately remedy the condition on their property. *See* Minn. Stat. § 572B.23(a).

III. Denying request to respond to Plan

Appellants argue that the arbitrator exceeded his authority by denying their request to respond to the Plan. We agree that the AAA Rules and Minnesota law afforded

appellants the right to respond to documents submitted after the hearing. *See* Minn. Stat. § 572B.23(a)(3); AAA Rules ARB-33. However, appellants have not substantiated their claim that the arbitrator improperly denied them an opportunity to respond to the Plan. In fact, the largely undisputed record indicates the contrary. In his decision, the arbitrator noted that, during the hearing, appellants could have challenged the testimony about remedial measures presented at the hearing and that those measures were the core of the Plan. The parties' post-hearing correspondence reflects that appellants appeared satisfied with the opportunity to submit a response to the Plan in the form of "a couple of paragraphs" on how the testimony at the hearing differed from the Plan. Ultimately, appellants elected not to submit the two paragraphs or anything further. The arbitrator then closed the record. Then, nearly one month later, he issued his decision. After release of the decision, appellants wrote to respondent, complaining that the arbitrator's award was not an effective remedy and forwarding a technical report created after the record closed in support of their position. Subsequently, appellants' attorney sent the arbitrator a copy of this letter and the technical report, without requesting any relief. On this record, appellants have not demonstrated that the arbitrator exceeded his authority or that they otherwise are entitled to vacation of the arbitration decision based on the arbitrator's handling of post-hearing submissions.

IV. Costs, disbursements, fees, and expenses

Appellants argue that the arbitrator exceeded his authority by denying their request that respondent pay their costs and disbursements. The parties' arbitration agreement provides that "[u]nless otherwise recoverable by law or statute, each party shall bear its

own costs and expenses, including attorneys' fees and paraprofessional fees, for any mediation and arbitration." Appellants argue that Minnesota law provides for recovery of costs and disbursements by a prevailing party, that they prevailed, and therefore the arbitrator exceeded his authority by not awarding them costs and disbursements. This is a challenge to the arbitrator's application of Minnesota law on costs and disbursements. Misapplication of the law does not provide a basis for vacating an arbitration award. *See Hunter*, 575 N.W.2d at 854. Moreover, nothing in this record indicates that the arbitrator clearly exceeded his authority by declining appellants' request for costs and disbursements under the circumstances presented here. Looking at all of the claims and the dispute between the parties, it appears that appellants only obtained a fraction of the relief they sought. *Cf. Elsenpeter v. St. Michael Mall, Inc.*, 794 N.W.2d 667, 673 (Minn. App. 2011) (stating that determination of prevailing party is reviewed for abuse of discretion).

Appellants also contend that the arbitrator exceeded his authority by ordering the parties to share the costs of arbitration equally and thereby requiring them to reimburse respondent a portion of the arbitration costs it had paid. The AAA rules provide that the arbitrator may, in the final award, "apportion such fees among the parties in such amounts as the arbitrator determines is appropriate or in accordance with the parties' arbitration agreement if such agreement provides otherwise." AAA Rules ARB-43(c). We discern nothing in the language of the parties' arbitration agreement that precludes equal apportionment of the costs of arbitration in the final award or reimbursement when

one party has paid more than its share. As such, appellants' claim regarding allocation of arbitration fees fails.

Finally, respondent urges that we dismiss appellants' claims because their district court action was untimely. The district court did not address the timeliness of appellants' action. While we may consider "any sound reason for affirmance even if it is not the one assigned by the [district court]," *Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321, 331 (Minn. 2010) (quotation omitted), we ordinarily will not review an issue unless it was decided by the district court, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1998). Because we have sustained the district court's decision upholding the arbitration award, we do not reach respondent's argument regarding the timeliness of appellants' motion to vacate.

Affirmed.