IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 4, 2025 Session

PARADIGM BUILDING GROUP, LLC v. JEFFREY D. FENNESSEY ET AL.

Appeal from the Circuit Court for Wilson County
No. 2023-CV-131 Clara W. Byrd, Judge

No. M2023-01384-COA-R3-CV

A dispute over the construction of a custom home went to arbitration. After the arbitrator found in favor of the builder, the builder applied for confirmation of the arbitration award. The homeowners responded by moving to vacate. The trial court vacated the award and sent the case back to arbitration. In the court's view, the arbitrator exceeded his powers by deciding the case based on a defense the builder did not raise and by failing to postpone the hearing. Because the homeowners failed to establish a basis to vacate the award under the Uniform Arbitration Act, we reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., C.J., and THOMAS R. FRIERSON, II, J., joined.

Joshua A. Jenkins, Murfreesboro, Tennessee, for the appellant, Paradigm Building Group, LLC.

Karen M. Fennessey and Jeffrey D. Fennessey, Mt. Juliet, Tennessee, pro se appellees.

OPINION

I.

A.

In August of 2019, Jeffrey and Karen Fennessey signed a New Home Construction Contract with Paradigm Building Group, LLC. The contract called for Paradigm to

construct the home for a fixed price of $268,689.50, with the Fennesseys paying a five-percent deposit upon signing. The contract also provided that, "[s]hould any dispute arise relative to the performance of th[e] contract that the parties cannot resolve, the dispute shall be referred to a single arbitrator acceptable [to the parties]."

After construction began, quality of workmanship became an issue. Paradigm maintained that any defects could be cured after the inspection, which had not yet occurred, but the Fennesseys found this unacceptable. After a December 2019 meeting between the parties and the Fennesseys' lender, the Fennesseys blocked Paradigm's access to the property, halting construction.

Two years later, the Fennesseys demanded arbitration with the American Arbitration Association. They alleged breach of contract, breach of implied and express warranties, fraud, negligent misrepresentation, and conversion, seeking over $900,000 in damages. Paradigm denied liability and counterclaimed for the value of tools left on site and the contract deposit, which it alleged was unpaid. It claimed that the Fennesseys committed the first material breach of contract and/or that they failed to mitigate their damages.

After a three-day hearing, the arbitrator rejected all claims except those for attorney's fees and costs. Although finding "substantial framing deficiencies" with the home, he determined that the Fennesseys could not recover on most of their claims because they had failed to give Paradigm notice of the defects and a reasonable opportunity to cure. For the remainder, the arbitrator found that the claims failed for a lack of proof. He also rejected Paradigm's claims for the value of tools left on site and for payment of the deposit based on a lack of proof.

As for attorney's fees and costs, the arbitrator awarded Paradigm $25,058.46. Under the contract, attorney's fees were "the responsibility of the party not prevailing in the dispute." While both the Fennesseys and Paradigm had prevailed by successfully defending against the claims of the other, the arbitrator reasoned "that the claims asserted by the [Fennesseys] were substantially greater and more complicated than the Counterclaim asserted by [Paradigm]." Also of significance, "the dispute was precipitated by the first material breach of the [Fennesseys] in failing to give proper notice of alleged defective performance under the [contract] and reasonable opportunity to cure those defects."

B.

Paradigm applied to the circuit court for confirmation of the arbitration award under the Tennessee Uniform Arbitration Act (TUAA). Tenn. Code Ann. § 29-5-312

(2012) (repealed 2023).[1] The Fennesseys opposed confirmation and moved to vacate the award, claiming that there was not a valid agreement to arbitrate. *See id.* §§ 29-5-302(a), -313(a)(1)(E) (2012) (repealed 2023). They also asserted that "[t]here was evident partiality" on the part of the arbitrator; the arbitrator exceeded his powers; and the arbitrator "refused to postpone the hearing upon sufficient cause being shown," refused to hear evidence material to the controversy, and conducted the hearing contrary to the statutory procedure in a way that substantially prejudiced their rights. *See id.* § 29-5-313(a)(1)(B) - (D).

The Fennesseys asked the court to remand the matter to the arbitrator to determine whether they notified Paradigm of construction defects and whether Paradigm refused to correct them. *See id.* § 29-5-313(c) (allowing a trial court to vacate an arbitration award and order a rehearing under specified circumstances). Alternatively, they sought modification or correction of the award by vacating the grant of attorney's fees and arbitration expenses. *See id.* § 29-5-314(a) (2012) (repealed 2023).

The trial court held a hearing in which it considered only the pleadings and arguments of counsel. Afterward, the court denied Paradigm's application to confirm the award and granted the Fennesseys' motion to vacate. It determined that failure to give notice and an opportunity to cure was an affirmative defense that had not been raised by Paradigm. So it faulted the arbitrator for not requiring prior notice of the defense and for not giving the Fennesseys "an opportunity to put on proof of their efforts to provide notice of defects and opportunity to cure." The court also faulted the arbitrator for not postponing the hearing when two subpoenaed witnesses failed to appear.

Although the arbitrator did "not need to rehear the entire matter because he already heard three (3) days of testimony," the court directed the parties "to submit the issue of notice and opportunity to cure and the Fennesseys' claim to arbitration." The court also compelled the subpoenaed witnesses to appear at the rehearing.

II.

Paradigm argues that the trial court applied the wrong legal standard because it vacated the award based on the merits, rather than a statutory ground for vacatur. In addition to the fees and costs awarded, Paradigm seeks an award for attorney's fees and costs incurred in the trial court and on appeal based on the contract and the TUAA. *See*

[1] In 2023, Tennessee adopted the Revised Uniform Arbitration Act (RUAA). 2023 Tenn. Pub. Acts 957 (ch. 319). Because this case was filed before July 1, 2023, the effective date of the RUAA, we cite to the former version of the TUAA. *Id.* at 967; *see also* Tenn. Code Ann. § 29-5-304 (2024) (providing the RUAA "governs an agreement to arbitrate made on or after July 1, 2023").

id. § 29-5-315 (2012) (repealed 2023). The Fennesseys, who are representing themselves on appeal, ask this Court to affirm or, alternatively, to strike the award of attorney's fees and arbitration expenses. Their arguments mirror those made in their motion to vacate.

In reviewing an arbitration award, the trial court's discretion "is severely circumscribed by statute." *Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595, 611 (Tenn. 2013). The court does "not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 449 (Tenn. 1996). "As long as the arbitrator is, arguably, construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* Instead, the court may vacate or modify an award only under circumstances enumerated by statute. Tenn. Code Ann. §§ 29-5-313(a), 29-5-314(a); *Arnold*, 914 S.W.2d at 448.

On appeal, our standard of review is deferential to the arbitration award. Like the trial court, we "are not permitted to consider the merits of an arbitration award even if the parties allege that the award rests on errors of fact or misrepresentation of the contract." *Arnold*, 914 S.W.2d at 450. We review the trial court's "findings of fact under a 'clearly erroneous' standard." *Id.* at 449. We review the trial court's conclusions of law de novo. *See Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 258 n.4 (Tenn. 2010).

A.

The trial court vacated the arbitration award in favor of Paradigm based on Tennessee Code Annotated § 29-5-313(a)(1)(D). Under that provision of the TUAA, a court must vacate an award if the arbitrator "refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing . . . as to prejudice substantially the rights of a party." Tenn. Code Ann. § 29-5-313(a)(1)(D). The key element of this basis for vacating an award is that the arbitrator's actions must have worked "to prejudice substantially the rights of a party." *Id.*; *see also Hall v. Superior Ct.*, 22 Cal. Rptr. 2d 376, 383 (Cal. Ct. App. 1993) (observing, in interpreting a similar California statute, that "the reviewing court should generally focus first on prejudice").

Here, the trial court made no finding that the Fennesseys' rights were substantially prejudiced. The court found that the arbitrator applied what the court deemed an "affirmative defense" that Paradigm had not raised. And it found that the arbitrator did not continue the arbitration hearing when witnesses that the Fennesseys subpoenaed declined to appear. Conspicuously missing, however, are findings about the proof the

Fennesseys would have offered had they been given adequate notice of the affirmative defense or the testimony the uncooperative witnesses might have provided.

The Fennesseys had the burden of establishing a statutory basis for vacating the arbitration award. *Lemma v. York & Chapel, Corp.*, 254 A.3d 1020, 1031 (Conn. App. Ct. 2021); *Heartland Surgical Specialty Hosp., LLC v. Reed*, 287 P.3d 933, 941 (Kan. Ct. App. 2012); *Letke Sec. Contractors, Inc. v. U.S. Sur. Co.*, 991 A.2d 1306, 1312 (Md. Ct. Spec. App. 2010); *Bates v. McQueen*, 613 S.E.2d 566, 568 (Va. 2005); *Cacheris v. Mayer Homes, Inc.*, 969 S.W.2d 876, 878 (Mo. Ct. App. 1998). In relying on the arbitrator's refusal to postpone the hearing or to consider material evidence, this burden required at least some evidence of how those actions resulted in substantial prejudice. But the Fennesseys offered none, choosing instead to rely only on the pleadings. "Allegations in pleadings are not, of course, evidence of the facts averred." *Hillhaven Corp. v. State ex rel. Manor Care, Inc.*, 565 S.W.2d 210, 212 (Tenn. 1978). So vacating the award was not appropriate under Tennessee Code Annotated § 29-5-313(a)(1)(D).

In their briefing, the Fennesseys assert other grounds for vacating the award beyond the one relied on by the trial court. They submit there was no valid agreement to arbitrate because the arbitration provision in their contract was not separately signed or initialed as required by statute. *See* Tenn. Code Ann. § 29-5-302(a) (2012) (repealed 2023). But, to vacate an award on the basis that there was no valid arbitration agreement, an objection to validity of the agreement must be raised in the arbitration. *Id.* § 29-5-313(a)(1)(E). The Fennesseys made no such objection; they demanded arbitration.

Some of the Fennesseys' assertions simply repeat the statutory bases for vacatur without factual support. They cite no evidence of misconduct or evident partiality by the arbitrator beyond the adverse ruling. *See id.* § 29-5-313(a)(1)(B); *see also Bronstein v. Morgan Keegan & Co.*, No. W2011-01391-COA-R3-CV, 2014 WL 1314843, at *3 (Tenn. Ct. App. Apr. 1, 2014) (noting the need for specific evidence to support such claims).

Nor is there evidence that the arbitrator exceeded his powers. *See* Tenn. Code Ann. § 29-5-313(a)(1)(C). The arbitrator acted well within his powers by arbitrating a "dispute . . . relative to the performance of th[e] contract" and awarding attorney's fees. *See D & E Constr. Co., Inc. v. Robert J. Denley Co., Inc.*, 38 S.W.3d 513, 518 (Tenn. 2001) (the scope of an arbitrator's authority is determined by the arbitration agreement). The contract provided that attorney's fees would "be the responsibility of the party not prevailing in the dispute."[2] At best, the Fennesseys claim that the arbitrator erred in

[2] To the extent the Fennesseys claim that the arbitration award should be modified to eliminate the award of attorney's fees and costs because those questions were not submitted to arbitration, we find that argument unavailing. *See* Tenn. Code Ann. § 29-5-314(a)(2). The statement of claims and defenses

making legal conclusions or factual findings. They claim the arbitrator incorrectly placed a duty on them to give notice of defects or incorrectly found that they had not given notice and wrongly determined that they were "the party not prevailing" in the arbitration. Yet, even if incorrect, making those conclusions and findings fell within the arbitrator's powers. As noted above, "an arbitration award is not subject to vacation for a mere mistake of fact or law." *Arnold*, 914 S.W.2d at 451.

B.

Paradigm requests an award of its attorney's fees and costs incurred on appeal and in the trial court under either the contract or the TUAA. The contract provides that attorney's fees are the responsibility of "the party not prevailing in the dispute." Given our disposition, Paradigm is entitled to an award of attorney's fees incurred at trial and on appeal.

Although we have determined that an award of attorney's fees is mandated under the parties' contract, we must also consider the claim for attorney's fees and costs under the TUAA. *Eberbach v. Eberbach*, 535 S.W.3d 467, 479 (Tenn. 2017). When a court grants an application to confirm an award, "[c]ost of the application, and of the proceedings subsequent thereto, and disbursements may be awarded by the court." Tenn. Code Ann. § 29-5-315. We have interpreted the statute to include the discretion to grant attorney's fees as well as costs. *Wachtel v. Shoney's, Inc.*, 830 S.W.2d 905, 909-10 (Tenn. Ct. App. 1991). Exercising our discretion, we decline to award attorney's fees and costs under the statute.

III.

Because there were no statutory grounds to vacate the award, we reverse the decision to vacate. This case is remanded with instructions to confirm the arbitration award, to determine reasonable attorney's fees incurred by Paradigm before the trial court and on appeal, and for such other proceedings as are necessary and consistent with this opinion.

s/ W. Neal McBrayer
W. NEAL MCBRAYER, JUDGE

submitted in the arbitration by Paradigm includes a request for both attorney's fees and costs.