IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
FEBRUARY 19, 2003 Session

HAREN CONSTRUCTION CO., INC. v. B&G ELECTRICAL CONTRACTORS, INC.

Direct Appeal from the Chancery Court for Shelby County
No. CH-01-1559-3 D. J. Alissandratos, Chancellor

No. W2002-02679-COA-R3-CV - Filed September 3, 2003

This is an appeal from the denial of Appellants' motion to vacate an arbitration award. Appellants contend that one of the arbitrators chosen by their opponents exhibited behavior showing evident partiality. Appellants further contend that the trial court erred in not applying the Federal Arbitration Act to the case and in awarding Appellees Rule 11 sanctions. For the following reasons, we affirm the court below.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Howard B. Jackson, Knoxville, TN, for Appellant

David A. Velander, Memphis, TN, for Appellee

OPINION

Facts and Procedural History

Eddie Haren Construction Co., Inc. ("Haren") contracted with B&G Electrical Contractors, Inc. ("B&G") to perform electrical work as part of the construction of a wastewater treatment plant in Bartlett, Tennessee. After the project began, the parties disagreed over their contract and B&G stopped work on the project. B&G subsequently sued Haren for approximately $28,000 in unpaid bills for the work it had performed. Haren invoked an arbitration clause contained in the parties' agreement and counterclaimed for $280,000 for damages it allegedly suffered when B&G stopped work. The arbitration agreement called for each party to choose one arbitrator and then the two arbitrators to choose a third to complete the panel. B&G chose Wyeth Chandler ("Mr. Chandler") with its selection. A nine-hour hearing was held by the panel on May 24, 2001. The panel issued

written findings on June 11, 2001 that stated that neither party had carried its burden of proof and declined to award damages to either party.

On July 26, 2001 Haren petitioned the Shelby County Chancery Court to vacate the arbitral award. Haren claimed that during the course of the hearing by the panel, Mr. Chandler committed several acts that warranted reversal of the arbitration panel's decision. Haren claimed that Mr. Chandler attempted to force Haren to accept B&G's proposed settlement offer during *ex parte* discussions. Haren also claimed that when it refused, Mr. Chandler threatened to hold one of its representatives in contempt and put him in jail. Haren stated that Mr. Chandler told them that he was sympathetic to their side, but that if they did not agree to settle, he would vote with one of the other arbitrators to award B&G damages and vote against awarding Haren damages. Haren claimed the arbitration should be vacated either under the Federal Arbitration Act or its Tennessee equivalent. Haren argued that because one of the sub-contractors on the project was from Alabama, the Federal Arbitration Act applied.

On May 2, 2002, a hearing was held on the motion to vacate the arbitral award. The chancellor, citing the Tennessee Uniform Arbitration Act, denied Haren's motion to vacate the arbitration award and granted B&G's motion for Rule 11 sanctions which had claimed Haren's petition was frivolous and without merit. On June 10, 2002, the trial court entered its written order. In this order, the trial court found that Haren had "failed to demonstrate that the arbitration award was procured by undue means, that there was evident partiality by an arbitrator appointed as a neutral, or that there was misconduct prejudicing the rights of any party." Thus the lower court found that Haren had not carried its burden of proof under Tennessee Code Annotated section 29-5-313. The lower court further found that the testimony of Haren's lawyer at the arbitration, Mr. Smith, was credible as was Mr. Chandler's. The chancellor also stated that "[t]o the extent there is any conflict between the testimony of Smith or Chandler and Haren, the testimony of the former two are [sic] credited." The chancellor, citing to the testimony of Mr. Smith and Mr. Chandler, specifically found "that the arbitration decision had been made by the entire panel of arbitrators prior to the acts of which [Haren] complains. On June 14, 2002, Haren appealed to this Court and presents the following issues for our review:

I. Whether the court erred by failing to apply the terms of the Federal Arbitration Act?
II. Whether the court erred by failing to vacate the arbitral award and remand the case for a hearing before a new panel of arbitrators?
III. Whether the court erred by awarding Rule 11 sanctions against Haren Construction Company?

Law and Analysis

Haren argues that because one of the subcontractors involved in the wastewater plant construction was from Alabama that the court erred in not applying the Federal Arbitration Act to Haren's motion to vacate and instead applied the Tennessee Arbitration Act. This is significant according to Haren because, as stated in Haren's brief, Mr. Chandler "was a party appointed

arbitrator. Therefore, his conduct is not subject to the 'evident partiality' standard under the Tennessee Law. Under the FAA, however, the 'evident partiality' standard does not apply to Chandlers' conduct." Thus, Haren asks us to reverse the trial court and apply the Federal Arbitration Act to this case. We do not find proof in the record to enable us to conclude that the Federal Arbitration Act applies. Our Supreme Court set forth the standard to be applied here in *Frizzell Constr. Co. V. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 83 (Tenn. 1999) and applied it to the facts of that case:

> As part of its constitutional authority to regulate interstate commerce, Congress may regulate intrastate activities that have a *substantial relation* to interstate commerce. See *United States v. Lopez*, 514 U.S. 549, 557-59, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995). After a careful review of the record, we find that such a relation is present in this case. At least six out-of-state contractors participated in the construction of the hotel, at least nine employees were employed from outside Tennessee, and at least seven out-of-state vendors supplied more than $380,000 worth of materials for the project. An Ohio corporation insured the project, and a Delaware corporation based in New Jersey issued a payment and performance bond along with a bond to discharge liens filed against the project as required by the contract. The construction financing was accomplished with the assistance of three out-of-state banks, and the purpose and scope of the agreement was to develop a commercial venture extending beyond Tennessee. When all of these factors are viewed together, it is clear that this contract is one that "involves commerce."

(emphasis added)(footnotes omitted).

In the record before us in this case, no such proof is found. The only mention in the whole record of any interstate activity involved with this contract was one sentence in one of the affidavits submitted by Haren along with its motion to vacate stating that one subcontractor from Alabama provided an unspecified amount of equipment and the installation of the equipment. Thus we cannot say that the intrastate contract for this wastewater project had a "substantial relation to interstate commerce" and we find that the trial court properly applied the Tennessee Uniform Arbitration Act rather than the Federal Arbitration Act.

As to Haren's contention that the trial court erred by refusing to vacate the award, we find that this argument is not well taken. As Haren states in its brief, Mr. Chandler "was a party appointed arbitrator. Therefore, his conduct is not subject to the 'evident partiality' standard under the Tennessee Law." We have in the record below testimony as to what occurred. The testimony given by Mr. Smith and Mr. Chandler was that a decision had been made prior to the conduct Haren now challenges. Mr. Smith testified that he understood the decision to be that neither side would recover from the other. Mr. Chandler testified that the decision had been made that neither side would recover. The trial court heard this testimony and made a ruling based on the credibility of this testimony. The trial court found Haren's lawyer, Mr. Smith, and Mr. Chandler credible and resolved

any conflict found with other testimony in favor of these two. A trial judge's determination of credibility is given considerable weight on appeal. "Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review." *McCaleb v. Saturn,* 910 S.W.2d 412, 415 (Tenn. 1995) (citing *Townsend v. State,* 826 S.W.2d 434, 437 (Tenn. 1992)). For these reasons, we affirm the decision of the court below in not vacating the decision of the arbitration panel.

Haren also challenges the grant of B&G's motion for Rule 11 sanctions in which B&G was granted $19,328.50 in attorney's fees and other costs. The trial court's grant of sanctions reads as follows:

> There is nothing in the law which would lead anyone to reasonably believe in good faith the facts of this case would fall under the prevailing law as it relates to those narrow cases of reversals of arbitration awards, nor is there anything to show that there would have been a reasonable likelihood to think that the existing law of this state under these facts would reasonably change. The only reason Plaintiff brought this action was some passion and at the same time, some desire merely to get an award vacated, but the court does not find any logical, reasonable basis in law for the request that has been made before this court.

We review the grant of a motion for Rule 11 sanctions under an abuse of discretion standard. *Stigall v. Lyle*, No. M2001-00803-COA-R3-CV, 2003 Tenn. App. LEXIS 89 at *10-11, (Tenn. Ct. App. Feb. 4, 2003) (citing *Andrews v. Bible,* 812 S.W.2d 284 (Tenn. 1991). After a thorough review of the record, we find no abuse of discretion in the award of Rule 11 sanctions. Thus, we affirm the decision of the court below.

Conclusion

We affirm the decision of the court below. Costs on this appeal are taxed to the Appellant, and its surety, for which execution may issue if necessary.

_____

ALAN E. HIGHERS, JUDGE