IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 4, 2022 Session

THOMAS BUILDERS, INC. v. CKF EXCAVATING, LLC

Appeal from the Chancery Court for Davidson County
No. 21-0475-II Anne C. Martin, Chancellor

No. M2021-00843-COA-R3-CV

An arbitrator awarded a subcontractor damages against a general contractor. In chancery court, the general contractor moved to vacate the award on the basis that the arbitrator exceeded his powers. The chancery court denied the motion to vacate and, at the request of the subcontractor, confirmed the arbitration award. We affirm.

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

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., joined. KENNY ARMSTRONG, J., filed a dissenting opinion.

Timothy W. Burrow, Nashville, Tennessee, for the appellant, Thomas Builders, Inc.

J. Ross Hutchison, Nashville, Tennessee, for the appellee, CKF Excavating, LLC.

OPINION

I.

A.

Thomas Builders, Inc. served as the general contractor on a hotel project in Ashland City, Tennessee. It subcontracted grading and undercut work to CKF Excavating, LLC. Under the subcontract, CKF Excavating agreed that it would remove up to 1,000 cubic yards of "unsuitable soils." Unsuitable soils in excess of 1,000 cubic yards would be removed at a rate of $55 per cubic yard.

As the project proceeded, disputes arose between Thomas Builders and CKF Excavating over how much soil was removed in excess of 1,000 cubic yards, the necessity for removal, and payment for that work. When the parties reached an impasse, CKF Excavating stopped work.

The subcontract provided that the parties would arbitrate any claims arising from the subcontract, but it did not specify the arbitral forum or the process for arbitration. After CKF Excavating made its demand for arbitration, the parties signed an arbitration agreement that named an arbitrator and specified the process for arbitration. The agreed process incorporated some of the Construction Industry Arbitration Rules of the American Arbitration Association. Among other rules, the parties agreed that Construction Industry Arbitration Rule 47 would apply. Rule 47 provides in relevant part: "In all cases, unless waived by agreement of the parties, the arbitrator shall provide a concise written financial breakdown of any monetary awards."

CKF Excavating submitted several claims for arbitration. Among others, it claimed damages of $191,490.78 for work performed before it abandoned the project. This amount included $74,022.74 owed to Rogers Group, Inc., a supplier to CKF Excavating. For its part, Thomas Builders submitted a claim for damages in the amount of $163,137.93. Thomas Builders also requested that "for any ruling in favor of either side," the arbitrator "provide any 'conditions' of any such [a]ward regarding [Rogers Group's claim]."

Following three days of hearings, the arbitrator issued an award setting out his findings and reasoning with respect to the parties' claims. The arbitrator concluded that CKF Excavating improperly stopped working on the project. But he also found that, before stopping, CKF Excavating removed unsuitable soils in excess of 1,000 cubic yards and that Thomas Builders knew or should have known about the excess removal. And "such removal was absolutely necessary for the [p]roject to proceed." So the arbitrator awarded CKF Excavating $191,490.78 for the work performed before stopping, which included withheld retainage from previous payments. The arbitrator also ordered that $74,022.74 of the award be placed in an escrow account to guarantee payment of the money owed to Rogers Group.

The arbitrator denied recovery for almost all of Thomas Builders' claims. But it did award Thomas Builders $1,480 for the cost to bond off Rogers Group's lien on the project. The final section of the arbitration award provided:

> Summary of Final Award
> Based upon all of the above, including all claims and counterclaims, I award as follows:

> 1. Thomas Builders, Inc. shall pay to CKF Excavating, LLC the amount of $115,988.04 no later than twenty (20) days from the date of this Award (the "Initial Payment");
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> 2. As set forth above, Thomas Builders, Inc. shall pay an additional amount of $74,022.74 into an escrow account to be paid out according to this Award, no later than twenty (20) days from the date of this Award (the "Escrow Payment"); and
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> 3. All costs of this Private Arbitration, including the estimated amounts paid by the parties to the Arbitrator, are not allocated but shall be borne as incurred, and a final accounting shall be timely provided to counsel by the Arbitrator.

So CKF Excavating received the amount it requested for work performed before abandoning the project less the amounts due to its supplier and the cost to bond off the supplier's lien.

Thomas Builders filed a "motion for financial breakdown." It complained that the arbitrator failed to provide a "concise written financial breakdown" as required by Rule 47. And that a breakdown would reveal computational errors made by the arbitrator. But Thomas Builders did not explain what computational errors the arbitrator allegedly made. It also complained that the arbitrator's breakdown should include the amount of unsuitable soils in excess of 1,000 cubic yards removed by CKF Excavating. Thomas Builders claimed that CKF Excavating failed to produce sufficient evidence about the amount of unsuitable soil it removed. And, because CKF Excavating failed to meet its burden, the arbitrator could not provide a breakdown of its award. So, according to Thomas Builders:

> the financial breakdown should show "$0" on the line item of unsuitable soils removed above 1,000 [cubic yards], and therefore, the current $191,491.78 award should be reduced by $152,279.82 ($110,000 plus $42,279.82), leaving a ruling of $39,211.96, which would be paid to [Rogers Group].

The arbitrator denied the motion of Thomas Builders.

B.

In the Chancery Court for Davidson County, Tennessee, Thomas Builders moved to vacate the arbitration award.[1] It asserted that the arbitrator exceeded his powers by not

[1] Before the Davidson County filing, CKF Excavating filed a motion to confirm the arbitration award in a case filed by Rogers Group in Cheatham County. Rogers Group named both CKF Excavating and Thomas Builders as defendants. The dissent contends that, because of Rogers Group's suit, the prior

providing a financial breakdown of the monetary award. It also asserted that the arbitrator exceeded his powers by making "clearly erroneous factual conclusions as to geotechnical engineering matters" and "the number of cubic yards of unsuitable soils removed" and by "relying on what he believe[d] [wa]s industry-wide knowledge of experts' opinions not given by any qualified witness at the hearing."

CKF Excavating responded and moved to confirm the arbitration award. It contended that the award satisfied both the arbitration agreement and Rule 47. And the other concerns raised by Thomas Builders were merely an effort to "reargue the evidence to escape payment." CKF Excavating also sought an award of attorney's fees.

The chancery court denied the motion to vacate the arbitration award. It found that the arbitrator had issued a "final ruling, the [arbitration] [a]ward was provided as agreed upon by the parties, and . . . the arbitrator did not exceed his authority." So the court confirmed the arbitration award. But it denied CKF Excavating's request for attorney's fees.

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suit pending doctrine deprived the Chancery Court for Davidson County of subject matter jurisdiction.

As Thomas Builders and CKF Excavating argue in their supplemental briefing, the prior suit pending doctrine does not apply. The doctrine requires that both lawsuits concern "identical subject matter." *West v. Vought Aircraft Indus., Inc.*, 256 S.W.3d 618, 623 (Tenn. 2008). "[T]o determine whether the same subject matter is involved in both suits, a court must consider whether a judgment in the first suit would bar litigation of an issue in the second suit under *res judicata* principles." *Fid. & Guar. Life Ins. Co. v. Corley*, No. W2002-02633-COA-R9-CV, 2003 WL 23099685, at *4 (Tenn. Ct. App. Dec. 31, 2003). Under res judicata principles, two suits involve the same cause of action if they concern the same transaction or occurrence. *Creech v. Addington*, 281 S.W.3d 363, 380-81 (Tenn. 2009) (citing Restatement (Second) of Judgments §24(1)). The arbitration itself is a transaction or occurrence. *See Consolidation Coal Co. v. United Mine Workers of Am., Dist. 12, Local Union 1545*, 213 F.3d 404, 408 (7th Cir. 2000). While the arbitration award was an issue in both lawsuits, CKF Excavating withdrew its motion to confirm the arbitration award in the Cheatham County case. *See Cannon ex rel. Good v. Reddy*, 428 S.W.3d 795, 798 (Tenn. 2014) (holding that voluntary dismissal of former suit precludes dismissal of next suit based on prior suit pending doctrine); *Walker v. Vandiver*, 181 S.W. 310, 311 (Tenn. 1915) (same). The Cheatham County case now concerns only the claims of Rogers Group. So both lawsuits do not concern identical subject matter.

Even if the prior suit pending doctrine applied, it would not deprive the Davidson County Chancery Court of subject matter jurisdiction. The doctrine is not jurisdictional. *But see Am. Lava Corp. v. Savena*, 476 S.W.2d 639, 640 (Tenn. 1972) (describing the earlier filed case as acquiring "jurisdiction [that] became exclusive"); *Robinson v. Easter*, 344 S.W.2d 365, 366 (Tenn. 1961) (holding that "the court which first takes jurisdiction thereby acquires exclusive jurisdiction of the case"). Rather, it is a doctrine of judicial comity and efficiency, which should not be evoked here. *E.g., Reece v. Reece*, 56 S.E.2d 641, 642 (N.C. 1949); *Barber v. Neal*, 170 S.E. 906, 907 (W. Va. 1933); *Reed v. Frey*, 458 P.2d 386, 389 (Ariz. Ct. App. 1969). Dismissal would serve neither end.

II.

On appeal, Thomas Builders contends that there were two grounds for vacating the arbitration award under the Federal Arbitration Act ("FAA"). First, the arbitrator exceeded his powers by not providing a concise written financial breakdown of the monetary award. Second, the arbitrator exceeded his powers or imperfectly executed them because there was no factual support for one of the determinations underlying the award. For its part, CKF Excavating seeks an award of its attorney's fees on appeal.

A.

We first consider Thomas Builders' contention that the FAA, rather than the Tennessee Uniform Arbitration Act ("TUAA"), Tenn. Code Ann. §§ 29-5-301 to -320 (2012), governs judicial review of the arbitration award. Although the judicial review provisions of the two acts "are substantially similar," the TUAA provisions "are more restrictive." *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 259 (Tenn. 2010).

The FAA applies to "[a] written provision in . . . a contract *evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction." 9 U.S.C. § 2 (emphasis added). The term "commerce" as used in the FAA includes "commerce among the several States." *Id.* § 1. The United States Supreme Court has interpreted the term "involving commerce," and thus the reach of the FAA, as concurrent with that of the Commerce Clause. *See, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (describing the FAA as "embod[ying] Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause"). So the FAA applies whenever the contract that is the subject of arbitration has "a substantial relation to interstate commerce." *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 83 (Tenn. 1999) (citing *United States v. Lopez*, 514 U.S. 549, 557-59 (1995)). A transaction can substantially relate to interstate commerce if its purpose is "to develop a commercial venture extending beyond Tennessee." *Id.* A transaction can also substantially relate to interstate commerce if it involves contractors and materials from other states. *See id.*; *Tenn. River Pulp & Paper Co. v. Eichleay Corp.*, 637 S.W.2d 853, 855 (Tenn. 1982).

We conclude that the FAA governs our review because the subcontract between Thomas Builders and CKF Excavating "involves commerce" within the meaning of the FAA. The work related to the construction of a hotel that would be part of a national chain. Suppliers delivered materials to the job site from Pennsylvania, Georgia, Texas, Indiana, and North Carolina. And subcontractors from Georgia, North Carolina, and Mississippi worked at the job site.

B.

Section 10 of the FAA provides the exclusive grounds for vacating an arbitration award. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008); *Grain v. Trinity Health, Mercy Health Servs. Inc.*, 551 F.3d 374, 378 (6th Cir. 2008). A court may vacate an arbitration award

> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
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> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
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> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). Here, the request to vacate the arbitration award arises under § 10(a)(4). The burden of proof, which falls on Thomas Builders, "is very great." *Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990).

In part, Thomas Builders contends that the arbitrator exceeded or imperfectly executed his powers by not providing a financial breakdown of the monetary award as required by the arbitration agreement. Generally, "[a]rbitrators have no obligation to the court to give their reasons for an award." *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). Parties may impose such an obligation in their arbitration agreements. *See Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 473 (5th Cir. 2012); *Green v. Ameritech Corp.*, 200 F.3d 967, 976 (6th Cir. 2000). But courts disagree about whether arbitrators can "exceed their powers" by "not doing enough." *Compare In re Romanzi*, 31 F.4th 367, 375 (6th Cir. 2022) (recognizing that it "ha[d] never squarely held that a dearth of explanation constitutes a §10(a)(4) violation—indeed, the subsection's plain language seems to contradict that reading"); *Halim v. Great Gatsby's Auction Gallery, Inc.*, 516 F.3d 557, 564 (7th Cir. 2008) (holding that "the arbitrator did not exceed his power by not explaining his award in greater detail"), *and ARCH Dev. Corp. v. Biomet, Inc.*, No. 02 C 9013, 2003 WL 21697742, at *4 n.4 (N.D. Ill. July 30, 2003) (commenting that "it is very strange to assert that an arbitrator has *exceeded* his powers by not doing enough"), *with Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 843 n.14 (11th Cir. 2011) (expressing the "belie[f] that an arbitrator can, in fact, exceed his powers by 'not doing enough'").

We agree with those courts that conclude that an arbitrator does not exceed his power by not doing enough. So we instead consider whether the arbitrator "so imperfectly executed [his powers] that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

An arbitration award "'even arguably construing or applying the [arbitration agreement]' must stand, regardless of the court's view of its (de)merits." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013) (citation omitted). When reviewing an arbitration award under § 10(a)(4), "the sole question . . . is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Id.* Thomas Builders asserts that the arbitrator failed to comply with the arbitration agreement's "concise written financial breakdown" requirement.

When an arbitrator is tasked with providing a concise financial breakdown, that is exactly what is intended—a concise breakdown. *Cf. In re Romanzi*, 31 F.4th at 375 n.6 (holding that a one sentence order was a sufficiently "reasoned decision" as to not violate § 10(a)(4)). Here, the arbitrator awarded CKF Excavating the full amount of its damages. CKF Excavating itemized those damages in its pre-arbitration brief, referencing its pay requests, prior payments, and retainage amounts. The arbitrator explained that his final decision was largely based on the evidence of the materials removed from the project site provided by CKF Excavating, which the arbitrator credited over the "'new,' after the fact analysis" provided by Thomas Builders.

In providing its breakdown of damages, the arbitrator did not "so imperfectly execute[] [his powers] that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). He thoroughly laid out his findings and reasoning in his award. He denied all of Thomas Builders' claims except the cost of eliminating Rogers Group's lien on the project. And the arbitrator adequately explained the basis for the award to CKF Excavating.

Thomas Builders claims that the arbitrator exceeded his powers or imperfectly executed them in one other crucial aspect. It faults the arbitrator for not identifying all the material CKF Excavating removed as being "unsuitable soils." According to Thomas Builders,

> the record is undisputed that 101 truckloads of unidentified material . . . , which equates to $83,325 based on 15 cubic yards per truckload and $55 per cubic yard[,] was part of CKF [Excavating's] claim and the arbitrator's award of $191,490.78. Therefore, $83,325 of the award is based on a mistake of fact or a non-fact . . . .

An arbitration award may be vacated under § 10(a)(4), "where the record that was before the arbitrator demonstrates an unambiguous and undisputed mistake of fact *and* the record demonstrates strong reliance on that mistake by the arbitrator in making his award." *Nat'l Post Office, Mailhandlers, Watchmen, Messengers & Grp. Leaders Div., Laborers Int'l Union of N. Am., AFL-CIO v. U.S. Postal Serv.*, 751 F.2d 834, 843 (6th Cir. 1985). The problem with Thomas Builders' argument is that the so-called "mistake of fact" was not undisputed. As CKF Excavating explains, the "assertion that the matter removed from the site was 'unidentified' is directly contradicted by the record—as it was identified as unsuitable soil and necessary for removal." And the arbitrator found in favor of CKF Excavating on this point. An arbitrator's "factual determinations based on disputed or ambiguous evidence" are not grounds for vacating an arbitration award. *Id.*

C.

CKF Excavating seeks attorney's fees under the TUAA. *See* Tenn. Code Ann. § 29-5-315 (2012); *Wachtel v. Shoney's, Inc.*, 830 S.W.2d 905, 909 (Tenn. Ct. App. 1991) (holding that the statute permits an award of attorney's fees for confirming an arbitration award). Because we have concluded that our review is governed by the FAA, we decline to award attorney's fees based on the TUAA.

CKF Excavating also seeks attorney's fees as damages for a frivolous appeal. *See* Tenn. Code Ann. § 27-1-122 (2017). A frivolous appeal is one "utterly devoid of merit." *Combustion Eng'g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978). This appeal was not devoid of merit. Thomas Builders "made legitimate arguments and cited to relevant law and facts." *See Coolidge v. Keene*, 614 S.W.3d 106, 120 (Tenn. Ct. App. 2020). So we also decline to award attorney's fees based on a frivolous appeal.

III.

Thomas Builders failed to carry its burden to show that the arbitrator exceeded or imperfectly executed his powers. So the chancery court properly confirmed the arbitration award. We affirm the judgment. And we remand the case for such further proceedings as may be necessary and consistent with this opinion.

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