Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00824-CV

METHODIST HEALTHCARE SYSTEM, LTD., LLP,
Appellant

v.

Nancy **FRIESENHAHN**,
Appellee

From the 166th Judicial District Court, Bexar County, Texas
Trial Court No. 2016CI08375
Honorable Richard Price, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: October 11, 2017

AFFIRMED IN PART; REVERSED AND RENDERED IN PART

Methodist Healthcare System, LTD., LLP appeals the trial court's judgment confirming an arbitration award. Methodist first argues the parties' arbitration agreement expanded judicial review of the arbitration award as permitted by *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011). Methodist further argues the trial court erred in confirming the arbitration award under the expanded judicial review because the arbitrator failed to follow legal precedent. Finally, Methodist argues the trial court erred in awarding attorney's fees to enforce the arbitration award. We hold the parties' arbitration agreement did not expand judicial review; therefore, we need not consider

Methodist's argument that the trial court erred in confirming the arbitration award under an expanded judicial review. We also hold the trial court erred in awarding Nancy Friesenhahn attorney's fees for enforcing the arbitration award. Accordingly, we reverse the portion of the trial court's judgment awarding Friesenhahn additional attorney's fees and render judgment that Friesenhahn is not entitled to recover any such additional attorney's fees as a matter of law. We affirm the remainder of the trial court's judgment.

BACKGROUND

Nancy Friesenhahn was terminated by Methodist for sending a reference letter on behalf of a former employee who was also a friend. Methodist claimed Friesenhahn violated its Reference Inquiries Policy and also falsified the reference letter by misrepresenting her job title and by inaccurately describing the job performance of the former employee.

Friesenhahn claimed Methodist fired her because of her gender and age (female over 40), relying on evidence that a younger male employee was not similarly disciplined for similar misconduct. The claim was submitted to arbitration, and the arbitrator found in favor of Friesenhahn, awarding her $213,932.80 in damages and $170,000 in attorney's fees.

Friesenhahn filed a motion to confirm the arbitration award, and Methodist filed a motion to vacate the arbitration award. The parties then filed competing motions for summary judgment.

Friesenhahn filed a no-evidence motion for summary judgment asserting Methodist "provided no evidence that supports its contention [in] its Petition to Vacate Arbitration Award." In her motion, Friesenhahn asked the trial court to award her additional attorney's fees for seeking enforcement of the award. Methodist filed a traditional motion for summary judgment, asserting the arbitration agreement provided for expanded judicial review and the arbitrator ignored the legal standards applicable in reviewing Friesenhahn's discrimination claim.

The trial court granted Friesenhahn's motion and denied Methodist's motion. The trial court also awarded Friesenhahn $28,000 in attorney's fees and costs for the enforcement of the arbitration award, $28,000 in conditional appellate attorney's fees for an appeal to this court, and $28,000 in conditional appellate attorney's fees for an appeal to the Texas Supreme Court. Methodist appeals.

DID THE ARBITRATION AGREEMENT PROVIDE FOR EXPANDED JUDICIAL REVIEW OF THE ARBITRATION AWARD UNDER *NAFTA*?

The Texas Arbitration Act "lists specific grounds for vacating, modifying, or correcting an arbitration award and provides that unless such grounds are offered, the [trial] court, on application of a party, shall confirm the award." *Nafta*, 339 S.W.3d at 89-90 (internal quotations omitted). Ordinarily, a trial court is not allowed to review complaints regarding the sufficiency of the evidence to support an arbitration award. *Patten v. Johnson*, 429 S.W.3d 767, 777 (Tex. App.—Dallas 2014, pet. denied); *Blue Cross Blue Shield of Tex. v. Juneau*, 114 S.W.3d 126, 135 (Tex. App.—Austin 2003, no pet.). Similarly, a trial court generally is not allowed to review contentions that the arbitrator misapplied the law or the arbitrator's reasoning was legally erroneous. *Denbury Onshore, LLC v. Texcal Energy S. Tex., L.P.*, 513 S.W.3d 511, 520 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *see also Hoskins v. Hoskins*, 498 S.W.3d 78, 81 (Tex. App.—San Antonio 2014), *aff'd*, 497 S.W.3d 490 (Tex. 2016) ("A mere mistake of law or fact is insufficient to set aside an arbitration award.") (internal quotations omitted).

Notwithstanding these general rules, in *Nafta*, the Texas Supreme Court held an arbitration agreement can place "limitations" on an arbitrator's authority to decide a matter and provide for "expanded judicial review." 339 S.W.3d at 97, 101. "Absent clear agreement, [however], the default under the TAA … is restricted judicial review." *Id.* at 101.

The arbitration agreement in *Nafta*, which the court construed to provide "expanded judicial review," stated the arbitrator "does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law." 339 S.W.3d at 91. Under this provision, the court held the parties agreed "an arbitrator should not have authority to reach a decision based on reversible error." *Id*. at 92-93.

After *Nafta*, the Texas Supreme Court again addressed the issue of whether an arbitration agreement provided for expanded judicial review by "clear agreement" in *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 518 S.W.3d 422 (Tex. 2017). In *Forest Oil Corp.*, the arbitrator awarded exemplary damages, and, on appeal, Forest Oil Corp. argued that the exemplary damage award should be vacated because the panel exceeded its authority. 518 S.W.3d at 427, 431. Under the arbitration agreement, the arbitrators had the authority to "award punitive damages where allowed by Texas substantive law." *Id*. at 432. Because the award of punitive damages by the arbitrators was not authorized by Texas law, Forest Oil Corp. argued the arbitrators exceeded their authority and, therefore, judicial review of the award was appropriate under *Nafta*. *Id*. The Texas Supreme Court rejected the argument holding there was no "clear agreement" to expand judicial review. *Id*. The court concluded, "In the absence of a clear agreement to limit the [arbitration] panel's authority and expand the scope of judicial review, this Court may not exercise expanded judicial review of exemplary damages." *Id*.; *see also Humitech Dev. Corp. v. Perlman*, 424 S.W.3d 782, 794 (Tex. App.—Dallas 2014, no pet.), *abrogated on other grounds*, *Hoskins v. Hoskins*, 497 S.W.3d 490, 493 n.4 (Tex. 2016) (holding governing law provision in arbitration agreement did not permit review of mistake of law).

In *Denbury Onshore, LLC*, the appellant relied on the following statement in the arbitration agreement to argue that the parties expanded judicial review, "An appeal from an order or

judgment of the Panel shall be taken in the manner and to the same extent as from orders or judgment in civil cases under Texas law." 513 S.W.3d at 518. The court concluded, "It is not clear what the parties intended by the sentence," noting arbitration panels issue awards while the language refers to a panel's "judgment." *Id*. In addition, the court noted the language refers to an "appeal" of the panel's "judgment," but "the legislature has not provided for an appeal from an arbitration award to a Texas court; instead, parties file an application to a court for confirmation, vacatur, modification, or correction of the award." *Id*. The Houston court then held the agreement did not "clearly expand judicial review of an arbitration award to encompass reversible error under standards applicable in a conventional appeal from a final judgment rendered after trial." *Id*. at 519.

In its brief, Methodist quotes language from various provisions of the arbitration agreement to argue that the agreement provided for expanded judicial review. For example, under a section of the arbitration agreement entitled "How does arbitration work?," the agreement states, "the arbitrator will apply the same laws and will be able to grant the same relief as would a judge or jury." Reading the section of the agreement as a whole, however, we do not believe this language is a "clear agreement" to expand judicial review. Instead, as the section of the agreement further states, the language is intended to explain that, "Arbitration simply changes the forum in which the legal issues will be resolved."

Methodist also quotes from a section entitled, "What remedies are available in arbitration?" which states, "The arbitrator has the same power, authority, and limitations to award any remedy to which either party would have been entitled had the dispute been taken to a government agency or to a court." We disagree that this language is a "clear agreement" to expand judicial review. Instead, this section is intended to explain that the remedies available in arbitration are "[t]he same remedies that are available in court."

Finally, Methodist quotes a section of the agreement entitled "What authority does the arbitrator have?" That section of the agreement provides:

> The arbitrator will have all the powers a judge would have in dealing with any question or dispute that may arise up through the arbitrator rendering a decision. The arbitrator's power is limited to rights which would be protected in court. The arbitrator must apply the same statutory law and follow the same case precedent that would have to be applied and followed by the state or federal court judge who would otherwise have jurisdiction of the dispute. The arbitrator will apply the burden of proof required by applicable federal, state or local law. Like a judge, the arbitrator will have no power to change the Employer's policies and procedures (including this one), to change the law applicable to the facts of the dispute, or to substitute his/her business judgment for that of the Employer. The arbitrator must enforce, and not deviate in any way from, the Procedures herein. The arbitrator will not award relief greater than what the employee would otherwise be entitled to in a court of law.

The question presented is whether the foregoing language is a "clear agreement to limit the [arbitrator's] authority ***and*** expand the scope of judicial review." *Forest Oil Corp.*, 518 S.W.3d at 432 (emphasis added). In *Nafta*, the Texas Supreme Court focused on the "limitations" the agreement placed on the arbitrator's authority and the agreement's reference to "reversible error." The court held the parties expanded the scope of judicial review because the parties agreed an arbitrator did "not have authority to reach a decision based on reversible error." 339 S.W.3d at 92-93. The reference to "reversible error" is a clear reference to the type of review undertaken in reviewing judicial decisions. By prohibiting the arbitrator from making decisions based on reversible error, the agreement expanded the scope of judicial review by allowing the arbitrator's decision to be reviewed the same as a judicial decision. *Id*.

In the instant case, the agreement does not "clearly expand judicial review of an arbitration award to encompass reversible error under standards applicable in a conventional appeal from a final judgment rendered after trial." *Denbury Onshore, LLC*, 513 S.W.3d at 519. Instead, the quoted provision of the agreement is explaining the authority the arbitrator does have. Therefore, because the agreement in question does not contain any language referencing judicial review or a

standard applicable in a conventional judicial review like the reference to "reversible error" in *Nafta*, we hold the agreement was not a "clear agreement to limit the [arbitrator's] authority ***and*** expand the scope of judicial review." *Forest Oil Corp.*, 518 S.W.3d at 432 (emphasis added).

ADDITIONAL ATTORNEY'S FEES

Methodist contends that even in the absence of expanded judicial review, the portion of the trial court's order awarding additional attorney's fees not awarded by the arbitrator must be reversed. We agree.

In her brief, the only argument Friesenhahn makes to defend the portion of the trial court's order awarding her additional attorney's fees is that Methodist did not object to the award at the summary judgment hearing. In order to recover the additional attorney's fees in a summary judgment context, however, Friesenhahn had the burden to establish her entitlement to those fees as a matter of law. *Garcia v. Nat'l Eligibility Express, Inc.*, 4 S.W.3d 887, 889 (Tex. App.—Houston [1st Dist.] 1999, no pet.); TEX. R. CIV. P. 166a. "If an arbitration award includes an award of attorneys' fees, a trial court may not award additional attorney fees for enforcing or appealing the confirmation of the award, unless the arbitration agreement provides otherwise." *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 436 (Tex. App.—Dallas 2004, pet. denied); *see also Gordon v. Nickerson*, No. 03-16-00071-CV, 2017 WL 1549150, at *3 (Tex. App.—Austin Apr. 27, 2017, no pet.) (mem. op.) ("Under well-established case law, if an arbitration award includes an award of attorney fees, a trial court may not award additional attorney fees for enforcing or appealing the confirmation of the award unless the arbitration agreement provides otherwise."); *DiAthegen, LLC v. Phyton Biotech, Inc.*, No. 04-14-00267-CV, 2015 WL 5037645, at *5 (Tex. App.—San Antonio Aug. 26, 2015, pet. denied) (mem. op.) (holding trial court not authorized to award post-arbitration attorney's fees for fees incurred in confirmation proceedings absent bad faith or an agreement for such an award); *D.R. Horton-Tex., Ltd. v. Bernhard*, 423 S.W.3d 532, 536 (Tex. App.—Houston

[14th Dist.] 2014, pet. denied) ("When an arbitrator decides the issue of attorney's fees, a trial court ordinarily may not modify the award to include additional appellate attorney's fees."); *Int'l Bank of Commerce-Brownsville v. Int'l Energy Dev. Corp.*, 981 S.W.2d 38, 55 (Tex. App.—Corpus Christi 1998, pet denied) ("Attorney's fees incurred in the enforcement of an arbitration award cannot be recovered."); *Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 235-36 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (holding trial court may not award additional attorney's fees). Because Friesenhahn was not legally permitted to recover the additional attorney's fees awarded by the trial court, the trial court erred in awarding those fees.

CONCLUSION

The portion of the trial court's order awarding Friesenhahn additional attorney's fees is reversed, and judgment is rendered that Friesenhahn is not entitled to recover any such additional attorney's fees as a matter of law. The remainder of the trial court's order is affirmed.

Sandee Bryan Marion, Chief Justice