

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODNEY BEARD,
Appellant,

vs.

RONALD MOSER, INDIVIDUALLY
AND AS MANAGER OF TUSCAN
VILLAGE DEVELOPMENT GROUP,
LLC; AND TUSCAN ENTERPRISES,
LLC,
Respondents.

No. 52628

FILED

NOV 24 2009

TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order confirming an arbitration award. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant Rodney Beard and respondent Ronald Moser formed an LLC for the development of the Hoy Ranch property.¹ When Beard and Moser's relationship deteriorated, the matter was submitted to arbitration, and the arbitrator determined that Beard had agreed to convey the Hoy Ranch property to the LLC and directed its sale. The district court confirmed the award; Beard appealed, asserting that the arbitrator had no authority over the property, which he owned in community with his wife, Virginia Beard, a nonparty. Specifically, Beard argues that the district court erroneously confirmed an arbitration award concluding that he had contributed community real property to an LLC and directing the sale of that real property, even though Virginia did not

¹The district court properly found that because the Hoy Ranch property is located in California, any transfer of that property would be dictated by the laws of the state of California.

sign the LLC documents and was not a party to the arbitration.² We conclude that all of Beard's arguments are without merit and, as such, affirm the order of the district court.

Standard of review

"[T]he scope of judicial review of an arbitration award is limited and is nothing like the scope of an appellate court's review of a trial court's decision." Health Plan of Nevada v. Rainbow Med., 120 Nev. 689, 695, 100 P.3d 172, 176 (2004) (citing Bohlmann v. Printz, 120 Nev. 543, 546, 96 P.3d 1155, 1157 (2004), overruled on other grounds by Bass-Davis v. Davis, 122 Nev. 442, 452 n. 32, 134 P.3d 103, 109 n. 32 (2006)). We are to play only a narrow role when asked to review an arbitrator's decision. Paperworkers v. Misco, Inc., 484 U.S. 29, 36 (1987).

NRS 38.241(1)(d) dictates that a court shall vacate an arbitration award if the arbitrator exceeded his powers. The purpose of this provision is to ensure that an arbitrator does not "address issues or make awards outside the scope of the governing contract." Health Plan of Nevada, 120 Nev. at 697, 100 P.3d at 178. However, as recently reiterated in Health Plan of Nevada:

[A]llegations that an arbitrator misinterpreted the agreement or made factual or legal errors do not support vacating an award as being in excess of the arbitrator's powers. Arbitrators do not exceed their powers if their interpretation of an agreement, even if erroneous, is rationally grounded in the agreement. The question is whether the arbitrator had the authority under the agreement to decide an issue, not whether the issue was correctly decided.

²The parties are familiar with the facts, and we do not recount them further here, except as pertinent to our disposition.

Id. at 697-98, 100 P.3d at 178 (citations omitted). Therefore, review of an arbitration award under excess-of-authority grounds is rarely granted, as “[a]n award should be enforced so long as the arbitrator is arguably construing or applying the contract.” Id. at 698, 100 P.3d at 178. Accordingly, “[t]he party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award.” Id. at 695, 100 P.3d at 176 (citing E.D.S. Const. v. North End Health Center, 412 N.W.2d 783, 785 (Minn. Ct. App. 1987)). Absent this showing of clear and convincing evidence, “courts will assume that the arbitrator acted within the scope of his or her authority and confirm the award.” Id. at 697, 100 P. 3d at 178.

Confirmation of the arbitration award

Beard argues that a nonparty spouse to an arbitration agreement is not bound by the decision of the arbitrator, and consequently, cannot be compelled to execute a listing agreement or a deed of conveyance. See Baker v. Birnbaum, 248 Cal. Rptr. 336, 337 (Ct. App. 1988) (holding “that the ‘policy [in favor of arbitration] does not extend to those who are not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement.’” (quoting Rhodes v. California Hospital Medical Ctr., 143 Cal. Rptr. 59, 61 (Ct. App. 1978)) (alteration in original); Smith v. Microskills San Diego, L.P., 63 Cal. Rptr. 3d 608, 612 (Ct. App. 2007) (holding that California’s strong policy favoring arbitration must yield to the substantial right to pursue claims in a judicial forum unless the person seeking such right has agreed in writing to arbitrate).

Further, Beard argues that the enactment of California Civil Code Section 5127, now California Family Code Section 1102, superseded

the prior California caselaw that held that Virginia Beard's written authorization to convey the property was not required.³ Beard contends that Moser was aware of Virginia Beard's community property ownership of the Hoy Ranch property. However, he argues that Virginia Beard never gave her consent or authorization for the sale of the Hoy Ranch property, never signed the subject operating agreement, and there is nothing on the unsigned version of the agreement indicating that Beard was signing or was authorized to sign for anyone else as required by California Civil Code section 1624(a).⁴ Consequently, Beard contends that the district court

³California Family Code section 1102(a) states:

Except as provided in Sections 761 and 1103, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses, either personally or by a duly authorized agent, must join in executing any instrument by which that community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered.

⁴California Civil Code section 1624(a) states in pertinent part:

The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:

....

(3) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the

continued on next page . . .

erred when it confirmed the power of the arbitrator to order a sale of the property that was in excess of his powers and to make an award outside the scope of the governing contract.

Additionally, Beard argues that “[c]ommunity property principles of equal management and shared responsibility mandate that the nonconsenting spouse is entitled to invalidate in its entirety the other spouse's transfer of community real property.” Droeger v. Friedman, Sloan & Ross, 812 P.2d 931, 944 (Cal. 1991). As such, Beard argues that the nonconsenting spouse is entitled to void the encumbrance in its entirety. Id. at 932.

The district court concluded, and we agree, that because Virginia Beard was not a party to the arbitration, the issue of her lack of consent was not before the arbitrator, the district court, nor this court. See Weiner v. Beatty, 121 Nev. 243, 250 n. 39, 116 P.3d 829, 833 n. 39 (2005); Trustees v. Developers Surety, 120 Nev. 56, 64 n. 24, 84 P.3d 59, 64 n. 24 (2004). There is no legal or factual basis to support Beard's contention that the arbitrator, Judge Breen, exceeded his powers as an arbitrator in this matter because the arbitration took place pursuant to the express terms of the LLC operating agreement. Judge Breen did as was asked by the parties and stayed within the scope of the party's submissions. As such, a reviewing court is correct in refusing to vacate the award. IBEW Local 396 v. Central Tel. Co., 94 Nev. 491, 494, 581 P.2d 865, 867 (1978).

... continued

authority of the agent is in writing, subscribed by
the party sought to be charged.

In addition, as the record reveals that Beard participated in the arbitration process without raising an objection over the arbitrator's authority to adjudicate until after the decision, we conclude that Beard waived his right to contest arbitrability. See Fortune, Alsweet & Eldridge, Inc. v. Daniel, 724 F.2d 1355, 1357 (9th Cir. 1983) (stating that "[w]e have long recognized a rule that a party may not submit a claim to arbitration and then challenge the authority of the arbitrator to act after receiving an unfavorable result"). "A claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrators to act." Ficek v. Southern Pacific Company, 338 F.2d 655, 657 (9th Cir. 1964); see also Nghiem v. NEC Electronic, Inc., 25 F.3d 1437, 1440 (9th Cir. 1994) (holding that plaintiff could not challenge the authority of the arbitrator because the plaintiff had initiated the arbitration, attended the hearings with representation, presented evidence, and submitted a closing brief before filing suit).

We agree with the Ninth Circuit that it would be unreasonable and unjust to allow a voluntary participant in an arbitration to challenge the legitimacy of the arbitration at a late stage in the process. Fortune, Alsweet & Eldridge, Inc., 724 F.2d at 1357; Sheet Met. Workers, Loc. 252 v. Standard Sheet Metal, 699 F.2d 481, 482 (9th Cir. 1983). It would frustrate the policy of supporting the enforcement of arbitration awards for the speedy resolution of cases. Fortune, Alsweet & Eldridge, Inc., 724 F.2d at 1357; Sheet Met. Workers, Loc. 252, 699 F.2d at 482.

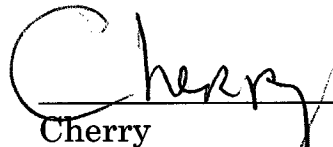
Furthermore, the California Supreme Court has held that a transfer of real property without spousal consent is valid, subject only to the nonconsenting spouse's right to seasonably institute an action in equity to revoke the deed. Lahaney v. Lahaney, 281 P. 67, 69 (Cal. 1929); Droeger, 812 P.2d at 944, 949 (Kennard, J. dissenting). Thus, if the

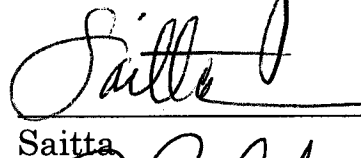
transfer does not comply with the statute, it is not void, but merely voidable. Droeger, 812 P.2d at 932; Harris v. Harris, 369 P.2d 481, 482 (Cal. 1962). As such, we conclude that Virginia Beard's proper remedy is to quiet title to the Hoy Ranch property in California where the property is located.⁵

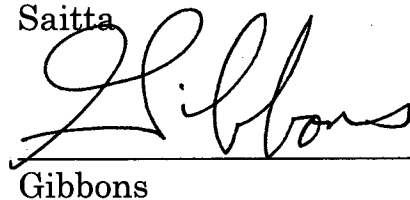
Therefore, we conclude that Beard has not demonstrated sufficient cause with clear and convincing evidence that the arbitration award should be vacated.

In light of the foregoing discussion, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Cherry

 _____, J.
Saitta

 _____, J.
Gibbons

⁵We note that, in fact, Virginia Beard has already begun to institute these proceedings.

cc: Hon. Connie J. Steinheimer, District Judge
Leonard I. Gang, Settlement Judge
Bradley Paul Elley
Wait Law Firm
Weintraub Genshlea Chediak Law Corporation
Washoe District Court Clerk