

Circuit Court for Montgomery County
Case No. 430148-V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 01919

September Term, 2017

AMERICAN HOME & HARDSCAPE, LLC

v.

SEYIDO ELESINMOGUN, ET AL.

Berger,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: January 31, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises out of an action filed in the Circuit Court for Montgomery County by appellant, American Home & Hardscape, LLC (“American Home”) to vacate an arbitration award in favor of appellees, Seyido and Cynthia Elesinmogun (the “Homeowners”). After holding an evidentiary hearing, the circuit court denied American Home’s petition to vacate the arbitration award. On appeal, American Home poses three questions, which we consolidate and rephrase as follows¹:

Whether the circuit court erred in denying American Home’s petition to vacate the arbitration award.

For the reasons explained herein, we affirm.

¹ The issues, as framed by American Home, are as follows:

1. Did the trial court err in failing to find that the arbitrator abused his discretion in refusing to schedule the arbitration hearing for a time other than when appellant’s primary witness (owner of the company) was scheduled to be out of the country on a pre-arranged/prepaid trip?
2. Did the trial court err in failing to find that the arbitrator abused his discretion by refusing to continue the arbitration hearing for a short period time to allow for the presentation of evidence by appellant’s primary witness who was out of the country on the aforesaid pre-arranged/prepaid trip?
3. Did the trial court err in failing to find that the arbitrator abused his discretion by refusing to continue the arbitration hearing for a short period of time to allow appellant to review appellee’s discovery submissions which appellant was unable to access until just two days before the arbitration hearing?

FACTS AND PROCEEDINGS

In April 2015, the Homeowners entered into a construction and home improvement contract with American Home. For reasons that are not pertinent to this case, a dispute over payment arose following American Home's completion of the work. Thereafter, the parties agreed to arbitrate the dispute before J. Richard Marguiles, Esquire (the "arbitrator"), and to follow the rules of the American Arbitration Association ("AAA").

On November 16, 2016, the arbitrator conducted a conference call with American Home and the Homeowners to set the date of the arbitration hearing. The arbitrator discussed that pursuant to AAA rules, the case was set for the "fast track." These expedited procedures provide that when a party claims less than \$75,000, a hearing must take place within 30 days of the arbitrator's date of appointment. Both American Home and the Homeowners had the assistance of counsel on the call. The parties, through counsel, agreed to hold the hearing on December 21, 2016.

Following the conference call, the arbitrator sent a letter to the parties providing as follows:

* * *

A preliminary hearing was held by telephone conference on November 16, 2016. All parties appeared and participated by their respective counsel. All matters recited below were the subject of mutual agreement.

1. This is a fast track case. The arbitration hearing will take not more than one day. The hearing is scheduled to commence at 9:30 [a.m.] on December 21, 2016[.]

* * *

2. On or before 5:00 [p.m.] December 14, 2016, the parties shall exchange: (1) a list of witnesses which shall

include a statement of the topics each such witness will testify to; and (2) a copy of all exhibits.

If any of the foregoing is not in accordance with any party’s understanding of the preliminary hearing, that party should immediately email the Arbitrator (with a copy to AAA and all other parties) following the “Direct Exchange Protocol.”

* * *

(Emphasis in original.) There is no evidence in the record that either party emailed the arbitrator to request a postponement of the hearing date or otherwise express concerns.

Thereafter, American Home submitted its pre-arbitration hearing statement, which listed Michael Middledorf and Richard Kaufmann as individuals whom American Home intended to call as witnesses. American Home described Mr. Middledorf as the company’s project manager and the individual who “oversaw the project and renovations of the [Homeowners’] real property.” American Home further provided in the statement that Mr. Middledorf “was the contact person that dealt with the [Homeowners’] on most issues.” Mr. Kaufmann was described as the “owner and Managing Member of American Home[.]” Finally, American Home noted that Mr. Kaufmann “had minimal contact with the [Homeowners].”

On December 14, 2016, Thomas L. Wilson, counsel for the Homeowners, emailed Craig Holcomb, counsel for American Home in the arbitration proceeding.² In the email, Mr. Wilson attached a copy of the Homeowners’ exhibit list and witness list. Mr. Wilson

² Mr. Holcomb does not represent American Home on appeal.

further included a hyperlink for American Home to access the Homeowners' exhibits. In addition, Mr. Wilson offered to "FedEx hard copies of the exhibits."

The arbitration proceeded according to the schedule with the hearing taking place on December 21, 2016. Both parties were present and represented by counsel. Mr. Kaufmann did not testify, however, because he was out of the country on a vacation. Nevertheless, American Home argued its case. Indeed, American Home introduced evidence, cross-examined the Homeowners' witnesses, and had Mr. Middledorf testify.

On January 11, 2017, the arbitrator issued the Homeowners an award in the amount of \$25,724.33. The arbitrator further awarded the Homeowners \$2,050.00 in administrative fees.

On February 10, 2017, American Home filed a petition to vacate the award in the Circuit Court for Montgomery County. American Home alleged that it requested that the arbitration hearing be postponed due to Mr. Kaufmann's absence and American Home's inability to review the Homeowners' exhibits in a timely manner. The Homeowners' filed a counterclaim requesting that the circuit court confirm the award.

After holding a hearing, the circuit court denied American Home's petition to vacate the award and granted the Homeowners' motion to confirm the award. This appeal followed.

STANDARD OF REVIEW

American Home challenges the arbitrator's refusal to postpone the arbitration hearing. "[T]he decision whether to grant a postponement of the hearing is within the discretion of the arbitrator." *Letke Sec. Contractors, Inc. v. United States Sur. Co.*, 191

Md. App. 462, 474 (2010). “An abuse of discretion exists when no reasonable person would take the view adopted by the [arbitrator], or when the [arbitrator] acts without reference to any guiding rules or principles.” *Id.* (citations and quotations omitted). We have observed that this standard is “among the narrowest known to the law.” *Id.* at 472 (citations and quotations omitted). Moreover, “[a] party asserting that error was committed by an arbitration panel bears the burden of showing, by the record, that the error occurred.” *Id.* (quoting *Kovacs v. Kovacs*, 98 Md. App. 289, 303 (1993)).

DISCUSSION

We first consider American Home’s contention that the arbitrator abused his discretion by refusing to postpone the hearing and accommodate Mr. Kaufmann’s vacation. American Home alleges that it requested a postponement on the morning of the hearing because Mr. Kaufmann was out of the country. According to American Home, the arbitrator unfairly deprived the company of its “primary witness.” We disagree.

Under Md. Code (1973, 2013 Repl. Vol.), § 3-224(b)(4) of the Courts and Judicial Proceedings Article (“CJ”), a court shall vacate an award if:

The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 3-213 of this subtitle, as to prejudice substantially the rights of a party[.]

Accordingly, American Home bears the burden of proving: (1) that there was sufficient cause to postpone the hearing; and (2) that the arbitrator’s refusal to postpone the hearing substantially prejudiced American Home. *Letke Sec. Contractors, Inc.*, 191 Md. App. at 473.

We first observe that to contest the validity of an arbitration award, a petitioner must “provide a transcript or record of what transpired at the proceedings.” *Kovacs*, 98 Md. App. at 303. It is insufficient for the petitioner to merely proffer testimony at a subsequent circuit court review hearing. *Id.* In essence, reviewing the merits of an arbitration award “without any knowledge of what was said or submitted at the arbitration hearing, might itself be deemed ‘irrational.’” *Downey v. Sharp*, 428 Md. 249, 267 (2012).

In *Kovacs*, we reviewed a party’s petition to vacate an arbitration award. 98 Md. App. at 302. The petitioner alleged that the arbitration panel abused its discretion by refusing to allow her attorney to make opening or closing statements or cross-examine witnesses. *Id.* The petitioner did not, however, provide a transcript or record of the arbitration hearing to substantiate this allegation. *Id.* at 303. Rather, the petitioner proffered an affidavit of her attorney. *Id.* We refused to consider the affidavit, holding that the petitioner failed to provide a record of the arbitration proceeding, and “in the absence of a record, [the petitioner] has simply failed to support her allegations that her counsel was not allowed to cross-examine witnesses or otherwise represent her effectively.” *Id.*

In this case, we are unable to determine whether the arbitrator abused his discretion because American Home has failed to provide any transcript or record of the arbitration proceeding. Without a record, we lack the ability to even find that the arbitrator exercised any discretion at all. Instead of providing a transcript of the arbitration hearing, American Home relies exclusively on witness testimony from the evidentiary hearing in the circuit court. As we held in *Kovacs*, “[t]he failure to provide the court with a transcript [of the

arbitration proceeding] warrants summary rejection of the claim of error.” 98 Md. App. at 303. *See also Wicomico Cty. Educ. Ass’n v. Bd. of Educ. of Wicomico Cty.*, 59 Md. App. 564, 567 (1984) (“[The petitioners’] failure to order the transcript may not be converted into their advantage, i.e., a *de novo* hearing where the judge hears anew the testimony and assesses his evaluation of the credibility of the witnesses rather than relying upon that of the arbitrator.”). We, therefore, hold that the circuit court did not err in denying American Home’s petition to vacate the arbitration award.

Even if we consider the testimony that American Home’s witnesses proffered at the circuit court hearing, for the reasons that follow, the circuit court did not err in denying American Home’s petition to vacate the arbitration award. In our view, American Home has failed to demonstrate that there was sufficient cause to postpone the hearing. *See* CJ § 3-224(b)(4). Indeed, on November 16, 2016, American Home and its counsel participated in a conference call with the Homeowners and the arbitrator. American Home allegedly disclosed that Mr. Kaufmann would not be available to attend or testify at a hearing in December 2016 because he planned to be out of the country. Nevertheless, December 21, 2016 was selected as the hearing date and the record reflects that this date was “the subject of mutual agreement.” In essence, American Home explicitly consented to proceed without Mr. Kaufmann. Thus, Mr. Kaufmann’s absence could not possibly generate sufficient cause to postpone the arbitration proceeding. Accordingly, the arbitrator did not abuse his discretion in requiring the hearing to proceed on December 21, 2016 without Mr. Kaufmann.

Furthermore, to the extent that American Home argues that it was prejudiced by the arbitrator’s refusal to postpone the hearing, we disagree. Critically, Mr. Kaufmann testified at the circuit court hearing that he “didn’t think [the hearing] had to be postponed because we had our evidence.” Further, American Home noted on its pre-hearing statement that Mr. Kaufmann “had minimal contact with the [Homeowners].” This evidence directly contradicts American Home’s contention that Mr. Kaufmann was its primary witness. Moreover, American Home knew on November 16, 2016 -- 35 days before the hearing -- that Mr. Kaufmann did not plan to attend the hearing. Thus, American Home had over a month to prepare and devise a strategy for the hearing without Mr. Kaufmann. Put simply, American Home was neither surprised by Mr. Kaufmann’s absence nor placed in an unfair position. We, therefore, hold that the arbitrator did not abuse his discretion in denying American Home’s postponement request.³

American Home further contends that the arbitrator abused his discretion by refusing to postpone the hearing to provide American Home time to review the Homeowners’ exhibits. American Home takes the position that it had only one day to review a twenty-seven-page expert report. Consequently, American Home argues that the arbitrator should have provided American Home additional time to review the report. We disagree. In short, the record is devoid of any evidence to support this contention.

³ American Home further contends that the arbitrator abused his discretion in initially scheduling the hearing to occur on a date when Mr. Kaufmann would not be available to testify. In this opinion, we hold that Mr. Kaufmann’s absence did not substantially prejudice American Home. For this reason, we further hold that the arbitrator did not abuse his discretion in initially scheduling the arbitration hearing for December 21, 2016.

To be sure, American Home relies on Mr. Middledorf’s testimony from the circuit court hearing. Mr. Middledorf testified that American Home requested that the arbitrator postpone the hearing because “the night before [the arbitration hearing], we were given two lengthy expert report[s] ... that we had basically less than 24 hours to review.” Mr. Middledorf further testified that American Home “didn’t know what [the Homeowners] were coming to the table with.”

Mr. Middledorf’s testimony is completely contradicted by the record. In fact, American Home had a week to review the Homeowners’ exhibits. On December 14, 2016 at 2:40 p.m., Mr. Wilson -- counsel for the Homeowners -- emailed American Home’s attorney and provided a hyperlink for American Home to download the Homeowners’ exhibits. In the email, Mr. Wilson offered to “FedEx hard copies of the exhibits.” Mr. Wilson further advised American Home’s attorney to notify Mr. Wilson if there was “any difficulty accessing the exhibits through the above link.” There is no evidence in the record that American Home’s attorney requested that hard copies be mailed. Moreover, it is unclear whether American Home’s attorney responded to Mr. Wilson’s email, or even attempted to download the exhibits until the day before the hearing. Clearly, the arbitrator did not abuse his discretion in refusing to postpone the hearing. We, therefore, hold that the circuit court did not err in denying American Home’s petition to vacate the arbitration award.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**