Reversed and Rendered and Memorandum Opinion filed June 10, 2025.

In The

Fourteenth Court of Appeals

NO. 14-24-00174-CV

THOMAS AND ROBIN LUTZ, Appellants

V.

RWH HOMEBUILDERS, LP, RWH BUILDERS, LLC, ROHE & WRIGHT HOMEBUILDERS, LP, AND ROHE & WRIGHT BUILDERS, LLC, Appellees

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On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 2015-65727

M E M O R A N D U M O P I N I O N

This is an appeal from the denial of a motion to confirm an arbitration award. In a single issue, appellants Thomas and Robin Lutz contend that the trial court erred in refusing to confirm an arbitration award favoring the Lutzes in their lawsuit against appellees, RWH Homebuilders, LP; RWH Builders, LLC; Rohe & Wright Homebuilders, LP; and Rohe & Wright Builders, LLC (collectively, "RWH"). We reverse the trial court's order denying confirmation and render

judgment confirming the arbitrators' award.

Background

There were two arbitration proceedings in this case. The first resulted in an arbitration award favoring RWH on construction defect and warranty claims by the Lutzes. The second resulted in an arbitration award favoring the Lutzes on a breach of contract claim against RWH. When the Lutzes moved to confirm the second award, RWH objected on res judicata grounds, citing the first arbitration award and a bankruptcy case. We will begin by setting out the facts in more detail before turning to a recitation of applicable law and our analysis.

In September 2007, Thomas Lutz purchased a home from Rohe & Wright Homebuilders, LP pursuant to a residential sales contract that contained an arbitration clause. The Lutzes subsequently filed suit against RWH in November 2015, alleging several "water intrusion events" at the residence and faulty warranty repair work.[1] The pleaded causes of action included breaches of statutory and common law warranties, breach of contract, deceptive trade practices, and negligence. RWH then filed a motion to compel arbitration pursuant to the arbitration clause in the contract. That clause states in part as follows:

> The Purchaser and Builder agree that all controversies, claims (and any related settlements), or matters in question arising out of or relating to (i) this Contract, (ii) any breach or termination of this Contract, (iii) the construction of the Home and/or its repairs, (iv) any acts or omissions by the Builder (and its officers, directors or agents), and/or (v) any actual or purported representations or warranties, express or implied, relating to the Property and/or the Home (herein

[1] In addition to Rohe & Wright Homebuilders, LP, the remaining RWH entities were named in the lawsuit due to alleged assignment of rights and obligations and general affiliation among them. Robin Lutz was apparently added to the lawsuit due to her community property interest in the home. Neither side has raised any issue regarding the naming of particular parties in this litigation.

> referred to collectively as a "Dispute") shall be submitted to binding arbitration. . . . In the event one or both Parties do not desire to mediate, or the Dispute is not resolved by direct discussions and/or mediation, the Dispute shall be submitted to the AAA [American Arbitration Association] for binding arbitration in accordance with the Construction Industry Arbitration Rules of the AAA. . . . The arbitration shall be governed by Texas law and the U.S. Arbitration Act, 9 U.S.C. §§1-16, to the exclusion of any provisions of state law that are inconsistent with the application of the Federal Act.

The purchase contract also contains an option for RWH to repurchase the property in the event construction defects are discovered that exceed 10 percent of the home's fair market value. This provision further provides that if the option is chosen, RWH would be required to pay the Lutzes the original purchase price plus all closing costs, the cost of any permanent improvements the Lutzes made, reasonable moving expenses, attorney's fees, and inspection costs.

According to the Lutzes, RWH elected to exercise the option to repurchase on January 23, 2017, but then subsequently breached the contract by failing to abide by the terms of the option. The Lutzes further explain that they did not include this breach claim in their statement of claims to the first arbitrator because the exercise of the option did not occur until after the deadline had passed to add claims for affirmative relief in the first arbitration. The Lutzes, however, made this breach of contract claim the basis for a second statement of claims that they filed with the AAA. A panel of arbitrators was then selected and a second arbitration proceeding occurred. In its answering statement in the second arbitration, RWH raised res judicata as an affirmative defense.

In the arbitrator's award following the first arbitration, the arbitrator found against the Lutzes on all of their claims, principally on statute of limitations grounds. The arbitrator ruled that the Lutzes take nothing on their claims and also that RWH take nothing on its counterclaim for attorney's fees. RWH moved for

confirmation of this award, and the trial court issued a judgment confirming the award.

In the second arbitration proceeding, RWH failed to appear for the final hearing. The arbitrators found that RWH had indeed elected to exercise the repurchase option and breached the contract by not abiding by the terms of that election, but before the arbitrators could issue their award, RWH filed for bankruptcy and the arbitration proceedings were automatically stayed. Once the stay was lifted, the arbitrators issued an award holding that RWH breached the contract by failing to honor its election of the option to repurchase. As relief, the arbitrators ordered the parties to effect specific performance, with the Lutzes required to deed the property to RWH and RWH required to pay the Lutzes $1,350,000 for the home; $868,133.39 as reimbursement for permanent improvements, moving expenses, and inspection costs; and attorney's fees of $207,558. Although the arbitration award does not specifically reference RWH's res judicata defense, the Lutzes contend the arbitrators considered and rejected it. The Lutzes then filed a motion to confirm the award with the trial court.

In its brief response to the Lutzes' motion to confirm the second arbitration award, RWH argued that the second arbitration award was barred by the doctrine of res judicata based on both the first arbitration award and confirmation judgment and the bankruptcy proceedings. Beyond asserting res judicata, RWH did not offer any substantive analysis of the claims or issues in the three proceedings. RWH also did not file any documents from the bankruptcy proceedings or offer any explanation as to how those proceedings could be res judicata as to the second arbitration. After a significant delay in obtaining a ruling, the Lutzes filed a petition for writ of mandamus with this court, asking that the trial court be ordered to rule on the motion to confirm the second arbitration award. After we granted the

requested relief, *In re Lutz*, No. 14-23-00364-CV, 2023 WL 4652043, at *1 (Tex. App.—Houston [14th Dist.] July 20, 2023, orig. proceeding) (per curiam), the trial court denied the Lutzes' motion to confirm the second arbitration award on December 6, 2023. The trial court's order does not state the basis therefor.

In a single issue, the Lutzes contend the trial court erred in refusing to confirm the second arbitration award because RWH's motion to vacate did not assert any valid grounds for refusing to confirm an arbitration award and was not timely filed. RWH did not file an appellate brief.

Applicable Law

We review a trial court's decision to confirm or vacate an arbitration award under a de novo standard of review. *D.R. Horton-Tex., Ltd. v. Bernhard*, 423 S.W.3d 532, 534 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Texas law strongly favors arbitration; thus, review of an award must be extraordinarily narrow and exceedingly deferential. *See, e.g.*, *Hoskins v. Hoskins*, 497 S.W.3d 490, 494 (Tex. 2016); *Vargas v. Rigid Glob. Buildings, LLC*, 654 S.W.3d 1, 6 (Tex. App.—Houston [14th Dist.] 2022, pet. denied). Accordingly, we indulge all reasonable presumptions in favor of upholding the award and none against doing so. *Moody Nat'l Grapevine MT, LP v. TIC Grapevine 2, LP*, 651 S.W.3d 450, 454 (Tex. App.—Houston [14th Dist.] 2022, pet. denied); s*ee also Southwinds Express Constr., LLC v. D.H. Griffin of Tex., Inc.*, 513 S.W.3d 66, 70 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *CVN Grp., Inv. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002)).

As shown above, the arbitration provision in this case specified that any arbitration between the parties was to "be governed by Texas law and the U.S. Arbitration Act, 9 U.S.C. §§1-16, to the exclusion of any provisions of state law that are inconsistent with the application of the Federal Act." The provisions of the

Federal Arbitration Act (FAA) and the Texas Arbitration Act (TAA) potentially applicable to this case are remarkably consistent with one another. Nonetheless, we will concentrate on the provisions of the FAA, which would control in the event of any inconsistencies. *See Courtland Bldg. Co. v. Jalal Fam. P'ship*, 403 S.W.3d 265, 269–70 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (holding identical language in arbitration provision expressed agreement that the FAA applied to the arbitration).[2]

The FAA requires that an arbitration award must be confirmed unless it is vacated, modified, or corrected pursuant to specifically enumerated statutory grounds. *See* 9 U.S.C. §§ 9–11; *Vargas*, 654 S.W.3d at 6. The grounds on which a trial court may vacate an arbitration award under the FAA are limited to those expressly identified in section 10, to the exclusion of all other potential grounds. *Vargas*, 654 S.W.3d at 6 (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008)). The party seeking vacatur of an award bears a heavy burden to prove one of the enumerated grounds. *See, e.g.*, *id*.

Section 10(a) of the FAA provides that a trial court may vacate an arbitration award:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (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

[2] We note that the Lutzes support their arguments mostly with citation to the TAA and related cases and not the FAA, but the actual arguments work equally as well under the FAA.

> (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). To demonstrate that arbitrators exceeded their powers under subsection (4), it is not enough to show that the arbitrators committed error, even grave error. *Vargas*, 654 S.W.3d at 6 (citing *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013)). Arbitrators exceed their powers when they decide a matter not properly before them. *Id*. at 6–7. The arbitrators' authority is limited to a decision of the matters properly submitted to arbitration either expressly or by necessary implication. *See id*. at 7.

Analysis

As discussed above, the only ground that RWH raised for vacating or denying confirmation of the second arbitration award in this case was res judicata. Res judicata generally precludes relitigating claims that have been finally adjudicated, or that arise out of the same subject matter and should have been litigated in the prior action. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). The party relying on the affirmative defense of res judicata must prove (1) a prior final determination on the merits by a court of competent jurisdiction, (2) identity of parties or those in privity with them, and (3) a second action based on the same claims as were or could have been raised in the first action. *Id*. An arbitration award generally has preclusive effect for purposes of res judicata. *Premium Plastics Supply, Inc. v. Howell*, 537 S.W.3d 201, 204 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld*, 105 S.W.3d 244, 270 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).

The current consensus among Texas and federal courts that have considered

the issue is that in arbitration proceedings, unless the arbitration agreement stipulates otherwise, res judicata is generally an affirmative defense for the arbitrators to decide, not the court. *See, e.g.*, *Robinson v. Home Owners Mgmt. Enters., Inc.*, No. 02-20-00215-CV, 2021 WL 924839, at *5–9 (Tex. App.—Fort Worth Mar. 11, 2021, pet. denied) (mem. op.) (collecting and discussing cases); *Aspri Invs., LLC v. Afeef*, No. 04-10-00573-CV, 2011 WL 3849487, at *1 (Tex. App.—San Antonio Aug. 31, 2011, pet. dism'd) (mem. op.) (same), *abrogated on other grounds by Hoskins v. Hoskins*, 497 S.W.3d 490 (Tex. 2016); *W. Dow Hamm III Corp. v. Millennium Income Fund, L.L.C.*, 237 S.W.3d 745, 753–55 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding) (same); *see also Constellium Rolled Prods. Ravenswood, LLC v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO/CLC*, 18 F.4th 736, 740–41 (4th Cir. 2021) (holding that unless the arbitration agreement stipulates otherwise, res judicata is an issue for the arbitrator to decide); *Grigsby & Assocs., Inc. v. M Sec. Inv.*, 664 F.3d 1350, 1353 (11th Cir. 2011) ("[R]es judicata is a question for the arbitrator, in the absence of an agreement to the contrary between the contracting parties."). The reasoning behind the rule is that the question of res judicata is a matter of procedural arbitrability, such matters being for the arbitrators, rather than a matter of substantive arbitrability, which are for the court. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (holding that unless the arbitration agreement provides otherwise, the court must determine only matters of substantive arbitrability, such as whether dispute falls within scope of arbitration provision, while the arbitrator determines matters of procedural arbitrability—those that "grow out of the dispute and bear on its final disposition," such as delay, time limits, notice, laches, estoppel, etc.); *see also G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 519–20 (Tex. 2015); *Constellium Rolled Prods.*, 18 F.4th at 740–41; *Grigsby & Assocs.*, 664 F.3d at

1352–53; *Robinson*, 2021 WL 924839, at *4–8; *Aspri Invs.*, 2011 WL 3849487, at *5; *W. Dow Hamm III Corp.*, 237 S.W.3d at 753–54.

Some courts have recognized a limited exception to the rule when the prior judgment arose from a court proceeding, rather than an arbitration. *See, e.g.*, *Aspri Invs.*, 2011 WL 3849487, at *5 (discussing but not necessarily adopting exception); *W. Dow Hamm III Corp.*, 237 S.W.3d at 755 (same). The rationale for the exception is that a court is inherently empowered to protect the integrity and finality of its own prior judgment, and this policy outweighs even the strong policy favoring arbitration. *Aspri Invs.*, 2011 WL 3849487, at *5; *W. Dow Hamm III Corp.*, 237 S.W.3d at 755. The exception does not apply, however, when the prior judgment simply confirmed a prior arbitration award, as occurred here. *Aspri Invs.*, 2011 WL 3849487, at *5; *W. Dow Hamm III Corp.*, 237 S.W.3d at 756.

Here, as stated, RWH asserted res judicata in their response to the Lutzes' motion to confirm based on both the first arbitration award and confirmation judgment and the bankruptcy proceedings. To the extent the trial court based its denial of the motion to confirm on res judicata from the prior arbitration award and confirmation judgment, it erred in doing so because that issue was for the arbitrators and not the court. *See, e.g.*, *Constellium Rolled Prods.*, 18 F.4th at 740–41; *Grigsby & Assocs.*, 664 F.3d at 1352–53; *Robinson*, 2021 WL 924839, at *4–8; *Aspri Invs.*, 2011 WL 3849487, at *5; *W. Dow Hamm III Corp.*, 237 S.W.3d at 753–54. RWH does not identify, and we do not discern, anything in the arbitration agreement that would assign the question of res judicata to the court rather than the arbitrators. Additionally, the trial court's judgment simply confirmed the arbitration award and did not address any new issues.

To the extent the trial court based its denial of the motion to confirm on the result of the bankruptcy proceeding, it also erred because, apart from two

conclusory sentences in its response to the motion to confirm, RWH did not provide any explanation, analysis, or support for its assertion that the result in the bankruptcy proceeding was res judicata as to the issues raised in the Lutzes' second statement of claims. In particular, RWH did not provide any documents from the bankruptcy proceedings, so the court had no basis on which to conclude that the Lutzes' new claims were barred by res judicata. Moreover, since the alleged prior judgment here, the bankruptcy judgment, was not a judgment by this trial court, the supposed rationale for the exception was not applicable. *See Aspri Invs.*, 2011 WL 3849487, at *5 (explaining that the exception stems from the trial court's inherent power to protect its own judgment); *W. Dow Hamm III Corp.*, 237 S.W.3d at 755 (same).

As indicated, RWH did not raise any other grounds for denying confirmation of the second arbitration award. *See* 9 U.S.C. § 10(a) (listing grounds for vacating an arbitration award); *Vargas*, 654 S.W.3d at 6 (explaining that the permissible grounds are limited to those in section 10(a)). Because the trial court erred in denying the motion to confirm the second arbitration award, we sustain the Lutzes' sole issue.

Conclusion

We reverse the trial court's order denying confirmation of the second arbitration award and render judgment confirming the arbitrators' second award. *See* Tex. R. App. P. 43.3; *E. Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 274 (Tex. 2010) (affirming appellate court's judgment reversing and rendering confirmation of award); *Robinson*, 2021 WL 924839, at *16 (reversing and remanding for referral of res judicata issue to arbitrator).

/s/ Maritza M. Antú
Justice

Panel consists of Justices Wise, McLaughlin, and Antú.