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#20,678

June 17, 2009

Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Rev. Martin Luther King Jr. Blvd.
St. Paul, Minnesota 55155

Dear Clerk:

**RE: Ann S. Phillips and Felix M. Phillips, Respondents, vs. Kathleen A. Dolphin,
Michael Jonsson and John Doe, Appellants; Case Number A09-689**

Pursuant to Rule 128.01, Subd. 2 of the Minnesota Rules of Civil Appellate Procedure,
Respondents respectfully submit the following letter argument and attached Appendix:

Statement of Facts

Respondents and Appellants own adjoining parcels of residential real estate in Minneapolis, Minnesota. Appellants deliberately destroyed survey stakes placed by Respondents' surveyor on Respondents' side of the common boundary line between the properties. Respondents sued Appellants for trespass, money damages, violation of municipal ordinances, and for nuisance. Appellants counterclaimed, seeking money damages and challenging the location of the parties' common lot line, claiming that Respondents' fence encroached on Appellants' property and seeking its removal.

By agreement of the parties, the matter was decided by binding arbitration before the Honorable Robert H. Lynn (Retired Judge of District Court), as arbitrator. Three surveyors were

called as arbitration witnesses (two by Appellants and one by Respondent), and they testified at length on the question of the true location of the common boundary line. The arbitrator, surveyors, counsel and parties also visited the site to inspect the lot line and lot corner monuments, and two boundary surveys were placed into evidence.

The arbitrator specifically found that the Respondents' survey accurately located the common boundary line between the properties, that the Respondents' fence was properly located on their side of the line, and that Appellants deliberately trespassed and destroyed Respondents' property, awarding treble damages to Respondents in the amount of \$1,260.00.

The arbitration award also dismissed all other claims and counterclaims, including specifically the Appellants' counterclaim that Respondents' fence was encroaching onto their property.

The arbitrator's decision, as set forth in his Findings of Fact, Conclusions of Law and Arbitrator's Award, was issued on August 6, 2008. Appellants did not bring a motion to vacate or modify the arbitration award within the time allowed by statute, or at any time thereafter. Accordingly, on January 14, 2009, Respondents moved for an order confirming the arbitration award and for the entry of judgment in conformity therewith.

Respondents' motion was heard by the Honorable Denise Reilly, the judge to whom the case had been assigned and who had duly ordered the alternative resolution of this case through binding arbitration. By Order dated February 13, 2009, Judge Reilly granted Respondents' motion and duly confirmed the arbitrator's Finding of Facts, Conclusions of Law and Arbitrator's Award in all respects, and entered judgment in conformity with that award.

Argument

1. May the Appellants, in effect, take an appeal from a binding arbitration award, long after the legal deadline to vacate or modify the award has passed?

Minnesota Statutes, Chapter 572 provides that if a party does not apply within 90 days to vacate or modify an arbitration award, the trial court *shall confirm* the award. See Minnesota Statutes §§ 572.18 (emphasis added); 572.19; subd. 2; and 572.20, subd. 20. In the instant case, the arbitrator's award (which included a dismissal of Appellants' encroachment counterclaim and a rejection of their surveyor's finding regarding the location of the common lot line), was issued on August 6, 2008. Appellants did not apply to vacate or modify that award within the required ninety-day period, or at any time thereafter.

In response to Respondent's motion to confirm the award, however, Appellants objected to confirmation on the chief ground that the "sole means" of determining boundaries between registered properties was by a proceeding under Minnesota Statutes Section 508.671.¹ Such an objection—and the Appellants' present appeal of the trial court's order confirming the arbitration award-- amounts to an attempt to vacate or modify the arbitrator's decision without following the required statutory procedure, well after the 90-day statutory period for doing so has passed, and should not be considered or permitted by the Court of Appeals.

2. Where the parties voluntarily submitted their controversy regarding the location of the common boundary line to binding arbitration, and where the arbitrator's decision included an express determination of that issue, did the District Court have the authority to confirm the award in its order and judgment, including the arbitrator's boundary determination?

Minnesota law favors arbitration. Lucas v. American Family Mut. Ins. Co., 403 N.W.2d 646, 647 (Minn. 1987). Contract law principles clearly apply to agreements to arbitrate, and the scope of the arbitrators' powers is a matter of contract to be determined from a reading of the

¹ See Defendants' Memorandum and Motion Opposing Plaintiff's Motion to Confirm Award, p. 1.

parties' arbitration agreement." *Id.* at 648; State v. Minnesota Ass'n of Prof. Employees, 504 N.W.2d 751, 755 (Minn. 1993). A reviewing court refers to the arbitration agreement to define the extent of the arbitrator's authority. Eide v. State Farm Mut. Auto Ins. Co., 492 N.W.2d 549, 554 (Minn. App. 1992).

In the instant case, the parties' arbitration agreement expressly provided that "[t]he parties hereto agree to arbitrate, and hereby submit for final determination, the controversy between the parties and their respective claims."² The issue of the common boundary line was raised by the Appellants themselves in their Answer and Counterclaim, which referenced a survey and alleged encroachment of the Respondents' fence over the common lot line,³ and formed the heart of the controversy between the parties. The opposing claims to determine the proper location of the boundary line were litigated by the express and implied consent of both parties from the inception and during the entire course and arbitration of this lawsuit. Prior to arbitration, the Appellants *specifically acknowledged* in writing their consent to binding arbitration of the issues, which included "determining the correct lot line."⁴ As such, a determination of the proper boundary line lay squarely within the scope of the parties' arbitration contract, and the contract gave the arbitrator full authority to determine that issue.⁵

At the arbitration, the arbitrator took testimony from three surveyors, visited the site with the surveyors and counsel to inspect the lot line and lot corner monuments, and received and

² See Agreement to Arbitrate dated July 8, 2009, attached as Exhibit B to Affidavit of Steven G. Potach.

³ See paragraph 9 and prayer for relief C, Answer and Counterclaim.

⁴ See Appellants' Arbitration Submission, p. 4, attached as Exhibit A to Supplemental Memorandum of Steven G. Potach.

⁵ In fact, Judge Lynn himself wrote the arbitration agreement, evidently wishing to be absolutely clear on what he was to decide in this case. If the Appellants had wished to object to the entry of the surveyors' evidence at any stage of the arbitration proceeding, they could have done so, and Judge Lynn would have ruled on the matter.

reviewed two lot line surveys. There was thus ample evidence produced at arbitration to enable Judge Lynn to make a careful and informed decision on the lot line issue.

In dismissing the Appellants' counterclaim alleging encroachment of Respondent's fence, the arbitrator determined the correct property line to be the same as that found by Respondents' surveyor.⁶ The trial court, in turn, properly included the arbitrator's lot line determination as part of its Order, simply repeating what was clearly and unmistakably found in Judge Lynn's decision dismissing Appellants' counterclaim.

Having failed in their effort to have their two surveyor-witnesses persuade the arbitrator of their claim as to the lot line's location, Appellants now argue that the arbitrator and trial court lacked the legal authority to determine the boundary issue. They contend that the "exclusive" procedure for determining a boundary line for Torrens property is under Minnesota Statutes §508.671. In making this argument, however, Appellants ignore the plain language of Minnesota Statutes §559.23, which provides a clear alternative statutory remedy for judicial determination of boundary lines for registered property.⁷

Moreover, the Minnesota Court of Appeals rejected an analogous argument in *Kennedy, Matthews, Landis, Healy & Pecora, Inc. v. Young*, 524 N.W.2d 752 (Minn.App. 1994). There the trial court confirmed an arbitrator's award of punitive damages, an issue that had been submitted to arbitration under the parties' arbitration contract. The appellants contended that the arbitration panel had exceeded its powers by hearing the punitive damages issue, and that a punitive damages award was limited to the statutory procedure found under Minnesota Statutes §549.20. The Court of Appeals rejected these arguments, stating that

⁶ See Finding of Fact No. 17, Findings of Fact, Conclusions of Law and Arbitrator's Award, attached as Exhibit C to Affidavit of Steven G. Potach.

⁷ See the discussion in Plaintiffs' Reply Memorandum in Support of Motion to Confirm Arbitration Award and for the Entry of Judgment, pp. 1-3

“Having agreed to submit to arbitration respondent’s claim, including the issue of punitive damages, appellant cannot now assert that the panel exceeded its authority by hearing the very issue that appellant asked it to hear.” 524 N.W.2d at 755.

The Court went on to state that even if the arbitrators had erred in awarding punitive damages, “no statutory or case law authority exists giving the district court jurisdiction to vacate an award because the arbitrator made an error of law.” 524 N.W.2d at 755. Accordingly, the Court of Appeals in *Kennedy* affirmed the trial court’s order confirming the arbitrator’s decision.

In the instant case, the issue of determining the common boundary line fell clearly within the scope of the parties’ arbitration agreement, and the arbitrator had full authority to determine that issue. Even if Appellants are found to be correct in arguing that Minnesota Statutes §508.671 provides the proper procedure for determining boundary lines for registered property (and the provisions of Minnesota Statutes §559.23 are ignored), the trial court nonetheless acted properly in confirming the arbitrator’s decision, and the possibility that the arbitrator made an error of law in making his boundary line determination provides no basis for reversing the trial court’s confirmation order. See *Kennedy, Matthews, Landis, Healy & Pecora, Inc. v. Young*, supra.

In addition, equitable considerations compel a denial and dismissal of the Appellants’ appeal in this matter, based upon the Appellants’ following conduct both prior to and during the arbitration, all as specifically found by Judge Lynn: (1) Appellant Jonsson, at the direction of Appellant Dolphin, deliberately and secretly invaded his neighbor’s yard, pulled up their surveyor’s markers and flags, broke them into pieces and made off with them;⁸ (2) Appellants thereby trespassed and destroyed property and Judge Lynn awarded treble damages to

⁸ See Finding of Fact No. 7, Findings of Fact, Conclusions of Law and Arbitrator’s Award, attached as Exhibit C to Affidavit of Steven G Potach.

Respondents under the statute;⁹ and (3) Judge Lynn explicitly found it appropriate to hold that the arbitration testimony of both Appellants were “not credible” on the salient points of their defense and counterclaim.¹⁰

The Court is also referred to the additional arguments and authorities set forth in Respondents’ trial submissions, as contained in the attached Appendix.

Conclusion

Based on the foregoing discussion and authorities, the trial court’s Order dated February 13, 2009 should be affirmed in all respects, and Appellants’ appeal should be denied and dismissed.

Respectfully submitted,



Steven G. Potach
(Minnesota Attorney I.D. No. 87762)

⁹ See Findings of Fact Nos. 9 and 10, Findings of Fact, Conclusions of Law and Arbitrator’s Award, attached as Exhibit C to Affidavit of Steven G. Potach.

¹⁰ See Findings of Fact No. 8 and 19, Findings of Fact, Conclusions of Law and Arbitrator’s Award, attached as Exhibit C to Affidavit of Steven G. Potach.

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).