NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

CUSHING HOSPITALITY, LLC,

Plaintiff,

vs.

CMP CONSTRUCTION, INC.,

Defendant/Appellee,

and

MG POOLS, a Texas limited liability company,

Third-Party Defendant/ Appellant.

Case No. 118,983

APPEAL FROM THE DISTRICT COURT OF
PAYNE COUNTY, OKLAHOMA

HONORABLE PHILLIP C. CORLEY, TRIAL JUDGE

AFFIRMED

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Defendant/Appellant
MG Pools[1]

[1] On December 22, 2021, appellant's counsel was permitted to withdraw. To date, no successor counsel has entered an appearance. The Clerk is directed to mail this opinion to the appellant at the address provided in counsel's motion to withdraw, filed December 8, 2021.

OPINION BY GREGORY C. BLACKWELL, JUDGE:

MG Pools appeals the denial of its motion to vacate an arbitration award against it. On review, we find that MG Pools' motion to vacate was time-barred by 12 O.S.2011, § 1874(B). We therefore affirm the decision of the district court.

BACKGROUND

This matter arises from the construction of a Best Western Hotel in Cushing, Oklahoma, in 2011. The hotel was owned by the plaintiff below, Cushing Hospitality, LLC (Cushing). The prime contractor was the appellee, CMP Construction, Inc. (CMP). The appellant, MG Pools (MGP), was a subcontractor to CMP, and was contracted to install a swimming pool. Shortly after completion, parts of the hotel began to show signs of structural problems, including cracking of both sheetrock and floors and movement in parts of the first floor slab. Cushing contacted CMP regarding these problems, invoking the warranty on the construction. CMP hired a geotechnical engineer to assess the cause of the problems. The engineer opined that the problems were the result of water infiltrating under the slab, which caused it to heave. The engineer's report suggested a number of possible causes, including a leak in the pool drain or piping, and recommended that the pool be removed and the piping checked for leaks. The arbitrator's report also notes continuing complaints from hotel staff that the pool appeared to be losing water at an unusual rate and needed frequent "topping up."

For several years, CMP undertook various measures to remediate this problem without success. In May 2017, Cushing filed a notice of arbitration with CMP pursuant to the dispute resolution provisions of the parties' construction

agreement. In July 2017, CMP sent MGP a letter demanding that it indemnify CMP against any claims based on the construction of the pool. CMP also asked the arbitrator to add MGP as a party to the arbitration, as MGP had made a similar arbitration agreement with CMP. The arbitrator did so in October 2017. Seven weeks later, however, CMP dismissed MGP as a party to the arbitration. Approximately one year after that, CMP sought to re-add MGP to the arbitration, evidently because of a report identifying an un-cemented joint in the pool "filler pipe" as the likely source of the infiltrating water. On November 26, 2018, the arbitrator granted CMP's motion rejoining MGP as a third party defendant in the arbitration. The trial court found that, on February 9, 2019, MGP's registered agent, Adison Gideo, was personally served by private process server with copies of pleadings and the order, although MGP denies it was served. On March 13, 2019, MGP sent an email to the American Arbitration Association, and all other participants in the arbitration, acknowledging that MGP was involved in the underlying construction, but denying any liability.

The record shows that various other communications were sent to MGP via email and letter, but MGP made no further attempt to participate in the arbitration and apparently did not regard itself as a party. In November 2019, the arbitrator sent a copy of his ruling and award to MGP via email, to the email address provided by MGP. The award found CMP liable to Cushing for damage to the building and remediation costs, and that MGP was liable to CMP for 95% of CMP's liability, for a total of $1,784,549. MGP did not respond.

In January 2020, Cushing filed a petition in the district court seeking to enforce the arbitration award against CMP. CMP's response includes a third-

party petition to enforce the $1,784,549 portion of the award against MGP. The record indicates that this third-party petition was served on MGP. MGP appeared and raised various arguments attacking the validity of the arbitration award that we will detail in this opinion. The district court denied MGP's defenses to enforcement, finding, among other reasons, that they were time-barred by 12 O.S.2011, § 1874(B). The court confirmed CMP's arbitration award against MGP and reduced it to judgment. MGP now appeals that decision.

STANDARD OF REVIEW

The scope of our review of arbitration awards is narrow. The statutory grounds for vacation of an arbitration award are enumerated in 12 O.S.2011, § 1874, and the counterpart sections of the Federal Arbitration Act. Whether the district court has authority under this section to vacate or modify an award is a question of law that is reviewed *de novo. Sooner Builders & Investments, Inc. v. Nolan Hatcher Const. Servs., L.L.C.*, 2007 OK 50, ¶ 8, 164 P.3d 1063. Generally, in reviewing a district court's decision concerning a motion to vacate an arbitration award, we review the court's factual findings for clear error. *Wilbanks Sec., Inc. v. McFarland*, 2010 OK CIV APP 17, ¶ 8, 231 P.3d 714 (citing *Thompson v. Bar–S Foods, Co.*, 2007 OK 75, 174 P.3d 567); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001) (construing Oklahoma law). The applicable appellate review standard affords arbitrators great deference. *Fraternal Order of Police, Lodge 142 v. City of Perkins*, 2006 OK CIV APP 122, 146 P.3d 829.

ANALYSIS

The Timeliness of the Motion to Vacate

The arbitration agreement in question does not specify a choice of law. Both parties appear to agree in their briefing that the quest to vacate the arbitration order here is governed by either the Federal Arbitration Act (FAA) or the Oklahoma Uniform Arbitration Act (OUAA), 12 O.S.2011, § 1851 *et seq.*

The OUAA provides the basis and deadline for review of an arbitration award:

> A. Upon an application and motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:
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> 1. The award was procured by corruption, fraud, or other undue means;
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> 2. There was:
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> a. evident partiality by an arbitrator appointed as a neutral arbitrator,
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> b. corruption by an arbitrator, or
>
> c. misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
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> 3. An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 6 of this act [codified as 12 O.S. § 1856], so as to prejudice substantially the rights of a party to the arbitration proceeding;
>
> 4. An arbitrator exceeded the arbitrator's powers;
>
> 5. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under subsection C of Section 16 of this act [codified as 12 O.S. § 1866] not later than the beginning of the arbitration hearing; or

> 6. The arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 10 of this act [codified as 12 O.S. § 1860] so as to prejudice substantially the rights of a party to the arbitration proceeding
>
> B. ***An application and motion under this section must be filed within ninety (90) days after the movant receives notice of the award*** pursuant to Section 20 of this act [codified as 12 O.S. § 1870] or within ninety (90) days after the movant receives notice of a modified or corrected award pursuant to Section 21 [codified as 12 O.S. § 1871] of this act, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within ninety (90) days after the ground is known or by the exercise of reasonable care would have been known by the movant.

12 O.S.2011, § 1874 (emphasis added). Functionally identical grounds are provided in the FAA. 9 U.S.C. §§ 10-12.[2]

MGP's claim is rooted in subsection (A)(6), that "[t]he arbitration was conducted without proper notice." If MGP was aggrieved by an arbitration conducted without proper notice, *it therefore had 90 days after the receipt of the arbitrator's award* to raise this claim, pursuant to § 1874. The district court found that MGP was sent a copy of the arbitration award by email on November 1, 2019, and that such a method of service was proper. It was not until June 17, 2020, that MGP made any appearance in the district court. Hence, if the emailed copy of the award constituted "notice of the award," MGP waited too long to seek vacation pursuant to § 1874(B).

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[2] The Oklahoma Supreme Court has recognized: "The FAA does not preempt state law unless the state law frustrates the Congressional purposes and objectives embodied in the FAA." *Rogers v. Dell Computer Corp.*, 2005 OK 51, ¶ 12, 138 P.3d 826, 829 (*citing Volt v. Board of Tr. of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 477, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). In accordance with *Rogers*, the OUAA would govern proceedings on a motion to vacate the award of an arbitrator "so long as the OUAA does not frustrate the purposes underlying the FAA." *Id.* ¶ 15.

It is important to note that the threshold question is not whether MGP received sufficient statutory or contractual notice of the *arbitration.* Even if it were undisputed that MGP did not receive proper notice of the initiation of the arbitration, MGP was still required by § 1874(B) to raise this claim within ninety days of receipt of the *arbitrator's award.* Thus, the initial question is whether MGP moved to vacate within ninety days of receiving notice of the arbitrator's award.

The trial court found that, as a matter of fact, MGP was sent a copy of the arbitration award by email on November 1, 2019. MGP does not appear to dispute this finding. The agreement is silent on how an arbitration award shall be communicated to the parties. Section 1870 of the OUAA requires only as follows:

> An arbitrator shall make a record of an award. The award may, or may not, contain the evidence and conclusion upon which the award was based unless the agreement of the parties specifies the type of award to be issued. The record shall be signed or otherwise authenticated by any arbitrator who concurs with the award. *The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.*

12 O.S.2011, § 1870 (emphasis supplied).

The statute does not specify how this notice is to be given. If the method of notice is governed by the OUAA, it falls under the provisions of § 1853 governing notices made after the initial service of an arbitration demand:

> Except as otherwise provided in the Uniform Arbitration Act, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

We believe an email, sent to the last known email address of the recipient, where the address was initially provided by the intended recipient, all as occurred here, satisfies this standard. Accordingly, we find no error in the district court's decision that MGP received statutory notice of the arbitration award on November 1, 2019. Hence MGP's attempt to vacate was not timely.

Due Process and Arbitration

MGP also argues that constitutional due process requirements override the statutory directive that a petition to vacate an award on the grounds of lack of notice has to be filed within ninety days of receipt of the award. Oklahoma law provides a process for appealing a lack of notice of an arbitration to the district court in § 1874(B). MGP's "due process" claim is, therefore, that this statutory process and time limit are insufficient pursuant to the due process standards of either the state or federal constitution.

Although state power may be used to order arbitration or enforce an arbitration award, the general consensus of the federal courts is that the due process requirements of notice and opportunity to be heard apply only to those parts of the proceedings occurring within the state court system, not the proceedings in private arbitrations.[3] Hence, where courts have mentioned due

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[3] *See, e.g., Davis v. Prudential Sec., Inc.*, 59 F.3d 1186 (11th Cir. 1995). As that court explained: "[I]t is axiomatic that constitutional due process protections 'do not extend to private conduct abridging individual rights," and "the state action element of a due process claim is absent in private arbitration." *Id.* at 1190–91. See Also *Fed. Deposit Ins. Corp. v. Air Florida Sys., Inc.*, 822 F.2d 833, 842 n. 9 (9th Cir.1987) ("Although Congress, in the exercise of its commerce power, has provided for some governmental regulation of private arbitration agreements, we do not find in private arbitration proceedings the state action requisite for a constitutional due process claim."); *Elmore v. Chicago & Ill. Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir.1986) ("[T]he fact that a private arbitrator denies the procedural safeguards that

process principles in arbitration cases, it has usually been in terms of the state action that may occur before or after arbitration, *i.e.*, notice and opportunity to contest either a motion to compel arbitration, or the confirmation and enforcement of an arbitrator's decision.[4]

Any elements of constitutional due process that *may* persist during the arbitration process itself are protected by the process for vacation stated in the FAA at 9 U.S.C. §§ 10-12 and the OUAA at 12 O.S.2011, § 1874. *See In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013) ("Through § 10 of the FAA Congress attempted to preserve due process while still promoting the ultimate goal of speedy dispute resolution");*U.S. Life Ins. Co. v. Superior Nat. Ins. Co.*, 591 F.3d 1167, 1173 (9th Cir. 2010)("[W]e are mindful not to impose the federal courts' procedural and evidentiary requirements on the arbitration proceeding; rather, our responsibility is to ensure that the FAA's due process protections were afforded.")

We also note that a similar limitations period is found in the Federal Arbitration Act at 9 U.S.C. § 12. Federal law interpreting the FAA holds that, when a party fails "to move to vacate an arbitral award within the three-month limitations period," it is barred "from raising the alleged invalidity of the award as a defense in opposition to a motion ... to confirm the award." *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 854 (11th Cir. 1989). Pursuant to

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are encompassed by the term 'due process of law' cannot give rise to a constitutional complaint.").

[4] *See e.g., Oklahoma Oncology & Hematology P.C. v. US Oncology,* Inc., 2007 OK 12, ¶ 36, 160 P.3d 936 (finding that due process required evidentiary hearing where necessary facts were not otherwise established by motion to compel arbitration).

Rogers v. Dell Computer Corp., 2005 OK 51, ¶ 12, 138 P.3d 826, the OUAA can govern proceedings on a motion to vacate the award of an arbitrator provided that "the OUAA does not frustrate the purposes underlying the FAA." *Id.* ¶ 15 (citing *Volt v. Board of Tr. of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 477, 109 S.Ct. 1248 (1989). To hold that the parallel Oklahoma law requiring a motion to vacate on the grounds of lack of notice of arbitration be filed no more than ninety days after notice of the award offends state or federal due process requirements would certainly "frustrate the purposes underlying the FAA" and place the OUAA on a direct collision course with its federal counterpart. We find no violation of constitutional due process here

Conditions Precedent and the Authority of the Arbitrator

MGP's next argument is that the award is contractually invalid as a matter of law because a contractual condition precedent to arbitration was not met. Article 6.1.1 of the Agreement states that "[a]ny claim arising out of or related to this subcontract ... shall be subject to mediation as a condition precedent to binding dispute resolution." MGP argues that the arbitration was therefore invalid because mediation was a contractual condition precedent to arbitration, and it was not a party to any mediation that may have occurred.

This argument fails for two reasons. First, a claim that the arbitrator improperly conducted arbitration of MGP's liability before a mediation was held would fall under the grounds for vacation listed in the FAA at 9 U.S.C. §§ 10-12 and the OUAA at § 1874. Hence, it had to be raised within ninety days of MGP receiving the arbitration award. It was not. Second, substantive questions of arbitrability, such as the validity of an arbitration clause or a question of whether

the dispute is one the parties agreed to arbitrate, are for the courts to decide. The arbitrator, however, determines questions of procedural arbitrability such as whether a condition precedent to arbitration exists or has been satisfied. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86, 123 S. Ct. 588, 593, 154 L. Ed. 2d 491 (2002).

Actual Notice of the Proceedings

Finally, even if some previously unidentified due process protection applies here, the district court found that MGP *was* served with notice of the arbitration by a process server.

The provisions governing the initial notice in the OUAA are found at 12 O.S.2011, § 1860. The statute states:

> A person initiates an arbitration proceeding by giving notice in a record to all the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action.

Service by a process server at a party's home is an acceptable method for "commencement of a civil action" under 12 O.S.Supp.2017, § 2004(C)(1). The district court found that "MG Pool's Registered Agent Adison Gideo, was personally served with copies of the order re-adding MGP to the arbitration." Adison Gideo filed an affidavit contradicting that of the process server, swearing that he was not at home on the alleged day of service. The credibility of these two accounts of service was solely a matter for the trial court. We will not disturb its decision that MGP had notice of the proceedings.

CONCLUSION

MGP relied here on its understanding that it had not been properly made a party to the underlying arbitration and hence needed to take no action until a motion to enforce was served on it. This belief was mistaken, and MGP's arguments were barred by 12 O.S. § 1874 at the time it first raised them. As such, there was no error in the district court's decision.

AFFIRMED.

WISEMAN, P.J., and BARNES, J., concur.

March ___, 2022