THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Casey L. Manning, Circuit Court Judge

Civil Action No.: 2011-CP-40-8456
Civil Action No.: 2011-CP-40-8459

Appellate Case No.: 2013-000386

Xu Dong Sun, Appellant.

v.

Xiaolan M. Wang, Rui Cao,
and M. Vista Restaurant, LLC,
Respondents,

Shengen Sun, Appellant.

v.

Xiaolan M. Wang, Rui Cao,
and Miyo's at Sandhills, LLC,
Respondent,

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR VACATING THE ARBITRATION AWARD ON THE GROUNDS THAT ARBITRATOR MANIFESTLY FAILED TO APPLY THE LEGAL PRINCIPLE THAT THE FIRST TO BREACH A CONTRACT CANNOT LATER COMPLAIN OF A SUBSEQUENT BREACH OF THE OTHER PARTY?

STATEMENT OF THE CASE

Appellant Xu Dong Sun filed a Demand for Arbitration against Respondents Xiaolan M. Wang, Rui Cao, and M. Vista Restaurant, LLC on December 22, 2010. On that same date, Appellant Shengen Sun filed a separate Demand for Arbitration against Respondents Xiaolan M. Wang, Rui Cao, and Miyo's at Sandhills, LLC. Respondents filed Answers and Counterclaims to Appellants Demands for Arbitration on January 19, 2011. By agreement the parties selected Columbia lawyer Danny Crowe of the law firm of Turner Padget Graham & Laney, P.A. to serve as arbitrator. The cases were arbitrated together over a period of six days, March 14, 15, and 16 and May 10, 11, and 12, 2011 at the arbitrator's office in Columbia.

On June 1, 2011, the arbitrator issued his Decision and Award of the Arbitrator in Binding Arbitration ("Arbitration Award"). Appellants filed Motions to Modify or Correct the Arbitration Award on June 6, 2011. Respondents filed their own Motions to Modify or Correct as well as opposition papers to Appellants' Motions on June 16, 2011. The arbitrator issued his Order of the Arbitrator on the Post-Decision Motions ("Post-Decision Order") on November 11, 2011.

On December 12, 2011 Appellants filed Motions for Order Confirming Arbitration Award and Entry of Judgment. On January 17, 2012 Respondents filed Motions to Vacate, Modify, or Correct Arbitration Award, in which it also opposed Appellant's December 12, 2011 motion to confirm the award and enter a judgment. Appellants filed their opposition to Respondents motion to vacate, modify or correct on March 15, 2012, the date of the hearing on all pending motions before the Honorable Casey L. Manning. The parties each provided proposed Order to

Judge Manning within ten days. Almost ten months to the day later, Judge Manning signed Respondents' proposed Order on Motions to Modify, Vacate or Correct, which was filed January 14, 2013. Appellants received written notice of entry of this Order on January 17, 2013, and this appeal was filed on February 15, 2013. On February 26, 2013 this Court consolidated both matters for purposes of appeal. The undersigned requested the transcript on February 25, 2013 and received the transcript on June 5, 2013. On July 8, 2013, Appellants requested a five day extension in which to file their Initial Brief.

FACTS

Because neither party disputes any the arbitrator's Findings of Fact, the facts set forth herein come directly, for the most part, from the Arbitration Award. In July 13, 2010, Xu Dong Sun ("Xu Dong") entered into a contract with Xiaolan M. Wang ("Michelle Wang") and her husband Rui Cao to purchase M. Vista Restaurant ("M. Vista"). (Arbitration Award, p. 2, ¶ 1) These parties also executed a License/Management Agreements at the same time, allowing Xu Dong license rights to M. Vista and providing for continued management by Michelle Wang for a period of time. (Id.) The effective date of both contracts was August 1, 2010. (Id.)

On August 22, 2010, Michelle Wang became unhappy with Xu Dong and locked him out of M. Vista for four days, after which Xu Dong signed an Amended Purchase Agreement and Amended License Management Agreement. (Arbitration Award, p. 3, ¶ 2) The amended agreements were essentially the same as those executed on July 13, 2010, although in the Amended Purchase Agreement, the down payment was increased from $80,000 to $150,000 and the payment terms were changed from a level amortized payment of $18,253 per month for 36 months at 6% interest to a flexible monthly payment principal payment of the restaurants "gross monthly profits" less $10,000 to Xu Dong for salary with an additional payment of 10% per annum and a final balloon payment of the unpaid balance of the sales price. (Id.) The purchase price of $680,000 remained the same. The Amended Purchase Agreement also contained the following language: "In the event Purchaser is more than thirty (30) days late on any payments hereunder, the Units sold hereunder shall revert to Seller and Purchaser forfeits all money paid to Seller

and his/her own ownership in the LLC and Business. (Id.) (Xu Dong Amended Purchase Agreement, p. 2, Section 2.2(b))

On July 16, 2010 Shengen Sun ("Jack Sun") entered into a Purchase Agreement and License/Management Agreement with Michelle Wang and her husband to purchase the restaurant Miyo's at Sandhills ("Sandhills"). (Arbitration Award, p. 3, ¶ 3) The effective date was August 1, 2010, although Michelle Wang became unhappy with Jack Sun in August 2010 and locked him out of Sandhills for a period of four days. (Arbitration Award, p. 4, ¶ 4) Jack Sun and Michelle Wang negotiated amended agreements which were essentially the same as the July 16, 2010 agreements: The purchase price remained $480,000 but the down payment increased from $80,000 to $100,000 and the monthly payments went from $12,169 for 36 months at 6% interest to monthly payments of the gross monthly profits less $8,000 paid as salary to Jack Sun with an additional payment of 10% per year and a final balloon payment on September 1, 2012 of the unpaid balance. (Id.) The Amended Purchase Agreement Jack Sun signed also contained Section 2.2(b) allowing for Michelle Wang to take the restaurants back if any payments are more than thirty days late. (Id.) (Jack Sun Amended Purchase Agreement, p. 2, Section 2.2(b))

Xu Dong and Jack Sun paid their $80,000 down payments in cash, but the increased down payments were made up of credits given to Xu Dong and Jack Sun respectively during their ownership in the month of August 2010 before they were locked out by Michelle Wang. (Arbitration Award, p. 4, ¶ 5) The sale of M. Vista and Sandhills was part of Michelle Wang's disposition of all her restaurants during July 2010, although M. Vista and Sandhills were the only restaurants resold in

August after Michelle Wang took them all back that month. (Arbitration Award, p. 4, ¶ 6) The owners of the other restaurants which Respondents reacquired in August all received their down payments back. (Id.)

After Xu Dong and Jack Sun reacquired their restaurants in August, they would each, along with Michelle Wang, meet in the early part of the new month to reconcile the prior month's business and determine the "gross profit" due Michelle Wang for that previous month. (Arbitration Award, p. 5, ¶ 7) This happened for the months of August, September, and October. (Id.) Michelle Wang locked Xu Dong and Jack Sun out of their restaurants again on December 6, 2010 and December 16, 2010 respectively claiming she was owed money for inappropriate deductions and because the quality of the food and restaurants had diminished in violation of the agreements. (Arbitration Award, p. 5, ¶ 8) Although Michelle Wang complained during the months of August, September, and October about some payments Xu Dong and Jack Sun made that she deemed were not appropriate business expenses and thus shortchanged her gross profits she was entitled to under the Amended Purchase Agreements, she never provided any notice to Xu Dong or Jack Sun of any specific amounts they owed her. (Arbitration Award, p. 5, ¶¶ 7 and 9) There is no evidence that Xu Dong or Jack Sun were ever thirty days or more late on any payments due under the Amended Purchase Agreement. (Arbitration Award, p. 5, ¶ 9)

Michelle Wang challenges many of the payments deducted from her gross monthly profits by Xu Dong for August, September, October and November 2010, some of which are inappropriate totaling $9330.94. (Arbitration Award, p. 6 and 7, ¶ 13) Others are appropriate, including, but not limited to, the chef's salary Xu

Dong paid himself, other payments to staff, and the purchase of food items. (Arbitration Award, p. 7, ¶¶ 14 and15) Similarly some of the challenges to the amount of gross profits due Michelle Wang by Jack Sun were deemed inappropriate in the amount of $16,934.28 (Arbitration Award, p. 8, ¶ 16) Others were deemed appropriate business deductions. (Arbitration Award, p. 8, ¶ 17)

Under the terms of the Amended Purchase Agreements such analysis is unnecessary until the final payment is due, i.e. it is an "academic exercise." (Arbitration Award, p. 6, ¶ 12) As damages, Xu Dong and Jack Sun are only entitled to damages in the amount of repayment of actual cash they paid to Michelle Wang as the Amended Purchases Agreements do not allow them any other benefits, other than the monthly salaries which they were paid, until after the final payment. (Arbitration Award, p. 6, ¶¶ 10 - 12) On their counterclaims, Respondents are only entitled to repayment of inappropriate expenses deducted from gross profits.

Based on the foregoing facts, the arbitrator determined as a matter of law that Xu Dong was entitled to the repayment of his $80,000 cash down payment for breach of the agreement by Respondents less the $9330.94 of charges which were deemed inappropriate by the arbitrator. (Arbitration Award, p. 9, ¶¶ 2 and 3) Likewise the arbitrator determined as a matter of law that Jack Sun was entitled to return of his $80,000 down payment less the $16,934.28 which were deemed inappropriate deductions by the arbitrator. (Arbitration Award, p. 9, ¶¶ 2 and 4)

In their motion to the arbitrator to modify and correct the award, Respondents argue that "even if the arbitrator were to determine that respondent's actions [in taking back the restaurants] was a breach of the agreement, [Appellants] were the first to breach and as such should be precluded from having any recovery

in this matter." (Respondent's June 16, 2011 Motion to Modify and Correct Award, pp. 3, 11) This has been Respondents' theories since they answered the original Demand for Arbitration. (Respondents' Answers and Counterclaims, p. 3, ¶¶ 10 – 12) In his Order of the Arbitrator on the Post-Decision Motions the arbitrator does make it clear that he has considered fully the grounds for the arguments set out in the parties cross motions to modify or correct award, as well as reviewed the evidence and testimony and that he had previously considered all prior to his initial award. (Post-Decision Order, pp. 1 and 2). Indeed Judge Manning also made inquiry into this issue at the hearing on February 25, 2013. (Transcript. p. 13, ll. 3 – 18). The issue of who breached the contract first was considered by the arbitrator.

ARGUMENT

The Standard of Review

Without question, the standard of review in vacating an arbitration award in South Carolina is very limited.[1] "Arbitration is a favored method of settling disputes in South Carolina." Pittman Mortgage Co. v. Edwards, 327 S.C. 72, 75, 488 S.E.2d 335, 337 (1997). "Generally speaking, an arbitration award is conclusive and courts will refuse to review the merits of an award." Batten v. Howell, 300 S.C. 545, 547, 389 S.E.2d 170, 171 (Ct. App. 1990). A court

[1] Although Respondents styled their motion in the Circuit Court as one to Vacate, Modify, or Correct (Defendant's Motion to Vacate, Modify, or Correct Arbitration Award, p. 1) and Judge Manning's ruling attempts to "correct and modify" the award to give Appellants nothing (Order of Judge Manning, p. 6), his ruling is actually one to vacate the arbitration award. The way an arbitration award can be changed or modified is clearly limited and changing the ultimate ruling of the arbitrator is not one of the allowed methods of change or modification. S.C. Code Ann. § 15-48-140(a)(1) through (3). Judge Manning's ruling affects the merits of the case. This is a vacation of the arbitration award and not a correction or modification.

reviewing an arbitration award is therefore very limited in its scope of review. Weimer v. Jones, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005).

"When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact. Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be vacated only under narrow, limited circumstances." Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). A reviewing court should vacate an arbitrator's decision only when the arbitrator has exceeded his or her authority or has manifestly disregarded or perversely misconstrued the law. Id. "[F]or a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable." Id. In other words, "[m]anifest disregard of the law occurs when the arbitrator knew of a *governing* legal principle yet refused to apply it, *and* the law disregarded was well defined, explicit, and clearly applicable to the case." Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 268, 569 S.E.2d 349, 361 (2002), *vacated and remanded on other grounds,* 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). "The focus is on the conduct of the arbitrator and *presupposes something beyond a mere error in construing or applying the law.*" Gissel, 382 S.C. at 241, 676 S.E.2d at 323.

The Arbitrator Did Not Manifestly Disregard the Law

The inquiry here is three fold: Is the law well defined, explicit and clearly applicable to the case? Was the arbitrator aware of the law? Did the arbitrator refuse to apply it?

The law at issue in this case, according to Respondents, is that a party who is the first to breach an agreement cannot later complain about any subsequent

breaches by the other party. Respondents cite Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 658 S.E.2d 539 (Ct. App. 2008) for this proposition. Appellants agree that this legal principal is well defined, explicit, and clearly applicable. In fact, Judge Manning, aptly points out that this legal theory is similar to the long standing equitable doctrine of unclean hands. (Transcript. p. 16, ll. 6 and 7) All of the parties hereto agree that this principle of law is "well defined, explicit, and clearly applicable to the case" as required by Gissel, 382 S.C. at 241, 676 S.E.2d at 323 and Bazzle, 351 S.C. at 268, 569 S.E.2d at 361.

The parties also agree that the arbitrator was aware of the law. This legal theory was put before the arbitrator as early as Respondents Answer and Counterclaim to the Appellants' original Demand for Arbitration served on December 22, 2010. (Respondents' Answers and Counterclaims, p. 3, ¶¶ 10 – 12) It permeated the arbitration of the case and found its way into the final brief of Respondents put before the arbitrator. (Respondent's June 16, 2011 Motion to Modify and Correct Award, pp. 3, 11)

So the focus of inquiry then turns to whether or not the arbitrator refused to apply this well-defined, explicit and clearly applicable law of which he was aware. "The focus is on the conduct of the arbitrator and *presupposes something beyond a mere error in construing or applying the law.*" Gissel, 382 S.C. at 241, 676 S.E.2d at 323. Even the "clearly erroneous interpretation of [a] contract" by an arbitrator cannot be disturbed. Trident Technical Coll. v. Lucas & Stubbs, Ltd., 286 S.C. 98, 108, 333 S.E.2d 781, 787 (1985). It is "exceedingly rare, requiring circumstances far more egregious than mere errors in interpreting or applying the law" to vacate an arbitration award on the ground of manifest disregard of the law. Id. As long

as there is at least an arguable ground for an award, an arbitrator has not manifestly disregarded the law. Batten, 300 S.C. at 549, 389 S.E.2d at 172.

A review of the arbitrator's Findings of Fact in his Arbitration Award clearly show that this is not the case. The grounds for an award in this case go well beyond just "arguable," and in fact Respondents problem is not with the law or the arbitrator's application of it but rather Respondents do not like the facts that the arbitrator found. They do not like the arbitrator's Findings of Fact because he clearly finds that at the times in December when Michelle Wang breached the agreements and locked Xu Dong and Jack Sun out of the restaurants she never provided any notice to Xu Dong or Jack Sun of any specific amounts they owed her and there is no evidence that Xu Dong or Jack Sun were ever thirty days or more late on any payments due under the Amended Purchase Agreement. (Arbitration Award, p. 5, ¶ 9)

Respondents are attempting to turn their disagreement with the arbitrator's Findings of Fact with regard to interpretation of the contract and the supporting evidence into a theory that the arbitrator failed to apply the law. They are doing this because they know and even admitted before Judge Manning that they cannot "quibble over the facts" of an arbitration award. (Transcript. p. 7, ll. 5 and 6)

The arbitrator clearly went through the various provisions of the contract and the facts and determined that before Appellants could be deemed to have breached the contract for nonpayment over thirty days, Respondents had to give them some kind of notice and thirty days to cure. (Arbitration Award, p. 5, ¶ 9) This is logical and obvious from the plain meaning of the contract. How else is someone supposed to know they breached? Since Michelle Wang did not give

notice or any right to cure but locked the doors first, before she had a right to under Section 2.2(b) of the Amended Purchase Agreements, she breached first. That is very clear from the Arbitration Award.

As seen in Paragraphs 14, 15 and 17 of the Arbitration Award not all of the items that Respondents deemed inappropriate were in fact inappropriate. So until there was at least a demand for those items, a refusal to pay and some determination that they were inappropriate the contract simply would not make sense. This is no doubt why the arbitrator determined that until the end of the term of the agreement when final payments were due, any other application of debits and charges to the parties would simply be an "academic exercise." (Arbitration Award, p. 6, ¶ 12) If Respondent's interpretation of the contract were true that no notice was required before the Units reverted back and they could lock out Appellants even if Respondents were wrong about whether some deductions were appropriate the contract is a joke. Are the parties supposed to arbitrate items whether certain items are appropriately business expenses every month? The contract seems illusory if Respondents can implement the self-help remedy in Section 2.2(b) without even notice, a discussion, or a determination as to what are appropriate expenses.

It is the duty of the arbitrator to synthesize the facts and the law in a matter such as this and make findings consistently therewith. Interpreting a contract is vastly different than re-writing a contract. Clearly the arbitrator has just reviewed the contract, the surrounding facts, and the applicable law. There is nothing remotely unreasonable about his decision. After six days of testimony largely through the use of Chinese translation, he synthesized the facts with the law of the case. The detailed Findings of Fact with citations to the contract and the record

bear that out. This is well beyond an "arguable ground" for an award, but even if that is all it is; it was improper for the Circuit Court to vacate the Arbitration Award.

So this Court should not be confuse Mr. Crowe's able findings regarding the facts in this case, which must be given complete deference for the most part, with his failure to apply the law. As the undersigned argued before Judge Manning, Respondents are stuck with the fact that the arbitrator deemed no monies were unpaid and Appellants did not know what, if anything, they owed Respondents when they were locked out of the restaurants they had purchased. (Transcript. p. 23, l. 20 through p. 25, l. 1). The arbitration award clearly applies the law regarding who breaches first, Respondents just factually lost this issue and do not like it.

CONCLUSION

There is at least arguable grounds for an award for Appellants in this case and therefore the arbitrator did not manifestly disregard the law. This Court should reverse the decision of the Circuit Court and remand the case with instructions that the Arbitration Award be reinstated and that Appellants Motion to Confirm the Award and Enter Judgment be granted.

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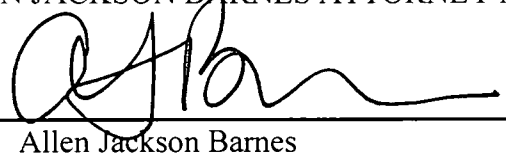
By: 

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July 12, 2013
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DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following to be included in the Record on Appeal.

1. Decision and Award of the Arbitrator in Bind Arbitration.
2. Respondents' Answer and Counterclaims to Demand for Arbitration.
3. Post-Decision Order of Arbitrator
4. Transcript of Proceedings pp. 7, 13 – 18, and 23 – 25.
5. Respondents' Motion to Vacate, Modify, or Correct Arbitration Award.
6. Order of Judge Manning.
7. Xu Dong Sun Demand for Arbitration.

8. Shengen Sun Demand for Arbitration.
9. Xu Don Sun Amended Purchase Agreement.
10. Shengen Sun Amended Purchase Agreement.

I certify that this designation contains no matter which is irrelevant to this appeal.

July 12, 2013

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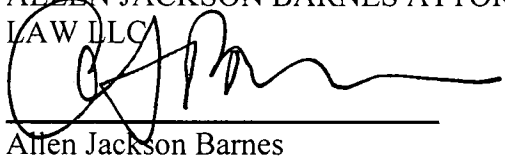

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PROOF OF SERVICE

I certify that I have served a copy of Initial Brief of Appellant and Designation of Matter to Be Included in the Record on Appeal on Respondents by mailing a copy of the same by first class mail, postage prepaid to their attorneys of record, John E. Schmidt, III, Esquire and Melissa J. Copeland, Esquire at Post Office Box 11547, Columbia, South Carolina, 29211 on July 12, 2013.

July 12, 2013

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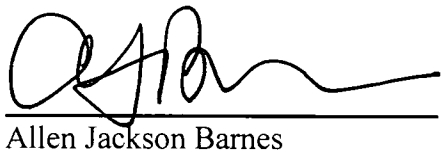

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