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SC Court of Appeals

ELECTRONICALLY FILED - 2024 Feb 06 11:09 AM - CHARLESTON - COMMON PLEAS - CASE#2012CP1000580

<p>STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON</p> <p>THOMAS H. MORGAN</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>JOHN L. GILBERT, STUART L. FRED, BELLA VISTA PARTNERSHIP, A TEXAS GENERAL PARTNERSHIP, BOMASADA GROUP, INC., A TEXAS CORPORATION, BOMASADA INVESTMENT GROUP II, LLC, A TEXAS LIMITED LIABILITY COMPANY, LAURALIS MANAGEMENT, INC., A TEXAS CORPORATION AND 150 BEE STREET, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY,</p> <p style="text-align: center;">Defendants.</p>	<p>IN ARBITRATION</p> <p>IN THE COURT OF COMMON PLEAS C.A. NO. 2012-CP-10-00580</p> <p><b><u>ORDER</u></b></p> <p><b><u>DENYING DEFENDANTS'</u></b> <b><u>MOTION TO VACATE OR MODIFY</u></b> <b><u>THE FINAL ARBITRATION AWARD</u></b></p> <p><b><u>AND</u></b></p> <p><b><u>CONFIRMING ARBITRATION AWARD</u></b></p>
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This matter comes before the court on Defendants' Motion to Vacate or Modify the Final Arbitration Award (filed June 30, 2023), and Plaintiff's Opposition to Defendants' Motion and Motion to Confirm the Award (filed July 17, 2023).

The arbitration award (Arbitration Award, April 10, 2023, and Final Arbitration Award, June 19, 2023, together, the "Arbitration Award") that the Defendants seek to vacate or modify is the result of a 10-year arbitration proceeding pursuant to a valid arbitration agreement and an order of this court referring the matter to arbitration with the consent of the Defendants (Consent Order Referring Matter to Arbitration, July 9, 2012). All of the issues raised by the Defendants in this motion were briefed and argued many times before the Panel and ultimately the Panel ruled against the Defendants' arguments on each occasion. Now, the Defendants seek to reargue those issues

before this Court, in this motion to vacate. This the Defendants cannot do under the law of this state.

The Panel was a 3-arbitrator panel made up of experienced lawyers chosen by consent of the parties that changed somewhat over the course of the ten years but the Panel that decided the dispositive motions and tried the case over more than a week's time consisted of two experienced and accomplished members of the Charleston County Bar<sup>1</sup> and a retired Chief Justice of the South Carolina Supreme Court<sup>2</sup> (the "Panel" or "Arbitration Panel").

The Panel read and examined thousands of pages of briefs, memos, exhibits, statutes, and legal opinions, and heard days of testimony from live witnesses, as well as reading hundreds of pages of submitted deposition testimony. The Panel read memoranda on three separate dispositive motions (Plaintiff's Memo, **Exhibits C and D**) filed by the Defendants and briefed by the parties and heard arguments on the motions at a hearing after which the Panel issued an order denying the motions (Plaintiff's Memo, **Exhibit E**). Thereafter, the Panel heard testimony and argument at an arbitration hearing that began on October 31, 2022, and ended on Nov 8, 2022 (Plaintiff's Memo, **Exhibit F**). Thereafter, the Plaintiff and Defendants prepared and submitted hundreds of pages of final written argument in the form of proposed orders which the Panel considered and issued a written award on April 10, 2023 (Plaintiff's Memo **Exhibit G**). After considering the Defendants' motions and supporting memoranda on a Motion for Reconsideration, the Panel issued a final award on June 19, 2023, which also resolved the award of attorney's fees which had likewise been briefed and contested by the Defendants.

After reviewing the motions, memoranda, and exhibits submitted by the parties and after hearing arguments of counsel for both parties on November 13, 2023, this Court DENIES the

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<sup>1</sup> H. Brewton Hagood, Chair; Paul A. Dominick, Member

<sup>2</sup> Costa M. Pleicones, Member

motions of the Defendants to vacate or modify the arbitration award and CONFIRMS the award of the arbitrators.

### THE SCOPE OF REVIEW OF ARBITRATION AWARDS

(A) A motion to modify may only be made on certain grounds provided by the statute, which do not exist in this case.

S.C. Code Ann. Sec. 15-48-140 provides:

- (a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where: (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.
- (b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

S.C. Code Ann. § 15-48-140 (LexisNexis, Lexis Advance through 2023 Regular Session Act No. 7, not including changes and corrections made by the Code Commissioner) (“SC Arbitration Act”)

There is no evident miscalculation, decision on a matter not submitted, or flaw in form not affecting the merits raised by the Defendants in their motion. There is, therefore, no basis in the law for modifying or correcting the Panel's award. The motion made under 15-48-140 is denied.

(B) Review of an arbitration award is limited, and the decision of the arbitrator will be vacated only upon certain grounds as provided by statute, or upon the non-statutory ground of manifest disregard or perverse misconstruction of the law.

Arbitration is not “litigation carried on by other means.” Lauro v. Visnapuu, 351 S.C. 507, 516, 570 S.E.2d 551, 555-56 (Ct. App. 2002), citing White v. Preferred Research, Inc., 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 1993). Judicial review of an arbitration award is therefore limited in scope, and any attempt to convert arbitration into a trial-like judicial proceeding is looked upon with disfavor. Lauro, 570 S.E. 2d at 555-556.

Arbitration is a favored method of settling disputes in South Carolina. When a dispute is submitted to arbitration, the arbitrators determine questions of both law and fact. *Id.* Generally, an arbitration award is conclusive, and courts will refuse to review the merits of an award. *Id.*, citing Pittman Mortgage Co. v. Edwards, 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997) (citations omitted). Review of an arbitration award is limited, and the decision of the arbitrator will be vacated only under certain grounds as provided by statute, or upon the non-statutory ground of manifest disregard or perverse misconstruction of the law. *Id.*, citing Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998).

"Generally, an arbitration award is conclusive, and courts will refuse to review the merits of an award." Crouch Constr. Co. v. Causey, 405 S.C. 155, 163, 747 S.E.2d 482, 486 (2013), citing C-Sculptures, LLC v. Brown, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) (quoting Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009)). "An award will be vacated only under narrow, limited circumstances." *Id.* "The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality." *Id.*, quoting Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 151, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968) (White, J., concurring).

In reviewing arbitration awards, "the standards for judicial intervention are . . . narrowly drawn to assure the basic integrity of the arbitration process without meddling in it." *Id.*, quoting Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983). "The reasons for this are not hard to identify." *Id.*, citing In re Andros Compania Maritima, S.A., 579 F.2d 691, 700 (2d Cir. 1978).

A decision to vacate an arbitration award may only be made on the specific grounds found in S C Code Ann. Sec. 15-48-130 or on the non-statutory basis of "manifest disregard or perverse misconstruction" of the law.

The SC Arbitration Act provides:

(a) Upon application of a party, the court shall vacate an award where: (1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an

arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers; (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 15-48-50, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 15-48-20 and the party did not participate in the arbitration hearing without raising the objection. But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

S.C. Code Ann. § 15-48-130(a).

Decisions of courts in this and other jurisdictions have vacated arbitration awards where there has been "a manifest disregard or perverse misconstruction of the law." Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009), citing Technical College v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985); S.C. Code Ann. § 15-48-130(a); Batten v. Howell, 300 S.C. 545, 548-49, 389 S.E.2d 170, 172 (Ct. App. 1990) (citations omitted). However, decisions recognizing this non-statutory ground for vacating arbitration awards have required "something beyond and different from a mere error of law or failure on the part of arbitrators to understand or apply the law." Batten, 389 S.E.2d at 172. "[A]rbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are 'barely colorable.'" Id. If a ground for the award can be inferred from the facts, the award should be confirmed. Id.

For 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. Case law presupposes something beyond a mere error in construing or applying the law. Even a "clearly erroneous interpretation of the contract" cannot be disturbed. Id. at 108, 333 S.E.2d 787. The focus is on the conduct of the arbitrator and presupposes something beyond a mere error in construing or applying the law. Id. at 108, 333 S.E.2d at 787. Accord, Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998).

An arbitrator's "manifest disregard of the law" as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it. Gissel, 676 S.E. 2d at 324, citing Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005). Factual and legal errors by arbitrators do not constitute an abuse of power, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers. Id., Pittman, supra (emphasis added).

Here, the Defendants argue that the Arbitration Award should be vacated under the statute because "The arbitrators exceeded their powers" "and/or manifestly disregarded the law governing their jurisdiction in this matter in that the Panel lacked subject matter jurisdiction to hear the case and should have dismissed the case as a matter of law." Defendants' Motion to Vacate, at 1.

The Defendants' burden, therefore, in this motion to vacate, is to prove that as a matter of law the arbitrators (1) knew that they had no authority to decide this case, (2) ignored the law, and (3) decided the arbitration proceeding in knowing and manifest disregard of that law.

#### DENIAL OF THE DEFENDANTS' MOTION TO VACATE OR MODIFY THE ARBITRATION AWARD

1. **The issue of subject matter jurisdiction was thoroughly briefed and argued before the Panel at both the dispositive motion stage, at the trial and at the post-trial stage, and the Panel ultimately decided in favor of the arguments recognizing the court's and Panel's subject matter jurisdiction.**

The consent order initiating the arbitration dated July 9, 2012, established exclusive and binding subject matter jurisdiction in the panel for all matters raised by the pleadings in this matter. The consent order, to which the Defendants explicitly agreed, referred:

All claims, both compulsory and non-compulsory, specifically including all claims, counter-claims, and/or third-party claims, related to the underlying facts, transactions, and/or occurrences that are the subject matter of the pleadings and claims asserted in this case, shall be decided by binding arbitration that shall be conducted in accordance with the terms of this Order and otherwise pursuant to the Federal Arbitration Act and all of the parties submit themselves to the jurisdiction of this court and arbitration panel.

This is not a matter of a party raising subject matter jurisdiction later in the case. Rather, subject matter jurisdiction in this case was decided by court order and by consent submission of the

parties, including these Defendants pursuing this argument. This Court, and the arbitration Panel to which it referred this matter, have subject matter jurisdiction of this matter.

This matter was extensively argued throughout the course of the arbitration proceedings by the Defendants and, specifically, in the motions for summary judgment, at trial, post-trial, and in a motion for reconsideration. Likewise, at every stage, the Plaintiffs presented arguments establishing the Panel's subject matter jurisdiction and arguing against the Defendant's position. (Plaintiff's Memo, Exhibits C, D, E, F, and G).

The Panel ruled against the Defendants' motion at the summary judgment stage (Plaintiff's Memo Exhibit E), and after hearing the evidence and legal arguments of counsel at trial and considering their extensive arguments submitted post-trial, the Panel decided in favor of the Plaintiff's position and found that the Panel did have subject matter jurisdiction (see Exhibit A). The Defendants raised the argument yet again in the Motion for Reconsideration and the Panel once again, in its ruling on that motion, rejected Defendants arguments and found that the Defendants had raised no new issues or arguments, and the Panel did have subject matter jurisdiction to issue an award in the arbitration proceeding (see Defendants' Motion, Exhibit A).

Now, the Defendants make the same arguments here, again.

The Defendants cannot vacate the Arbitration Award, however, by arguing that the Panel did not fully consider their argument or even that the Panel wrongly decided the issue. Rather, they must show that there is a clear law supporting their position that the Panel recognized to be controlling and simply refused to follow it. There is no such clear controlling law, and there is no evidence that the Panel disregarded the law of South Carolina in any respect. Rather, the Panel disagreed with the Defendants' interpretation of the law and facts and instead adopted the argument made by the Plaintiff.

There is no clear legal principle that compels a decision for Defendants that the Panel knowingly failed to follow. The Panel disagreed with Defendants' argument and adopted Plaintiff's argument on this issue. The motion to vacate on this issue is denied.

- 2. The issue of the statute of limitations was exhaustively briefed and argued before the Panel at both the dispositive motion stage, the trial and at the post-trial stage, and the Panel ultimately decided against Defendants' arguments.**

The same analysis applies to the Defendants' statute of limitations argument. The issue was briefed and argued at the dispositive motions, at trial, post-trial, and post-award. At each stage, the Plaintiff made arguments against applying the statute of limitations defense as a bar to recovery. In each instance, the Panel rejected the Defendants' arguments and decided that the statute of limitations defense did not bar recovery in this case.

As with the subject matter jurisdiction issue, the Defendants must prove not only that the Panel erred as a matter of law but did so knowing a clear and unassailable principle of law that controlled the outcome of the issue and knowingly disregarded it to render its decision. There is absolutely no support for this argument in the record or the award, and this Court denies the Defendants' motion to vacate on this issue.

- 3. The Panel invited and considered the arguments of the Defendants regarding the attorney's fees award and ultimately made an award to the Plaintiff that was less than Plaintiff requested.**

Even more so, regarding the attorneys' fee issue, the Defendants do not even argue that the Panel knowingly disregarded the law. The Defendants simply disagree with the Panel's conclusion not to bar the Plaintiff's recovery for attorney's fees based on an unfounded theory of "unclean hands." The Defendants challenged this measured award by the Panel, set out in detail in its June 19, 2023, written ruling, which was less than the Plaintiff requested, and based on a reasoning detailed in the text.

The Defendants argue that the Panel was wrong in making the award and ask the Court to apply an equitable doctrine, unclean hands, to vacate or modify the Panel's award. The Defendants provide

no authority provided in 15-48-130 or -140 that would supply a basis for such an action. Nor have the Defendants shown any "manifest disregard of the law" with regard to this award of attorney's fees. The motion on this issue, too, must fail for want of any support in the law.

**4. The Panel's award was detailed and specific, and complies with the SC Arbitration Act.**

The Defendants raised this issue explicitly in the Motion to Reconsider filed with the Panel after the arbitration award of April 10, 2023. In their final award ruling of July 19, 2023, at pages 3-4, the Panel rejected this argument as follows:

The Panel notes that this dispute was referred to Arbitration by a Consent Order agreed to by counsel for the parties and signed by Judge Thomas L. Hughston dated July 9, 2012. Paragraph 8 of the Consent order stated that "This arbitration shall follow the South Carolina Rules of Civil Procedure where practical and to the extent not inconsistent herewith". The only provision in the Consent Order addressing the form of the Award is the requirement in paragraph 13 that "The determination shall be issued in the form of an award on all claims and counterclaims." The Panel issued a 25-page unanimous Arbitration Award addressing each of the claims asserted by the Plaintiff in his Second Amended Complaint, except those which the Plaintiff withdrew following the hearing. The Panel did not award any relief to the Defendants under the Counterclaims set forth in the Defendants' Answer to Second Amended Complaint and Counterclaims dated April 26, 2022.

The Panel has considered the grounds and Motion for Reconsideration of Arbitration Award dated April 18, 2023, and the arguments presented in Memorandum In Opposition To Defendants Motion For Reconsideration Of Arbitration Award dated May 3, 2023. The Panel finds that it is not required to issue separate findings of fact or conclusions of law when ruling on motions presented and ruled upon prior to the hearing which are renewed during the hearing. In ruling on Defendants Motions the Panel noted that the Defendants had submitted proposed Orders of Dismissal on the Statute of Limitations Issue and the Derivative Action Issue and that it had considered the testimony presented at the hearing, excerpts from the depositions of Jo Ved and Stuart Fred submitted by counsel, and all exhibits entered into evidence by the parties and the proposed Orders submitted by counsel. The Defendants presented no new arguments in the Motion for Reconsideration which had not previously been submitted to the Panel at the hearing held on June 16, 2022, after which the panel issued its July 11, 2022, Order Denying Defendants' Motions to Dismiss and for Summary Judgment.

S.C. Code Ann. Sec. 15-48-90 states that

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

There is no other requirement for the form of the award, which is consistent with the law of arbitration in SC that it is not "litigation by other means." Beyond the Arbitration Act provisions, the only other law governing the mode of trial and award for this arbitration was the Consent Order of Reference, July 9, 2012. As cited by the Panel, that Order required that the Panel "address each of the claims," which the Panel did. In addition, the Panel addressed each affirmative defense argued by the Defendants, in writing, numerous times.

There is no support for this argument in S.C. Code Ann.15-28-130 or -140, and the Court denies the Defendants' motion on this argument, as well.

#### **MOTION TO CONFIRM**

Having heard and resolved the Motions to Vacate and Modify the arbitration award, the Court confirms the arbitration award under SC Code Ann. Sec. 15-48-130(d).

**IT IS SO ORDERED.**

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Bentley D. Price, Presiding Judge,

Ninth Judicial Circuit



Charleston Common Pleas

**Case Caption:** Thomas H Morgan VS John L Gilbert , defendant, et al  
**Case Number:** 2012CP1000580  
**Type:** Order/Vacate Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766