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,

Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. **Have the Appellants met their burden to show that the Circuit Court erred in holding that the arbitrator exceeded his power and manifestly disregarded the well-established legal principles that the first to materially breach a contract cannot later complain of a subsequent breach of the other party, and that it is not a breach of contract to do exactly what the contract permits?**

STATEMENT OF THE CASE

This matter arises from two commercial contracts between business owners regarding the sale of restaurant businesses. Claims of breach were asserted by each party. Both contracts contain arbitration provisions.

Appellants filed Demands for Arbitration as against Respondents on December 22, 2010. Counterclaims were timely asserted. The Arbitration was consolidated and conducted by the agreed Arbitrator. On June 1, 2011, the Arbitrator issued his Decision and of the Arbitrator in Binding Arbitration ("Award"). Respondents filed a timely motion to modify or correct the Award [*see* Post Decision Order of the Arbitrator at 1] [*see also* Respondents' and Counterclaimants' Opposition to Claimants' Motion to Modify and Correct Award and Respondents and Counterclaimants' Motion to Modify and Correct Award, hereinafter "Post Award Motion of Respondents," attached as Exhibit D to Respondents' Motion to Vacate, Modify or Correct Arbitration Award, hereinafter "Respondents' Circuit Court Motion," filed January 18, 2012]; which was denied by the Post Decision Order of the Arbitrator on November 11, 2011. [*Id.* at 2.]

Appellants filed Motions in the Circuit Court for Orders Confirming Arbitration Award and Entry of Judgment. Respondents timely filed their Respondents' Motion to Vacate, Modify or Correct Arbitration Award, and opposed the motions of Appellants. [Order of Judge Manning at 1]. The Circuit Court set the hearing for the motions. At the motions hearing on March 15, 2012, the Circuit Court fully considered the Arbitrator's Award, the motions and materials filed with the Court, as well as arguments of counsel. On January 14, 2013, the Circuit Court issued its Order granting the relief requested by Respondents herein, correcting, modifying and vacating the Award so that each Claimant (Appellants) shall recover nothing and, further, to the extent

that the Award granted any recovery to either Claimant (Appellants), the Awards were vacated. [*Id.*]

Appellants filed a notice of intent to appeal on February 15, 2013.

ARGUMENT

I. Have the Appellants met their burden to show that the Circuit Court erred in holding that the arbitrator exceeded his power and manifestly disregarded the well-established legal principles that the first to materially breach a contract cannot later complain of a subsequent breach of the other party, and that it is not a breach of contract to do exactly what the contract permits?

A. Background

This case involves arms-length contracts between business persons, not consumers. In this case, Respondents, restaurant owners, sold interests in their restaurant businesses to two businessmen. Respondents sold one restaurant location ("Sandhills") to Appellant Shengen Sun, and another location ("Vista") to Appellant Xu Dong Sun.

The terms of the sales were amended and made nearly identical. They provided that each purchaser would make a down payment and then operate the businesses. The agreements provided, *and the Arbitrator properly found, that the purchasers were to pay the remainder of the purchase price in monthly payments to the sellers in the amount of the gross monthly profits from the businesses,* less a fixed, stated monthly amount that was considered the purchasers' "salary" by the parties. The fixed monthly "salary" was $10,000 per month for the Vista location and $8,000 per month for the Sandhills location - until the full purchase price was paid. [Award at pp. 3-6, ¶¶ 2, 4, 10.] The Arbitrator also properly found that the agreements provided that:

> In the event Purchaser is more than thirty (30) days late on any payments hereunder, the Units [of ownership in the Restaurant] sold hereunder shall revert to Seller and Purchaser forfeits all money paid to Seller and his/her ownership in the LLC and Business.

[Award pp. 3-4, ¶¶ 2, 4]; [Vista Agreement, and Sandhills Agreement, attached as Exhibits B and C to the Respondents' Circuit Court Motion, p. 2.][1]

The Arbitrator held that "the necessary inquiry is whether the evidence established, as alleged in the Counterclaims, that either Claimant [Appellants] made inappropriate cash withdrawals or received the benefit of any inappropriate expense deductions from gross receipts." [Award p. 6, ¶ 12.] The Arbitrator did, in fact, find and conclude that each Appellant "treated as business expenses ... several items which were not appropriate business expenses." [*Id.*, pp. 6-8, ¶ 13, 16.] The Arbitrator further found and concluded that these "inappropriate" deductions from gross profits amounted to $ 9,330.94 over the course of three months as to the M Vista location, [*Id.* at p. 6, ¶ 13, p. 9, ¶ 3] and $ 16,934.28 over the course of four months as to the Sandhills location. [*Id.* at 7-8, ¶ 16, p. 9 ¶ 4.]

Further, despite argument by the Appellants, the Arbitrator specifically found and concluded that Respondents did not waive these claims at any time. [*Id.* at p. 5, ¶ 7.] Finally, the Arbitrator specifically determined that the Appellants expressly abandoned any argument that the Agreements at issue were unconscionable or otherwise invalid. [*Id.* at p. 8, ¶ 19.][2] Notwithstanding all of the factual findings and conclusions expressed in the Arbitrator's reasoned Award decision, the Arbitrator awarded a recovery to the Appellants.

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[1] Appellants asked that the Court insert into the agreements "notice" and "right to cure" requirements that are simply not in the agreements. While the arbitrator noted as a fact that no "notice" was given, he did not hold or find anywhere in his reasoned Award decision that either a "notice" or "cure period" was in fact required. Indeed, he could not have done so without violating other well-defined, explicit and clearly applicable governing rules of South Carolina law, namely, that courts will not re-write the written contract of the parties. *See Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 310 S.E.2d 814 (1983). The contracts simply do not provide for "notice" or for a "cure period."

[2] This directly contradicts Appellants' argument that, as written, the contracts were "illusory."

B. The Standard for Vacating an Arbitrator's Award

Under South Carolina law, the Circuit Court may correct, modify, or vacate an award in arbitration when the arbitrator's award exceeds the arbitrator's powers in that it is in manifest disregard of the law, or where the award perversely misconstrues the law. *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E. 2d 320, 323 (2009); *C-Sculptures v. Brown*, 403 S.C. 53, 742 S.E.2d 359, 360 (2013). The Court may vacate the arbitrator's award for exceeding his powers when his decision constitutes manifest disregard of the law. *See C-Sculptures,* 403 S.C. 53, 742 S.E.2d 359, 360 (2013). Manifest disregard of the law is established where the governing law, ignored by the arbitrator, is well-defined, explicit, and clearly applicable, and where the arbitrator knew of the governing legal principle, yet refused to apply it. *Id.* As stated in *C-Sculptures*, such refusal to apply governing law is recognized as a circumstance constituting the arbitrator's exceeding his or her powers, because parties submitting to arbitration are at a minimum entitled to expect that the process will be conducted in accordance with, and not contrary to, well - defined, explicit and clearly applicable law that is brought to the arbitrator's attention.

In *C-Sculptures*, the Supreme Court held that where the governing law ignored by the arbitrator is well-defined, explicit and clearly applicable, the manifest disregard standard for vacating the arbitrator's award has been met. *Id.*

C. The Circuit Court Acted Properly.

Here, the Circuit Court properly reversed the Arbitrator's Award, holding that on its face, the reasoned Award directly violated the well-defined, explicit and clearly applicable governing South Carolina law, and that the Arbitrator was specifically aware of that law, but chose to disregard it.

In this case, the well-defined, explicit and clearly applicable legal principles are that:

(1) the first to breach a contract may not complain about any subsequent breach by the other party. *See Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 658 S.E.2d 539 (Ct. App. 2008), and

(2) it is not a breach of contract for a party to do precisely what the contract expressly permits. *Williams v Riedman*, 339 S.C. 251, 529 S.E.2d 28 (S.C. App. 2000). The Circuit Court properly held that the Award to Appellants should be vacated because of the Arbitrator's manifest disregard of these well-defined, explicit and clearly applicable rules of law.

Here, the crucial requirements of the standard set forth by the Supreme Court in *C-Sculptures* are conceded by Appellants, and are not in dispute. First, as stated by Appellants, the fact that these legal principles are well-defined, explicit and clearly applicable *is not disputed.* [*Appellants' Brief* at 10.] Second, as stated by the Appellants, *the parties agree* that the Arbitrator was well aware of that law. [*Id.*] In addition, it is plain, and it is uncontested in this appeal, that the Arbitrator chose not to apply these laws in his reasoned decision or in his decision to deny Respondents' Post-Award Motion to Modify or Correct the Award. Under the most recent South Carolina Supreme Court's pronouncement on this very issue, in *C-Sculptures*, 403 S.C. 53, 742 S.E.2d 359, 360, 362 (2013), these concessions by Appellants are, in this case, dispositive.

1. The Circuit Court in Review properly observed that the reasoned Award Decision explicitly shows that Appellants were the first to breach, and held that Appellants therefore could not recover.

Applying these well-defined, explicit and clearly applicable governing rules of South Carolina law to the findings and conclusions in the Arbitrator's reasoned decision itself, each

Appellant could recover nothing. The Arbitrator's reasoned decision shows on its face that each Appellant was the first to commit material monetary breaches of the agreements at issue for three and four consecutive months preceding Respondents' conduct complained of, respectively, and, further, that Respondents' actions in response to those breaches were specifically authorized by the parties' written agreements. However, in spite of these findings, the Arbitrator did not apply the clearly applicable law, which would preclude any recovery by Appellants. Because of that failure, the Circuit Court properly vacated those portions of the Arbitrator's Award. As in *C-Sculptures*, while such a result in an arbitration should be rare, it is the inevitable consequence of these circumstances.

The Circuit Court in this case reviewed the Arbitrator's Award under the proper standard as set forth by this Court in *C-Sculptures v. Brown*, 394 S.C. 519, 523, 716 S.E.2d 678, 680 (Ct. App. 2011), *rev'd*, 403 S.C. 53, 742 S.E.2d 359 (2013). Although the Court of Appeals result in *C-Sculptures* was reversed, its statement as to the applicable law and standard were recognized to be correct. *C-Sculptures*, 403 S.C. 53, 742 S.E.2d 359, 360 (2013).

The Circuit Court correctly found that the Arbitrator manifestly disregarded the well-defined, explicit and clearly applicable governing law in *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 658 S.E.2d 539 (Ct. App. 2008), and in *Williams v Riedman*, 339 S.C. 251, 529 S.E. 2d 28 (S.C. App. 2000). The Circuit Court properly found, *and there is no dispute in this appeal*, that these authorities were well-defined, explicit and clearly applicable governing law. The Circuit Court properly found, *and it is undisputed in this appeal*, that this law was brought to the Arbitrator's attention, but the Arbitrator ignored or declined to apply it. [*See* Order of Judge Manning; Appellants' Brief at 10; *see also* Post Decision Order of the Arbitrator].

This is not a case in which the Respondents are asking the Court to surmise the possible findings or conclusions of an unreasoned award. Respondents are not quibbling with the Arbitrator's reasoned findings. This is not a case in which the asserted manifest error of law is some inconsequential matter such as a question about the admission of evidence. Indeed, the findings as stated in the Arbitrator's decision point to the inescapable, plain and manifest error of law that necessarily affected the outcome of the case on the merits, and which the Circuit Court corrected under the governing and applicable standard recently reaffirmed in *C-Sculptures*, which is directly on point.

The fact that the Arbitrator manifestly disregarded the law is evident on the face of the Award itself. The Award specifically finds that each Appellant *failed to pay to Respondents* the entire gross profits (less the precise amount of monthly "salary" to each Appellant) due monthly as to each restaurant, for a period of at least three months – a clear, ongoing breach of the contracts. This is most clearly evident from the Arbitrators' findings at pages 6-8 at paragraphs 13 and 16 of the reasoned Award. There, the Arbitrator found that each Appellant, in addition to taking their agreed, fixed monthly "salary" amount, also charged the businesses with purely personal items, including personal apartment "rent" (among other things) for a period of three or more months.[3] This finding alone demonstrates that the Appellants were the first to commit

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3 The Arbitrator's reasoned Award reveals that over a series of months in late 2010, each Appellant improperly failed to pay over to Respondents each month the full gross profits less the agreed salaries. Indeed, the Award is clear that each Appellant wrongfully misappropriated monies of the businesses, over the course of months, to pay for improper and purely personal non-business expenses. [Award at pp. 6-7, ¶ 13; at pp. 7-8, ¶ 16.] By using business funds to pay these purely personal expenses, each Appellant in effect took extra monthly "salary" over and above the agreed amount, without consent and in violation of the agreements. In the case of Sandhills, the Arbitrator found that Appellant Shengen Sun wrongfully took almost $17,000 over the course of only a few months leading up to December 2010. In the case of Vista, the Arbitrator found that Appellant Xu Dong Sun improperly took almost $10,000 in the course of only a few months leading up to December 2010. And while the Appellants contended that Respondents "waived" these matters, the Arbitrator found that there was no such waiver. [*See* Award p. 5, ¶ 7.]

material breach of the agreements, and precludes them from recovering at all - even if there were a subsequent breach by Respondents. *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 658 S.E.2d 539 (Ct. App. 2008).

As a result of these actions on the part of Appellants over a course of months, Respondents re-took possession of the businesses in December 2001 and declared that Appellants had forfeited their investments under the contract clause quoted above, which the Arbitrator recognized.

The Appellants' appeal argument appears to seek shelter only in the strict requirements for overturning an arbitrator's decision. However, as stated in *C-Sculptures*, that argument is simply not enough to overcome undeniable manifest disregard of the law, such as shown here.

Appellants argue that Respondents failed to give "notice" of these breaches by Appellants, and failed to allow a "cure period," despite the fact that there is no provision for such notice or cure period in these commercial agreements among business persons, and no finding in the Arbitrator's decision that there was either a notice requirement or a cure period. Essentially, Appellants have requested that the Arbitrator, the Circuit Court, and this Court re-write the commercial contract between these business persons to add such terms. However, in cases such as this, between business persons, neither the Arbitrator nor the Courts can re-write the parties' written contract. *See Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 310 S.E.2d 814 (1983) (stating that it is not the function of the court to rewrite contracts for parties).

2. The Circuit Court also properly observed that the Contracts as Recognized by the Arbitrator expressly provided that the ownership reverted to Respondents based on the facts and conclusions of the Arbitrator that each Appellant had failed to pay the required amounts for a period of consecutive months.

Because the Arbitrator actually found that Appellants "improperly" failed to pay each month the full monthly profit less the agreed "salary" amount, for three months or more, a clear provision of the contract, recognized by the Arbitrator in the Award, applied:

> In the event Purchaser is more than thirty (30) days late on any payments hereunder, the Units [of ownership in the Restaurant] sold hereunder shall revert to Seller and Purchaser forfeits all money paid to Seller and his/her ownership in the LLC and Business.

[Award pp. 3-4, ¶¶ 2, 4]; [Vista Agreement, attached as Exhibit B to the Respondents' Circuit Court Motion, p. 2]; [Sandhills Agreement, attached as Exhibit C to the Respondents' Circuit Court Motion, p. 2.]

Based on this provision of the agreements, it was simply not a breach on the part of Respondents to reclaim the Units of ownership in the restaurants as they did, and to consider the money paid to Respondents as forfeited. It is axiomatic that it is not a breach of contract to do that which the contract specifically permits. *Williams v Riedman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000).

D. Conclusion.

The Circuit Court properly observed that the Arbitrator was presented with the above described clear and well settled and clearly applicable law, and that he knew of it but simply chose not to apply it. This is exactly the type of scenario, albeit rare, in which the South Carolina

Supreme Court has most recently recognized that an arbitrator's award must be vacated, revised or corrected as being manifest error of law and in excess of authority. The decision of the Circuit Court should be affirmed.

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August 7, 2013

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DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondents propose the following to be included in the Record on Appeal:

1. Xu Dong Sun Demand for Arbitration.

2. Shengen Sun Demand for Arbitration.

3. Respondents' Answer and Counterclaims to Demand for Arbitration.

4. Respondents' Motion to Vacate, Modify, or Correct Arbitration Award, with the following exhibits:

   Exhibit A - Decision and Award of the Arbitrator in Binding Arbitration

   Exhibit B - Xu Dong Sun Amended Purchase Agreement

   Exhibit C - Shengen Sun Amended Purchase Agreement

   Exhibit D – Respondents' and Counterclaimants' Opposition to Claimants' Motion to Modify and Correct Award and Respondents' and Counterclaimants' Motion to Modify and Correct Award

   Exhibit E - Post-Decision Order of Arbitrator

   Exhibit F [omitted]

5. Order of Judge Manning.

6. Transcript of Proceedings pp. 7, 13 – 25.

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

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PROOF OF SERVICE

I certify that I have served a copy of Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal on Appellants by mailing a copy of the same by first class mail, postage prepaid, to their attorneys of record, Allen Jackson Barnes, Allen Jackson Barnes Attorney at Law LLC, P. O. Box 2838, Sumter, South Carolina 29151 on August 7, 2013.

[Signature Block on Following Page]

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