

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DORCHESTER)	
)	
AJP SOLUTIONS, LLC)	CASE NO. 2022-CP-18-01997
)	
)	
)	
vs.)	
)	
CLARK CONSTRUCTION, INC. OF)	
MISSISSIPPI ET AL.)	
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ORDER



THIS MATTER comes before the Court on the Motion of Defendant Clark Construction, Inc. of Mississippi (“Clark”) for an Order: (1) confirming an arbitration order of dismissal; and (2) dismissing this action with prejudice. The Court hereby denies the Defendant’s Motion for the reasons set forth herein and orders the parties back to arbitration to resolve AJP’s claims against Clark.

FACTUAL BACKGROUND

This matter arises from a payment dispute involving construction services rendered by AJP at a multi-family project located at 112 Grandview Drive Summerville, SC 29483. AJP provided painting and drywall services on the project; however, during the course of construction a payment dispute arose with Clark Construction, Inc. of Mississippi (Clark Construction), the general contractor on the project. AJP ultimately filed a mechanic’s lien against the project in September of 2022.

Subsequently, AJP filed a foreclosure action regarding the mechanic’s lien in December of 2022, and Clark, in turn, made an appearance by counsel and filed a motion to dismiss and/or to compel arbitration pursuant Rules 12(b)(1), 12(b)(3), and 12(b)(6) of the South Carolina Rules of

EXHIBIT A

Civil Procedure, for an order dismissing Plaintiff's Complaint for lack of subject matter jurisdiction, improper venue and failure to state a claim upon which relief may be granted, and alternatively, for an order, pursuant to 9 U.S.C.A. § 3 staying the South Carolina action as to all parties and compelling AJP and Clark to arbitration.

Arch filed a related action against Clark in the United States District Court for the Southern District of Mississippi, Western Division concerning its bond styled *Arch Insurance Company v. Clark Construction, Inc. of Mississippi*, Case No. 5:22-cv-100-ks-bwr, wherein curtailed counterclaims were filed in response by Clark against Arch.

Clark instituted an arbitration against AJP in January of 2023 through the AAA before the South Carolina court ruled upon its pending motion asserting claims for damages against AJP. AJP objected to participation in the arbitration until the South Carolina court heard the pending motion.

On May 22, 2023, counsel for Arch reached out to counsel for AJP and Clark to coordinate a global mediation. Clark's counsel informed the parties that Clark would not participate in the mediation if Clark was expected to pay any money to AJP or let AJP walk away.

On June 5, 2023, counsel for Arch asked if AJP would be ok with this arrangement for the mediation, and indicated that he had not "studied AJP's claim to know how strong it is." AJP indicated that it was not interested in that arrangement and would not be contributing to any settlement funds for Clark's claims.

In turn, Arch moved forward in coordinating the mediation with the parties and offered AJP to attend by zoom in order to help with the factual allegations concerning Clark's claims against AJP and Arch. On June 20, 2023, AJP agreed to participate in the mediation by zoom to help Arch.

On June 22, 2023, the South Carolina court ordered AJP and Clark to arbitration despite AJP's opposition to Clark's motion to compel the arbitration on several grounds.

On June 23, 2023, AJP filed an Answer and Counterclaim in the AAA arbitration.

On July 6, AJP and its counsel participated in the mediation by zoom, but AJP did not authorize Arch to resolve its arbitration claims against Clark. The discovery phase of the arbitration was ongoing, as only limited documents had been exchanged and no depositions had been taken yet. Arch misrepresented its settlement authority to Clark and the mediator despite knowing that AJP had not authorized it to resolve its claims against Clark.

Clark, in turn, moved to dismiss the arbitration via the unauthorized settlement agreement. On July 28, the arbitrator dismissed the proceeding based upon this misrepresentation by Clark and Arch that all claims were amicably settled during the mediation.

In reviewing an arbitration award for the purpose of confirmation or vacating of the same, this Court must determine whether the arbitrator's award demonstrates a manifest disregard for the law. *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 742 S.E.2d 359 (2013). "An arbitrator's 'manifest disregard of the law,' as a basis for vacating an arbitration ward occurs when the arbitrator knew of a governing legal principle yet refused to apply it." *Id.*, 403 S.C. at 56, 742 S.E.2d at 360.

AJP argues that the Defendant's motion should be denied because the arbitrator dismissed the arbitration proceeding despite AJP's objection to the purported settlement based upon the invalidity of the settlement agreement. In the arbitrator's order, he specifically states he does not believe that he has the "authority or jurisdiction" to consider whether the power of attorney provision of the indemnity agreement is enforceable under South Carolina law giving effect to the settlement agreement; yet, he accepts the settlement agreement, which is based upon the indemnity agreement, as the basis for his dismissal of the arbitration.

AJP contends that this was a manifest disregard of the law. AJP argues that its claims asserted in the arbitration against Clark were separate and distinct from the claims made by Clark

against AJP, which were subject to the indemnity agreement, and that Arch did not have the legal authority to negotiate and/or settle those claims.

The Court agrees that Arch overstepped its authority by attempting to negotiate AJP's claims against Clark for the following reasons:

I. Arch did not have standing or proper authority from the purported power of attorney to participate in the arbitration.

Arch was not a party to the arbitration and had no standing to participate in the arbitration and no rights within the arbitration forum or otherwise to settle and/or release AJP's claims and/or liens. Arch did not file a motion to intervene in the arbitration proceeding, and it cannot interpose itself into the arbitration proceeding in such a manner as creating an unauthorized and unenforceable settlement agreement with Clark in order to extinguish its own liability being litigated in a separate action and forum (*Arch Insurance Company v. Clark Construction, Inc. of Mississippi*, Case No. 5:22-cv-100-ks-bwr). The power to do so far exceeds the scope of the general indemnity agreement.

The Court finds that AJP's claims against Clark are separate and distinct from any claims Clark has filed against AJP, which would be included in the bond/declaratory judgment action against Arch. AJP's Complaint asserts claims which arise not only from the breach of the contractual agreement between Clark and AJP and quantum meruit but also from the South Carolina Mechanic's Lien Statute, S.C. Code section 29-5-10 *et seq.* and the bond claim against Travelers Insurance Company. In its Complaint, AJP claims it is owed and has filed claims for \$626,429.28, plus interest at the legal rate, cost, and attorneys' fees. On the other hand, Clark alleged damages in the arbitration of \$443,781.41 arising from AJP's departure from the project.

Clark and Arch argue that Arch's authority to reach a settlement of AJP's counterclaim derives from a general indemnity agreement between Arch and AJP. Ex. B. However, the power of attorney provisions contained in paragraph 7 of the general indemnity agreement do not comply with the South Carolina Uniform Power of Attorney Act, South Carolina Code section 62-8-101 *et seq.*, which was established in 2017, prior to the execution of the indemnity agreement. South Carolina Code section 62-8-107 provides that the meaning and effect all power of attorneys shall be determined by the law of the jurisdiction in which the power of attorney was executed (South Carolina), when it does not specifically indicate that the law of another state applies. South Carolina requires that all power of attorneys be signed by two disinterested witnesses. *See* S.C. Code section 62-8-105 (2) & S.C. Code section 62-2-502.

The general indemnity agreement in question did not have any witnesses sign it, and it is therefore invalid. Thus, the power of attorney provision contained in the indemnity agreement is in violation of South Carolina law, and Arch has no authority to act on behalf of AJP in this arbitration. Without actual standing to participate in this arbitration or authorization from a duly executed power of attorney, Arch cannot manipulate a settlement of the entirety of the claims and counterclaims in this arbitration as set forth by the parties, even if Clark has agreed to do so.

II. The purported settlement violates Rule 43(k) of the South Carolina Rules of Civil Procedure

AJP and its personal indemnitors did not authorize the settlement agreement between Clark and Arch. The plain language of the agreement sets forth the assignment of certain interests to the surety with respect to claims asserted by Clark against AJP or Arch as a means of recovery for any payment made on its behalf; however, it does not give Arch specific and complete authority over any and all claims that AJP may have against Clark.

In South Carolina, Rule 43(k), SCRPC, states that “[n]o agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record or reduced to writing and signed by the parties and their counsel.” *See also Ashfort Corp. v. Palmetto Constr. Grp., Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 534.

From a review of the record, it is clear that AJP and its personal indemnitors have objected to any settlement resolving its claims against Clark. Without the consent of AJP any purported agreement to settle its claims is invalid. Therefore, the Defendants motion is denied and the parties are ordered back to arbitration in order to resolve the claims that AJP asserted against Clark.



Dorchester Common Pleas

Case Caption: Ajp Solutions Llc VS Clark Construction Inc Of Mississippi ,
defendant, et al
Case Number: 2022CP1801997
Type: Order/Dismissal

It is so Ordered!

s/Diane S. Goodstein