

the “prevailing party”; the arbitrators had no jurisdiction to render a decision on the award of attorneys’ fees; the Panel exceeded its power in determining the amount of fees awarded to ATC; and the award should be corrected to calculate additional pre-judgment interest. ATC has moved to confirm the award. Based on the following, the Court finds the Panel’s Award should not be disturbed; therefore, ATC’s Motion to Confirm the Panel’s Award is Granted; NKD’s Motion to Vacate or Modify the Award is Denied, and the Motion for Release/Relief of Mechanic’s Lien is Moot.

STANDARD OF REVIEW

“When a dispute is submitted to arbitration, the arbitrators determine 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 only be vacated under narrow, limited circumstances.” Pittman Mortg. Co. v. Edwards, 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997).

S.C. Code Ann. § 15-48-130(a) (Supp.1996) provides the grounds for vacating an arbitration award. It states in relevant part:

- (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.

These statutory provisions make it clear that when parties choose arbitration, the primary role of the courts is not one of reviewing the record for factual or legal errors. Rather, the primary role is to provide relief where the arbitrators have acted in an unexpected and harmful manner such as to exhibit corruption, evident partiality, or acting beyond their powers.

In these cases, it is appropriate for a court to remedy the situation to protect the parties, who cannot protect themselves. However, where the parties have chosen arbitrators, rather than the courts, to resolve their disputes, the General Assembly has not empowered the courts to correct mere errors of law or fact arising from private resolution efforts. As Pittman, supra, states, such arbitration awards are conclusive.

FACTUAL BACKGROUND

The parties were involved with a real estate development in the White Rock area of Richland County. NKD is the owner of the development known as River Shoals, and ATC was the site contractor hired by NKD to construct roads and utilities for that development. Problems arose between the parties which resulted in a mechanics lien and lis pendens being filed by ATC, which prompted counterclaims by NKD for road and utility defects and for liquidated damages for delay, and interest. Geo-Systems Design & Testing was the designer of the roads which were installed and was brought in as a third-party defendant by ATC, while NKD brought in Gearig Civil Works, LLC, a sub-contractor who laid soil cement on the roadbeds, as a third-party defendant. As noted above, the parties consented to arbitration.

After the parties agreed to arbitration, the parties selected three experienced and capable construction lawyers who have outstanding reputations in this State, as arbitrators. The arbitration hearing was held in Columbia and lasted four days in November 2024.

During the arbitration proceeding, Gearig settled its claims with ATC and NKD and was dismissed as a party. It was agreed Gearig's settlement payment to NKD would serve as a credit or setoff in ATC's benefit. At the conclusion of the arbitration, Geo-Systems was found not liable by the Panel. Thus, the Award and challenges to the same is between the contractor, ATC and the owner, NKD.

On January 21, 2025, the Panel issued its Interim Award. The Interim Award found that NKD had suffered net repair damages of \$1,111,787.83 plus liquidated damages of \$365,000, and pre-judgment interest of \$147,616.05. ATC was awarded \$838,685.95 on its mechanics lien claim. The Panel then reduced NKD's award to the extent of the amounts awarded to ATC. After the set-off of the mechanics lien claim, the total amount due NKD by ATC was \$785,717.93. The only issue not resolved by the Interim Award was the issue of the award of Attorney's Fees and costs on the mechanics lien claim. The Panel asked the parties to brief the Panel on the issue of entitlement to attorneys' fees before issuing its final award.

In response, NKD filed a Motion to Correct Interim Award which raised issues concerning: 1) the mistaken or inconsistent calculation of liquidated damages; 2) a miscalculation of interest on the Gearig settlement resulting in a shortfall of \$34,701.40; and 3) a clerical error concerning the damages claimed by NKD against ATC. With respect to the award of attorneys' fees, both parties submitted a Petition for attorneys' fees and both sides filed responses to the other side's Petition.

On April 9, 2025, the Panel issued its Final Award. The Panel rejected NKD's Motion to Correct Interim Award, determining that the liquidated damages had been properly computed, and denying NKD's request for pre-judgment interest on the settlement amount with Gearig. With respect to the award of attorneys' fees, the Panel determined that ATC was the prevailing party for attorneys' fees under S.C.Code Ann. §29-5-10(b). It based this determination on the fact that neither party had made an offer, therefore the issue would be decided under §29-5-10(b) by determining which party's pre-trial offer was closer to the final award in the case. ATC's offer was deemed to be the amount prayed for in its Complaint of \$847,236.20. Because NKD also made no offer, §29-5-10(b) directed that its offer was the amount of its counterclaim, which the Panel found to be \$3,373,570.29. Considering that the Panel's final net award was \$638,101.88 before interest, and \$785,717.93 with interest, under either calculation, ATC's pre-trial demand of \$847,236.20 was "clearly 'Closer to the verdict reached' in this matter."

ATC sought attorneys' fees in the amount of \$267,930.00. After review of all parties' submissions on the issue, the Panel exercised its judgment by reducing ATC's requested fees of \$267,930 by \$39,330 resulting in a total of \$228,600. The Panel reduced NKD's net award by that amount. ATC's Motion to Confirm and NKD's Motion, which are now before this Court, followed.

I. THE PANEL DID NOT LACK SUBJECT MATTER JURISDICTION

NKD raised the issue the Arbitration Panel did not have subject matter jurisdiction to hear the motions for attorney's fees. NKD cites Palmetto Wildlife Extractors, LLC v. Ludy, 435 S.C. 690, 869 S.E.2d 859 (Ct. App.2022), but this case does not discuss the issue of subject matter jurisdiction. The statutes it cites in its decision do not refer to arbitration, concern procedural issues for obtaining certain types of specialized relief, and the case does not discuss the grant of jurisdiction.

The causes of action that the Court of Appeals refused to send to arbitration involved non-parties whose interests might be affected by a decision to which they were not a party. Pursuing a receivership, dissolution or accounting can involve the interests of non-parties, especially creditors, which an arbitration would not have the power to protect

Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994) anticipated this problem of confusion between venue and subject matter jurisdiction. Quoting from the case:

“The distinction between subject matter jurisdiction and venue is an important one in the law.” “Subject matter jurisdiction is ‘the power to hear and determine cases of the general class to which the proceedings belong.’ “On the other hand, venue is the place or geographical location of trial.” “A court sitting where venue is improper may nevertheless render judgment provided the party who possesses the venue right consents, either expressly or impliedly.” “A court lacking subject matter jurisdiction, however, has no authority to act regardless of the geographical location or consent of the litigants.” “There is but one Circuit Court in South Carolina, with uniform subject matter jurisdiction ‘throughout the State.’ The circuit court is made up of the court of common pleas, which hears civil actions, and the court of general sessions, which hears criminal cases. The phrase "court of common pleas" contained in the statute, refers to the South Carolina Court of Common Pleas, and not a particular circuit or county. The statute grants the court of common pleas throughout the State subject matter jurisdiction to hear appeals from the orders of the full commission.” Having held the Court of Common Pleas sitting in Richland County has subject matter jurisdiction, we review the statute to determine the correct venue for the appeal. S.C.Code Ann. § 42-17-60 designates "the county in which the alleged accident happened, or in which the employer resides or has his principal office" as proper venue for the appeal. As the accident occurred in Lexington County, venue is clearly proper in Lexington County. Proper venue in one county, however, does not exclude proper venue in another county where equally authorized under the statute.” (Citations omitted)
Id. at 600.

Subject matter jurisdiction is a concept that applies to courts. If the Court does not have subject matter jurisdiction, it must dismiss the case. It also cannot stay the case, nor can it transfer the matter to arbitration since it has no power over the case.

If a court has subject matter jurisdiction, and venue exists or has been waived, it can hear the case. The court also has the power, since it has jurisdiction, to stay the case and refer the matter to arbitration if there is a valid arbitration agreement. S.C. Code Ann. §15-48-20.

Subject matter jurisdiction is not a concept that mandates the matter remain with a Court and prevents it from being sent to a master, a special referee, or an arbitration panel, as NKD seems to contend. Rather, subject matter jurisdiction must exist before a court can take any of those actions.

In this case, the court of common pleas had subject matter jurisdiction pursuant to S.C. Code Ann. §29-5-140.¹ Richland County was the correct venue for the mechanics lien case arising from a subdivision located in Richland County. See, Dove v. Gold Kist and S.C. Code Ann. §29-5-140.

Richland County was also the correct venue for awarding attorney's fees to the prevailing party in the mechanics lien action according to S.C. Code Ann. §29-5-10(a). Although NKD refers to S.C. Code Ann. §29-5-10(a) as a subject matter jurisdiction statute, NKD is in error because §29-5-10(a) contains no grant of jurisdiction to any specific court. That section simply grants venue in the court in which the lien action is filed, although there is no limitation to it being a circuit court. It is §29-5-140 that bestows subject matter jurisdiction to the circuit court for enforcing a mechanics lien.

NKD argues the use of the imperative "must" in Section 29-5-10(b) indicates a jurisdictional requirement that the case be heard where the lien was filed. In fact, that term is used in venue statutes such as S.C. Code Ann. §15-7-10 and §15-7-20. See also §§15-7-30 and 15-7-80. The use of the term "must" is an indicator of venue, not of jurisdiction.

¹ S.C. Code Ann. §29-5-140 states in pertinent part: "The lien may be enforced by petition to the court of common pleas for the county in which the building or structure is situated."

Since the Court of Common Pleas for Richland County had subject matter jurisdiction over the case and was the correct venue for the case, this Court also had the power to stay the case and refer the entire matter, including attorneys' fees, to an arbitration panel per S.C. Code Ann. §15-48-20, once the parties agreed to arbitration in the consent order. NKD voluntarily moved and consented to the arbitrators deciding the issue of the entitlement to, and amount of attorney's fees. Accordingly, based upon the record presented to this Court, NKD waived its right to have the Richland County Court of Common Pleas determine those issues.

II. THE AWARD CORRECTLY AWARDED ATTORNEYS' FEES TO ATC

NKD's Motion seeks to vacate the Panel's decision to award ATC attorneys' fees under the mechanics lien statute. The Motion claims that the award of mechanics lien attorney's fees "exceeded their powers" as arbitrators and was "in manifest disregard of the law."

To establish that the arbitrators exceeded their powers under sub-section (a)(3) of S.C. Code Ann. §15-48-130, NKD must show that the issue resolved by the arbitrators was not within the scope of the agreement to arbitrate. Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct.App.1998).

The record reflects that both ATC and NKD made motions for the award of attorneys' fees. This Court's Consent Order to Stay provided "The arbitration panel shall be empowered to hear and rule on all motions as though this matter were being heard in the South Carolina Court of Common Pleas." Thus, the arbitrators did not exceed their powers under section (a)(3) in ruling on this issue which both parties brought before the Panel.

NKD's motion also alleges the non-statutory ground that the decision was in manifest disregard of the law. When a dispute is submitted to arbitration, the arbitrators' decision is generally conclusive, and courts will refuse to review the merits of an award. Pittman Mortgage

Co. v. Edwards, 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997). While it is true the courts have not hesitated in appropriate cases to vacate an arbitration award where there is a manifest disregard or perverse misconstruction of the law, “those cases have been exceedingly rare, requiring circumstances far more egregious than mere errors in interpreting or applying the law.” Lauro v. Visnapuu, 351 S.C. 507, 519, 570 S.E.2d 551 (S.C. App. 2002). 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. Pittman, supra, at 337. If there is even an arguable ground for an award, the arbitrators have not manifestly disregarded the law. Batten v. Howell, 300 S.C. 545, 548, 389 S.E.2d 170, 172 (Ct.App. 1990).

NKD argues in its omnibus memorandum there is a standard of review which is “perverse misconstruction” of the law. There is no definition of that standard of review in any of the cases this Court has reviewed. The cases speak in terms of arbitration awards that have been very rarely overturned based on a “manifest disregard or perverse misconstruction of the law.” Batten v. Howell, 300 S.C. 545, 548, 389 S.E.2d 170, 172 (Ct.App. 1990). In the absence of any further definition, “perverse misconstruction” should be construed as an equivalent standard to “manifest disregard”, with all the limitations on its use.

NKD claims that because its recovery on its construction defect and delay counterclaims exceeded ATC’s recovery on its mechanics lien, that ATC has failed to prove “some entitlement” to recover on its lien. NKD has failed to cite to a case saying the party with the smaller award cannot be the prevailing party under the statute for purposes of awarding attorneys’ fees, despite the statute having been in effect for 35 years.

The three cases which NKD does cite were cases that decided, based upon procedural grounds and as a matter of law only, that the lien claimant was not entitled to relief. NKD cites to

EFCO Corp. v. Renaissance on Charleston Harbor, LLC, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006); Utilities Const. Co. v. Wilson, 321 S.C. 244, 250, 468 S.E.2d 1, 4 (Ct. App. 1996); and Seckinger v. Vessel Excalibur, 326 S.C. 382, 388, 326 S.C. 382, 388, 483 S.E.2d 775, 777-78 (Ct. App. 1997).

In EFCO, the Court of Appeals found that the Contractor failed to establish some entitlement to a mechanics lien because the contractor failed to file its lien within the statute of limitations, thus it had no rights at all under the statute. In Utilities, the trial court directed a verdict in favor of Wilson on the mechanic's lien cause of action because Utilities failed to timely serve notice of the mechanic's lien. Once again, the decision was based upon the plaintiff not meeting the statutory prerequisites for making a claim.

Finally, Seckinger ruled that because neither party had made a pre-trial settlement offer, the statutory test did not apply, and instead the common law test of the larger award determined entitlement to attorney's fees.

The holdings in Utilities, EFCO and Seckinger that the contractor had failed to prove entitlement to a lien award were not based upon the merits of the entitlement to lien damages but upon a failure to meet statutory prerequisites that have no relevance to this case. These cases do not apply to the facts in this case.

The Court finds any confusion on how to handle this situation is governed by the holdings in two later Supreme Court decisions, Brasington Tile Co., Inc. v. Worley, 327 S.C. 280, 289, 491 S.E.2d 244, 248 (1997) *superseded by statute* and JRS Builders, Inc. v. Neunsinger, 364 S.C. 596, 614 S.E.2d 629 (2005), that held the statutory prevailing party test applies regardless of whether the parties make a pre-trial offer of settlement.

NKD submitted these same arguments to the Panel. The Panel considered NKD's position but instead applied the statutory formula for determining the "prevailing party" entitled to fees:

Neither party made an offer of settlement as allowed in Section 29-5-10(b) of the South Carolina Code. Therefore, the Panel must look to the amount prayed for in ATC's Complaint as the "final offer of settlement" from ATC. That amount is \$847,236.20. Since NKD also did not make an offer of settlement pursuant to the statute, the Panel must consider "the value of his counterclaim" to be the "negative offer of settlement." Since the statute utilizes "offers of settlement" that are made prior to the start of a trial to determine the "prevailing party," the Panel gives more weight to the counterclaims asserted in NKD's Pre-Hearing Brief than the exhibit introduced at trial, or the subsequent amount asserted in NKD's Post-Hearing Brief. We conclude that the proper amount to be used as NKD's "negative offer of settlement" is \$3,373,570.29.

(Final Award, p.2.)

“Both ATC and NKD thoroughly briefed the issues and provided affidavits in support of their requests for attorneys’ fees and costs. The Panel carefully reviewed those submissions and determined that ATC is the “prevailing party” pursuant to the South Carolina Mechanic’s Lien statute and related cases. ATC was entitled to nearly all of its mechanics lien amount, but after consideration of the compulsory counterclaims we found that the net award, or one verdict, resulted in an Interim Award in favor of NKD of \$638,101.88 before interest or \$785,717.93 with interest through January 24, 2025. Using either number, and considering the offers of settlement discussed above, ATC is clearly “closer to the verdict reached” in this matter.”

(Final Award, p.3)

NKD also claims the Panel engaged in a perverse misconstruction or manifest disregard of the statute by rejecting NKD's arguments. The Court finds The Panel did not disregard the governing statute, but expressly made their decision based upon that statute.

ATC proved entitlement to a mechanics lien of \$838,685.95, or 98.99% of the amount sought. That amount was the final amount awarded under the mechanics lien statute by the Panel. NKD argues that ATC lien award did not result in a cash payment from NKD to ATC, therefore

ATC did not recover on its lien. NKD's setoffs were the result of claims that were not filed under the mechanics lien statute. The fact that the offsetting common law claims exceeded the lien recovery, meant that ATC's 98.99% mechanics lien recovery took the form of an offset rather than cash under the "one verdict" procedure. ATC proved "some entitlement" to a mechanics lien and the arbitrators correctly determined that ATC was the prevailing party under §29-5-10(b) and therefore awarded ATC its attorney's fees. The set-off resulted in a benefit to ATC of \$838,685.95.

The attorneys' fees statute (Section 29-5-10(b)) was enacted in 1991 and amended in 1999. In the 35 years since its enactment, the "one verdict" procedure has been a part of the test that determines which party gets attorney's fees. Replacing the common law rule that the party with the largest net recovery was the prevailing party for attorney's fees, the General Assembly enacted an approach that was designed to promote settlements by rewarding the most reasonable pre-trial offer. Seckinger v. Vessel Excalibur, 326 S.C. 382, 389, 483 S.E.2d 775,780 (Ct.App. 1997). By netting the value of all the claims to reach a single verdict, the single verdict is a benchmark to which the Panel or any court compares the pre-trial offers of the parties. The party whose pre-trial offer is closer to the "one verdict" amount is the prevailing party.

The Panel correctly concluded that after considering the common law counterclaims in which the recovery exceeded the lien recovery, that ATC's 98.99% mechanics lien recovery had to take the form of an offset rather than cash under the "one verdict" procedure. The Panel correctly applied Section 29-5-10(b) to the facts of this case. On review of the record before it, this Court finds the Panel did not engage in either a perverse misconstruction nor a manifest disregard of the statute.

NKD also claims that ATC cannot prevail on its mechanics lien claim because the lien was bonded off and ATC failed to bring a new claim on the bond. Citing Keeney's Metal Roofing, Inc. v. Palmieri, 345 S.C. 550, 555, 548 S.E.2d 900, 902 (Ct.App. 2001), holding that once the property has been bonded off, there is no claim against the property, and a new action must be filed against the bondholder.

However, in this litigation, the bond stated that "Upon the filing of this cash bond, the Mechanics Lien shall be discharged, and the Cash Bond shall take the place of the property upon which the lien existed and shall be subject to the lien." (Cash Bond ECF filing dated April 19, 2022, p.2 of 3.) Thus, no new filing was necessary under the terms of the bond.

There is also no need to refer to the cash bond because ATC's mechanics lien recovery was satisfied by being set off against the amount of NKD's defect claims award. In Cohen's Drywall Co., Inc. v. Sea Spray Homes, LLC, 374 S.C. 195, 648 S.E.2d 598 (2007), the Supreme Court ruled that upon the posting of a cash bond to remove the mechanics lien, the Plaintiff is not required to file a second enforcement action against the cash bond. See also, United Tank Services, Inc. v. United Industries Group, 453 F.Supp.3d, 826 (D.S.C. 2020).

III. NKD FAILS TO ESTABLISH GROUNDS TO REVERSE OR AMEND THE PANEL'S AWARD OF ATTORNEYS' FEES

NKD's motion contends that the Panel "Exceeded Its Power" in determining the amount of fees awarded to ATC. The motion alleges the Panel exceeded their powers and "manifestly disregarded South Carolina law."

The Panel awarded ATC \$228,600 for its attorney's fees. In comparison, NKD's attorney filed a request for \$224,560 for attorney and paralegal time, very close to what ATC received. NKD also spent \$93,000 on expenses for the mechanics lien case, while ATC spent \$0.

Factual and legal errors by arbitrators do not constitute abuse of their powers, and the court is not required to review the merits of their decision so long as the arbitrators do not exceed their powers. Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (Ct.App. 1998). As previously noted, arbitrators “exceed their power” under South Carolina law, only if the issue resolved by them is not within the scope of the agreement to arbitrate. The decisions made regarding attorney’s fees were the result of motions for attorneys’ fees filed by both parties, and the arbitrators were specifically granted the power to decide motions. Upon review of the record before this Court, the arbitrators did not “exceed their power” in awarding attorney’s fees.

NKD summarily includes a statement in Paragraph 32 of its Motion, that the Panel “manifestly disregarded South Carolina law.” This argument is unpersuasive on its merits, and in addition, it would not amount to such an “exceedingly rare” violation as to amount to a “manifest disregard of the law.” The Panel’s reduction of \$39,330, indicates the Panel considered the points NKD argued before the Panel and continues to argue before this Court.

The Panel considered the six factors in Jackson v. Speed, 326 S.C. 492, 494, 486 S.E.2d 750, 760 (1997) and made specific findings of fact regarding those factors. Thus, the Panel was not ignoring existing law on the award of attorneys’ fees. NKD may disagree with the result of the Panel’s deliberation, but the Panel certainly considered the factors they should have under existing law.

Based upon the record before this Court, this Court finds that the arbitrators did not exceed their powers and did not manifestly disregard the law. NKD’s motion for relief is denied.

IV. THE PANEL CORRECTLY CALCULATED PRE-JUDGMENT INTEREST

NKD challenges the Panel’s calculation of pre-judgment interest concerning Gearig’s settlement payment during the arbitration hearing. As noted in the Panel’s Interim Award filed with

this Court, "Gearig reached a settlement with NKD in return for payment of \$150,000 to NKD and the dismissal of all claims by NKD against Gearig and dismissal of the crossclaims asserted by ATC. All parties agreed that this payment would act as a credit against the claims being asserted by NKD."

NKD contends the Gearig settlement should be incorporated after calculating pre-judgment interest versus before creating an alleged shortfall of \$34,701.40. This proposed calculation is inconsistent with South Carolina law concerning setoffs.

"A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles." Welch v. Epstein, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000) (citing Powers v. Temple, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967) ("[T]he rule is almost universally followed that one [tortfeasor] is entitled to credit for the amount paid by another [tortfeasor] for a covenant not to sue.")). "The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him." Truesdale v. S.C. Highway Dep't, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), overruled on other grounds by McCall ex rel. Andrews, 285 S.C. 243, 329 S.E.2d 741 (1985), superseded by statute. "In other words, there can be only one satisfaction for an injury or wrong." Welch, 342 S.C. at 312, 536 S.E.2d at 425.

When the settlement is for the same injury as a matter of law, "the right to setoff arises as an operation of law, and the circuit court must award a setoff." Smith v. Widener, 397 S.C. 468, 474, 724 S.E.2d 188, 191 (Ct. App. 2012). Once there is a verdict against a defendant, it becomes the trial court's function to determine whether the defendant is entitled to a setoff and the amount of the setoff, if any. *See* Smith, 397 S.C. at 471-72, 724 S.E.2d at 190 ("[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds

previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury."); *id.* at 472, 724 S.E.2d at 190.

An application dealing almost directly with the issue at hand can be found in Butler Contr., Inc. v. Court St., LLC, 369 S.C. 121, 631 S.E.2d 252 (2006). In Butler, Subcontractor contended the trial court erred in denying its request for prejudgment interest because the amount owed was certain or capable of being reduced to certainty upon demand for payment when a Contractor counterclaimed seeking an offset for damages allegedly caused by delays attributable to Subcontractor and work which Subcontractor failed to timely or properly perform. The South Carolina Supreme Court agreed.

“The amount Contractor owed Subcontractor was a certain sum or capable of being reduced to a certainty based on contractual provisions regarding the amount of the original contract, the amount of change orders approved by Contractor, and payments made by Contractor. **In this case, the trial court should have awarded prejudgment interest to Subcontractor after determining the amount Contractor owed Subcontractor.** Furthermore, Contractor's assertion of a counterclaim seeking an offset does not prevent an award of prejudgment interest because it is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable.”

Butler at 134-135. (Emphasis Added)

Gearig's settlement was paid to dismiss both NKD's and ATC's claims against it, extinguish any liability it may have to either party with no admission to liability, and to buy Gearig's peace. For purposes of the \$150,000.00 Gearig settlement, NKD is entitled to the payment, and the Panel properly handled this issue.

Here, ATC should receive the benefit of the credit/setoff from Gearig's payment, and prejudgment interest should only be calculated after determining the amount ATC owes NKD.

This was the purpose of the settlement. “All parties agreed that [Gearig’s payment] would act as a credit against the claims being asserted by NKD.” The Panel correctly awarded pre-judgment interest after determining the amount ATC owed NKD.

CONCLUSION

Because NKD’s motion does not state grounds sufficient to vacate or modify the Panel’s award, the Motion of ATC, Inc. to confirm the arbitrators award should be granted and NKD’s motion to vacate, modify and partially confirm, must be denied.

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Richland Common Pleas

Case Caption: Atc Site Construction Llc , plaintiff, et al vs Nkd Inc , defendant, et al

Case Number: 2020CP4003915

Type: Order/Confirm

So Ordered

William W. Wheeler, III