

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2007-CP-46-0119

J. W. Neal Construction, LLC..... Respondent,

v.

Cornelia Thomas..... Appellant.

FINAL BRIEF

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STATEMENT OF THE CASE

On November 2, 2005 Cornelia Thomas (“Thomas”) contracted with J. W. Neal Construction, LLC (“Neal, LLC”) to build a house for Thomas. The contract price was \$359,000. The house was to be built according to a set of plans and specifications provided by Thomas. The house was to be completed within nine (9) months (R. pp. 115-122).

After Neal began construction of the house, disputes arose between Neal, LLC and Thomas concerning the quality of construction and compliance of construction with the plans and specifications provided by Thomas. When the parties were unable to resolve their differences, counsel for Thomas gave Neal Notice of Right to Cure as required by S.C. Code Ann., § 40-59-810, et. seq. (R. pp. 123-124). When Neal was unable to propose a resolution of the dispute satisfactory to Thomas, Thomas terminated Neal’s right to proceed with the contract.

On January 11, 2007, Neal filed a mechanic’s lien on Thomas’s house (R. pp. 125-129). On January 12, 2007, Neal brought suit to foreclose on the mechanic’s lien. (R. pp. 26-46) On February 2, 2007, Thomas filed an answer and counterclaim denying that any amount was owed to Neal and asserting a counterclaim for the cost to Thomas to complete the house to the extent the cost exceeded the contract price (R. pp. 47-55).

As provided in the contract, parties agreed to arbitrate the dispute. An arbitrator was selected by agreement and the case was arbitrated on January 28th and 29th 2010 (R. pp. 12-20).

On February 25, 2010, the arbitrator issued his award (R. pp. 12-20). The arbitrator found that Neal was entitled to \$42,182.00 and Thomas was entitled to

\$43,442.00. Based on S.C. Code Ann., §29-5-10 (1976), the arbitrator concluded that Thomas was the prevailing party and awarded Thomas attorneys' fees in the amount of \$6250.00 (R. pp. 12-20).

On March 22, 2010, Counsel for Neal objected to the award by email (R. pp. 131-134). Counsel claimed that the arbitrator's award was incorrect and asked the arbitrator to change the award (R. pp. 131-134). Counsel for Thomas objected to the request to change the award (R. pp. 131-134).

On March 31, 2010, before the arbitrator issued an Amended Award, counsel for Thomas moved to confirm the award of the arbitrator issued on February 25, 2010 (R. p. 63).

On June 1, 2010, the Honorable S. Jackson Kimball issued an order denying Thomas's motion to confirm the arbitration award issued on February 25, 2010. Judge Kimball ordered the arbitrator to amend the award and remanded the matter to the arbitrator to make an award of attorneys' fees under the Mechanic's Lien Statute.

On June 17, 2010, the arbitrator issued his amended award (R. pp. 21-23). The arbitrator changed the award and reversed his decision regarding entitlement to attorneys' fees (R. p. 21-23).

Following the issuance of the amended arbitration award, there was no further activity in the case until February 3, 2012. On February 3, 2012, counsel for Thomas moved to dismiss the mechanic's lien for failure to prosecute and inability to enforce the arbitration award due to Neal's failure to be licensed (R. p. 108). In response, Neal moved to confirm the amended award (R. pp. 64-65).

On June 18, 2012, Judge Kimball issued a final order confirming the amended arbitration award. This appeal followed.

Standard of Review

On appeal of a case tried without a jury, the Appellate Court may correct errors of law. Epworth Children's Home v. Beasley, 365 S.C. 157, 616 SE 2d 710 (2005). The Trial Court's findings of fact will not be disturbed as long as they are reasonably supported by the evidence.

ARGUMENT

I. The Respondents request to modify the award was not timely.

The arbitrator's award was issued on February 25, 2010 (R. pp. 12-20). The award was transmitted to counsel the same day (R. pp. 12-20).

On March 22, 2010, by email, counsel for Neal, LLC requested that the arbitrator correct what counsel characterized as a mistake (R. p. 133). The request to change the Award came 26 days after the Award was transmitted to counsel by the arbitrator.

When the parties agreed to submit this case to arbitration, they agreed that the case would be governed by the American Arbitration Association Construction Industry Arbitration Rules of the American Arbitration Association (R. pp. 135-136). Rule 47 of the AAA rules provides:

R-47 Delivery of Award to Parties

Parties shall accept as notice and delivery of the Award the placing of the Award or a true copy thereof in the mail addressed to the parties or their representatives at the last known address, personal or electronic service of the Award, or the filing of the Award in any other manner that is permitted by law.

R-48 Modification of Award

- (a.) Within 20 calendar days after the transmittal of an Award, the arbitrator, on his or her initiative or any party upon notice to the other parties, may request that the arbitrator correct any clerical, typographical, technical or computational errors in the Award. The arbitrator is not empowered to re-determine the merits of any claim already decided.

It is undisputed that the Award was mailed to counsel by the arbitrator on February 25, 2010 (R. pp. 12-20). The AAA Rules require that any request to modify an Award be made within 20 days of “transmittal” of the Award. Generally, when the arbitrator mailed the Award on February 25, 2010, the Award was “transmitted” as that term is used in AAA Rule 48. This is consistent with Rule 47 which provides that delivery of the Award is complete upon mailing by the arbitrator. Any request to modify the Award had to be made within 20 days thereafter. It was not.

II. The arbitration Award could not be modified by the arbitrator or the Court.

Even if the request to modify the Award had been timely, the arbitrator did not have the authority to modify the Award. AAA Rule 47 provides that an Award may be modified only if the Award reflects a “clerical, typographical, technical or computational error”. The alleged error made by the arbitrator here does not fit into any of these categories. There was clearly no clerical or typographical error. There is nothing technical about the issue that resulted in what Neal argues is an error. The arbitrator did not reach his conclusion by an erroneous computation.

When one party to an arbitration files a motion in the circuit court to confirm an arbitration Award, the circuit court resumes jurisdiction of the case. Mills v. William Clarke Jeep Eagle, Inc., 321 S.C. 150, 467 SE 2d 268 (Ct. app., 1996). To request modification or clarification of an Award by the arbitrator after a motion to confirm has

been filed, it is necessary to move the circuit court to submit the Award to the arbitrators for modification.

Once Thomas filed a motion to confirm the Award, Confirmation of the Award was controlled by the Uniform Arbitration Act, S.C. Code Ann. § 15-48-10 et. seq. (Rev. 2005).

The Uniform Arbitration Act provides that upon application of a party, the Court shall confirm the Award unless grounds for vacating, modifying or correcting an award are asserted. S.C. Code Ann. § 15-48-120 (Rev. 2005). The statutory grounds for vacating an Award are not relevant here. See S.C. Code Ann. § 15-48-130 (Rev. 2005).

An Award can be modified or corrected by the Court only upon the following grounds:

- (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 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.

S.C. Code Ann. § 15-48-140 (Rev. 2005)

The Court based its decision to modify the Award on § 15-48-140 (1). Thomas submits that the Court erred in doing so.

Judicial review of an arbitrator's Award is limited and may only be vacated or modified under certain grounds as provided by statute or upon the non-statutory ground of manifest disregard or perverse misconstruction of the law. Lauro v. Visnapu, 351 S.C. 507, 570 SE 2d 551 (Ct. App. 2002). If an arbitrator acted even arguably within the scope

of his authority, even a serious error on his part does not warrant overturning his decision. Bazzle v. Green Tree Financial Corp., 351 S.C. 244, 569 SE 2d 349 (S.Ct., 2002).

Section 11 of the Federal Arbitration Act contains language identical to S.C. Code Ann. § 15-48-140 (1). Numerous cases have established that in order to modify an arbitration Award based on an “evident material miscalculation of figures, there must be a mathematical computational error on the face of the Award.

“To similar effect are cases interpreting the Federal Arbitration Act, which allows an arbitrator to correct an “evident material miscalculation of figures (9 USC § 11). These cases make clear that the provision reaches only computational errors, not legal or factual mistakes concerning the amount of damages that should be awarded. Curtis Lumber Company v. American Energy Care, Inc., 2010 WL 175 6883 (N.Y. Supp. 20107)

In Apex Plumbing Supply, Incorporated v. U.S. Supply Company, Incorporated, 142 F. 3d 188 (4th Cir. 1998), the Fourth Circuit recognized an arbitration award cannot be modified unless a mathematical error appears on the face of the Award.

“...Here, because even if the claimed miscalculation of the inventory’s value constituted a “material mistake”, the miscalculation was not evident because it did not appear on the face of the arbitration award...”
Id. at p. 194

See Lauro v. Visnapu, 351 S.C. 507, 570 SE 2d 551 (Ct. App., 2002). (Even if the arbitrator’s decision in this regard is erroneous, it does not constitute an evident miscalculation of figures as envisioned under § 15-48-140. That is, the arbitrator did not commit a mathematical error in computing the total amount of the Award...)”)

Here, the arbitrator’s Award finds that the “total payment to Plaintiff was \$161,550.00. The Award also finds that the Defendant paid a total of \$197,450.00. To

the extent it is determined that these findings are inconsistent, a conclusion which Thomas contests, there is no way to tell on the face of the Award which figure is accurate. It is also clear that to the extent that one of these figures is inaccurate, it is not the result of a computational error evident on the face of the Award.

Without any justification apparent on the face of the Award, the Court accepted one figure and rejected the other thus reversing the arbitrator's decision. In light of the arguable conflict between the two numbers the Court had two options:

- a. Affirm the arbitrators Awards since there was no evident miscalculation on the face of the Award;
- b. Remand the case to the arbitrator to resolve the apparent conflict. Upon rehearing, Thomas submits that the total amount paid to Neal would have been greater than the amount accepted by the Court

III. Neal cannot use the court system to enforce an illegal contract.

In South Carolina it is illegal to engage in construction under a name other than the exact name which appears on the license issued as required by statute. S.C. Code Ann. § 40-11-370 (B). An entity that enters into a contract to engage in construction in a name other than the name which appears on the license may not bring an action to enforce the contract.

Thomas's contract is with J.W. Neal Construction, LLC. (R. pp. 115-122) The complaint in this action alleges that J.W. Neal Construction by its general qualifying party. Joshua Neal is duly licensed as a Building Contractor. Thomas's answer and counterclaim denies the allegations of the complaint alleging that J.W. Neal Construction, LLC was "duly licensed as a building contractor". The question of the status of J.W. Neal Construction, LLC's license was raised in the initial pleadings.

The records of South Carolina Labor, Licensing and Review reflected that Joshua W. Neal was, in fact, licensed. While there was no mention of J.W. Neal Construction, LLC, it appeared that this was a technicality, and that J.W. Neal Construction, LLC could rely on Joshua W. Neal as its qualifying party.

Through involvement in another matter, counsel for Thomas became aware that Joshua W. Neal was operating another business as a sole proprietor. The records reflect that Joshua W. Neal has been the qualifying party for Joshua W. Neal, sole proprietorship. Consequently, J.W. Neal Construction, LLC was not properly licensed.

At the time this information came to light, Neal had not moved for an order confirming the Amended Award. After a substantial amount of time passed with no activity by Neal, Thomas filed a motion to amend the answer to specifically allege failure to be properly licensed and to dismiss the mechanic's lien based in part on the failure of Neal to be properly licensed (R. p. 108). In response, Neal filed a motion to confirm the Amended Award.

It is apparent that Neal, LLC was not properly licensed. As such, it is clear that S.C. Code Ann. § 40-59-30 and § 40-11-370 prohibits Neal from pursuing enforcement of the contract through the Court system.

In Madren v. Bradford, 378 S.C. 187, 661 SE 2d 390 (2008), the South Carolina Court of Appeals considered an issue related to failure of a contractor to be properly licensed. The Court found that the failure of a contractor to be properly licensed is an affirmative defense which must be asserted in the responsive pleading and that failure to plead the licensing issue constituted a waiver of the right to assert it.

Madren is factually and procedurally different from this case in several ways. In Madren, the Defendant had filed his answer and counterclaim a year and nine months earlier without raising an issue regarding the contractor's license. Here, Thomas specifically denied that Neal LLC was properly licensed in the first pleading.

In Madren, the Court recognized that Rule 15 (b), SCRPC provides an exception to the waiver rule by permitting a party to amend his pleadings to conform to the evidence. The Court found that "no such motion was ever made by Bradford".

In this case, as suggested in Madren, Thomas filed a motion to reopen the case and amend the answer to specifically allege the licensing issue. Everything the Court said should have been done in Madren was done in this case.

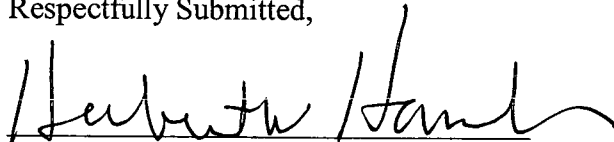
After this case was referred to arbitration, the first time Neal LLC came to the court system to enforce the illegal contract was the Motion to confirm the Amended Award. The licensing issue was properly raised and the steps suggested by Madren were taken. Neal LLC's motion to confirm the Amended Award should have been denied and the Mechanic's Lien dismissed.

Conclusion

For the forgoing reasons, Appellant respectfully submits that the Trial Court's Order Confirming the Amended Award in Arbitration should be reversed and judgment for the Appellant entered for the full amount due as provided in the original award including attorneys' fees.

December 12, 2013

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

December 16, 2013



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CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens Ballou & Carroll, LLC certifies that the Appellant's Final Brief and Reply Brief was served upon other counsel of record by depositing same in the United States Mail, with sufficient postage affixed and addressed as follows:

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The is the 16th day of December, 2013



L. Melia Sweatt