THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
CIRCUIT COURT

John C. Hayes, III, Circuit Court Judge

Case No.: 2009-CP-46-01244

Appellate Case No.: 2013-002633

Phil Vasey and Pamela Vasey, ... Appellants,

vs.

Colton Builders, LLC, ... Respondent.

RESPONDENT'S BRIEF IN RESPONSE TO INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The parties entered into a construction contract in 2005, and the Respondent Colton Builders built a home for Appellants Phil and Pamela Vasey in 2005-2006. Appellants filed an action against Respondent Corporation in 2009, alleging breach of contract,[1] and Respondent Corporation counterclaimed for an unpaid balance for the work performed. [ROA ___; Complaint, filed March 20, 2009. ROA ___; Answer and Counterclaim, filed May 28, 2009.] The parties entered into a consent order for binding arbitration, which was signed by the Honorable ____ on December 18, 2012, and filed December 20, 2012. [ROA ___; Consent Order.]

The matter was scheduled – by agreement – for hearing on Tuesday, January 22, 2013, before the Terry B. Millar. Under the terms of the Consent Order, the parties were required to exchange all witness lists, exhibits and provide copies to the arbitrator within ten days prior to the arbitration. Respondent complied with the Consent Order and timely provided witness/exhibit lists to Appellants and the Arbitrator. The Appellants did not provide witness/exhibit lists to the Respondent or the Arbitrator. Instead, on Friday, January 18, 2013, at 4:54 p.m., the Appellants' counsel sent an email to the Arbitrator and Respondent's counsel raising – for the first time – an issue about the corporate status of the Respondent as listed with the Secretary of State. [See ROA ___; Award, dated 2/5/13.]

Although the Appellants had used the name Colton Builders, LLC in the caption of its complaint, the Appellants' Counsel indicated that he would be filing a motion to have the Consent Order for Arbitration set aside as "illusory" because the company was

[1] The Defendant Collinswood Cabinetry, LLC was never served and not a party to the arbitration.

listed with the Secretary of State as Colton Builders, Inc. and the Company had been administratively dissolved by the Secretary of State's office. Counsel for the Respondent immediately responded by email at 5:28 p.m. on that same Friday afternoon, referencing Rule 15(c), SCRCP, and consenting to substitution of Colton Builders, Inc. [See ROA ___; Award, dated 2/5/13.]

The Arbitrator considered the email from Appellants as a request for a continuance and denied the motion during a phone conference with the parties at 11:00 a.m. on Monday morning, January 21, 2013. The Arbitrator did move the hearing start to 11:00 a.m. to allow the Appellants time to seek an order from a Circuit Court judge staying the arbitration. Thereafter, Appellants' counsel notified the Arbitrator they would not be appearing because "there is no valid agreement to submit the case to mediation." [See ROA ___; Award, dated 2/5/13.]

The Appellants filed a motion to set aside the consent order of arbitration on the morning of the hearing. [ROA ___; Motion, filed January 22, 2013.] However, as of the commencement of the arbitration hearing, the Arbitrator confirmed that the Circuit Court had not been contacted and had not issued a stay. Accordingly, the Arbitrator proceeded with the arbitration hearing. The Respondent made a motion to have the Appellants' claim dismissed for failure provide the witness/exhibit lists and failure to prosecute, which was granted. The hearing proceeded on the Respondent's counterclaim and witness testimony was presented to support the claim for the unpaid balance due on the construction contract. The Arbitrator issued an Award upon Binding Arbitration, filed February 7, 2013. [ROA ___; Award, dated 2/5/13.]

The Trial Court issued an order on April 23, 2013, denying the motion to vacate the consent order to arbitrate without prejudice to raise the issue under §15-48-130(a).. [ROA ___; Order.]

Respondent made a motion to confirm the arbitration award, filed April 17, 2013. [ROA ___; Motion to confirm.] Appellants filed a motion to vacate the arbitration award on July 15, 2013. [ROA ___; Motion.] The motions came for hearing before the Honorable John C. Hayes, III, on August 27, 2013, who issued an order denying the motion to vacate the arbitration award and confirming the award. [ROA ___; Order, filed September 23, 2013.] The matter is now before this Court on an amended notice of appeal from the Order filed September 23, 2013.

The appeal has been dismissed by the Court twice for failure to timely comply with the Appellate Court Rules. The appeal was dismissed by order of June 17, 2014, for failure to order the transcript or file an initial brief, and reinstated by order September 26, 2014, upon the transcript being ordered. The appeal was again dismissed by order of February 3, 2015, when the Appellants failed to timely file and serve an initial brief after receipt of the transcript and advisory letters from the Court. The appeal was reinstated by order of May 28, 2015 after the Appellants finally submitted an initial brief with a motion to reinstate.[2]

---

[2] Respondent submits that even though the Appellants have finally filed and served an initial brief, it does not adequately present a viable issue for appeal. First, the Appellants Statement of the Issue on Appeal – "The Circuit Court erred in denying the Appellant's Motion to Vacate Arbitration Award pursuant to S.C. Code §15-48-130" -- is not adequately set forth. Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("The statement of each issue on appeal shall be concise and direct, and broad general statements of issues may be disregarded by this Court."). In addition, the argument on the only issued raised on appeal consists of only three paragraphs which fail to cite any law or authority that specifically supports their arguments. York v. Dodgeland of

STATEMENT OF THE FACTS

The corporate history of Colton Builders is a matter of public record and can be found on the Secretary of State's easily-accessible, free and public online website -- http://www.sos.sc.gov. The Company started as Colton Builders, LLC on December 6, 2002, and converted to Colton Builders, Inc. on March 26, 2007. The Corporation was administratively dissolved on December 19, 2010, and it was reinstated as of August 20, 2013.

ARGUMENT

Standard for Vacating an Arbitration Award

"Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be vacated only under narrow, limited circumstances." Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). The grounds for challenging a binding arbitration award are strictly limited by statute, S.C. Code Ann. § 15-48-130, which provides, in pertinent 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;

Columbia, Inc., 406 S.C. 67, 96-97, 749 S.E.2d 139, 154 (Ct. App. 2013) (Appellants deemed to have abandoned issue where brief failed to cite any law or authority that supports the *particular* proposition and, instead, relied upon an attenuated argument and a summary conclusion).

(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.

(b) An application under this section shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

The Appellants moved to vacate the arbitration award on grounds (a)(1) alleging that the arbitration award was procured by fraudulent or undue means, and (a)(5) alleging that there was no valid arbitration agreement. Both grounds were based on the fact that Colton Builders, Inc. had been administratively dissolved by the Secretary of State for failure to make required filings. The Circuit Court held that:

> The Court finds that Plaintiffs' motion pursuant to §15-48-130(a)(1) is not supported by the record. Nothing in the records indicates that the arbitration award was procured by corruption, fraud or any other undue means. As to the Plaintiffs' motion pursuant to §15-48-130(a)(5), the Court affirmatively finds that the parties agreed to, and did, in fact, enter into a binding arbitration agreement and are, therefore, subject to the award issued by the Arbitrator. Plaintiffs' motions are predicated on the contention that the Defendant did not have the ability to proceed with litigation that was instituted by the Plaintiffs. **** The Court finds that the Plaintiffs have suffered no prejudice by the arbitration going forward. The Defendant, as much as the Plaintiffs, had the right to protect their interest, whatever it may have been, as well as the right to have the case timely resolved. The Court, therefore, upholds the arbitration award, confirms the award, and denies the motion to vacate. [ROA ___.]

The Circuit Court's decision to deny Appellant's Motion to Vacate Arbitration Award pursuant to § 15-48-130(a)(1) should be upheld because failure to notify the Appellants that the corporation had been dissolved by the Secretary of State – a fact of which Respondent was not even aware -- did not constitute fraudulent or undue means in the process of obtaining an arbitration award. Likewise, the Circuit Court's decision to deny Appellant's motion to vacate the arbitration award pursuant to § 15-48-130(a)(5) should be upheld because the temporary administrative dissolution of the Respondent Corporation did not invalidate the Consent Order to Arbitrate.

I. Failure to notify the Appellants that the Respondent Corporation had been temporarily dissolved by the Secretary of State did not constitute undue means in the process of obtaining an arbitration award.

Relying upon precedent applying the Federal Arbitration Act, the Court has addressed the provision "corruption, fraud, or undue means": "The phrase "corruption, fraud, or undue means" has been construed by the court to proscribe affirmative misconduct by the parties, such as perjury or subornation of perjury." Trident Technical Coll. v. Lucas & Stubbs, Ltd., 286 S.C. 98, 108, 333 S.E.2d 781, 787 (1985). The Court has also drawn a distinction between an attack on an arbitration award in contrast to the arbitration itself. See Garrell v. Blanton, 316 S.C. 186, 188, 447 S.E.2d 840, 841 (1994)("Garrell does not contend that the award itself was fraudulent or unfair but, rather, contests the arbitration itself. He has not established fraud or undue means within § 15-48-130(a).") As the Circuit Court found, there is no evidence in this record that the Respondent procured the arbitration award through any undue means.

It appears that the Appellants are no longer pursuing their argument that the arbitration award should be set aside because of any issue of the legal name of the Respondent Company. In any event, there is no merit to any contention that the designation of the Defendant as an "LLC" constitutes any ground to set aside the consent order or the arbitration award. First, the mistake was of the Appellants' own making in that they so named the Company in the caption, and there is no evidence that the Respondent hid the information or made any misrepresentation; rather, the corporate information was a matter of public record, readily available on the Secretary of State's website. Moreover, there was no prejudice to the Appellants' from any alleged "failure" to advise them about the "correct" name because they consented to amendment to substitute the "Inc." for the "LLC" under the provisions of Rule 15(c), SCRCP, and Hughes v. Water World Water Slide, 314 S.C. 211, 442 S.E.2d 584 (1994). Even if a judgment/award was made in the name of the "LLC" it would have been enforceable against the "Inc." See Tri-Cnty. Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 238, 399 S.E.2d 779, 780 (1990)(where default judgment entered against company in trade name, judgment could be amended to substitute correct legal name); Long v. Carolina Baking Co., 193 S.C. 225, 8 S.E.2d 326 (1939) (judgment would not be invalidated against corporation who is incorrectly named where corporate defendant has suffered no prejudice).

The crux of the Appellants argument of fraudulent or undue means now appears to rest upon the Respondent's "alleged" failure to notify them that the Company had been administratively dissolved. First, the Respondent was unaware of the administrative dissolution; and further, the information was a matter of public record. See Sylver v.

Regents Bank, N.A., 300 P.3d 718, 722 (Nev. 2013)(to prove that an award was procured by undue means, the party seeking to vacate the award must establish that the undue means was not discoverable upon the exercise of due diligence prior to the arbitration). Again, there is no evidence of record that the Respondent used any undue means in procuring the arbitration award. The status of the Respondent's corporate existence with the Secretary of State simply had no impact on the arbitration process or any influence on the Arbitration Award. See Garrell v. Blanton, infra.

II. The temporary administrative dissolution of the Respondent Corporation did not invalidate the Consent Order to Arbitrate.

The Appellants also contend that the arbitration award should be vacated under §15-48-130(a)(5) because there was no binding arbitration agreement. In support of this ground, the Appellants argue that was no meeting of the minds when they agreed to the consent order to arbitrate because the Respondent Company had been administratively dissolved and "was no longer a corporation in good standing" and not a viable entity.

It is well settled in this state that a corporation, after its charter is canceled, continues as a body corporate for the purpose of winding up its affairs. Ocean Forest Co. v. Woodside, 184 S.C. 428, 192 S.E. 413 (1937); S.C. Code Ann. § 33-14-105. The statute expressly provides that "a dissolved corporation continues its corporate existence" and that dissolution does not "prevent commencement of a proceeding by or against the corporation in its corporate name." In addition, as the Circuit Court held, there was no prejudice from the temporary administrative dissolution of the Respondent Corporation because while the Respondent Corporation was administratively dissolved on December 9, 2010, it was reinstated as of August 20, 2013. Upon reinstatement, the dissolution has no consequences under the express provisions of S.C. Code Ann. § 33-14-220(c):

"When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred."

CONCLUSION

The South Carolina Supreme Court has noted that § 15-48-130(a) only provides limited circumstances for which an arbitration award may be vacated. Appellants' contention that the mere failure to notify them of the dissolution -- which was a matter of public record, but of which Respondent was unaware-- falls short of an adequate circumstance to vacate under either (a)(1) or (a) (5). For the reasons set forth above, the September 23, 2013 order of the Circuit Court denying the Appellants' Motion to Vacate Arbitration Award should be affirmed.

Respectfully submitted,

June 24, 2015

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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CIRCUIT COURT

John C. Hayes, III, Circuit Court Judge

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Phil Vasey and Pamela Vasey, ... Appellants,

vs.

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CERTIFICATE OF SERVICE
BY MAIL

I certify that I have served the Initial Brief of Appellant and Designation of Matters on Appeal on Appellants, Phil and Pamela Vasey by placing a copy of same in the United States Mail to the attorney for the Appellants, David B. Sample, 1506 Ebenezer Road, Rock Hill, SC 29732.

June 24, 2015

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June 26, 2015

The Honorable Jenny Abbott Kitchings
Clerk of the Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Phil and Pamela Vasey v. Colton Builders, LLC
Appellate Case No.: 2013-002633

Dear Ms. Kitchings,

Enclosed please find the original Respondent's Brief in Response to Initial Brief of Appellants and Respondent's Designation of Matter to be Included in the Record on Appeal, along with a certificate of service mailing in the Phil and Pamela Vasey v. Colton Builders, LLC case, above-referenced.

Sincerely,

F. Craig Wilkerson, Jr.

Cc: David B. Sample with Enclosures

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