ELECTRONICALLY FILED - 2020 May 01 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2016CP1002955

TCC OF CHARLESTON, INC.,

Plaintiff,

v.

CONCORD AND CUMERLAND, LLC., CONCORD & CUMBERLAND HPR, LEO HALL, DIANE HALL, BEA H. SMITH, MARGARET C. POPE, WILLIAM D. FOSTER, JR., GENE G. FOSTER, MATTISON J. MACGILLIVRAY, TERESA MACGILLIVRAY, PAMELA L. VAUGHN, NELIA A. PATRICIO, Trustee of the Nelia A. Patricio Revocable Trust Agreement, STUART D. REEVES, EDWARD T. STROM, BARBARA K. HENDERSON, JAMES R. CLARKE, PAUL A. BRIM, ROBERT K. SEIDL, JENNIFER M. SEIDL, ROBERT KENNETH SEIDL, II, M. BERT STOREY, THOMAS R. MATHER, EDWARD T. STROM, 304 CONCORD & CUMBERLAND, LLC, MARION M. SIMPSON F/K/A MARION MOORE MCDONALD SIMPSON, KATHY GARDNER, GREGORY J. GARDNER, FREEMAN WATERFRONT PROPERTIES, LLC, JO-ANN COOPER, BETTY Y. SEGAL, ROBERT M. LEVIN AND BONITA K. LEVIN, DONALD D. LEONARD, BETTY L. BEATTY, MATTELLEN, LLC, AND THOMAS R. DEBNAM, Trustee of the Trust Agreement of Thomas R. Debnam,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Case No.: 2016-CP-10-02955

ORDER ON CONCORD & CUMBERLAND HPR'S MOTIONTO TO ALTER/AMEND

RECEIVED
Jun 11 2020
SC Court of Appeals

Presiding Judge:	Hon. Deadra L. Jefferson
Plaintiff's Attorney:	Jaan Rannik, Esq., and Andrew Epting, Jr., Esq.
Defendants Concord and Cumberland, LLC's Attorney:	Cordes Ford, Esq.

Defendant Concord and Cumberland HPR's Attorney:	Andrew Walden, Esq.
Date of Hearing:	December 16, 2019
Court Reporter:	Lorraine Harris

THIS MATTER comes before the Court by way of Defendant Concord & Cumberland HPR's (hereinafter "HPR") Motion to Reconsider, Alter, or Amend Judgment pursuant to Rule 59 (e), SCRCP, filed February 10, 2020. HPR asks the Court to Amend its Order, January 30, 2020 Denying HPR's Motion to Vacate or Modify and Granting Plaintiff's Motion to Lift Stay. HPR filed its Motion to Reconsider on February 10, 2020. TCC filed its response in opposition to HPR's Motion on March 12, 2020. HPR filed its reply to TCC's response on April 22, 2020. Having considered HPR's Motion, as well as the various interests balanced by the Court at the time of the ruling, HPR's Motion to Reconsider, Alter, or Amend is hereby Denied. [1]

FINDINGS OF FACT AND PROCEDURAL HISTORY

On February 27, 2014, HPR contracted with TCC to perform a scope of work at 175 Concord. The contract was cost plus a fee, with a guaranteed maximum price ("GMP") of $3,923,939.00. Corrected Arbitration Award at 3. The contract consisted on an A102 and A201 as modified by the parties. Id. HPR designated Tom Mather as its initial owner's representative and the project architect was Shawn Mellin of Glick Boehm and Associates ("GBA"). Id. Generally, TCC was to declad the building, apply waterproofing, replace the windows, and apply new cladding. Id.

A Notice to Proceed was issued on July 28, 2014. Id. The contract required the work to be substantially completed 306 days after the Notice to Proceed, specifically May 30, 2015. Id.

[1] This Motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401–402, 444 S.E.2d 534, 536 (Ct. App. 1994).

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Substantial competition occurred on March 8, 2016. Id. It is undisputed that the condition of the building was different from what TCC contemplated when it originally submitted its bid. Id. During the course of the work, at least 134 proposed change orders ("PCOs") were requested by TCC. Id. $1,953,145.00 of the PCOs were paid by HPR, increasing the total contract to $5,877,084.00 as of February 2016. Id. The paid PCOs were paid on a cost-plus basis. Id. This dispute involves architect approved but unpaid PCOs, architect approved but unpaid retainage, and remaining unapproved PCOs. Id.

The matter came before an arbitration panel by the Order of the Honorable Roger M. Young, Sr. dated December 30, 2016, staying the case and compelling arbitration between the parties. Id. at 2. The Arbitration Panel ("the Panel") conducted a merits hearing on January 21 – 24, 2019. Each part was represented by counsel and presented exhibits and witness testimony. The Panel issued an Award on April 16, 2019. Id. The Panel subsequently issued a Corrected Arbitration Award on August 12, 2019 which "corrects, amends, and supplements" its April 16, 2019 Award. Id. at 1. HPR filed a Motion to Change the Corrected Arbitration Award on September 7, 2019, which the Panel denied in its October 23, 2019 order.

On June 17, 2019, TCC filed a Motion to Lift Stay, and on July 16, 2019, HPR filed a Motion to Vacate or Modify the Panel's Corrected Arbitration Award. A hearing was held on December 16, 2019 before this Court, and on January 30, 2020, the Court issued an Order Granting TCC's Motion to Lift Stay and Denying HPR's Motion to Vacate the Panel's Corrected Arbitration Award.

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CONCLUSIONS OF LAW

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E. 2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E. 2d 268 (1993)); See also Arnold v. State, 309 S.C. 157, 172–73, 420 S.E.2d 834, 842 (1992).

I. HPR's contention that the Court's January 30, 2020 Order relies on new findings of fact as to the Conditional Release and Waiver of Liens is without merit.

HPR argues:

> The Court's Order is improperly based on new findings of fact. On page 8, the Court states: "The Court finds no error or manifest disregard of the law in the panel's findings, especially in light of a contemporaneous email from HPR's agent confirming the agreement." The Panel made no such finding regarding any "contemporaneous email," and the Court has no legal basis to make the finding in its Order.

Motion to Reconsider at 3 (emphasis omitted). HPR's argument is based on the contested Conditional Release and Waiver of Liens ("Lien Waivers") accompanying each pay application, specifically Pay Application 17.

In its Corrected Arbitration Award, the Panel found that the Lien Waivers were not enforceable in the present circumstances, stating:

> Knowing that TCC had signed Conditional Release and Waiver of Liens, HPR nonetheless agreed to PCOs; signed the Change Orders; and made payment for claims that may have otherwise been released or barred by the Conditional Release and Waiver of Liens. HPR cannot now claim that the Conditional Release and Waiver of Liens bar TCC's claims.

Corrected Award at 5. The record reflects that Lien Waivers were provided with every payment application over the course of the project. However, when issues began to arise with the scope of the project and PCOs, the parties came to an agreement whereby they would resolve certain matters at the conclusion of the project. Corrected Award at 4. ("Credible testimony at the hearing was presented and considered by the Panel that TCC and HPR agreed to address outstanding PCOs and TCC's claims for additional costs at the end of the project.")

TCC asserts that this agreement was memorialized by an email between counsel for the parties. The Court did not introduce new evidence or make new findings of fact by referring to this email. However, in light of the fact that the Panel did not explicitly reference the email in its Corrected Award, the Court will clarify that it did not rely on the email in issuing its January 30, 2020 Order. Referencing the email was merely a reflection of the entire record the Panel had access to in reaching its Corrected Award and ultimate conclusion that HPR was estopped from claiming the protections of the Lien Waiver. The Court's reference to the email was harmless error as the Court had a separate basis for concluding there was no manifest disregard of the law by the Panel. As a result, the Court's Order dated January 30, 2020 is modified at Page eight (8) to redact any reference to the email of HPR's agent, as it was not a specific finding of the Panel and not relied upon in this Court's final ruling on the merits.

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However, absent consideration of the email, there was sufficient evidence of HPR and TCC's conduct for the Panel to conclude that the Lien Waivers were not controlling, namely, "that TCC had signed Conditional Release and Waivers of Liens, HPR nonetheless agreed to PCOs; signed the Change Orders; and, made payment for claims that may have otherwise been released or barred by the Conditional Release and Waiver of Liens." Corrected Award at 5.

Additionally, and more importantly, the Court can discern no manifest disregard of the law or any other violation of S.C. Code Ann. § 15-48-130(a) that would empower the Court to vacate the Panel's Corrected Award. The Panel's conclusion that HPR is estopped from asserting that the Lien Waivers bar TCC's claim is not predicated on a violation of statutory law or a manifest disregard of the law, and therefore the Court will not disturb the Panel's conclusions. Further, as explained supra, the Court did not rely on any new evidence or findings of fact in reaching this conclusion, and referenced the email merely in an observatory capacity based on the entirety of the record presented to the Panel, but in no way relied upon the email to reach its decision. Accordingly, HPR's Motion is respectfully Denied as to this ground.

II. HPR's contention that the Court's January 30, 2020 Order relies on new findings of fact as to the GMP and out-of-scope items is without merit.

Similar to the argument supra, HPR argues that the Court relied on new findings of fact in concluding that there was no evidence of error or manifest disregard of the law in the Panel's finding that the GMP provided for in the contract was overcome by the agreement that TCC would fix out-of-scope items and be compensated for those items on a time and material basis.

The parties contracted for a guaranteed maximum contract price of $3,923,030.00. Corrected Award at 3. However, the Panel found that the condition of the building was different from what TCC contemplated when it originally submitted its bid. Id. To address the difference in the condition of the building, TCC submitted at least 134 PCOs, and those PCOs were paid on a

cost-plus basis. Id. This additional work and cost increased the total contract price to $5,877,084.00. Id.

As addressed supra, the Panel found, "[c]redible testimony at the hearing was presented and considered by the Panel that TCC and HPR agreed to address outstanding PCOs and TCC's claims for additional costs at the end of the project." Corrected Award at 4. Evidently, sufficient proof existed for the Panel to conclude, "TCC performed additional work outside the original scope of work" which entitled TCC to be paid "a portion of the remaining unapproved PCOs." Id. at 3-4.

However, in light of the fact that the Panel did not use the exact phrase, "that the GMP provided for in the contract was overcome by the agreement that TCC would fix out-of-scope items and be compensated for those items on a time and material basis," the Court will clarify. While the Panel phrased the increase to the GMP as "additional costs at the end of the project" on a "cost-plus" basis, and the Court phrased the increase to the GMP as "overcome" by an agreement to be compensated on a "time and material basis," the difference between the two phrasings is merely semantic, and both phrasings have the same effect. Specifically, that TCC and HPR agreed to address outstanding PCOs and claims at the end of the project, which led to the increase in the GMP. See Corrected Award at 3. ("It is undisputed that the condition of the building was different than what TCC contemplated when it originally submitted its bid. During the course of the work, at least 134 proposed change orders ('PCOs') were requested by TCC. $1,953,145.00 of the PCOs were paid by HPR, increasing the total contract to $5,877,084.00 as of February 2016. The paid PCOs were paid on a cost-plus basis."); see id. at 4. ("Credible testimony at the hearing was presented and considered by the Panel that TCC and HPR agreed to address outstanding PCOs and TCC's claims for additional costs at the end of the project."). While the Court may have used

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different phrasing, the difference is merely semantic, and the Court did not misstate the substance of the Panel's findings.

Therefore, the Court cannot discern how it introduced new findings of fact that would preclude it from ruling that the Panel made no error or manifestly disregarded the law in concluding that by the agreement of the parties, the additional work and costs overcame the contract's GMP. Finally, the Court can discern no manifest disregard of the law or any other violation of S.C. Code Ann. § 15-48-130(a) that would empower the Court to vacate the Panels' Corrected Award. Accordingly, HPR's Motion is Denied as to this ground. However, to the extent necessary the January 30, 2020 Order of this Court is modified at Page eight (8) to reflect the exact findings of the Panel, which state: "It is undisputed that the condition of the building was different than what TCC contemplated when it originally submitted its bid. During the course of the work, at least 134 proposed change orders ("PCOs") were requested by TCC. $1,953,145.00 of the PCOs were paid by HPR, increasing the total contract to $5,877,084.00 as of February 2016. The paid PCOs were paid on a cost-plus basis[;]" "TCC performed additional work outside the original scope of work…[;]" and, "Credible testimony at the hearing was presented and considered by the Panel that TCC and HPR agreed to address outstanding PCOs and TCC's claims for additional costs at the end of the project." Corrected Award at 3-4.

III. HPR's contention that the Court did not rule on HPR's argument as to the Panel's October 23, 2019 Order on HPR's Motion for Change of Corrected Arbitration Award is without merit.

After the Panel issued its Corrected Award on August 12, 2019, HPR filed a Motion for Change of Corrected Award on September 7, 2019 ("Motion to Change Corrected Award"), arguing that the Panel made erroneous findings regarding the Lien Waivers and that the Panel awarded upon a matter not submitted to it. Order on HPR Motion for Change of Corrected

Arbitration Award at 1. The Panel issued an Order denying HPR's Motion for Change on October 23, 2019. HPR correctly notes that the Court inadvertently failed to discuss its argument regarding the Panel's October 23, 2019 Order in the Court's January 30, 2020 Order.

In its Corrected Award, the Panel found "'that some of the PCOs and TCC's claims for additional costs were subsequently submitted and paid by HPR which arose and existed as of the date of the execution of the Conditional Release and Waiver of Liens." Corrected Award at 4-5. In its Motion to Change Corrected Award, HPR argued that the Panel found that "'some of the PCOs and TCC's claims for additional costs were subsequently submitted and paid by the HPR which arose and existed as of the date of the execution of the Conditional Release and Waiver of Liens' *of Payment Application No. 17*." Order on HPR Motion for Change at 1 (emphasis in original).

This is not what the Panel found. HPR interjected "of Payment Application No. 17" into the Panel's finding where the Panel made no such finding. The Panel addresses this interjection in its October 23, 2019 Order, finding that in its Corrected Award, the Panel concluded that TCC and HPR agreed, prior to Payment Application No. 17, that some of the outstanding PCOs and TCC's claims for additional costs would have to be resolved at the end of the project. The Panel further explained:

> Rather, this Panel found from the evidence presented that prior to the submission of Payment Application No. 17 'TCC and HPR agreed to address outstanding PCOs and TCC's claims for additional costs at the end of the project.' This Panel also found evidence that prior to Payment Application No. 17 'some of the PCOs and TCC's claims for additional costs were subsequently submitted and paid by the HPR which arose and existed as of the date of the execution of the Conditional Release and Waiver of Liens' that had been executed by TCC.

Order on HPR Motion for Change of Corrected Award at 1.

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HPR argues "any agreement between TCC and HPR that could have somehow indicated that HPR waived, or was not enforcing the Release precedes, not succeeds, Pay Application 17 and the accompanying Release. Clearly, even if there was an agreement to agree that HPR would pay additional costs, such agreement would be superseded by the explicit terms of the later Release." Motion to Reconsider at 9.

However, this argument was considered and rejected by the Panel. Evidently, sufficient proof existed for the Panel to conclude that HPR and TCC's agreement to address certain PCOs and costs at the conclusion of the project, coupled with HPR's conduct of paying PCOs and claims after the execution of other Lien Waivers, estopped HPR from claiming the protections of the Lien Waiver as to Pay Application No. 17. See Corrected Award at 4-5. ("Credible testimony at the hearing was presented and considered by the Panel that TCC and HPR agreed to address outstanding PCOs and TCC's claims for additional costs at the end of the project…Knowing that TCC had signed Conditional Release and Waiver of Liens, HPR nonetheless agreed to PCOs; signed the Change Orders; and, made payment for claims that may have otherwise been released or barred by the Conditional Release and Waiver of Liens.") The Court finds that the Panel did not err or manifestly disregard the law in reaching that conclusion. Accordingly, HPR's Motion is Denied as to this ground.

IV. HPR's contention that the Court did not rule on the Release document itself is without merit.

HPR argues, "[t]he Court did not rule on or address the Release document itself…" and, "if the Court maintains its denial of the Motion to Vacate, it must do so having determined and held, consistent with the Panel's factual findings, that the Release was an unambiguous contract, executed by TCC under oath, which was last in time as compared to any other agreement or action

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that the Panel found the HPR to have undertaken and upon which the Panel based its disregard of the Release." Motion to Reconsider at 4.

HPR's argument is based on a misapprehension of the Court's scope of authority in ruling on a motion to vacate an arbitration award. Because "[a]rbitration is a favored method of settling disputes in South Carolina," Pittman Mortg. Co., Inc. v. Edwards, 327 S.C.72, 76 (1997), "[t]he scope of judicial review for an arbitrator's decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all." Group III Mgmt., Inc. v. Suncrete of Carolina, Inc., 425 S.C. 141, 149 (Ct. App. 2018) (internal quotations omitted). "Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." Pittman, 327 S.C. at 76.

In reviewing an arbitration award, the court's function is limited "to determin[ing] whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it." Id. at 150 (internal quotations omitted). Therefore, it is not within the scope of this Court's authority to rule on or address the Release document itself. Rather, the Court's only duty is to determine whether the Panel ruled on the Release document without exceeding its power or manifestly disregarding the law.[2] The Court conducts a thorough inquiry to determine whether the Panel exceeded its power or manifestly disregarded the law on Pages 7 – 10 of its January 30, 2020 Order.

Therefore, the Court will not entertain HPR's invitation to substitute its interpretation of the Release for the interpretation reached by the Panel in issuing its Corrected Award. Accordingly, HPR's Motion to Reconsider is Denied as to this ground.

[2] The Court must also consider whether the Panel violated any of the remaining three statutory grounds enumerated in S.C. Code Ann. § 15-48-130(a) in reaching its award, however, the arbitrators exceeding their authority was the only statutory ground advanced by HPR for vacating the Corrected Award.

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V. HPR's contention that the Court did not rule on whether the manifest disregard standard was met is without merit.

HPR contends, "the Court did not consider the circumstances that meet the manifest disregard standard... The Court's Order does not consider or rule upon whether the manifest disregard standard is met by an arbitration panel's disregard of unambiguous contract provisions...." Motion to Reconsider at 4.

The Court addressed HPR's manifest disregard argument on Pages 7 – 8 of its January 30, 2020 Order. Specifically, the Court found that the Panel made express findings consistent with the applicable law and provided reasoned support of those findings. Order on Motion to Lift Stay and Motions to Vacate or Correct Arbitration Award at 7. The Court found, "far from disregarding the law, the panel considered and applied the law, and reached a result that the HPR simply disagrees with. The HPR has not carried its burden of showing the arbitrators manifestly disregarded the law, and this argument for vacating the arbitration award is unavailing." Id. at 8.

Therefore, the Court finds without merit the HPR's argument that the Court failed to rule upon whether the manifest disregard standard was met. Accordingly, HPR's Motion to Reconsider is Denied as to this ground.

CONCLUSION

Except as otherwise clarified by the Court supra, HPR's Motion seeks only to reargue the issues on the same basis previously presented to the Court and presents no novel facts, arguments, or theories in support of the Motion to Alter or Amend the Judgment. Except as addressed supra, HPR has not highlighted any portions of the record this Court may have misunderstood, failed to fully consider, or perhaps failed to rule on. Accordingly, HPR's Motion is heard and respectfully Denied.

AND IT IS SO ORDERED.

____
Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

April______, 2020
Charleston, South Carolina
At Chambers

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Charleston Common Pleas

Case Caption: Tcc Of Charleston Inc VS Concord And Cumberland Llc , defendant, et al

Case Number: 2016CP1002955

Type: Order/Other

IT IS SO ORDERED.

s/D.L. Jefferson Ninth Judicial Circuit Judge 2128

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