THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Deadra L. Jefferson, Circuit Court Judge

Case No. 2016-CP-10-2955

Appellate Case No. 2020-000875

TCC of Charleston, Inc., Respondent,

v.

Concord and Cumberland, 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,

Of Which Concord & Cumberland HPR is the Appellant.

RETURN TO MOTION TO DISMISS APPEAL

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Concord & Cumberland HPR (the "HPR") hereby responds to TCC of Charleston, Inc.'s ("TCC") motion to dismiss appeal. Contrary to TCC's assertions, this appeal is proper because statute mandates confirmation of an arbitration award upon denial of a motion to vacate or change the award.

BACKGROUND

The procedural history relevant to TCC's motion begins in the Circuit Court.[1] Specifically, on November 18, 2019, the HPR filed a Motion to Vacate the Corrected Arbitration Award or Alternatively, to Modify or Correct the Corrected Arbitration Award in the Circuit Court. Judge Deadra L. Jefferson heard this motion on December 16, 2019. On January 30, 2020, Judge Jefferson issued an Order Granting TCC's Motion to Lift Stay and Denying the HPR's Motions to Vacate the Panel's Corrected Arbitration Award. On February 10, 2020, the HPR filed a Motion to Reconsider, Alter, or Amend Judgment pursuant to Rule 59, SCRCP, and, on May 1, 2020, Judge Jefferson denied that motion without a hearing.

This appeal followed, and Appellant filed its initial brief on July 1, 2020. In response, TCC filed the present motion to dismiss on the ground that the orders were not immediately appealable. Contemporaneously, TCC filed a motion to confirm the award in the Circuit Court but specifically requested that the confirmation be withheld until "all proceedings are concluded." **Ex. A** (TCC of Charleston, Inc.'s Motion to Confirm Arbitration Award and to Stay Granting of Requested Relief). Presumably, TCC's motion to stay the confirmation is strategically requested to prevent higher review of what the HPR argues was a terribly flawed arbitration process and award as indicated in its initial brief.

[1] The full procedural history is provided in Appellant's Initial Brief, previously filed with this Court.

ARGUMENT

Following the procedural history above, and reconciling it with S.C. Code Ann. §§ 15-48-120, 130, and 140, Appellant had no choice but to seek review by this court in the time and manner contemplated by this appeal. S.C. Code Ann. § 15-48-120 states: "Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, *in which case the court shall proceed as provided in Sections 15-48-130 and 15-48-140*." (emphasis added). The HPR filed a Motion to Vacate the Corrected Arbitration Award or Alternatively, to Modify or Correct the Corrected Arbitration Award in the Circuit Court, thereby implicating both sections 130 and 140.

S.C. Code Ann. § 15-48-130(d) requires confirmation of the arbitration award when the application to vacate the award is denied. *See* S.C. Code Ann. § 15-48-130(d) ("If the application to vacate is denied and no motion to modify or correct the award is pending, the court **shall** confirm the award.") (emphasis added). S.C. Code Ann. § 15-48-140(b) also requires confirmation of the award following the adjudication of a motion to change the award. *See* S.C. Code Ann. § 15-48-140(b) (Stating that . . . "[t]he court **shall** confirm the award as made.") (emphasis added). Thus, once Appellant's motion to vacate or change the award was denied, confirmation was mandated by statute. *See*, *e.g.*, *Wigfall v. Tidelands Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) ("The term 'shall' in a statute means that the action is mandatory."); *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement.") Based on the plain language of S.C. Code Ann. §§ 15-48-130 and 140, Appellant had no choice but to file this Appeal within 30 days of the Circuit Court's order denying the HPR's Motion to Reconsider, Alter, or Amend Judgment pursuant to Rule 59, SCRCP. If Appellant had not

appealed within the prescribed timeframe following the adjudication of these motions, TCC would have undoubtedly taken the contrary position -- that the HPR had foregone its rights to seek appellate review.

Notwithstanding the above, and as indicated in TCC's motion, TCC has now moved to confirm the award, which, as stated above, is simply an administrative task that the lower Court must perform. *See generally Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008) (stating the "provision for judicial confirmation carries no hint of flexibility" and the statement the court "must grant" the application "unless the award is vacated, modified, or corrected" is one "which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies"). Therefore, even if this Court finds that this appeal is not yet ripe due to the failure of the lower court to contemporaneously confirm the award when denying the aforementioned motions, the ripeness issue is cured by TCC's filing for confirmation of the award and the statutory mandate discussed herein. From a practical standpoint, dismissal of this appeal at this stage would simply result in the HPR refiling the appeal as soon as the lower court confirms the award in the near future. The motion to dismiss should be viewed for what it is – a delay tactic.

CONCLUSION

For the reasons stated above, the HPR respectfully requests that this Court deny TCC's motion to dismiss and allow this appeal to proceed without further delay.

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Respectfully submitted this 7th day of August 2020.

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EXHIBIT A

STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON**	)	**IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT**
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.	)	Case No.: 2016-CP-10-2955 **TCC OF CHARLESTON, INC.'S MOTION TO CONFIRM ARBITRATION AWARD AND TO STAY GRANTING OF REQUESTED RELIEF**

Plaintiff TCC of Charleston, Inc. ("TCC") moves for confirmation of the arbitration award entered August 19, 2019 (**Exh. A**) and simultaneously moves to stay confirmation until all

issues are adjudicated. The award must be confirmed, as this Court previously denied Concord & Cumberland HPR's ("the HPR's") motion to vacate, modify, or correct the arbitration award (**Exh. B**), and thus is required by statute to confirm it. S.C. Code §§ 15-48-130(d) ("If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award."), 140(b) (if a motion to modify or correct the award is denied, "the court shall confirm the award as made"); 9 U.S.C. § 9 ("at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title").

TCC moves now, because the Federal Arbitration Act ("FAA") requires that any motion to confirm be filed within one year of the date of the arbitration award, which here was August 19, 2019. 9 U.S.C. § 9. There has been no contention that the FAA applies to or governs this matter; however, to foreclose any argument that the eventual motion to confirm would be untimely, TCC files this motion now and simply requests it not be heard until there is a final adjudication of the issues among the parties.

TCC also moves to confirm under the State Act, as the arbitration award was not vacated, and therefore TCC is entitled to confirmation. TCC requests relief pursuant to this motion not be granted until all proceedings are concluded.

[signature on following page]

Respectfully submitted,

EPTING & RANNIK, LLC

This 30th day of July, 2020
Charleston, SC

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ATTORNEY FOR TCC OF CHARLESTON, INC.

EXHIBIT A

IN THE MATTER OF THE ARBITRATION BETWEEN

TCC OF CHARLESTON, INC., Plaintiff,	)	**Civil Action No. 2016-CP-10-2955**
v.	)	**CORRECTED ARBITRATION AWARD**
CONCORD & CUMBERLAND HPR, Defendant.	)	

This matter comes before the undersigned Arbitration Panel pursuant to Concord & Cumberland HPR's ("HPR") Motion for Change of Award. For the reasons set forth below, HPR's Motion for Change of Award is granted in the following respects. This Corrected Arbitration Award corrects, amends, and supplements this Panel's prior Arbitration Award dated April 16, 2019. The Post Award Order dated July 12, 2019, is withdrawn.

In finding the sum of $2,023,074.45 recoverable by TCC of Charleston, Inc. ("TCC") in the Arbitration Award dated April 16, 2019, the Panel included the amounts in PCO 143 (TCC Exhibit 124), PCO 144R (TCC Exhibit 123), and PCO 146 (TCC Exhibit 125), as part of the recovery to TCC. In calculating interest for the Post Award Order, the Panel mistakenly referred back to Pay Application No. 17, and the sums therein, instead of the above exhibits or TCC Exhibit 128.[1]

[1] Exhibit 128 references PCO 144. However, the value included in TCC Exhibit 128 for PCO 144 is $128,041.00, which is the amount of PCO 144R rather than the value of PCO 144.

In reviewing HPR's Motion to Correct Award, this Panel also realized it had erroneously included $9,608.00 in the Arbitration Award for the transom door based on PCO 145 (TCC Exhibit 131 and TCC Exhibit 128). The claim for the transom door was withdrawn during the hearings. Accordingly, the Panel's Arbitration Award dated April 16, 2019, should be corrected to deduct the amount of the transom door claim.

THEREFORE, THE PANEL ISSUES THE FOLLOWING CORRECTED ARITRATION AWARD:

This matter is before the undersigned pursuant to the Order of Judge Roger M. Young, Sr., dated December 30, 2016, to stay Case No. 2016-CP-10-2955 (the "Lawsuit") and compel arbitration of a dispute between TCC of Charleston, Inc. ("TCC") and Concord & Cumberland HPR ("HPR") (cumulatively the "Parties"), the Arbitration Agreement entered into between the Parties on January 18, 2017 (the "Arbitration Agreement"), and appointment in accordance with S.C. Code Ann. § 15-48-30.

The merits hearing was conducted January 21 - 24, 2019. Each party was represented by counsel and presented exhibits and witness testimony. TCC called as witnesses John David Griffith, Chris Burrell, Ryan Tomberlin, Gary Moore, and Zan Edens. HPR called as witnesses Trey McCraw and Shawn Mellin. At the conclusion of the hearing, the Panel requested that TCC provide a summary or itemization of its damages claim and that each party present proposed Orders. Each side provided a proposed Order on or before March 21, 2019, and the hearing was closed at that time.

Based upon the evidence presented; after careful consideration of all the testimony, exhibits, submissions, arguments of counsel; proposed orders submitted by the parties; and review

of the applicable law, the Panel makes the following Findings relevant to this proceeding and issues this Corrected Arbitration Award.

Findings

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. The contract consisted of an A102 and A201 as modified by the parties. HPR designated Tom Mather as its initial owner's representative and the project architect was Shawn Mellin of Glick Boehm and Associates ("GBA").

The scope of work for the contract was developed by GBA based upon GBA's investigations performed in prior litigation of HPR and the individual unit owners against the original developer, contractor, and subcontractors. Generally, TCC was to declad the building, apply waterproofing, replace the windows, and apply new cladding.

A Notice to Proceed was issued on July 28, 2014. The contract required the work to be substantially complete 306 days after the Notice to Proceed, to-wit: May 30, 2015. Substantial completion actually occurred on March 8, 2016.

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.

This dispute involves architect approved but unpaid PCOs; architect approved but unpaid retainage; and, remaining unapproved PCOs. TCC is entitled to be paid PCOs 143, 144R, 146, and unpaid retainage. TCC performed additional work outside the original scope of work which

was not approved and was not paid. TCC was inefficient in its prosecution of some of the additional work and is only entitled to be paid a portion of the remaining unapproved PCOs. The Panel finds based on the testimony of TCC and HPR that the work performed by TCC and its subcontractors was inefficient in the amount of 25% of the remaining unapproved amounts claimed.

Effect of Conditional Lien Waivers Accompanying Payment Application No. 17 and Prior Payment Applications

HPR has maintained in its proposed Arbitration Award, its Motion for Reconsideration, and its Motion for Change of Arbitration Award that the Conditional Release and Waiver of Lien executed by TCC and accompanying Payment Application No. 17 which HPR paid, as well as others executed by TCC, bars a significant portion of recovery, "at least $996,180.71", sought by TCC. 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.

The Panel finds that TCC provided Conditional Release and Waiver of Liens with each application for payment. Each Conditional Release and Waiver of Lien contained the following:

> The undersigned TCC of Charleston, Inc. in consideration of receipt of payment in the amount of $_____, for materials, labor and services rendered and supplied as of _____ (the date of the period covered by the Payment Application), and does hereby release and waive all claims and liens existing as of _____ (the date of the period covered by the Payment Application), against Concord & Cumberland HPR C/O McAlister Preferred Properties on account of, or in any way resulting from or in connection with construction located at 175 Concord St., Charleston, SC in the County of Charleston, State of South Carolina.

The Panel finds 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. 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.

Correction of Award

The corrected total award is based, in part, on the sum of approved and unpaid PCOs in the amounts of $258,799.00 (PCO 143), $128,041.00 (PCO 144R), and $266,168.00 (PCO 146) plus retainage in the amount of $305,565.00 as itemized in TCC Exhibit 161. These sums total $958,573.00. Additionally, a portion of the disputed amount of $1,417,322.87 and a portion of the stone tower is also awarded. However, both parties testified that PCO 145 for the transom door in the amount of $9,608.00 (TCC Exhibit 131) should not be included.

Based on the evidence presented and testimony of both parties, the Panel concludes and finds that the disputed claims and work performed by TCC, including the stone tower had an inefficiency factor of 25 percent (25%) of the amount claimed. TCC is also entitled to receive 8.25 percent (8.25%) for data processing fees and profit on the corrected award. The total award to TCC is calculated as follows:

A. TCC's award is based on the unadjusted sum of $258,799.00 (PCO 143) + $128,041.00 (PCO 144R) + $266,168.00 (PCO 146) + $305,565.00 (Retainage) + $1,417,322.87 (Disputed amount from Exhibit 161) + $32,540.00 (Stone Wall) = $2,408,435.87.

B. Less the disputed unpaid PCOs by 25%, including 8.25% profit and data processing on the 25% deduction due to TCC's inefficiencies.

$1,417,322.87 – ($1,417,322.87 x 25%) (1.0825) = $1,033,759.87. The inefficiency adjustment is $383,563.00 including O&P and data processing.

C. The stone tower adjustment is $32,540.00 – ($32,540.00 x 25%) (1.0825) = $23,733.86. NOTE: The inefficiency adjustment is $8,806.14 including O&P and data processing.

D. Calculated Corrected Award:

$958,573.00	Approved and unpaid PCOs excluding transom door
$1,033,759.87	Disputed amount from Exhibit 161 with inefficiency deduction
$23,733.86	Adjusted stone tower with inefficiency deduction
$2,016,066.73	Corrected Award

E. The corrected total award to TCC with all adjustments exclusive of interest and fees and excluding counsel fees incurred in the conduct of the arbitration is $2,016,066.73.

Attorney Fees

Litigants are not entitled to recover attorney fees absent a written agreement to do so or statutory authority allowing for the recovery of attorney fees. The Order of Judge Roger M. Young, Sr., dated December 30, 2016, provides in pertinent part "the parties have consented to an arbitration of the dispute between Plaintiffs and Defendant CONCORD & CUMBERLAND HPR ("Regime") and stay of Plaintiffs (*sic*) foreclosure request as to the remaining Defendants." Section 5 of the Arbitration Agreement between TCC and HPR states as follows:

> 5. *Fees and Expenses of Arbitrators* - All fees and expenses incurred and charged by the Arbitrators prior to the hearing shall be borne equally between the Parties, with Trident bearing one-half and the HPR bearing one-half. However, *the Arbitrators shall assess, in whole or in part, their fees and expenses incurred* in connection with the Arbitration as a part of their award in accordance with S.C. Code Ann. § 15-48-110 and the fee provision contained in the Mechanic's Lien Laws. *(emphasis added).*

S.C. Code Ann. § 15-48-110 grants to an arbitrator limited jurisdiction to award "the arbitrator's expenses, and fees, together with other expenses." S.C. Code Ann. § 27-3-20 requires that TCC's lien must be filed against the property owners rather than the HPR. Accordingly, the language in Section 5 of the Arbitration Agreement mandates that this Panel award "their fees and

expenses incurred in connection with the Arbitration … in accordance with" the prevailing party fee provision "in the Mechanic's Lien Laws."

The construction contract between TCC and HPR does not contain a prevailing party attorney fee provision. No statutory authority has been provided to the Panel as a basis to award attorney fees. Accordingly, this Panel finds it is without jurisdiction to entertain a Motion for Attorney Fees. Both TCC's and HPR's requests for attorney fees are denied without prejudice to either TCC or HPR to seek attorney fees before the Court of Common Pleas for Charleston County, South Carolina.

S.C. Code Ann. § 15-48-110 Arbitrators Expenses and Fees, Other Expenses

Section 5 of the Arbitration Agreement mandates that this Panel make an award of the Panel's "fees and expenses incurred in connection with the Arbitration." The Panel finds in accordance with S.C. Code Ann. § 15-48-110 and the prevailing party fee provision contained in the Mechanic's Lien Laws that TCC is entitled to recover from the HPR its deposit of $44,250.00 paid by it. Upon HPR paying TCC the amount of the deposit ($44,250.00), any funds remaining in the Elmore Goldsmith, P.A. Trust Account for arbitrator fees and expenses shall, at the conclusion of the arbitrators' service, be paid to the HPR.

S.C. Code Ann. § 15-48-110 also provides for an award of "other expenses, not including counsel fees incurred in the conduct of the arbitration." The Panel has reviewed TCC's claimed costs and finds that TCC is entitled to and awards TCC $21,691.02 for other expenses, not including counsel fees incurred in the conduct of the arbitration.

Correction of Interest Calculation

Article 15.2 of AIA Document A102-2007, *Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price* dated February 27, 2014, as modified, between TCC and HPR provides:

> § 15.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.
> *(Insert rate of interest agreed upon, if any.)*
>
> Prime as published in the Wall Street Journal %

TCC seeks interest at 5.5% from March 8, 2016. HPR contends that Panel does not have jurisdiction to award interest under the parties Arbitration Agreement; that a sum certain due was not known until the arbitration award; and, that the amount awarded arising under Article 15.2 must be specified.

PCOs 143, 144R, and 146, were all approved by the architect no later than August 29, 2017. The project was substantially complete on March 8, 2016. Through no fault of TCC, retainage in the amount of $305,565.00 was never paid. This Arbitration Panel finds TCC is entitled to recover interest on PCOs 143, 144R, 146 and retainage totaling $958,573.00 since September 29, 2017, at the rate of 4% compounded annually through August 1, 2019.

IT IS THEREFORE ORDERED:

1. TCC is entitled to recover against HPR the sum of $2,016,066.73 for all claims asserted in this proceeding including, but not limited to, approved and unapproved PCOs and retainage.

2. TCC and HPR's respective motions for an award of their attorney fees are denied without prejudice to seek attorney fees before the Court of Common Pleas as the prevailing party under S.C. Code Ann. § 29-5-10, *et seq*.

3. TCC is entitled to recover its arbitrator deposit in the amount of $44,250.00 against HPR. Upon HPR paying TCC the amount of the deposit

($44,250.00), any funds remaining in the Elmore Goldsmith, P.A. Trust Account for arbitrator fees and expenses shall, at the conclusion of the arbitrators' service, be paid to the HPR.

4. TCC is entitled to recover its expenses, not including counsel fees, incurred in the conduct of the arbitration in the amount of $21,691.02 against HPR pursuant to S.C. Code Ann. § 15-48-110.

5. TCC is entitled to recover interest on the sum of PCOs 143, 144R, and 146 and retainage, totaling $958,573.00, since September 29, 2017, at the rate of 4% compounded annually through August 1, 2019 in the amount of $71,667.31. Interest shall accrue at the rate of $112.90 per day thereafter until (1) this Corrected Arbitration Award is satisfied and paid in full; or (2) until judgment is entered on this Corrected Arbitration Award, whichever first occurs.

AND IT IS SO ORDERED.

August 12, 2019

Alan O. Campbell, Arbitrator

John L. McCants, Arbitrator

L. Franklin Elmore, Arbitrator

EXHIBIT B

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE NINTH JUDICIAL CIRCUIT**
COUNTY OF CHARLESTON	)	
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.	)	Case No.: 2016-CP-10-2955 **ORDER ON MOTION TO LIFT STAY AND MOTIONS TO VACATE OR CORRECT ARBITRATION AWARD**

Presiding Judge:	Hon. Deadra L. Jefferson
Plaintiff's Attorneys:	Jaan Rannik, Esq., and Andrew Epting, Jr., Esq.
Defendant 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 came before the Court on December 16, 2019 for a hearing on TCC of Charleston's ("TCC's") Motion to Lift Stay, filed June 17, 2019 and the Concord & Cumberland HPR's ("the HPR's") Motion to Vacate or Modify Arbitration Award, filed July 16, 2019.[1] After reviewing the materials and authorities filed with this Court and considering the record and arguments presented at the hearing, the Court rules as follows.

FINDINGS OF FACT

This is a construction contract payment dispute arising from a repair project at condominiums located at 175 Concord Street in Charleston, South Carolina (the "Project"). The HPR was the Project owner. TCC was the Project's general contractor. The dispute centers on TCC's final pay application, Pay Application eighteen (18), and TCC's resulting claim for $2,385,503.57. The parties do not dispute payment in full of the first seventeen (17) pay applications.

The dispute was referred to binding arbitration by agreement. After the hearing, issuance of an initial Award, and exchange and consideration of subsequent motions, the Arbitration Panel (the "Panel") issued a Corrected Arbitration Award granting TCC $2,016,066.73, plus interest and

[1] While this Order refers to the HPR's "motion" (singular), the HPR filed two separate motions to vacate — one filed on July 16, 2019 relating to the initial award delivered by the arbitrators, and one filed November 18, 2019 relating to the corrected award signed by the arbitrators on August 12, 2019. The only award properly before the Court is the corrected award, and this award forms the basis for the Court's ruling on the HPR's motions.

costs. TCC commenced this action by filing a lawsuit in Charleston County against the HPR on June 6, 2016. TCC amended the Complaint on June 10, 2016 to add the individual condominium unit owners as captioned herein. Contemporaneously with filing the initial Complaint on June 6, 2016, TCC filed a Motion to Stay and Compel Arbitration. The HPR consented to Arbitration in a Consent Order filed with this Court on December 30, 2016, and the arbitration proceeded on the claims between TCC and the HPR.

The Parties entered into an Arbitration Agreement on January 18, 2017, which provides in relevant part, "this dispute is to be decided by final and binding arbitration pursuant to S.C. Code § 15-48-10 et. seq. …" The Panel agreed to issue a "Reasoned Award" as stated in Panel Order No. 1, dated April 19, 2017. The arbitration hearing was held January 21 – 24, 2019, and the Panel issued its initial Award on April 16, 2019. After the exchange of post-hearing motions and the Panel's issuance of a Post Award Order, the HPR submitted a Motion to Change Award to the Panel on July 15, 2019. To preserve its right to judicial review, the HPR also filed an initial Motion to Vacate with this Court.

Subsequently, the Panel issued a Corrected Arbitration Award on August 19, 2019. The HPR then submitted a Motion to Change the Corrected Arbitration Award, asserting the Panel's manifest disregard of well-settled contract law, which resulted in the Panel's October 23, 2019 "Order on HPR Motion for Change of Corrected Arbitration Award." The HPR then filed the present Motion to Vacate Corrected Arbitration Award on November 18, 2019 and its Memorandum of Law in support on December 11, 2019.

CONCLUSIONS OF LAW

I. Motion to Lift Stay

On January 3, 2016, Judge Roger M. Young signed a consent order staying this matter pending binding arbitration between TCC and the HPR. That arbitration has taken place and ended with a Corrected Arbitration Award signed on August 12, 2019. The arbitration having taken place, the stay is no longer in effect by the terms of the consent order signed by Judge Young. Moreover, as agreed to by counsel for the HPR, the HPR's filing of their motion to vacate the arbitration award is itself a consent to lift the stay.

II. Motion to Vacate or Correct the Corrected Arbitration Award

A. Legal Standard

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.

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 quotation omitted). "Even a clearly erroneous interpretation of the contract cannot be disturbed." Gissel v. Hart, 382 S.C. 235, 241 (2009) (internal quotation omitted).

"Therefore, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." Group III, 425 S.C. at 151 (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)).

A court may vacate an arbitration award only under very narrow circumstances: the four statutory grounds enumerated in S.C. Code Ann. § 15-48-130(a);[2] and one common law ground—manifest disregard of the law, as stated in Gissel v. Hart, 382 S.C. 235, 241 (2009).

Regarding the former, "[a]rbitrators exceed their powers only if the issue resolved by them is not within the scope of the agreement to arbitrate." Pittman, 327 S.C. at 77. It is the scope of the arbitration agreement, and not the pleadings, that determines what matters have been referred to the arbitrators. Id.

Regarding manifest disregard of the law, "[a] court may vacate an arbitration award under the manifest disregard standard only when a plaintiff has shown that: (1) the disputed legal principle is clearly defined and is not subject to reasonable debate; and (2) the arbitrator refused to apply that legal principle." Group III, 425 S.C. at 154–55. More precisely, "manifest disregard of the law is established only where the arbitrator[] understand[s] and correctly state[s] the law, but proceed[s] to disregard the same." Id. at 155 (alterations in original). The manifest disregard standard "is not an invitation to review the merits of the underlying arbitration." Id. (internal quotation omitted).

With regard to modification of an arbitration award, a court may modify the award only "so as to effect its intent," S.C. Code Ann. § 15-48-140(b), and only if one of three grounds set

[2] Of which only one—the arbitrators exceeding their authority—is advanced by the HPR as grounds for vacating this award; accordingly, the other grounds set forth in this statute are not discussed.

forth in S.C. Code Ann. § 15-48-140(a) is applicable. These grounds are: an evident mistake in the calculation of figures or the description of any person, thing, or property referred to in the award; award by the arbitrators on a matter not submitted to them, so long as correcting the award does not affect the merits; or imperfection in the form of the award unrelated to the merits of the controversy.

B. Public Policy Behind the Exacting Legal Standard

There is a strong State and Federal policy in favor of arbitration of disputes. Pittman, 327 S.C. at 75; Trident Tech. College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 103 (1985). The Parties agreed that each would appoint their own arbitrator and that the party-appointed arbitrators would jointly select the third arbitrator. This is a case involving construction, and the HPR selected John McCants, Esq., and TCC selected Frank Elmore, Esq., each known for his extensive experience in construction litigation. Mr. McCants and Mr. Elmore selected Alan Campbell, an engineer, as the third arbitrator. The qualifications of this panel to preside over a full arbitration proceeding on the merits in their area of expertise is an example that justifies the strong policy in favor of arbitration. After four (4) days of testimony, during which 200 exhibits were submitted into evidence, the panel issued a unanimous decision in favor of TCC.

Given the panel's experience in disputes of this nature, it is not without significance or logic that the Parties stipulated to final and binding arbitration. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011) (recognizing arbitration's benefit of giving parties the "ability to choose expert adjudicators to resolve specialized disputes."). Notwithstanding this stipulation, the Court continues and considers the HPR's motion.

C. HPR's Arguments for Vacating or Modifying the Award

1. Not A Reasoned Award

The HPR argues that the arbitrators failed to deliver a "reasoned award" as required by the arbitration agreement, requiring vacating or modification of the award. South Carolina courts have not directly defined a "reasoned award." However, the Supreme Court of South Carolina held, "[a]rbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are 'barely colorable.'" Pittman, 327 S.C. at 77, 488 S.E.2d at 338.

The Court finds that the nine (9) page order submitted by the arbitrators explains the basis for the amounts awarded and the grounds for the award. The factual inferences and legal conclusions are sufficient to support the arbitrators' findings, and the award therefore constitutes a reasoned award within the meaning of the parties' arbitration agreement. Accordingly, the HPR's Motion to Vacate is heard and respectfully Denied on this ground.

2. Manifest Disregard of Applicable Law

The HPR argues that the arbitrators manifestly disregarded the law in declining to enforce the lien waiver attached to Pay Application 17 and in "wrongfully eviscerat[ing] the GMP"[3] referred to in the contract between TCC and the HPR. A review of the applicable law and of the arbitrator's final award shows the HPR's position to be untenable.

As this Court noted during the hearing, the arbitrators made express findings that are consistent with the applicable law and provided reasoning supporting those findings. For example, with regard to the lien waiver, the arbitrators dedicated an entire page of their order to a discussion of why the lien waiver was not enforceable in the circumstances, stating:

[3] "GMP" stands for Guaranteed Maximum Price.

> 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 Court finds no error or manifest disregard of the law in the panel's finding, especially in light of a contemporaneous email from HPR's agent confirming the agreement.

In its initial Award, filed December 11, 2019, as to the contract price, the panel found that "[i]t is undisputed that the condition of the building was different than what TCC contemplated when it originally submitted its bid" and that certain proposed change orders "were paid on a cost-plus basis" pursuant to agreements between TCC and agents of the HPR. Award at 3. The Court finds no 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. Further, as the issue of the contract price was not corrected or reversed by the Corrected Award,

These findings by the panel indicate that, 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. Accordingly, the HPR's Motion to Vacate is heard and respectfully Denied as to this ground.

3. Exceeding Authority

The HPR also argues that the award should be vacated, or in the alternative modified, because the arbitrators exceeded their authority in awarding $29,000.00 relating to the "Stone

tower," a portion of the exterior of the property not in the original scope of the contract. The Court disagrees.

As noted *supra*, arbitrators only exceed their authority when they rule on something not submitted to them. Here, as the Court noted during oral argument, the language of the referral in the arbitration agreement is very broad, applying to "certain disputes [that] have arisen regarding performance and payment on the Project," with "Project" being referred to in the agreement as "exterior repairs to Concord & Cumberland located at 175 Concord Street, Charleston, South Carolina." The Stone Tower work relates to the exterior of the building and is within the scope of the referral to the panel. To the extent there is doubt about the scope of the referral, the doubts are to be resolved in favor of arbitration. See Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct. App. 2010) ("[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

Moreover, the HPR acknowledges that TCC asked for this precise relief in their pretrial brief, that the issue was tried, that the relief was asked for requested by TCC in its post-trial proposed order to the panel.

The Court therefore finds that the award relating to the Stone Tower was within the scope of the arbitrators' authority, as the Parties gave them this authority. The arbitrators did not exceed their authority and this basis for vacating or modifying the award likewise is unavailing. Accordingly, the HPR's Motion to Vacate is heard and respectfully Denied as to this ground.

4. Evident Miscalculation

The South Carolina Arbitration Act grants the Court authority to modify or correct an award if some technical issue with the award means that its intent would not be effective without modification. See S.C. Code Ann. § 15-48-140(b) ("If the application is granted, the court shall

modify and correct the award so as to effect its intent…"). The Court finds no such technical issue, such as any "evident miscalculation of figures," "evident mistake in the description of any person, thing, or property," imperfection in the form of award, or any other basis provided under the statute. The award is not subject to modification or correction. Accordingly, the HPR's Motion to Vacate is heard and respectfully Denied as to this ground.

III. Conclusion

Precedent is clear, even were the Court to believe the arbitrators committed error on these topics, the United States Supreme Court has stated, "[i]t is not enough… to show that the [arbitrator] committed an error—or even a serious error." Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 559 U.S. 662, 671 (2010). It is not the prerogative of this Court to substitute its own judgment for that of the arbitrators who presided over the arbitration proceeding. Accordingly, having reviewed the arbitration panel's award and considering the record and the arguments of counsel it is hereby ordered that the Plaintiff's Motion to Lift Stay is Granted, and the HPR's Motion to Vacate or Modify is Denied.

AND IT IS SO ORDERED.

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

January _____, 2020
Charleston, South Carolina

Charleston Common Pleas

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

Case Number: 2016CP1002955

Type: Order/Form 4

IT IS SO ORDERED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Deadra L. Jefferson, Circuit Court Judge

Case No. 2016-CP-10-2955

TCC of Charleston, Inc.,

Respondent,

v.

Concord & Cumberland HPR, Appellant.

PROOF OF SERVICE

I, F. Cordes Ford IV, certify that I have served the foregoing **RETURN TO MOTION TO DISMISS APPEAL** on all other parties to this matter via electronic mail and by depositing a copy of the same in the United States Mail, postage prepaid, on August 7, 2020, addressed to their attorneys of record as follows, as evidenced by Exhibit "A" attached hereto:

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Dated: August 7, 2020

EXHIBIT A

From:	Herron, Robin
To:	jgr@epting-law.com; mendemann@clarksonwalsh.com
Cc:	Ford, Cordes; Walden, Andrew; Grimball, Henry; Casey, Carol
Bcc:	{F6706110}.Womble@wcsrwces01.wcsr.com
Subject:	TTC of Charleston, Inc. v. Concord & Comberland HPR - Appellant"s Return to Motion to Dismiss Appeal
Date:	Friday, August 7, 2020 4:46:44 PM
Attachments:	Letter to Counsel of record enc Appellant"s Return to Motion to Dismiss Appeal.pdf Return to Motion to Dismiss Appeal.pdf imagecaff21.PNG image49eaf8.PNG imagedeae24.PNG image9879b9.PNG

Attached for service, please find Appellant's Return to Motion to Dismiss Appeal, and letter from Cordes Ford regarding same.

Best Regards,

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August 7, 2020

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Re: TCC of Charleston, Inc. v. Concord and Cumberland, LLC
Appellate Case No. 2020-000875
WBD Ref: 88786.0001.1

Dear Ms. Kitchings:

Enclosed please find Appellant's Return to Motion to Dismiss Appeal with Proof of Service, in the above referenced action. Please file the same and return filed copies to me via email.

Thank you for your assistance.

Kind regards,

Womble Bond Dickinson (US) LLP

F. Cordes Ford IV

FCF/cbc
Enclosures

cc: Jaan G. Rannik, Esq.
Michelle N. Endemann, Esq.