

EXHIBIT “A”

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT

TCC OF CHARLESTON, INC.)
Plaintiff,)

Case No.: 2016-CP-10-2955

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.)

**ORDER ON MOTION TO LIFT
STAY AND MOTIONS TO
VACATE OR CORRECT
ARBITRATION AWARD**

RECEIVED
Mar 16 2021
SC Court of Appeals

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
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IT IS SO ORDERED.

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