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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Mikell Scarborough, Master in Equity

Case No. 2016-CP-10-2955

Appellate Case No. 2021-000272

TCC of Charleston, Inc. ……*Plaintiff and Appellant/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, 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, Bonita K. Levin, Donald D. Leonard, Bebby L. Beatty, Mattellen, LLC, and Thomas R. Debnam, Trustee of the Trust Agreement of Thomas, R. Debnam……..*Defendants and Respondents/Appellants*

RESPONSE BRIEF OF APPELLANT/RESPONDENT TCC OF CHARLESTON, INC.

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I. THE CORRECTED ARBITRATION AWARD IS NOT SUBJECT TO BEING VACATED OR MODIFIED

A. Legal Standards

Because "[a]rbitration is a favored method of settling disputes in South Carolina," *Pittman Mortg. Co., Inc. v. Edwards*, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (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, 819 S.E.2d 781, 785 (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." *Group III*, 425 S.C. at 150, 819 S.E.2d at 786 (internal quotation omitted). "Even a clearly erroneous interpretation of the contract cannot be disturbed." *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (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, 819 S.E.2d at 786 (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:

(i) the four statutory grounds enumerated in S.C. Code Ann. § 15-48-130(a)[1]; and

(ii) one common law ground—manifest disregard of the law, as stated in *Gissel v. Hart*, 382 S.C. at 241, 676 S.E.2d at 323.

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 76, 488 S.E.2d at 338. 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, 819 S.E. 2d at 788. 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, 819 S.E.2d at 788 (alterations in original, internal quotation omitted). 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 forth in S.C. Code Ann. § 15-48-140(a) is applicable. These grounds are: (i) an evident mistake in the calculation of figures or the description of any person, thing, or property referred to in the award; (ii) award by the arbitrators on a matter not submitted to them, so long as correcting the

[1] 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.

award does not affect the merits; or (iii) imperfection in the form of the award unrelated to the merits of the controversy.

B. The Parties' Agreement to Final and Binding Arbitration

The Parties agreed (i) that the dispute between them would be resolved via final and binding arbitration and 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 trial on the merits in their area of expertise is an example that justifies the policy in favor of arbitration. After four 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"). "Final and binding" is not merely decorative language; its inclusion meant the arbitration is the last word and binds the parties. Notwithstanding the stipulation that the arbitration would be final and binding, the HPR has filed multiple motions to vacate, modify, rehear, and reconsider, and has appealed multiple times. The intent of "final and binding" is that the Panel's order would be conclusive.

C. Request for Confirmation of Award

TCC filed a motion to confirm the arbitration award on July 30, 2020; however, anticipating that the HPR would appeal once the award was confirmed and seeking to avoid

piecemeal appeals, TCC requested the Court not rule on confirmation until all other pending motions—including TCC's motion for attorneys' fees—had been resolved. The HPR, however, requested the Court grant TCC's motion.

In a memorandum filed October 27, 2020, the HPR stated:

> [T]he HPR requests that this Court GRANT TCC of Charleston, Inc.'s ("TCC") Motion to Confirm the Corrected Arbitration Award but without the requested delay.

ROA ___. As the HPR's counsel expressly requested confirmation, it has no appeal regarding its confirmation as only an aggrieved party may appeal, Rule 201, S.C.A.C.R.

D. 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. A "reasoned award" falls somewhere between a standard arbitration award containing no explanation whatsoever and a thorough "findings of fact and conclusions of law." *Tully Const. Co. / A.J. Pegno Const. Co., J.V. v. Canam Steel Corp.*, No. 13-cv-0307-PGG, 2015 WL 906128, at *13–14 (S.D.N.Y. Mar. 2, 2015). An award is a "reasoned award" if it "sets out the arbitrator's key findings and, where necessary, the reasons for those findings." *Id.* at *14.

The 9-page order submitted by the arbitrators explains the basis for the amounts awarded and the grounds for the award and therefore constitutes a reasoned award.

2. Manifest Disregard of Applicable Law

a. Lien Waivers

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[2]" 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.

The arbitrators made express findings on this issue that are consistent with the applicable law and provided reasoning supporting those findings. Indeed, the arbitrators dedicated an entire page of their order to a discussion of why the lien waiver would not vitiate the Parties' agreement to hold certain cost items to the end of the job, 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.

Award at 5. There is no error or manifest disregard of the law in the panel's finding. The lower court agreed and correctly declined to revisit the merits of the arbitrators' finding. *See Group III Mgmt., Inc. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 150, 819 S.E.2d 781, 786 (Ct. App. 2018) (noting the courts' function in reviewing an arbitration award 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").

b. GMP Contract

With regard 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

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

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. The lower court correctly found no error, let alone 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 panel, far from disregarding the law, considered and applied the law, reaching 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.

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 relating to the "Stone tower," a portion of the exterior of the property not in the original scope of the contract.

As noted *supra*, arbitrators only exceed their authority when they rule on something not submitted to them. Here, 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. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). Here, there is no doubt. As the HPR acknowledges (Respondent's Initial Brief at

18), TCC asked for this precise relief in their pretrial brief (**ROA ___**), the issue was tried, the relief was asked for requested by TCC in its post-trial proposed order to the panel (**ROA ___**), and the relief was granted by the Panel.

The award relating to the Stone Tower was therefore 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.

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.

II. CONCLUSION

The lower court's denial of the HPR's motions must be affirmed.

Respectfully submitted:

EPTING & RANNIK, LLC

This 8th day of June, 2021
Charleston, South Carolina

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