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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
Master-In-Equity

Hon. Deadra L. Jefferson, Circuit Court Judge
Hon. Mikell R. Scarborough, Master-In-Equity

Case No. 2016-CP-10-2955

Appellate Case No. 2021-000272

TCC of Charleston, Inc., 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, 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 Respondent/Appellant.

REPLY BRIEF OF RESPONDENT/APPELLANT

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ARGUMENT

I. NEITHER TCC NOR THE PANEL HAVE EVER CITED ANY LEGAL AUTHORITY AS TO HOW THE PANEL CAN DISREGARD A LEGAL, UNAMBIGUOUS CONTRACT.

TCC of Charleston, Inc.'s (TCC) "legal standard" section of its initial brief, while lengthy, is superficial at best when applied to the facts of this case. For instance, TCC quotes *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E. 2d 320, 323 (2009) in stating that "[e]ven a clearly erroneous interpretation of the contract cannot be disturbed." However, this statement has exactly zero relevance to this case. In this case, the Panel did not interpret the Conditional Release and Waiver of Lien ("Release") in error. Quite the opposite, the Panel acknowledged the Release and its lack of ambiguity but proceeded to completely disregard the plain terms and resulting impact of the Release without any legal basis. Thus, the Panel did not erroneously interpret - it manifestly disregarded - the Release, which is the distinguishing factor in this appeal. Yes, an arbitration panel's award should be difficult to overcome by its very nature. However, it should not be impossible, especially when the law has so clearly been ignored, without any legal support.

Indeed, neither the Panel nor TCC in any of its subsequent briefing have cited any law or legal authority that would allow the Release to be ignored. Even in this appeal, TCC makes the blanket statement that the Panel's express findings on this issue are "consistent with the applicable law," but yet cites no law. Where is this law?

II. A FINAL AND BINDING ARBITRATION AWARD DOES NOT PRECLUDE THE APPELLATE RIGHTS PROVIDED BY STATUTE.

The Arbitration Agreement states that "this dispute is to be decided by final and binding arbitration pursuant to S.C. Code § 15-48-10 et seq." Thus, this arbitration has been governed by the South Carolina Uniform Arbitration Act, which expressly provides a statutory right to appeal

in Section 15-48-200. TCC's implication that a "final and binding" arbitration award should not be subject to appellate review is without merit.

III. THE HPR IS AN AGGRIEVED PARTY AND CAN APPEAL UNDER RULE 201, SCACR.

The HPR appealed the lower court's failure to vacate or modify the arbitration award immediately following Judge Jefferson's orders, but the appeal was dismissed as interlocutory because the arbitration award had not yet been "confirmed" by the lower court. *See* Order on Motion to Lift Stay and Motions to Vacate or Correct Arbitration Award (January 30, 2020), Order on Concord & Cumberland HPR's Motion to Alter/Amend (May 1, 2020), and Court of Appeal's Order (September 11, 2020).

TCC, not the HPR, filed a motion to confirm the award in the lower court, but requested that the confirmation be delayed until the end of the case. *See* TCC of Charleston's Motion to Confirm Arbitration Award, dated July 30, 2020. The HPR, seeking the ability to finally appeal the manifest disregard of the law evidenced by the arbitration award, requested in briefing that the confirmation of the award not be delayed. This certainly does not remove the "aggrieved party" status necessary to seek appeal under Rule 201, SCACR. If anything, when viewed in light of this Court's prior dismissal, it indicates the HPR's resolve to appeal without delay.

As this court previously noted, "A party is aggrieved by a judgment or decree, for purposes of determining whether the party can appeal, when it operates on his or her rights of property or bears directly on his or her interest." *Powell ex rel. Kelley v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008). The lower court's failure to vacate or modify the Arbitration Award certainly "bears directly" on the HPR's interest, thus TCC's argument is without merit.

IV. THE LOWER COURT IMPROPERLY RELIED ON A NEW FINDING WHEN IT FAILED TO VACATE THE ARBITRATION AWARD.

TCC states that 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.”

First, TCC can present no evidence of this alleged agreement. At best, there is an email that discusses a potential agreement to agree in the future and, even then, the subject of that email involves specific and contemporaneous proposed change orders, not the entire project or future change orders. Further, that email is between counsel, and was never reduced to a writing to be executed by the parties, which in situations of similar importance, such as during a court proceeding, must be reduced to writing and signed by the parties before it is enforceable. Rule 43(k), SCRCF.

Second, the Panel did not make a 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.” Rather, this language arose for the first time in the proposed order submitted by TCC to Judge Jefferson, and, at best, reflects TCC’s desire for what the Panel might have concluded. As the Panel’s Order on HPR Motion for Change of Corrected Arbitration Award makes clear, eight months after this alleged agreement, an enforceable Release was sworn to and executed, which, by law, subsumes and resolves any earlier alleged agreement.

Specifically, the Panel stated:

HPR erroneously interprets and concludes that the Panel’s Corrected Award 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. **That is not what this panel found.**

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 Arbitration Award at 1 (emphasis added).

Simply put, per the Panel’s own findings, there was no agreement post-dating the Release that accompanied Payment Application No. 17. Therefore, it was a manifest disregard of the law to completely disregard the Release, which was an enforceable contract upon the HPR’s undisputed payment in full of the amount requested by TCC in Payment Application No. 17. Indeed, there is no law the Panel could have cited to support its disregard of the Release, and so it cited none.

V. THE ARBITRATION WAS NARROWLY TAILORED TO THE CLAIMS PROVIDED FOR IN THE AIA A201-2007, AND THE PANEL EXCEEDED ITS POWERS BY INCLUDING THE STONE TOWER COSTS IN THE AWARD.

TCC relies on a general statement in a “Whereas” clause of the Arbitration Agreement as support for its argument that the “stone tower” was included in the scope of the arbitration and states that “the Parties gave them [the] authority” to rule on this issue. However, the Arbitration Agreement explicitly defines its scope in paragraph six, which provides that “the scope of arbitration will be governed by § 15.4.1 of the AIA Document A201-2007, General Conditions of the Contract entered into between the parties. . . .” Section 15.4.1 references “Claim,” which is defined under the GMP Contract as “a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract.” *See* AIA 201-2007, General Conditions.

However, on January 18, 2017, the date the Arbitration Agreement was executed, TCC had long since alleged, and the HPR had long since admitted, that the work of the GMP Contract was complete as of March 17, 2016. In contrast, the separate investigatory work of the stone tower was not complete. Thereafter, TCC did not assert a “claim” for payment for that work to the HPR, the Court, or the Panel; TCC did not assert a lien to secure payment for that work; and TCC did not amend its prior lien to include a claim of payment for that work. Accordingly, the Parties did not conduct discovery contemplated by the Arbitration Agreement on any such claim. In sum, TCC had provided no notice of a claim or any dispute regarding the stone tower, and the HPR had provided no assent to referring it to or resolving it by arbitration, and, indeed, the HPR was given no opportunity by TCC to do so. The record on appeal lacks any evidentiary support to the contrary. As such, any arbitration award to TCC of costs associated with the stone tower is improper.

CONCLUSION

For the reasons stated above and in its initial brief, the HPR respectfully requests that the Court reverse the ruling below and remand with instructions to the Circuit Court to enter an Order vacating the Arbitration Award. In the alternative, the HPR requests that the Court reverse the ruling below and remand with instructions that the Circuit Court modify the Arbitration Award by enforcing the Release, recalculating the award, and removing the stone tower costs.

Respectfully submitted this 21st day of June 2021.

[Signature on next page.]

WOMBLE BOND DICKINSON (US) LLP

A handwritten signature in blue ink, appearing to read "Cordes Ford", is centered on a light pink rectangular background.

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Of Which Concord & Cumberland HPR is the Respondent/Appellant.

PROOF OF SERVICE

I, F. Cordes Ford IV, certify that I have served the foregoing **REPLY BRIEF OF THE RESPONDENT/APPELLANT** on all other parties to this matter via electronic mail on **June 21, 2021**, addressed to their attorneys of record as follows, as evidenced by Exhibit "A" attached hereto:

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Charleston, South Carolina
Dated: June 21, 2021

EXHIBIT “A”

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Subject: TCC of Charleston v. Concord & Cumberland - Reply Brief of Respondent/Appellant
Date: Monday, June 21, 2021 9:35:35 PM
Attachments: [Reply Brief of Respondent-Appellant.pdf](#)

Dear Counsel:

Attached for service, please find Concord & Cumberland HPR's Reply Brief in the referenced action.

Thank you,
Carol Casey