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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4876-10T2

BROCKWELL & CARRINGTON
CONTRACTORS, INC.,

Plaintiff-Respondent,

v.

FOUR STRONG BUILDERS, INC.

Defendant-Appellant.

Submitted March 6, 2012 - Decided July 10, 2012

Before Judges Yannotti and Kennedy.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-12393-10.

Faugno & Associates, L.L.C., attorneys for appellant (Paul Faugno, on the brief).

Tesser & Cohen, attorneys for respondent (Lee M. Tesser, on the brief).

PER CURIAM

Defendant appeals from judgment entered on May 6, 2011, confirming an arbitration award in favor of plaintiff and entering judgment against defendant for $22,123.70 plus interest

running from the date of the arbitration award. For reasons set forth hereinafter, we affirm.

I.

Plaintiff is a general contractor and defendant is an asbestos removal subcontractor. They entered into three contracts in 2005 and 2006 whereby defendant agreed to provide "asbestos abatement" and related work at several public project sites for which plaintiff was the general contractor. The 2005 contract concerned the Monmouth County library and the 2006 contracts concerned a public school in Maywood and two public schools in Montvale. Each contract provided that all claims and disputes relating to the contract or any breach thereof, at the option of plaintiff, "shall be decided by arbitration in accordance with the Construction Industry Rules of the American Arbitration Association." Additionally, the 2006 contracts gave plaintiff the right to withhold payments due to defendant if defendant's work were defective or incomplete, among other things, "on any other contract" between the parties.

Defendant claimed it completed its services at the Monmouth County library in March 2007 and received payment in full from plaintiff on their contract. Defendant claimed it completed its services at the Montvale schools and applied for payment in October 2006. The contract for the Maywood school called for

defendant to perform work in phases and defendant applied for payment for its work on some of the phases in May 2007.

Plaintiff, however, refused to pay defendant on the Montvale and Maywood contracts, claiming that it received notice from Monmouth County that an area in the library had not been demolished and the asbestos there had not been abated as required by the prime contract. Defendant claimed it had performed all required services at the library and refused to undertake any further work there unless it was paid separately.

Plaintiff and defendant thereafter filed claims against each other with the American Arbitration Association (AAA). An arbitrator was appointed and hearings were conducted over the course of several months, during which numerous witnesses testified and many documents were submitted by the parties. None of the hearings were recorded, however.

The arbitrator requested counsel for the parties to submit closing briefs and asked them to address credits claimed by plaintiff with respect to the Monmouth County library project. Plaintiff submitted its brief and a supplemental report from its expert on August 31, 2010. In its brief, plaintiff addressed defendant's failure to demolish the wall and abate asbestos required by the prime contract. Also, plaintiff addressed at length a claim that defendant had only abated asbestos in two

areas of the library, allegedly at the request of Monmouth County's representative, yet had received full payment from plaintiff on the contract which called for abatement services in five areas of the library. Defendant responded with a brief and exhibits on September 8, 2010, and explicitly addressed all the issues raised by plaintiff in its submission.

On November 30, 2010, the arbitrator issued his award which stated, in pertinent part:

> 1. Claimant is a General Contractor who had contracts to perform work at 4 public projects.
> 2. Respondent is a specialty contractor hired by Claimant to remove asbestos from all 4 projects.
> 3. Respondent's contract at the Monmouth County Library was $120,000.00 and required Respondent to remove asbestos from 5 chases.
> 4. PMK Group, Inc., hired by the County to monitor the asbestos removal, verbally directed Respondent to only abate 2 of the 5 chases.
> 5. Respondent never notified Claimant that it only would abate 2 of the 5 chases.
> 6. Respondent is only entitled to be paid for abating 2 of the 5 chases[;] however[,] Respondent received full payment of the contract price therefore Respondent owes $31,699.23 for work it never performed on the 3 chases.
> 7. Respondent completed its work at the Library and on March 12, 2007, PMK Group certified the work was complete.
> 8. The Certificate of Completion and the Notification of Asbestos Abatement was never delivered to or shown to Claimant by Respondent.
> 9. Approximately 2 months later the County issued Directive 48 requiring Claimant to

demolish a concrete wall surrounding the chase at Meeting Room #118 and Storage #119 stating that this [was] part of the original scope of the prime contract requiring the asbestos removal.

10. Claimant demanded Respondent return to the job to perform this work but Respondent refused stating this was now an extra and should be paid for it separately which Claimant rejected.

11. Respondent has no right to accept a modification of the contract issued by PKM Group and not agreed to by Claimant, the only party to which it had privity.

12. Since Respondent refused to return to the job to complete Directive 48, Claimant had every right to retain a replacement contractor to perform this work.

13. Respondent should not be held responsible for the additional costs incurred when the concrete wall was demolished improperly instead of containing the asbestos, it spread throughout, consequently, Respondent will only be charged the money it received for this chase but never performed the work.

14. Respondent seeks payment for work it performed on 3 of the 7 phases at the following jobs:

A. Maywood school $102,974.40
B. Memorial school $16,900.00
C. Fieldstone school $24,700.00

15. Respondent wrongly refused to return to these projects to complete the other phases based upon the theory that Claimant refused to remit payment for the work it had already done and wasn't likely to pay Respondent because of the dispute regarding the County Library project.

16. Claimant paid $87,761.51 [to] Abate Tech to have the abatement part of the work performed and such amount is to be backcharged to Respondent.

17. Total Credits to Claimant are
31,699.23 (County Library)
87,761.51 (Maywood)

23,500.00 (Overhead)
17,800.00 (Legal Fees)

160,760.74

18. Total Credits to Respondent are
102,974.00 (Maywood)
16,900.00 (Memorial)
24,700.00 (Fieldstone)

144,574.00

TOTAL DUE CLAIMANT 16,186.74

On December 28, 2010, plaintiff filed a complaint to confirm the award and enter judgment pursuant to N.J.S.A. 2A:23B-22 and -25. Defendant responded by filing a motion on January 17, 2011, to "vacate, modify and/or correct" the award. Among other things, defendant asserted the award was premised upon a "miscalculation of math" which required correction.

The trial court on February 17, 2011, entered an order remanding the matter to the AAA to allow defendant to file an application for relief under Rule 48 of the Construction Industry Rules of the AAA, but retained jurisdiction to "re-list[]" the matter on further application of plaintiff. On March 29, 2011, defendant filed a motion with the AAA to modify the award.

In a written ruling issued on April 14, 2011, the arbitrator cited Rule 48 which provided that "[w]ithin 20 calendar days of the transmission of an award" any party may

request that the arbitrator "correct . . . technical or computational errors in the award. The arbitrator is not empowered to re-determine the merits of any claim already decided." The arbitrator thereafter rejected defendant's application for modification because it was not submitted within the time period prescribed by the rule, and concluded that he "is no longer empowered to perform any function in connection with the award or the arbitration . . . [and cannot] even review the application for [m]odification."

The parties then returned to the trial court, where, as noted, judgment was entered for plaintiff. In a written "rider" to the judgment, the court reviewed the history of the controversy and the claims of the parties, and concluded:

> A court's ability to correct or modify a award is limited to situations where: (1) there is an evident mathematical miscalculation on the face of the award; (2) arbitrator has exceeded the scope of his authority and award may be correct[ed] without affecting the merits of the decision upon the claims submitted; or (3) an award is imperfect in a matter of form not affecting the merits of the award. N.J.S.A. 2A:23B-24(a)(1) to (3). In regard to mathematical miscalculations, the Supreme Court has held that provisions allowing correction or modification on this basis were intended only to enable the court to

> correct simple arithmetical errors. See Tretina, supra, 135 N.J. at 359.[1]
>
> 4. FINDINGS/CONCLUSION
>
> This Court finds that there is no basis under N.J.S.A. 2A:23B-1 et seq. to disturb the Arbitrator's award. It is clear that the Arbitrator did not make a mathematical miscalculation on the face of the award that is akin to a simple arithmetical error. The mathematical miscalculation alleged is well beyond a simple computation error and well beyond the province of the Court. Furthermore, [defendant] also has not demonstrated the other bases for correction or modification of an arbitration award nor any of the bases to vacate an award. Based on the foregoing, [defendant's] application for correction or modification is DENIED.

This appeal followed.

II.

Defendant makes the following arguments in support of its appeal:

> A. The Arbitrator's Determination that an Application for a Modification was Untimely, was Contrary to a Superior Court Order, and Without Authority.
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> B. Having Retained Jurisdiction, the Court Erred by not Modifying The Arbitration Award Based Upon an Evident Miscalculation of Credit.
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> C. The Arbitration Award needs to be Vacated or Modified as it was Predicated upon Claims not Submitted to the Arbitrator.

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[1] Tretina Printing, Inc. v. Fitzpatrick & Assoc., Inc., 135 N.J. 349 (1994).

D. Arbitrator Failed to follow the American Arbitration Rules by Wholeheartedly Relying upon an Expert Report not submitted during the Arbitration itself.

Having considered these arguments in light of the applicable legal principles, we affirm.

Initially, defendant contends that the arbitrator erred by not reconsidering his decision after the trial court remanded the matter to enable defendant to seek relief under Rule 48 of the AAA's Construction Industry Rules, which provides that an arbitrator may correct "technical or computational errors" if such relief is sought within twenty days of the award. Defendant asserts that section (c) of that rule requires the arbitrator to follow "applicable law [if it] provides a different time frame" and that N.J.S.A. 2A:23B-24 provides a different time frame. We disagree.

The statute cited by defendant addresses the authority of a court to modify or correct an arbitration award under certain conditions. The power of an arbitrator to modify or correct an award is governed by N.J.S.A. 2A:23B-20(b), which, like Rule 48, allows a party to seek modification or correction of an award if application for such relief is made "within 20 days after the aggrieved party receives notice of the award." We have held that the failure of a party to seek modification of an

arbitration award within the "stringent time constraints" prescribed by N.J.S.A. 2A:23B-20(b) precludes an arbitrator from granting relief. Kimm v. Blisset, LLC, 388 N.J. Super. 14, 35 (App. Div. 2006), certif. denied, 189 N.J. 428 (2007).

Next, defendant argues that the trial court erred by not modifying the award pursuant to N.J.S.A. 2A:23B-24(a)(1) based on the arbitrator's alleged "evident miscalculation" of credits due to plaintiff. Defendant asserts the arbitrator mistakenly concluded that $87,761.51 had been paid by plaintiff to an entity known as Alba Tech[2] to complete work defendant failed to undertake at the Maywood public school, whereas "the amount of money paid to Alba Tech was actually . . . $30,000[.]"

N.J.S.A. 2A:23B-24(a)(1) states:

> Upon filing a summary action within 120 days after the party receives notice of the award pursuant to section 19 of this act or within 120 days after the party receives notice of a modified or corrected award pursuant to section 20 of this act, the court shall modify or correct the award if:
>
> (1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

In Tretina Printing, Inc., supra, 135 N.J. at 359, the Court explained that similar language in the statute that preceded the

[2] The arbitrator's award refers to this entity as "Abate Tech."

current statute only "enable[d] the court to correct simple arithmetical errors, such as 2 + 2 = 5 . . . ." The Court emphasized that the errors must be "obvious and simple - errors that can be fixed without a remand and without the services of an experienced arbitrator." Id. at 360.

The alleged error that defendant raises does not fit within that category. Rather, defendant challenges the fact finding of the arbitrator and asserts, in effect, that the arbitrator's determination is not supported by evidence in the record. Such a challenge is not within the scope of review available in court. Ukrainian Nat'l Urban Renewal Corp. v. Joseph L. Muscarelle, Inc., 151 N.J. Super. 386, 398 (App. Div.), certif. denied, 75 N.J. 529 (1977).

The New Jersey Arbitration Act (Act), N.J.S.A. 2A:23B-1 to -32, which governs this matter, grants arbitrators extremely broad powers, N.J.S.A. 2A:23B-15, and "extends judicial support to the arbitration process subject only to limited review." Barcon Assoc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981) (interpreting predecessor Act, N.J.S.A. 2A:24-1 to -11). Generally, an arbitration award is presumed valid. Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super. 503, 510 (App. Div. 2004).

As noted, "the scope of review of an arbitration award is narrow[,]" lest "the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes . . . be severely undermined." Fawzy v. Fawzy, 199 N.J. 456, 470 (2009). Consequently, arbitration awards may be vacated only if:

> (1) the award was procured by corruption, fraud, or other undue means;
>
> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
>
> (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
>
> (4) an arbitrator exceeded the arbitrator's powers;
>
> (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or
>
> (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

[N.J.S.A. 2A:23B-23(a).]

We, like the trial judge, reject defendant's reliance upon N.J.S.A. 2A:23B-24(a)(1) for the relief sought and we discern no basis for such relief under N.J.S.A. 2A:23B-23(a).

Next, defendant asserts that the arbitrator erred in making an award on a claim "not submitted to the arbitrator" contrary to N.J.S.A. 2A:23B-24(a)(2). Defendant contends that the arbitrator awarded credits to plaintiff on a claim that plaintiff overpaid defendant for work not done on the Monmouth County library project even though that claim was not contained within plaintiff's original demand for arbitration.

We find this argument to be unpersuasive. Defendant was clearly on notice of plaintiff's claims, including the overpayment claim pertaining to the Monmouth County project, which were thoroughly briefed by the parties prior to the arbitrator's decision. See generally Singer v. Commodities Corp., 292 N.J. Super. 391, 405 (App. Div. 1996) (arbitration of a "'particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'") (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83, 80 S. Ct. 1347, 1352-53, 4 L. Ed. 2d 1409, 1417 (1960)). Clearly, the question of

overpayment was an arbitrable grievance of which defendant had notice.

Lastly, defendant challenges plaintiff's alleged late submission of an amended expert report. We find this claim to be without sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(1)(E), except to note that defendant received a copy of the report months before the arbitration award and had ample opportunity to review it and respond.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION