NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2511-10T4

INTEGRATED CONSTRUCTION
ENTERPRISES, INC.,

Plaintiff-Appellant,

v.

BRADLEY SCIOCCHETTI, INC., and
INTERNATIONAL FIDELITY
INSURANCE COMPANY,

Defendants-Respondents.

Argued December 20, 2011 - Decided November 20, 2012

Before Judges Fisher, Baxter and Nugent.

On appeal from the Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C-239-10.

Richard T. Garofalo argued the cause for appellant (Garrity, Graham, Murphy, Garofalo & Flinn, attorneys; Mr. Garofalo, of counsel and on the briefs; Jane Garrity Glass, on the briefs).

Sally J. Daugherty argued the cause for respondents (Salmon, Ricchezza, Singer & Turchi, L.L.P., attorneys; Ms. Daugherty, on the brief).

PER CURIAM

Plaintiff, Integrated Construction Enterprises, Inc. (ICE), appeals from a Chancery Division order that denied its motion to

vacate an arbitration award and granted defendants Bradley Sciocchetti, Inc. (BSI) and International Fidelity Insurance Company's (IFIC) cross-motion to confirm the award. ICE contends the court should have vacated the arbitration award because the arbitrator exceeded his powers by failing to render a "reasoned award" as required by the parties' modified arbitration agreement, and by requiring ICE to pay the American Arbitration Association's administrative fees, as well as the arbitrator's compensation and expenses. ICE argues in the alternative that the court should have modified the arbitrator's award to correct an evident mathematical error.

Having reviewed the record in light of ICE's arguments, we conclude the arbitrator did not exceed his powers. We further conclude that ICE's disagreement with the arbitrator's damage award is more than a disagreement about an evident mathematical error. Accordingly, we affirm.

I.

The parties' dispute stems from a construction subcontract agreement. In May 2004, ICE, a general contractor, was awarded the construction contract for improvements to a high school, including the installation of a new geothermal heating and cooling system. ICE entered into a subcontract agreement with BSI in which BSI agreed to install a control system that

complied with the project plans and specifications. IFIC bonded BSI's performance. During the course of construction, ICE and BSI became embroiled in several disputes and ICE terminated BSI's subcontract.

Five months after terminating BSI's subcontract, ICE filed a complaint against BSI and IFIC in Superior Court, seeking damages it allegedly sustained as a result of BSI's breach of the subcontract agreement. BSI filed an answer and counterclaim, seeking the money ICE allegedly owed BSI for work BSI performed before ICE terminated the subcontract agreement. IFIC answered and denied ICE's claim under the performance bond on the ground that BSI had not breached its subcontract with ICE.

The parties never went to trial. Instead, they agreed to submit their dispute to binding arbitration before an arbitrator appointed by the American Arbitration Association (AAA). Before signing the arbitration agreement, the parties' attorneys exchanged e-mails about the arbitration forum and the form of the arbitration award. ICE preferred not to use the AAA because of the cost and because the "AAA doesn't generally provide reasons for its decisions." ICE insisted that they "must have any arbitrator, who decides this case, explain its findings in writing." BSI and IFIC disagreed and responded:

> AAA is an approved vendor for IFIC, and they also want the procedural safeguards provided

> by AAA's well established and judicially recognized rules . . . . As for a written decision, AAA generally does not provide them because their decisions are final and non appealable. BSI does not want to participate in any proceeding that will not fully and finally resolve the matter. I believe that AAA will provide a written opinion at the expense of the party requesting it if it is needed for their own purposes, such as for taxes or a later claim involving other parties. Please let me know if you would like to go forward with arbitration before AAA.

ICE responded, "yes[.]"

The parties subsequently signed an arbitration agreement that provided:

> All claims and controversies arising out [of] a June 14, 2004 contract between [ICE] and [BSI], the subject of which was presented to the Essex County Superior Court, Law Division, . . . including all claims by [ICE] against [BSI] and IFIC and all claims by [BSI] against [ICE] shall be settled by binding arbitration administered by the [AAA] under its Construction Industry Arbitration Rules, and judgments on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. A copy of the construction industry arbitration rules and mediation procedures amended and effective September 1, 2007 are made part of this agreement and shall be followed by the parties.

The arbitration agreement was dated April 1, 2009. Although the agreement did not address the form of award, the September 1, 2007 AAA Construction Industry Arbitration Rules and Mediation Procedures (2007 CIAR) referenced in the

arbitration agreement did. The 2007 CIAR, Rule R-43(b), required the arbitrator to "provide a concise, written breakdown of the award" (standard award) unless the parties timely requested in writing, "prior to the appointment of the arbitrator, . . . a written explanation of the award" (written explanation); or the arbitrator believed that a written explanation was appropriate. The parties did not timely request in writing that the arbitrator provide a written explanation.

The arbitrator conducted a preliminary telephone conference with the parties on August 17, 2009. During the conference, ICE requested that the arbitrator provide a "reasoned award" for his decision. BSI and IFIC's counsel objected due to the extra expense of such an award. ICE agreed to pay for the extra cost. The arbitrator reserved his decision on the issue and directed the parties — BSI and IFIC by September 4, 2009, ICE by September 19, 2009 -- to submit their positions in writing.

In their September 4, 2009 letter, BSI and IFIC requested "that the form of Order . . . be AAA's Standard Award." They informed the arbitrator that "BSI and [IFIC] specifically agreed to submit this matter to arbitration on the condition that they be financially responsible only for the cost of a Standard Award[,]" and that they had "no objection to ICE privately retaining [the arbitrator] to prepare either a Reasoned Award or

Findings of Fact and Conclusions of Law at its sole expense" if ICE desired to do so.[1] BSI and IFIC also maintained that their insistence on a standard award was "a material condition on which [they] agreed to submit this matter to arbitration, and they would not have done so if ICE insisted on receiving a written decision at the expense of both parties." They explained that a standard award would obviate the expense of transcripts and would "minimize[] the risk of a party making an improper objection to confirmation of the award based on the merits of the award." ICE did not submit a letter by its September 19, 2009 deadline.

The arbitration hearings took place during seventeen days that spanned six months, the last hearing taking place on May 18, 2010. After the hearings began, ICE wrote to the AAA administrator on January 26, 2010, regarding its "earlier request that the arbitrator provide a 'written explanation' for his decision when it is rendered." ICE's attorney recalled that defense counsel "had no objection provided that BSI did not get charged for this expense." ICE agreed to "absorb the sole cost of the arbitrator's fee in rendering a written decision." After ICE sent follow-up requests for a response, the AAA

[1] ICE asserts in its brief that BSI submitted nothing in writing concerning the form of the award. In its reply brief, however, ICE quotes BSI and IFIC's September 4, 2009 letter.

administrator responded on February 9, 2010, that "[the arbitrator] has agreed to do a Reasoned Award.[2] At this time, he has no extra billing, however, that could change."

Following the close of the proceedings, the arbitrator rendered a single-page award, which stated:

> The termination by Claimant of Respondent, BSI's, subcontract . . . was unjustified and wrongful. Respondent, BSI, did not contribute to any overall project delay and was not, in any way, in breach of said subcontract.
>
> For Claimant:
>
> The claims of Claimant are denied in full substantially for the reasons delineated in the Final Brief(s) of Respondent, which I found to be valid.
>
> For Respondents:
>
> Respondent, BSI, is entitled to payment of the final amount due under the subcontract, as requested, in the amount of $64,387.07. Respondents claims for MEA expenses . . . and attorneys fees . . . in counterclaim and in reply brief are denied.
>
> . . . .

[2] The AAA Construction Industry Arbitration Rules and Mediation Procedures were amended, effective October 1, 2009 (2009 CIAR). The amended Rule R-44(b) requires an arbitrator to provide "a concise written financial breakdown of any monetary awards . . . ." Rule R-44(c) permits the parties to "request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact or conclusions of law no later than the conclusion of the first Preliminary Management Hearing."

> The administrative fees of the American Arbitration Association totaling $10,000 and the compensation and expenses of the arbitrator totaling $40,645.13 shall be borne [by ICE]. Therefore, [ICE] shall reimburse [BSI] the sum of $24,322.56, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by [BSI].

After receiving the award, ICE filed in the Chancery Division, General Equity, an order to show cause seeking to vacate the arbitration award or, alternatively, to modify the award by reducing it to $51,799. ICE asserted that the arbitrator exceeded his powers by failing to issue a "reasoned award" and committed an evident mathematical miscalculation in rendering the award. Following oral argument on December 7, 2010, the court delivered an opinion from the bench and denied ICE's application.

The court noted that ICE had requested in its e-mails "a written decision, a written explanation," not a reasoned award; and that "people could reasonably say that [the arbitrator's award] was a written explanation for his decision, and even a reasoned opinion." After considering "the ambiguity . . . as to what the arbitrator agreed to issue, and even what the request was, for a written explanation . . . not reasons, . . ." and after further considering "the content of what the arbitrator

said," the court concluded that the arbitrator did not exceed his powers.

The court also concluded that the AAA 2007 CIAR permitted the arbitrator to apportion the AAA administrative fee and his fees and expenses "among the parties in such amounts as he determines is appropriate." Lastly, the court rejected ICE's argument that the arbitrator had committed a mathematical error and concluded that ICE's argument "required a reexamination of the merits, which the arbitrator was not allowed to do." The court entered an order that denied ICE's application and confirmed the arbitration award. ICE appealed from that order.

II.

Because the decision to vacate or confirm an arbitration award is a decision of law, our review is de novo. Manger v. Manger, 417 N.J. Super. 370, 376 (App. Div. 2010). Nevertheless, the scope of our de novo review is "narrow," Fawzy v. Fawzy, 199 N.J. 456, 470 (2009), and "is informed by the authority bestowed on the arbitrator by the [Uniform Arbitration Act (UAA), N.J.S.A. 2A:23B-1 to -32]."[3] Manger,

[3] The trial court referred to both the UAA and the New Jersey Alternative Procedure for Dispute Resolution Act (APDRA), N.J.S.A. 2A:23A-1 to -30, in its opinion. Parties to an arbitration agreement "must expressly elect to be governed by APDRA." Manger, supra, 417 N.J. Super. at 375. In the absence of such an express agreement, the UAA applies to "all agreements

Footnote continued on next page.

supra, 417 N.J. Super. at 376. The UAA authorizes a court to vacate an arbitration award 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-23a(1) to (6).]

---

to arbitrate" made on or after January 1, 2003, with the exception of arbitrations conducted under collective bargaining agreements or collectively negotiated agreements. Ibid. (quoting N.J.S.A. 2A:23B-3(a)).

The UAA authorizes courts to modify an arbitration 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;
>
> (2) the arbitrator made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or
>
> (3) the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.
>
> [N.J.S.A. 2A:23B-24(a).]

The UAA further provides:

> b. If an application made pursuant to subsection a. of this section is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, unless an application to vacate is pending, the court shall confirm the award.
>
> c. An application to modify or correct an award pursuant to this section may be joined with an application to vacate the award.
>
> [Id. at (b)-(c).]

As the Supreme Court has stated, "public policy . . . encourages the 'use of arbitration proceedings as an alternative forum.'" Wein v. Morris, 194 N.J. 364, 375-76 (2008) (quoting Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479,

489 (1992)). Generally, an arbitration award is presumed to be valid and "the party seeking to vacate it bears a heavy burden." Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super. 503, 510 (App. Div. 2004), certif. granted, 183 N.J. 218, appeal dismissed, 195 N.J. 512 (2005).

ICE first argues that the arbitrator exceeded his powers because the parties modified their arbitration agreement to require a "reasoned award," but the arbitrator failed to issue such an award. BSI and IFIC contend the parties agreed that their dispute would be determined under the 2007 CIAR, which required only that the arbitrator provide a standard award, and that ICE did not comply with the 2007 CIAR because it did not make a written request for a written explanation prior to the appointment of the arbitrator.

As our Supreme Court has explained, "'[a]lthough arbitration is traditionally described as a favored remedy, it is, at its heart, a creature of contract.'" Fawzy, supra, 199 N.J. at 469 (quoting Kimm v. Blisset, L.L.C., 388 N.J. Super. 14, 25 (App. Div. 2006), certif. denied, 189 N.J. 428 (2007)). Thus, when parties contract to arbitrate disputes, they may agree in their contract upon the form of the award. The 2007 CIAR so provides. For example, Rule R-1(a) of the 2007 CIAR states explicitly that "[t]he parties, by written agreement, may

vary the procedure set forth in these rules." This rule imposes one restriction: "After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator."

"'Where arbitrators act contrary to express contractual provisions, they have exceeded their powers.'" Rain CII Carbon, L.L.C. v. ConocoPhillips Co., 674 F.3d 469, 472 (5th Cir. 2012)(quoting Apache Bohai Corp. LDC v. Texaco China BV, 480 F.3d 397, 401 (5th Cir. 2007)). For that reason, "[a]n arbitrator may . . . exceed her authority by failing to provide an award in the form required by an arbitration agreement." Cat Charter, L.L.C. v. Schurtenberger, 646 F.3d 836, 843 (11th Cir. 2011). In the case before us, the arbitrator did not exceed his authority because the parties' arbitration agreement did not specify the form of the award, and the parties did not request a written explanation before the arbitrator was appointed.

ICE, BSI, and IFIC contracted in their April 1, 2009 arbitration agreement to arbitrate their dispute by submitting it to "binding arbitration administered by the [AAA] under its [2007 CIAR]." The parties entered into the agreement without requesting a written explanation from the arbitrator. The omission was deliberate; as stated in its e-mails to ICE, BSI refused to agree to arbitrate if ICE insisted on a written

explanation, though BSI did not object to ICE obtaining a written explanation for its own purposes and at its own cost. The parties agreed to be bound by the 2007 CIAR and its rule that required only that the arbitrator provide a standard award. To obtain a written explanation, the parties were obliged to comply with CIAR Rule 43, which stated, "[i]f requested in writing by all parties prior to the apppointment of the arbitrator, or if the arbitrator believes that it is appropriate to do so, the arbitrator shall provide a written explanation of the award." (emphasis added). None of the parties requested in writing, prior to the appointment of the arbitrator, that the arbitrator provide a written explanation.

Although ICE asserts that the parties modified their arbitration agreement to require a reasoned award, its assertion is unsupported by the record. During the arbitrator's initial telephone conference with the parties, ICE made an oral request for a reasoned award, but then failed to comply with the arbitrator's directive to submit a reply to BSI and IFIC's written objections to a written explanation.[4] ICE's unilateral

[4] It is not clear that ICE received BSI and IFIC's letter. See n. 1, supra. Nevertheless, ICE was not entitled to a written explanation because neither party had timely requested a written explanation.

oral request did not constitute a modification of the arbitration agreement.

ICE argues that R-1(a) of the 2007 CIAR authorizes the parties to vary the AAA procedures. The pertinent part of this rule provides that "[t]he parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator." Here, the parties did not enter into a written agreement to vary the procedures set forth in the rules. To the contrary, BSI had refused to vary the rules concerning the form of the AAA award.

Five months after the deadline expired for requesting a written explanation, and after arbitration had begun, ICE sent e-mails to the arbitration administrator requesting a decision from the arbitrator about the form of the award. None of those e-mails constituted a "writing by all parties," 2007 CIAR R-43(b), or a "written agreement" by the parties, 2007 CIAR R-1(a), to request a written explanation or alter the arbitration rules.

Ultimately, ICE received an award in a form that satisfied ICE's arbitration agreement with BSI and IFIC. BSI and IFIC did not consent to modify the arbitration agreement, and ICE did not comply with the 2007 CIAR. For those reasons, the arbitrator

was not required to render a written explanation unless he "believe[d] it . . . appropriate to do so." 2007 CIAR R-43(b). The arbitration administrator's statement that the arbitrator would issue a reasoned award was not based on either a contractual agreement between the parties or a subsequent written agreement that conformed to the 2007 CIAR. Thus, the arbitrator did not enter an award in a form that was contrary to the parties' arbitration agreement and did not exceed his powers by entering the final award in its present form.

Further, we see no reason to disturb the court's determination that the arbitrator's award could be viewed as a "reasoned award." ICE insists that, contrary to the court's determination, the term "reasoned award" was not ambiguous, and that the parties and the arbitrator knew exactly what it meant. ICE cites the 2009 CIAR, specifically R-44(c), which states that "[t]he parties may request a specific form of an award, including a reasoned opinion, . . . no later than the conclusion of the first Preliminary Management Hearing." That rule was in effect in 2010 when the arbitration administrator informed the parties that the arbitrator would render a reasoned award. ICE then cites chapter thirty-four of the American Arbitration Association Handbook on Construction Arbitration in ADR, (Jurisnet L.L.C., 2d ed. 2010), which explains the term

"reasoned award," equates it to a written explanation, and provides the author's view on how to prepare such an award.

Generally, courts have found arbitration awards to be "reasoned" when the awards consist of more than a standard award that simply announces a result, but less than an award that contains findings of fact and conclusions of law. See ConcoPhillips Co., supra, 674 F.3d at 473; Cat Charter L.L.C., supra, 646 F.3d at 844. Cat Charter is particularly illustrative. In Cat Charter, L.L.C. v. Schurtenberger, 691 F. Supp. 2d 1339 (S. D. Fla. 2010), the parties arbitrated a dispute concerning the construction of a yacht. The district court vacated an arbitration award because the arbitrator did not issue a "reasoned award" as the parties had agreed upon. The award issued by the arbitrator stated only "that two of Plaintiff's claims have been proven 'by the greater weight of the evidence,' and state[d] summarily that all remaining claims, both Plaintiffs' and Defendant's, are denied, without offering any reasons for the result." Id. at 1344. The Eleventh Circuit Court of Appeals reversed. Cat Charter, L.L.C., supra, 646, F.3d at 839. After affirming "the contractual nature of arbitration," and explicitly leaving undisturbed "the notion that arbitrators are bound to perform their contractual duties," id. at 843, the court explained:

> Logically, the varying forms of awards may be considered along a "spectrum of increasingly reasoned awards," with a "standard award" requiring the least explanation and "findings of fact and conclusions of law" requiring the most. In this light, therefore, a "reasoned award is something short of findings and conclusions but more than a simple result."
>
> [Id. at 844 (quoting Sarofim v. Trust Co. of the W., 440 F.3d 213, 215 n.1 (5th Cir. 2006)) (citations and internal quotation marks omitted).]

The court next explained that the statement in the arbitration award -- "'[o]n the claim of the Claimant's . . . for breach of contract . . . we find that Claimant . . . has proven its claim . . . by the greater weight of the evidence'" -- was easily understood to mean that the arbitration panel found the plaintiffs' witnesses to be more credible. Id. at 845. Thus, the court determined that "the reason for the Plaintiffs' victory is plainly provided." Ibid. Noting that the arbitration panel could have provided more, the circuit court reasoned that "had the parties wished for a greater explanation, they could have requested that the Panel provide findings of fact and conclusions of law; to this court, the statement quoted above is greater than what is required in a 'standard award,' and that is all we need decide." Ibid.

In the matter before us, ICE has not carried its heavy burden of demonstrating that the arbitrator exceeded his powers

by issuing something other than a "reasoned award." The arbitrator explained that BSI did not breach the subcontract agreement or delay the construction project's completion; these were the arbitrator's "reasons" for finding in favor of BSI and against ICE. The arbitrator went further, however, and essentially adopted the reasons contained in BSI's brief. The arbitrator rendered an award that provided more than was required by the standard award, and more than ICE had bargained for with BSI and IFIC. In short, the arbitrator did not exceed his powers.

III.

ICE next contends that the arbitrator exceeded his powers by requiring it to pay the AAA administrative fees and the arbitrator's compensation and expenses. ICE argues that its subcontract agreement with BSI permitted ICE to terminate the agreement for its convenience or for any other reason, and that if ICE so terminated the subcontract agreement, BSI would receive as its entire and sole compensation the amount due under a contractual schedule of values. ICE's argument is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only that ICE agreed in its arbitration contract with BSI and IFIC to submit the parties' dispute to binding AAA arbitration under the 2007 CIAR, and that the 2007

CIAR permitted the arbitrator "to assess fees, expenses, and compensation . . . . The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate." The parties did not contract to modify these rules. The arbitrator acted well within the rules, and therefore, well within his powers, by apportioning the AAA administrative fees and his compensation, in their entirety, to ICE.

IV.

Lastly, ICE argues that the arbitrator committed an evident mathematical miscalculation. ICE claims the arbitrator awarded BSI $64,387.07 as the final amount due BSI under its subcontract agreement "even though the difference between the value of BSI's Completed and Stored to Date Work and the payments made by ICE amounted to only $51,797." ICE then proceeds to argue about inconsistencies among two of BSI's pay applications, a billing detail inquiry, and canceled checks submitted to the arbitrator by ICE. ICE also questions why the arbitrator awarded BSI $64,387.07 in damages when BSI sought a payment of only $39,924.65 in one of its payment applications. ICE's arguments belie its assertion that the arbitrator simply committed an evident mathematical error. Rather, implicit in ICE's argument, is that the arbitrator improperly evaluated documentary evidence

and incorrectly resolved discrepancies in that evidence. ICE does not point to a simple computational error; rather, it suggests that the arbitrator somehow misevaluated conflicting documentary evidence. See Tretina Printing, Inc. v. Fitzpatrick & Assoc., 135 N.J. 349, 360 (1994). The trial court correctly determined that ICE's argument involved more than an evident mathematical miscalculation which it could correct by modifying the award as authorized by N.J.S.A. 2A:23B-24(a).[5]

Affirmed.

[5] In addition to responding to ICE's arguments, BSI and IFIC argue that they should be awarded attorney's fees. Because BSI and IFIC have filed neither a cross-appeal nor an appropriate motion, we decline to address their argument.