(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

ERG RENOVATION & CONSTRUCTION, LLC,

Plaintiff-Respondent/Cross-Appellant,

v.

DELRIC CONSTRUCTION COMPANY, INC.,

Defendant-Appellant/Cross-Respondent.

January 12, 2015

Argued December 17, 2014 – Decided

Before Judges Waugh, Maven, and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-2472-13.

Gerard J. Onorata argued the cause for appellant/cross-respondent (Peckar &Abramson, P.C., attorneys; Mr. Onorata, on the briefs).

Ralph P. Ferrara argued the cause for respondent/cross-appellant (Ferrara Law Group, P.C., attorneys; Mr. Ferrara and Morgan J. Zucker, on the briefs).

PER CURIAM

Defendant Delric Construction Company, Inc. (Delric) appeals the Law Division's November 21, 2013 orders that denied its application to vacate a commercial arbitration award, and granted the application of plaintiff ERG Renovation & Construction, LLC (ERG) to confirm the award. ERG cross-appeals from the court's January 31, 2014 order denying its request for counsel fees. After reviewing the record in light of the contentions advanced on appeal, we affirm.

I.

Delric was the general contractor on a project to construct a new courthouse in Staten Island, New York (the Project). Delric engaged ERG as a subcontractor to perform site work and

excavation work, and the parties entered into a written subcontract on November 27, 2009. ERG was to be paid $1,740,000 for its services, which included earth and rock excavation, backfilling, site demolition, site utilities, and disposal of excess soil. The subcontract contains several riders, including a "Rider to Site [W]ork Scope."

The subcontract includes a choice of law provision entitled "LAW TO APPLY." That section states: "This agreement and all Contracts hereunder shall be governed and interpreted under the law of the State of New Jersey, and venue shall be maintainable in Passaic County, State of New Jersey." Additionally, Article XXIV of the subcontract, entitled "Dispute Resolution," contains the following relevant provisions:

> 24.1 Except as provided in paragraph 24.2 below, any and all disputes or claims arising out of and/or related to the Subcontract and the performance of the Work at the Project, shall be decided solely in the Superior Court of New Jersey and venue in any such action must be placed in the County of Passaic.
>
> Notwithstanding the above, any claims, disputes or other issues arising out of and/or related to the Subcontract and the performance of the work may, at Delric Construction Company, Inc.'s sole option, be decided in binding arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration and Mediation rules. If arbitration is selected as the forum, the parties shall equally pay all AAA fees and arbitrator compensation, subject to reallocation in the arbitrator's award.

. . . .

> 24.3 When the Subcontract is signed by Delric Construction Company, Inc., it is deemed executed and delivered in the State of New Jersey and shall be construed in accordance with the Laws of the State of New Jersey, without any consideration being given to any principles of choice or conflict of laws.

ERG performed work on the project beginning in October 2009, and ending on December 11, 2010. A dispute arose in October 2010, primarily regarding the scope of work to be performed on the project. Delric essentially alleged that ERG was "delinquent in completing work activities," while ERG claimed that it was owed money for additional costs. The parties met on January 17, 2011, but were unable to resolve their differences. On February 11, 2011, Delric sent ERG a notice terminating ERG's involvement in the project and directing it to remove its equipment by February 18, 2011.

ERG filed a public improvement lien against the project on December 5, 2011, in the amount of $1,893,225.19. On January 4, 2012, Delric filed a demand for arbitration against ERG with the American Arbitration Association (AAA) for $3,142,870, claiming breach of contract. Delric listed the hearing location as Passaic County, New Jersey. ERG answered and filed a counterclaim for $2,643,225.19, which included the lien amount plus $750,000 "for damages flowing as a result of Delric's breach of contract, improper termination, lost profits, attorneys' fees, cost of arbitration, cost of suit and fraudulent misrepresentation." ERG stated that these represented the presently known claims, and "may be supplemented prior to the actual arbitration hearing." ERG later amended its counterclaim to "an amount in excess of $715,000," listing several claims including: "breach of contract, violations of the relevant prompt payment

act provisions, Owner and/or Contractor caused delay, improper termination, lost profits, attorneys' fees, cost of arbitration, cost of suit and fraudulent misrepresentation." ERG again stated that those were the claims presently known and reserved the right to supplement them "prior to the actual arbitration hearing and pursuant to the rules of the [AAA]."

The AAA appointed Barry B. Bramble, Esq., as the arbitrator. The parties participated in a preliminary hearing on April 26, 2012, during which several issues were addressed. Delric raised "choice of laws," and the arbitrator directed the parties to brief the issue. Relevant to this appeal, the arbitrator's initial order included the following two paragraphs:

> 9. Counsel for both parties agreed that a stenographic record of the hearings will not be required. This will be confirmed in the next telephone conference.
>
> 10. The form of the award does not have to be a "Reasoned Award" but will be broken down by various elements of recovery with explanation. Counsel for the parties shall each prepare and submit to the Arbitrator on the last hearing day a proposed award in the requested format.

Each subsequent scheduling order stated that Bramble would not provide a "Reasoned Award," and instead would provide the award to be broken down by elements with an explanation. With respect to a stenographic record, a September 14, 2012 order provided:

> 9. Counsel for the Respondent will advise [c]ounsel for the Claimant within a week as to whether he will be obtaining and paying for a stenographic record of the hearings. Counsel for the Claimant previously stated that it did not want to pay for

a stenographic record of the hearings.

ERG submitted a pre-arbitration memorandum of law on August 15, 2012, arguing that New York law should apply. Delric opposed ERG's position, arguing in its post-arbitration brief that the contractual New Jersey choice of law provision should control. The arbitrator ultimately concluded that New Jersey law should apply.

The arbitration hearings commenced on September 25, 2012, and lasted a total of twenty-one hearing days. On October 4, 2012, the fifth hearing day, ERG brought a court reporter to transcribe testimony from Delric's vice president, Robert Ricciardi. ERG did so primarily because of Ricciardi's "surprising testimony that . . . he either submitted a knowingly false claim to [the project owner] or was false in his testimony concerning ERG's performance." Delric objected to the use of the court reporter, citing AAA Rule 28(a) which states: "Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least [seven] calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record." The arbitrator suspended the hearings pending briefing of the issue. Bramble allowed ERG to proceed with a stenographic record when the hearing resumed on October 11, 2012. Delric requested that the remainder of the hearings be recorded via stenographer, and Bramble likewise granted that request.

At the arbitrator's request, at the conclusion of the hearings each party submitted its proposed form of award. They also submitted post-hearing briefs. On June 2, 2013, Bramble awarded Delric $1,174,828.08, from which he subtracted a previous payment received of $845,698.25, for a total award to Delric of $329,129.83. Bramble then awarded ERG $1,333,716.90. Offsetting the two awards, Bramble directed Delric to pay ERG $1,004,587.07, and denied the parties' requests for counsel fees.

Delric filed a petition to vacate the award in Richmond County, New York on June 13, 2013. In response, ERG moved for summary judgment dismissing the petition. On November 12, 2013, the New York court denied Delric's petition to vacate the arbitration award and granted ERG's cross-motion for summary judgment on the grounds "that the forum selection clause precluded commencement of the action in New York."

ERG initiated the present action to confirm the arbitration award in Passaic County, New Jersey on June 21, 2013. Delric in turn sought to vacate the award. Judge Philip H. Mizzone entertained oral argument on the motions on November 15, 2013. On November 21, 2013, the judge denied Delric's application to vacate the arbitration award, and entered an order confirming the award along with an attached statement of reasons. The judge reserved decision regarding attorney's fees and litigation expenses, and directed the parties to brief the issue. On January 31, 2014, he denied ERG's request for attorney's fees, litigation expenses, and sanctions, finding "that [d]efendant's opposition was not frivolous and [was] made in good faith."

This appeal followed in which Delric raises the following arguments:

POINT I: THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO APPLY THE FEDERAL ARBITRATION ACT.

A. The Delric-ERG Subcontract Does Not Control an Action to Confirm or Vacate an Arbitration Award.

B. The FAA Applies Because the Delric-ERG Subcontract Meets the Low Threshold for FAA Applicability.

POINT II: THE TRIAL COURT ERRED IN FAILING TO APPLY NEW YORK LAW.

A. The Choice of Law and Forum Selection Clauses in the Subcontract Were Inapplicable Due to the State of New York Having the Most Significant Contact With The Dispute.

B. ERG Waived its Right to Rely on New Jersey Law Through its Past Conduct and Representations That New York Law Should Apply to the Underlying Arbitration.

POINT III: THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE ARBITRATOR EXCEEDED HIS POWERS BECAUSE THE ARBITRATOR IGNORED HIS OWN ORDERS, THE DELRIC-ERG SUBCONTRACT, AND THE AAA RULES, WHILE UNFAIRLY PREJUDICING DELRIC.

A. The Arbitrator Exceeded His Powers by Violating His Own Scheduling Orders.

B. The Trial Court Failed to Find that the Arbitrator Exceeded His Power by Fashioning an Irrational Award that Violated the Delric-ERG Subcontract.

C. The Arbitrator Exceeded His Powers by Allowing ERG to Submit Two New Claims by Two Separate Experts on the Fifteenth and Twentieth Days of a Twenty-One Day Arbitration.

D. The Arbitrator Exceeded His Powers by Allowing a Stenographic Record of the Arbitration Hearings After Delric Had Put on the Majority of its Case in Chief.

POINT IV: THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO APPLY THE MANIFEST DISREGARD OF THE LAW STANDARD WHICH IS AVAILABLE UNDER BOTH THE FAA AND NJAA.

A. ERG Released its Claim.

B. The Arbitrator Committed a

Manifest Disregard of the Law by Awarding ERG Damages That Were Not Based on Actual Losses.

C. The Arbitrator Allowing ERG to Submit a "Total Cost Claim" Was a Manifest Disregard of the Law.

D. The Arbitrator Manifestly Disregarded the Law by Not Following the Notice Provisions in the Subcontract.

For the reasons that follow, we deem these arguments to be without merit.

II.

The New Jersey Arbitration Act (Act), N.J.S.A. 2A:23B-1 to -32, as revised in 2003, L. 2003, c. 95, which we conclude 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 Assocs. v. Tri-Cnty. 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), certif. granted, 183 N.J. 218, appeal dismissed, 195 N.J. 512 (2005). It is also well-settled that "there is a strong preference for judicial confirmation of arbitration awards." Linden Bd. of Educ. v. Linden Educ. Ass'n, 202 N.J. 268, 276 (2010) (internal quotation marks omitted). See also Martindale v. Sandvik, Inc., 173 N.J. 76, 83-85 (2002).

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). "Because arbitration is so highly favored by the law, the presumed validity of the arbitration award is entitled to every indulgence, and the party opposing confirmation has the burden of establishing statutory grounds for vacation." Pressler & Verniero, Current N.J. Court Rules, comment 3.3.3 on R. 4:5-4 (2015); see also Twp. of Wyckoff v. PBA Local 261, 409 N.J. Super. 344 (App. Div. 2009). Because the decision to affirm or vacate an arbitration award is a decision of law, our review is de novo. Minkowitz v. Israeli, 433 N.J. Super. 111, 136 (App. Div. 2013).

The Court in Tretina Printing, Inc. v. Fitzpatrick & Associates, 135 N.J. 349 (1994), imposed a strict standard of review of private contract arbitration, limited by a narrow construction of the statutory grounds stated by N.J.S.A. 2A:23B-23 for judicial intervention. Tretina overruled Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479 (1992), which had permitted judicial intervention for gross errors of law by the arbitrators.

Consequently, a court may vacate an arbitration award 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 . . . .
>
> [N.J.S.A. 2A:23B-23(a).]

A.

At the outset, Delric argues that the trial court erred in failing to apply the Federal Arbitration Act (FAA) (9 U.S.C.A. §§ 1 to -16) in determining whether to vacate the arbitration award. It contends that the choice of law provision in the subcontract is generic and makes no mention of New Jersey law governing an action to confirm an arbitration award. We disagree.

"An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award pursuant to this act." N.J.S.A. 2A:23B-26(b). Although the FAA "pre-empts application of state laws which render arbitration agreements unenforceable," federal law does not have "preclusive effect in a case where the parties have chosen in their [arbitration] agreement to abide by state rules." Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 472, 109 S. Ct. 1248, 1252, 103 L. Ed.2d 488, 496 (1989) (alteration in original) (internal quotation marks omitted). Accordingly, parties that enter into an agreement to arbitrate are "at liberty to choose the terms under which they will arbitrate." Ibid. (internal citations and quotation marks omitted); see also Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57-58, 115 S. Ct. 1212, 1216, 131 L. Ed.2d 76, 84 (1995).

The United States Supreme Court considered a similar issue in the context of a construction contract entered into between an Indian tribe and an Oklahoma construction company, where it noted:

> The construction contract's provision for arbitration and related prescriptions lead us to this conclusion. The arbitration clause requires resolution of all contract-related disputes between C & L and the Tribe by binding arbitration; ensuing arbitral awards may be reduced to judgment "in accordance with applicable law in any court having jurisdiction thereof." For governance of arbitral proceedings, the arbitration clause specifies American Arbitration Association Rules for the construction industry, and under those Rules, "the arbitration award may be entered in any federal or state court having jurisdiction thereof," American Arbitration Association, Construction Industry Dispute Resolution Procedures, R-48(c) (Sept. 1, 2000).
>
> The contract's choice-of-law clause makes it plain enough that a "court having jurisdiction" to enforce the award in question is the Oklahoma state court in which C & L filed suit. By selecting Oklahoma law ("the law of the place where the Project is located") to govern the contract, the parties have effectively consented to confirmation of the award "in accordance with" the Oklahoma Uniform Arbitration Act . . . .
>
> [C& L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418-19, 121 S. Ct. 1589,

1594-95, 149 L. Ed.2d 623, 631-32 (2001) (internal citations omitted).]

We also draw guidance from other cases that have reached a similar result. See, e.g., Yates v. Doctor's Assocs., Inc., 549 N.E.2d 1010, 1015 (Ill. App. Ct. 1990) (holding that "[w]here . . . the parties have agreed to arbitrate in accordance with State law, the [FAA] . . . does not apply, even though the transaction involves interstate commerce. . . . This is so except where the applicable State law would prevent the arbitration agreements negotiated between the parties from being enforced according to their terms."); Flight Sys. v. Paul A. Laurence Co., 715 F. Supp. 1125, 1127 (D.D.C. 1989) (applying Virginia law and confirming an AAA award where the parties to a construction contract agreed to submit a dispute to AAA construction rules because they contracted under Virginia law, agreed to arbitration under Virginia law, and applicable Virginia law did not directly conflict with the goals of the FAA). See also Martin Domke, Domke on Commercial Arbitration, § 7:7 (3d ed. 2003).

Here, the parties agreed (1) to arbitrate "any and all disputes or claims" stemming from the subcontract, (2) that venue in any court action arising from such disputes or claims must be placed in the Superior Court, Passaic County, and (3) that the subcontract was to be construed in accordance with New Jersey law, "without any consideration being given to any principles of choice or conflict of laws." Thus, the trial court acted appropriately in applying N.J.S.A. 2A:23B-23 to determine whether to vacate the arbitration award. Moreover, consistent with the cases we have cited, there is nothing in the statute that prevents the parties' arbitration agreement from being enforced according to its terms. Nor does N.J.S.A. 2A:23B-23 directly conflict with the goals of the FAA, whose parallel provision for vacatur of an arbitration award is substantially similar. 9 U.S.C.A. § 10.

B.

Delric next asserts the somewhat incongruous argument that the trial court erred by not applying New York law in rendering its decision. It contends that New York has the most significant contact with the dispute, which should override the parties' choice of law provision. We find this argument unavailing.

"'It is well settled that the law of the state chosen by the parties will be honored so long as that choice does not contravene a fundamental policy of New Jersey.'" Winer Motors, Inc. v. Jaguar Rover Triumph, Inc., 208 N.J. Super. 666, 671 (App. Div. 1986) (quoting Turner v. Aldens, Inc., 179 N.J. Super. 596, 601 (App. Div. 1981)). Here, we do not find any public policy that would be violated by applying New Jersey law to this commercial dispute. Moreover, Delric itself asserted in its brief to the arbitrator that:

> Simply stated, the choice of law provisions contained in the Subcontract were freely entered into between two private commercial parties and should be enforced as written. While it is acknowledged by Delric that the genesis of the dispute involves a New York project, this is a dispute between two New Jersey contractors, the outcome of which will not violate any New Jersey public policy. Furthermore, the Subcontract is the only document that ERG's president/owner Peter Gregory personally signed with his hand. [] This dispute is no different than thousands of other commercial contract disputes that apply New Jersey law. As such, the choice of law provision should be applied as agreed by and between the parties.

Under the doctrine of judicial estoppel, "[w]hen a party successfully asserts a position in a prior legal proceeding, that party cannot assert a contrary position in subsequent litigation arising out of the same events." Kress v. La Villa, 335 N.J. Super. 400, 412 (App. Div. 2000), certif. denied, 168 N.J. 289 (2001). "[T]o be estopped [a party must] have convinced the court to

accept its position in the earlier litigation." Ali v. Rutgers, 166 N.J. 280, 288 (2000) (alternations in original) (internal quotation marks omitted). Delric prevailed in its argument before the arbitrator. In any event, having previously advocated that New Jersey rather than New York law should apply, Delric is hard-pressed to argue for a contrary result here.

C.

Next, Delric renews its argument before the trial court that the arbitration award should be vacated on the statutory basis that the arbitrator exceeded his powers. N.J.S.A. 2A:23B-23(4). Specifically, Delric contends that the arbitrator exceeded his powers by (1) violating his own scheduling orders; (2) fashioning an irrational award; (3) allowing ERG to submit new claims late in the arbitration; and (4) allowing a stenographic record.

In his thorough written opinion, Judge Mizzone carefully considered, and rejected, each of these challenges to the arbitration award. The judge reasoned:

> Delric asserts four bases for their argument that the arbitrator exceeded his power. The first, that the arbitrator provided an award without explanation as obligated by scheduling orders, is unsubstantiated. There were seven scheduling orders issued prior to the arbitration proceedings. The first six orders state that the arbitration award will not be reasoned, "but will be broken down by the elements of recovery with explanation." The final scheduling order states that award would not be reasoned, "but will be broken down by various elements of recovery." Delric does not submit any evidence that they objected to the change at any point prior to the evidentiary hearings or in their post-arbitration briefs.[1] Further, the contract, and not the arbitrator's scheduling order, give[s] guidance as to whether the arbitrator exceeded

his power and there is nothing in the contract requiring the arbitrator to issue an award with explanation.

The second basis provided by Delric is that the arbitrator fashioned an award in direct contravention of the ERG – Delric contract. While this is a sufficient basis for vacating an award, Delric argues that the arbitrator ignored a rider to the contract and that the award 'doesn't make sense,' which are not [] sufficient bases for vacating an award. The award provides categories of damages for each party – the same categories suggested by Delric – and assigns amounts to said categories. Further, the rider, as described by Delric, did not provide guidance as to how the arbitrator was to fashion the award.

Thirdly, Delric submits that the arbitrator exceeded his power by allowing ERG to submit new claims by separate experts during the arbitration process. This, too, is an unsubstantiated argument. The evidence in the record clearly demonstrates that the arbitrator did not allow "new claims" into the arbitration. On the contrary, the record reflects that the arbitrator allowed additional evidence to be presented into the arbitration, which supported already existing claims. As to [ERG's expert's] report, the arbitrator, after reminding the parties of the relaxed evidentiary rules for arbitrations, recognized that there would be a disadvantage to Delric, and questioned whether they would actually be prejudiced. The arbitrator also allowed Delric to submit a supplemental brief in response to one of the modified expert report[s] submitted on behalf

> of ERG. As to [ERG's expert's] report, the arbitrator, over Delric's objection, allowed the evidence into the record because it was determined that the report did not include relevant information previously unavailable to the witness.
>
> Lastly, Delric submits that the arbitrator exceeded his power by allowing stenographic machines to be used during the hearings. As a preliminary matter, AAA Rule 28(a) states that "[a]ny party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least [seven] calendar days in advance of the hearing." While ERG did not give sufficient notice as required by the AAA rule, the arbitrator requested that the parties submit briefs on whether it was appropriate to stenographically record the hearing. After review of said briefs, the arbitrator ruled in favor of ERG and allowed stenographic recording. Delric's issue with the ruling is that they did not have the benefit of recording the direct examination of their key witness, and as a result they were prejudiced. Delric, however, fails to acknowledge that after stenographic recording had begun it was afforded the opportunity to redirect their key witness and recall the same key witness to rebut ERG witness testimony, which it chose not to do.

An arbitrator's authority is limited to the powers conferred upon him or her in the parties' agreement.

> When parties have agreed, through a contract, on a defined set of rules that are to govern the arbitration process, an arbitrator exceeds his powers when he ignores the limited authority that the contract confers. The scope of an arbitrator's authority depends on the terms of the contract between the parties. Communications Workers v. Monmouth County Bd. of Social Servs., 96 N.J. 442, 448 (1984); Barcon Assocs. v. Tri-County Asphalt Corp., [] 86 N.J. 179, 209-10[, (1981)] (dissenting opinion); Goerke Kirch Co. v. Goerke Kirch Holding Co., 118 N.J. Eq. 1, 4 (E. & A. 1935); William J. Burns Int'l Detective Agency, Inc. v. New Jersey Guards Union, Inc., 64 N.J. Super. 301, 307 (App. Div. 1960), certif. denied, 34 N.J. 464 (1961). Both the jurisdiction and the authority of the arbitrator are circumscribed by the powers delegated to him by the contract of the parties. Communications Workers [v. Monmouth Cnty. Bd. of Social Servs.], [] 96 N.J. [442, 448 (1984)]; see Kearny PBA Local # 21 v. Town of Kearny, [] 81 N.J. [208, 217 (1979)]. Thus, an arbitrator may not disregard the terms of the parties' agreement, State v. State Troopers Fraternal Ass'n, [] 91 N.J. [464, 469 (1982)], nor may he rewrite the contract for the parties. In re Arbitration Between Grover and Universal Underwriters Ins. Co., [] 80 N.J. [221, 230-31 (1979)].
>
> [Cnty. Coll. of Morris Staff Ass'n v. Cnty. Coll. of Morris, 100 N.J. 383, 391-92 (1985).]

Here, Judge Mizzone correctly applied the above principles. As he noted, the parties' agreement authorized the arbitrator to resolve all issues and disputes arising out of the

subcontract in accordance with the AAA's Construction Industry Arbitration and Mediation rules. That is precisely what the arbitrator did. Delric's dissatisfaction with the way the rules were applied or the ultimate result does not establish that the arbitrator exceeded his powers and is simply not a sufficient basis to vacate his award.

D.

Finally, Delric argues that the trial court erred in failing to apply the manifest disregard of the law standard to vacate the arbitration award. Specifically, Delric contends that the arbitrator disregarded the law because (1) ERG released its claims; (2) his award was not based on ERG's actual losses; (3) he allowed ERG to submit a total cost claim, which is an improper method of calculating damages; and (4) he failed to recognize that ERG did not comply with the notice provisions of the subcontract.

After considering these arguments in light of the record and applicable law, we conclude that they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(A), (E). Following the Court's decision in Tretina, supra, 135 N.J. at 357-59, it is clear that our review is limited by a narrow construction of the enumerated, exclusive grounds for vacatur under N.J.S.A. 2A:23B-23,[2] and that judicial intervention based on gross errors of law by arbitrators is no longer warranted.

III.

In its cross-appeal ERG argues that the trial court erred in denying its application for counsel fees. It contends that an award of fees is authorized by N.J.S.A. 2A:23B-25(c), which provides:

> On application of a prevailing party to a contested judicial proceeding pursuant to section 22, 23, or 24 of this act, the court may add reasonable attorney's fees and other reasonable expenses of

> litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, or substantially modifying or correcting an award.
>
> [N.J.S.A. 2A:23B-25(c) (emphasis added).]

ERG also seeks attorney's fees as a sanction under Rule 1:4-8, contending that Delric's arguments were frivolous and not advanced in good faith.

The decision whether to award counsel fees is discretionary and subject to an abuse-of-discretion standard on appellate review. Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001). "'We will disturb a trial court's determination on counsel fees only on the 'rarest occasion,' and then only because of clear abuse of discretion.'" Barr v. Barr, 418 N.J. Super. 18, 46 (App. Div. 2011) (quoting Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008)). When reviewing a claim for sanctions for frivolous litigation, we similarly review the trial court's decision for an abuse of discretion. Ferolito v. Park Hill Ass'n, 408 N.J. Super. 401, 407 (App. Div.), certif. denied, 200 N.J. 502 (2009); see also McDaniel v. Man Wai Lee, 419 N.J. Super 482, 498 (App. Div. 2011). "[A]buse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).

Here, we note that an award of attorney's fees under N.J.S.A. 2A:23B-25(c) is discretionary rather than mandatory. Moreover, "[f]or purposes of imposing sanctions under Rule 1:4-8, an assertion is deemed frivolous when no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable." United

Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 389 (App. Div.) (internal quotation marks omitted), certif. denied, 200 N.J. 367 (2009).

In denying ERG's request for fees, the trial judge found "that [Delric's] opposition was not frivolous and [was] made in good faith." Having reviewed the record, Delric's arguments, while unsuccessful, were not so lacking in rational support as to be deemed frivolous. Accordingly, we discern no clear abuse of discretion in the court's decision not to award attorney's fees.

Affirmed.

1 In a footnote, the judge added: "It should also be noted that Delric's submission of the recommended award is in the exact format of the arbitrator's award – broken down by elements without explanation – and presents the same elements as the arbitrator's award."

2 It is also questionable whether the manifest disregard of law doctrine remains viable under the FAA following the decision of the United States Supreme Court in Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed.2d 254 (2008).
