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Re: Daisy Construction Company v. Mumford & Miller Concrete, Inc.
C.A. No. 661-N
Date Submitted: March 2, 2005

Dear Counsel:

Petitioner Daisy Construction Company ("Daisy") seeks to set aside an arbitration award in favor of Respondent Mumford & Miller Concrete, Inc. ("Mumford"). Mumford, in turn, counterclaims for confirmation of the award. Mumford has moved to dismiss Daisy's petition and for summary judgment confirming the award. For the reasons set forth below, Mumford's motion for summary judgment is granted.

I. BACKGROUND

Daisy was the general contractor for a Delaware River & Bay Authority (“DRBA”) project involving the west approach ramp for the I-295/U.S.13 interchange. In April 2002, Daisy entered into a subcontract (the “Subcontract”) with Mumford for certain concrete work on that project. The Subcontract provided, “Unless otherwise specifically agreed herein, payments on [the Subcontract] are to be made in the same manner as provided for in the General Contract between the Contractor and Owner”¹ Additionally, the Subcontract stated, “Subcontractor shall furnish the materials and perform the work . . . as required by and in accordance with . . . [t]he Latest Project Plans, Specifications and Special Provisions.”² “This subcontract obligates the subcontractor to the full extent to which Daisy Construction Company is obligated to the owner for the specific scope of work indicated above”³ Finally, the Subcontract established

¹ Subcontract, at ¶ 10.

² Subcontract, at 1.

³ *Id.* (original in capitals).

arbitration as the proper means of dispute resolution with the Delaware Uniform Arbitration Act as the governing law;⁴ however, it did not address the timing of payment of any arbitration award.

Daisy's contract with the DRBA (the "DRBA Contract") contained provisions concerning (1) "Changes in Extent of Work";⁵ (2) the final authority of the DRBA Director "[o]n all questions concerning the interpretation of Plans and Specifications . . . and the determination of payment due";⁶ and (3) payments on "force accounts."⁷

Mumford started work under the Subcontract in October 2002 and completed its work in, approximately, September 2003. During the course of its performance, Mumford performed extra "force account" work. When the project concluded, Daisy paid Mumford for the majority of its work, but it did not pay Mumford \$144,956.94 that Mumford claimed it was owed.⁸

⁴ 10 *Del. C.* §§ 5701 *et seq.*

⁵ DRBA Contract, at ¶ 1.4.4.

⁶ DRBA Contract, at ¶ 1.5.1.

⁷ DRBA Contract, at ¶ 1.8.3. "Force account" work is additional work that, while not specified in the Subcontract, was, nonetheless, required to be performed by the DRBA.

⁸ The Subcontract initially required Daisy to pay Mumford \$789,000 for its work. That amount was adjusted downward to \$461,261.74 by change orders.

Mumford made demand for arbitration. Daisy and Mumford submitted the dispute to an arbitrator designated by the American Arbitration Association. An issue before the Arbitrator concerned “the meaning of the term ‘force account’ and whether the Contract Specifications required Mumford to perform [the] disputed work.”⁹ Mumford argued that that the work was beyond the scope of the Subcontract. Daisy “acknowledged that the items may be extra, but maintained that under the Subcontract between Daisy and Mumford, the determination of whether they are extra, and the amount to be paid, if any, must be decided by the Director of the DRBA in accordance with the [DRBA] Contract Specifications.”¹⁰

The parties also disputed the timing of payment of retainage owed to Mumford. Daisy contended that the Subcontract provided that final payment would be made when the work is complete and the Director of the DRBA approves a final certificate.

On August 2, 2004, the Arbitrator issued an award to Mumford. The Arbitrator found that Daisy must pay Mumford \$121,078.32.¹¹ Included in this

⁹ Pet. of Daisy Constr. Co. to Part. Vacate Arb. Award, at ¶ 5.

¹⁰ *Id.* at ¶ 6.

¹¹ Award of Arbitrator, at 1.

award are six force account items (totaling \$14,824)¹² and a portion of the retainage (\$31,873.23).¹³ The award was to be paid to Mumford within fifteen days and interest was to be added at 6% per annum after fifteen days until the amount is paid in full. At the time of the arbitration, the Director of the DRBA had not determined the extent and proper value of Mumford's force account work nor had the Director of the DRBA issued a final certificate.

II. CONTENTIONS

Mumford has moved (1) to dismiss Daisy's claim under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted and (2) for summary judgment under Court of Chancery Rule 56. It claims that, accepting all of Daisy's well-pled allegations as true, Daisy has not set forth facts that permit this Court to vacate an arbitration award under 10 *Del. C.* § 5714. In addition, it claims that there are no material facts in dispute and that it is entitled to judgment, as a matter of law, confirming the Arbitrator's award.

In response, Daisy argues that the Arbitrator exceeded his authority in determining that the Subcontract, instead of the DRBA Contract, established the

¹² Pet. of Daisy Constr. Co. to Part. Vacate Arb. Award, at ¶ 9.

¹³ *Id.* at ¶ 10.

now-contested terms of the relationship between the parties. Daisy asserts that the parties are bound by the incorporated terms of the DRBA Contract which govern the timing of payment of force account sums and retainage.¹⁴ Additionally, Daisy contends that this Court should set aside the Arbitrator's award because grounds for the award cannot be inferred from the facts of the case.

III. ANALYSIS

A. *Applicable Standards*

1. Motion to Dismiss Standard

Mumford has moved to dismiss Daisy's Petition for failure to state a claim. Under Court of Chancery Rule 12(b)(6), if the Court determines with "reasonable certainty that the plaintiff could not prevail on any set of facts that can be inferred from the pleading," the plaintiff's case must be dismissed.¹⁵ In considering a motion to dismiss for failure to state a claim, "[a]ll facts of the pleadings and inferences that can reasonably be drawn therefrom are accepted as true. However, neither inferences nor conclusions of fact unsupported by allegations of specific fact are accepted as true."¹⁶

¹⁴ Daisy only challenges the award's treatment of retainage and force account work.

¹⁵ *Wal-Mart Stores Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 619 (Del. Ch. 2005).

¹⁶ *Id.* (footnotes omitted).

2. Summary Judgment Standard

A party may obtain summary judgment under Court of Chancery Rule 56 if it can show that no material facts are in dispute and that it is entitled to judgment as a matter of law. Summary judgment is an appropriate judicial mechanism for reviewing an arbitration award because the complete record may be placed before the Court and no *de novo* hearing is permitted to determine whether the award should be [confirmed or] vacated.¹⁷

In considering a motion for summary judgment, all rational inferences from facts before the Court must be drawn in favor of the nonmoving party.¹⁸

3. Vacating or Confirming an Arbitration Award

Delaware's Uniform Arbitration Act, at 10 *Del. C.* § 5714, sets forth the limited circumstances under which an arbitration award will be set aside. Of particular relevance to the pending matter is § 5714(a)(3), which reads: "Upon complaint or application of a party in an existing case, the Court shall vacate an award where . . . [t]he arbitrators exceeded their powers"

¹⁷ *City of Wilmington v. Am. Federation of State, County, and Municipal Employees*, 2005 WL 820704, at *3 (Del. Ch. Apr. 4, 2005) (footnotes and internal alterations and quotations omitted).

¹⁸ *See, e.g., AeroGlobal Capital Management, LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005) ("In evaluating the summary judgment record, a trial court shall not weigh the evidence or resolve conflicts presented by pretrial discovery. The trial court shall examine the factual record and make reasonable inferences therefrom in the light most favorable to the nonmoving party to determine if there is any dispute of material fact.") (footnote omitted). Daisy does not contend that any material facts are in dispute.

“An award may be vacated under § 5714(a)(3) only when there is *strong and convincing* evidence that the arbitrator clearly exceeded his authority.”¹⁹ “The sources of [an] arbitrator’s authority include: ‘(1) the underlying agreement between the parties in which they agree to submit their disputes to arbitration and (2) the document containing the submission to the Arbitrator of the issues to be decided.’”²⁰ Additionally, under § 5714(a)(3), “[i]n an extreme case, where the record reveals no support whatsoever for the determination made by the arbitration panel, the award must be vacated. An award must be vacated as well if the arbitrators, in ‘manifest disregard’ of the law, were cognizant of the controlling law but clearly chose to ignore it in reaching their decision.”²¹ However, this Court only conducts a “limited review” of an arbitrator’s decision.²² “If grounds for the award can be inferred from the facts of the case, the award is deemed to be within the scope of the Arbitrator’s authority and must be affirmed.”²³

¹⁹ *Pocket Change Kahunaville, Inc. v. Kahunaville of Eastwood Mall, Inc.*, 2003 WL 1791874, at *4 (Del. Ch. Mar. 21, 2003) (emphasis added).

²⁰ *KL Golf, LLC v. Frog Hollow, LLC*, 2004 WL 1949295, at *3 (Del. Ch. Aug. 23, 2004) (quoting *Malekzadeh v. Wyshock*, 611 A.2d 18, 21 (Del. Ch. 1992)).

²¹ *Wier v. Manerchia*, 1997 WL 74651, at *4 (Del. Ch. Jan. 28, 1997) (citation omitted), *aff’d*, 700 A.2d 736 (Del. 1997) (TABLE).

²² See, e.g., *Appoquinimink Educ. Ass’n v. Appoquinimink School Dist.*, 2003 WL 1794963, at *5 n.40 (Del. Ch. Mar. 31, 2003), *aff’d*, 844 A.2d 991 (Del. 2004) (TABLE).

²³ *Malekzadeh*, 611 A.2d at 22.

B. *Consideration of Daisy's Reasons for Vacating (or Not Confirming) the Award*

1. The Arbitrator Did Not Exceed his Authority by Acting Outside of the Subcontract

The Arbitrator did not act beyond the limits of the Subcontract in reaching his decision. As discussed above, a source of the arbitrator's authority is "the underlying agreement between the parties in which they agree to submit their disputes to arbitration."²⁴ Daisy argues that the Arbitrator's award with regard to the retainage, force account work, and the timing of these payments is governed, indirectly, by the DRBA Contract. It asserts that if the Subcontract is silent as to certain matters at issue, the Subcontract is deemed to incorporate the terms of the DRBA Contract as to those matters.²⁵ However, the Subcontract specifically incorporates the DRBA Contract with regard to "work."²⁶ A plausible interpretation of this contractual language is that enumeration presupposes that which is not enumerated was not intended to be included. In other words, it would not be in "manifest disregard" of the law or beyond an arbitrator's authority to

²⁴ *KL Golf*, 2004 WL 1949295, at *3.

²⁵ *See, e.g., Westinghouse Elec. Supply Co. v. Fidelity & Deposit Co. of Md.*, 560 F.2d 1109 (3d Cir. 1977).

²⁶ Subcontract, at 1 ("This Subcontract obligates the Subcontractor to the full extent to which Daisy Construction Company is obligated to the owner *for the specific scope of work indicated above . . .*") (emphasis added) (original in capital letters).

determine that the DRBA Contract was incorporated for the purpose of “work” only and that it *was not* a blanket incorporation.

Additionally, Daisy argues that even if the terms of the DRBA Contract were not generally incorporated into the Subcontract where the Subcontract is silent, Paragraph 10 (which specifically deals with payment for the work Mumford was to perform under the Subcontract) expressly incorporates the DRBA Contract by providing: “Unless otherwise specifically agreed herein, payments on [the Subcontract] are to be made in the same manner as provided for in the [DRBA] Contract between the Contractor and Owner”²⁷ Daisy argues that payment for force account work was not mentioned in the Subcontract and, thus, in accordance with Paragraph 10 of the Subcontract, the payment must be made in the manner set forth in the DRBA Contract. However, it is plausible to read Paragraph 10 as referring to work *under* the Subcontract. The claims that Daisy has opposed (specifically the force account work) were for work beyond the scope the Subcontract. Since this interpretation is not a decision without support, the

²⁷ Subcontract, at ¶ 10.

Arbitrator cannot be said to have exceeded his authority by acting outside the agreement reached by the parties and manifested in the Subcontract.²⁸

2. The Arbitrator Did Not Act Beyond the Scope of the Issues the Parties Submitted to Arbitration

Daisy does not contend that the retainage and force account payments it owed to Mumford were outside of the scope of the issues the parties submitted for decision,²⁹ nor does Daisy challenge the amount of the Arbitrator's finding. Instead, Daisy challenges, with regard to force account work and retainage, the fifteen-day timeframe in which the Arbitrator required it to make payment. In essence, Daisy is arguing that, even if the Arbitrator did not act outside the Subcontract, the Arbitrator was asked to make a decision with regard to force account work and retainage owed and not asked to render a decision regarding the collection of any force account work or retainage that was owed.³⁰ However,

²⁸ The question, of course, is not whether the Court agrees or disagrees, even strongly, with the Arbitrator's conclusions. The parties contracted for the Arbitrator to resolve not only factual disputes but also questions of law. The Court would be interfering with the parties' agreement if it substituted its judgment for that of the Arbitrator. It is, of course, for this reason that the grounds prescribed by the General Assembly for vacating an Arbitration award are so narrow.

²⁹ In fact, Paragraphs 3 and 4 of Daisy's Petition allude to this and Paragraphs 5 and 7 state that "issues arose" at arbitration concerning Mumford's force account and retainage.

³⁰ I note that Daisy's argument with regard to the timing of the payment blends with its argument in Part III.B.1. In other words, Daisy argues that the timing of the payment for force account work and retainage is contained in the DRBA Contract, which is in turn incorporated into the Subcontract. This argument has already been addressed.

providing an arbitrator with the authority to determine the amount owed without giving him authority to prescribe terms of payment would be make his authority illusory. I decline to take such a restricted view of the power that Mumford and Daisy granted to the Arbitrator. By giving the Arbitrator the authority to resolve the amount of force account work and retainage owed to Mumford, the parties necessarily gave the Arbitrator authority to enforce his decision.³¹

3. The Grounds for the Award Can Be Inferred from the Case

The grounds for the Arbitrator's award can be inferred from the facts of the case.³² In arguing that the Arbitrator's award is baseless, Daisy reverts to its argument that the payment terms of the DRBA Contract are incorporated into the Subcontract where the Subcontract is silent. I have previously determined that it would not be a "manifest disregard" of the law or facts of this case to determine that the Subcontract incorporated the DRBA Contract with respect to work and work alone.

³¹ Of course, the parties could have specifically given the Arbitrator the power to decide liability and liability alone. They did not expressly restrict the Arbitrator's authority in such a manner.

³² The Arbitrator's award, not atypically, is a two-page compilation which contains no significant textual analysis. *See also* Arbitration Order, dated March 8, 2004 (Ex. D to Resp'ts' Opening Br.).

In addition to arguing that the reasons for the Arbitrator's award cannot be inferred from the facts of the case, Daisy argues that the Arbitrator refused to follow binding law. Daisy cites *Westinghouse Electric Supply Co. v. Fidelity & Deposit Co. of Maryland*,³³ for the principle that a general contractor's contract is incorporated into a subcontract where the subcontract is silent. *Westinghouse*, however, involved a specific contract that was submitted to a court (and not to an arbitrator) for interpretation and application. Moreover, it focused on the scope of the work to be performed and not on the somewhat more tangential question of when payment was to be made.³⁴

IV. CONCLUSION

This Court does not function as an appellate tribunal to review decisions from the arbitration venue. Instead, Delaware's version of the Uniform Arbitration Act provides this Court with only limited means to question an arbitrator's award. In this case, from the undisputed facts, Daisy has not satisfied that standard and

³³ 560 F.2d 1109 (3d Cir. 1977) (applying Pennsylvania law).

³⁴ Daisy takes the position that requiring payment within fifteen days of the award is a decision without any basis. Perhaps Daisy is arguing that there is no principled distinction among ten, fifteen, and twenty days, and perhaps that is so. Perhaps Daisy would have considered a requirement to pay immediately, although less favorable, more supportable. It is a sufficient answer that some grace period was appropriate; that fifteen days is inherently reasonable; and Daisy can claim no adverse consequences from the timing.

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Mumford is entitled to summary judgment on its counterclaim.³⁵ The Award of Arbitrator is confirmed.³⁶

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-NC

³⁵ With that decision, Mumford's motion to dismiss is moot.

³⁶ See 10 Del. C. § 5714(d) ("If the application to vacate the award is denied, . . . the Court shall confirm the award.").