IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RICHARD W. STEMPIEN and EVELYN T. MULDER,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2017-0026-TMR
MARNIE PROPERTIES, LLC, a Delaware Limited Liability Company,	)	
Defendant.	)	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

WHEREAS, Plaintiffs Richard W. Stempien and Evelyn T. Mulder and Defendant Marnie Properties, LLC went to arbitration in September 2015;

WHEREAS, the arbitrator issued a final award on December 7, 2016 and awarded Defendant $67,434.19 in damages and $225,755.17 in attorneys' fees;

WHEREAS, Plaintiffs filed a Verified Complaint on January 13, 2017 seeking to vacate or modify the award in this Court;

WHEREAS, Defendant moved to dismiss the Complaint for failure to state a claim on May 15, 2017;

NOW, THEREFORE, THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

1. The Court has reviewed the parties' briefs, supporting submissions, and applicable law.

2. The Motion to Dismiss is GRANTED in part and DENIED in part.

3. When considering a motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6), a court must accept all well-pleaded factual allegations in the complaint as true, accept even vague allegations in the complaint as "well-pleaded" if they provide the defendant notice of the claim, "draw all reasonable inferences in favor of the non-moving party," and deny the motion unless the plaintiff could not recover "under any reasonably conceivable set of circumstances susceptible of proof." *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002).

4. Under 10 *Del. C.* § 5714(a)(3), "the Court shall vacate an award where . . . [t]he [arbitrator] exceeded [his] powers or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made." In order to vacate an arbitration award under this section there must be "evidence that the arbitrator acted in 'manifest disregard' of the law." *Roncone v. Phoenix Payment Sys., Inc.*, 2014 WL 6735210, at *4 (Del. Ch. Nov. 26, 2014). "In other words, the Court must find 'an error that is so obvious that it would be instantly perceived as

such by the average person qualified to serve as an arbitrator.'" *Id.* (quoting *Travelers Ins. Co. v. Nationwide Mut. Ins. Co.*, 886 A.2d 46, 49 (Del. Ch. 2005)).

5. For a court to find that an arbitrator showed manifest disregard of the law, "a court must find that the arbitrator consciously chose to ignore a legal principle, or contract term, that is so clear that it is not subject to reasonable debate." *SPX Corp. v. Garda USA, Inc.*, 94 A.3d 745, 747 (Del. 2014). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced that he committed serious error does not suffice to overturn his decision." *United Paperworkers Int'l Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, 38 (1987). "To successfully convince the Court to vacate [an arbitration award], the movant must show 'something beyond and different from a mere error in the law or failure on the part of the arbitrator to understand or apply the law.'" *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Sec., Inc.*, 953 A.2d 726, 732-33 (Del. Ch. 2008) (quoting *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 208 (2d Cir. 2002)).

6. Under 10 *Del. C.* § 5715, "the Court shall modify or correct the award where . . . [t]here was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award." An "evident miscalculation" is one "of mathematical or computational error" rather than "a substantive conclusion of the arbitrator" that is "largely based on fact." *Roncone*,

2014 WL 6735210, at *7. If there is evidence "the arbitrator implemented the award he intended, and without any miscalculation," then any argument under Section 5715(a) must fail. *Id.* Under 10 *Del. C.* § 5715(c) "[a]n application to modify or correct an award may be joined in the alternative with an application to vacate the award."

7. Plaintiffs argue that the arbitrator ignored the provisions of 25 *Del. C.* § 2705, which rose to the level of manifest disregard of the law. Section 2705 provides:

> The owner of any structure built, repaired or altered by any contractor or subcontractor may require such contractor or subcontractor from time to time to furnish and submit to the owner complete and accurate list in writing of all persons who have furnished labor or material, or both, in connection therewith, and who may be entitled to avail themselves of the provisions of this chapter. Should any such contractor or subcontractor fail to furnish such list for 10 days after demand made therefor by such owner, the contractor or subcontractor shall be entitled to receive no further payments from the owner until such list be furnished and shall not be entitled to avail himself or herself of any of the provisions of this chapter.

25 *Del. C.* § 2705. In *Carey v. Estate of Myers*, the Superior Court held, and the Delaware Supreme Court affirmed, that Section 2705 is not applicable when no mechanics' lien was filed. 2015 WL 4087056, at *20 (Del. Super. July 1, 2015), *aff'd*, 132 A.3d 749 (Del. 2016) (TABLE). Plaintiffs make several valid arguments as to the differences between *Estate of Myers* and their case. Pls.' Answering Br.

20. Plaintiffs even suggest that *Estate of Myers* may have misinterpreted Section 2705. *Id.* While this may be true, these allegations show at worst that the arbitrator committed serious error in his interpretation, but even "serious error does not suffice to overturn [the arbitrator's] decision." *United Paperworkers*, 484 U.S. at 38. Because Delaware case law arguably supports the arbitrator's decision, it is not reasonably conceivable that the arbitrator acted with a manifest disregard of the law. Therefore, the Motion to Dismiss is GRANTED as to these claims, and all claims related to this argument are DISMISSED.

8. Plaintiffs also argue that the arbitrator erred by deducting $10,000 instead of $22,000 from Defendant's claim for charges for exterior stairs not installed at the home. Pls.' Answering Br. 23. The arbitrator determined "[t]here is no evidence in the record establishing a cost for the exterior stairs." Compl. Ex. K, at 3. The standard for vacatur or modification, however, is not error. Instead, Plaintiffs must state a reasonably conceivable claim that there was either a manifest disregard of the law or an evident miscalculation. 10 *Del. C.* §§ 5714, 5715. Here, Plaintiffs have not pointed to "a legal principle, or contract term, that is so clear that it is not subject to reasonable debate" that the arbitrator ignored; thus, Plaintiffs have not stated a reasonably conceivable claim that the arbitrator showed a manifest disregard of the law. *SPX Corp.*, 94 A.3d at 747. Additionally, the arbitrator made a substantive determination when he found there was "no evidence in the record

establishing a cost for the exterior stairs." Compl. Ex. K, at 3. This determination is "largely based on fact" rather than an evident miscalculation, which would be some sort of "mathematical or computational error." *Roncone*, 2014 WL 6735210, at *7. Therefore, the Motion to Dismiss is GRANTED for the claim related to deduction of the cost of the stairs, and the claim is DISMISSED.

9. Plaintiffs argue the arbitrator's interpretation of the contract provisions regarding the total cost of the home evidenced a manifest disregard for the law. Compl. 11. Plaintiffs allege that the contract between Plaintiffs and Defendant was a fixed-price contract for $700,000; that no changes could be made unless in writing; and that no changes were made so the total amount Plaintiffs could owe under the contract is $700,000. Compl. 5; Pls.' Answering Br. 5, 22-23. Plaintiffs also allege that they had paid $730,000 before Defendant ceased work and filed its request for arbitration. Compl. 5. Plaintiffs argue the arbitrator acted with manifest disregard of the law when he awarded Defendant damages above the fixed price of the contract. Answering Br. 23. Defendant argues that the contract was a cost-plus contract. Def.'s Opening Br. 9. The documents currently before the Court seem to imply that the contract was a cost-plus contract as Defendant suggests. The documents currently before the Court, however, also include references to other documents that constitute the entire contract. Compl. 4; Compl. Ex. A, ¶ 3. These documents include a building permit, a draw schedule, plans and specifications, an

owner's specification sheet, and any written, signed changes to the contract. Compl. 4. The parties' contract explicitly incorporates by reference these documents, none of which the parties provided to the Court. *Id.* Since the Court does not have access to these documents, the Court would have to draw inferences in Defendant's favor to conclusively determine the contract was a cost-plus contract. To draw such inferences in Defendant's favor would be improper at the motion to dismiss stage. Instead, the Court must accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, and "draw all reasonable inferences in favor of the plaintiff." *Savor, Inc.*, 812 A.2d at 896-97. Therefore, it is reasonably conceivable that the contract was a fixed-price contract for $700,000, and the arbitrator acted with a manifest disregard of the law by awarding Defendant damages above the $700,000 cap of the contract. Thus, the Motion to Dismiss as to these claims is DENIED.

10. Finally, Plaintiffs argue the arbitrator exceeded the scope of his authority and acted in manifest disregard of the law when he issued the award for fees and expenses to Defendant. The final sentence in Section 15 of the parties' agreement states, "[i]n the event the Owner is in breach of this Agreement or any of the payment terms hereof, Owner shall be liable to the Contractor for any and all attorney's fees, expert witness fees, and arbitration fees and court costs incurred by Contractor due to any such breach or non-payment." Compl. Ex. A, at 3. Plaintiffs

advance several theories as to how the arbitrator's award of fees and expenses was in manifest disregard of the law. First, Plaintiffs assert that the plain language of the contract does not allow for the recovery of either attorney expenses or expert expenses, but the arbitrator awarded both to Defendant. Oral Arg. Tr. 34; Compl. Ex. K, at 4. Second, Plaintiffs claim Defendant's case-in-chief at the arbitration lasted for only the first two days of a nine-day hearing, and Defendant called no expert witnesses. Oral Arg. Tr. 29. Therefore, all of the expert witness fees awarded and some portion of the attorneys' fees incurred after the first two days of the hearing were not incurred "due to any such breach or non-payment" by Plaintiffs, but instead they were incurred defending against Plaintiffs' counterclaims. *Id.* This, Plaintiffs argue, means the parties' contract did not authorize the expert fees and some portion of the attorneys' fees awarded by the arbitrator. Compl. Ex. K, at 4. Third and finally, Plaintiffs allege that Defendant's attorneys doubled billed for certain services, which could only result from a manifest disregard of the law. Oral Arg. Tr. 14. Plaintiffs raised these same arguments with the arbitrator in their "Objections to Claimant's Claim for Attorneys' Fees and Costs" in the arbitration. Compl. Ex. I. These allegations sufficiently state a reasonably conceivable claim that the "arbitrator consciously chose to ignore a … contract term, that is so clear that it is not subject to reasonable debate" and acted with a manifest disregard of the law by awarding fees and expenses to Defendant that were plainly not allowed under the

contract. Therefore, the Motion to Dismiss as to the issue of attorneys' fees is DENIED.

/s/ Tamika Montgomery-Reeves
Vice Chancellor
Dated: November 3, 2017