

**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, )  
 )  
Defendant. )

**ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY  
JUDGMENT AND DENYING PLAINTIFFS’ MOTION FOR SUMMARY  
JUDGMENT**

WHEREAS, Plaintiffs Richard W. Stempien and Evelyn T. Mulder and Defendant Marnie Properties, LLC, entered into a Contract for Construction on June 28, 2014 (the “Contract”), for the construction of a home in Bethany Beach, Delaware;

WHEREAS, Plaintiffs and Defendant 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 attorney and expert fees and expenses;

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;

WHEREAS, this Court granted in part and denied in part Defendant's motion to dismiss on November 3, 2017;

WHEREAS, Plaintiffs and Defendant cross-moved for summary judgment on May 25, 2018;

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

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

2. Defendant's Motion for Summary Judgment is GRANTED, and Plaintiffs' Motion for Summary Judgment is DENIED.

3. Summary judgment will be "granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at \*8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)). The movant bears the initial burden of demonstrating that there is no question of material fact. *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at \*3 (Del. Ch. Dec. 29, 2009). When the movant carries that burden, the burden shifts to the nonmoving party "to present some specific, admissible evidence that there is a genuine issue of fact for a trial." *Id.* (quoting *Watson v. Taylor*, 829 A.2d 936, 2003 WL 21810822, at \*2 (Del. Aug.

4, 2003) (TABLE)). When considering a motion for summary judgment, this Court must view the evidence and the inferences drawn from the evidence in the light most favorable to the nonmoving party. *Judah v. Del. Tr. Co.*, 378 A.2d 624, 632 (Del. 1977); *Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999), *aff'd*, 752 A.2d 112 (Del. 2000). Even so, the nonmoving party may not rely on allegations or denials in the pleadings to create a material factual dispute. Ct. Ch. R. 56(e).

4. When the parties have filed cross-motions for summary judgment and have not argued that a material issue of fact exists, as is the case here, “the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.” Ct. Ch. R. 56(h). Nevertheless, “even when presented with cross-motions for summary judgment, a court must deny summary judgment if a material factual dispute exists.” *Bank of N.Y. Mellon v. Realogy Corp.*, 979 A.2d 1113, 1119 (Del. Ch. 2008).

5. Under 10 *Del. C.* § 5714(a)(3), “the Court shall vacate an [arbitral] 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 arbitral 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)).

6. 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.” *Id.* at 751 (alteration in original) (quoting *United Paperworkers Int’l Union v. Misco Inc.*, 484 U.S. 29, 38 (1987)). “To successfully convince the Court to vacate [an arbitral 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.*, 304 F.3d 200, 208 (2d Cir. 2002)).

7. With regard to their first claim, Plaintiffs argue that the arbitrator’s interpretation of the Contract provisions regarding the total cost of the home evidences a manifest disregard for the law. Pls.’ Opening Br. 19-24. Plaintiffs assert 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. *Id.* Plaintiffs argue the arbitrator acted with manifest disregard of the law when he purportedly ignored the terms of the Contract and awarded Defendant damages above the fixed price of the Contract. *Id.* at 24.

8. Defendant responds by arguing that the Contract was a cost-plus contract. Def.'s Answering Br. 12-13. In support of this argument, Marnie Properties points to several possible bases for the arbitrator's conclusion that the Contract is a cost-plus contract. First, the plain language of the Contract states that Plaintiffs agree to pay Marnie Properties "the cost for the construction of a new home on the premises plus a fee of 18%." Pls.' Opening Br. Ex. 1, at 1. The Contract also states the "[Plaintiffs] shall pay [Marnie Properties] on a cost basis plus a fee of 18%." *Id.* at 2. The Draw Schedule and the Scope of Construction, two documents attached to the Contract, indicate that the price of \$700,000 was an estimate. *Id.* at 1; Def.'s Opening Br. Ex. 1 Attach. E, at 1.

9. The arbitrator's calculation of the amounts Plaintiffs owe to Marnie Properties indicates that the arbitrator did not "consciously [choose] to ignore a . . . contract term" when he interpreted the Contract as a cost-plus contract. *SPX Corp.*, 94 A.3d at 747. To the contrary, the arbitrator arguably applied the terms of the Contract described in Paragraph 8 of this Order, including the terms regarding

Marnie Properties' eighteen percent fee, and "act[ed] within the scope of his authority" when he calculated the amounts Plaintiffs owe Marnie Properties. *Id.* at 751. Thus, I conclude that the arbitrator's interpretation of the Contract provisions regarding the total cost of the home do not evidence a manifest disregard for the law. Defendant's Motion for Summary Judgment is GRANTED and Plaintiffs' Motion for Summary Judgment is DENIED as to this claim.

10. With regard to their second claim, 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. Pls.' Opening Br. 24-32. The final sentence in Paragraph 15 of the Contract states,

In 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.

Pls.' Opening Br. Ex. 1, 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 argue that because the Contract was the sole basis upon which Marnie Properties sought fees and expenses, the arbitrator should have limited the award to those fees and expenses permitted by the Contract. Pls.' Opening Br. 25. Such an award, Plaintiffs contend, would exclude attorney and expert expenses and also would be limited to fees "due to [Plaintiffs'] breach or non-payment." *Id.* at 28-29.

Second, in conjunction with the first argument, Plaintiffs assert that their counterclaim was a challenge to Marnie Properties' incomplete or incorrect work and, thus, not due to any breach or non-payment. *Id.* at 27. Third, Plaintiffs argue that because Marnie Properties did not prevail on the entirety of its claim, the arbitrator was incorrect to award the majority of Marnie Properties' fees and expenses. *Id.* at 25-26. Plaintiffs raised these same arguments with the arbitrator in their "Objections to Claimant's Claim for Attorneys' Fees and Costs" in the arbitration. Pls.' Opening Br. Ex. 22, at 4-5, 18-20.

11. The arbitrator's Determination on Claimant's Request for Counsel Fees and Costs states that the arbitrator reviewed the parties' submitted documents and specifically "reviewed each line item of the invoices for counsel fees at least twice—first independently and second in conjunction with points made by [Plaintiffs] in their Objections." Pls.' Opening Br. Ex. 25. The determination does not articulate the bases for the arbitrator's award of fees and costs to Marnie Properties. *See id.* Marnie Properties provides potential bases for the arbitrator's determination. First, Marnie Properties argues that the fees and costs are all related to a "common core of facts," namely, the Plaintiffs' nonpayment of amounts they owed to Marnie Properties. Def.'s Opening Br. 21-23. Second, Marnie Properties contends that the arbitrator had the right to award attorneys' fees under Rule 48(d) of the American Arbitration Association Construction Industry Arbitration Rules, which provides

that “[t]he award of the arbitrator may include . . . an award of attorneys’ fees if . . . it is authorized by law or [the parties’] arbitration agreement.” *Id.* at 23-24. Third, Marnie Properties argues that the fee award reflects the Plaintiffs’ conduct during the arbitration in that Plaintiffs failed to balance the cost of the underlying arbitration issues with their counsel’s fees and in that Plaintiffs elicited redundant testimony during the arbitration hearings. Def.’s Opening Br. 24-28. Fourth and finally, Marnie Properties points to 10 *Del. C.* § 5712 as a source of the arbitrator’s authority to award attorneys’ costs and expert witness fees and costs. Def.’s Answering Br. 19. Section 5712 provides that “[u]nless otherwise provided in the agreement to arbitrate, the arbitrators’ expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.”

12. Because the arbitrator considered each line of the invoices by reviewing them twice and because a combination of (1) the terms of the Contract, (2) Rule 48(d) of the American Arbitration Association Construction Industry Arbitration Rules, and (3) 10 *Del. C.* § 5712 provides support for the arbitrator’s award of fees and costs, I cannot determine that the arbitrator “consciously chose to ignore” the terms of the Contract or “act[ed] [outside] the scope of his authority” when he awarded fees and costs to Marnie Properties. *SPX Corp.*, 94 A.3d at 747, 751. I conclude that the arbitrator did not exceed the scope of his authority or act in

manifest disregard of the law when he issued the award for fees and expenses to Marnie Properties. Defendant's Motion for Summary Judgment is GRANTED and Plaintiffs' Motion for Summary Judgment is DENIED as to this claim.

13. Marnie Properties requests its attorneys' fees and costs incurred in this action. "The American Rule applies in Delaware." *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1221 (Del. 2012). Under the American Rule, "litigants in Delaware are generally responsible for paying their own counsel fees, absent special circumstances or a contractual or statutory right to receive fees." *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 686 (Del. 2013) (quoting *Burge v. Fid. Bond & Mortg. Co.*, 648 A.2d 414, 421 (Del. 1994)). Paragraph 15 of the Contract provides that

[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.

Pls.' Opening Br. Ex. 1, at 3. Marnie Properties filed the original demand for arbitration due to Plaintiffs' failure to make the final payment. In this action, Marnie Properties is defending its award from the underlying arbitration action. "Absent any qualifying language that fees are to be awarded claim-by-claim or on some other partial basis, a contractual provision entitling the prevailing party to fees will usually be applied in an all-or-nothing manner." *W. Willow-Bay Court, LLC v. Robino-Bay*

*Court Plaza, LLC*, 2009 WL 458779, at \*8 (Del. Ch. Feb. 23, 2009). Therefore, Paragraph 15 applies to “all attorney’s fees, expert witness fees . . . and court costs” Marnie Properties incurred in this action. Paragraph 15, however, fails to include attorneys’ costs or expenses. Thus, I award attorneys’ fees only to Marnie Properties.

*/s/ Tamika Montgomery-Reeves*

Vice Chancellor

Dated: February 11, 2019