

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 1242

**SOUTHGATE PENTHOUSES, LLC AND
SOUTHGATE RESIDENTIAL TOWERS, LLC**

VERSUS

MAPP CONSTRUCTION

Judgment Rendered: APR 26 2013

**Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 548119**

The Honorable Todd Hernandez, Judge Presiding

**David K. Persons
Metairie, Louisiana**

**Counsel for Defendant/Appellant
Concrete Coatings Southern
Division, Inc.**

**Mathew J. Ungarino
Daniel G. Collarini
Metairie, Louisiana**

**Counsel for Defendant/Appellant
The Stained Floor, LLC**

**W. Evan Plauche
Justin E. Alsterberg
David C. Bach
Metairie, Louisiana**

**Counsel for Defendant/Appellant
Southern States Plumbing, Inc.**

*Todd, J. concurs in the result.
ij concurs with reasons*

**Phillip W. Preis
Charles M. Gordon, Jr.
Crystal D. Burkhalter
Caroline D. Preis
Charles M. Thompson
Jennifer R. Dietz
Baton Rouge, Louisiana**

**Counsel for Plaintiff/Appellees
Southgate Penthouses, LLC and
Southgate Residential Towers, LLC**

*** * * * ***

BEFORE: GUIDRY, CRAIN, AND THERIOT, JJ.

THERIOT, J.

This appeal consists of three separate matters, each appealed by three individual appellants. The appellees in each matter are Southgate Penthouses, LLC, and Southgate Residential Towers, LLC (collectively “Southgate”). The appellants are Concrete Coatings, Southern Division, Inc. (“Concrete Coatings”); The Stained Floor, LLC (“The Stained Floor”); and Southern States Plumbing, Inc. (“Southern States”). The matters between each appellant and the appellees were submitted to arbitration, with the arbitration ruling confirmed by the Nineteenth Judicial District Court in favor of Southgate and against all three appellants. For the following reasons, we affirm the trial court’s rulings against Concrete Coatings and The Stained Floor, and reverse the ruling against Southern States.

FACTUAL BACKGROUND

The litigation history of this case is long and complex. In August of 2003, Southgate entered into a contract with MAPP Construction, Inc. (“MAPP”) to build an apartment/retail complex consisting of an eight story apartment complex, two retail stores, a cabana, a guardhouse, and a parking garage, all located on Nicholson Drive, south of the Louisiana State University campus. Due to the enormity of this project, dozens of subcontractors were hired by MAPP in order to complete the work by the construction deadline. The three appellants in the instant case were subcontractors hired by MAPP, among many others.

In 2005, a dispute arose over monies owed on the project. Through settlement, Southgate signed a promissory note in favor of MAPP for five million dollars; however, Southgate subsequently stopped payment on the note after citing various construction defects. MAPP filed suit in July 2006, demanding payment on the note. Southgate countersued for the numerous

construction defects. As the cited defects involved many different parts of the construction project, a vast majority of the subcontractors became involved when MAPP filed a third party demand to include them in the lawsuit.

The contract between Southgate and MAPP called for contractual disputes to be resolved through arbitration, pursuant to the rules of the American Arbitration Association (“AAA”). After a lengthy arbitration hearing, the arbitration panel rendered a decision in December of 2010.

After the decision was rendered, Southgate petitioned the trial court to review the panel’s findings, pursuant to La. R.S. 9:4209, which also requires notice to be served on the adverse parties or their attorneys, and for the arbitration decision to be filed into the court’s record.

Writs had been taken to this court on a previous ruling by the trial court, in which it was decided that under the contracts between MAPP and the subcontractors, the subcontractors were also bound to resolve contractual disputes through arbitration and would be subject to the decision rendered by the arbitration panel.¹

Arbitration awards in favor of Southgate and against the various subcontractors were subsequently confirmed by the trial court.² For the purpose of this appeal, we are only concerned with the awards regarding the three appellants.

Concrete Coatings

Subsequent to the filing of the third party demand, MAPP attempted to serve all the subcontractors involved. In the service instructions regarding Concrete Coatings, MAPP requested the Sheriff serve Concrete Coatings,

¹ See *M&R Drywall, Inc. v. MAPP Construction, L.L.C., et al*, 2009 CW 0898 and 0943, taken from *Southgate Residential Towers, L.L.C., et al v. MAPP Construction Inc., et al*, No. 529,351, consolidated with 550,534, 19th JDC.

² Prior to the panel’s rendering a decision and award, Southgate and MAPP had reached a settlement in which MAPP assigned all of its claims against the subcontractors to Southgate.

Inc., Southern Division, through its registered agent in Hammond, Louisiana. It was later discovered that this service information was not correct. Concrete Coating's correct agent was located in Gonzales, Louisiana, evidenced by the records of the Louisiana Secretary of State.

At the time MAPP had filed its third party demand on February 27, 2009, Concrete Coatings had already been dissolved for two years, and service through the sheriff could never be perfected. However, Concrete Coatings did receive notices of arbitration through the AAA. Nevertheless, Concrete Coatings did not attend the arbitration, and a default hearing was held on August 3, 2010. At that hearing, the arbitration panel concluded that Concrete Coatings had been properly served on February 28, 2008, through mailing to the last known address. Through evidence presented by Southgate, the panel decided that the cost of repair to the project's concrete flooring totaled \$2,335,000.00. It was further decided that Concrete Coatings and The Stained Floor were liable for 20% of the damages, equaling \$467,000.00.³

Southgate filed a motion to confirm the award against Concrete Coatings with the 19th JDC on February 1, 2011. Concrete Coatings filed declinatory exceptions of insufficient service and citation of process of MAPP's third party demand, and a memorandum in opposition to Southgate's motion to confirm the award. The court confirmed the award on December 9, 2011, and mooted Concrete Coatings's exceptions. The final judgment was signed on February 1, 2012. Concrete Coatings filed a motion for new trial on February 9, 2012, demanding a ruling on its exception and a written finding of fact from the court. Concrete Coatings also wanted the court to determine whether it was solidarily liable with The Stained Floor for

³ This is the corrected figure, after the panel had at first calculated the percentage incorrectly. The panel's order was thus modified on January 27, 2011.

\$467,000.00, or separately liable, meaning each party was individually liable for \$467,000.00. The motion for new trial was denied on February 16, 2012, and Concrete Coatings appealed timely.

ASSIGNMENTS OF ERROR

Concrete Coatings states the trial court erred in confirming the arbitration award against it and in rendering judgment in Southgate's favor after Southgate failed to serve Concrete Coatings with a citation from the sheriff.

Further, Concrete Coatings states the trial court erred by upholding the arbitration panel's award despite the fact that Southgate and MAPP failed to obtain a court order compelling Concrete Coatings to participate in the arbitration proceeding.

Concrete Coatings also claims the trial court erred as a matter of law in upholding the arbitration panel's ruling, since, according to Concrete Coatings, Southgate and MAPP failed to present any competent evidence that Concrete Coatings breached its obligations under the subcontract agreement sufficient to confirm the default judgment.

Finally, Concrete Coatings claims the trial court erred in confirming the arbitration award and in rendering judgment in Southgate's favor as the arbitrators made significant errors of calculation in the damages award, and after modifying the award failed to determine what amount was attributable to Concrete Coatings based on the evidence before the arbitration panel.

STANDARD OF REVIEW

Since a declinatory exception involves a question of law, it should receive a de novo standard of review. See *Premier Dodge, L.L.C. v. Perrilloux*, 2005-0554, p. 2 (La. App. 4 Cir. 1/25/06), 926 So.2d 576, 577. As to the award of an arbitrator, it is res judicata and unless grounds are

established, in accordance with arbitration law, for the vacation, modification or correction of the award, it must be affirmed. *Hill v. Cloud*, 26,391, p. 6 (La. App. 4 Cir. 1/25/95), 648 So.2d 1383, 1387, *writ not considered*, 95-0486 (La. 3/17/95), 651 So.2d 260. More specifically, absent the existence of one of the specified grounds for vacating an arbitration award found in Louisiana Revised Statutes 9:4210, the reviewing court is prohibited from reviewing the merits of the arbitrator's decision. *Pennington v. Cuna Brokerage Securities, Inc.*, 2008-0589, p. 6 (La. App. 1 Cir. 10/1/08), 5 So.3d 172, 176, *writ denied* 2008-2600 (La. 1/9/09), 998 So.2d 723.

DISCUSSION

It is well-accepted that a defendant's actual knowledge of a legal action cannot supply the want of citation because proper citation is the foundation of all actions. *Naquin v. Titan Indem. Co.*, 2000-1585 (La. 2/21/01), 779 So.2d 704, 710. Concrete Coatings is correct in its assertion that it never received a court order to appear at the arbitration proceeding, as other defendants had; however, we must examine, first, if a court order to compel appearance at the arbitration hearing is necessary, and second, if some other form of notice or citation can be considered proper as *Naquin* requires.

Concrete Coatings admitted to receiving a notice in the mail, conforming with the requirements of AAA Rule 41, which pertains to service of notice for arbitration proceedings.⁴ However, Concrete Coatings asserts that the trial court erred in denying its declinatory exception, raising

⁴ Concrete Coatings received this notice at its proper business address in Gonzales, rather than the incorrect address in Hammond where service was attempted by the Sheriff. The Gonzales address is also the proper business address for The Stained Floor, who also received notice for the arbitration proceeding and attended.

the objections of insufficiency of citation and service of process because it did not receive notice through the Sheriff.

Concrete Coatings was named in the third party demand, and because of our previous ruling in *M&R Drywall, Inc. v. MAPP Construction, L.L.C., et al.*, was required to have its dispute resolved through arbitration. As the dispute was handled by the AAA, this made all the parties subject to the AAA's rules and procedures. Once parties have entered into an enforceable agreement which provides for arbitration, it is binding as law upon them. When there is doubt, the general rule is that it should be resolved in favor of and not against arbitration. *Parker v. St. Tammany Parish Hosp. Service Dist.*, 94-2278 (La. App. 1 Cir. 2/27/96), 670 So.2d 531, 534, *writ denied*, 96-0805 (La. 5/10/96), 672 So.2d 925.

There is a similar scenario in *Commercial Renovations, Inc. v. Shoney's of Boutte, Inc.*, 2000-2319 (La. App. 4 Cir. 10/10/01), 797 So.2d 183, *writ denied*, 2001-3185 (La. 2/8/02), 808 So.2d 351. As in the instant case, *Shoney's* dealt with a defendant who failed to appear at an arbitration proceeding because a citation was not served on its registered agent. *Id.* at 184. The Fourth Circuit ruled that when a party agrees to be bound by arbitration, they also agree to be bound by all the procedural rules of the arbitrator and contract conditions regarding arbitration. *Id.* at 184-185.

While in the instant case there is no per se "agreement" given by Concrete Coatings to submit to the AAA's rules of arbitration, our previous ruling in *M&R Drywall* makes Concrete Coatings bound to the arbitration process. With the AAA overseeing the arbitration, all parties named in the third party demand are subject to its procedural rules, including the rules of giving proper notice under Rule 41. Whether Concrete Coatings was properly served by citation through the sheriff becomes irrelevant at this

point, because Concrete Coatings did receive proper notice of the arbitration hearing at its business address in accordance with the AAA's rules. We therefore find that Concrete Coatings did receive proper notice of the arbitration proceeding and was compelled to attend.

In its third assignment of error, Concrete Coatings challenges the arbitration panel's decision itself, claiming that it is not based on competent evidence. According to La. R.S. 9:4210, a court may vacate an arbitration award only:

- A. Where the award was procured by corruption, fraud, or undue means;
- B. Where there was evident partiality or corruption on the part of the arbitrators;
- C. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced;
- D. Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

An arbitrator's award can only be vacated when at least one of the four conditions listed above are present. See *JK Developments, LLC v. Amtek of Louisiana, Inc.*, 2007-1825, p. 2 (La. App. 1 Cir. 3/26/08), 985 So.2d 199, 200-201, *writ denied* 2008-0889 (La. 6/20/08), 983 So.2d 1276. Alleging that the arbitrators' decision is not based on competent evidence does not come within any of the enumerated grounds for vacating an arbitration award. Accordingly, absent such grounds, the arbitration award must be confirmed. See *Hill*, 648 So.2d at 1387.

In the final assignment of error, Concrete Coatings alleges the arbitration panel miscalculated the award and erred in the attribution of fault, making Concrete coatings and The Stained Floor each liable for 20% of the entire award, which Concrete Coatings claims is contrary to the evidence presented. Here, we must still follow the standard put forth in *Pennington*,

and we note that while Concrete Coatings does not name La. R.S. 9:2410(D) specifically, the assignment of error suggests that the arbitration panel may have imperfectly executed its powers such that a definite award was not made.

It is true that the arbitration panel initially miscalculated the percentage of fault allocated to Concrete Coatings and The Stained Floor. Louisiana Revised Statutes 9:4211(A) requires a court to correct an evident material miscalculation of figures in an arbitration award, and this was done. The panel corrected the mistake and modified the award. Again, we cannot overturn an arbitrator's factual determination on the evidence presented, unless one of the grounds of La. R.S. 9:4210 is met. After its second review of the evidence, the panel made its award accordingly, and we can find no compelling reason to vacate its confirmation with the trial court.

Furthermore, La. R.S. 9:4213 gives a party aggrieved by a confirmed arbitration award three months to file a motion to vacate or modify an award after the award has been filed. Concrete Coatings filed no such motion within the prescribed time period. Therefore, aside from the reasons we have given above, Concrete Coatings failed to timely move the trial court to vacate or modify the award which they consider erroneous. For the foregoing reasons, we affirm the trial court's confirmation of the default award against Concrete Coatings.

The Stained Floor

Through the evidence provided by Southgate at the arbitration proceeding, the panel ruled that the cost of repair to the concrete flooring of the work project totaled \$2,335,000.00. The Stained Floor and Concrete Coatings were found to be 20% liable for the total figure. After an initial miscalculation that was corrected, The Stained Floor's share of the liability

equaled \$467,000.00. After this award was confirmed by the 19th JDC, The Stained Floor appealed.

ASSIGNMENT OF ERROR

The Stained Floor claims the trial court erred when it failed to modify or vacate the reasoned award of the arbitration panel, as it is flawed, contains contradictions, and is not a fair assessment of damages against The Stained Floor.

STANDARD OF REVIEW

The accepted standard of reviewing the reasonableness of an arbitration award is found in *Pennington v. Cuna Brokerage Securities, Inc.*, 2008-0589, p. 6 (La. App. 1 Cir. 10/1/08), 5 So.3d 172, 176, *writ denied* 2008-2600 (La. 1/9/09), 998 So.2d 723.

DISCUSSION

The Stained Floor's sole assignment of error questions the fairness of the final allocation of damages based on the evidence presented. It should be noted that The Stained Floor does not attack the competency of the evidence presented at the arbitration but the reasonableness of the award itself.

The Stained Floor claims the panel erred by holding it liable for the cleanup of the improperly stained concrete flooring, as this was not one of its responsibilities in its subcontract with MAPP. The Stained Floor also claims the panel erred when it did not allocate comparative fault with the other subcontractors who were responsible for the concrete flooring. Neither of these assertions resemble any of the grounds listed in La .R.S. 9:4210. The panel based its decision on the evidence presented, and while The Stained Floor appeared at the arbitration proceeding, it presented no evidence in its defense. The panel only had evidence presented by

Southgate to render its decision. Further, unlike Concrete Coatings, The Stained Floor does not dispute that they agreed to submit to the arbitration. When parties agree to arbitration, they are presumed to accept the risk of procedural and substantive mistakes of either fact or law. *In re Arbitration Between U.S. Turnkey Exploration, Inc. and PSI, Inc.*, 577 So.2d 1131, 1134 (La. 1991). Therefore, we find no error in the trial court's confirmation of the arbitration award against The Stained Floor.

Southern States

At the beginning of the construction project, MAPP had initially subcontracted with a plumbing company other than Southern States, which went out of business before the plumbing work could be completed. MAPP subcontracted with Southern States to complete the plumbing, with the completion deadline for the project fast approaching. Due to the limited time, Southern States was unable to obtain a bond for its work. An agreement was thus reached that MAPP would not be held liable by Southgate for cost overruns should Southern States default on the work. The contract between MAPP and Southern States also included a clause that transferred the same rights and remedies the contractor (MAPP) had against the owner (Southgate) to the subcontractor (Southern States). This included the binding agreement to arbitrate contract disputes.

Southern States was unable to complete the plumbing work before the completion deadline and defaulted. MAPP released Southern States from the contract on May 7, 2004, and retained another plumbing subcontractor to complete the work. The project was completed on or about March 25, 2005. Southern States alleged it never received notice of a claim for contractual default from either Southgate or MAPP at this time, when MAPP and Southgate were commencing litigation against the other subcontractors.

On August 22, 2005, Southgate and MAPP settled several claims, including claims relating to cost overruns with the plumbing. MAPP assigned whatever rights it had in these claims to Southgate. On October 5, 2007, Southgate filed a petition for damages and declaratory judgment against Southern States for defective plumbing work. Prior to then, Southern States was never named as a defendant by MAPP or Southgate in any previous petition. MAPP filed a motion to join Southern States in its third party demand on January 21, 2008, to hold Southern States liable for costs MAPP may owe Southgate associated with the plumbing.

As the litigation proceeded to arbitration, the panel ordered Southgate on July 31, 2009 to specify the work it claimed was defective with respect to each named subcontractor. On April 30, 2010, Southgate and MAPP settled all their remaining claims, with MAPP assigning all of its claims against the subcontractors to Southgate. On June 4, 2010, Southgate submitted a pre-hearing brief to the arbitration panel, in which it asserted that cost overruns associated with the plumbing were a result of Southern States's contractual default.

Southern States objected to being brought into the arbitration proceeding, asserting the claim for default brought by Southgate was preempted under La. R.S. 9:2772. Southern States claims the panel also ignored its own scheduling order which stated that no new claims may be asserted by any party after the filing of the pre-hearing order on or before May 14, 2010, but allowed Southgate to make its new claim for default almost one month after that deadline. MAPP's own expert admitted in the arbitration proceeding that MAPP had not made an initial claim for default prior to settling with Southgate. Southern States claimed the panel incorrectly applied the ten-year prescriptive period of La.

C.C. art. 3500 instead of the proper five-year preemptive period of La. R.S. 9:2772.

After the panel reached the decision to find Southern States liable for contractual default, Southern States filed a motion with the 19th JDC to vacate the award. The court denied the motion, reasoning that the correctness of the arbitration award was not reviewable. After the court rendered a final judgment based on the arbitration award, which totaled \$1,356,263.00 against Southern States, Southern States filed a timely devolutive appeal.

ASSIGNMENTS OF ERROR

First, Southern States claims the district court erred in failing to vacate the arbitration award when the arbitrators manifestly disregarded clear and binding Louisiana law imposing a preemptive period on Southgate's claim for default.

Second, Southern States claims the district court erred in failing to vacate the arbitration award for the arbitrators' misconduct in disregarding binding Louisiana law, resulting in prejudice against Southern States.

Third, Southern States claims the district court erred in failing to vacate the arbitration award as an improper exercise of the arbitrators' power in excess of their contractually granted authority.

STANDARD OF REVIEW

We must apply the standard of *Pennington*, where we can only reverse or modify the arbitration award under one of the four grounds in La.R.S. 9:4210. Although arbitration proceedings are not held to the same strict rules as are the courts, nonetheless, an arbitrator must be vigilant in affording basic due process. *Pennington*, at 176. The appellate court's function is to determine if the arbitration proceedings have been

fundamentally fair. *Id.* The standard of review of arbitration procedures is whether a party to an arbitration has been denied a fundamentally fair hearing.⁵

DISCUSSION

Southern States's assignments of error with respect to the arbitration award go beyond those of Concrete Coatings and The Stained Floor in that they do not merely complain of the arbitration panel's rulings on law and fact; Southern States contends that the actions of the panel constituted prejudicial misconduct and an improper exercise of contractually granted authority. Such allegations, should they be true, would constitute a fundamentally unfair proceeding against Southern States. Louisiana Revised Statutes 9:4210(D) requires a court to vacate an arbitration award when the arbitrators exceed their powers or so imperfectly execute them that a mutual, final, and definite award upon the subject matter submitted was not made.

The arbitration panel exceeded its authority and prejudiced Southern States by violating its own scheduling order and allowing Southgate to make the contractual claim against Southern States after the deadline for doing so in the scheduling order had expired. These actions by the arbitrator come within La.R.S. 9:4210(D), which required the district court to vacate the award against Southern States in its entirety.⁶

CONCLUSION

All the parties in the instant case were bound by contract and court order to resolve their contractual disputes through arbitration by the AAA. Therefore, the rules of the AAA and not the court govern all procedure and

⁵ While other circuit courts have adopted a "manifest disregard for the law" as an additional basis for modifying or vacating an arbitration award, we have consistently and strictly adhered to the statutory standard established by La.R.S. 9:4210. *JK Developments, LLC v. Amtek of Louisiana, Inc.*, 07-1825, p. 5-6 (La. App. 1 Cir. 3/26/08), 985 So.2d 199, 202, *writ denied*, 08-0889 (La. 6/20/08), 983 So.2d 1276.

⁶ Since the arbitration award against Southern States can be vacated pursuant to La. R.S. 9:4210(D), the issue of peremption becomes moot and is unnecessary to discuss.

factfinding. The arbitration process, however, still must be fundamentally fair. Concrete Coatings and The Stained Floor were subject to those arbitration rules, and the awards against them were made accordingly. Southern States would also be bound to the AAA's rules if a matter against it were properly raised before the arbitration panel, but if the arbitration panel acts outside its scope of authority and makes an award, the award has no legal validity before the district court and must be vacated.

DECREE

The judgment of the 19th JDC is affirmed with respect to the awards in favor of appellees, Southgate Penthouses, LLC, and Southgate Residential Towers, LLC and against Concrete Coatings, Southern Division, Inc. and The Stained Floor, LLC. The judgment is reversed with respect to the award in favor of the appellees and against Southern States Plumbing, Inc. Costs of the appeal regarding Concrete Coatings is assessed to the appellant, Concrete Coatings, Southern Division, Inc. Costs of the appeal regarding The Stained Floor are assessed to the appellant, The Stained Floor, LLC. Costs of the appeal regarding Southern States are assessed to the appellees, Southgate Penthouses, LLC, and Southgate Residential Towers.

AFFIRMED IN PART, REVERSED IN PART.

**SOUTHGATE PENTHOUSES, LLC
AND SOUTHGATE RESIDENTIAL
TOWERS, LLC**

**FIRST CIRCUIT
COURT OF APPEAL**

VERSUS

STATE OF LOUISIANA

MAPP CONSTRUCTION

2012CA 1242

 **CRAIN, J., concurring in the result.**

Southgate moved to confirm the arbitrator's award and supplied the documentation required by Louisiana Revised Statutes 9:4214. The subcontractor agreement with Concrete Coatings was filed in connection with the motion to confirm and requires arbitration. *See, M & R Drywall, Inc. v. MAPP Construction, LLC*, 09-0898 (La. App. 1 Cir. 8/24/09) (unpublished writ action), *writ denied*, 09-2079 (La. 11/25/09), 22 So. 3d 167; *M & R Drywall, Inc. v. MAPP Construction, LLC*, 09-0943 (La. App. 1 Cir. 8/24/09) (unpublished writ action), *writ denied*, 09-2079 (La. 11/25/09), 22 So. 3d 168. Section 4214 does not require proof of a court order ordering participation in the arbitration proceedings. Concrete Coatings did not move to vacate the arbitration award pursuant to Louisiana Revised Statutes 9:4213, and the record does not support any of the grounds for vacating an arbitration award set forth in Louisiana Revised Statutes 9:4210. Accordingly, I concur in affirming the judgment confirming the arbitration award against Concrete Coatings.

Additionally, I concur in affirming the judgment confirming the arbitration award against The Stained Floor, and reversing the judgment as to Southern States.