NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3279-09T2
A-3280-09T2

WASHINGTON TOWNSHIP
BOARD OF EDUCATION,

Plaintiff-Appellant,

v.

SAL ELECTRIC, INC.,

Defendant-Respondent.

SAL ELECTRIC, INC.,

Plaintiff-Respondent,

v.

WASHINGTON TOWNSHIP
BOARD OF EDUCATION,

Defendant-Appellant.

Argued November 10, 2010 - Decided May 4, 2011

Before Judges Fuentes, Gilroy and Ashrafi.

On appeal from the Superior Court of New Jersey, Chancery Division, Morris County, Docket Nos. C-173-09 and C-160-09.

Philip E. Stern argued the cause for appellant (Adams Stern Gutierrez & Lattiboudere, LLC, attorneys; Mr. Stern, of

counsel; Mr. Stern and Adam S. Herman, on the brief).

Stephen Paul Winkles argued the cause for respondent (Tesser & Cohen, attorneys; Mr. Winkles, of counsel and on the brief).

PER CURIAM

These two appeals arise out of an arbitrator's award in a school construction contract dispute between the Washington Township Board of Education (the Board) as the owner and Sal Electric, Inc. (SEI) as the prime electrical contractor. The Board appeals from two January 21, 2010 orders that confirmed the arbitration award entered in favor of SEI and dismissed its complaint seeking to vacate the award.[1] We affirm on both appeals.

I.

On September 7, 2007, SEI filed a demand for binding arbitration with the American Arbitration Association (AAA) pursuant to that entity's construction industry's dispute resolution procedures. Under its demand, SEI not only sought payment of monies owed by the Board under the construction contract, but also interest and delay damages. On September 28, 2009, the arbitrator entered an award in favor of SEI in the amount of $372,020.09, representing the balance owed of

[1] We consolidated the appeals by order of June 24, 2010.

$66,884.90 on the contract; interest of $20,346.19; and delay damages of $284,789.

On October 28, 2009, SEI filed a complaint seeking to confirm the arbitration award. On December 1, 2009, the Board filed a complaint seeking to vacate the award. Although the two matters were not formally consolidated, the trial court heard oral argument on both matters on January 21, 2010. At the conclusion of argument, the court entered the two orders from which the Board appeals. The order entered under Docket No. C-160-09 confirmed the arbitration award, granted pre-judgment interest from September 28, 2009, and awarded SEI attorney fees of $1,195.25 for the enforcement of the award. The order entered under Docket No. C-173-09 denied the Board's application seeking to vacate the award. Subsequent to the Board filing its two notices of appeal, the parties entered into a consent order under which the Board paid SEI those portions of the arbitration award relating to the balance owed on the contract claim and accrued interest. Because the Board does not challenge the award of attorney fees, the only remaining issue on appeal pertains to the trial court's confirmation of the arbitration award concerning the delay damage claim.

II.

We discern the following facts from the documents submitted in arbitration. In 2003, the Board publicly advertised for bids for the construction of a new elementary school. The bid proposal was divided into multiple prime contracts, including: general construction, structural steel, plumbing and fire protection, mechanical, and electrical. The Board awarded the electrical contract to SEI.

On April 27, 2004, notice-to-proceed letters were sent to each of the prime contractors on the project. In June 2004, the Board and SEI entered into a standard American Institute of Architects (AIA) form contract, wherein SEI would receive $1,993,570.00 for its timely completion of electrical work on the project. The contract set August 1, 2005, as the substantial completion date.

Additionally, the contract between the parties incorporated by reference AIA document A201/CMa-1992, entitled "General Conditions of the Contract for Construction," (the Rider). Article I, subsection 1.1.3 of the Rider defined "the Work" as:

> the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, material, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations.

Article 4, section 7, of the Rider addressing "Claims and Disputes," provided in pertinent part:

> 4.7.1. Definition. A claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract . . . .
>
> 4.7.2 Decision of Architect. Claims . . . shall be referred initially to the Architect for action as provided in paragraph 4.8. A decision by the Architect . . . shall be required as a condition precedent to arbitration . . . of a Claim between the Contractor and Owner as to all such matters arising prior to the date final payment is due . . . . The decision by the Architect in response to a Claim shall not be a condition precedent to arbitration . . . in the event . . . the Architect has not received evidence or has failed to render a decision within agreed time limits [or] has failed to take action required under Subparagraph 4.8.4 within 30 days after the Claim is made [or] 45 days have passed after the Claim has been referred to the Architect . . . .
>
> 4.7.3. Time Limits on Claims. Claims by either party must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice.

Article 4, section 4.7.8 of the Rider, addressing "Claims for Additional Time," provided in relevant part:

> 4.7.8.1 If the Contractor wishes to make [a] Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work.
>
> . . . .
>
> 4.7.8.3 If any Prime Contractor is delayed in the progress of the Work at any time by the Owner, Architect, Construction Manager or other Prime Contractor, due to the incorporation of any major changes to the Work, the relative Prime Contractor shall not assert any claim regarding the same to any of these parties and the relative Prime Contractor's sole remedy shall be limited to an extension to the time, without cost, of completion in the amount deemed to be reasonable by the Architect and Construction Manager.

Article 4, section 4.8 of the Rider, governing "Resolution of Claims and Disputes," provided in relevant part:

> 4.8.1 The Architect will review Claims and take one or more of the following preliminary actions within ten days of receipt of a claim: (1) request additional supporting data from the claimant, (2) submit a schedule to the parties indicating when the Architect expects to take action, (3) reject the Claim in whole or in part, stating reasons for rejection, (4) recommend approval of the Claim by the other party or (5) suggest a compromise.

Finally, Article 8, section 3 of the Rider, governing "Delays and Extensions of Time," provided:

> 8.3.1. If the Contractor is delayed at any time in progress of the Work by an act or neglect of the Owner's own forces, Construction Manager, Architect, any of the other Contractors or any employee of them, . . . or other causes beyond the Contractor's control, . . . or by other causes which the Architect . . . determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.
>
> 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Paragraph 4.7
>
> 8.3.3 This paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

The project encountered several substantial delays. The general contractor, Chanree Construction Co. Inc. (Chanree), anticipated starting site work on May 11, 2004. However, it could not obtain a building permit because the soil conservation authority had not approved the site drawings. The underlying issue concerned how water would drain onto an adjacent farmland. The issue caused a delay of about eight weeks, but was eventually resolved with work commencing on July 6, 2004.

The initial delay in commencing the project caused a cascade of other delays. A major problem was that because the

steel erection did not begin until December 8, 2004, it was not completed within the usual six-week time frame due to "freezing temperatures, icy unsafe conditions and snowfalls." As a result, several delays ensued including that SEI could not install its major electrical panel because there were no watertight rooms. Chanree's vice president noted in a letter detailing these problems that he "firmly believe[d] that the delay to this project [was] not the fault of [anyone] involved with the project, it's just the fact that there were some unforeseen items that occurred, which were uncontrollable by the [Board] and the contractors."

On multiple occasions, SEI documented by correspondence the delays it was experiencing throughout the project. For example, by letter dated August 5, 2004, SEI indicated that it could not continue the electrical installation without coordination drawings from the mechanical contractor. This letter was addressed to Epic Management, Inc. (Epic), the construction manager for the project, and the Board's architect was among those copied on the letter.

On August 5, 2004, SEI wrote Epic inquiring about the status of the formal construction schedule, indicating that it "need[ed] time to review, make comments, coordinate and schedule

[its] work and then sign off." The architect was copied on this correspondence.

On September 22, 2004, SEI responded by letter to a revised construction schedule proposed by Chanree, stating that:

> [b]ased on the events over the past six months that have delayed this project, under the present circumstance, [we cannot] agree and sign off on this schedule. An extension of time is needed and any associated costs for the extension must be reviewed and approved under a delay claim. Please advise.

SEI's letter was sent to Epic, and the architect was among those copied. By letter dated October 1, 2004, Chanree indicated that SEI and another contractor had misinterpreted the schedule, and that the proposed early finish date was September 30, 2005, not September 25, 2005.

Thereafter, on October 20, 2004, SEI requested in its letter to Epic to document a sixteen-day delay in beginning underground slab deck work. The letter indicated that SEI "hope[d] this time [could] be made up over the course of the project without any impact on [its] progress, production and costs." Moreover, the letter indicated that SEI would "continue to document any delays and/or problems along the timelines set forth in the construction schedule. . . . to protect the interests of [its] position come the summer months of 2005."

Again, the architect was copied on this letter, along with other contractors and the Board.

On November 3, 2004, SEI sent a letter to Epic advising that due to the various delays, it would be forced to pay additional wages to union electricians because of a scheduled wage increase. As such, SEI informed Epic that it would be "requesting the additional monies due to the wage rate increase for all time after the original completion date." The architect was copied on the letter.

On June 24, 2005, SEI sent Epic a letter advising that "[d]ue to the delays in completion of the electrical room per the original schedule [it] [had] incurred extra costs in the reconsignment of the gear to [its] warehouse and the reshipment to [its] site." The letter quoted the exact costs, attaching one invoice and indicating that another invoice would be provided. This letter was addressed to Epic, and the architect was again copied.

On June 24, 2005, SEI sent Epic a letter asking how to proceed with a generator representative who, because of the delays, wanted a 30% increase in costs before he would release certain equipment. Again, this correspondence was copied to the architect.

Shortly thereafter, by letter dated July 8, 2005, SEI informed Epic that under the construction schedule, it was to provide temporary power and light through February 17, 2005, at which time the permanent power source would be turned on, and the Board would be charged for the electric usage. However, due to the project delays, the permanent power source had not yet been turned on. As a result, SEI was still providing temporary power and light sources and being charged for it. The letter indicated that SEI had paid all electrical charges including those for February 2005, but that it would no longer be responsible for those charges beyond that date. Again, the architect was copied on this correspondence.

On September 15, 2005, SEI wrote Epic, indicating that it was "aggressively proceeding" with the installation of all finishing devices in order to achieve the final completion date. It also stated that some of the light fixtures required a stem and canopy attached to a ceiling tile, and that the ceiling tile still needed to be installed. Furthermore, it noted that if it was requested to halt work in certain areas, "there [would] be an additional cost to return at a later date for installation." This correspondence was copied to a Board member, as well as the architect. Notwithstanding SEI's numerous letters, the record

is devoid of evidence that SEI received responses from either Epic or the architect.

Although the revised substantial completion date had been pushed back to December 2, 2005, this date was not met. On February 21, 2006, SEI ceased work on the project. The final certificate of occupancy for the School was issued on July 17, 2006.

On April 17, 2007, SEI filed a claim with the Board for damages.[2] Because the parties failed to resolve the claim, the matter proceeded to arbitration in September 2007. On September 28, 2007, the arbitrator issued an award of $372,020.09 without reasons stated in favor of SEI.

In October 2009, SEI filed a verified complaint seeking to confirm the arbitration award. In response, the Board filed a verified complaint in November 2009, seeking to vacate the award. The Board's complaint asserted that the arbitrator exceeded his powers. The Board contended that SEI's claim was not only untimely filed under the terms of the contract, but also that delay damages were prohibited by the contract.

The two matters were jointly argued on January 21, 2010. The trial court concluded that the arbitrator's award should stand in light of its limited scope of review applicable to such

[2] This document is not included in either party's appendix.

awards. Accordingly, the court granted SEI's application to confirm the arbitration award pursuant to N.J.S.A. 2A:23B-22, and denied the Board's application to vacate the award.

III.

On appeal, the Board argues that the trial court erred in confirming the arbitration award, contending the award was violative of N.J.S.A. 2A:23B-23. Specifically, the Board argues that the court should have vacated the award determining that it was procured by "undue means" contrary to N.J.S.A. 2A:23B-23(1). The Board contends that the arbitrator ignored: 1) "subsection 4.7.3 of the contract Rider, which required any and all claims by [SEI] to be filed with the Board within twenty-one (21) days"; and 2) the no damages for delay clause contained in subsection 4.7.8.3 of the Rider, contending the provision is a complete bar to plaintiff's claim. The Board also asserts that the arbitrator exceeded his powers pursuant to N.J.S.A. 2A:23B-23a(4).

Judicial review of an arbitration award is limited. Fawzy v. Fawzy, 199 N.J. 456, 470 (2009). On appeal from a trial court's decision denying a motion to vacate an arbitration award, our review is de novo. Del Piano v. Merrill Lynch, Pierce, Fenner & Smith Inc., 372 N.J. Super. 503, 507 (App. Div.

2004), certif. granted, 183 N.J. 218, certif. dismissed as improvidently granted, 195 N.J. 512 (2005).

In New Jersey, arbitration is a favored method of resolving disputes between parties. Malik v. Ruttenberg, 398 N.J. Super. 489, 494-95 (App. Div. 2008). The primary purpose of arbitration is to reach a final disposition "'in a speedy, inexpensive, expeditious and perhaps less formal manner.'" Fawzy, supra, 199 N.J. at 468 (quoting Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981)). Arbitration can only attain those goals "if judicial interference with the process is minimized; it is, after all, meant to be a substitute for and not a springboard for litigation." Ibid. Because an arbitration award is presumed valid, Del Piano, supra, 372 N.J. Super. at 510, a party "seeking to vacate [an arbitration award] bears a heavy burden." Ibid.

"'Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. [They] can be corrected or modified only for very specifically defined mistakes as set forth in [N.J.S.A. 2A:24-9].'" Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 358 (1994) (quoting Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 548-49 (1992) (Wilentz, C.J., concurring)). The Court also determined that "in rare

circumstances a court may vacate an arbitration award for public policy reasons." Id. at 364-65. This "heightened judicial scrutiny" is generally limited to review of "certain arbitration awards that sufficiently implicate public policy concerns." Weiss v. Carpenter, 143 N.J. 420, 429 (1996). For example, a court may apply the public policy exception when considering a motion to vacate an arbitration award rendered in a public-sector arbitration proceeding. Tretina Printing, supra, 135 N.J. at 364.

Private arbitration proceedings are governed by the Revised New Jersey Arbitration Act of 2003 (the Act), N.J.S.A. 2A:23B-1 to -32. The Act contains specific provisions governing appeals from arbitration awards. Fawzy, supra, 199 N.J. at 469-70. For example, the Act sets forth the standard governing a court's confirmation of an arbitration award, N.J.S.A. 2A:23B-22, as well as the court's vacation of an award, N.J.S.A. 2A:23B-23a. The former statute provides: "After a party to an arbitration proceeding receives notice of an award, the party may file a summary action with the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to [N.J.S.A. 2A:23B-20 or 2A:23B-24] or is vacated pursuant to [N.J.S.A. 2A:23B-23]." N.J.S.A. 2A:23B-22. The latter statute directs a court

to vacate an arbitration award only upon finding of one or more of six grounds:

> (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;
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> (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 [N.J.S.A. 2A:23B-15] so as to substantially prejudice the rights of a party to the arbitration proceeding;
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> (4) an arbitrator exceeded the arbitrator's powers;
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> (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to [N.J.S.A. 2A:23B-15c] not later than the beginning of the arbitration hearing; or
>
> (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in [N.J.S.A. 2A:23B-9] so as to substantially prejudice the rights of a party to the arbitration proceeding.
>
> [N.J.S.A. 2A:23B-23a.]

Here, the record does not contain any evidence that the award was procured by fraud, corruption or misconduct. Acknowledging that, the Board contends the award was procured by

"undue means" because the arbitrator ignored SEI's failure to comply with the contract time requirements for making a claim for delay damages. In support of this contention, the Board cites to subsection 4.7.3 of the Rider, which requires a claim to be made in writing, "within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later." The Board asserts that the various letters written by SEI from August 2004 through September 2005 do not constitute a valid claim under the contract, and that the only valid claim asserted was filed "on April 17, 2007, fourteen (14) months after [SEI] left the jobsite." The trial court rejected this argument and so do we.

The phrase "undue means" contained in N.J.S.A. 2A:23B-23a(1) "ordinarily encompasses a situation in which the arbitrator has made an acknowledged mistake of fact or law or a mistake that is apparent on the face of the record." Office of Emp. Relations v. Commc'ns Workers of Am., 154 N.J. 98, 111 (1998); see also Liberty Mut. Ins. Co. v. Open MRI of Morris & Essex, L.P., 356 N.J. Super. 567, 580 (Law Div. 2002) (vacating an arbitration award on finding from the face of the award that the arbitrator mistakenly failed to apply New Jersey law in

deciding the issue in dispute although obligated to do so by the rules of arbitration).

The Board's argument that the arbitrator misconstrued SEI's contractual obligation to provide notice of its delay damage claim within twenty-one days "after the claimant first recognizes the condition giving rise to the [c]laim[s]" does not constitute "an acknowledged" mistake of fact, nor does it constitute a mistake that is "apparent on the face of the record." Office of Emp. Relations, supra, 154 N.J. at 111. Thus, we reject the Board's argument that the award was procured by "undue means." We determine that the Board's challenge to the arbitrator's implied determination that SEI fulfilled its contractual notice obligations is beyond a court's scope of review. See Empire Fire & Marine Ins. Co. v. GSA Ins. Co., 354 N.J. Super. 415, 421 (App. Div. 2002) (holding that where an appeal arises from a private sector arbitration, not a public sector arbitration, and the parties did not agree to the contrary, the judicial "scope of review does not encompass errors of law or facts").

What is more, we conclude that SEI fulfilled its notice obligations, if not literally, then by substantial compliance. The record contains evidence demonstrating that SEI had placed the Board, through Epic and the Board's architect, on notice of

the delays SEI was confronting and that the Board may be liable for additional costs caused by those delays. The record reveals that, from August 2004 through September 2005, SEI promptly documented in writing, through at least nine separate letters, the delays that it was experiencing. Many of the letters specifically indicated the effect of the delays on SEI's construction costs, such as increases in union wages and additional costs to supply temporary power beyond the scheduled completion date. Although some of the other letters did not include such information, the absence of the information was reasonable under the circumstances. For example, the October 20, 2004 letter documenting a sixteen-day delay in slab work indicated that the company did not know whether there would be any impact on its schedule and costs, but that it wanted to document such delay to protect its position later on. Lastly, because SEI had provided notice of the delays and its potential damage claim to the Board during the course of construction, we find no prejudice to the Board in addressing the claim.

The Board argues next that the arbitrator exceeded the scope of his powers by awarding delay damages to SEI because the contract between the parties expressly prohibits such damages. Specifically, the Board asserts that subsection 4.7.8.3 of the

Rider is a "no damages for delay" clause per se. We do not interpret that provision as such.

A trial court must vacate an arbitrator's award if the arbitrator exceeded his authority in making such award. N.J.S.A. 2A:23B-23(a)(4). An arbitrator exceeds his authority if he "disregard[s] the terms of the parties' agreement." Office of Emp. Relations, supra, 154 N.J. at 111.

A plain reading of that subsection indicates that it is not, as the Board maintains a "no damages for delay" clause per se. Rather, the provision only takes effect if the contractor is delayed "due to the incorporation of any major changes to the Work." (Emphasis added). The Board argues that the delays at issue constituted "major changes in the work." We disagree because the term "Work" is defined in subsection 1.1.3 of the Rider as "the construction and services required by the Contract Documents." We conclude that the "plain and ordinary meaning" of this language does not encompass delays unrelated to additional or modified services required by the contract documents. See M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002) ("Generally, the terms of an agreement are to be given their plain and ordinary meaning.").

Moreover, assuming that an ambiguity exists in the phrase "major changes to the work," the contract would be strictly

construed against the Board, as the drafter of the agreement. See Driscoll Constr. Co., Inc. v. State, Dep't. of Transp., 371 N.J. Super. 304, 318 (App. Div. 2004) ("[W]here an ambiguity exists in the contract allowing at least two reasonable alternative interpretations, the contract is to be strictly construed against the drafter. Public authorities, who choose contract terms when they invite contractors to bid on construction projects, are not exempt from this doctrine.").

In light of these principles of contract interpretation, we determine that the delays in this case do not constitute "the incorporation of . . . major changes to the work" under subsection 4.7.8.3 of the Rider. The record indicates that the delays at issue were not caused by additional work being performed, but rather, by other unforeseen circumstances, including a legal dispute with a neighboring farmer as well as weather conditions. Indeed, the general contractor's vice president noted in a March 1, 2005 letter that the delays were based on unforeseen events which were beyond the control of the Board and other contractors.

As a final matter, SEI argues that it should be awarded attorney's fees in defending this appeal pursuant to N.J.S.A. 2A:15-59.1, the Frivolous Litigation Act (FLA). We deny SEI's request on both procedural and substantive grounds.

Procedurally, an application for attorney's fees must be made by motion following the disposition of an appeal. R. 2:11-4. Substantively, we do not find the appeal frivolous; moreover, the FLA is not applicable to appeals. See Zavodnick v. Leven, 340 N.J. Super. 94, 103 (App. Div. 2001).

Affirmed.