

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1010-11T2

J & T BROTHERS, LLC,

Plaintiff-Appellant,

v.

MARK PACELLI t/a MCP  
CONSTRUCTION,

Defendant-Respondent.

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Argued May 23, 2012 - Decided July 5, 2012

Before Judges Axelrad and Sapp-Peterson.

On appeal from the Superior Court of New  
Jersey, Law Division, Somerset County,  
Docket No. L-1193-11.

I. Michael Heine argued the cause for  
appellant (Heine Associates, P.A.,  
attorneys; Mr. Heine, on the brief).

Respondent has not filed a brief.

PER CURIAM

Plaintiff, J & T Brothers, LLC, appeals from a September  
14, 2011 order of the Law Division denying its motion for  
correction and modification of the binding arbitration award or,  
in the alternative, vacation of the arbitration award and remand  
to the arbitrator. We affirm.

Plaintiff is a subcontractor who entered into an agreement with defendant, MCP Construction, LLP (MCP), a general contractor, to install exterior stucco as part of a renovation of a Days Inn hotel located in Plattsburgh, New York. Defendant, Mark Pacelli, executed the agreement on behalf of MCP. Although plaintiff had completed 99% of the work required under the contract and addenda, he claimed that MCP failed to make timely and full progress payments. He prepared a claim summary, which he submitted to MCP for \$58,057.91 for payment. When MCP failed to pay, plaintiff filed a demand for arbitration in accordance with the terms of the contract.

The matter proceeded to arbitration on January 5, 2011. Plaintiff testified and produced as a witness one of his employees, Ioan Vaida. Vaida testified that he "contracted with defendant personally," and he claimed that "[d]efendant used both his individual name, as well as the fictitious trade name 'MCP Construction,' on the executed Contract." In addition, he testified that all of his communications related to plaintiff's subcontracting work were through use of defendant's personal email address.

Pacelli, who was present at the hearing, was permitted to submit a responding statement at that time, over plaintiff's objection, despite having failed to comply with the arbitrator's

Management Order directing him to file a pre-hearing statement. Following the conclusion of the hearing, the arbitrator invited both parties to submit post-hearing documents. On February 1, 2011, the arbitrator awarded plaintiff \$58,057.91, the full amount sought by plaintiff. In the written decision, the arbitrator stated that the first issue to be resolved was the "true identify of [r]espondent":

Claimant alleges the true [r]espondent is Mark Pacelli individually, trading as MCP Construction. Mr. Pacelli, in his post-hearing submittal, insists that the contract was made between two companies, and that "nowhere is there a personal agreement between the parties[.]" Although [r]espondent alleges "MCP Construction Group, LLC is a legal LLC with an employer identification number, who files taxes appropriately[,]" there is simply no proof in the record of that fact. However, when [c]laimant prepared the agreement, the customer was described as "MCP Construction[.]" Thus, there is a clear ambiguity as to the identity of the real party in interest. Since it is well settled under New Jersey law that ambiguities must be construed against draftsmen, I must conclude that the true respondent is MCP Construction Group, LLC, hereinafter referred to as [r]espondent.

On February 4, 2011, plaintiff's attorney submitted an application to the arbitrator for "Reconsideration of Certain Limited Findings of Fact and Conclusions of Law," asserting that defendant should have been determined to have been personally liable for the amount due. The application was denied without

comment. Plaintiff filed a second application for reconsideration on March 17, 2011, and once again, on April 22, 2011, the application was denied, with notice to plaintiff that the arbitrator would "not consider any further requests for modification of the Award rendered in this matter."

On August 1, 2011, plaintiff filed a verified complaint in Superior Court seeking an order from the Law Division modifying the arbitration award or, alternatively, an order vacating the award and remanding to the arbitrator. The court issued an order to show cause the following day, directing defendant to show cause why final judgment should not be rendered for the relief sought. The relevant parts of the order directed that: (1) it be served on defendant personally or by mail within seven days, in compliance with Rule 4:67-3; (2) defendant file and serve any written response by September 2, 2011; and (3) if defendant failed to file and serve opposition to the order, "the application will be decided on the papers on the return date and relief may be granted by default[.]" Defendant failed to respond.

One or two days prior to the return date, the court notified plaintiff that no appearance was necessary, and on September 14, 2011, the court entered an order dismissing, with prejudice, "[p]laintiff's [m]otion for [c]orrection and

[m]odification of the binding [a]rbitration [a]ward," and "[p]laintiff's [m]otion to [v]acate and [r]emand the binding [a]rbitration [a]ward[.]"

Plaintiff filed its notice of appeal on October 28, 2011, and on that same date, the trial court issued an oral decision. In denying plaintiff's motion, the judge found: "The evidence does not weigh heavily on one side versus the other on the issue of whether MCP Construction was a fictitious company; and, therefore, I find no reason to overturn the arbitrator's award." The present appeal followed.

On appeal, plaintiff raises the following point for our consideration:

THE TRIAL COURT PLAINLY ERRED AND ABUSED ITS DISCRETION ON THE RETURN DAY OF AN ORDER TO SHOW CAUSE (OSC) (ISSUED UNDER [RULE] 4:67) BY DENYING NOTICED RELIEF (I.E. STATUTORILY AUTHORIZED MODIFICATION OF AN ERRONEOUS BINDING ARBITRATION AWARD) WHERE:

- 1) THE OSC WAS ISSUED ON THE FILING OF A[] COMPREHENSIVE DOCUMENTED VERIFIED COMPLAINT;
- 2) THE EXECUTED OSC EXPRESSED A *PRIMA FACI[E]* FINDING OF PLAINTIFF'S ENTITLEMENT TO THE RELIEF REQUESTED;
- 3) THE PROPERLY SERVED OSC NOTICED THE DEFENDANT THAT THE ARBITRATION AWARD WOULD BE MODIFIED OR VACATED IF OPPOSING CAUSE NOT SHOWN;

- 4) THE DEFENDANT FAILED TO OPPOSE THE APPLICATION;
- 5) THE COURT DISREGARDED THE UNOPPOSED VERIFIED ALLEGATIONS IN THE COMPLAINT;
- 6) THE COURT, PRIOR TO THE RETURN DAY O[F] THE OSC, DID NOT DISCLOSE TO PLAINTIFF ITS INTENTION TO DISREGARD THE GOVERNING RECORD, TO REPUDIATE ITS OWN ORDER, AND TO DEPRIVE PLAINTIFF OF AN *EX PARTE* HEARING, AS PROVIDED UNDER RULE; AND
- 7) THE COURT MADE ERRONEOUS FINDINGS CONTRARY TO THE UNOPPOSED ALLEGATIONS IN THE MOVING RECORD.

The New Jersey Arbitration Act (Act), N.J.S.A. 2A:23B-1 to -32, as revised in 2003, L. 2003, c. 95, § 1 TO -32, which governs this matter, grants arbitrators extremely broad powers, N.J.S.A. 2A:23B-15, and "extends judicial support to the arbitration process subject only to limited review." Barcon Assocs. v. Tri-Cnty. Asphalt Corp., 86 N.J. 179, 187 (1981) (interpreting the predecessor Act, N.J.S.A. 2A:24-1 to -11). In that regard, an arbitration award is presumed valid. Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super. 503, 510 (App. Div. 2004), certif. granted, 183 N.J. 218, appeal dismissed by 195 N.J. 512 (2005).

To construe otherwise would undermine the "the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes[.]" Fawzy v. Fawzy, 199 N.J. 456, 470 (2009). Consequently, arbitration awards may be vacated only if:

(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;

(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 section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act 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 section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

[N.J.S.A. 2A:23B-23(a).]

In this case, plaintiff originally sought relief pursuant to N.J.S.A. 2A:23B-24a(2) and 2A:23B-23(3) and (4). In this appeal, however, plaintiff only addresses relief pursuant to N.J.S.A. 2A:23B-24a(2). Therefore, we deem any claimed error pursuant to N.J.S.A. 2A:23B-23(3) and (4) abandoned. See Houseman v. Dare, 405 N.J. Super. 538, 540 n.1 (App. Div. 2009) (stating a claim not pursued on appeal is abandoned).

N.J.S.A. 2A:23B-24a(2) provides that

[u]pon filing a summary action within 120 days after the party receives notice of the award . . . the court shall modify or correct the award if . . . the arbitrator made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted.

Relief under this statutory provision contemplates a modification or correction of the award, which will not affect the merits. Plaintiff's arbitration demand was filed against MPC Construction, and even if plaintiff intended to include Pacelli, as argued before the arbitrator, that position was rejected. The arbitrator found "there is a clear ambiguity as to the identity of the real party in interest." Therefore, the arbitrator resolved the ambiguity against the drafter of the agreement, in this case plaintiff. Thus, modifying or correcting the award to reflect that the award is against defendant individually would affect the merits. Consequently,



the motion judge correctly concluded there was no basis to modify the arbitration award.

We find no merit to plaintiff's contention that it was entitled to relief because defendant did not oppose the order to show cause. An application, though unopposed, must nonetheless have a legal basis for which relief may be granted. See Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 302 (App. Div. 2009) ("[E]ven in an uncontested motion, the judge must consider whether undisputed facts are sufficient to entitle a party to relief.").


Likewise, the fact that the order mistakenly reflects that "plaintiff appears" and the motion judge also mistakenly concluded there were no other documents not containing the designation LLC when there were documents that did not contain the designation LLC are immaterial, as the critical issue is that the relief sought in the verified complaint was not one that could be accomplished "without affecting the merits" of the decision. N.J.S.A. 2A:23B-24a(2); see also Kimm v. Blisset, LLC, 388 N.J. Super. 14, 31 (App. Div. 2006) (noting that N.J.S.A. 2A:23B-24 "specifically excludes an attack on an award, either by way of application to the arbitrator or the court," on grounds of imperfection "if the claim of imperfection is

addressed to the merits of the award"), certif. denied, 189 N.J.  
428 (2007).

We have considered plaintiff's remaining arguments and deem  
them without sufficient merit to warrant discussion in this  
opinion under Rule 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION