NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2026-10T1

WITHUM, SMITH & BROWN,

Plaintiff-Respondent,

v.

COAST AUTOMOTIVE GROUP, LTD.
and TAMIM SHANSAB,

Defendants-Appellants.

Argued January 23, 2012 – Decided February 16, 2012

Before Judges Parrillo, Grall and Skillman.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-4301-10.

Geoffrey J. Hill argued the cause for appellants.

Michael J. Canning argued the cause for respondent (Giordano, Halleran & Ciesla, attorneys; Mr. Canning, of counsel and on the brief; Matthew N. Fiorovanti, on the brief).

PER CURIAM

Defendants, Coast Automotive Group, Ltd. (Coast) and Tamim Shansab (Shansab), appeal from a December 17, 2010 order of the Law Division confirming the entry of an arbitration award dated September 3, 2010, and a denial of a request to modify that

award dated September 27, 2010, in favor of plaintiff Withum Smith & Brown (WSB). We affirm.

By agreement executed on July 12, 2005, Coast retained WSB, a professional group of certified public accountants and consultants, as an expert in connection with its litigation against Universal Underwriters, the insurer of one of Coast's dealerships in Toms River. The dealership was located on premises leased from Shansab, and was damaged in a March 11, 2001 fire. Pursuant to the agreement, WSB was to examine documents and pleadings to determine the appropriate level of coverage by Universal; analyze the progression of damages resulting from the fire; and respond to various questions raised by the litigation, including Universal's alleged deviation from standard insurance practices.

WSB also agreed to bill on a monthly basis, "keep detailed records of time and expenses[,]" and make those records available for Coast's inspection upon request and reasonable notice. Coast, in turn, acknowledged that WSB would rely on its acceptance of the bill as "fair and reasonable" and of its obligation to pay if it did not object within twenty days of receipt of the bill. Bills were to be paid within thirty days of receipt, and WSB reserved the right to terminate or discontinue services if they were not paid pursuant to the terms

of the agreement. The parties also provided that all outstanding "fees" were to be paid in full prior to WSB's preparation for testifying at depositions. Lastly, the parties agreed "to participate in mediation and binding arbitration to resolve any and all fee-related disputes."

A dispute arose over fees when WSB submitted its first bill for payment after issuing its formal written report on July 29, 2005. Failing to resolve the matter, Coast filed suit in July 2006, asserting causes of action sounding in tort, breach of contract and the covenant of good faith and fair dealing. Its complaint alleged that the first bill included a total, "with no breakdown of hours"; WSB refused to provide documentation describing each hour billed; WSB failed to keep hourly billing records; the invoices WSB provided for its services were fraudulent in that they included double billings and billings for work that was not necessary or was not done; WSB wrongly accused Coast of being in breach of their retainer agreement; WSB wrongly demanded payment in an attempt to extract payment of a compromise amount, which WSB then wrongfully declined to accept; and WSB's conduct "placed [Coast's] litigation [with] [its] insurance carrier in great jeopardy."

WSB then sought an order compelling arbitration pursuant to the retainer agreement. The Law Division judge determined that

the parties' agreement to arbitrate applied to the fee dispute and that "any breach of contract or any breach of duty of good faith and fair dealing -- is part and parcel of the fee dispute." Thus, the judge's order of October 26, 2006, compelled arbitration in accordance with his decision.[1]

The next day, WSB filed its answer and a counterclaim against Coast, alleging breach of contract for non-payment, fraud and unjust enrichment. Thereafter, on motion by WSB, the judge dismissed Coast's claims for fraud, tortious interference with prospective economic advantage, estoppel, declaratory relief, breach of fiduciary duty and violations of the Consumer Fraud Act. The judge also determined, in orders dated May 4 and May 7, 2007, that Coast's claims for "damages flowing from the breach of the contract"[2] are "to be resolved through [arbitration,]" as should the claims asserted by WSB. By subsequent order of August 1, 2008, the judge compelled arbitration and appointed an arbitrator.

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[1] The judge had also determined that the tortious acts alleged were not subject to the arbitration agreement.

[2] On July 6, 2007, Coast amended its complaint to include a claim for damages incurred as a consequence of WSB's professional malpractice. That count also seeks consequential damages including damages based upon Coast's alleged "unfavorable" settlement with Universal.

Coast appealed and we affirmed save for exempting from arbitration Coast's affirmative claims for consequential damages incurred as a consequence of the quality of WSB's performance or the lack of good faith and fair dealing, Coast Automotive Group, Ltd. v. Withum Smith & Brown, 413 N.J. Super. 363, 365, 371 (App. Div. 2010).[3] We concluded that "any dispute related to fees earned, billed and owed under the terms of the agreement as well as all defenses to payment based on WSB's breach of its contractual duties" was to be arbitrated based on the ordinary meaning of the language employed. Id. at 370.

Consequently, the matter proceeded to arbitration in August 2010, after which the arbitrator awarded WSB the full amount of its invoice plus costs and attorney's fees totaling $49,096.55. He reasoned that Coast knew or should have known that WSB would review the significant amount of material provided to it and that such review would take a significant amount of time, and also that WSB knew or should have known that the July 31, 2005 invoice was unsatisfactory "without any backup and breakdown of hours worked." Notwithstanding this, the arbitrator concluded that WSB "performed work that had to be done; it delivered the

[3] There is a parallel appeal now pending, in which Coast is challenging a grant of summary judgment to WSB on the issue of consequential damages resulting from WSB's refusal to continue as Coast's expert. Coast Automotive Group v. Withum Smith & Brown, Docket No. A-1173-10.

product; its client got the benefit of that product" and that "[i]ts lapses did not constitute a breach of its contract."

Shortly thereafter, WSB moved for modification and correction of the award under N.J.S.A. 2A:23B-20, claiming that the arbitrator had inadvertently failed to rule on WSB's claim for contractual interest under the retainer agreement and had failed to include the cost of the court reporting services and transcripts. The arbitrator denied WSB's request, concluding that the award was "reaffirmed and remains in full force and effect." Finding no basis for a challenge and clarifying solely for the purpose of addressing the limited issue raised, the arbitrator stated that the "[a]ward was based on the theory of quantum meruit" because "Coast had the benefit of the bargain in accepting and using the expert report[,]" and that it was "reaffirmed and remains in full force and effect[.]"

WSB moved to confirm the award in the Law Division and Coast opposed the relief, arguing the award should be vacated or, in the alternative, modified. The judge confirmed the arbitration award in his December 17, 2010 order.

On appeal, defendants argue the arbitrator exceeded his authority by basing the award on the theory of quantum meruit, since no such claim had been pled or referred to arbitration. We find no merit to this argument.

The New Jersey Arbitration Act (Act), N.J.S.A. 2A:23B-1 to -32, as revised in 2003, L. 2003, c. 95, 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 Assoc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981) (interpreting predecessor Act, N.J.S.A. 2A:24-1 to -11). Generally, an arbitration award is presumed valid. Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super. 503, 510 (App. Div. 2004).

As noted, "the scope of review of an arbitration award is narrow[,]" lest "the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes . . . be severely undermined." 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;
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> (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 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, the only statutory basis argued by defendants for vacating the award is that the arbitrator exceeded his authority. N.J.S.A. 2A:23B-23(a)(4). In this regard, "[a]lthough an arbitrator in the private sector has broad discretion when authorized by the parties in determining legal issues and, when so authorized may even decide issues irrespective of the law, he cannot disregard the terms and conditions of the agreement." PBA Local 160 v. Twp. of North Brunswick, 272 N.J. Super. 467, 476 n.5 (App. Div.), certif. denied, 138 N.J. 262 (1994). "Whether in the public or private sector, it is the agreement between the parties that essentially

empowers the arbitrator and his function is to comply with the authority given him by the parties." Ibid. In other words, because an arbitrator's powers are derived from the express terms of an agreement to arbitrate, he exceeds those powers by disregarding the terms of that agreement. Office of Emp. Relations v. Commc'ns Workers of Am., 154 N.J. 98, 112 (1998); PBA Local 160, supra, 272 N.J. Super. at 476 n.5. Thus, while "'arbitration is traditionally described as a favored remedy, it is, at its heart, a creature of contract.'" Fawzy, supra, 199 N.J. at 469 (quoting Kimm v. Blisset, LLC, 388 N.J. Super. 14, 25 (App. Div. 2006), certif. denied, 189 N.J. 428 (2007)).

Here, the parties expressly agreed to arbitrate "any and all fee-related disputes" and that is precisely and undeniably what the arbitrator in this instance did, namely, render an award resolving the parties' fee dispute. By arguing that the arbitrator based his award on a legal theory neither pled nor referred to arbitration, defendants confuse the arbitrator's authority to render an award with the basis for that award. Resolution of the fee dispute was well within the four corners of the parties' agreement, which solely defines the scope of the arbitrator's authority, irrespective of the legal basis for his decision. PBA Local 160, supra, 272 N.J. Super. at 476 n.5. As such, in this instance, absent fraud, undue means, or arbitrator

partiality, corruption or misconduct prejudicing the rights of a party to the arbitration proceeding — and defendants here make no such claim — the arbitrator's decision is binding and not reviewable for any error of law. Ibid.

Even if otherwise, we are satisfied the basis for the arbitrator's award was contemplated and argued by the parties. Indeed, the complaint and counterclaim both pled the other's breach of contract. Significantly, WSB sought and was awarded the full amount of its unpaid fees under the agreement, highly suggestive of a finding that WSB materially satisfied its contractual requirements. But even more explicit is the arbitrator's express finding that WSB did not breach the agreement, lending support to the assumption that whatever WSB's lapses thereunder, they were minor and did not bar recovery of the entire amount of its fee incurred in the preparation of the expert report.

Defendants nevertheless rely on the arbitrator's use of the term "quantum meruit" in his denial of WSB's post-arbitration application for contractual service fees. This reliance is misplaced. The arbitrator's post-arbitration disposition is not challenged on appeal. More importantly, nowhere in the actual arbitration award does the arbitrator even mention "quantum meruit[,]" much less predicate his award of expert fees to WSB

on any theory sounding in implied, rather than express, contract. Thus, defendants' attempt to import any different rationale for the arbitrator's decision is belied by both the fundamental nature of WSB's claim for relief and the precise stated premise of the arbitration award.

That said, we nevertheless emphasize that "quantum meruit" is a form of quasi-contractual recovery, Starkey, Kelly, Blaney & White v. Estate of Nicolaysen, 172 N.J. 60, 68 (2002); Weichert Co. Realtors v. Ryan, 128 N.J. 427, 437 (1992); Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 108 (App. Div. 1966), and one that, in this instance, was well suggested by WSB's pleadings to give adequate notice to defendants of this alternate theory. In any event, as we have previously mentioned, irrespective of the legal or equitable theory employed, Tretina Printing, Inc. v. Fitzpatrick & Assoc., 135 349, 358 (1994); Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208, 217 (1979); Cap City Products Co. v. Louriero, 332 N.J. Super. 499, 504 (App. Div. 2000), the arbitrator acted well within his statutory power in resolving the fee dispute and rendering an award to WSB.

We have considered defendants' remaining arguments and deem them without sufficient merit to warrant discussion in this

opinion, Rule 2:11-3(e)(1)(E), especially in light of our essential holding.

Affirmed.