XCNOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2428-12T4

MERION CONSTRUCTION
MANAGEMENT, LLC,

Plaintiff-Appellant,

v.

KEMRON ENVIRONMENTAL
SERVICES, INC.,

Defendant-Respondent.

KEMRON ENVIORNMENTAL
SERVICES, INC.,

Plaintiff-Respondent,

v.

MERION CONSTRUCTION
MANAGEMENT, LLC,

Defendant-Appellant.

Argued October 2, 2013 – Decided March 13, 2014

Before Judges Sapp-Peterson and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2787-12.[1]

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[1] Merion's verified complaint against Kemron in Middlesex County (Docket No. L-6940-12) and Kemron's verified complaint against Merion in Mercer County (Docket No. L-2442-12) were consolidated by a Consent Order to Transfer and Consolidate before Judge

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Bruce L. Phillips (Venzie, Phillips & Warshawer, P.C.) of the Pennsylvania bar, admitted pro hac vice, argued the cause for appellant (Venzie, Phillips & Warshawer, P.C., attorneys; Mr. Phillips, of counsel and on the brief).

David H. Pikus, argued the cause for respondent (Bressler, Amery & Ross attorneys; Mr. Pikus, on the brief; Gerd W. Stabbert, Jr., on the brief).

PER CURIAM

Merion Construction Management, LLC ("Merion") appeals from Law Division orders entered in favor of its subcontractor, Kemron Environmental Services, Inc. ("Kemron"), which confirmed an arbitration award, as modified by the arbitrator and awarded counsel fees and costs to Kemron and denied its motion to vacate that award. We reverse.

On May 13, 2009, Merion entered into a subcontract with Kemron to perform environmental remediation work for a project owned by the Sayreville Economic Redevelopment Agency. The subcontract agreement provided that any disputes between the parties would be submitted to the American Arbitration Association ("AAA"). After Kemron substantially performed under the subcontract and Merion failed to make payment on invoices it

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Francis on November 9, 2012. The actions were consolidated at Docket No. 2787-12 in the New Jersey Superior Court for Mercer County.

submitted, Kemron instituted arbitration proceedings claiming entitlement to damages equal to or exceeding $4,442,804.65, including $950,953.65 in approved claims and direct billings.

The arbitration proceedings were conducted over five days in March 2012. Upon its conclusion, and after submission of post-hearing briefs, the arbitrator issued the "Award of Arbitrator," awarding Kemron the net sum of $873,758.56 and dismissing Merion's counterclaims. Paragraph 10 of the Award stated: "Merion is liable to Kemron on Kemron's claim for payment on its invoices/application for payment 9, 10 and 11 in part of (sic) the amount of $462,480.00." Paragraph 15 stated: "Any other claims in this matter not specifically mentioned above are denied." The concluding two sentences of the Award stated: "This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied."

By letter addressed to the AAA dated and transmitted on July 9, 2012, Kemron's attorney requested that the arbitrator "reconsider[]" the Award to "rule on a circumscribed portion of the Claim which he did not specifically determine, most likely as an oversight," and that the Award "be amended to $1,118,261.99, reflecting the aggregate of $244,503.43 for the two unaddressed items." The letter identified the two

unaddressed items as, (1) "the retainage amount, which totals $198,006.43," and (2) "the amount awarded for [Kemron's] Invoice [Number Eight]" which counsel stated "is inexplicably short by $46,497.00." Additionally, counsel expressed, "[b]ecause the award purports to approve [Kemron's] receivables . . . there is no logical or factual reason to deny the retainage," and, "once again, since the award, by its terms, was intended to compensate [Kemron] fully for Invoice [Number Eight], this amount of $46,497.00 should be added to the award."

Through its attorney, Merion objected to any modification of the Award on the basis that the arbitrator was without authority to reconsider or amend the Award. By correspondence dated July 13, 2012, Kemron's attorney characterized the matters for which Kemron sought further review as "matters that . . . fall squarely within the reasonable definition of a 'technical or computation error.'" In further response, to this position, Merion's attorney, in a July 13, 2012 email, stated that he wanted "to make it clear that the amount by which Kemron seeks to have the Award amended was disputed during the evidentiary hearings conducted in this case." He additionally stated:

> I did not, and will not here, address the "merits" of the dispute because Kemron did not show that there is any "clerical, typographical, technical or computational errors in the award" such as would permit the Arbitrator to consider modifying the

> Award pursuant to Rule R-48. The hearing(s) and evidentiary record in this case were officially closed by the Arbitrator on June 6th, and the Arbitrator "is not empowered to redetermine the merits" of Kemron's claim which was fully and finally decided by the Award.

Following review of the correspondence between the parties' counsel, the arbitrator requested Kemron to provide "[s]pecific transcript and exhibit references [] to support K[emron]'s position." Kemron complied with this request. Thereafter, the Association transmitted to the parties the arbitrator's "Disposition of Application for Modification of Award," in which the arbitrator stated:

> The Arbitrator made two computational errors and the Award must be modified. First, undisputed invoices 1 through 8 were not paid in full; a 5% retainage in the amount of $198,006.43 should have been included in the computation of the Award. Second, invoice 8 was only partially paid and the corrected amount for item 10 of the Award should be increased by $46,497.00 for a total of $508,977.
>
> The net sum of the Award to Kemron from Merion is corrected for those computational errors and modified from $873,758.56 to $1,118,261.99.
>
> In all other respects my Award dated July 2, 2012 is reaffirmed and remains in full force and effect.

Kemron filed a verified complaint in Mercer County Superior Court, moving to confirm the modified Award. Merion filed a

separate action in Middlesex County Superior Court, seeking to partially vacate the modified Award. The actions were consolidated in Mercer County. Following oral argument the trial court denied Merion's motion to partially vacate the award and granted Kemron's motion confirm the modified Award. The court noted the deference to which such awards must be given and "clearly" found

> what [the arbitrator] did here with respect to the five percent issue of retainage in Invoice Number 8 was in my mind a computational change, and he was authorized to do that. It wasn't in any way a substantive change or a reexamination, or to look at the rule, a redetermination of the merits of what he decided, so respectfully, I'm going to deny the application by Merion, and grant it for Kemron.

The court also granted Kemron's motion for post-arbitration attorneys' fees and costs, and subsequently issued an order awarding $18,315 in counsel fees and $1,667.75 in costs pursuant to N.J.S.A. 2A:23B-25. The present appeal followed.

Except as set forth in a written arbitration agreement entered into by the parties, the terms of the Uniform Arbitration Act, N.J.S.A. 2A:23B—1 to —32 ("Act"), control the conduct of civil arbitrations in this state. See Fawzy v. Fawzy, 199 N.J. 456, 469 (2009) (noting that the statute "sets forth the details of the arbitration procedure that will apply unless varied or waived by contract") (citing N.J.S.A. 2A:23B—

4); see also Minkowitz v. Israeli, 433 N.J. Super. 111, 133 (App. Div. 2013). "It is well-settled that New Jersey's strong public policy favors settlement of disputes through arbitration." Id. at 131 (citing Hojnowski v. Vans Skate Park, 187 N.J. 323, 343 (2006)). "'The object of arbitration is the final disposition, in a speedy, inexpensive, expeditious, and perhaps less formal manner, of the controversial differences between the parties.'" Hojnowski, supra, 187 N.J. at 343 (quoting Carpenter v. Bloomer, 54 N.J. Super. 157, 162 (App. Div. 1959)).

Given the strong public policy favoring consensual arbitration, courts apply a "presumption in favor of the validity of an arbitral award," and "the party seeking to vacate it bears a heavy burden." Minkowitz, supra, 433 N.J. Super. at 136 (quoting 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, 195 N.J. 512 (2005)). "'Otherwise, the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes, would be severely undermined.'" Ibid. (quoting Fawzy, supra, 199 N.J. at 470).

That said, under the Act, there are limited circumstances where an arbitrator's award may be vacated. N.J.S.A. 2A:23B-

23(a) sets forth six grounds upon which an arbitrator's award may be vacated of which only subsection (a)(4) is pertinent to our discussion. It provides that an arbitration award may be vacated where an arbitrator has exceeded his powers. N.J.S.A. 2A:23B-23(a)(4). An arbitrator exceeds his powers when under the guise of computational or technical errors he modifies an award to include claims not addressed in the original award, even if the failure to do so was due to inadvertence, where the award expressly denied all claims for relief not otherwise mentioned. Wein v. Morris, 194 N.J. 364, 385 (2006).

The two unaddressed items in the award, the $198,006.43 retainage amount and the $46,497 shortage reflected on Invoice Number Eight, were characterized by Kemron's attorney in his July 9, 2012 letter as "most likely and oversight." The arbitrator, however, in issuing the modified Award, characterized the omissions as "computational errors." The latter characterization may have been reasonable and acceptable, had the award referenced these two specific claims. The original Award of Arbitrator, however, stated the following under "Award:"

> 1. Under the terms of the contract documents, Merion is not liable to Kemron for delay damages.
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> 2. Merion is not liable to Kemron for its claim for "Fee on Total Cost[.]"

3. Merion is not liable to Kemron for its claim for "Savings Within GMP (Profit)[.]"

4. Merion is not liable to Kemron for its claim for "Interest on Outstanding[.]"

5. Merion is not liable to Kemron for its claim for "Spector Lease for Field Trailer Area[.]"

6. Merion is liable to Kemron on Kemron's claim for "Costs Associated with Union Labor Delay in Signing PLA" in the amount of $28,377.56.

7. Merion is liable to Kemron on approved Change Order Requests 7, 8, 12, and 15 for excess stump removal, spraying, stump tie downs and wetland piping in the amount of $141,040.00.

8. Merion is liable to Kemron for removal of storm debris in the amount of $162,020.00.

9. Merion is liable to Kemron for contaminated PDM soil removal in the amount of $31,181.00.

10. Merion is liable to Kemron on Kemron's claim for payment on its invoices/application for payment 9, 10, and 11 in part of the amount of $462,480.00.

11. Merion is liable to Kemron for winter seeding in the amount of $48,660.00.

12. Kemron is not liable to Merion for its claim for repayment of "Backfill Delay[.]"

13. Kemron is not liable to Merion for its claim of $500,000.00 for Kemron's alleged failure to remedy defective work and honor its maintenance bond and warranty obligation. Kemron shall honor its

> maintenance bond and warranty obligations as required by the contract documents.
>
> 14. Kemron is not liable to Merion for "Audit Costs[.]"
>
> 15. Any other claims in this matter not specifically mentioned above are denied.

The net sum of the above mentioned items equals $873,758.56, which is what the arbitrator originally awarded Kemron.

Notably absent from the award is any reference to "retainage amount" or "Invoice Number Eight." It is undisputed that an arbitrator is permitted under AAA rules to "correct any clerical, typographical, technical or computational errors in the award." AAA Rule 48. He is not, however, permitted to amend the Award to add claims not previously included in the award and recast those claims as computational errors. Wein, supra, 194 N.J. at 385. Given the clear language of Paragraph 15 that "[a]ny other claims in this matter not specifically mentioned above are denied," the trial court erred in concluding the change in the Award represented a computation change. Ibid.

Finally, because the trial court erred in confirming the modified Award, the counsel fees and costs awarded to Kemron must also be vacated as such an award was, pursuant to N.J.S.A. 2A:23B-25(c), premised upon Kemron being the prevailing party in

the post-arbitration contested judicial proceeding to confirm the arbitration award.

Reversed and remanded. We do not retain jurisdiction.