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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION- CIVIL

DOCKETED

OCT 21 2024

H. FOOTELL
COMMERCE PROGRAM

TOUCH UP PAINTING & CONSTRUCTION, LLC,	:	March Term 2024
	:	
	:	No. 2677
Petitioner,	:	Commerce Program
	:	
v.	:	
	:	
W.S. CUMBY, INC.,	:	Control Number 24061883
	:	
Respondent.	:	

ORDER

AND NOW, this 21st day of October 2024, upon consideration of Petitioner Touch Up Painting & Construction, LLC's Petition to Vacate Arbitration Award, the Response in Opposition, and the attached Opinion, it hereby is **ORDERED AND DECREED** as follows:

1. The Petition to Vacate the Arbitration Award is **DENIED**.
2. Pursuant to 42 Pa. C. S. § 7314 (d) the Arbitration Award is **CONFIRMED**.

BY THE COURT:


PAULA A. PATRICK, J.

ORDOP-Touch Up Painting



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Respondent.	:	

OPINION

Before the court is Petitioner Touch Up Painting & Construction LLC (“TUP”) Petition to Vacate an Arbitration Award. For the reasons discussed below, the Petition to Vacate is denied and the Arbitration Award is affirmed.

BACKGROUND

The Contract

On November 20, 2017, TUP, a painting subcontractor, and W.S. Cumby (“Cumby”), a general contractor, executed a subcontract for painting and wall covering services at Penn Wynn House- the Dane (“Project”) located at 2201 Bryn Mawr Avenue in Philadelphia, PA which is owned by CP Acquisitions 30 LLC. (Docket (Dkt.) 6-7-24, Motion to Vacate Exhibit “2” Mechanics Lien Claim) The initial subcontract amount was \$690,800. (Id.) Change orders from June 7, 2018 through December 13, 2018 totaling \$554,200.00 increased the amount owed under the subcontract to \$1,245,000. (Id.)

Cumby paid TUP \$494,761.50 for work performed before December 31, 2018, but did not pay TUP for any subcontract work performed after December 31, 2018. (Id.) TUP alleged it is owed \$548,625.50 for unpaid work performed in January, February and March 2019 plus retainage

and ticket work. (Id.) Cumby alleged TUP was not owed any money because during January to March 2019, TUP was issued four separate formal notices of default and fourteen separate change orders for poor workmanship, numerous safety violations and corrective actions that other trades were forced to perform on TUP's behalf. (Dkt. 6-7-24, Motion to Vacate, Exhibit "4", Answer, Affirmative Defenses and New Matter to Mechanics Lien Claim) On March 15, 2019, Cumby terminated TUP from the project. (Id. Exhibit "2") Pursuant to §§ 9.2 and 9.3 of the Subcontract, Cumby informed TUP that it would perform the remainder of TUP's scope of work and would back charge TUP for the costs incurred in doing so. (Id. Exhibit "4") Cumby hired Zebby Sulecki, Inc. ("Zebby") to complete TUP's work and to correct defective work performed by TUP for a contact sum of \$616,000.00.

The Mechanics Lien

On June 9, 2019, TUP filed a mechanics' lien action in the Court of Common Pleas of Philadelphia County captioned *Touch Up Painting & Construction LLC v. W. S. Cumby et al.* 1907M0006 (Lien Action) in the amount of \$548,625.50 for the unpaid work at the property performed in January, February and March 2019. Cumby filed an answer with affirmative defenses and new matter alleging that TUP failed to complete the work in accordance with the project schedules and in a workmanlike manner. The counterclaim was for a sum in excess of \$800,000. The parties participated in discovery and thereafter agreed to arbitrate their claims through the American Arbitration Association ("AAA"). (Dkt. 6-7-24 Motion to Vacate and Dkt. 7-1-24 Answer to Motion to Vacate ¶7). On September 9, 2022, the parties filed a Joint Motion to Stay Litigation pending resolution of the arbitration. On October 4, 2022, the Court granted the motion to stay the case. (Id. ¶8).

The Arbitration

On November 10, 2022, TUP filed an arbitration demand with AAA. (Dkt. 6-7-24, Exhibit “6” Demand). The damage claim submitted was for \$548,625.50. (Id.) The case was captioned *Touch Up Painting & Construction, LLC v. W. S. Cumby, Inc., American Arbitration Association* case no. 01-22-0004-7494. Cumby filed its answer and counterclaim to the demand and sought damages in the amount of \$800,000. (Id. Exhibit “7”)

Stanley Edelstein was selected as the Arbitrator. (Dkt. 7-1-24 Answer to Motion to Vacate, Exhibit “2”, “4”) Cumby is represented by Cohen Seglias in this action (Dkt. 6-7-24 Motion to Vacate and Dkt. 7-1-24 Answer ¶ 15) Edelstein disclosed that on at least one occasion within the last seven years, Cohen Seglias referred him a client in a matter in which Cohen Seglias had a conflict. (Dkt. 7-1-24 Answer to Motion to Vacate, Exhibit “8”) Edelstein certified that he did not believe that those dealings would affect his ability to decide the case fairly and impartially. (Id.) Edelstein was not disqualified as the Arbitrator by the parties.

On April 6, 2023, the Arbitrator conducted a preliminary conference with the parties. (Dkt. 6-7-24 Motion to Vacate and Dkt. 7-1-24 Answer ¶ 17) The parties agreed to a Modified Standard Award with limited reasoning. (Dkt. 6-7-24, Exhibit “9”). The Arbitration took place from September 18-23, 2024 at the Arbitrator’s office in Philadelphia, PA. (Id. Exhibit “10”) The Arbitrator did not impose time limits on either party’s case. TUP and Cumby presented witnesses who were subject to cross examination. TUP was permitted a full day for rebuttal. On November 10, 2023, the parties submitted closing briefs and proposed forms of award. (Dkt. 7-1-24, Answer to Motion, Exhibits “5”, “6”)

On November 28, 2023, the Arbitrator reopened the hearing for the limited purpose of clarifying certain dollar amounts already in evidence, and not for the purpose of rearguing the case.

(Dkt. 6-7-24 Motion to Vacate, Exhibit “17”) During a conference call with the parties on January 5, 2024, the Arbitrator asked Cumby to address three separate issues related to its damages calculations, specifically, (1) the damage calculation contained in Exhibit D-154 in the amount of \$1,115,559, (2) the breakdown for payments made to Zebby for TUP work in the amount of \$692,196.47 and (3) an explanation as to why various Zebby Change Orders fell within TUP’s scope of work (Change Orders Nos. 5,6,7,8,11,15,16,17,18,19,20, 21, 23, 24, 24, 31,32-41). (Id., Exhibit “18”) On January 10, 2024, Cumby sent the Arbitrator an email addressing each of these issues. (Id.) On January 11, 2024, TUP responded to Cumby’s email and requested a further opportunity to respond. (Id., Exhibit “19”) On January 12, 2024, the Arbitrator permitted TUP to submit in writing arguments addressing items (1) and (2) only and for Cumby to submit a response if necessary. (Id., Exhibit “20”) The Arbitrator cautioned that the opportunity to submit a response was not to be used to add new evidence. (Id.) TUP submitted its written response to items (1) and (2) and Cumby submitted a reply. (Id., Exhibit “21” and “22”) The proceedings were closed.

The Award

On February 22, 2024, the Arbitrator issued a partial award, awarding damages to Cumby in the amount of \$43,457.69 and declared Cumby the prevailing party. (Dkt. 7-1-24 Answer to Motion to Vacate Exhibit “12”) The Partial Award included limited reasoning and a table which identified the numbers and formula used to calculate damages. (Id.) The Arbitrator also awarded Cumby attorney fees as the prevailing party. On May 10, 2024, after the parties submitted briefs on the question of attorney fees, the Arbitrator issued its final award. The award included attorney fees in the amount of \$168,445.69 for a total award of \$211,903.38. (Id. Exhibit “15”).

On June 7, 2024, TUP filed this petition seeking to vacate the Arbitration Award. Cumby responded to the petition and asked that the Award be affirmed. The petition is now ripe for disposition.

DISCUSSION

It is undisputed that this petition and response is governed by the standards for common law arbitration. The standard of review for a common law arbitration is very limited:

The award of an arbitrator in a nonjudicial arbitration which is not subject to (statutory arbitration) or [to] a similar statute regulating nonjudicial arbitration proceedings is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.¹

The petitioner must demonstrate by clear, precise and indubitable evidence that it was denied a hearing, or that fraud, misconduct, or some other irregularity on the part of the arbitrator, or the parties involved, caused an unjust, inequitable or unconscionable award.² In an arbitration proceeding, an irregularity refers to the process employed in reaching the result of the arbitration, not to the result itself.³ The arbitrators are the final judges of both law and fact, and an arbitration award is not subject to reversal for a mistake of either.⁴

TUP argues that the Final Award should be vacated because (1) the Arbitrator failed to consider Cumby's certified business records and admissions made by Cumby's Vice President, Mr. O'Brien and its counsel that it was paid in full for the replacement subcontractor's work; (2)

¹ 42 Pa.C.S. § 7341.

² *Chervenak, Keane & Co., Inc. (CKC Associates) v. Hotel Rittenhouse Assoc., Inc.*, 477 A.2d 482 (1984).

³ *Lowther v. Roxborough Memorial Hosp.*, 738 A.2d 480, 486 (Pa. Super.1999) citing *Press v. Maryland Casualty Co.*, 324 A.2d 403, 404 (Pa. Super. 1974).

⁴ *Runewicz v. Keystone Ins. Co.*, 383 A.2d 189, 191-92 (Pa. 1978).

the Arbitrator refused to permit TUP to respond to Cumby's supplemental submission post hearing pertaining to Item 3 addressing the replacement subcontractor's change orders; (3) the Arbitrator considered the replacement change orders as damages without any supporting testimony; and (4) the Award was flawed and contrary to the proceedings. As discussed below, these grounds do not warrant vacating the Arbitration Award.

1. The evidence considered by the Arbitrator is not proper ground for vacating a common law arbitration.

TUP contends that the Arbitrator failed to consider Cumby's certified business records and the admissions of its Vice President and Counsel that the owner was paid in full for the replacement subcontractor's work. This is not a ground for vacating a common law arbitration award. The arbitrators are the final judges of both law and fact, and an arbitration award is not subject to reversal for a mistake of either.⁵ The evidence considered by the Arbitrator in reaching his decision is not subject to review by this Court and therefore the petition to vacate is denied on this ground.

Notwithstanding the foregoing, if TUP contends that the Arbitrator denied it a hearing because it failed to permit it from presenting evidence that Cumby was paid in full by the owner for the replacement contractor's work, the record does not support this contention. As admitted by TUP, the record before the Arbitrator included evidence that Cumby was paid by the owner for the replacement contractor's work. In fact, in addition to oral testimony from witnesses, the Arbitrator also received TUP's post hearing supplemental brief on the issue of payment. (Dkt. 6-7-24 Motion to Vacate, Exhibits "19" and "21"). Unlike the plaintiff in *Smaligo v. Fireman's Fund Ins. Co.*, 247 A.2d 577 (Pa. 1968) where the Arbitrator failed to grant counsel a continuance to secure expert testimony, TUP did present evidence during the hearing of repayment. Similarly, TUP was not

⁵ *Runewicz v. Keystone Ins. Co.*, 383 A.2d 189, 191-92 (Pa. 1978).

denied a hearing like the plaintiff in *Andrew v. CUNA Brokerage Services, Inc.*, 976 A.2d 496 (Pa. Super. 2009) whose case was dismissed based on the statute of limitations before any testimony was received.

Here, the theory advanced by TUP was presented on more than one occasion and rejected by the Arbitrator not based on procedural irregularities or fraud, but on witness credibility and evidence. (Dkt. 7-1-24, Answer to Motion, Exhibit “15”) The Arbitrator alone was the final judge of the evidence submitted. While TUP may disagree with the Award, it assumed the risks by agreeing to arbitrate its dispute that the Arbitrator would not find in its favor. The lack of a record and TUP’s conclusory claims of fraud, irregularity and deprivation of a hearing, give credence to the finality of common law arbitration awards absent evidence of a defect in the process.⁶

2. The Arbitrator’s refusal to permit TUP to respond to Item 3 of Cumby’s Supplemental Submission did not deprive TUP of hearing.

TUP contends that it was deprived of a hearing because the Arbitrator did not give it an opportunity to address Item (3) in Cumby’s email dated January 10, 2024 post hearing. The evidence does not support this contention. First, TUP did respond to Cumby’s email, including Item 3 as evidenced by its January 11, 2024, email. (Dkt. 6-7-24, Motion to Vacate, Exhibit “19”) The interpretation of TUP’s response to Item 3 in its January 11, 2024, email by the Arbitrator is not subject to review by this Court, nor is it necessary. A response from TUP was not necessary as Item (3) specifically pertained to Cumby’s claim for damages. In the end, TUP benefitted from the inquiry as Cumby withdrew a majority of the change orders. The Arbitrator, as evidenced by the Final Award, was satisfied with the explanations. (Dkt. 7-1-24, Answer to Motion to Vacate,

⁶ *Snyder v. Cress*, 791 A.2d 1198 (Pa. Super.2002).

Exhibit 15 footnote 2) Additional argument or evidence was not necessary and TUP was not deprived of a hearing.

3. TUP was not deprived of a hearing on the replacement change orders as damages.

TUP contends it was deprived of a hearing because the Arbitrator independently reviewed the replacement subcontractor's change orders without any supporting witness testimony and deprived it of an opportunity to cross-examine a witness on the evidence. Once again, there is no evidence to support this contention. TUP was given an opportunity to question and cross examine witnesses including Cumby's Project Executive, Cumby's foreman and Zebby's project manager. In addition to cross-examining witnesses, TUP was given an opportunity to offer rebuttal and could have questioned the witnesses on the validity of the subcontractor's change orders.

Moreover, the Arbitrator's Final Award dispels TUP's contention. In footnote 2 of the Final Award, the Arbitrator stated the following:

Although I questioned a number of change orders to ZSI [Zebby] that Respondent sought to claim against Claimant, Respondent withdrew all except three of them and gave sufficient justification for the three that it did not withdraw. But the deduct change orders that Respondent asserted against Claimant have a different outcome. Respondent presented the deduct change orders listed in this table, and gave testimony as to each. Claimant disagreed with a number of them, but taking the exhibits and testimony together, Respondent carried the day with the exception of Change Orders 10 (no evidence) and 24. Change Order 24 was for clean up, based on a ticket from All Done that clearly included work that covered more contractors than Claimant. With no evidence as to how Respondent allocated the total charge, the backcharge against Claimant is rejected. Taking all of the evidence on the deduct change orders, along with a lack of credibility by Claimant's principal, Mehmet Yelmaz on some of those change orders, the Change Orders other than 10 and 24 will stand. (Dkt. 7-1-24, Answer to Motion to Vacate, Exhibit 15 footnote 2)

Additionally, footnote 3 of the Final Award states:

...Claimant presented testimony and charts to the extent that it had completed more work than Respondent acknowledged. Claimant's evidence was inconsistent with documentary evidence, and its case was hampered by a lack of credible testimony by Mr. Yelmaz. ...much of his testimony was not credible. ...while Claimant strongly argued that he had

completed floors that ZSI (Zebby) included in its work, given that claimant had delayed the Project and that Respondent needed to have all of the work completed reliably and on a timely basis, Respondent's decision to a scope of work by ZSI that included work on that (sic) Claimant says it had completed was not unreasonable; in situations involving painting work, it can be more expensive to survey incomplete or improperly completed work, price each portion and then pay to complete the work on a portion-by-portion basis than it would be to repaint entire areas. In this instance, Claimant's lack of credible testimony on material issues weighed heavily against Claimant. I do not suggest that Mr. Yelmaz was lying, and it is likely that he believed much of what he testified to. But the testimony was inconsistent with other evidence and with what happens in commercial construction industry in Philadelphia. Moreover, Mr. Yelmaz's testimony reflected an unbounded confidence in Claimant's capabilities that did not fit with reality. That confidence may have led to Claimant taking on far more work on this Project (especially the change order almost doubling the Contract Sum) that it had the experience or staff to manage. But having agreed to that scope of work, Claimant was bound to perform consistent with the requirements of the Subcontract. ((Dkt. 7-1-24, Answer to Motion to Vacate, Exhibit 15 footnote 3)

Clearly, the Arbitrator did not rely upon the Supplemental Submission made by Cumby post hearing for his decision. TUP was given an opportunity to present evidence and cross-examine witnesses on the replacement change orders but, in the end, the Arbitrator did not find TUP's evidence convincing.

4. The Award on its face is not flawed, totally irregular and contrary to the evidence.

While courts may vacate an arbitration award where it is manifestly irregular and contrary to the facts in the proceedings to prevent unjust, inequitable and unconscionable award, the Final Award here is not flawed, irregular or contrary to the evidence. The Final Award provides the parties with a detailed explanation as to how the award of damages was computed. The tables set forth the values in issue and are footnoted with explanations of the values. The Arbitration proceeded exactly as agreed by the parties with a Modified Standard Award with limited reasoning.

In an arbitration proceeding, an irregularity refers to the process employed in reaching the result of the arbitration, not to the result itself.⁷ The instant case does not implicate due process

⁷ *Press v. Maryland Casualty Co.*, 324 A.2d 403, 404 (Pa. Super. 1974).

concerns. Here, TUP was given a hearing and is merely dissatisfied with the Award. Any errors of law and fact, and the unavailability of appellate review of such errors, are the risks of arbitration.

CONCLUSION

For the forgoing reasons, the Petition to Vacate the Arbitration Award is Denied. The Arbitration Award is Confirmed.

BY THE COURT:



PAULA A. PATRICK, J.