

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0902

KING COMPANY, LIMITED PARTNERSHIP

VERSUS

MBD CONSTRUCTION COMPANY, INC. AND JTS
CONSOLIDATED PROPERTIES, L.P.

DATE OF JUDGMENT: OCT 29 2010

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 571,688, DIVISION D, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE JANICE CLARK, JUDGE

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BEFORE: KUHN, PETTIGREW, AND KLINE, JJ,¹

Disposition: DISTRICT COURT JUDGMENT REVERSED; ARBITRATOR'S SEPTEMBER 3, 2009 AWARD MODIFIED AND, AS MODIFIED, CONFIRMED; JUDGMENT RENDERED; MOTION TO SUPPLEMENT GRANTED.

¹ The Honorable William F. Kline, Jr. is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

Kuhn, J.

King Company, Limited Partnership (“King”) appeals the district court’s judgment that denied its motion to confirm an arbitration award and, further, vacated the award on the grounds that a “definite award upon the subject matter submitted was not made” pursuant to La. R.S. 9:4210. We reverse the district court’s judgment. Additionally, we modify the arbitrator’s September 3, 2009 award, and as modified, we confirm it and render judgment in accordance with its terms.

I. PROCEDURAL AND FACTUAL BACKGROUND

King filed suit, naming MBD Construction Company, Inc. (“MBD”) and JTS Consolidated Properties, L.P. (“JTS”), as defendants.² King’s petition alleged that: 1) it had executed written subcontracts with MBD for two construction projects in Baton Rouge, one referenced as the “Corporate Atrium” project and the other referenced as the “Acadian Centre” project; 2) King satisfactorily provided the services, labor, equipment, and materials required by these contracts on immovable property owned by JTS; and 3) MBD has been paid by JTS for the construction projects, but MBD has failed to pay King any amounts due under the subcontracts.³ King sought to recover \$162,650.00, plus interest, costs, and attorneys’ fees.

Thereafter, MBD, JTS, and King agreed to submit their disputes arising from the two construction projects to arbitration. The arbitrator’s September 3,

² King also named Travelers Casualty and Surety Company of America (“Travelers”) as a defendant, but Travelers is not involved in this appeal and it was not named in the arbitration award.

³ Our reference to King’s petition includes both its original and amending petitions.

2009 award indicates that an evidentiary hearing was held “where all parties ... submitted documentation, testimony of witnesses and other arguments and proofs” related to the matter. The award further states that “The Hearing was recessed for the filing of additional information and was declared closed by the undersigned arbitrator on August 14, 2009.” The award ordered JTS and MBD to pay the following sums, in pertinent part:

1. **JTS shall pay to MBD** the following amounts for the listed Projects:

Acadian Centre Project

JTS shall pay to MBD of the remaining contract balance due from the Owner-JTS in the amount of \$128,169.40 **less** Liquidated Damages payable by MBD for 71 days of delay in the amount of \$31,750.00, and, **less** \$53,625.00 awarded for completion of the flooring for this Project, and

JTS shall pay to MBD the contractual interest for late Progress payments for Pay Applications 1, 2, 3, 4, 5, and 6 in the amount of \$1,159.74.

Corporate Atrium Project

JTS shall pay to MBD of the remaining balance of the contract amounts payable from the Owner-JTS in the amount of \$128,554.90 **less** Liquidated Damages payable by MBD for 74 days of delay in the amount of \$33,250.00, and

JTS shall pay to MBD the contractual interest due for late Progress payments for Pay Application 1, 2, 3, 4, 5, and 6 in the amount of \$9,369.46.

Total amount payable and due by JTS to MBD for Acadian Centre (\$43,954.14) and for Corporate Atrium (\$104,674.36) is \$148,628.50.

2. **King is awarded the following amounts against MBD and JTS, *In Solido*,** for the below listed Projects:

Acadian Centre Project

MBD/JTS shall pay to King the remaining balance of the subcontract amounts payable from Contractor-MBD the (sic) in the sum of \$ 56,750,00 plus Judicial Interest in the amount of \$8,945.51 for a **total amount of \$65,695.51.**

Corporate Atrium Project

MBD/JTS shall pay King the remaining balance of the subcontract amounts payable from Contractor-MBD the (sic) in the sum of \$105,900.00 plus Judicial Interest in the sum of \$16,693.03, for a **total amount of \$122,593.03**; and

MBD/JTS shall pay to King the amount of \$3000.00 for work done by King for non-scope expenditures related to the carpet “transition strips.[”]

Total amount payable and due by MBD/JTS to King for Acadian Centre (\$65,695.51) and for Corporate Atrium (\$125,593.03) is \$191,288.54 plus legal Prompt Payment Penalties in amount of \$8920.56 and reasonable attorneys fees of \$10,000.000. (sic)

The award further provided that all amounts awarded were due and payable “on or before the 30th day of September” and further specified that “there after (sic) interest at the legal rate of interest established by the Office of Financial Institutions for the State of Louisiana is AWARDED on all unpaid balances until the same are paid in full.” Otherwise, the award ordered that \$12,000 in administrative fees and expenses of the arbitration were to be borne equally amongst MBD, JTS, and King. Compensation and expenses of the arbitrator in the amount of \$11,003.12 was also to be borne equally amongst these parties.

In response to motions filed in the arbitration proceeding, the arbitrator signed a “Modified Award” on November 23, 2009. The “Modified Award” did not affect any of the amounts ordered to be paid to or by King; the modifications pertained to the award insofar as it set forth JTS’s obligations to MBD. The parties do not dispute that the “Modified Award” was a correction of the September 3, 2009 award in that the original award transposed the amounts attributable to each construction project. The “Modified Award” ordered JTS to

pay MBD the same amounts that it had been ordered to pay in the initial award but with respect to the opposite construction project.

On January 28, 2010, King filed a motion to confirm the arbitrator's award pursuant to La. R.S. 9:4209. JTS filed an opposition memorandum, wherein it raised the following argument, in pertinent part:

[T]he arbitrator ordered [JTS] to pay MBD a total amount of \$148,628.50 for both projects. This award included a reduction of liquidated damages assessed against MBD and a further reduction of \$53,625.00 for "completion of the flooring for [the Corporate Atrium] Project."

However, the arbitrator ordered [JTS] and MBD, *in solido*, to pay King a total amount of \$191,288.54. The deduction of \$53,625.00 for "completion of the flooring for [the Corporate Atrium] Project" was not deducted from the amount awarded to King, the flooring contractor. As a result of this oversight and because the award to King was granted *in solido*[,] [JTS] is now bound to pay an amount granted to it as a reduction in order to complete the unfinished flooring work.

MBD also filed an opposition memorandum, wherein it urged the following, in pertinent part:

The arbitrator deducted from the amount owed to MBD, \$53,625.00, for completion of the flooring. The arbitrator refused, neglected or forgot to pass on this deduction to the sole flooring subcontractor on this job, King. This is illogical and unfair. This allegation of flooring work not being completed should have been handled in one of two ways: first, the deduction for the flooring work should have been passed on from the general contractor, MBD, to the flooring subcontractor, King; second, is the more probable scenario, namely that the flooring work was completed and there never should have been a deduction of the \$53,625.00 from the amount owed to MBD.

It is respectfully submitted that this Court modify the arbitration award by eliminating the deduction of \$53,625.00 from the arbitrator's award. In other words, MBD should be awarded its contract balance less liquidated damages. In turn, King should get the amount that was awarded to it.... Either the work was completed or it was not. If it was completed then MBD should not have this amount deducted from its contract balance. If it was not completed then this

amount should be passed on to the flooring subcontractor who should have completed it.

King argued in a reply memorandum that the arbitrator did not allow MBD to pass along any delay damages to King based in part on MBD's failure to produce certain documents. It asserts that the arbitrator presumably made his ruling regarding the alleged defective work on that same basis, *i.e.*, that sufficient documentation was not provided to support a deduction against the award in King's favor.

The district court held a hearing on the motion, during which counsel presented their respective arguments, but no evidence was introduced. After the arguments were presented, the district court commented, "I do not have [a record of the arbitration proceedings] and I can not (sic) conduct a record review. But it appears that the arbitrators (sic) may have so imperfectly executed these proceedings that it just defies logic." After taking the matter under advisement, the district court rendered judgment on March 11, 2010, stating, in pertinent part, "The court is of the opinion that the award should be vacated. It appears that the arbitrator acted imperfectly in executing its powers so that a definite award was not made on the subject matter." On March 31, 2010, the trial court signed a judgment denying King's motion to confirm the arbitration award and further vacating the arbitration award.⁴

⁴ King also filed by facsimile transmission a supplemental memorandum in support of his motion. It filed a motion to supplement this court's record on appeal with the Nineteenth Judicial Clerk of Court's March 10, 2010 confirmation of that filing. At oral arguments before this court, JTS and MBD both represented they had no opposition to King's motion. Therefore, we grant King's motion to supplement the record in this regard.

King has appealed the trial court's judgment, urging that the trial court erred: 1) in vacating the arbitrator's award because it had no legal basis on which to do so, and 2) in failing to confirm the award.

II. ANALYSIS

Louisiana Civil Code Articles 3099 through 3132 comprise Title XIX, entitled "Of Arbitration." Parties who have submitted their differences to arbitrators must establish their claims in the same manner as in a court of justice, by producing written or verbal evidence. La. C.C. art. 3112. Once an arbitrator fixes an award, the award in order to be put in execution ought to be approved by the judge; but this formality is only intended to invest the award with a sufficient authority to ensure its execution and not to submit to the judge the examination of its merits, except in case an appeal is brought before him. La. C.C. art. 3129. A party who is not satisfied with the award may appeal from it. La. C.C. art. 3130. Once the arbitrator has given his award, he cannot retract it nor change any thing in it. La. C.C. art. 3131.

The applicable law governing confirmation of an arbitration award is set forth in The Louisiana Binding Arbitration Law, see Louisiana Revised Statutes 9:4201 *et seq.* Louisiana Revised Statutes 9:4209, provides, in pertinent part:

At any time within one year after the award is made any party to the arbitration may apply to the court in and for the parish within which the award was made for an order confirming the award and thereupon the court shall grant such an order unless the award is vacated, modified, or corrected as prescribed in La. R.S. 9:4210 and 9:4211.

The provisions of La. R.S. 9:4210 and 4211 limit the grounds on which an appeal from an arbitrator's decision may be taken. See *St. Tammany Manor, Inc.*

v. Spartan Bldg. Corp., 509 So.2d 424, 427 (La. 1987). Louisiana Revised Statutes 9:4210 addresses the grounds for vacating an arbitrator's award, as follows:

In any of the following cases the court in and for the parish wherein the award was made shall issue an order vacating the award upon the application of any party to the arbitration.

A. Where the award was procured by corruption, fraud, or undue means.

B. Where there was evident partiality or corruption on the part of the arbitrators or any of them.

C. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.

D. Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

Louisiana Revised Statutes 9:4211 delineates the following circumstances in which a district court has the authority to modify or correct an arbitrator's award:

In any of the following cases the court in and for the parish wherein the award was made shall issue an order modifying or correcting the award upon the application of any party to the arbitration.

A. Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

B. Where the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matters submitted.

C. Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order shall modify and correct the award so as to effect the intent thereof and promote justice between the parties.

Louisiana courts have strictly adhered to these statutory grounds as the exclusive and very limited authority for judicial modifications of arbitration awards. *JK Developments, L.L.C. v. Amtek of Louisiana, Inc.*, 07-1825 (La. App. 1st Cir. 3/26/08), 985 So.2d 199, 201, *writ denied*, 08-0889 (La. 6/20/08), 983 So.2d 1276.⁵ In *St. Tammany Manor, Inc. v. Spartan Building Corporation*, 509 So.2d 424 (La. 1987), our supreme court further specified that “[t]hose grounds do not include errors of law *or* fact,” which are insufficient to invalidate an award fairly and honestly made. *Id.* at 427. The underlying purpose of this limited scope of review is explained in *National Tea Co. v. Richmond*, 548 So.2d 930, 932-33 (La. 1989):

Because of the strong public policy favoring arbitration, arbitration awards are presumed to be valid. Errors of fact or law do not invalidate a fair and honest arbitration award. Therefore, misinterpretation of a contract by an arbitration panel is not subject to judicial correction. Judges are not entitled to substitute their judgment for that of the arbitrators chosen by the parties.

...

Arbitration is a substitute for litigation. The purpose of arbitration is settlement of differences in a fast, inexpensive manner before a tribunal chosen by the parties. That purpose is thwarted when parties seek judicial review of an arbitration award. (Citations omitted).

Further, a district court reviewing an arbitration award ordinarily does not sit in an appellate capacity to an arbitration panel, but confines its determinations to whether there exists one or more of the specific grounds for impeachment as

⁵ We also note that this circuit has not embraced the “jurisprudentially created” circumstance of “manifest disregard for the law” as an additional legal basis for modifying or vacating an arbitration award. *JK Developments, L.L.C.*, 985 So.2d at 202-03. Thus, we reject MBD’s contention to that effect.

provided for by statute. *MMR-Radon Constructors, Inc. v. Continental Ins. Co.*, 97-0159 (La. App. 1st Cir. 3/3/98), 714 So.2d 1, 5, *writ denied*, 98-1485 (La. 9/4/98), 721 So.2d 915. Additionally, the burden of proof is on the party attacking the arbitrator's award. *Firmin v. Garber*, 353 So.2d 975, 978 (La.1977).

In the instant case, we note initially that once the arbitrator had given his September 3, 2009 award, it had no authority to change it, and thus had no authority to issue the November 23, 2009 modified award. La. C.C. art. 3131. Therefore, our references to the arbitrator's award hereinafter are to his September 3, 2009 award.

Although MBD and JTS are not satisfied with the arbitrator's award, neither of them has filed an appeal, a motion or application to vacate the arbitrator's award, or a motion or an application to modify or correct the award. They have merely filed opposition memorandums to King's motion to confirm the arbitrator's award. However, in these opposition memorandums, both MBD and JTS prayed that the arbitrator's award be vacated or modified. Because they requested this particular relief, we will consider their oppositions as the requisite applications for vacating, modifying, or correcting the arbitrator's award.

Addressing the provisions of La. R.S. 9:4210, we find no basis for vacating the arbitrator's award. MBD and JTS make no contention of corruption, fraud, undue means, or partiality. La. R.S. 9:4210A & B. Neither MBD nor JTS have alleged misconduct or misbehavior by the arbitrator. La. R.S. 9:4210C. Likewise, they have not alleged that the arbitrator refused to hear evidence material to this controversy or that he exceeded his powers. La. R.S. 9:4210C & D. While the arbitrator's award is debatable in that it is not apparent why the flooring costs

were not deducted from the award in King's favor (since they were deducted from the award in MBD's favor), the district court did not have any of the evidence on which the arbitrator's award was based, and it acted improperly by substituting its judgment for that of the arbitrator chosen by the parties.

The district court sought to base its action on La. R.S. 9:4210D, reasoning that the award was not definite. A final and definite award "must both resolve all the issues submitted to arbitration, and determine each issue fully so that no further litigation is necessary to finalize the obligations of the parties under the award." *Holmes v. Orleans Parish School Bd.*, 698 So.2d 429, 436 (La. App. 4th Cir. 7/9/97), *writ denied*, 97-2102 (La. 11/14/97), 703 So.2d 630. MBD and JTS have not identified any outstanding issues; they have only expressed dissatisfaction with the manner in which the arbitrator resolved the issues presented to him. Thus, we conclude the arbitrator's award is final and definite. Based on the record before us, we find none of the grounds set forth in La. R.S. 9:4210 exist. Consequently, MBD and JTS failed to meet their burden of establishing grounds to vacate the arbitrator's award.

Next, we address the statutory grounds for modifying or correcting an arbitrator's award. MBD and JTS do not challenge the scope or the form of the arbitrator's award. La. R.S. 9:4211B & C. In its brief to this court, MBD urges that the deduction for the flooring work and the associated liquidated damages for not completing the flooring work should have been passed on from it to King. This argument does not relate to "an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property

referred to in the award.” La. R.S. 9:4211A.⁶ MBD and JTS simply seek a different and more favorable outcome on the merits than that set forth in the arbitrator’s award. At best, their arguments suggest an error of fact or law by the arbitrator, which this court has no authority to remedy. *St. Tammany Manor, Inc. v. Spartan Bldg. Corp.*, 509 So.2d at 427. Thus, we conclude that MBD and JTS have not established they are entitled to have the arbitration award modified to provide for a deduction in the amount they have been ordered to pay to King.

However, because the parties agree that the arbitrator’s award transposed the amounts attributable to each construction project in addressing JTS’s obligations to MBD, we find grounds for modifying the arbitrator’s September 3, 2009 award to correct this “evident material mistake in the description of ... property referred to in the award.” La. R.S. 9:4211A. Accordingly, we modify Paragraph 1 of the award to provide as follows:

1. JTS shall pay to MBD the following amounts for the listed Projects:

Corporate Atrium Project

JTS shall pay to MBD of the remaining contract balance due from the Owner-JTS in the amount of \$128,169.40 **less** Liquidated Damages payable by MBD for 71 days of delay in the amount of \$31,750.00, and, **less** \$53,625.00 awarded for completion of the flooring for this Project, and

JTS shall pay to MBD the contractual interest for late Progress payments for Pay Applications 1, 2, 3, 4, 5, and 6 in the amount of \$1,159.74.

⁶ JTS makes no argument in support of a modification; it only argues that the district judge properly vacated the arbitration award.

Acadian Center Project

JTS shall pay to MBD of the remaining balance of the contract amounts payable from the Owner-JTS in the amount of \$128,554.90 less Liquidated Damages payable by MBD for 74 days of delay in the amount of \$33,250.00, and

JTS shall pay to MBD the contractual interest due for late Progress payments for Pay Application 1, 2, 3, 4, 5, and 6 in the amount of \$9,369.46.

Total amount payable and due by JTS to MBD for Corporate Atrium Project (\$43,954.14) and for Acadian Center Project (\$104,674.36) is \$148,628.50.

Based on the provisions of La. R.S. 9:4209, we now confirm the arbitrator's award, as modified by this court, and render judgment in accordance with its terms. La. R.S. 9:4212.⁷

III. CONCLUSION

For these reasons, we reverse the district court's judgment. We modify the arbitrator's September 3, 2009 award as specified herein, and as modified, we confirm it. We further render judgment in accordance with the terms of the modified award.

DISTRICT COURT JUDGMENT REVERSED; ARBITRATOR'S SEPTEMBER 3, 2009 AWARD MODIFIED AND, AS MODIFIED, CONFIRMED; JUDGMENT RENDERED; MOTION TO SUPPLEMENT GRANTED.

⁷ Louisiana Revised Statutes 9:4212 provides, "Upon the granting of an order confirming, modifying, or correcting an award, judgment may be entered in conformity therewith in the court wherein the order was granted."