UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

EASTERN SEABOARD CONCRETE CONSTRUCTION CO., INC., *et al.*,	)	
Plaintiffs	)	
v.	)	Civ. No. 08-37-P-S
GRAY CONSTRUCTION INC., *et al.*,	)	
Defendants	)	

RECOMMENDED DECISION

The plaintiffs commenced this matter with a motion to vacate an amended arbitration award arising from the parties' construction dispute. On September 21, 2007, the arbitrator issued an award on the parties' respective claims, including an award of $77,000 to Gray Construction, the general contractor, for money Gray paid to hire a replacement subcontractor to finish certain work that Eastern Seaboard should have performed, which award was to be deducted from significantly larger amounts that the arbitrator awarded to Eastern Seaboard for work that Gray had not properly compensated. On November 4, 2007, in response to Eastern Seaboard's motion to amend the arbitration award, the arbitrator amended his prior arbitration award with respect to the $77,000 awarded to Gray. The arbitrator concluded that the $77,000 had to be reduced by the amount remaining unpaid on the contract when the parties' contractual relationship was terminated: $66,613.89, resulting in a net award to Gray of $10,386.11. Gray contends in the pending motion to vacate that the arbitrator did not have the authority to revise his original arbitration award. Gray relies on the doctrine of *functus officio* to support its motion.

Eastern Seaboard has filed a cross-motion to confirm the arbitration award, as amended by the arbitrator. Eastern Seaboard further moves the Court to add prejudgment interest to its net award.

Background

The issues generated by the parties' respective motions are legal in nature, making much of the underlying factual controversy irrelevant. In brief, Gray Construction entered into a contract with the United States Navy to construct a new entrance facility at the Portsmouth Naval Shipyard in Kittery, Maine. Gray awarded Eastern Seaboard the subcontract for excavation and concrete work. The subcontract contained an arbitration clause. The excavation portion of the project, which commenced in 2004, suffered from delays occasioned by unanticipated ledge and the Navy's prohibition against blasting at the site, which in turn pushed the project into winter conditions. A dispute arose as to compensation for the added expense arising from these conditions. A dispute also arose as to the scope of the subcontract work. Eastern Seaboard left the project for a time and then returned without sufficient personnel to complete the already delayed project on a reasonable schedule. Gray terminated the subcontract and hired another firm to complete the work.

In February 2006, Eastern Seaboard filed a civil action in this Court against Gray and Travelers Casualty and Insurance Company of America. That action (06-CV-29-P-C) was stayed from May 2006 through February 2007, to permit the parties to arbitrate their dispute. However, in February 2007, that action was dismissed without prejudice and without costs by stipulation of the parties.

On February 15, 2007, the parties entered into an agreement for arbitration services with the chosen arbitrator. The agreement specified that the arbitration would be governed by the

American Arbitration Association's Construction Industry Rules of Arbitration. (Agreement for Arbitration Services, Doc. No. 1, Ex. 3.[1]) Section R-47 of those rules addresses the arbitrator's authority to modify an award. It provides as follows:

> R-47. Modification of Award
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> Within twenty calendar days after the transmittal of an award, the arbitrator on his or her initiative, or any party, upon notice to the other parties, may request that the arbitrator correct any clerical, typographical, technical or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided.

(AAA Constr. Indus. Arbitration Rules and Mediation Procedures, Doc. No. 1, Ex. 4.)

The September 21, 2007, arbitration award states on its second page the following: "To the extent that an issue or claim is not explicitly discussed and resolved, it is denied." (Arbitration Award at 2, Doc. No. 1, Ex. 1.)

In the original award, the arbitrator resolved the following issues:

1. That Eastern Seaboard was not entitled to any extra payment for site electrical work because that work was within the scope of its subcontract. (Id. at 4-6.)
2. That Eastern Seaboard was entitled to payment for extra work on account of unanticipated ledge. The arbitrator awarded Eastern Seaboard $160,650.02 for this item. (Id. at 6.)
3. That Eastern Seaboard was entitled to payment for extra work on account of winter conditions. The arbitrator awarded Eastern Seaboard $28,605 for this item. (Id.)

[1] The abbreviation "Doc. No." refers to entries on the electronic docket sheet maintained by the Clerk's Office and available through the electronic case management and filing system.

4. That Eastern Seaboard was entitled to payment for certain approved, miscellaneous extras. The arbitrator awarded Eastern Seaboard $25,220 for this item. (Id. at 6-7.)
5. That Eastern Seaboard was entitled to compensation for interest expenses on a line of credit used to finance ongoing operations due to Gray's failure to pay for the extra work. The arbitrator awarded Eastern Seaboard $27,341.93 for this item. (Id. at 7.)
6. That Gray was entitled to reimbursement from Eastern Seaboard based on amounts paid to the replacement subcontractor, because Eastern Seaboard was properly terminated for not committing to the timely completion of the project. The arbitrator awarded Gray "$77,000 for the completion of the contract, to be deducted from the award paid to Eastern Seaboard." (Id. at 8.) This award was based on the finding that $77,000 was "a reasonable estimate of the amount remaining" on the uncompleted portion of the subcontract.
7. That Eastern Seaboard was not entitled to any interest under the Prompt Pay Act, 31 U.S.C. §§ 3901 *et seq.*

The arbitrator did not make any finding of fact with respect to the amount remaining unpaid on the subcontract. There is no mention of the $66,613.89 figure in the arbitration award. The arbitrator did not address any claim of statutory prejudgment interest.

Following the issuance of the arbitration award, Eastern Seaboard moved to amend or clarify the award on the issue of whether the $77,000 awarded to Gray should be offset by the contract balance of $66,613.89. The arbitrator characterized Gray's opposing argument to be that the $77,000 was in the nature of an equitable offset applied to reduce Eastern Seaboard's

equitable remedy rather than a contract award for Gray. (Am. Arbitration Award at 1, Doc. 1, Ex. 2.) The arbitrator explained that the $77,000 was awarded "[u]nder settled contract principles . . . to make Gray whole for the difference between what was reasonably required to complete the job in excess of what it would have expended in any event if the contract had been performed by [Eastern Seaboard]." (Id.) Next, he stated that Eastern Seaboard "contends that $66,613.89 remained unpaid on the contract, a figure that Gray does not seriously dispute." (Id.) The arbitrator rejected the suggestion that he had awarded Gray an equitable remedy or offset and noted that his original award of $77,000 was based on the finding that $77,000 was the reasonable value of the amount of work remaining on the subcontract. (Id.) The arbitrator pointed out that it would be a "windfall" for Gray to recover $77,000 from Eastern Seaboard to complete the contract work while also retaining the unpaid balance of the subcontract. (Id.) Finally, he noted that the amended result conformed to the terms of the subcontract, which provided that the subcontractor would be liable for the amount by which the cost of completing the subcontractor's work exceeded the unpaid balance of the contract price. (Id. at 2.) The arbitrator did not address whether it was within his authority under AAA Rule R-47 to so amend his earlier award.

Discussion

The pending motions present two questions: (1) whether the arbitrator exceeded his authority when he amended his original arbitration award and (2) whether prejudgment interest is available to Eastern Seaboard on its net recovery. I address them in turn.

1. Authority to Amend

Gray Construction argues that the amended award must be vacated because the arbitrator made a "substantive" amendment rather than a clarification of a technical or clerical nature.

(Gray's Mot. to Vacate at 1, Doc. No. 1.) Gray contends that the arbitrator lacked any authority to announce a substantive revision and was therefore *functus officio* when the amended award issued. (Id. at 6-7.) Gray notes that the arbitration rules that the parties agreed to also prohibit any substantive modification of an award. (Id. at 7 n.2.) Accordingly, Gray has filed a motion to vacate pursuant to section 10(a)(4) of the Federal Arbitration Act, 9 U.S.C. § 10(a)(4), which provides:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
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> . . .
>
> (4) 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.

In opposition, Eastern Seaboard has filed a cross-motion for confirmation of the amended arbitration award. (Doc. No. 4.) Eastern Seaboard argues that the Federal Arbitration Act and the Maine Arbitration Act both permit arbitrators to clarify, interpret, or amplify an award, and that the First Circuit Court of Appeals has also indicated that substantive modifications are permitted. (Id. at 3-4.)

Functus officio is a common law doctrine that holds that an arbitrator may not revisit the merits of a dispute once he or she has issued an arbitration award; that, in effect, the issuance of a substantive award extinguishes the arbitrator's jurisdiction or authority to make any further determinations binding upon the parties who commissioned the arbitrator's services. Local 2322, IBEW v. Verizon New England, Inc., 464 F.3d 93, 97 (1st Cir. 2006). The doctrine offers a clear solution to troublesome questions that arise when arbitrators decide to revise or rework what they have already determined. Id. The First Circuit has neither embraced the doctrine nor foreclosed its application. Id. It has noted that all of the problems that stem from the revision and

modification (or even outright reversal) of previously issued arbitration awards will remain if the doctrine is rejected, as Eastern Seaboard encourages, but also that the practical advantages of permitting clarification would be thwarted by rigid adherence to the doctrine, which Gray advocates. Id. at 97-98. Ultimately, the First Circuit has taken a case-by-case approach, permitting arbitrators to "interpret," "amplify," or "clarify" an award, provided it is done in a timely fashion and avoids "outright alterations," id. at 98 (quoting, in part, Red Star Express Lines v. Int'l Bhd. of Teamsters, Local 170, 809 F.2d 103, 106 (1st Cir. 1987)). This practical approach also permits a court to resubmit an issue to an arbitrator if a lack of clarity in the award prevents the parties compliance, at least in the field of labor disputes. Red Star Express Lines, 809 F.2d at 106; Courier-Citizen Co. v. Boston Electrotypers Union No. 11, 702 F.2d 273, 279 (1st Cir. 1983). The clearer the guideposts become over time, the less likely parties will engage in "merely formal judicial proceedings aimed at obtaining confirmatory orders," which will foster greater "finality" for arbitral proceedings. Local 2322, 464 F.3d at 97.

There is, of course, an escape hatch from the judicial burden of fashioning common law fixes for difficult presentations. Judicial application of a common law rule is only necessary "*absent agreement by the parties*." Id. at 97 (emphasis added). In this case the parties have agreed upon a standard designed to restrict the arbitrator's authority to revise an arbitration award. They agreed to rely on the American Arbitration Association's Construction Industry Rules of Arbitration. (Agreement for Arbitration Services, Doc. No. 1, Ex. 3.) Section R-47 of those rules restricts the arbitrator's authority significantly, permitting only the correction of "clerical, typographical, technical or computational errors in the award."

In my view, the arbitrator's reduction of the $77,000 award by the amount remaining unpaid on the subcontract fixes more than a clerical, typographical, technical or computational

error. It is a substantive modification that reflects a fact finding concern, insofar as there was no finding in the arbitration award about the amount remaining unpaid on the subcontract, as well as a legal concern, insofar as it is unclear from the arbitration award whether the $77,000 award arose from legal or equitable principles. Gray's advancement of a legal claim did not necessarily preclude the arbitrator from fashioning an equitable remedy instead. If, as the arbitrator states in his amended award, he meant to award a legal measure of damages and should have reduced the reasonable cost of the replacement contractor's work by the balance owed on the subcontract, then it was a legal error to fail to do so and a factual error to not make the finding needed to perform that computation.[2] If the arbitration award had included that finding and had revealed an intention to reduce the award in that fashion, then this would be a case of "computational" error. However, because the original arbitration award lacked any finding that would have supplied the $66,613.89 figure and any explanation of an intent to reduce the $77,000 by that amount, this is something more than a simple computational problem. It is understandable that the arbitrator would wish to avoid having an undeserved windfall arise from his award. However, because the amendment requires an application of legal analysis and some additional fact finding, it simply does not appear fair to characterize these errors or omissions as being of the "clerical, typographical, technical or computational" kind.[3]

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[2] The arbitrator stated in the amended award only that Eastern Seaboard "*contends* that $66,613.89 remained unpaid on the contract, a figure that Gray does not seriously dispute." (Am. Arbitration Award at 1.) It is unclear whether this finding is based on evidence introduced at the arbitration hearing. Eastern Seaboard represents that there was no dispute over the balance, which is also something it represented to the arbitrator in its post-trial brief, though not in relation to Gray's claim. (E. Seaboard's Post-Trial Brief at 19, Doc. No. 6, Ex. 1.) Eastern Seaboard refers the Court to Gray's solitary counterclaim, which includes language recognizing that any recovery Gray was due for hiring a replacement contractor would be for costs over and above the subcontract balance. (E. Seaboard's Opp'n to Mot. to Vacate at 4 n.2; Gray's Counterclaim ¶ 17, Doc. No. 4, Ex. A at 9.)

[3] This does not appear to be a circumstance in which an error on the part of the arbitrator would require the Court to vacate the arbitration award in the absence of the amended award. Legal and factual errors are not among the grounds identified in the FAA for vacating arbitration awards. See 9 U.S.C. § 10(a).

Eastern Seaboard argues that the modification was nevertheless appropriate because Maine law permits a modification under these circumstances, citing 14 M.R.S.A. § 5935, 5939. (E. Seaboard's Opp'n to Mot. to Vacate at 3-4, Doc. No. 4.) For present purposes, those statutory provisions permit a modification or correction of an award where "[t]here was an evident miscalculation of figures" or where "[t]he award is imperfect in a matter of form, not affecting the merits of the controversy." 14 M.R.S.A. § 5939(1)(A), (C). For the reasons already stated, this fact pattern does not simply present a matter of miscalculation of figures because the critical figure was not even included among the arbitrator's findings.[4]

> The statute contains no express ground upon which an award can be overturned because it rests on garden-variety factual or legal bevues. To the precise contrary, courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987). Even where such error is painfully clear, "courts are not authorized to reconsider the merits of arbitration awards. . . ." S. D. Warren Co. v. United Paperworkers' Int'l. Union, Local 1069, 845 F.2d 3, 7 (1st Cir.), cert. denied, 488 U.S. 992, 109 S. Ct. 555, 102 L. Ed. 2d 582 (1988).

Advest, Inc. v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990). Eastern Seaboard has not advanced an argument that the original arbitration award might be subject to vacatur for a legal error made in "manifest disregard of the law," P.R. Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 25 (1st Cir. 2005). In any event, the Supreme Court has recently indicated that this theoretical basis for judicial review of an arbitration award is really a shorthand reference to the statutory grounds for vacatur listed in sections 10(a)(3) and 10(a)(4) of the FAA. See Hall St. Assocs. v. Mattel, Inc., 170 L. Ed. 2d 254, 263-64 (2008). Note that the Maine Arbitration Act is consistent with the FAA in this respect. 14 M.R.S.A. § 5938(1) ("But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.")

[4] Eastern Seaboard cites H.E. Sargent, Inc. v. Millinocket, 478 A.2d 683 (Me. 1984), in support of its position. In that case the Law Court held that the Superior Court should have resubmitted an arbitration award to the arbitrator when a clarification was necessary to confirm the award, due to an inability to determine the names of the parties liable for the amounts specified in the award. Id. at 685-86. Such a circumstance obviously frustrated simple confirmation of the arbitration agreement. Here, the arbitration award is not so deficient. It may not require what the arbitrator meant it to require, but it is nevertheless "sufficiently clear and definite so that it is susceptible of enforcement." Id. at 686 (quoting Lisbon Sch. Comm. v. Lisbon Ed. Ass'n, 438 A.2d 239, 245 (1981)).

Eastern Seaboard also cites a judgment entered by the Maine Superior Court in Canatal Industries, Inc. v. The Diaz Corporation, No. CV-03-182. (Confirmation of Arbitration Award and Judgment, Doc. No. 4, Ex. B.) In that judgment, the Superior Court stated:

> After review of the record in this matter and the submissions of the parties, the court concludes that the arbitrator did not exceed the scope of his authority when he modified the original award to include an inadvertently omitted and undisputed contract balance amount which resulted in a corrected net award to the plaintiff.

The arbitrator exceeded his powers when he amended the arbitration award because the rules mutually agreed upon by the parties prohibited any redetermination of the merits and the amendment made by the arbitrator was not limited to correcting mere clerical, typographical, technical or computational errors.

2. Prejudgment Interest

Eastern Seaboard requests prejudgment interest pursuant to 14 M.R.S.A. § 1602-B(3). (E. Seaboard's Opp'n to Mot. to Vacate at 9; E. Seaboard's Reply Brief at 1-2, Doc. No. 8.) That provision provides for prejudgment interest in civil actions. Eastern Seaboard does not limit its request to a calculation of interest dating from the amended arbitration award. Rather, it asks the Court to award prejudgment interest on its arbitration award dating from a notice of claim provided to Gray in November 2005. (E. Seaboard's Opp'n to Mot. to Vacate at 9.) This request is a little puzzling, because the original civil action was dismissed and the arbitrator evidently did not consider making an award of statutory interest. He did, however, rule with respect to the parties' construction dispute that "[t]o the extent that an issue or claim is not explicitly discussed and resolved, it is denied." (Arbitration Award at 2.) The cases Eastern Seaboard cites do not suggest that the Court would commit error were it to deny statutory prejudgment interest on Eastern Seaboard's arbitration award.

(Id.) The problem with this judgment is that there is no basis from which to determine what scope the arbitration agreement afforded the arbitrator to modify or clarify the award. Nor is there any mention of the Maine Arbitration Act that might indicate whether the ruling turned on an interpretation of one of the section 5939 grounds for modification. The outcome of the judgment in Canatal is arguably preferable to my recommendation, but it is difficult to escape the fact that the parties to the instant arbitration both elected to assume the risk of substantive mistakes when they agreed to have the arbitration be governed by the AAA rules.

In Osgood v. Osgood, 698 A.2d 1071 (Me. 1997), the Law Court concluded that it was error for the Superior Court to award prejudgment interest on an arbitration award running only from the date of the arbitration award, rather than from an earlier date. Essential to that ruling was the fact that the civil action from which the arbitration award arose remained pending throughout the arbitration process. The Court recognized that "there is authority suggesting that interest may not be added by a court in confirming an arbitration award." Id. at 1073. It nevertheless held that interest was required because the civil action remained open during the arbitration and the arbitration only address a subset of the litigation issues, resulting in a "hybrid" proceeding. Id.

In Brown v. Hunter, No. CV-01-18, 2002 Me. Super. Lexis 198, 2002 WL 31546060 (Me. Sup. Ct. Oct. 29, 2002), the Superior Court awarded prejudgment interest where an entire civil action was resolved through arbitration. The order, however, does not clearly indicate whether the civil action was stayed pending arbitration or dismissed and then reopened. All that is stated is that the order arises from an application for confirmation of an arbitration award and that the matter "went through considerable discovery and even a trial management conference before the parties agreed to submit the matter to arbitration." Id. at *1. Quite possibly, the original case was dismissed. In any event, I am not persuaded by the Brown decision that an award of prejudgment interest is appropriate on Eastern Seaboard's cross-motion.

Ordinarily, as is the case here, "confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court, and the court must grant the award unless the award is vacated, modified, or corrected." D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006) (citation omitted). When parties voluntarily refer their legal claims to an arbitrator, they should pursue prejudgment interest as a

component of an arbitration claim that would otherwise have remained or become a civil action. If prejudgment interest is not awarded by the arbitrator, possibly due to contractual provisions or mutually agreed upon arbitration rules, that is an unavoidable consequence of the agreement to arbitrate. See, e.g., Coastal Caisson Corp. v. E.E. Cruz/NAB/Frontier-Kemper, 05 Civ. 7462 (DLC), 2007 U.S. Dist. Lexis 58114, *21-22, 2007 WL 2285936, *7-8 (S.D.N.Y. Aug. 10, 2007) (refusing to vacate arbitrator's denial of statutory prejudgment interest mandated by New York law where AAA Construction Industry Arbitration Rules gave arbitrator discretion with respect to interest). A contrary ruling only encourages claimants to initiate unnecessary civil actions when the claims in question are subject to arbitration, simply as a "placeholder" to preserve a claim for prejudgment interest. That kind of development frustrates one of the purposes of arbitration, which is to avoid the relative delays and burdens of litigating in this forum. Parties who have agreed to take certain claims to arbitration should proceed to arbitration without commencing unnecessary civil actions.

I conclude that an award of prejudgment interest is not called for under the present circumstances. Despite Eastern Seaboard's continued reference in its filings to the docket number of the dismissed action, the instant civil action is a new action arising from motions to vacate or confirm the arbitrator's awards. It is not a "hybrid" proceeding, as was Osgood, and no significant proceedings previously transpired in this Court to bring it within the rule suggested by the Superior Court's order in Brown.

Conclusion

For the reasons stated above, I RECOMMEND that the Court GRANT Gray Construction Inc.'s Motion to Vacate (Doc. No. 1) and DENY Eastern Seaboard's Cross-Motion to Confirm the Award Plus Interest (Doc. No. 5).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

April 18, 2008.

/s/Margaret J. Kravchuk
U.S. Magistrate Judge