DOCKET NO. UWY CV-23-6075365-S	:	SUPERIOR COURT
KOBYLUCK ENTERPRISES INC.	STATE OF CONNECTICUT SUPERIOR COURT	JUDICIAL DISTRICT OF WATERBURY
V.	2024 MAY 21 A 10: 53	
LOUREIRO CONTRACTORS INC.	JUDICIAL DISTRICT OF WATERBURY	MAY 21, 2024

MEMORANDUM OF DECISION

INTRODUCTION & FACTS

This action arises from an arbitration proceeding that took place between the plaintiff, Kobyluck Enterprises Inc., and the defendant, Loureiro Contractors Inc., concerning a dispute regarding the performance of a contract that the parties entered into on October 27, 2022, in relation to a project known as the Connecticut State Pier Project. This project was commissioned by the Connecticut Port Authority (CPA), the owner of the Connecticut State Pier in New London. The defendant acted as a subcontractor on the project and entered into an agreement with the plaintiff to provide the materials needed for the defendant to fulfill its duties on the subcontract. Namely, the plaintiff agreed to supply the defendant with $4,766,940 of building material known as dense grade aggregate. The contract the parties entered into included an owner-acceptance clause, which provided that materials supplied pursuant to the purchase order could be rejected if they failed testing by the CPA's representatives. After undergoing such testing, the materials provided by the plaintiff to the defendant were rejected by the CPA as non-conforming and the defendant later informed the plaintiff that it did not intend to pay for the non-conforming materials supplied or to accept any additional materials following consultation with the CPA. The plaintiff then initiated arbitration proceedings pursuant to the contract's arbitration clause on June 30, 2023, which the parties had mutually agreed would be conducted

by Attorney James K. Robertson, Jr., of the law firm of Carmody, Torrance, Sandak, & Hennessey LLP. The plaintiff claimed the defendant breached the contract by acting in bad faith when it rejected the materials and sought $2,367,867.53 in damages. The defendant denied breaching the contract and raised a counterclaim seeking $160,204.94 in costs incurred from receiving and storing the non-conforming materials.

Arbitration hearings between the parties took place on October 31, November 1, and November 2, 2023, in Waterbury. The arbitrator issued an award rejecting the plaintiff's claim and granting the defendant's counterclaim in a written memorandum of decision dated November 20, 2023. The arbitrator also denied the defendant's request for an interim award of attorney's fees, costs and expenses. Almost one month later, on December 19, 2023, the plaintiff filed its underlying application to vacate the arbitration award, which contained two exhibits, the executed contract between the parties and the award decision. Docket entry no. 100.31. On January 5, 2024, the plaintiff filed an amended application to vacate the arbitration award, and on February 9, 2024, it filed a memorandum in support, appended with a copy of the arbitration decision and exhibits. Docket entry nos. 107 & 113. The defendant filed a brief in opposition to the plaintiff's application to vacate and in support of confirming the award on February 22, 2024. Docket entry no. 115.

DISCUSSION

"Arbitration is favored by courts as a means of settling differences and expediting the resolution of disputes. . . . There is no question that arbitration awards are generally upheld and that we give great deference to an arbitrator's decisions since arbitration is favored as a means of settling disputes. . . . The limited scope of judicial review of awards is clearly the law in

Connecticut." (Internal quotation marks omitted.) *Clasby* v. *Zimmerman*, 191 Conn. App. 143, 155, 213 A.3d 1144, cert. denied, 333 Conn. 919, 217 A.3d 1 (2019).

"Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . . Furthermore, in applying this general rule of deference to an arbitrator's award, [e]very reasonable presumption and intendment will be made in favor of the [arbitration] award and of the arbitrators' acts and proceedings. . . . When the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' [arbitration] agreement. . . . This is because [a]rbitration is a creature of contract and the parties themselves, by the terms of their submission, define the powers of the arbitrators. . . . Thus, the standard of review of the claims in the present case is dependent on whether the submission to the arbitrator was restricted or unrestricted." (Citations omitted; internal quotation marks omitted.) *ARVYS Protein, Inc.* v. *A/F Protein, Inc.*, 219 Conn. App. 20, 28-29, 293 A.3d 899, cert. denied, 347 Conn. 905, 297 A.3d 198 (2023).

There is no dispute that the submission to the arbitrator in this case was unrestricted. "[A]n unrestricted submission to the arbitrator is considered final and binding; thus the courts will not review the . . . award for errors of law or fact. . . . Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted, will they review the arbitrators' decision of the legal questions involved." (Citation omitted; internal quotation marks omitted.) Id., 29.

The plaintiff argues that the award should be vacated pursuant to General Statutes § 52-407ww (a) (4)[1] because the arbitrator's determination was based on his manifest disregard of the law. Specifically, the plaintiff argues that the arbitrator applied the incorrect legal standard when determining whether the defendant acted in bad faith by rejecting the product delivered by the plaintiff as non-conforming, and that the arbitrator's failure to articulate a burden of proof regarding the defendant's counterclaim constituted a manifest disregard of the law. The defendant argues that § 52-407ww (a) (4) does not provide grounds for vacatur of an arbitral award based on manifest disregard of the law, and that even if it does, the arbitrator's conduct did not rise to the level of manifest disregard. It asks the court to confirm the arbitrator's award, assign pre and postjudgment interest to the amount it was awarded, and requests permission to file a motion for costs and attorney's fees in relation to this proceeding.

As a preliminary matter, § 52-407ww (a) (4) appears to provide the court with a basis to vacate an arbitral award based on an arbitrator's manifest disregard of the law. The relevant language in § 52-407ww (a) (4) states only that a court shall vacate an arbitrator's award upon motion if the arbitrator "exceeded [his or her] powers," but our Supreme Court has previously determined, in the context of similar statutory language, "that an award that manifests an egregious or patently irrational application of the law is an award that should be set aside pursuant to [General Statutes § 52-418 (a) (4)] because the arbitrator has 'exceeded [his] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.'" *Garrity* v. *McCaskey*, 223 Conn. 1, 10, 612 A.2d 742 (1992); see *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 85, 881 A.2d 139 (2005) ("a claim that the

[1] Section § 52-407ww (a) (4) provides that: "Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if . . . [a]n arbitrator exceeded the arbitrator's powers . . . ."

arbitrators have 'exceeded their powers' may be established . . . [by showing that] the arbitrators manifestly disregarded the law" [citation omitted]).

Indeed, the plaintiff correctly notes that at least one other Superior Court judge has substantively considered an application to vacate an arbitral award brought pursuant to § 52-407ww (a) (4) on the basis of manifest disregard for the law. See *Elevator Services Co.* v. *63rd Street CT, LLC*, Superior Court, judicial district of Waterbury, Docket No. CV-14-5016624-S (May 14, 2021, *Pellegrino, J.*) ("There is minimal Connecticut case law that applies § 52-407ww, as our courts specifically dealt with the former statute [§ 52-418] . . . . The amended language, however, remains sufficiently similar and, therefore, the analysis used in cases for § 52-418 (a) (4) is applicable to § 52-407ww (a) (4)."). Therefore, like Judge Pellegrino did in *Elevator Services Co.*, the court will consider the plaintiff's § 52-407ww (a) (4) claim in accordance with the case law that applies to manifest disregard claims brought pursuant to § 52-418 (a) (4).

(a) Manifest Disregard – Standard of Review

"Manifest disregard of the law is an extremely deferential standard of review. [T]he manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles. . . . This level of deference is appropriate because the parties voluntarily have chosen arbitration as a means to resolve their legal dispute. . . . As an essential component of that choice, they have agreed to bypass the usual adjudicative apparatus, including its conventional appellate features, for the advantages that accompany private arbitration. To borrow a phrase from the marriage ceremony, that choice is made for better or for worse, which, in this context, means that the arbitrator's decision is final and binding unless it is manifestly, obviously, and indisputably

wrong. Review by a judicial authority is not forfeited entirely, but it is conducted under a different and far less rigorous level of scrutiny. . . . In order for the plaintiff to prove that the arbitrator manifestly disregarded the law under this highly deferential standard . . . it must prove three elements: (1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the [arbitrator] appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the [arbitrator] is [well-defined], explicit, and clearly applicable." (Citations omitted; internal quotation marks omitted.) *ARVYS Protein, Inc.* v. *A/F Protein, Inc.*, supra, 219 Conn. App. 35-36.

"Further, [t]he deference owed to the arbitrator's decision is not defeated, even if the losing party's preferred interpretation finds substantial support upon a close analysis of the controlling legal principles at issue. In other words, the plaintiff does not satisfy the manifest disregard standard simply by persuading us that the arbitrator misinterpreted [a contractual provision]. See *State* v. *Connecticut State Employees Assn., SEIU Local 2001*, [287 Conn. 258, 281, 947 A.2d 928 (2008)] ('even if the arbitrator's decision constitutes a misapplication of the relevant law, we are not at liberty to set aside an [arbitrator's] award because of an arguable difference regarding the meaning or *applicability* of laws') . . . ." (Emphasis in original; internal quotation marks omitted.) Id., 36.

Our Supreme Court has recognized that "a situation could arise in which an arbitrator's interpretation of a contract provision constitutes a manifest disregard of the law"; *Blondeau* v. *Baltierra*, 337 Conn. 127, 167 n.27, 252 A.3d 317 (2020); but the standard of proof for a showing of manifest disregard is so high, that it "has rarely, if ever, been met in Connecticut. . . . Indeed, [our Supreme Court] has acknowledged that [t]he exceptionally high burden for proving

a claim of manifest disregard of the law under [§ 52-418 (a) (4)] is demonstrated by the fact that, since the test was first outlined in *Garrity* [v. *McCaskey*, supra, 223 Conn. 9, the court had] yet to conclude that an arbitrator manifestly disregarded the law." (Internal quotation marks omitted.) *SBD Kitchens, LLC* v. *Jefferson*, 157 Conn. App. 731, 742-43, 118 A.3d 550, cert. denied, 319 Conn. 903, 122 A.3d 638 (2015).

(b) Manifest Disregard – Kobyluck's Claim

With respect to the arbitrator's rejection of the plaintiff's claim, the essence of the plaintiff's argument is that the arbitrator's failure to use the legal standard for determining bad faith set forth in *Clover Mfg. Co.* v. *Austin Co.*, 101 Conn. 208, 125 A. 646 (1924), constituted a manifest disregard of the law. See Amended Application, ¶ 27. The plaintiff asserts *Clover* stands for the proposition that in building contracts that include an owner-acceptance clause, "bad faith may be established by showing that an engineer who is responsible for evaluating the work fails to give the parties the benefit of their bargain." Docket entry no. 116, p. 2. But based on *Clover* and the cases that have cited it, this argument appears to ask the court to revisit the arbitrator's interpretation of the contract, because our Supreme Court has described the applicability of this bad faith standard as one that is not inherent to all building contracts that include an owner-acceptance clause, but rather, one that may be applicable by way of a condition that the parties have agreed upon. See *Grenier* v. *Compratt Construction Co.*, 189 Conn. 144, 148, 454 A.2d 1289 (1983) ("It is of course well established that contracting parties are free to impose conditions upon contractual liability. . . . *Frequently, building contracts provide* that a third party, an architect or an engineer, acting in good faith and in the exercise of his best

judgment, shall decide when one of the contracting parties has fulfilled the requirements of the contract." [Citations omitted; emphasis added.]).

It is not appropriate for the court to revisit the arbitrator's interpretation of the contract and offer its own interpretation. See, e.g., *Blondeau* v. *Baltierra*, supra, 337 Conn. 167 ("[w]e will not substitute our interpretation of the premarital agreement for that of the arbitrator"); *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 265 Conn. 771, 780, 830 A.2d 729 (2003) ("[I]t was incumbent upon the arbitrator to interpret the relevant language. Although the plaintiff and the trial court may disagree with the arbitrator's ultimate interpretation of that section . . . it is the arbitrator's judgment that was bargained for . . . and we do not substitute our own judgment merely because our interpretation of the agreement or contract at issue might differ from that of the arbitrator." [Internal quotation marks omitted.]). As the plaintiff's application essentially asks the court to interpret the contract between the parties to determine whether a provision that required application of the *Clover* standard existed, and to then substitute the arbitrator's interpretation with its own, the plaintiff has failed to provide the court with a valid basis to vacate the award on the ground of manifest disregard of the law.

Here, it may be reasonably presumed that the arbitrator interpreted the contract between the parties as not including a condition that invoked the *Clover* standard, as evidenced by his identification of the owner-acceptance clause and application of a different bad faith standard. The plaintiff cannot satisfy the elements of manifest disregard by claiming that such an interpretation was in error, because a "plaintiff does not satisfy the manifest disregard standard simply by persuading us that the arbitrator misinterpreted [a contractual provision]." (Internal quotation marks omitted.) *ARVYS Protein, Inc.* v. *A/F Protein, Inc.*, supra, 219 Conn. App. 36; see also *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 103 ("[T]he relevant determination

is to be made 'on a case-by-case basis . . . .' Therefore, it cannot be said that the arbitrators ignored clearly applicable law."). In addition, even if the court viewed application of the *Clover* standard as being so ubiquitous to owner-acceptance clauses in building contracts that no contractual interpretation on the court's part is required to determine that it should have been applied, the plaintiff's claim still fails, because nothing in the record establishes that the arbitrator "appreciated the existence" and applicability of the *Clover* standard, "but decided to ignore it . . . ." (Internal quotation marks omitted.) *ARVYS Protein, Inc.* v. *A/F Protein, Inc.*, supra, 219 Conn. App. 36. Thus, the plaintiff has failed to meet its burden on its claim that the arbitrator's award should be vacated because the arbitrator's rejection of the plaintiff's claims was based on his manifest disregard of the law.

(c) Manifest Disregard – Loureiro's Counterclaim

Considering the arbitrator's decision on the defendant's counterclaim next, the plaintiff argues that the arbitrator's granting of the counterclaim was based on a manifest disregard of the law because "[the arbitrator] never even addressed [the defendant's] burden on its counterclaim"; docket entry no. 113, p. 10; in that his written memorandum of decision "did not undertake any parallel analysis" in determining that the defendant proved its counterclaim. Docket entry no. 116, p. 5. The arbitrator's failure in the award decision to address the standard of proof applied to the defendant's counterclaim or to engage in the sort of "parallel analysis"; id.; referenced by the plaintiff, is not sufficient evidence to support the plaintiff's claim of manifest disregard of the law because "the award rather than the finding and conclusions of fact controls, and . . . ordinarily, the memorandum of the arbitrator is irrelevant." (Internal quotation marks omitted.) *AFSCME, Council 4, Local 2663* v. *Dept. of Children & Families*, 317 Conn. 238, 259, 117 A.3d

470 (2015); see also *Hudson Wire Co.* v. *Winsted Brass Workers Union*, 150 Conn. 546, 553, 191 A.2d 557 (1963) ("The arbitrator filed an extended memorandum setting forth the process of his reasoning and the bases of his award. We may disagree with both, but unless his memorandum patently shows an infidelity to his obligation, the result reached by the award, and not the memorandum, controls.").

In this case, the arbitration clause in the contract did not require the arbitrator to write a memorandum of decision, and nothing in the record indicates he possessed an obligation to conduct any kind of written analysis or to articulate the reasoning behind his determinations. Further, the plaintiff has not presented any evidence, and the arbitrator's award decision does not reveal that, by omitting the plaintiff's desired analysis of the counterclaim "the [arbitrator] appreciated the existence of a clearly governing legal principle but decided to ignore it . . . ." (Internal quotation marks omitted.) *ARVYS Protein, Inc.* v. *A/F Protein, Inc.*, supra, 219 Conn. App. 36. It may be reasonably presumed that the arbitrator did appreciate and apply the proper standard of proof the defendant needed to meet on its counterclaim, but simply omitted the analysis from his written memorandum. See id., 22 n.1 ("[T]o the extent the arbitrator failed to make factual findings pertinent to the analysis in this case, we are not free to supplement the record with factual findings of our own. . . . Instead, [e]very reasonable presumption and intendment will be made in favor of the award and of the arbitrator's acts and proceedings." [Citation omitted; internal quotation marks omitted.]).

To be sure, reading the award in this manner is consistent with the general principle that "a reviewing court [must] engage in every reasonable presumption in favor of the validity of an arbitral award." *SBD Kitchens, LLC* v. *Jefferson*, supra, 157 Conn. App. 745. "It is also consistent with the federal appellate principle of reading an arbitral award, challenged as a

manifest disregard of the law, to yield a legally correct justification for its result." Id., citing *Duferco International Steel Trading Co.* v. *T. Klaveness Shipping A/S*, 333 F.3d 383, 390 (2d Cir. 2003) ("where an arbitral award contains more than one plausible reading, manifest disregard cannot be found if at least one of the readings yields a legally correct justification for the outcome"). Therefore, taking every reasonable presumption in favor of the award's validity, the plaintiff has failed to establish that the arbitrator engaged in a manifest disregard of the law with respect to his consideration of the defendant's counterclaim and the award should not be vacated on this basis.

Having determined that neither the arbitrator's consideration of the plaintiff's claim nor the defendant's counterclaim warrant vacatur of the award, the court denies the plaintiff's application to vacate, confirms the arbitrator's award pursuant to General Statutes § 52-407ww (d)[2] and turns to the issues of attorney's fees, costs and interest raised by the defendant.

(d) Loureiro's Requests for Pre and Postjudgment Interest and for Permission to File a Motion for Costs and Attorney's Fees

First, the defendant asks the court to assign pre and postjudgment interest on the amount awarded to it at arbitration, pursuant to General Statutes § 37-3a,[3] at a rate of 10%. Section 37-3a "applies to interest as damages and allows a trial court to award interest as compensation for the detention of money . . . . An award of interest under § 37-3a may include either or both prejudgment and post-judgment interest. . . . Whether a prevailing party will receive interest as

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[2] Section 52-407ww (d) provides that: "If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending."

[3] Section 37-3a (a) provides in relevant part that: "interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings . . . as damages for the detention of money after it becomes payable." (Footnote omitted.)

damages pursuant to § 37-3a is principally an equitable question lying within the trial court's discretion. . . . The trial court also has discretion to choose the rate of prejudgment and postjudgment interest, up to the statutory maximum rate of 10 percent." (Citations omitted; internal quotation marks omitted.) *Sikorsky Financial Credit Union, Inc.* v. *Butts*, 315 Conn. 433, 442-43, 108 A.3d 228 (2015). "[U]nder § 37-3a, proof of wrongfulness is not required above and beyond proof of the underlying legal claim. . . . In other words, the wrongful detention standard of § 37-3a is satisfied by proof of the underlying legal claim, a requirement that is met once the plaintiff obtains a judgment in his favor on that claim. . . . The trial court's discretion in awarding interest is quite broad, and the court may consider whatever factors may be relevant to its determination. . . . A court's discretion must be informed by the policies that the relevant statute is intended to advance. . . . [T]he policy behind [§ 37-3a] is to compensate the successful party for the loss of the use of the money that he or she is awarded from the time of the award until the award is paid in full." (Citations omitted; internal quotation marks omitted.) *Anketell* v. *Kulldorff*, 223 Conn. App. 345, 356-57, 308 A.3d 594 (2024). "The fact that there existed a legitimate dispute between the parties does not mean that an award of . . . interest is not appropriate." *Prime Management Co.* v. *Steinegger*, 904 F.2d 811, 817 (2d Cir. 1990), citing *Harris Calorific Sales Co.* v. *Manifold Systems, Inc.*, 18 Conn. App. 559, 566, 559 A.2d 241 (1989).

Given that the defendant prevailed in proving its counterclaim at arbitration and that the amount due to it has been payable since the award was rendered by the arbitrator on November 20, 2023, the court agrees with the defendant that the monies it was awarded have been wrongfully detained by the plaintiff within the meaning of § 37-3a. Accordingly, to compensate the defendant for the loss of the use of the money that it was awarded by the arbitrator, the court

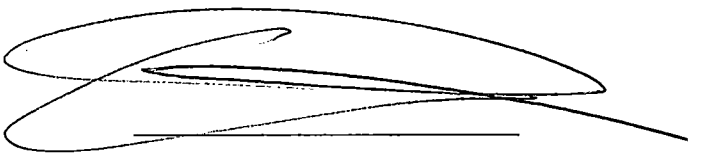
exercises its discretion to assign pre and postjudgment interest to the amount awarded by the arbitrator on the defendant's counterclaim. Such prejudgment interest will run from the date the award was rendered to the date of this decision, and postjudgment interest will accumulate daily until the amount is paid in full. Pre and postjudgment interest will both run at a rate of 5%.

Second, the defendant asks the court for permission to file a motion for costs and attorney's fees in relation to litigating this matter pursuant to General Statutes § 52-407yy (b), which provides that "[a] court may allow reasonable costs of the motion and subsequent judicial proceedings" in a matter brought to confirm or vacate an arbitral award. Consequently, the court grants the defendant permission to file a motion for reasonable costs and attorney's fees in relation to this proceeding, subject to the court's consideration.

CONCLUSION

For the foregoing reasons, the court denies the plaintiff's application to vacate the arbitrator's award, confirms the award, the defendant receives interest on the award and is hereby permitted to file a motion for costs and attorney's fees.

SO ORDERED



Parkinson, J.

5/21/2024
Decision entered in accordance with memorandum. JDNO sent to all counsel of record. Copy emailed to ROJD.

Sabrina Ahmad
Asst. Clerk