IN THE SUPREME COURT OF THE STATE OF NEVADA

SVJ, INC., A NEVADA CORPORATION; STEVEN J. PTAK; WELLS FARGO BANK, NA; AND NEVADA POWER COMPANY,
Appellants,
vs.
JOE CAMPAGNA; AND CAMP & SONS, INC., A NEVADA CORPORATION,
Respondents.

No. 37040

FILED

AUG 21 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court's order confirming an arbitration award in the amount of $60,940.76, and an additional award of attorney fees, prejudgment interest and costs.

Appellants claim that the district court's order confirming the arbitration award and granting the additional award of prejudgment interest was erroneous and should be overturned. "A reviewing court may vacate an arbitrator's award if the arbitrator manifestly disregards the law."[1] Furthermore, "if an arbitrator's award is arbitrary, capricious or unsupported by the agreement, it will not be enforced."[2] A manifest disregard of law is an error which is "'obvious and capable of being readily and instantly perceived by the average person qualified to serve as an

[1]Graber v. Comstock Bank, 111 Nev. 1421, 1427, 905 P.2d 1112, 1115-16 (1995) (citing Wichinsky v. Mosa, 109 Nev. 84, 89-90, 847 P.2d 727, 731 (1993)).

[2]Id.

02-14274

arbitrator.'"[3] "'[D]isregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it."[4]

Appellants first argue that the district court did not have the entire record of the proceeding before it when it made its decision to confirm the arbitration award. Since there was no indication that the district court reviewed the "full transcript" before issuing its decision, appellants argue that the decision to confirm the arbitration award is erroneous and should be reversed. We disagree.

NRS 3.380(2) provides that the district court may appoint an official reporter to operate sound recording equipment, and that "[t]he person so operating such sound recording equipment shall subscribe to an oath that he will well and truly operate the equipment so as to record all of the matters and proceedings." Further, pursuant to NRS 3.380(3), "[t]he court may then designate the person operating such equipment or any other competent person to read the recording and to transcribe it into typewriting. The person transcribing the recording shall subscribe to an oath that he has truly and correctly transcribed it."

Here, the arbitrator recorded the proceedings with his personal tape recorder for his own use. Although the tapes were transcribed by a court reporter who subscribed to an oath, the tapes were not recorded by an official reporter who subscribed to an oath as required by NRS 3.380. Therefore, we conclude that the audiotapes did not

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[3]Id. at 1426, 905 P.2d at 1115 (quoting French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (9th Cir.1986)).

[4]Id.

constitute a "transcript" for the purposes of judicial review, and the district court did not err by confirming the arbitration award without reviewing the transcribed tapes from the arbitrator.

Appellants next contend that the district court erroneously confirmed the arbitration award, which was based upon the arbitrator's failure to appreciate the evidence, testimony and controlling law. Since both parties testified that the American Institute of Architects Standard Form Agreement ("AIA contract") was not the controlling document prior to any failure to perform, appellants claim that the arbitrator either ignored or refused to utilize this critical testimony. We disagree.

Here, the arbitrator heard testimony from Campagna and from Ptak, as principal of SVJ, Inc. The arbitrator found that testimony presented at the proceeding did not substantiate a finding in favor of appellants. The district court was made aware of what appellants characterized as a manifest disregard of the evidence and the law. However, the district court suggested the possibility that the arbitrator was just not persuaded by Ptak's testimony. While both parties testified that they never intended the AIA contract to be controlling, Campagna alleged that it was his understanding that he would be bound by the terms of the AIA contract if he did not perform. Furthermore, appellants initially sued based upon the AIA contract. Therefore, we conclude that appellants have provided no evidence that the arbitrator decided to ignore a clearly governing legal principle. Rather, the arbitrator considered the evidence presented and concluded that, consistent with clearly governing legal principle, the evidence did not support appellants' arguments.

Appellants claim that the arbitrator did not acknowledge the parol evidence or testimony of the parties, which allegedly proved that the AIA contract was not the valid agreement between the parties. Therefore, appellants claim that the district court erred by confirming the arbitration award. We disagree.

"Parol evidence is admissible to show conditions precedent which relate to the delivery or taking effect of an instrument."[5] In addition, parol evidence may "[go] to the very existence of the contract and tends to show that no valid and effective contract ever existed."[6]

In the instant case, the arbitrator heard testimony from both parties regarding the intent of the cost plus ten percent agreement. The arbitrator accepted the testimony at the hearing, but ruled that the evidence did not support Ptak's position. In his final recommendation, the arbitrator acknowledged Ptak's claim that the AIA contract was not the true agreement between the parties. Therefore, we conclude that the arbitrator did, in fact, consider the parol evidence in this case, and the district court did not err merely because it did not accept Ptak's version of the parties' agreement.

Appellants also argue that the district court erred in confirming the arbitration award because the arbitrator failed to mention alleged damages suffered by appellants despite Ptak's testimony setting forth evidence of such damages.

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[5]Child v. Miller, 74 Nev. 223, 227, 327 P.2d 342, 343 (1958).

[6]Id. at 227, 327 P.2d at 344.

A party to a contract is entitled to all damages which flow from the breach of such contract.[7] However, pursuant to NRS 104.2719(3), "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." Furthermore, NRS 104.2719(3) provides that where the loss is commercial, limitation of consequential damages is not prima facie unconscionable.

Here, the arbitrator expressly noted in his final recommendations that the bulk of the damages alleged by appellants was consequential, and the agreement entered upon by the parties waived claims of such damages. Therefore, we conclude that the district court did not err when it affirmed the arbitration award without damages to appellants.

Appellants claim that the arbitrator failed to mention any discounts in the subcontractor's price, the abandonment or termination of the work by Campagna, the hiring of an alternate contractor to complete the work and the loss of revenue and damages to appellants based on Campagna's conduct. However, in his final recommendations, the arbitrator mentioned Campagna's withdrawal from the project and his replacement by subcontractors. The arbitrator found the other damages to be consequential and therefore waived. Accordingly, we conclude that the district court did not err when it affirmed the arbitration award without damages to appellants.

Appellants also contend that the district court erred in confirming the arbitration award because the arbitrator based the award upon the language of the AIA contract, which appellants maintain was not

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[7]Johnson v. Utile, 86 Nev. 593, 599, 427 P.2d 335, 338 (1970).

the controlling agreement between the parties. Further, appellants argue that the arbitrator improperly awarded $60,940.76 to Campagna under a theory of unjust enrichment.

"An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement."[8] However, when there is a contract, the appropriate measure of damages for a breach of contract is the difference between the contract price and the actual cost of completion.[9]

In the present case, the arbitrator found that appellants began replacing subcontractors without the consent of Campagna, causing Campagna to withdraw and cease performance as permitted by the AIA contract. The arbitrator noted that Campagna sought to recover a judgment for the full contract price, but found the AIA contract to lack a provision for such an award. However, the arbitrator also considered Campagna's request for $82,870.76 under what Campagna described as an unjust enrichment theory in an amount reflecting the balance due for work performed. The arbitrator cited Article 14 of the AIA contract, which provides that "[if] the Work is stopped . . . because the Owner has persistently failed to fulfill the Owner's obligations under the [AIA contract] with respect to matters important to the progress of the Work, the Contractor may . . . terminate the Contract and recover from the

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[8]LeasePartners Corp. v. Brooks Trust, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997).

[9]Kirkpatrick v. Temme, 98 Nev. 523, 525, 654 P.2d 1011, 1013 (1982).

Owner [payment for work performed]." The arbitrator then awarded Campagna for work performed, minus offsets described in the recommendation. The arbitrator acknowledged that Campagna referred to the requested judgment as that under a theory of unjust enrichment, but did not himself characterize the award as such.

The recommendation from the arbitrator did not find either party to be in breach. Therefore, the judgment awarded by the arbitrator was not one involving a breach of contract, nor unjust enrichment. Rather, Campagna was permitted to withdraw pursuant to the AIA contract, and the arbitrator awarded actual damages for work performed as directed by the AIA contract. Accordingly, we conclude that the district court did not err in confirming the arbitration award.

Appellants argue that the district court erred in awarding prejudgment interest to Campagna because adding prejudgment interest to an arbitration award is not a statutorily authorized modification. We disagree.

NRS 38.165 provides authority for the district court to confirm an arbitration award. However, we have held that "[s]ince an order awarding prejudgment interest is not among the statutory bases for modifying an award, the inclusion of such interest constitutes an impermissible modification of the arbitrator's award."[10] However, a district court in a confirmation proceeding may add prejudgment interest to an arbitration award where there is "statutory or contractual authority."[11]

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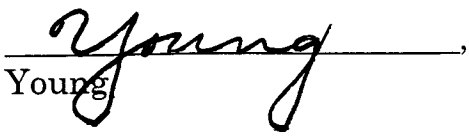
[10]Mausbach v. Lemke, 110 Nev. 37, 42, 866 P.2d 1146, 1150 (1994).

[11]Id.

Here, the AIA contract terms provide that "[p]ayments due and unpaid under the [AIA contract] shall bear interest from the date payment is due." Since there is contractual authority to award prejudgment interest, we conclude that the district court did not err by adding prejudgment interest to the arbitration award. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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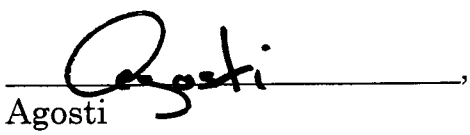

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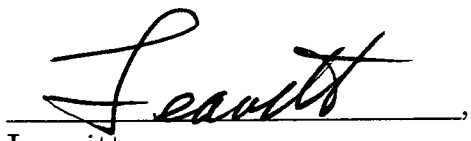

_____, J.
Leavitt

cc: Hon. Gene T. Porter, District Judge
Jerome A. DePalma
Van & Ralphs, Chtd.
Clark County Clerk