[Cite as *Sunrush Constr. Co., Inc. v. Landmark Properties, L.L.C.*, 2017-Ohio-8598.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

SUNRUSH CONSTRUCTION CO., INC.,	:	Case No. 17CA3596
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
LANDMARK PROPERTIES, L.L.C.,	:	**RELEASED: 10/31/2017**
Defendant-Appellant.	:	

APPEARANCES:

Thomas M. Spetnagel, Law Offices of Thomas M. Spetnagel, Chillicothe, Ohio, for appellant.

Stephen K. Sesser, Michael L. Benson, and Mark D. Tolles, II, Benson & Sesser, L.L.C., Chillicothe, Ohio, for appellee.

Harsha, J.

{¶1} An arbitrator issued an award in favor of Sunrush Construction Co., Inc. ("Sunrush") on its claim for money and interest due under a construction contract it had with Landmark Properties, L.L.C. ("Landmark"). The Ross County Court of Common Pleas denied Landmark's motion to vacate the arbitration award and granted Sunrush's motion to confirm it.

{¶2} Landmark asserts that the trial court erred in confirming the arbitration award and refusing to vacate it because the arbitrator's findings established that the parties did not enter into a valid contract, making the contractual arbitration clause unenforceable.

{¶3} We agree with the trial court that the arbitration award draws its essence from the parties' construction contract because there is a rational nexus between the agreement and the award, and the award is neither unlawful, arbitrary, nor capricious.

Notwithstanding Landmark's contention, the arbitrator did not find that the parties' contract was invalid and unenforceable. Rather he found that the parties failed to successfully perform the contract because of Landmark's failure to provide a complete set of plans and specifications, and the parties' failure to abide by the terms of their written contract. All agreements have some degree of indefiniteness and uncertainty, but this does not relieve parties of the promises they make. The arbitrator concluded that Sunrush did the work performed in accordance with the contract, properly and timely billed Landmark for the work, and had not been paid for it, and that the contract required interest on the unpaid amounts. The parties all proceeded as if the contract was valid, failed to contest its validity before the arbitrator, and agreed to binding arbitration of their contractual claims.

{¶4} Moreover, even if we assume that the arbitrator's award establishes that the contract was invalid and unenforceable, the arbitrator did not exceed his authority by awarding Sunrush damages based on a noncontractual theory like quantum meruit or unjust enrichment. The parties agreed in the trial court to submit all of their "claims and demands whatsoever, in law, or in equity, which the parties ever had against one another," to binding arbitration.

{¶5} The trial court did not err in denying Landmark's motion to vacate the award and granting Sunrush's motion to confirm it. We overrule Landmark's assignment of error and affirm the judgment of the trial court.

I. FACTS[1]

[1] These facts are based on the record before the court, which does not include a transcript of the arbitration proceedings, but does include the arbitration award. Although a transcript of the arbitration proceeding is not required in a proceeding to vacate or confirm an arbitration award, its absence limits review of it, so that we must presume the validity of the arbitration proceeding and award. *See, e.g.,*

{¶6} Sunrush entered into a contract with Landmark to construct renovations and additions to a facility Landmark owns. At this facility Cardo's Family Fun Center, Inc. ("Cardo's") operates a business known as Triple Crown Sports. Kevin Ross owns both Landmark and Cardo's. Disputes arose between the parties, and Sunrush sought payment under the contract for its work, as well as additional payment for alleged delays and extra work. Landmark sought payment from Sunrush for the cost to remediate Sunrush's alleged defective work and to complete the work that Sunrush left unfinished. The parties' contract included provisions for binding arbitration to resolve any claim arising out of or relating to the contract or its breach.

{¶7} Sunrush filed a complaint in the Ross County Court of Common Pleas against Landmark for breach of the construction contract. Sunrush also filed a motion to stay the proceedings pending binding arbitration. About six months later Landmark filed an answer and counterclaim, which admitted that it had entered into the construction contract with Sunrush and asserted claims against Sunrush for breach of contract and negligent performance of contractual obligations.

{¶8} The trial court issued an agreed entry approved by both parties, stating that the case would be stayed pending arbitration, which would be "binding and determinative of all issues herein," including all "claims and demands whatsoever, in law, or in equity, which the parties ever had against one another."

{¶9} The arbitrator conducted hearings on the matter and also considered the parties' written arguments. The arbitrator determined that the construction project was

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Corrado v. Lowe, 11th Dist. Geauga No. 2014-G-3239, 2015-Ohio-1933, ¶ 42-43; *Ironton v. Rist*, 4th Dist. Lawrence No. 10CA10, 2010-Ohio-5292, ¶ 17-18; *Cincinnati v. Queen City Lodge No. 69, Fraternal Order of Police*, 164 Ohio App.3d 408, 2005-Ohio-6225, 842 N.E.2d 588, ¶ 19 (1st Dist.). Many of these facts are included in the arbitration award.

unsuccessful because: (1) Landmark never delivered a set of complete plans and specifications for Sunrush to assess, estimate, and build, so Sunrush had to initially rely upon a preliminary architectural drawing with the expectation that Landmark would at some point provide final plans and specifications; and (2) the parties did not follow the contractual terms.

{¶10} Addressing his first finding, the arbitrator noted that due to the proliferation of revised, nonfinal drawings, the project had not been completed and it was doubtful that it ever would be because of the "ever-changing, never final, moving target it appears that any contractor on this Project must face." The arbitrator relied on this finding to deny Landmark's claims that it had to repair Sunrush's alleged defective work and to complete its work after it terminated Sunrush from the project, i.e., "because there never was any final set of specifications for this Project and because the Project plans were constantly changing and in a state of flux – even to this day – it is virtually impossible to say with any degree of certainty whether any certain work was properly done pursuant to the appropriate plans or specifications or what was ultimately required to complete Sunrush's scope of work. The scope, simply put, kept changing and was a forever moving target. Indeed, it appears to still be changing to this very day." The arbitrator applied the same rationale to deny Sunrush's claim for 10% of the remaining contract price based on a termination without just cause.

{¶11} The arbitrator applied the second finding—the parties' failure to comply with their contractual obligations—to deny Sunrush's claims for delay and additional work because it did not give the contractually required written notice for these claims.

{¶12} Nevertheless, the arbitrator determined that the evidence established that Sunrush did the work covered by its invoices 17, 18, and 19 and timely billed Landmark for this work. The arbitrator determined that the total amount unpaid on these payment applications was $118,040.10. Ross admitted that some amount of these invoices was likely due and owing, but he could not say how much. The arbitrator determined that Landmark breached the construction contract by not paying Sunrush for the completed work and also found that Sunrush was due interest on the unpaid amount. The arbitrator concluded that Landmark and Cardo's should each reimburse Sunrush the additional sum of $1,327.68 as their share of the arbitration fees and expenses Sunrush paid on behalf of the parties.

{¶13} Sunrush filed an application for an order confirming the arbitration award, and Landmark filed an application for an order vacating it. Landmark claimed that the arbitrator exceeded his power in awarding Sunrush payment under the contract because he found that there was no meeting of the minds to create a construction contract capable of enforcement.

{¶14} The trial court rejected Landmark's claim because it determined the arbitrator found that the parties "committed significant errors in the execution of the contract not its creation," and the arbitrator "acted within his authority" so that the award "was based upon the essence of this contract." The trial court entered a judgment confirming the arbitration award in favor of Sunrush and overruling Landmark's application for vacation of the award.

II. ASSIGNMENT OF ERROR

{¶15} Landmark assigns the following error for our review:

I. THE TRIAL COURT ERRED IN CONFIRMING THE FINAL AWARD OF ARBITRATION AND ENTERING JUDGMENT AGAINST DEFENDANT-APPELLANT.

III. ARBITRATION LAW & STANDARD OF REVIEW

{¶16} Landmark contends that the trial court erred when it found that it had breached its contract with Sunrush by failing to pay for work performed, plus interest, denied Landmark's motion to vacate the arbitration award, and confirmed the award.

{¶17} Under R.C. 2711.15, "[a]n appeal may be taken from an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding or from judgment entered upon an award." "The law favors and encourages arbitration as a means of resolving disputes." *Ignazio v. Clear Channel Broadcasting, Inc.*, 113 Ohio St.3d 276, 2007-Ohio-1947, 865 N.E.2d 18, ¶ 18. "Arbitration is favored because it provides the parties thereto a relatively expeditious and economical means of resolving a dispute." *Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 712, 590 N.E.2d 1242 (1992). " 'Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, * * * [c]ourts thus 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.' " *Ironton*, 2010-Ohio-5292, at ¶ 12, quoting *Southwest Ohio Regional Transit Auth. v. Amalgamated Transit Union, Local 627*, 91 Ohio St.3d 108, 110, 794 N.E.2d 630 (2001).

{¶18} The General Assembly " 'has specified the narrow circumstances under which a trial court may vacate an arbitration award.' " *Ironton* at ¶ 13, quoting *Athens Cty. Commrs. v. Ohio Patrolmen's Benevolent Assn.*, 4th Dist. Athens No. 06CA49, 2007-Ohio-6895, ¶ 24, citing R.C. 2711.10. Landmark moved to vacate the award

under R.C. 2711.10(D), which provides that a common pleas court shall vacate an arbitration award upon the application of any party if the arbitrators "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award cannot be made."

{¶19} "[U]nder R.C. 2711.10(D) arbitrators can exceed their powers by going beyond the authority provided by the bargained-for agreement or by going beyond their contractual authority to craft a remedy under the law." *Cedar Fair, L.P. v. Falfas*, 140 Ohio St.3d 447, 2014-Ohio-3943, 19 N.E.3d 893, ¶ 7, citing *Oxford Health Plans, L.L.C. v. Sutter*, __ U.S. __, 133 S.Ct. 2064, 2068, 186 L.Ed.2d 113 (2013). "Arbitrators act within their authority to craft an award so long as the award 'draws its essence' from the contract—that is, 'when there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious or unlawful.' " *Id.*, quoting *Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St.3d 80, 488 N.E.2d 872 (1986), paragraph one of the syllabus. "[A]n award 'departs from the essence of a [contract] when: (1) the award conflicts with the express terms of the agreement, and/or (2) the award is without rational support or cannot be rationally derived from the terms of the agreement.' " *Id.*, quoting *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emps. Assn., Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177, 572 N.E.2d 71 (1991), syllabus.

{¶20} Our review is confined to the order issued by the common pleas court, which we review for errors occurring as a matter of law. *See, e.g., Portage Cty. Bd. of Developmental Disabilities*, 2017-Ohio-888, __ N.E.3d __, ¶ 13 (11th Dist.); *Pike Delta York Loc. School Dist. Bd. of Edn. v. Pike Delta York Edn. Assn.*, 6th Dist. Fulton No. F-

16-006, 2017-Ohio-1476, ¶ 17 (“An appellate court is confined to a review of the trial court’s decision, pursuant to R.C. 2711, and the substantive merits of the arbitrator’s award are not reviewable absent evidence of material mistake or extensive impropriety”).

{¶21} Our review is not a de novo review of the merits of the dispute presented to the arbitrator. Instead, we review the trial court’s decision to determine whether any of the limited grounds contained in R.C. 2711.10 regarding a motion to vacate exist. *See Portage Cty. Bd. of Developmental Disabilities* at ¶ 13; *Wright State Univ. v. Fraternal Order of Police*, 2d Dist. Greene No. 2016-CA-35, 2017-Ohio-854, ¶ 13, quoting *Piqua v. Fraternal Order of Police*, 185 Ohio App.3d 496, 2009-Ohio-6591, 924 N.E.2d 876, ¶ 18 (2d Dist.) (“ ‘in reviewing an arbitrator's award, the court must distinguish between an arbitrator's act in excess of his powers and an error merely in the way the arbitrator executed his powers. The former is grounds to vacate; the latter is not’ ”).

IV. ANALYSIS

{¶22} Landmark claims that based on the arbitrator’s findings, the parties failed to enter into a valid contract, thus rendering the arbitration clause of the contract unenforceable; therefore, the trial court erred in confirming the final award of arbitration in favor of Sunrush. Landmark also claims that in the absence of a valid contract, the arbitrator lacked the power to make an award to Sunrush for any unpaid work.

{¶23} In essence Landmark claims that the arbitrator determined that the parties did not have a meeting of the minds regarding the essential terms of their construction contract, i.e., the scope, timing and price of the work that Sunrush was obligated to

perform on the project. " 'A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract.' " *Rayess v. Educational Comm. for Foreign Med. Graduates*, 134 Ohio St.3d 509, 2012-Ohio-5676, 983 N.E.2d 1267, ¶ 19, quoting *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16.

{¶24} Notwithstanding Landmark's arguments, the arbitrator did not conclude that the parties' entire construction contract was invalid and unenforceable due to a lack of agreement on its essential terms. Instead, the arbitrator merely concluded that the parties' contemplated construction project was unsuccessful because: (1) Landmark never provided a set of complete plans and specifications for Sunrush to assess, estimate, and build; and (2) the parties did not comply with various provisions of the contract. Addressing the first reason, the arbitrator found that Landmark was anxious to get the project started so Sunrush used the preliminary architectural drawing Landmark provided to determine the general scope and pricing of the project, with the reasonable expectation that Landmark would provide final plans and specifications at some time.

{¶25} It is true that the arbitrator found that the lack of final plans and specifications precluded some of the parties' claims. Nevertheless, " '[a]ll agreements have some degree of indefiniteness and some degree of uncertainty * * * [but] people must be held to the promises they make.' " *Kostelnik* at ¶ 17, quoting 1 Corbin, *Corbin on Contracts*, Section 4.1 at 530 (Perillo Rev. Ed. 1993). "Consequently, ' "[c]omplete clarity in every term of the contract agreement is unnecessary because all agreements have some degree of indefiniteness and uncertainty." ' " *Martin v. Jones*, 2015-Ohio-3168, 41 N.E.3d 123, ¶ 43 (4th Dist.), quoting *DePompei v. Santabarbara*, 8th Dist.

Cuyahoga No. 101163, 2015-Ohio-18, ¶ 22, quoting *Advantage Renovations, Inc. v. Maui Sands Resort, Co., L.L.C.*, 6th Dist. Erie No. E-11-040, 2012-Ohio-1866, ¶ 18.

{¶26} The arbitrator concluded that Sunrush did the work performed in accordance with the contract, properly and timely billed Landmark for the work, and had not been paid for it, even though Landmark's owner conceded during the arbitration proceeding that some amount of Sunrush's pay orders was likely due and owing. Any lack of clarity in the performance of this part of the project was arguably due to Landmark's inability to follow its duty under Article 4 of the contract to "provide full information in a timely manner regarding requirements for the Project." And the award of interest on this unpaid amount was authorized by Article 9 of the contract.

{¶27} Moreover, Landmark's assertion that the potential invalidity of part of the parties' contract would necessarily invalidate the arbitration clause is meritless. " 'Because the arbitration clause is a separate entity, it only follows that an alleged failure of the contract in which it is contained does not affect the provision itself.' " *Norman v. Schumacher Homes of Circleville, Inc.*, 2013-Ohio-2687, 994 N.E.2d 865, ¶ 34 (4th Dist.), quoting *ABM Farms v. Woods*, 81 Ohio St.3d 498, 502, 692 N.E.2d 574 (1998).

{¶28} Finally, the parties all proceeded upon the contract as if it was valid, did not contest its validity before the arbitrator, and agreed to binding arbitration of their contractual claims.

{¶29} Under these circumstances, the trial court properly concluded that the arbitrator did not exceed his authority by finding "the parties committed significant errors in the execution of the contract not in its creation." Consequently, the court correctly ruled that the arbitrator's award neither conflicted with any express term of the contract

nor was it without support that could be rationally derived from the contract. "So long as there is a good faith argument that an arbitrator's award is authorized by the contract that provides the arbitrator's authority, the award is within the arbitrator's power." *Cedar Fair*, 140 Ohio St.3d 447, 2014-Ohio-3943, 19 N.E.3d 893, at ¶ 7.

{¶30} Even if we assume that Landmark is correct that the arbitrator's award establishes that the construction contract was invalid and unenforceable, the arbitrator did not exceed his authority by awarding Sunrush damages based on an equitable theory like quantum meruit or unjust enrichment. Here the parties agreed in the trial court to submit all of the parties' "claims and demands whatsoever, in law, or in equity, which the parties ever had against one another," to binding arbitration. This agreement was broader—encompassing all legal and equitable claims—than the parties' contractual arbitration clause, authorizing the binding arbitration of even noncontractual claims between the parties.

{¶31} Therefore, the trial court correctly held that the arbitrator did not exceed his authority by issuing an award in favor of Sunrush, denying Landmark's motion to vacate the award, and granting Sunrush's motion to confirm it. The arbitrator's award drew its essence from the parties' construction contract and was not arbitrary, capricious or unlawful.

{¶32} Because Sunrush's motion to confirm the arbitration award was timely and Landmark's motion to vacate the award was meritless, the trial court had a duty to grant Sunrush's motion to confirm the arbitration award. *See Warren Edn. Assn. v. Warren City Bd. of Edn.*, 18 Ohio St.3d 170, 480 N.E.2d 456 (1986), syllabus (""When a motion is made pursuant to R.C. 2711.09 to confirm an arbitration award, the court must grant

the motion if it is timely, unless a timely motion for modification or vacation has been made and cause to modify or vacate has been made and cause to modify or vacate is shown"). We overrule Landmark's assignment of error.

V. CONCLUSION

{¶33} Having overruled Landmark's assignment of error, we affirm the judgment of the trial court confirming the arbitration award in favor of Sunrush and denying Landmark's motion to vacate the award.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.