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Court of Appeals of Minnesota.

FAITH TECHNOLOGIES, INC., Respondent,
Biosar America, LLC, Respondent,
Frattalone Companies, Inc., et al., Plaintiffs,
v.
AURORA DISTRIBUTED SOLAR LLC, Appellant,
Aurora Land Holdings, LLC, et al., Defendants.

A19-1639
|
Filed June 15, 2020

Wright County District Court, File No. 86-CV-17-2033

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Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Bryan, Judge.

UNPUBLISHED OPINION

REYES, Judge

***1** Following the district court's confirmation of arbitration awards in this $30 million mechanic's lien dispute, appellant-solar-power-plant owner argues that the district court erred by upholding an award because the arbitrator exceeded the scope of his authority by granting equitable relief and attorney fees. Appellant also argues that it did not waive a contractual limitation on the arbitrator's authority. By notice of related appeal, respondent-subcontractor argues that the district court abused its discretion by denying respondent-subcontractor's motion for attorney fees under Minn. Stat. §§ 514.14, 572B.25(c) (2018), and that it is entitled to attorney fees in this appeal. We affirm in part and remand.

FACTS

In 2016, appellant Aurora Distributed Solar LLC (Aurora) entered into an Engineering, Procurement, and Construction Agreement (the EPC agreement) with respondent Biosar America LLC (Biosar) to design and construct solar-power generators for approximately $90 million (the project). Biosar agreed to complete the project by the end of 2016, and it entered into a subcontract with respondent and cross-appellant Faith Technologies Inc. (Faith) to provide labor, materials, and services for the project. Issues arose with the project, leading to numerous lawsuits, which the Minnesota Supreme Court assigned to a single district court judge. *See In Re Aurora Solar Project Mechanic's Lien Litigation*, A17-0804 (Minn. May 13, 2017) (order).

Section 14.2 of the EPC agreement (the arbitration clause) requires arbitration "of any controversy, claim, or dispute between [Aurora and Biosar] arising out of or related" to the EPC agreement and prohibits the arbitrator from awarding nonmonetary, injunctive, or equitable relief. In addition, the arbitration clause adopts the Comprehensive Arbitration Rules of JAMS, a private arbitration service (JAMS rules) and provides that the EPC agreement trumps any conflicting JAMS rule. The subcontract between Biosar and Faith also requires mandatory arbitration of all disputes arising out of the subcontract.

In 2017, Aurora and Biosar asserted claims arising out of disputes on the project against each other in a JAMS arbitration proceeding. Biosar also commenced a separate JAMS arbitration proceeding against Faith. JAMS later consolidated the two arbitration proceedings. In March 2018, the three parties agreed to, and filed with the district court, a stipulation to stay litigation and submit claims to binding

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arbitration, "to finally and expeditiously resolve all their claims against each another in one forum" (the stipulation). The parties agreed through the stipulation that the JAMS rules and the Federal Arbitration Act (FAA) govern the dispute, looking to applicable Minnesota state law and to federal law within the Eighth Circuit, respectively. *See Davies v. Waterstone Capital Mgmt., L.P.*, 856 N.W.2d 711, 716 (Minn. App. 2014) (noting Minnesota courts may apply state law to motions to confirm or vacate arbitration awards unless FAA preempts state law), *review denied* (Minn. Feb. 25, 2015); *see also In re Gillette Children's Specialty Healthcare*, 867 N.W.2d 513, 519 (Minn. App. 2015) (noting this court is bound by opinions of United States Supreme Court and Minnesota Supreme Court when interpreting federal statutes), *aff'd* 883 N.W.2d 778 (Minn. 2016).

***2** The parties participated in arbitration hearings in September and October 2018. The arbitrator first issued a partial final award, finding that Aurora abandoned the EPC agreement with Biosar due to the parties' departure from the strict terms of the EPC agreement and Aurora stepping into Biosar's shoes with respect to subcontractors. The arbitrator then determined that Biosar prevailed on the merits of its dispute with Aurora and issued the final award, granting (1) Biosar $3,258,676 in attorney fees, related costs, and expert fees, and Faith (2) $20,698,789 on its claims, (3) $4,867,902 in prejudgment interest, (4) $4,108,607 in attorney fees, related costs, and expert fees, and (5) 10% per annum postjudgment interest on $29,675,361 until paid in full.

The district court confirmed the arbitrator's awards. It determined that the arbitrator acted within the scope of his authority because (1) the stipulation supplanted the arbitration clause, allowing it to award equitable relief; (2) any potential ambiguity on the scope of the stipulation required resolution in favor of arbitration; and (3) the arbitrator determined that the parties intended to arbitrate all claims, including abandonment, to which the district court must defer under section 10(a)(4) of the FAA. Next, the district court determined that it lacked the authority to grant Aurora's request to vacate the arbitrator's award of attorney fees to Biosar. The district court declined to examine Aurora's claims on the merits because the parties agreed to submit all claims to arbitration, including contract abandonment. Lastly, the district court confirmed the arbitrator's award to Faith and Biosar because the award had not been vacated, modified, or corrected, as prescribed in sections 10 and 11 of the FAA. These appeals follow.

DECISION

I. Aurora waived its right to challenge the arbitrator's authority to find that Aurora abandoned the contract.

Aurora argues that it did not waive its right to argue that the arbitrator exceeded the scope of his authority when he found that Aurora abandoned the EPC agreement. We disagree.

A. Standard of Review

We defer to an arbitrator's findings of fact and determinations of law. *Phillips v. Dolphin*, 776 N.W.2d 755, 758 (Minn. App. 2009), *review denied* (Minn. Mar. 16, 2010). But we assess the scope of an arbitrator's authority, including assessments of arbitrability, de novo.[1] *See Seagate Tech., LLC v. W. Digital Corp.*, 854 N.W.2d 750, 760-61 (Minn. 2014). We will not set aside an arbitration award unless the arbitrator has clearly exceeded the scope of the powers granted by the arbitration agreement. *Id.* The party objecting to an arbitration award and the arbitrator's authority has the burden of proof. *Id.* at 761. We must exercise every reasonable presumption "in favor of the finality and validity of the award." *Id.* (quotation omitted).

Even though the district court made several findings equating to waiver, which we review for clear error, see *id.* at 757, we review whether Aurora waived its challenge to the arbitrator's authority to find contract abandonment de novo because the JAMS rules outline when waiver occurs, see *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 349 (Minn. 2003) (providing that appellate courts review arbitration clauses, such as JAMS rules, de novo).

B. The waiver issue is properly before us.

Aurora contends that we cannot decide the waiver issue because the arbitrator made no factual findings on it.[2] None of the parties raised the waiver issue before the arbitrator. To the contrary, the parties agreed to the arbitrator deciding all issues raised, without objection. Aurora stated that it had no "procedural, arbitrability or selection of arbitrator objections related to the claims, counterclaims, and defenses between Aurora and Biosar," and these claims included contract abandonment. Biosar and Faith did not argue waiver until after Aurora challenged in the district court the arbitrator's authority to find that Aurora abandoned the contract.

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***3** Similarly, Aurora contends that we cannot decide waiver because the district court made no factual findings on it. But the district court found that "[n]o party objected to the [a]rbitrator's jurisdiction over the issues raised during the hearing." These issues included contract abandonment. Moreover, the district court found that, "Aurora never asserted that the issue of abandonment was outside the scope of the [a]rbitrator's powers. Aurora instead argued the factual and legal merits of Biosar's abandonment claim to the [a]rbitrator." (Footnote omitted). The record supports these findings. [3]

C. The arbitrator viewed the stipulation as a source of his authority for the joint arbitration.

Aurora argues that the arbitrator viewed the EPC arbitration clause, as opposed to the stipulation, as the source of his authority over the Aurora-Biosar dispute because he acknowledged that the parties agreed to arbitrate their disputes under that arbitration clause, he referenced the clause numerous times in the partial and final awards, he expressly relied on the arbitration clause to award attorney fees to Biosar, and the stipulation did not reference the arbitration clause's limitations.

The arbitrator expressly acknowledged in his award that his authority derived from the EPC agreement *and* the stipulation by listing both the stipulation and article XIV of the EPC agreement, containing the arbitration clause, as arbitration agreements in the "Contracts, Arbitration Agreements and Rules" section of the partial final award. The stipulation is a three-party agreement governing "all claims, counterclaims, and defenses by, between, and among Faith, Aurora, and Biosar."

Aurora contends that the arbitrator referred to the stipulation as governing only the dispute between Aurora and Faith because the arbitrator characterized the stipulation as representative of an arbitration agreement "between Faith and Aurora," showing that he thought the stipulation did not govern the scope of his authority for the purpose of awarding relief. Aurora also contends that we must interpret the arbitrator's references to the stipulation in their context, which does not demonstrate a reference to the joint arbitration. In the "Parties and Jurisdiction" section of the partial final award, the arbitrator identifies the stipulation twice: in the context of determining whether the parties were properly named and whether he had jurisdiction to decide the lien claims by Faith against Aurora. But Aurora's arguments are contrary to the plain language of the stipulation, which gives the arbitrator broad authority over all claims between all three parties. Even if we were to assume that the arbitrator's analysis of the scope of his authority is ambiguous, we construe this ambiguity in favor of confirming the award. *United Food & Commercial Workers, Local No. 88 v. Shop 'N Save Warehouse Foods, Inc.*, 113 F.3d 893, 895 (8th Cir. 1997); *see Seagate*, 854 N.W.2d at 760-61. It is more appropriate to interpret these contextual qualifications as specific examples of the arbitrator's authority, not as limitations. Aurora's arguments to the contrary fail.

D. Having adopted the JAMS rules in the stipulation, Aurora waived the right to challenge the arbitrator's authority to decide abandonment.

Aurora contends that its conduct did not meet the definition of waiver under *Wells Fargo Bank, N.A. v. WMR e-PIN, LLC*, 653 F.3d 702, 711-12 (8th Cir. 2011), which Aurora contends requires a failure to object and an invocation of relief similar to that disputed. However, the stipulation expressly incorporates the JAMS rules, which provide a different waiver analysis than *Wells Fargo*. Under JAMS Comprehensive Arbitration Rules, 9(f), "jurisdictional challenges under rule 11 shall be deemed waived, unless asserted in a response to a [d]emand or counterclaim or promptly thereafter, when circumstances first suggest an issue of arbitrability." JAMS rule 11(b) governs jurisdictional and arbitrability disputes, including disputes over the scope of the agreement under which arbitration is sought. JAMS Comprehensive Arbitration Rules, 11(b). Thus, the JAMS rule controls, and *Wells Fargo* is inapplicable.

***4** Aurora also contends that the EPC agreement's no-waiver clause [4] prevented waiver. But, to the extent that the EPC agreement is inconsistent with the JAMS rules, the stipulation incorporates the JAMS rules and overrides any inconsistencies, including the no-waiver clause. To avoid waiver under the JAMS rules, Aurora had to assert the arbitrator's lack of authority over the abandonment claim, which it did not do until after the arbitration concluded. Thus, by entering into the stipulation, Aurora waived the no-waiver clause. *See Pollard v. Southdale Gardens of Edina Condo. Ass'n, Inc.*, 698 N.W.2d 449, 453 (Minn. App. 2005) ("[A] nonwaiver clause may be modified by subsequent conduct, [and] the mere presence of a nonwaiver clause does not automatically bar a waiver claim."). Even though the EPC arbitration clause provides that "in the event of

any conflict between the procedures herein and [JAMS,] the procedures herein shall control," as noted above, the stipulation supplanted this arbitration clause and adopted the JAMS rules wholesale.

Finally, Aurora argues that the arbitrator exceeded his authority by granting nonmonetary and equitable relief by finding that the agreement was "abandoned, and rescinded," and by allowing Biosar to pursue a claim against Aurora for quantum meruit. But when "a case is submitted to arbitration by order of a court, the scope of the issues submitted is controlled by the court's order." *Latenser v. John Latenser & Sons, Inc.*, 347 N.W.2d 486, 490 (Minn. 1984). Here, the stipulation filed with the district court gave the arbitrator the broad power to decide "all claims, counterclaims, and defenses ... arising out of and related to the Project." Moreover, under the JAMS rules, "[t]he [a]rbitrator may grant any remedy or relief that is just and equitable and within the scope of the [p]arties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy." JAMS Comprehensive Arbitration Rules, 24(c).

By entering into the stipulation and failing to object to the arbitrator's impending ruling on abandonment, Aurora intentionally and knowingly waived its right to challenge the arbitrator's authority to award equitable relief. *See* *Frandsen v. Ford Motor Co.*, 801 N.W.2d 177, 182 (Minn. 2011) ("Waiver is the intentional relinquishment of a known right."). Because the stipulation provided the arbitrator with broad authority to award equitable and nonequitable relief, we need not decide whether the arbitrator found the contract to be rescinded as opposed to abandoned.

E. The district court did not overrule the arbitrator's interpretation of his authority.

Aurora contends that, because the arbitrator referred to article XIV (sections 14.1-14.4) of the EPC agreement as the source of his authority, and because arbitrator determinations of their own authority are binding, the district court erred by determining that the stipulation supplanted the EPC arbitration clause (section 14.2).[5] Aurora's contention is misguided.

The district court did not overrule the arbitrator's interpretation of his authority. As explained above, the arbitrator viewed both the stipulation and the EPC agreement as sources of his authority. Moreover, the district court acknowledged the stipulation as providing the arbitrator authority. It noted that "the [a]rbitrator issued his award on the belief that the parties intended to arbitrate the claims Aurora is now challenging," referring to the arbitrator's incorporation of the stipulation as a basis for the arbitrator deciding the issues before him, which included abandonment. Finally, the district court confirmed the arbitrator's decision and in turn confirmed his decision that he had authority to decide the abandonment issue.

II. Biosar prevailed at arbitration, entitling it to attorney fees.

***5** Aurora argues that the arbitrator erred and exceeded the scope of his authority because section 14.3 of the EPC agreement only allows a "prevailing party" to receive attorney fees, which Biosar did not qualify as because the arbitrator did not award it any damages. We disagree.

The arbitrator examined the EPC agreement's definition of "prevailing party"[6] and assessed the qualification of a prevailing party holistically as one who prevails on the underlying merits, regardless of whether the party received compensation. *See, e.g.*, *Borchet v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998) (noting that, "[t]he prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered."). Under that reasoning, the arbitrator concluded that Biosar prevailed on the merits of its claim that Aurora abandoned the contract. We must defer to the arbitrator's legal determination that a party need not be entitled to receive damages to qualify as a prevailing party, so long as it prevails on the underlying merits of its claim. *See* *Phillips*, 776 N.W.2d at 758 (noting that appellate courts defer to arbitrators' determinations of law).

Aurora also argues that we must overturn the arbitrator's attorney-fee award to Biosar because the district court concluded that the stipulation supplanted article XIV of the EPC agreement while inconsistently confirming the arbitrator's award of attorney fees based on the arbitration clause within article XIV. We are not persuaded.

The district court never determined that the stipulation supplanted the entire dispute-resolution article of the EPC agreement, article XIV.[7] Instead, it determined that "the parties' stipulation and proposed order supplanted the EPC's arbitration provision," and later referred to the EPC "arbitration provision" as "the arbitration clause." The district court's reference to a single "clause" cannot be interpreted

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to extend to all of article XIV, which contains five clauses (sections 14.1-14.5). Rather, the district court determined that the stipulation supplanted the arbitration clause in section 14.2 but not the attorney-fee clause in section 14.3.

The district court determined that, even if the language in the arbitrator's written determination of his own authority is ambiguous, it must construe that authority in favor of supporting the arbitrator's award. At most, the arbitrator presented an unclear determination of his own authority by acknowledging both the stipulation and article XIV, which have some inconsistent provisions. Construing this ambiguity to support the arbitration award, we conclude that the arbitrator determined that certain sections of article XIV still provided him with authority. *See United Food*, 113 F.3d at 895; *Seagate*, 854 N.W.2d at 760-61.

***6** The arbitrator noted that the survival clause [8] in section 14.5 of the EPC agreement allowed the attorney-fee clause to survive Aurora's partial abandonment of the EPC agreement. [9] Reading the survival clause as preserving the attorney-fee clause but not the arbitration clause is consistent with the stipulation supplanting only the arbitration clause. Thus, Aurora fails to meet its burden of establishing that the arbitrator clearly exceeded the scope of his authority by applying the attorney-fee clause of the EPC agreement to award Biosar attorney fees. *See Seagate*, 854 N.W.2d at 760-61.

III. The arbitrator's award to Faith stands.

Aurora contends that Faith's award must be vacated as well, based on the assumption that the arbitrator erred by awarding attorney fees to Biosar, because the FAA does not permit severance of an arbitration award and the awards to Biosar and Faith are inextricably linked. Because we affirm the arbitrator's award to Biosar, this argument fails.

IV. The district court abused its discretion by not providing a rationale for why it denied Faith's request for attorney fees incurred on its motion to confirm the arbitrator's award.

Faith argues that the district court abused its discretion by denying its request for attorney fees because (1) Minn. Stat. § 572A.25 (2018), a section of the Uniform Arbitration Act, and Minn. Stat. § 514.14, the mechanic's lien statute, entitled it to receive attorney fees; (2) it reserved the right to submit a rule 119.02 affidavit until after the district court determined whether Faith was entitled to receive attorney fees; and (3) the district court could not have based its decision on a strict application of rule 119 because it did not mention that rule. We agree that the district court failed to provide a rationale for its decision.

We review a district court's decision on attorney fees for an abuse of discretion. *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). "A district court has discretion to strictly enforce or to waive the requirements of rule 119 when considering a motion for attorney fees." *Rooney v. Rooney*, 782 N.W.2d 572, 577 (Minn. App. 2010). Rule 119 requires, in part, a party requesting attorney fees in excess of $1,000 to submit a motion and accompanying affidavit describing the work performed, time spent, and hourly rate. Minn. R. Gen. Prac. 119.01, 02. However, a district court abuses its discretion by denying a motion for attorney fees without providing a rationale. *See Richard Knutson, Inc. v. Westchester, Inc.*, 374 N.W.2d 485, 490 (Minn. App. 1985).

Here, Faith submitted neither a motion nor an accompanying affidavit per rule 119.02. Instead, Faith argued why it was entitled to receive attorney fees, and "request[ed] leave to submit an affidavit proving the amount of its reasonable attorneys' fees." The district court did not comment on Faith's argument and did not grant it attorney fees.

We cannot determine whether the district court denied Faith attorney fees because Faith did not submit a rule 119 affidavit or because Faith failed on the merits of its request. Because we have no rationale to review, we remand for the district court to articulate a reason for a decision on Faith's request for attorney fees incurred.

V. We decline to award Faith attorney fees incurred on this appeal.

***7** Faith argues that it is entitled to recover attorney fees incurred on what it characterizes as an interlocutory appeal of a partial judgment pursuant to Minn. R. Civ. P. 54.02 because the appeal is necessary to setting the value of a mechanic's lien. We decline to reach the issue.

Under Minn. R. Civ. App. P. 139.05, subd. 1, "a party seeking attorney[ ] fees on appeal shall submit such a request by motion under Rule 127." *See* Minn. Stat. § 645.44, subd. 15 (2018) (providing that "shall" is mandatory). Rule 139.03 imposes a 14-day limitation for submitting this request to

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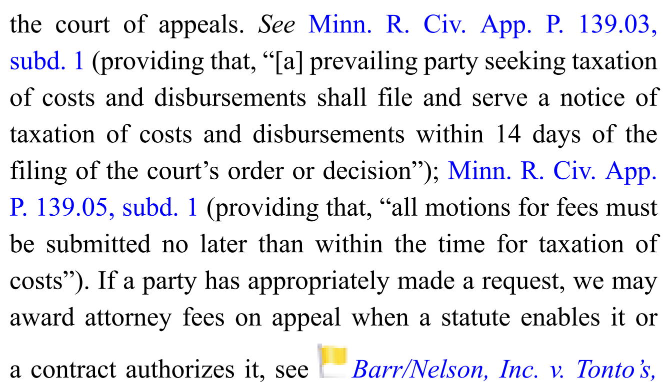
the court of appeals. *See* Minn. R. Civ. App. P. 139.03, subd. 1 (providing that, "[a] prevailing party seeking taxation of costs and disbursements shall file and serve a notice of taxation of costs and disbursements within 14 days of the filing of the court's order or decision"); Minn. R. Civ. App. P. 139.05, subd. 1 (providing that, "all motions for fees must be submitted no later than within the time for taxation of costs"). If a party has appropriately made a request, we may award attorney fees on appeal when a statute enables it or a contract authorizes it, see  *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983), or as a sanction, Minn. R. Civ. App. P. 139.05 1998 comm. cmt. Because Faith has not submitted a motion requesting attorney fees on appeal, we decline to reach the issue.

Affirmed in part and remanded.

All Citations

Not Reported in N.W. Rptr., 2020 WL 3172835

Footnotes

1 "Arbitrability" refers to "[t]he status of a dispute's being or not being within the jurisdiction of arbitrators to resolve, based on whether ... the dispute is within the scope of the arbitration agreement ... and whether the applicable law permits the arbitrators to resolve the subject matter of the dispute." *Black's Law Dictionary* 124 (10th ed. 2014).

2 As elaborated below, no factual finding of waiver is required for two reasons. First, the parties agreed to submit all issues to the arbitrator. Second, Aurora never asserted during the arbitration that abandonment was outside the scope of the arbitrator's decision.

3 The record also belies Aurora's contention that it had no notice of an abandonment claim.

4 The clause states, "To be effective, a waiver of any obligation or right must be in writing and signed by the Party waiving such obligation or right."

5 The district court noted that the stipulation supplanted the EPC arbitration clause "regardless of the arbitrator's finding that his authority was derived from the EPC contract."

6 The final arbitration award stated, "[T]he party to the action or proceeding who is entitled to recover its costs of suit for the proceeding, whether or not the same proceeds to final judgment. A party not entitled to recover its costs shall not recover attorneys' fees." The fact that the arbitrator assessed the EPC agreement's definition of "prevailing party" further supports the conclusion that he did not consider the stipulation to have supplanted the entire EPC agreement.

7 Aurora refers to the district court's language that, "Aurora does point out that the [a]rbitrator apparently thought the EPC contract was the source of his power with respect to the claims between Aurora and Biosar. Even if this is true, it does not change the fact that the parties' [s]tipulation and [p]roposed [o]rder should govern." The district court referenced Aurora's argument without deciding the point. And its reference to the stipulation does not imply that the stipulation supplanted article XIV in its entirety, as explained below.

8 "The provisions set forth in this Article XIV shall survive the termination or expiration of this Agreement."

9 Although the arbitrator referenced the impact of the termination clause as something that "Biosar notes," the arbitrator discussed the termination clause under the section of his award entitled "Arbitrator's Determinations – Prevailing party," based on which he awarded Biosar attorney fees.

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