SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 13

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ENDEAVOUR CONSTRUCTION CORP. a/k/a ENDEAVOUR CONSTRUCTION CORPORATION, on behalf of itself and on behalf of all persons entitled to share in the trust funds received by the defendants pursuant to Lien Law Article 3-A in connection with the construction at 4469 Broadway, New York, New York,

Plaintiff,

- against -

JACKSON BUILDERS LLC and NEIL WEISSMAN,

Defendants.

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DECISION AND ORDER

Index No: 9892/11

Motion Sequence Nos: 002 & 003
Original Return Date: 08-24-12

PRESENT:
HON. JOEL K. ASARCH,
Justice of the Supreme Court

The following named papers numbered 1 to 9 were submitted on this Notice of Motion on September 7, 2012:

	Papers numbered
Notice of Motion and Affirmation (Seq. 002)	1-2
Affirmation in Opposition	3
Reply Affirmation	4
Notice of Motion and Affidavit (Seq. 003)	5-6
Affirmation in Opposition	7
Memorandum of Law in Opposition	8
Reply Affirmation	9

The motion by the plaintiff, Endeavor Construction Corp., *et. al.*, for an Order, *inter alia*: (1) lifting a stay contained in a "So Ordered" stipulation dated October 7, 2011; (2) confirming an

arbitration award dated June 27, 2012 pursuant to CPLR 7510; and (3) severing the action as against co-defendant Neil Weissman (motion sequence 002); and the motion pursuant to CPLR 7511[b] by the defendants, Jackson Builders, LLC and Neil Weissman, for an Order vacating an arbitration award dated June 27, 2012 (motion sequence 003), are decided as follows.

By summons and verified complaint dated June 2011, the plaintiff Endeavor Construction Corp., *et., al.* ["Endeavor"] – a concrete subcontractor – commenced the within action as against Jackson Builders, LLC and Neil Weissman [the "defendants"]. The complaint alleges in substance that Endeavor poured concrete at a New York City job site pursuant to an agreement with Jackson, but that Jackson improperly terminated the agreement and then declined to pay the remaining contract amounts then allegedly due and owing (Cmplt., ¶¶ 4-9; Defs' Exh., "3"). Based upon these averments and others, the plaintiff has interposed three causes of action, grounded upon breach of contract, account stated and violation of Lien Law Article 3-A.

Thereafter, the defendants moved to dismiss the complaint, but after the motion was submitted, the parties executed a "So Ordered" stipulation dated October 7, 2011, pursuant to which, *inter alia*, the motion to dismiss was withdrawn; the matter was submitted to arbitration; and the underlying action was stayed pending completion of the arbitration proceeding (Defs' Exh., "1").

In June of 2012, the arbitrator rendered a determination in which he held for Endeavor, finding in relevant part that the defendants failed to provide proper notice supporting a "for cause" termination of the contract. More particularly, the arbitrator concluded in substance that because, *inter alia*, certain prior notices sent to Endeavor did not expressly "put * * * [Endeavor] on notice" that the defendants were considering cancelling the agreement, the contract had not been properly terminated for cause (Defs' Exh., "2", Award at 2). In light of the alleged absence of proper notice,

the arbitrator concluded that the termination was one for "the Owner's convenience" and that Endeavor would therefore be entitled to recover for work performed and costs incurred by reason of the termination (Defs' Exh., "2", Award at 2).

The defendants now move for an order vacating the subject award pursuant to CPLR 7511[b][1][iii], arguing, *inter alia*, that the arbitrator "exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made * * *". In sum, and according to the defendants, the arbitrator erred inasmuch as the agreement allegedly does not require any specific notice advising of an intent to terminate the contract for cause (Weissman Aff., ¶¶ 21-24).

Endeavor has opposed the defendants' motion and moved for an order: (1) lifting the stay contained in the October, 2011 stipulation; (2) confirming the award pursuant to CPLR Article 75; and (3) severing the action as to co-defendant Weissman (CPLR 7510, 7511[e]). Endeavor's motion is granted. The defendants' motion is denied.

It is settled that the scope of judicial review of an arbitration proceeding is "extremely limited" (*New York City Transit Authority v. Transport Workers Union of America, Local 100*, 14 NY3d 119, 123-124 [2010]; *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006]; *Allstate Ins. Co. v. GEICO,* ___ AD3d___, 2012 WL 5870369 [2nd Dept 2012]; *Westchester County Correction Officers' Benev. Ass'n v. County of Westchester,* ___AD3d___, 2012 WL 5416584 [2nd Dept 2012]). Specifically, "a court may vacate an arbitration award only if it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15 NY3d 530, 534 [2010]; *see, In re Kowaleski (New York State Dept. of Correctional Services),* 16 NY3d 85, 90-91 [2010]; *Merrick*

Union Free School Dist. v. Merrick Faculty Ass'n, Inc., 87 AD3d 536 [2nd Dept 2011]). Additionally, CPLR 7511[b][1][iii] provides, *inter alia*, that an award may be vacated where the arbitrator "exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made * * *" (*In re Kowaleski (New York State Dept. of Correctional Services), supra*, 16 NY3d at 90-91).

Notably, an arbitrator "exceed[s] his power" within the meaning of CPLR 7511[b][1][iii], where the "award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*In re Kowaleski (New York State Dept. of Correctional Services), supra*; *Cusimano v. Strianese Family Ltd. Partnership*, 97 AD3d 744, 745; *Modafferi v. Manhattan and Bronx Surface Transit Operating Authority*, 93 AD3d 673). In considering an award, however, "[c]ourts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies" and may not "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes that its interpretation would be the better one" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 NY2d 321, 326 [1999]; *Westchester County Correction Officers' Benev. Ass'n v. County of Westchester, supra*; *Miro Leisure Corp. v. Prudence Orla, Inc.*, 83 AD3d 945, 946 [2nd Dept 2011]). Indeed, "an arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached'" (*Wien & Malkin LLP v Helmsley-Spear, Inc., supra*, 6 NY3d at 479; *Allstate Ins. Co. v. GEICO, supra*). Notably, and pursuant to CPLR 7511[e], "[u]pon the * * * the denial of a motion to vacate or modify, * * * [the Court] shall confirm the award".

With these principles in mind, the Court agrees that the defendants have failed to demonstrate

that any of the applicable statutory grounds for vacating the arbitrator's award exist (*see generally, Modafferi v. Manhattan and Bronx Surface Transit Operating Authority, supra*, 93 AD3d 673; *Shimon v. Silberman*, 92 AD3d 789, 790 [2nd Dept 2012]; *Miro Leisure Corp. v. Prudence Orla, Inc., supra*, 83 AD3d 945; *Susan D. Settenbrino, P.C. v. Barroga-Hayes*, 89 AD3d 1094, 1095 [2nd Dept 2011]). Specifically, the defendants have not established that the award "violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*In re Kowaleski supra*, (16 NY3d 85, 90-91;*Cusimano v. Strianese Family Ltd. Partnership, supra*, 97 AD3d 744, 745; *Shimon v. Silberman, supra*, 92 AD3d at 790). Rather, the defendants' assertions and claims with respect to the arbitration award are essentially predicated on the theory that the arbitrator incorrectly construed or interpreted the parties' construction agreement, *i.e.*, their claims are based on alleged errors of law and fact, which fall "within the category of claims of legal error courts generally cannot review" (*Matter of Falzone, supra*, 15 NY3d at 534; *Merrick Union Free School Dist. v. Merrick Faculty Ass'n, Inc.*, 87 AD3d 536, 539 [2nd Dept 2011]).

It is settled in this respect that absent irrationality, an "award will not be vacated even though the court concludes that * * * [the arbitrator's] interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law" (*Matter of Silverman (Benmor Coats)*, 61 NY2d 299, 308 [1984] *see also, Matter of Falzone, supra* 15 NY3d at 534; *Westchester County Correction Officers' Benev. Ass'n v. County of Westchester, supra*). Indeed, it has long been held that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and that "'[i]t is not for the courts to interpret the substantive conditions of the contract or to determine the merits of the dispute'" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL–CIO v. Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 82–83 [2003], *quoting*

from, Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v. Barni, 51 NY2d 894, 895 [1980]; *see also, Wien & Malkin LLP v. Helmsley–Spear, Inc., supra*, 6 NY3d at 479–480).

The defendants' reliance on the Court of Appeal's recent holding in *In re Kowaleski supra*, (16 NY3d 85, 90-91), is misplaced, since *Kowaleski* is distinguishable. In *Kowaleski* – which involved a public contract disciplinary proceeding – the Court held, *inter alia*, that the arbitrator erroneously found that he lacked the authority to consider a potentially determinative and applicable statutory defense under the Civil Service Law.

Lastly, while the plaintiff's notice of motion incorrectly states, *inter alia*, that the motion is to be returnable in Kings County, Supreme Court (CPLR 2214[a]), the captioned heading on the notice of motion plainly apprises the reader that the action is pending in Nassau County; utilizes the correct Nassau County index number; and accurately lists the undersigned as the justice in this Court to whom the matter has been assigned. Upon the exercise of the Court's discretion, and in the absence of any evidence that substantial prejudice has resulted, the above referenced errors are properly disregarded (CPLR 2001; *Mondello v Mondello*, 174 AD2d 712, 713 [2nd dept. 1991]; *cf.*, *Tagliaferri v. Weiler*, 1 NY3d 605, 606 [2004]). The Court has considered the defendants' remaining contentions and concludes that they are lacking in merit.

Accordingly it is,

ORDERED that the motion by the plaintiff Endeavor Construction Corp., *et. al.*, for an order, *inter alia*: (1) lifting a stay contained in a so-ordered stipulation dated October 7, 2011; (2) confirming an arbitration award dated June 27, 2012; and (3) severing the action as against co-defendant Neil Weissman is **granted**, and it is further

ORDERED that the motion pursuant to CPLR 7511[b] by the defendants Jackson Builders,

LLC and Neil Weissman for an order vacating the arbitration award is **denied**.

The foregoing constitutes the decision and order of the Court.

Plaintiff shall settle an interlocutory judgment in accordance herewith.

Dated: Mineola, New York
December 10, 2012

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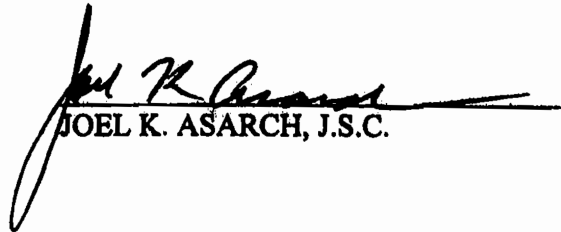

JOEL K. ASARCH, J.S.C.

Copies mailed to:

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