

No. 1-13-2102

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PRIVATE FLOORING ENTERPRISES, INC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 10 CH 13873
)	
POWERS & SONS CONSTRUCTION COMPANY, INC.,)	Honorable
)	Lisa R. Curcio,
Defendant-Appellee.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶1 *Held:* The circuit court properly confirmed the award of the arbitrator where it was supported by the findings of the arbitrator and the award does not contain on its face a gross error of law or fact.

¶2 Plaintiff, Private Flooring Enterprises, Inc. (Private Flooring), appeals the denial of its motion to vacate an arbitration award in favor of defendant, Powers & Sons Construction Company (Powers). In February 2008, the parties entered into a written contract for work to be

performed by Private Flooring at the Toyota Institute of Technology. After Private Flooring filed a subcontractor's claim for a lien and a complaint for foreclosure of a mechanic's lien, Powers filed and was granted a motion to compel arbitration and to stay judicial proceedings. The arbitrator ultimately entered an award in favor of Powers and did not award Private Flooring a set off or an award. The circuit court thereafter denied Private Flooring's motion to vacate the arbitration award, instead confirming the award and entering judgment in favor of Powers. Private Flooring filed its notice of appeal, arguing that the award should be vacated because it contained gross errors of law and fact on its face. We disagree and affirm the judgment of the circuit court.

¶3 BACKGROUND

¶4 On February 15, 2008, plaintiff and defendant, as an agent of the University of Chicago, entered into a written contract in connection with a project to be performed at The Toyota Institute of Technology located at 6045 S. Kenwood Ave., in Chicago. Powers was the general contractor and Private Flooring was a subcontractor on the project.

¶5 In relevant part, the contract provided, in the scope of work, that:

"Subcontractor hereby agrees for certain hereinafter specified considerations to furnish all materials, labor, and equipment and fully complete as required by the plans and specifications furnished by: Myefski Cook Architects, Inc., plan(s) and specification(s) dated August 20, 2007; the following described Toyota Institute of Technology *** All ceramic tile work, resilient flooring work, and sheet carpeting work as per specification

sections 093000, 096500 and 093816 including but not limited to ceramic porcelain tile, ceramic porcelain wall tile, stone thresholds, waterproof membrane, crack suppression membranes, rubber tile flooring, rubber wall base, rubber stair treads, flooring accessories, sub floor preparation and submittals *** and *** to fully relieve the Contractor of all responsibility for finishing and completing the said work in accordance with the Contractor's general contract with Toyota Technological Institute of Chicago hereinafter designated the Owner *** and agreed that the terms and provisions of said contract between the Contractor and said Owner with 2-15-08, are made part of this Agreement and further, that the Subcontractor grants to said Contractor those rights, powers, and remedies in every detail and respect and in the same language and intent which Owner reserves to itself in the said general contract."

¶6 The contract further provided:

"13. Should the Subcontractor refuse to start work promptly, neglect to supply a sufficient number of properly skilled workmen or sufficient materials of the proper quality, or fail in performance of any of the agreements herein contained, Contractor, without notice to Subcontractor, may provide any such labor or materials and deduct the cost from any money then due or thereafter to

become due under this Sub-Contract; but if such expense and damage shall exceed such unpaid balance, Subcontractor shall pay the difference to Contractor and all attorney fees associated therewith.

* * *

15. Subcontractor agrees with the terms and conditions of the attached construction schedule, and will exercise due diligence in completing his portion of the work in coordination with the other trades."

Powers agreed to pay Private Flooring \$87,000 for its performance under the contract.

¶7 On February 11, 2009, Private Flooring filed a subcontractor claim for lien against Powers, and, on April 1, 2010, filed a complaint for foreclosure of mechanic's lien and for other relief.

¶8 On October 7, 2010, Powers filed a motion to compel arbitration and to stay judicial proceedings and, on December 2, 2010, by agreement, the motion was granted. The case was referred to the American Arbitration Association for hearing and, according to the record, the hearing was held on December 12, 2012. The entire appellate record consists of one volume and no transcripts or a bystander report of the arbitration hearing are included.

¶9 According to the documents included in the record and from a review of the statement of facts contained in the parties' briefs, we provide the following synopsis of what claims were made and what evidence was submitted to the arbitrator for his consideration. The parties agree

that during the arbitration hearing witnesses testified and documentary evidence was presented to the arbitrator.

¶10 In the complaint for foreclosure of the mechanic's lien, Private Flooring alleged, in relevant part, that after contracting with Powers, Private Flooring provided "the flooring/tile materials required by the contractor" and substantially completed the furnishing of such materials. Private Flooring further contended that at the insistence of Powers, Private Flooring furnished extra and additional materials which caused additional charges and labor costs over and above the contract price in the amount of \$56,939.40. Private Flooring stated that it had been paid a total of \$38,566.80 and was therefore owed a balance of \$127,979.46, which Powers refused to pay.

¶11 Among the documents submitted to the arbitrator were: the twelve page contract between the parties; a receipt from E.R.C. Delivery Service for the delivery of items to the Toyota Institute with a designation of "charge to" Trans Ceramick; a document entitled "Invoice" with a designation of "ship to" Toyota Institute and a "bill to" notation to Powers & Sons; a letter dated May 29, 2008, from Private Flooring to Powers informing Powers that "consolidated Union Installers would execute the flooring subcontract job *** awarded to Private Flooring Enterprises. This job includes carpeting, terrazzo and laying of tiles etc."; a FedEx National LTL receipt showing a delivery to the Toyota Institute from Eurowest Decorative Surfaces; and seven "change orders."¹

¹ The "change orders" do not appear in the record.

¶12 On February 13, 2013, the arbitrator made the following findings in his award:

"1) The parties entered into a Subcontract dated February 15, 2008 providing for ceramic tile work, resilient flooring work and sheet carpeting work (including materials and labor) (the 'Work') to be performed by Private Flooring as a subcontractor for Powers, who was a contractor for work to be performed by Powers on the Toyota Institute of Technology in Chicago. The subcontract price for the Work was Eighty-Seven Thousand and No/100 Dollars (\$87,000.00). Private Flooring was unable or refused to start the Work promptly, to supply a sufficient number of properly skilled workmen or sufficient materials of the proper quality or to perform other agreements contained within the Subcontract.

2) As a result of the actions or inactions of Private Flooring, Powers exercised its rights under Section 13 of the Subcontract and without notice to Private Flooring (as provided in the Subcontract) provided such labor and materials that was called for under the Subcontract and deducted the cost of any money due to Powers thereafter from the Subcontract price and claimed the difference from Private Flooring as evidenced by seven (7) "change orders" delivered in unsigned form to Private Flooring and by two (2) other payments by Powers, one to Private Flooring and one to Masland, which were not included in the change orders.

These payments by Powers reduced the amounts payable to Private Flooring from \$87,000.00 to a negative \$63,372.87 which is due to Powers from Private Flooring together with interest on such amount payable at one and one-half percent (1.5%) per month on the amounts so expended by Powers which total \$41,125.00.

In addition to the foregoing, Powers has expended attorneys' fees associated with the defense of the claim by Private Flooring and with the pursuit of the counterclaim of Powers, which fees total \$16,253.73 as evidenced by the affidavit of David Buls, the attorney for Powers, which is the prevailing party in this arbitration and which has been submitted into the record.

3) Private Flooring has made its claim in this arbitration for \$157,164.28 plus attorneys' fees under the Subcontract, but has provided no evidence that it has delivered materials or performed the work called for under the contract. Private Flooring is not the prevailing party in this proceeding so as to justify an award of attorney fees.

Accordingly, I award as follows:

1) Private Flooring shall pay to Powers the sum of \$120,751.60 determined as follows:

Amount expended in completing	\$63,372.87
the Work	

Interest per the Subcontract	\$41,125.00
Attorney Fees	\$16,253.73
Total:	\$120,751.60

2) Powers shall make no payment to Private Flooring."

¶13 Private Flooring filed a motion to vacate the arbitration award in the circuit court and Powers filed its response. The circuit court denied Private Flooring's motion, confirmed the award, and entered judgment in favor of Powers. No transcript of the circuit court hearing or bystander's report was provided. This timely appeal followed.

¶14 ANALYSIS

¶15 Private Flooring contends the circuit court erred in denying its motion to vacate the arbitrator's award, contending the arbitrator made a gross error of law or fact on the face of the award. Specifically, Private Flooring contends the arbitration award omits on its face and fails to take into account: (1) Private Flooring's claim for the large quantities of materials it delivered to the work site and for which it was never compensated, as evidenced by testimony presented at the arbitration hearing and by receipts produced during the arbitration hearing; and (2) the unrebutted evidence that Private Flooring, as required by the contract, stood ready to hire union laborers as its workers, as evidenced by a letter Private Flooring sent to Powers.

¶16 We review the circuit court's decision to affirm the arbitrator's award for an abuse of discretion. *National Wrecking Co. v. Sarang Corp.*, 366 Ill. App. 3d 610, 620 (2006). An abuse of discretion occurs when the trial court rules arbitrarily or when its ruling exceeds the bounds of reason. *Jordan v. Bangloria*, 2011 IL App (1st) 103506, ¶8. It is important to note that "judicial review of an arbitrator's award is extremely limited, more limited than appellate

review of a trial.' " *First Health Group Corp. v. Ruddick*, 393 Ill. App. 3d 40, 52 (2009) (quoting *Anderson v. Golf Mill Ford, Inc.*, 383 Ill. App. 3d 474, 479 (2008)). The limited review is considered valid because the contracting parties have agreed to settle their dispute by means of arbitration. *TruServ Corp. v. Ernst & Young, LLP*, 376 Ill. App. 3d 218, 224 (2007).

¶17 In determining whether grounds exist to vacate an arbitration award, judicial review generally extends only to those areas expressly stated by statute. *Edwards Electric Co. v. Automation, Inc.*, 229 Ill. App. 3d 89, 97 (1992). Section 12(a) of the Illinois Uniform Arbitration Act (Act) (710 ILCS 5/1 *et seq.* (West 2012)) provides:

"(a) Upon application of a party, the court shall vacate an award where:

- (1) The award was procured by corruption, fraud or other undue means;
- (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any one of the arbitrators or misconduct prejudicing the rights of any party;
- (3) The arbitrators exceeded their powers;
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or
- (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was

such that it could not or would not be granted by the circuit court is not ground for vacating or refusing to confirm the award."

¶18 Nonetheless, a court may vacate an award where " 'a gross error of law or fact appears on the face of the award.' " *First Health Group Corp.*, 393 Ill. App. 3d at 53 (quoting *Anderson*, 383 Ill. App. 3d at 479). However, "to vacate an award based on a gross error of law, a reviewing court must be able to conclude from the face of the award that the arbitrators were so mistaken as to the law that, if apprised of the mistake, they would have ruled differently. [Citation.] Alternatively, an arbitration award may be subject to vacatur for misapplication of the law where it is shown that the arbitrators deliberately disregarded what they knew to be the law." [Citation.] *TruServ Corp.*, 376 Ill. App. 3d at 224-25.

¶19 Here, as support for its assertion that the arbitrator's award contained gross errors of law and fact on its face, Private Flooring makes two claims. First, it asserts that the award erroneously accounts for the amount expended by Powers in completing the job, as well as awarding attorney fees and interest per the subcontract for Powers, while completely failing to compensate Private Flooring for the materials it "without question" had delivered to the work site without compensation. Second, Private Flooring claims that the award completely ignored the unrebutted evidence that it "stood ready" to hire union labor workers, as required under the parties' contract.

¶20 We conclude that the arbitration award contains no such gross errors of law or fact on its face. Keeping in mind the deference afforded to the arbitrator, the award demonstrates that the arbitrator considered the arguments and evidence presented by the parties. In relation to the dispute over compensation for materials, the arbitrator found Private Flooring "has provided

no evidence that it has delivered materials or performed the work called for *under the contract*." (Emphasis added.) The parties' contract was incredibly specific in its requirements for materials. Whether Private Flooring dropped off materials that were received and signed for by Powers is of no matter. There was no argument or evidence presented that Private Flooring provided the materials for which the parties expressly contracted. Moreover, the receipts provided by Private Flooring do not substantiate their claim. Rather, the E.R.C. Delivery Service receipt does not contain Private Flooring's name anywhere and indicated that the materials were charged to Trans Ceramick. The FedEx delivery receipt indicates materials from Eurowest Decorative Surfaces and again does not contain Private Flooring's name anywhere. Finally, an invoice from an unknown provider does not include Private Flooring's name anywhere and lists Powers as the "bill to" entity. The "change orders" referenced in the arbitrator's award do not appear in the record on appeal. It was Private Flooring's burden of providing a sufficiently complete record to support its claims of error, and any doubts or deficiencies arising from an incomplete record will be construed against it. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). Consequently, there was no evidence demonstrating Private Flooring incurred any costs, let alone costs within the purview of the parties' contract, for which it was entitled to reimbursement.

¶21 In relation to the dispute over compensation for labor, the arbitrator found Private Flooring was "unable or refused to *** supply a sufficient number of properly skilled workmen ***." Private Flooring maintains that this statement was erroneous because it provided a letter at the arbitration hearing demonstrating Private Flooring had contracted with union installers to perform the labor required under the agreement. The letter was dated May 29, 2008, while the contract was dated February 15, 2008. Pursuant to the contract, Private Flooring expressly

agreed to "work promptly" and to maintain the schedule provided, exercising "due diligence in completing his portion of the work in coordination with other trades." Notwithstanding, Private Flooring only communicated its ability to provide the contracted for labor 3.5 months after entering into the contract. We cannot say it was a gross error of law or fact for the arbitrator to conclude Private Flooring was not entitled to compensation for labor, which was untimely and for which there was no evidence that it incurred any costs.

¶22 As a final matter, Private Flooring argues, in passing, that the arbitrator failed to follow "the procedure set forth in 710 ILCS 5/8(c)(iii), which required him to decide [Private Flooring's] claim for reimbursement for materials in accordance with the contract." Section 8(c)(iii) of the Act (710 ILCS 5/8(c)(iii) (West 2012)) provides that "in all cases, the arbitrators shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." Based on the record before us, we find the arbitrator satisfied the statute.

¶23 CONCLUSION

¶24 We affirm the circuit court's judgment confirming the award entered by the arbitrator.

¶25 Affirmed.