IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

United States of America for the Use of Magnum Contracting, Inc.,

Plaintiff,

vs.

Mason & Hanger, Inc. and Liberty Mutual Insurance Company,

Defendants.

Civil Case No. 3:14-cv-112

ORDER GRANTING MOTION TO CONFIRM ARBITRATION AWARD AND DENYING MOTION TO VACATE ARBITRATION AWARD

INTRODUCTION AND SUMMARY OF DECISION

Before the court are a motion by Plaintiff, United States of America for the use of Magnum Contracting, Inc. ("Magnum"), to confirm an arbitration award[1] and a motion by Defendant, Mason & Hanger, Inc. ("M&H"), to vacate the award.[2] Because the court is unable to identify any authorization under the Federal Arbitration Act to vacate the award, the court is required to grant Magnum's motion to confirm. M&H's motion to vacate is **DENIED.** Magnum's motion to confirm is **GRANTED.**

DISCUSSION

This matter came before the court on a breach of contract claim, a Miller Act Claim against Liberty Mutual Insurance Company, and an equitable claim in quantum meruit against M&H.[3] In an order dated April 2, 2015, the court granted summary judgment on the Miller Act Claim and, noting the parties' agreement, granted M&H's motion to compel

[1] Doc. #30.

[2] Doc. #35.

[3] Doc. #23, pp. 2-3.

arbitration on the state law breach of contract and equitable claims.[4] Magnum and M&H then proceeded to arbitration.[5]

M&H moved[6] the arbitrator to dismiss Magnum's arbitration claim, arguing that the claim was untimely under the arbitration clause in the parties' "Standard From of Agreement Between Contractor and Subcontractor" ("Contract").[7] The arbitration clause, Article XII, paragraph 1.5, of the Contract provided:

> If at any time any controversy should arise between Contractor and Subcontractor with respect to any matter or thing involved in this Subcontract or construction Project, which controversy is not controlled or determined by other provisions of this Subcontract, then the Subcontractor shall conclusively be bound by and abide by (Contractor's) decision, unless the Subcontractor shall commence arbitration proceedings not later than fifteen (15) days following receipt of (Contractor's) decision by giving Contractor written notice of intent to arbitrate."[8]

M&H argued that the notice of arbitration was untimely because Magnum did not commence arbitration until August 19, 2015. M&H argued that the fifteen-day limitations period was triggered by a letter received by Magnum on August 30, 2013, in which M&H refused to pay Magnum for extra work on the contract and "holding Magnum responsible for extra project costs . . .."[9] The arbitrator denied the motion to dismiss, noting letters between the parties that indicated on-going discussions between the parties[10] and finding

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[4] Doc. #23.

[5] Doc. #36-1.

[6] Doc. #36-1, pp. 2-12.

[7] Doc. #36-1, pp. 14-30.

[8] Doc. #34-1, p. 6.

[9] Doc. #34-1, p. 5.

[10] Doc. #34-2, ¶¶ 9-11.

"an insufficient basis upon the record presented to conclude that a 'decision' was issued by Mason & Hanger that invoked the provisions of Paragraph 1.5 of Article XII of the parties' subcontract."[11] The arbitrator further found insufficient grounds for a finding that M&H was prejudiced by any delay, noting that the initiation of arbitration was within the North Dakota statute of limitations for breach of contract.[12] After a full arbitration hearing, in which M&H continued to argue that the notice of arbitration was untimely, the arbitrator specifically held:

> I. M&H's contentions that this arbitration is untimely are rejected for the reasons stated in the December 7, 2015 Order on M&H's motion to dismiss. M&H argued that Magnum did not comply with the parties' subcontract requiring arbitration be commenced within 15 days of M&H's August 30, 2013 "decision" refusing to pay Magnum for its claimed extra work. I find that the correspondence between the parties indicates that they were engaged in on-going discussions about Magnum's work. The word "decision" is not used and no letter refers to the parties' contract provision addressing the time period for commencement of arbitration proceedings."[13]

The arbitrator awarded Magnum $191,328.76, which included an outstanding contract balance and remaining outstanding work orders.[14] The sole issue raised by M&H in its motion to vacate is whether the arbitrator exceeded her powers by her "refusal to enforce the contractual time limitation and dismiss the arbitration . . .."[15]

The court must grant Magnum's motion to confirm the award of the arbitrator "unless the award is vacated, modified, or corrected" as prescribed by the Federal

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[11] Doc. #34-2, ¶ 13.

[12] Doc. #34-2, ¶ 14.

[13] Doc. #34-5, ¶ 1.

[14] Doc. #34-5, ¶ 14.

[15] Doc. #34, p. 7.

Arbitration Act at 9 U.S.C. §§ 10 and 11.[16] One of the grounds for vacating under 9 U.S.C. § 10 is when an arbitrator exceeds her powers.[17] None of the grounds for modification authorized by the act have been raised to the court and none of them apply.[18]

Courts "provide 'an extraordinary level of deference' to" arbitration awards.[19] "Courts have no authority to reconsider the merits of an arbitration award, even when the parties allege that the award rests on factual errors or on a misinterpretation of the underlying contract."[20] "Thus, contract interpretation is left to the arbitrator."[21] Even when a court might have interpreted a contract differently, it will not set aside an arbitrator's award.[22] "The bottom line is" a court will confirm the arbitrator even if it is convinced "the arbitrator committed serious error, so long as the arbitrator is even arguably construing or applying the contract and acting within the scope" of her authority."[23] Further, "the validity of time-bar defenses to the enforcement of arbitration agreements should generally be determined by the arbitrator rather than the court."[24]

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[16] 9 U.S.C. § 9; Medicine Shoppe Int'l, Inc. v. Turner Investments, Inc., 614 F.3d 485, 488 (8th Cir. 2010) (citing Hall Street Associates, LLC v. Mattel, Inc., 552 U.S. 576, 582)).

[17] 9 U.S.C § 10(a)(4).

[18] See 9 U.S.C. § 11.

[19] Medicine Shoppe Int'l, Inc. v. Turner Investments, Inc., 614 F.3d 485, 488 (8th Cir. 2010) (quoting Schoch v. InforUSA, Inc., 341 F.3d 785, 788 (8th Cir. 2003)).

[20] Id.

[21] Inter-City Gas Corp. v. Boise Cascade Corp., 845 F.2d 184, 187 (8th Cir. 1988) (citations omitted).

[22] Id. (citing United Papers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987)).

[23] McGrann v. First Albany Corp., 424 F.3d 743, 748 (8th Cir. 2005).

[24] Conticommodity Services, Inc. v. Philipp & Lion, 613 F.2d 1222, 1225 (2d Cir. 1980).

The arbitrator was clearly authorized to decide the issue of whether the claim for arbitration was time-barred by the contract.[25] There is no basis for a finding that she exceeded her powers. 9 U.S.C. § 10(a)(4) does not provide the court with authority to vacate the arbitration order.

CONCLUSION

Magnum's motion to confirm the arbitration award[26] is **GRANTED.** M&H's motion to vacate the award[27] is **DENIED.**

IT IS SO ORDERED.

Dated this 31st day of August, 2017.

/Ralph R. Erickson
Ralph R. Erickson, District Judge
United States District Court

[25] Accord State v. Stremick Construction Co., 370 N.W.2d 730, 735 (N.D. 1985) (applying the Uniform Arbitration Act and concluding "that the proper forum for determining the timeliness of the demand for arbitration in this case is the arbitration board.").

[26] Doc. #30.

[27] Doc. #35.