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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

4 RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED
5 AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND
6 FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT
7 CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION
8 MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)."
9 UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE
10 WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE
11 PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER
12 WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE
13 AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT
14 DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

15 At a stated term of the United States Court of Appeals for the
16 Second Circuit, held at the Daniel Patrick Moynihan United States
17 Courthouse, 500 Pearl Street, in the City of New York, on the 23rd
18 day of September, two thousand nine.

19 PRESENT:

20
21 ROBERT D. SACK,
22 ROBERT A. KATZMANN,

23 Circuit Judges.*

24 -----

25 E.E. CRUZ, NAB CONSTRUCTION CORPORATION,
26 FRONTIER-KEMPER CONSTRUCTION, INC.,

27 Respondents-Consolidated-Plaintiffs- 07-3833 (L)
28 Appellants-Cross-Appellees, 07-3959 (XAP)
29

30 AETNA CASUALTY & SURETY COMPANY, TRAVELERS
31 CASUALTY AND SURETY COMPANY,
32 Respondents-Appellants-
33 Cross-Appellees,

* The Honorable Sonia Sotomayor, originally a member of this panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined the matter. See 28 U.S.C. § 46(d); Local Rule § 0.14(2); United States v. Desimone, 140 F.3d 457 (2d Cir. 1998).

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- v. -

COASTAL CAISSON, CORP., successor in
interest to BAUER OF AMERICA CORP.,

Petitioner-Consolidated-Defendant-
Appellee-Cross-Appellant.

Appearing for Appellants: REX S. HEINKE, Akin Gump Strauss
Hauer & Feld LLP, Los Angeles, CA
(Franklin E. Tretter and Eugene H.
Goldberg, McDonough Marcus Cohn
Tretter Heller & Kanca, L.L.P., New
Rochelle, NY, on the brief).

Appearing for Appellee: TONY BERMAN, Berman Paley Goldstein
& Monte LLP (Paul Monte, on the
brief), New York, NY.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND
DECREED that the judgment of the district court (Denise Cote,
Judge) is reversed in part and vacated in part.

E.E. Cruz, NAB Construction Corporation, Frontier-Kemper
Construction, Inc., AETNA Casualty & Surety Company, and
Travelers Casualty and Surety Company, appeal from a judgment of
the United States District Court for the Southern District of New
York. To the extent not discussed below, we assume the parties'
and counsel's familiarity with the facts and procedural history
of this case, and the issues presented on this appeal.

On March 18, 1998, contractors E.E. Cruz, Nab Construction
Corporation, and Frontier Kemper Construction, Inc.,
(collectively, the "Joint Venture") executed a subcontract with
Bauer of America Corporation, predecessor in interest to Coastal
Caisson Corporation, (collectively "Coastal") to build a large
caisson and jet grout retaining wall, known as an Earth Support
System ("ESS"), around a construction site in Flushing, Queens.
Pursuant to the agreement, the Joint Venture was to provide
labor, equipment, materials, and certain other services to aid
the subcontractor's work. The parties were soon mired in various
disputes related to the contract. Litigation, two arbitrations,
and this appeal followed.

1 On June 24, 2005, an arbitral panel from the American
2 Arbitration Association awarded Coastal \$791,731.27 in damages.
3 Thereafter, Coastal petitioned the district court to vacate the
4 award in part and confirm in part. The Joint Venture petitioned
5 the district court to modify the award for a material
6 miscalculation. The district court consolidated the two
7 petitions. By Oral Decision of October 14, 2005, the court
8 granted Coastal's petition to vacate the award on the basis that
9 the arbitral panel had manifestly disregarded New York law and
10 denied the Joint Venture's petition as moot. Transcript of Bench
11 Opinion, Coastal Caisson Corp. v. E.E. Cruz & Co., Inc., NAB, No.
12 05 Civ. 7462 (S.D.N.Y. Oct. 14, 2005) ("Bench Opinion").

13 Thereafter, by decision dated April 13, 2007, the arbitral
14 panel, with one member dissenting, awarded Coastal an additional
15 \$1,197,735.67 in damages, for a total award of \$1,989,466.94.
16 The panel declined to award pre-judgment interest. The
17 dissenting panel member, by separate opinion, concluded that the
18 district court had improperly vacated the June 2005 award.
19 Thereafter, Coastal petitioned the court to confirm the April
20 2007 award but amend it to award prejudgment interest. The Joint
21 Venture petitioned the district court to vacate the April 2007
22 award and confirm the June 2005 award, with modifications.

23 By written opinion dated August 10, 2007, the district court
24 confirmed the April 2007 award in its entirety and denied
25 Coastal's motion for prejudgment interest. Coastal Caisson Corp.
26 v. E.E. Cruz/NAB/Frontier-Kemper, Nos. 05 Civ. 7462, 7466, 2007
27 WL 2285936, 2007 U.S. Dist. LEXIS 58114 (S.D.N.Y. Aug. 10, 2007).

28 On appeal, the Joint Venture urges us to vacate the April
29 2007 award and confirm the June 2005 award after correcting it
30 for a material miscalculation. Coastal cross-appeals asking us
31 to confirm the April 2007 award, with the addition of interest.

32 "When a party challenges the district court's review of an
33 arbitral award under the manifest disregard standard, we review
34 the district court's application of the standard de novo."
35 Wallace v. Buttar, 378 F.3d 182, 189 (2d Cir. 2004) (internal
36 quotation marks omitted).

37 In light of intervening precedent, see Stolt-Nielsen SA v.
38 AnimalFeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008), cert.
39 granted on other grounds, 129 S. Ct. 2793 (2009), it has become
40 clear that the district court erred in vacating the first award
41 for "manifest disregard" of New York law. We will vacate for
42 manifest disregard of the law only where "the arbitrator knew of

1 the relevant [legal] principle, appreciated that this principle
2 controlled the outcome of the disputed issue, and nonetheless
3 willfully flouted the governing law by refusing to apply it."
4 Id. at 95 (internal quotation marks omitted); see also id. at 93
5 ("[W]e look to a subjective element, that is, the knowledge
6 actually possessed by the arbitrators" to see whether the
7 arbitrators "intentionally disregard[ed] the law." (internal
8 quotation marks omitted)); Wallace, 378 F.3d at 190 (vacatur for
9 manifest disregard appropriate "only if a reviewing court . . .
10 find[s] . . . that (1) the arbitrators knew of a governing legal
11 principle yet refused to apply it or ignored it altogether, and
12 (2) the law ignored by the arbitrators was well defined,
13 explicit, and clearly applicable to the case." (internal
14 quotation marks omitted, alteration in original)).

15 Here, the district court vacated the June 2005 arbitral
16 award based on the arbitrators' purported refusal to apply New
17 York's total cost method of calculating damages. A review of the
18 award indicates, however, that the arbitrators did not ignore New
19 York law in this regard. They specifically embraced the total
20 cost method of damages, explicitly rejecting the Joint Venture's
21 argument that New York's total cost method should not apply,
22 concluding that the panel "cannot ignore the numerous New York
23 cases that have found circumstances appropriate to apply it."
24 Coastal Caisson Corp. v. E.E. Cruz/NAB/Frontier-Kemper, No. 13 Y
25 110 00384 03, Slip Op. at 7 (Am. Arbitration Ass'n June 24,
26 2005).

27 The arbitration panel ruled "as a matter of law [that] a
28 total cost claim can[] be maintained" in such a circumstance,
29 noting that "[w]e believe that the cases teach that whether or
30 not such damages are available in a given case is a factual
31 question dependent on the nature and quality of the proof
32 presented, particularly on the issue of causation." Id.
33 (emphasis added). The "fundamental question," according to the
34 arbitrators, was whether "the factual record made by Bauer in
35 this case support[ed] [its] claim for total cost damages?" Id.

36 The arbitrators then concluded that Bauer's claim of delay
37 was, "if not invented, at least greatly inflated." Id. at 11.
38 Bauer failed to produce records of delay, and where Bauer did
39 submit evidence of delay, its calculations were inaccurate and
40 unreliable. Id. at 12-13. Moreover, Bauer failed to prove what
41 factors actually harmed it. Id. at 14-15. Because Bauer did not
42 submit adequate proof as to what delay, if any, it suffered, the
43 arbitrators held that determining costs attributable to the
44 alleged delay was impossible.

1 This was not an improper application of New York law:

2 It is well settled that in calculating
3 contract damages due to delays "[a]
4 contractor wrongfully delayed by its employer
5 must establish the extent to which its costs
6 were increased by the improper acts because
7 its recovery will be limited to damages
8 actually sustained." . . . [D]amages are
9 limited to awards based upon "a definite and
10 logical connection between what is proven and
11 the damages sought to be recovered" and
12 cannot be speculative or conjectural.

13 Clifford R. Gray Inc. v. State, 674 N.Y.S.2d 440, 442 (App. Div.
14 1998) (quoting Berley Indus. v. City of New York, 385 N.E.2d 281,
15 283 (N.Y. 1978) and Mid-State Precast Sys. v. Corbetta Constr.
16 Co., 608 N.Y.S.2d 546, 548 (App. Div. 1994)). Moreover, New York
17 courts have rejected total cost claims for lack of evidence.
18 See, e.g., F.W. Sims, Inc. v. T. Moriarty & Son, Inc., 696
19 N.Y.S.2d 453, 453-54 (App. Div. 1999) (agreeing with the trial
20 court that the "'total cost' method of calculating construction
21 delay damages was inapplicable under the particular circumstances
22 of this case, and that plaintiff did not otherwise sufficiently
23 prove delay-caused labor costs by non-speculative evidence");
24 Mid-State Precast Sys., 608 N.Y.S.2d at 548 (rejecting
25 plaintiff's total cost claim for delay where plaintiff's proof
26 consisted of a letter stating that it had sustained damages of
27 \$1,065,982 without supporting documentation or verification).
28 Therefore, we conclude that the arbitrators did not manifestly
29 disregard the law in failing to award total cost damages. Cf.
30 Stolt-Nielsen, 548 F.3d at 98 (noting that "federal courts may
31 not review [findings of fact] even for manifest disregard");
32 accord Wallace, 378 F.3d at 193.

33 The Joint Venture also asks that the June 2005 award be
34 modified to account for about \$548,000 that it claims should have
35 been debited against Coastal's award. But as the district court
36 noted in rejecting that argument:

37 These issues were raised directly with the
38 arbitrators, who denied them through an order
39 issued on August 11, 2005. . . . The
40 arbitrators would have had the power to
41 correct any computational errors, nothing
42 suggests that they misapprehended their
43 authority in that regard, and they declined
44 to make any alteration in the First

1 Award. . . . [T]he arbitrators decided these
2 issues in [Coastal's] favor on the merits.

3 Bench Opinion at 17-18. We agree.

4 We therefore reverse the district court's vacatur of the
5 June 2005 arbitral award.

6 We note that the Joint Venture also seeks vacatur of the
7 April 2007 arbitral award. Pursuant to the Federal Arbitration
8 Act ("FAA"), 9 U.S.C. § 1 et seq., when a party moves a court for
9 an order confirming an arbitral award, such as the April 2007
10 award, "the court must grant such an order unless the award is
11 vacated, modified, or corrected as prescribed in [Sections 10-11
12 of the FAA.]" 9 U.S.C. § 9. And as the Supreme Court has noted,
13 Sections 10 and 11 "provide the FAA's exclusive grounds for
14 expedited vacatur and modification." Hall Street Assocs., L.L.C.
15 v Mattel, Inc., 128 S. Ct. 1396, 1403 (2008).

16 The parties assume that vacatur of the April 2007 award
17 follows as a necessary result of our reversal of the vacatur of
18 the June 2005 arbitral award; on the basis of that assumption
19 they fail to address the authority by which a court can vacate
20 the April 2007 award.

21 With respect to the district court's vacatur of the June
22 2005 arbitral award, we reverse and remand with instructions to
23 confirm that award in its entirety. With respect to the district
24 court's confirmation of the April 2007 arbitral award, we vacate
25 and remand with instructions for the court to proceed in light of
26 our reversal of the June 2005 arbitral award, which conflicts
27 with the April 2007 award.

28 We have considered all of the parties' other arguments and
29 find them to be without merit. For the foregoing reasons, the
30 judgment is hereby REVERSED in part and VACATED and REMANDED in
31 part.

32 FOR THE COURT:
33 Catherine O'Hagan Wolfe, Clerk of Court

34 By: _____