COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-_____

COLUMBIA CONSTRUCTION CO.,
Defendant/Appellant

v.

J.C. CANNISTRARO, LLC,
Plaintiff/Appellee

Appeals Court No. 2025-P-0819

On Appeal from Norfolk County Superior Court
Civil Action No. 2082CV00738

APPELLANT COLUMBIA CONSTRUCTION CO.'S APPLICATION FOR DIRECT APPELLATE REVIEW

Date: July 23, 2025

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I. INTRODUCTION AND REQUEST FOR DIRECT APPELLATE REVIEW

On December 4, 2024, the Superior Court erroneously vacated an arbitration award involving one of the most important statutes in the Massachusetts construction industry: G.L. Chapter 149, Section 29E (the "Prompt Payment Act" or "Act"). The Superior Court vacated the award on grounds that the arbitrator "exceeded his powers" by failing to adhere to this Court's subsequent, post-award interpretation of the Prompt Payment Act in Business Interiors Floor Covering Bus. Tr. v. Graycor Constr. Co. Inc., 494 Mass. 216 (2024) ("Graycor").

The court erred in vacating the award. Under Massachusetts law, arbitrators "exceed their powers" when awarding relief in violation of express statutory law or offensive to public policy. Neither happened here. Instead, the Superior Court improperly vacated the award based upon its erroneous, retroactive application of Graycor, a decision that post-dated the Final Award. The Court's retroactive application of Graycor was improper, as was its conclusion that Graycor precluded the relief ordered by the Arbitrator.

Contrary to the Superior Court's ruling, the Arbitrator properly considered and correctly applied the express terms of the Prompt Payment Act and Tocci Bldg. Corp. v. IRIV Partners, LLC, 101 Mass. App. Ct. 133, 136 (2022) ("Tocci"), which was the only appellate-level case available at the time. The Arbitrator's Final Award not only complied with the express terms of the Act and Tocci, but it

also complied with the decision in Graycor despite being issued months prior to Graycor being decided. As such, the Arbitrator acted within his powers and did not issue relief contrary to either the express terms of the Act or case law interpreting the Act.

The Superior Court's error has profound consequences that impact not only the construction industry, but all private arbitration awards issued pursuant to the Massachusetts Arbitration Act. The Supreme Judicial Court is in the best position to confirm the award and protect the sanctity of arbitration and to clarify that its recent decision in Graycor cannot, and should not, be used as a means to void duly issued arbitration decisions. More particularly, this appeal presents the opportunity to (1) affirm Massachusetts' longstanding public policy favoring arbitration and avoid eroding the stringent standard for vacating arbitration awards (which will open the floodgates to litigants seeking judicial review of arbitration awards); (2) confirm Graycor does not establish a per se rule of retroactivity for re-evaluating prior arbitration awards or judgments; (3) clarify that Graycor does not stand for the proposition of wholesale forfeiture of all claims and defenses; and (4) mitigate Graycor's unintended consequence: that construction industry participants victimized by fraudulent and illegitimate claims must pay those claims and forfeit their ability to seek recovery, a consequence diametrically opposed to the stated statutory purpose underlying the Prompt Payment Act.

Accordingly, Defendant-Appellant, Columbia Construction Co. ("Columbia"), respectfully requests direct appellate review and reversal of the Superior Court's order denying its Motion to Confirm Arbitration Award and allowing the Motion to Vacate Arbitration Award by Plaintiff-Appellee, J.C. Cannistraro LLC ("JCC").

II. STATEMENT OF RELEVANT FACTS AND PRIOR PROCEEDINGS

A. The Initial Proceedings and Superior Court Action.

On February 3, 2017, Columbia, as the general contractor, entered into a contract with Siemens Healthcare Diagnostics, Inc. ("Siemens") for the renovation of a manufacturing facility in Walpole, Massachusetts (the "Project").

On April 25, 2018, Columbia entered into two separate subcontracts with JCC for the HVAC (the "HVAC Subcontract") and plumbing work (the "Plumbing Subcontract") (collectively the "Subcontracts"). The original amount of the HVAC Subcontract was $5,877,511.00 and the original amount of the Plumbing Subcontract was $1,186,640.00. The Project was subject to the Prompt Payment Act.

On January 8, 2020, after completing over 95% of the plumbing work, JCC sent Columbia a claim for $391,550 (the "Plumbing Claim"). Similarly, on January 23, 2020, JCC sent Columbia a claim for $571,601 (the "HVAC Claim"). JCC's claims for additional compensation totaled $951,855.05 (the "Claims").

On February 5, 2020, Columbia rejected JCC's claims in writing, including the factual and contractual reasons for the rejection. Columbia's rejections were timely under the Act, but did not include a written good faith certification. The letters were later certified as having been made in good faith on September 22, 2020.

On April 9, 2020, JCC included the Claims in its monthly payment application. Columbia again rejected the Claims by attaching the rejection letters.

On August 3, 2020, JCC filed a Complaint in the Norfolk County Superior Court (the "Original Complaint") alleging, inter alia, that Columbia violated the Act and that $951,855.05 was "deemed approved" pursuant to the Act. Columbia disputed this assertion, as it timely rejected the Claims and later certified that its rejections were made in good faith. On August 31, 2020, Columbia filed its answer to JCC's Original Complaint, denying it violated the Act and asserting affirmative defenses. JCC subsequently amended its Complaint (the "Amended Complaint") to substitute Siemens with the mechanic's lien bond surety, Travelers Casualty & Surety Company of America, and Columbia filed an answer to the Amended Complaint.

Because the Subcontracts contained mandatory arbitration clauses, Columbia filed a motion to compel arbitration and stay the Superior Court action. The Superior Court granted Columbia's motion, and case proceeded to arbitration.

B. The Arbitration Proceedings.

On March 15, 2021, JCC filed a demand for arbitration with the American Arbitration Association (the "Demand for Arbitration"). On April 2, 2021, Columbia filed its response to the Demand for Arbitration, denied that it violated the Act, and asserted numerous affirmative defenses.

On June 7, 2022, the Appeals Court issued its decision in Tocci Bldg. Corp. v. IRIV Partners, LLC, 101 Mass. App. Ct. 133, 136 (2022). The Tocci decision strictly interpreted the Act and held that a contemporaneous written good faith certification is a substantive requirement of the Act.

Thereafter, the parties moved for summary judgment in the Arbitration. Based on the then-recent decision in Tocci, the Arbitrator issued an Interim Order on August 9, 2022, finding that Columbia violated the Act by not including a contemporaneous written good faith certification in its rejection letters. The Arbitrator also made several relevant findings:

> "1. On February 3, 2017, Columbia entered into a contract with Siemens Healthcare Diagnostics, Inc. d/b/a Siemens Medical Solutions Diagnostics Corp. for the construction and renovation of an office and manufacturing facility on real property located at 333 Coney Street, Walpole, Massachusetts ("Project"). The amount of the prime contract was in excess of $3,000,000. Accordingly, I find that the Project is subject to the provisions of the Massachusetts Prompt Pay Act, G.L. c. 149, §29E ("Prompt Pay Act").
>
> 2. I find that on April 25, 2018, JCC and Columbia entered into two separate subcontracts concerning the HVAC and Plumbing work on

the Project. Said subcontracts were essentially in identical form with the exception of the scopes of work and schedules set forth in each.

3. I find that JCC submitted regular monthly requisitions to Columbia during the Project for its HVAC and Plumbing work.

4. I find that on January 8, 2020, JCC sent Columbia a letter requesting a change order to the Plumbing Subcontract totaling $391,550, and on January 23, 2020, JCC sent Columbia a letter requesting a change order to the HVAC Subcontract totaling $571,601.

5. I find that on February 5, 2020, Columbia responded in writing to the Plumbing and HVAC change order requests and purported to reject such requests.

6. I find that on April 9, 2020, JCC submitted its Application and Certificate for Payment No. 19 ("HVAC App.19") for HVAC work performed through April 30, 2020. As part of said HVAC App.19, JCC included a line item for "CEC 060-HR" in the amount of $569,238.77 for certain HVAC change order work.

7. I find that on April 9, 2020, JCC also submitted its Application and Certificate for Payment No. 22 ("Plumbing App. 22") for plumbing work performed through April 30, 2020. I find that in Plumbing App. 22, JCC included a line item "CEC 060" in the amount of $382,616.28 for certain plumbing change order work.

8. I find that in response to HVAC App.19 and Plumbing App. 22, Columbia by email dated April 24, 2020, responded to these claims, notified JCC that it was rejecting the referenced change orders contained in HVAC App. 19 and Plumbing App. 22, and attached the letters from Columbia to JCC dated February 5, 2020. In these responses, Columbia failed to include a certification that such rejections were made in good faith.

9. I find that in an email to JCC dated September 22, 2020, Columbia indicated for the first time that its rejections of HVAC App. 19 and Plumbing App. 22 were certified as being made in good faith.

> 10. There is no evidence that Columbia has paid any part of the subject claims set forth in HVAC App. 19 in CEC 060-HR in the amount of $569,238.77 and Plumbing App. 22 in CEC 060 in the amount of $382,616.28.
>
> 11. Columbia has not asserted any counterclaims in this arbitration."

The Interim Order required, inter alia, Columbia to pay JCC the full amount of JCC's Claims on or before September 9, 2022: $951,855.05 plus interest. Columbia complied, and paid JCC $1,036,870.05, consisting of the principal sum plus interest.

After the Interim Order issued, Columbia moved to add a counterclaim in the arbitration seeking recoupment of the principal sum of $951,855.05 paid to JCC, and a hearing was held on September 21, 2022.

On September 29, 2022, the Arbitrator issued an Order holding Columbia was entitled seek recoupment of the $951,855.05 paid to JCC. The September 29, 2022 Order provided that the "remaining question is whether there is a cognizable claim for recoupment or recovery of the amounts paid by Columbia to JCC . . . Columbia's only current claims relate to recovery of funds paid to JCC for claims, which Columbia has always contested . . . I find that Columbia is not foreclosed by the Prompt Pay Act or the rulings in the Tocci case from challenging the JCC claims following payment of such claims." The Arbitrator further held that the counterclaim was (1) timely and not prejudicial to JCC (as JCC was aware of Columbia's defenses from the rejection letters in January 2020); and (2)

appropriate given that Columbia had made payment to JCC pursuant to the Act. Finally, the Arbitrator provided a well-reasoned explanation for his decision and application of Tocci:

> "The impact of the failure to satisfy this requirement of the PPA [the good faith certification] was an open question until the decision of the Appeals Court in Tocci . . including the June 24, 2022, revision to said decision . . . As such I understand Columbia's position of being forced to pay based on a decision which arose years after the responses to the subject requisitions were due, but I also have ruled that based on the interpretation of the Prompt Pay Act set forth in the Tocci case, Columbia violated the Act."

The Arbitrator next considered whether the Act mandates a forfeiture or merely shifts when payment must be made, leaving open the right to challenge the underlying claims "and that nothing is waived other than the time when payment must be made . . . ." This issue was not resolved in the Tocci case. The Arbitrator went on to rule that it is unclear whether the words "deemed to be approved" mean there is a full waiver of claims or merely shifts the party who holds the funds pending the outcome of a dispute. Ultimately, the Arbitrator ruled the Act does not foreclose Columbia from challenging JCC's claims, so long as Columbia had in fact paid such "deemed to be approved" claims. Finally, the Arbitrator addressed important public policy considerations underlying his decision, emphasizing that "to hold otherwise would prevent a party from contesting possible duplicative, fraudulent or for work that was never performed . . . ."

On May 31, 2023, JCC filed a second motion for summary judgment in the Arbitration, this time on Columbia's recoupment counterclaim. On July 26, 2023, the Arbitrator denied JCC's summary judgment motion, holding: "Columbia is not foreclosed by the Prompt Pay Act or by the rulings set forth in the Tocci case or by my rulings and orders in this arbitration from challenging the merits of the change order requests submitted by JCC to Columbia in the total amount of $951,855.05, so that Columbia may seek to recover some or all of the principal amount of $951,855.05 paid by Columbia to JCC on September 9, 2022. … I rule that Columbia now bears the burden of proving that JCC's change order requests were not valid or were not valid in the amounts being claimed by JCC."

In January 2024, the parties proceeded to a hearing on the merits and on April 3, 2024, the Arbitrator issued a Final Arbitration Award ("Final Award"), finding JCC's Claims were inaccurate, unjustified, and substantially inflated and that the fair and reasonable value of JCC's Claims was $375,000, not $951,855.05. The Arbitrator therefore ordered JCC to remit payment to Columbia in the amount of $576,855.05 (the $951,855.05 Columbia previously paid to JCC, less $375,000), plus interest from the date of Columbia's September 9, 2022 payment. JCC never made that payment, and instead asked the Superior Court to vacate the Final Award.

C. **Post Arbitration Proceedings**.

On May 31, 2024, JCC filed its Rule 9A package for its motion to vacate the Final Award, along with Columbia's opposition. JCC's motion to vacate was premised on JCC's assertion that the Arbitrator "invented a remedy" by allowing Columbia to pursue a claim for recoupment. According to JCC, Columbia's failure to make a contemporaneous good faith certification in its rejection letters resulted in a complete and total forfeiture of its contractual and common law rights. According to JCC, Columbia was required to pay the "deemed approved" amount with no recourse. Columbia opposed JCC's motion.

On June 11, 2024, Columbia served via Rule 9A its motion to confirm the Final Award and for entry of judgment in conformity therewith.

On June 17, 2024, approximately two months after the issuance of the Final Arbitration, the Supreme Judicial Court issued its decision in Business Interiors Floor Covering Bus. Tr. v. Graycor Constr. Co. Inc., 494 Mass. 216 (2024).

On June 24, 2024, JCC served its opposition to the motion to confirm the arbitration award, which sought vacatur of the Final Award in heavy reliance on the Graycor decision. On August 19, 2024, Columbia filed its Rule 9A package for its motion to confirm, including a reply refuting JCC's contention that Graycor stands for the proposition that all factual and contractual defenses are irrevocably waived if payment of a "deemed approved" application is not made prior to, or

contemporaneously with, the raising of such defenses, and rejecting that the Arbitrator's Final Award was in any way contrary to the Act or public policy.

On December 4, 2024, after a hearing, the Superior Court denied Columbia's motion to confirm the Final Award and entered judgment vacating the Final Award on grounds that the Arbitrator "exceeded his powers;" specifically, by failing to adhere to this Court's subsequent, post-award interpretation of the Act under Graycor.

On January 24, 2025, Columbia filed its Rule 9A package for its motion for reconsideration with the Superior Court contending, inter alia, the Superior Court's retroactive application of Graycor to a Final Award issued months prior to the Graycor decision was an error of law. Included in the Rule 9A package was JCC's opposition and Columbia's reply. On March 5, 2025, the Superior Court denied Columbia's motion for reconsideration.

On April 8, 2025, the Superior Court issued the following Final Judgment: "This action came before the Court, Keren E. Goldenberg presiding and upon consideration thereof it is ORDERED and ADJUDGED that the arbitration award dated April 3, 2024 is hereby VACATED. All interim awards issued by the Arbitrator in the course of arbitration, remain in full force and effect." Upon entry of final judgment, this appeal ensued.

III. STATEMENT OF THE ISSUES OF LAW FOR WHICH DIRECT APPELLATE REVIEW IS SOUGHT

1. Did the Superior Court err in vacating the Final Award on the basis that the arbitrator "exceeded his powers" relative to the Massachusetts Prompt Payment Act?
2. Does an arbitrator exceed his powers if, after issuing an arbitration award in accordance with then-current express statutory law, an appellate court subsequently interprets the implications of the statute differently from the arbitrator but the express terms of the statute remain the same?
3. Did the Superior Court err by retroactively applying Business Interiors Floor Covering Bus. Tr. v. Graycor Constr. Co. Inc., 292 Mass. 216 (2024) to the Massachusetts Prompt Payment Act in this case?
4. Does the retroactive application of Graycor erode both the high standard for vacating arbitration awards and the strong public policy in favor of arbitration?
5. Does Graycor limit the pursuit of countervailing claims and contract defenses as compared to common-law defenses?

These issues were properly preserved in the Superior Court and may be addressed on appeal.

IV. ARGUMENT

A. The Narrow Scope of Review Afforded to Arbitration Awards.

"A matter submitted to arbitration is subject to a very narrow scope of review. Absent fraud, errors of law or fact are not sufficient grounds to set aside an award." (citation omitted). Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co., 407 Mass. 1006, 1007 (1990). See Trs. of Bos. & Maine Corp. v. Massachusetts Bay Transp. Auth., 363 Mass. 386, 390 (1973) ("[e]ven a grossly erroneous decision is binding in the absence of fraud").

The role of courts in confirming, vacating, and modifying an arbitration award is outlined in the Massachusetts Uniform Arbitration Act for Commercial Disputes ("MAA"), G.L. c. 251, §§ 11 through 13. See Katz, Nannis & Solomon, P.C. v. Levine, 473 Mass. 784, 789–90 (2016). Section 12 sets forth the limited grounds for vacating an arbitration award and, relevant to this dispute, allows vacatur of an arbitration award only if "the arbitrators exceeded their powers." G.L. c. 251, § 12(a)(3). Barring such a finding, a court is "strictly bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent, or unsupported by the record at the arbitration hearing." City of Lynn v. Thompson, 435 Mass. 54, 61 (2001), cert. denied, 534 U.S. 1131 (2002). See Beacon Towers Condo. Tr. v. Alex, 473 Mass. 472, 474 (2016); Trs. of Bos. & Maine Corp., 363 Mass. at 390–91.

Ultimately, "[a]n arbitrator's result may be wrong; it may appear unsupported; it may appear poorly reasoned; it may appear foolish. Yet, it may not be subject to court interference." City of Lynn, 435 Mass. at 62.

B. The Arbitrator Did Not Exceed His Powers Because He Relied Upon Express Statutory Provisions and Available Case Law When Issuing The Final Award.

An arbitrator's powers are exceeded by granting relief (1) beyond the scope of the arbitration agreement, (2) beyond that to which the parties bound themselves, or (3) prohibited by law. Superadio Ltd. P'ship v. Winstar Radio Prods., LLC, 446 Mass. 330, 334 (2006). The central question on this appeal is whether the arbitrator exceeded his powers by violating the third element--granting relief prohibited by law. Specifically, an arbitrator "may not 'award relief of a nature which offends public policy or which directs or requires a result contrary to [an] express statutory provision….'" (emphasis added). Superadio Ltd. P'ship, 446 Mass. at 334 (quoting Lawrence v. Falzarano, 380 Mass. 18, 28 (1980)).[1]

[1] Awards that exceed an arbitrator's authority must expressly contradict statutory terms. Cf. City of Lynn v. Lynn Police Ass'n, 455 Mass. 590, 599 (2010), overruled on other grounds by Buffalo-Water 1, LLC v. Fid. Real Est. Co., LLC, 481 Mass. 13 (2018) (arbitrator's award did not require City to violate express terms of the Bailout Act); City of Everett v. Int'l Bhd. of Police Officers, Locs. 633 & 634, 44 Mass. App. Ct. 671, 677 (1998) (arbitrator did not exceed authority, despite committing an error of law and erroneously interpreting the statutory term "adopt", where his award did not contradict the statutory language); Com. v. Massachusetts Org. of State Eng'rs & Scientists, 423 Mass. 667, 671 (1996) (award exceeded arbitrator's authority, requiring Commonwealth to credit

The Arbitrator's Final Award complies with the express statutory provisions of the Prompt Payment Act and supports the Act's underlying public policy considerations. The express language of the Act requires an application for payment or a change order:

> which is neither approved nor rejected within the time period shall be deemed to be approved unless it is rejected before the date payment is due. A rejection of an application for a periodic progress payment, whether in whole or in part, shall be made in writing and shall include an explanation of the factual and contractual basis for the rejection and shall be certified as made in good faith.

G.L. c. 149, § 29E(c), (d). With the Interim Award, the Arbitrator followed the Act's express terms, finding Columbia failed to certify its rejections of JCC's Claims in good faith and, thus, they were "deemed approved" and payable. Relying on Tocci, the only appellate case available, the Arbitrator strictly enforced the Act's express terms and ordered Columbia to issue payment to JCC for deemed approved amounts, plus interest. The Arbitrator also relied on Tocci in allowing Columbia's subsequent counterclaim to proceed on the merits. Accordingly, and at worst, the Final Award merely constitutes an error of law, improper for vacatur.

C. The MAA Does Not Allow for Vacatur of an Arbitrator's Award Based on an Error of Law.

The Superior Court's vacatur of the Final Award is not permitted under the MAA. Under G.L. c. 251, Section 12, a court may only vacate an arbitration

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employee vacation time, holidays and sick leave during unpaid union leave, where statute expressly precludes same).

award if: (1) the award was procured by corruption, fraud, or other undue means; (2) there was evident partiality or corruption among the arbitrators; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause shown, hear material evidence, or otherwise prejudiced a party's rights at the hearing; or (5) no arbitration agreement existed, and no adverse determination in prior proceedings. These grounds are strictly construed, and courts are "strictly bound by an arbitrator's findings and legal conclusions," even if erroneous. Levine, 473 Mass. at 790.

An error of law is not among the enumerated grounds for vacatur under the MAA, and the exclusion is intentional. See Schmidt v. UBS Fin. Servs., Inc., 86 Mass. App. Ct. 1102 (2014) (Rule 1:28) ("[T]he Legislature did not intend to permit vacatur on other grounds"). Accordingly, even if a retroactive application of Graycor results in an error of law by the arbitrator, there is no legal basis for vacatur.

D. The Superior Court's Retroactive Application of Graycor was Improper.

Massachusetts law does not require the retroactive application of Graycor to preexisting judgments or arbitration awards. Eaton v. Federal Nat. Mortg. Ass'n, 462 Mass. 569, 588 (2012). Neither did the SJC's holding in Graycor mandate retroactivity. To determine whether a decision should be applied retroactively, courts consider three factors: "(1) whether a new principle has been established

whose resolution was not clearly foreshadowed, (2) whether retroactive application will further the rule, and (3) whether inequitable results, or injustice or hardships, will be avoided by a holding of nonretroactivity." (citations omitted). McIntyre v. Assocs. Fin. Servs. Co. of Massachusetts, 367 Mass. 708, 708 (1975) ("McIntyre").

As for the first McIntyre factor, the Graycor decision interprets the Prompt Payment Act in a manner not reasonably foreseeable to industry participants. The SJC found an implied waiver of common-law defenses if "deemed to be approved" invoices are not paid "prior to, or contemporaneously with" the assertion of such defenses. 494 Mass. at 217–18, 226–27. The SJC found this implied waiver was a "necessary implication" of the Act, rather than arising from any express statutory waiver provision. Id. There is no evidence the Legislature intended to create such a waiver, underscoring its unforeseeability at the time of the Arbitrator's Awards. Id. at 226, 232.

Tocci was the only case interpreting the Act during the arbitration. Industry participants (including arbitrators) reasonably understood Tocci to hold that parties in violation of the Act, forced to pay deemed approved invoices, nonetheless retained the right to defend on the merits and recover such payments of claims that were fraudulent, without merit, or subject to valid defenses. Graycor's post-award

limitation of Tocci was therefore an unexpected change in statutory interpretation supporting non-retroactivity under the first McIntyre factor.

The second and third McIntyre factors also favor non-retroactivity. The retroactive application of Graycor does not further the Act's purpose and creates inequity in practice. The Act's purpose is to facilitate prompt payment without limiting contractual defenses or claims, or unduly interrupting private contracting. See Tocci, 101 Mass. App. Ct. at 135 (relying on ASM amicus brief and testimony on the Act's purpose). The SJC's implied waiver strays too far from that purpose and, in practice, supports unjust windfalls to claimants whose invoices are fraudulent or unsupportable on the merits. Here, the Arbitrator's Final Award found JCC only incurred one-third of the value of its Claims. The retroactive application of Graycor in this case creates a windfall the statute did not intend. The second and third McIntyre factors therefore support non-retroactivity.

E. Even if Graycor is Retroactively Applied, the Arbitrator Still Did Not Exceed His Authority.

The Arbitrator's Interim and Final Awards conform with the Graycor decision even if retroactively applied. In Graycor, under the Act, "a party does not waive its defenses by failing to approve or reject an invoice within the strict time requirements established by the [A]ct." (emphasis added). 494 Mass. at 217. However, the SJC determined a contractor must pay "deemed to be approved" invoices "prior to, or contemporaneous with, the raising of the defenses, or the

defenses cannot be raised." Id. at 218. The implied waiver, discussed supra, is limited to common-law defenses and does not prohibit a party from asserting contractual defenses or bringing separate claims for recovery. See id. at 225–26, 232 (solely addressing common-law defenses). The Arbitrator's Interim Award correctly required Columbia pay the deemed approved amounts prior to bringing any counterclaims to recover on the merits. Allowing a claim to proceed does not conflict with Graycor's implied waiver of common-law defenses. Indeed, and after a hearing on the merits, the Arbitrator determined JCC did not incur a substantial portion of its deemed approved Claims. The Arbitrator's Awards were legally sound, well-reasoned, and serendipitously in conformance with the SJC's subsequent Graycor ruling.

F. Confirming the Final Award Promotes Good Public Policy.

i. Public Policy Favors Arbitration and Upholding Arbitration Awards.

The Superior Court's application of Graycor erodes the high standard for upholding arbitration awards. This weakens the future utility of arbitrations as good public policy. It is well settled that "[t]he policy of limited judicial review is reflective of the strong public policy favoring arbitration as an expeditious alternative to litigation for setting commercial disputes." Plymouth-Carver Reg'l Sch. Dist., 407 Mass. at 1007. The Superior Court's order, retroactively applying Graycor, lowers the standard for enforcing arbitrations and threatens to recast the

dispute-resolution landscape, unraveling decades of law supporting the enforcement of arbitration awards as good public policy except in the narrowest of circumstances.

ii. The Superior Court's Application of Graycor Severely Prejudices Upstream Parties Under the Act, and Enforcing the Final Award Serves a Greater Public Interest Than Payment of Meritless Claims.

The Superior Court's application of Graycor sets a dangerous precedent. By vacating the Final Award, the Superior Court essentially ruled that if a contractor raises defenses prior to payment of deemed approved amounts it irrevocably waives all claims and defenses. That means, for example, if a contractor properly rejects an invoice under the Act, but inadvertently sends the rejection letter one day late, the invoice would be deemed approved and payable even if the invoice is fraudulent or otherwise without merit. The practical implication of the Superior Court's erroneous decision is that claims will be paid in full based on the procedural timing requirements of the Act without any legal remedy on the merits. Certainly, the purpose of the Act is not to establish an avenue for claimants to recover money for meritless claims. No statutory language, legislative history, or public policy grounds support such an inequitable and unfair result. Graycor, 494 Mass. 216, post at 231.

As detailed supra, there is no legal basis for the Superior Court's vacatur of the Arbitrator's Final Award, regardless of the improper retroactive application of

Graycor. In vacating the Final Award, the Superior Court created an inequitable result, allowing JCC to retain all amounts paid by Columbia despite JCC's failure to prove up the full value of its Claims in arbitration. The Superior Court's holdings inappropriately erode the longstanding public policy favoring arbitration, negatively impact the public interest, and should be remedied by this Court.

V. STATEMENT OF WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

On December 4, 2024, the Superior Court erroneously vacated an arbitration award involving the Prompt Payment Act, G.L. Chapter 149, Section 29E, one of the most important statutes in the Massachusetts construction industry. The Superior Court vacated the award on grounds that the Arbitrator "exceeded his powers" by failing to adhere to this Court's subsequent, post-award interpretation of the Prompt Payment Act in Business Interiors Floor Covering Bus. Tr. v. Graycor Constr. Co. Inc., 292 Mass. 216 (2024).

The court erred in vacating the award. Under Massachusetts law, arbitrators "exceed their powers" when awarding relief in violation of express statutory law or offensive to public policy. Neither happened here. Instead, the Superior Court improperly vacated the award based upon an erroneous, retroactive application of Graycor, a decision that post-dated the Final Award. The Court's retroactive application of Graycor was improper, as was its conclusion that Graycor precluded the relief ordered by the Arbitrator.

Contrary to the Superior Court's ruling, the Arbitrator carefully analyzed the Prompt Payment Act based upon then-available appellate case law and issued relief in compliance with the Act as construed before (and after) the Graycor decision. As such, the Arbitrator acted within his powers and did not issue relief contrary to either the express terms of the Act or then-current case law interpreting the Act.

If left uncorrected, and without proper guidance from this Court, the Superior Court's decision could have profound consequences impacting the construction industry and all private arbitration awards issued pursuant to the Massachusetts Arbitration Act.

The Supreme Judicial Court is in the best position to confirm the award and protect the sanctity of arbitration in the wake of its recent decision in Graycor. More particularly, this appeal presents the opportunity to (1) affirm Massachusetts' longstanding public policy favoring arbitration and avoid eroding the stringent standard for vacating arbitration awards; (2) confirm Graycor does not establish a per se rule of retroactivity for re-evaluating prior arbitration awards or judgments; (3) clarify the ambit of Graycor's implied waiver and forfeiture of common-law defenses vis-à-vis contractual defenses and claims; and (4) mitigate Graycor's unintended industry impact of claim windfalls to undeserving claimants--which is a consequence diametrically opposed to the statutory purpose underlying the Prompt Payment Act.

This case presents novel legal questions and the specter of ongoing impacts to the public interest requiring this Court's immediate attention. Resolution of these questions will provide necessary clarity to the construction industry regarding Graycor and its impact on arbitration awards. This Court is also best suited to resolve these novel issues because further appellate review from the Appeals Court is highly likely.

For these reasons, Defendant-Appellant, Columbia Construction Co. respectfully requests that this Court allow its application for direct appellate review. This appeal satisfies all of the criteria for direct appellate review as set forth in Mass. R. A. P. 11, as appearing in 481 Mass. 1620 (2019).

Respectfully Submitted,

Columbia Construction Co.

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CERTIFICATE OF COMPLIANCE WITH MASS. R. A. P. 16(k)

I, Seth M. Pasakarnis, attorney for the Defendant/Appellant, Columbia Construction Co., do hereby certify that the Brief of the Defendant/Appellant, Columbia Construction Co. complies with the rules of the Court that pertain to the filing of applications for direct appellate review, including, but not limited to: Mass. R. A. P. 11 and Mass. R. A. P. 20(a).

I further certify that this application for direct appellate review complies with the length limitations in Mass. R. A. P. 11(b) and Mass. R. A. P. 20(a) because it is produced in the proportional font Times New Roman at size 14 and contains 1,996 total non-excluded words under Mass. R. App. P. 20(a)(2) as counted using the word count feature of Microsoft Word.

I further attest that this application for direct appellate review is being filed under Mass. R. A. P. 13, and that the day of electronic filing or mailing is within the time fixed for filing by this Court.

Sworn under the pains and penalties of perjury this 23rd day of July, 2025.

/s/ Seth M. Pasakarnis
Seth M. Pasakarnis

CERTIFICATE OF SERVICE
PURSUANT TO MASS. R. A. P. 11(d), 13(d)

I, Seth M. Pasakarnis, counsel for Defendant/Appellant, Columbia Construction Co., do hereby certify under the pains and penalties of perjury that on this 23rd day of July, 2025, I served a true and accurate copy of the Defendant/Appellant, Columbia Construction Co.'s application for direct appellate review electronically on all parties who are registered participants of the Court's ECF system, and that I will serve by mail or e-mail those parties who are non-registered participants, upon notification by the Court's ECF system of those individuals who will not be served electronically, including counsel for:

J.C. Cannistraro, LLC

J. Nathan Cole, Esquire
jncole@kslegal.com
Kenney & Sams, P.C.
144 Turnpike Road
Southborough, MA 01772

Siemens Healthcare Diagnostics, Inc.

Jaclyn M. Essinger, Esquire
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Troutman Pepper Locke LLP
111 Huntington Ave, 9th Floor
Boston, MA 02199

/s/ Seth M. Pasakarnis
Seth M. Pasakarnis

ADDENDUM

(Per Mass. R. A. P. 11(b))

ADDENDUM

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2082CV00738 J.C. Cannistraro LLC vs. Columbia Construction Co. et al

- Case Type:
- Contract / Business Cases
- Case Status:
- Open
- File Date
- 08/03/2020
- DCM Track:
- F - Fast Track
- Initiating Action:
- Services, Labor and Materials
- Status Date:
- 08/03/2020
- Case Judge:
-
- Next Event:
-

All Information | Party | Event | Tickler | Docket | Disposition

Party Information

J.C. Cannistraro LLC
- Plaintiff

Alias

Party Attorney
- Attorney
- Cole, Esq., John Nathan
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- (508)490-8500
- Attorney
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More Party Information

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- Defendant

Alias

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More Party Information

Travelers Casualty & Surety Company of America
- Defendant

Alias

Party Attorney

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More Party Information

Columbia Construction Co.
- Defendant

Alias

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More Party Information

Events

Date	Session	Location	Type	Event Judge	Result
12/20/2022 02:00 PM	Civil B		Rule 16 Conference	Kirpalani, Hon. Maynard	Held as Scheduled
06/20/2023 02:00 PM	Civil B		Conference to Review Status	Hallal, Hon. Mark A	Not Held
08/01/2023 02:00 PM	Civil B		Conference to Review Status		Held as Scheduled
01/17/2024 02:00 PM	Civil B	DED-1st FL, CR 3 (SC)	Conference to Review Status	Sisitsky, Hon. Adam	Held as Scheduled
04/23/2024 02:00 PM	Civil B	DED-1st FL, CR 3 (SC)	Conference to Review Status	Hallal, Hon. Mark A	Held as Scheduled
10/23/2024 02:30 PM	Civil B	DED-1st FL, CR 3 (SC)	Motion Hearing	Goldenberg, Hon. Keren E	Decision rendered

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Service	08/03/2020	11/02/2020	91	09/23/2022
Answer	08/03/2020	12/01/2020	120	09/23/2022
Rule 12/19/20 Served By	08/03/2020	12/01/2020	120	09/23/2022
Rule 12/19/20 Filed By	08/03/2020	12/31/2020	150	09/23/2022
Rule 12/19/20 Heard By	08/03/2020	02/01/2021	182	09/23/2022
Rule 15 Served By	08/03/2020	12/01/2020	120	09/23/2022
Rule 15 Filed By	08/03/2020	12/31/2020	150	09/23/2022
Rule 15 Heard By	08/03/2020	02/01/2021	182	09/23/2022
Discovery	08/03/2020	05/31/2021	301	09/23/2022
Rule 56 Served By	08/03/2020	06/29/2021	330	09/23/2022
Rule 56 Filed By	08/03/2020	07/29/2021	360	09/23/2022

Tickler	Start Date	Due Date	Days Due	Completed Date
Final Pre-Trial Conference	08/03/2020	11/26/2021	480	09/23/2022
Judgment	08/03/2020	08/03/2022	730	09/23/2022
Status Review	12/31/2021	01/31/2022	31	02/28/2022
Status Review	08/09/2022	09/09/2022	31	09/23/2022
Under Advisement	10/23/2024	11/22/2024	30	03/27/2025

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
08/03/2020	Attorney appearance On this date Ross C Wecker, Esq. added as Private Counsel for Plaintiff J.C. Cannistraro LLC		
08/03/2020	Case assigned to: DCM Track F - Fast Track was added on 08/03/2020 Sent to attorney		Image
08/03/2020	Original civil complaint filed.	1	Image
08/03/2020	Civil action cover sheet filed.	2	Image
08/03/2020	Demand for jury trial entered.		
08/03/2020	J.C. Cannistraro LLC, Columbia Construction Co.'s MOTION for appointment of Special Process Server.	3	Image
08/03/2020	Endorsement on Motion for special process server (#3.0): ALLOWED as to service of all pre-judgment process (Connors, R.A.J.)		Image
08/05/2020	Party status: Plaintiff Columbia Construction Co.: Inactive;		
08/05/2020	Clarification / Correction of the docket: Due to Clerical Error - Columbia Construction Co. was put in originally as plaintiff when the party is listed as a defendant. Applies To: Columbia Construction Co. (Defendant)		
08/05/2020	Docket Note: New copy of tracking order with the corrected parties listed was sent on this day per request		
08/22/2020	One Trial case reviewed by Clerk, case to remain in the Superior Court. Judge: Hickey, Mary K		
09/01/2020	Service Returned for Defendant Columbia Construction Co.: Service made in hand; to Jean DiNitto, Receptionist and person authorized to accept service 100 Riverpark Drive North Reading MA 01864 on 8/17/2020 (Rec'd 8/31/2020)	4	Image
09/01/2020	Service Returned for Defendant Siemens Healthcare Diagnostics, Inc. Doing Business as Siemens Medical Solutions Diagnostics Corp.: Service made in hand; to Sequeira Lavender on 8/11/2020 (Rec'd 8/31/2020)	5	Image
09/02/2020	Received from Defendant Columbia Construction Co.: Answer with claim for trial by jury; (Rec'd 8/31/2020)	6	Image
09/02/2020	Attorney appearance On this date Hugh J Gorman, III, Esq. added as Private Counsel for Defendant Columbia Construction Co.		
09/17/2020	Attorney appearance On this date Jaclyn M Essinger, Esq. added as Private Counsel for Defendant Siemens Healthcare Diagnostics, Inc. Doing Business as Siemens Medical Solutions Diagnostics Corp.		
09/17/2020	Plaintiff J.C. Cannistraro LLC's Assented to Motion to File Amended Complaint	7	Image
10/05/2020	Pleading titled, Columbia Construction Company's Answer to Plaintiff's Amended Complaint and Jury Demand, filed with the court on 10/02/2020, returned to Hugh J Gorman, III, Esq. Motion to Amend the Complaint has not been ruled on and Amended Complaint has not been filed.		
10/07/2020	Endorsement on Motion to amend the complaint (#7.0): ALLOWED (W.Sullivan, J)(dated;10/6/2020)ns pl Judge: Sullivan, Hon. William F		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/07/2020	Party status: Defendant Siemens Healthcare Diagnostics, Inc. Doing Business as Siemens Medical Solutions Diagnostics Corp.: Inactive;		
10/14/2020	Amended: First amended complaint filed by J.C. Cannistraro LLC (rec'd 10/13/2020)	8	Image
10/22/2020	Received from Defendant Columbia Construction Co.: Answer to amended complaint; Applies To: Gorman, III, Esq., Hugh J (Attorney) on behalf of Columbia Construction Co. (Defendant)	9	Image
11/03/2020	Service Returned for Defendant Travelers Casualty & Surety Company of America: Service made in hand to Lindsay Knowlton, Bonds, and person authorized to accept service on 10/26/2020 at 12:03PM; (rec'd 11/2/2020)	10	Image
11/23/2020	Attorney appearance On this date Seth M Pasakarnis, Esq. added as Private Counsel for Defendant Columbia Construction Co.		
11/23/2020	Attorney appearance On this date Seth M Pasakarnis, Esq. added as Private Counsel for Defendant Travelers Casualty & Surety Company of America		
01/07/2021	Defendants(s) Columbia Construction Co., Travelers Casualty & Surety Company of America motion filed to compel arbitration and stay civil action	11	Image
01/07/2021	Columbia Construction Co., Travelers Casualty & Surety Company of America's Memorandum in support of Defendants' Motion to compel arbitration and to stay the civil action	11.1	Image
01/07/2021	Opposition to Defendants' Motion to stay and compel arbitration - filed by J.C. Cannistraro LLC	11.2	Image
01/07/2021	Defendants Columbia Construction Co., Travelers Casualty & Surety Company of America's Reply in support of their Motion to compel arbitration and stay the civil action	11.3	Image
01/07/2021	Certificate of Compliance Superior Court Rule 9C	11.4	Image
01/07/2021	Rule 9A notice of filing	11.5	Image
01/07/2021	Rule 9A list of documents filed.	11.6	Image
02/19/2021	Endorsement on motion to compel (#11.0): Arbitration; After review of the parties submissions ALLOWED See separate Order of this date. (Dated 2/12/2021) cs		Image
02/19/2021	ORDER: on Defendants' Motion to Compel Arbitration and Stay Action. (Dated 2/12/2021) cs	12	Image
12/31/2021	ORDER sent for Status Review, if notice is not received by 01/24/2022 the complaint will be dismissed. Judge: Kirpalani, Hon. Maynard	13	Image
01/11/2022	Status review notice returned On Feb. 19, 2021 the Court entered an order granting Defendant's motion to compel arbitration. the Order stays the case until further notice. The parties are currently undertaking the arbitration process. A hearing is scheduled in June, 2022 (rec'd 1/10/22_ Applies To: Pasakarnis, Esq., Seth M (Attorney) on behalf of Columbia Construction Co. (Defendant)	14	Image
08/09/2022	ORDER sent for Status Review, if notice is not received by 09/02/2022 the complaint will be dismissed. Judge: Leighton, Hon. Joseph		Image
09/23/2022	JUDGMENT of dismissal, J.C. Cannistraro LLC failed to comply with an ORDER after review of the Docket dated 08/09/2022. It is ORDERED and ADJUDGED: That all remaining claims are dismissed without prejudice. (cs)	15	Image
09/26/2022	ORDER: No. 15 Judgment is ordered vacated; response was received on Sept. 2, 2022. Judge: Leighton, Hon. Joseph	16	
09/26/2022	Status review notice returned The case is pending in Arbitration, but the parties would request a Rule 16 Status Conference at the Court's earliest convenience (rec'd 9/2/22) Applies To: Wecker, Esq., Ross C (Attorney) on behalf of J.C. Cannistraro LLC (Plaintiff)	17	Image
10/07/2022	The following form was generated: Notice to Appear for a R.16 Conference on Tuesday, December 20, 2022 at 2:00 before the Honorable	18	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Maynard Kirpalani Sent On: 10/07/2022 11:54:18		
12/20/2022	Event Result:: Rule 16 Conference scheduled on: 12/20/2022 02:00 PM Has been: Held as Scheduled Comments: FTR - Ctrm. 3 Via Zoom Hon. Maynard Kirpalani, Presiding		
12/27/2022	Pre-Trial ORDER: After a Rule 16 Conference on December 20, 2022 the Court ORDERS: The Order of February 12,2021 staying this action is extended to Jun 20,2023; A Status Conference will be held on Tuesday, June 20,2023 at 2;00pm (Kirpalani, J)(dated; 12/20/22) ns pl Judge: Kirpalani, Hon. Maynard	19	Image
04/03/2023	Party(s) file Stipulation of Dismissal J.C. Cannistraro LLC, Columbia Construction Co and Travelers Casualty & Surety Company of America stipulate that all claims, counterclaims, or other claims asserted against Travelers Casualty & Surety Company of America are dismissed with prejudice and without costs or attorney's fees. All rights of appeal are waived. (efiled 4/3/23) mc Applies To: Wecker, Esq., Ross C (Attorney) on behalf of J.C. Cannistraro LLC (Plaintiff); Pasakarnis, Esq., Seth M (Attorney) on behalf of Columbia Construction Co. (Defendant)	20	Image
04/03/2023	Party status: Defendant Travelers Casualty & Surety Company of America: Dismissed by agreement of parties;		
05/23/2023	Event Result:: Conference to Review Status scheduled on: 06/20/2023 02:00 PM Has been: Not Held For the following reason: By Court prior to date Hon. Mark A Hallal, Presiding		
05/23/2023	Pre-Trial ORDER: The Status Conference set for June 20,2023 at 2:00pm is re-scheduled for Tuesday, August 1,2023 at 2:00pm due to the unavailability of the "B" Session Judge on the originally assigned date. The Conference will be conducted via Zoom. Meeting I.D: 161 303 8151 (Hallal, J)(dated; 5/23/23) ns pl Judge: Hallal, Hon. Mark A	21	Image
08/01/2023	Event Result:: Conference to Review Status scheduled on: 08/01/2023 02:00 PM Has been: Held as Scheduled Comments: FTR - Ctrm. 3 Via Zoom Hon. Mark A Hallal, Presiding		
08/02/2023	Attorney appearance electronically filed. Applies To: Cole, Esq., John Nathan (Attorney) on behalf of J.C. Cannistraro LLC (Plaintiff)		Image
08/02/2023	Attorney appearance On this date John Nathan Cole, Esq. added as Private Counsel for Plaintiff J.C. Cannistraro LLC		
08/08/2023	Pre-Trial ORDER: After a Status Conference on August 1,2023 the Court ORDERS: A Further Status Conference will be held on Wednesday, January 17,2024 at 2:00pm to be conducted via Zoom (Hallal, J)(dated; 8/1/23) ns pl Judge: Hallal, Hon. Mark A	22	Image
01/17/2024	Event Result:: Conference to Review Status scheduled on: 01/17/2024 02:00 PM Has been: Held as Scheduled Comments: FTR - Ctrm. 3 Via Zoom Hon. Adam Sisitsky, Presiding		
01/22/2024	Pre-Trial ORDER: After a Status Conference on January 17,2024 the Court ORDERS: Case is set down for a further Status Conference on Tuesday, April 23,2024 at 2:00pm to be conducted via Zoom, Meeting ID: 161 843 6546 (Sisitsky, J)(dated; 1/17/24) ns pl Judge: Sisitsky, Hon. Adam	23	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/23/2024	Event Result:: Conference to Review Status scheduled on: 04/23/2024 02:00 PM Has been: Held as Scheduled Comments: FTR - Ctrm.3 Via Zoom Hon. Mark A Hallal, Presiding		
04/23/2024	Attorney appearance electronically filed.		Image
04/29/2024	Attorney appearance On this date Lindsey K Black, Esq. added for Defendant Columbia Construction Co.		
05/14/2024	Plaintiff J.C. Cannistraro LLC's Notice of Motion to Vacate April 3, 2024 Arbitration Award (E-filed 5/3/224)	24	Image
06/07/2024	Plaintiff J.C. Cannistraro LLC's Motion to Vacate the Arbitration Award (e-Filed 5/31/2024) dg	25	Image
06/07/2024	J.C. Cannistraro LLC's Memorandum in support of it's Motion to Vacate the Arbitration Award (e-Filed 5/31/2024) dg	25.1	Image
06/07/2024	Opposition to to Plaintiff J.C. Cannistraro, LLC's Motion to Vacate Arbitration Award--OPPOSITION filed by Columbia Construction Co.(e-Filed 5/31/2024) dg	25.2	Image
06/07/2024	Plaintiff J.C. Cannistraro LLC's Request for Hearing (e-Filed 5/31/2024) dg	25.3	Image
06/07/2024	Defendant Columbia Construction Co.'s Notice of Filing (e-Filed 5/31/2024) dg	25.4	Image
08/20/2024	Defendant Columbia Construction Co.'s Motion to Confirm Arbitration Award and for Entry of Judgment (e-Filed 8/19/2024) dg	26	Image
08/20/2024	Columbia Construction Co.'s Memorandum in support of it's Motion to Confirm Arbitration Award and for Entry of Judgment (e-Filed 8/19/2024) dg	26.1	Image
08/20/2024	Opposition to P. 26 Defendant's Motion to Confirm the Arbitration Award and for entry of Judgment -- OPPOSITION filed by J.C. Cannistraro LLC(e-Filed 8/19/2024) dg	26.2	Image
08/20/2024	Reply/Sur-reply -Defendant Columbia Construction Co.'s Reply Memorandum (e-Filed 8/19/2024) dg	26.3	Image
10/23/2024	Matter taken under advisement: Motion Hearing scheduled on: 10/23/2024 02:30 PM Has been: Held - Under advisement Comments: FTR - Ctrm. 3 IN PERSON Hon. Keren E Goldenberg, Presiding		
12/06/2024	Endorsement on Motion to vacate arbitration award---After hearing , Motion (#25.0): ALLOWED See Memorandum of Decision and Order of this date. (dated 12/4/2024) ns ni		Image
12/06/2024	Endorsement on Submission of opposition to J.C. Cannistraro, LLC's Motion to vacate arbitration award.---After hearing, Motion (#25.2): DENIED See Memorandum of Decision and Order of this date. (dated 12/4/2024) ns ni		Image
12/06/2024	MEMORANDUM & ORDER: MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO VACATE ARBITRATION AWARD AND DEFENDANT'S MOTION TO CONFIRM ARBITRATION AWARD AND FOR ENTRY OF JUDGMENT. (dated 12/4/2024) certified copies sent ni Judge: Goldenberg, Hon. Keren E	28	Image
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01/24/2025	Defendant Columbia Construction Co.'s Motion for reconsideration and memorandum of law in support (E-filed 1/21/2025)	30	Image
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Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Columbia Construction Co.'s reply in support of its motion for reconsideration (E-filed 1/21/2025)		
01/24/2025	Affidavit of compliance with superior court rule 9A (E-filed 1/21/2025)	30.3	Image
01/24/2025	Defendant Columbia Construction Co.'s Notice of filing and list of documents (E-filed 1/21/2025)	30.4	Image
01/24/2025	Docket Note: p#30- 30.4 were emailed to Judge Goldenberg		
03/05/2025	Endorsement on Motion for Reconsideration and Memorandum of Law in Support (#30.0): DENIED See Memorandum of Decision and Order of this date. (Goldenberg, J)(dated; 3/5/25) ns pl Judge: Goldenberg, Hon. Keren E		Image
03/05/2025	MEMORANDUM & ORDER: AND DECISION ON DEFENDANT'S MOTION FOR RECONSIDERATION (Goldenberg, J)(dated; 3/5/25) certified copy sent pl Judge: Goldenberg, Hon. Keren E	31	Image
03/27/2025	Plaintiff, Defendant J.C. Cannistraro LLC, Columbia Construction Co.'s Joint Motion for Entry of Judgment (e-Filed) dg	32	Image
04/11/2025	Endorsement on Motion for entry of Judgment.--Motion (#32.0): ALLOWED See Final Judgment of this date. (dated 4/8/2025) ns ni Judge: Goldenberg, Hon. Keren E		
04/11/2025	FINAL JUDGMENT This action came before the Court, Keren E. Goldenberg presiding and upon consideration thereof it is ORDERED and ADJUDGED that the arbitration award dated April 3, 2024 is hereby VACATED. All interim awards issued by the Arbitrator in the course of arbitration, remain in full force and effect, (dated 4/8/2025) certified copies sent ni	33	Image
05/14/2025	Defendant Columbia Construction Co.'s Notice of Appeal (E-Filed 05/06/2025)mk	34	Image
05/15/2025	Notice of appeal filed sent to: Applies To: Cole, Esq., John Nathan (Attorney) on behalf of J.C. Cannistraro LLC (Plaintiff); Wecker, Esq., Ross C (Attorney) on behalf of J.C. Cannistraro LLC (Plaintiff); Pasakarnis, Esq., Seth M (Attorney) on behalf of Columbia Construction Co. (Defendant); Black, Esq., Lindsey K (Attorney) on behalf of Columbia Construction Co. (Defendant)	35	Image
05/28/2025	Defendant Columbia Construction Co.'s Submission of Certification on Transcripts for Appeal (E-Filed 05/20/2025)mk	36	Image
06/09/2025	Plaintiff J.C. Cannistraro LLC's Notice to transcript order for appeal efiled 6/9/25	37	Image
06/17/2025	CD of Transcript of 10/23/2024 02:30 PM Motion Hearing received from Diane Harris. (received 6/9/2025)	38	
06/17/2025	Notice of assembly of record sent to Counsel Applies To: Cole, Esq., John Nathan (Attorney) on behalf of J.C. Cannistraro LLC (Plaintiff); Wecker, Esq., Ross C (Attorney) on behalf of J.C. Cannistraro LLC (Plaintiff); Pasakarnis, Esq., Seth M (Attorney) on behalf of Columbia Construction Co. (Defendant); Black, Esq., Lindsey K (Attorney) on behalf of Columbia Construction Co. (Defendant)		
06/17/2025	Notice to Clerk of the Appeals Court of Assembly of Record	39	Image
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07/11/2025	Appeal entered in Appeals Court on 07/02/2025 docket number 2025-P-0819 (received 7/9/2025)	41	

Case Disposition

Disposition	Date	Case Judge
Judgment after Finding on Motion	09/26/2022	

Disposition	Date	Case Judge

AMERICAN ARBITRATION ASSOCIATION

J.C. Cannistraro, LLC

Claimant,

v.

Columbia Construction Co.

Respondent.

Case Number: 01-21-0002-3063

Arbitrator: John W. Fieldsteel

FINDINGS, RULINGS, AND INTERIM ORDER ON MOTIONS FOR SUMMARY JUDGMENT OF THE PARTIES

I, THE UNDERSIGNED ARBITRATOR, having been designated and duly appointed in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association and as authorized and agreed to by Claimant J.C. Cannistraro, LLC ("JCC") and Respondent Columbia Construction Co., Inc. ("Columbia") (collectively "Parties"), and have received and considered the arguments set forth in the Parties' Motions for Summary Judgment and subsequent pleadings in support thereof and in opposition thereto, as well as the Joint Statement of Undisputed Material Facts agreed to by JCC and Columbia. I initially reserved my decision on said Motions in view of the pending decision of the Appeals Court in the case of Tocci Building Corp. v. IRIV Partners, LLC, which case presented similar issues as set forth in the Motions and Oppositions thereto. I have since considered the decision of the Appeals Court in Tocci Building Corp. v. IRIV Partners, LLC, No21-P-393 & 21-P-733, Mass. App. Ct. 2021, including the June 24, 2022 revision to said decision (collectively "Tocci case"), and the subsequent memoranda of the Parties relative to said decision. I find the decision in the Tocci

case to have precedential value and to be in many respects on point relative to the issues in this matter. In view of the above, I hereby find, rule and order as follows:

FINDINGS

1. On February 3, 2017, Columbia entered into a contract with Siemens Healthcare Diagnostics, Inc. d/b/a Siemens Medical Solutions Diagnostics Corp. for the construction and renovation of an office and manufacturing facility on real property located at 333 Coney Street, Walpole, Massachusetts ("Project"). The amount of the prime contract was in excess of $3,000,000. Accordingly, I find that the Project is subject to the provisions of the Massachusetts Prompt Pay Act, G.L. c. 149, §29E ("Prompt Pay Act").
2. I find that on April 25, 2018, JCC and Columbia entered into two separate subcontracts concerning the HVAC and Plumbing work on the Project. Said subcontracts were essentially in identical form with the exception of the scopes of work and schedules set forth in each.
3. I find that JCC submitted regular monthly requisitions to Columbia during the Project for its HVAC and Plumbing work.
4. I find that on January 8, 2020, JCC sent Columbia a letter requesting a change order to the Plumbing Subcontract totaling $391,550, and on January 23, 2020, JCC sent Columbia a letter requesting a change order to the HVAC Subcontract totaling $571,601.
5. I find that on February 5, 2020, Columbia responded in writing to the Plumbing and HVAC change order requests and purported to reject such requests.

6. I find that on April 9, 2020, JCC submitted its Application and Certificate for Payment No. 19 ("HVAC App.19") for HVAC work performed through April 30, 2020. As part of said HVAC App.19, JCC included a line item for "CEC 060-HR" in the amount of $569,238.77 for certain HVAC change order work.
7. I find that on April 9, 2020, JCC also submitted its Application and Certificate for Payment No. 22 ("Plumbing App. 22") for plumbing work performed through April 30, 2020. I find that in Plumbing App. 22, JCC included a line item "CEC 060" in the amount of $382,616.28 for certain plumbing change order work.
8. I find that in response to HVAC App.19 and Plumbing App. 22, Columbia by email dated April 24, 2020 responded to these claims, notified JCC that it was rejecting the referenced change orders contained in HVAC App. 19 and Plumbing App. 22, and attached the letters from Columbia to JCC dated February 5, 2020. In these responses, Columbia failed to include a certification that such rejections were made in good faith.
9. I find that in an email to JCC dated September 22, 2020, Columbia indicated for the first time that its rejections of HVAC App. 19 and Plumbing App. 22 were certified as being made in good faith.
10. There is no evidence that Columbia has paid any part of the subject claims set forth in HVAC App. 19 in CEC 060-HR in the amount of $569,238.77 and Plumbing App. 22 in CEC 060 in the amount of $382,616.28.
11. Columbia has not asserted any counterclaims in this arbitration.

RULINGS

G.L. c. 149, §29E requires that "every contract for construction shall provide reasonable time periods within which: (i) a person seeking payment under the contract shall submit written applications for periodic progress payments; (ii) the person receiving the application shall approve or reject the application, whether in whole or in part; and (iii) the person approving the application shall pay the amount approved." The Prompt Pay Act requires rejection within fifteen days at the prime contract level but allows an additional seven days for the rejection of a first-tier subcontractor's (such as JCC) application for payment, for a total of twenty-two days. Columbia, therefore, was required to provide a response in compliance with the Prompt Pay Act to JCC's April 9, 2020 HVAC App. 19 and Plumbing App. 22 by May 1, 2020.

If, in response to a proper application for a periodic progress payment, the payor does not provide a rejection in compliance with the Prompt Pay Act, the application will "be deemed to be approved unless it is rejected before the date payment is due." G. L. c. 149, § 29E (c). The statute requires that "rejection of an application for a periodic progress payment, whether in whole or in part, shall be made in writing and shall include an explanation of the factual and contractual basis for the rejection and **shall be certified as made in good faith**." Id. (emphasis added).

Notwithstanding any other alleged violations of the Prompt Pay Act, it is undisputed that Columbia failed to provide a written rejection, which included the required certification of good faith rejection of HVAC App. 19 and Plumbing App. 22, until September 22, 2020.

Under the Prompt Pay Act, Columbia had another forty-five days after the deemed approval of JCC's payment applications within which it could have issued a rejection that complied with the statute. This would have required Columbia to issue a written rejection that was certified as having been made in good faith by no later than June 15, 2020. Columbia did not

issue a rejection that complied with the requirements of the statute until September 22, 2020. By operation of law and pursuant to the provisions of the Prompt Pay Act, the unpaid portion of JCC's HVAC App. 19, in the amount of $569,238.77and the unpaid portion of JCC's Plumbing App. 22, in the amount of $382.616.28, for a total of $951,855.05, became due and payable on June 15, 2020.

The Tocci case clearly and unequivocally states that the Prompt Pay Act's requirement of a certification of good faith is part of the statutory requirements, is not a ministerial act (as argued by Columbia and by the defendants in the Tocci case), and the failure to provide such certification within the time frames required by the Prompt Pay Act renders the subject pay applications as deemed approved and, therefore, due and payable. The Court in the Tocci case further found that the "certification requirement is an essential component" of the provisions of the Prompt Pay Act.

Columbia, while recognizing the clear findings of the Tocci case, nevertheless attempts to distinguish that case by first arguing that Columbia only missed the certification requirement and later corrected such error and satisfied the other requirements of the Prompt Pay Act. The Tocci case makes it abundantly clear that all three requirements of the Prompt Pay Act must be satisfied in a timely manner, or the subject payment application is deemed to be approved.

Columbia also argues that the case of BRT Mgmt. LLC v. Malden Storage, LLC, No. CV 17-10005-FDS, 2021 WL 4133298, at *29 (D. Mass. Sept. 10, 2021) ("BRT case") is directly on point and supports Columbia's argument that any decision by the Arbitrator at this time of a violation of the Prompt Pay Act by Columbia is premature. I find that the BRT case, which was decided in the United States District Court for the District of Massachusetts, is not controlling.

The BRT case was decided before the Tocci case was decided, and the Court in the BRT case could not, therefore, consider the ruling of an appellate Massachusetts state court on this matter of interpretation of a Massachusetts statute. I also find that the fact pattern in the BRT case was distinguishable from the instant case, including findings in the BRT case, where the decision followed a trial on the merits, that the contractor had materially breached the contract and committed fraud.

INTERIM ORDER

Accordingly, where JCC's applications for payment were deemed approved on May 1, 2020, with payment to be made by no later than June 15, 2020, I hereby Order as follows:

1. Columbia is ordered to make payment to JCC in the amount of $951,855.05 by on or before September 9, 2022;

2. JCC is ordered to file its position on the calculation of interest due under this Interim Order by on or before August 16, 2022. Columbia shall submit is opposition, if any, to the award of interest, within seven days of the filing of JCC's submission on this issue;

3. JCC and Columbia are ordered to confer and advise the Arbitrator by September 10, 2022, as to whether Columbia has paid JCC $951,855.05, and as to what other claims, if any, need to proceed to arbitration.

SO ORDERED:

Dated: August 9, 2022

John W. Fieldsteel, Arbitrator

AMERICAN ARBITRATION ASSOCIATION

J.C. Cannistraro, LLC

Claimant,

Case Number: 01-21-0002-3063

v.

Arbitrator: John W. Fieldsteel

Columbia Construction Co.

Respondent.

FINDINGS, RULINGS AND ORDER ON RESPONDENT'S MOTION FOR LEAVE TO AMEND ITS RESPONSE TO CANNISTRARO'S DEMAND FOR ARBITRATION TO ADD A COUNTERCLAIM

I, THE UNDERSIGNED ARBITRATOR, have been designated and duly appointed in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association and as authorized and agreed to by Claimant J.C. Cannistraro, LLC ("JCC") and Respondent Columbia Construction Co., Inc. ("Columbia") (collectively "Parties"), and have received and considered the arguments set forth in the Respondent's Motion for Leave to Amend its Response to Cannistraro's Demand for Arbitration to Add a Counterclaim ("Motion") dated September 1, 2022, the proposed Columbia's Amended Response to JCC's Demand for Arbitration, including a proposed Counterclaim, dated September 1, 2022, JCC's Opposition to said Motion dated September 12, 2022, and an August 24, 2022 email from JCC's counsel also in opposition to said Motion, and Columbia's Reply to Cannistraro's Opposition to Motion for Leave to Amend dated September 16, 2022, as well as the arguments raised by counsel during the September 21, 2022 Zoom hearing on the Motion.

In support of its Motion, Columbia states that it is seeking to recoup the payment recently made by Columbia to JCC pursuant to my August 9, 2022 Findings, Rulings and Order on Motions for Summary Judgment of the Parties, wherein I ordered Columbia to pay JCC the sum of $951,855.05, by on or before September 9, 2022. In my August 29, 2022 email to counsel, I indicated that I determined that the applicable interest rate to be paid by Columbia to JCC would be 4% and that I would put that finding in an order, which I am doing hereby. In view of the above, I hereby find, rule and order as follows:

FINDINGS

1. Pursuant to my August 9, 2022 Findings, Rulings and Order on Motions for Summary Judgment of the Parties, and my August 29, 2022 email notice regarding the 4% applicable interest, on September 9, 2022, Columbia duly paid JCC the sum of $1,036,870.05, which represents the principal sum of $951,855.05, plus interest at the rate of 4%, which I found to be a fair and equitable rate of interest, from June 15, 2020, which was the date that I determined that payment was due from Columbia to JCC, to September 9, 2022, in the amount of $85,015..
2. JCC opposes the Motion based on several grounds, including that Columbia was attempting to assert its claims in an untimely manner and in violation of AAA Construction Industry Rule R-4(c)(ii) and the terms of the applicable Scheduling Order in this arbitration. I find that any claim to recover the amounts paid by Columbia to JCC did not arise until such amounts were paid on September 9, 2022. Accordingly, I find that the timeliness argument does not prevent the filing of the proposed Amended Response, including the proposed Counterclaim.

3. I further find that JCC has been on notice of the reasons for Columbia's initial failure to pay the subject change order requests since as early as the February 5, 2020 letter from Columbia to JCC responding to JCC's letters of January 8, 2020 and January 23, 2020 seeking change orders to the Plumbing and HVAC subcontracts, respectively.
4. I find that the reasons for Columbia's opposition to the subject JCC change order requests have always been known to JCC, including as early as before the actual change order requests were included in JCC's requisitions.
5. I find that the Affirmative Defenses asserted in the Amended Response appear to be the same as the Affirmative Defenses asserted in Columbia's initial Response to JCC's Demand for Arbitration.

6. I further find that the only reason that Columbia has been ordered to pay $1,036,870.05, which represents the principal sum of $951,855.05 plus interest at the rate of 4% from June 15, 2020, is that Columbia failed to certify in good faith in a timely manner its objections to the subject requisitions. The impact of the failure to satisfy this requirement of the Massachusetts Prompt Pay Act, G.L. c. 149, §29E ("Prompt Pay Act"), was an open question until the decision of the Appeals Court in Tocci Building Corp. v. IRIV Partners, LLC, Nos. 21-P-393 & 21-P-733, Mass. App. Ct. 2021, including the June 24, 2022 revision to said decision (collectively "Tocci case").

7. As such, I understand Columbia's position of being forced to pay based on a decision, which arose years after the responses to the subject requisitions were due,

but I also have ruled that based on the interpretation of the Prompt Pay Act set forth in the Tocci case, Columbia violated that Act.

8. The remaining question is whether there is a cognizable claim for recoupment or recovery of the amounts paid by Columbia to JCC. I find that this initially involves an interpretation of whether the Tocci case forecloses any challenge to JCC's initial change order claims and only permits other affirmative claims by Columbia, as is asserted by JCC, or whether the Tocci case recognizes that the Prompt Pay Act merely shifts when payment must be initially made leaving open the right to challenge the underlying JCC claims and that nothing is waived, other than the time when the payment must be made, as is asserted by Columbia.
9. I find that the Tocci case does not clearly answer this question. While there was some very persuasive discussion on this issue between Tocci's counsel and Justice Rubin, who was the author of the Tocci decision, during oral argument that the Prompt Pay Act did not foreclose such a challenge to claims, this issue was not resolved in the opinion in the Tocci case.
10. I also find that the words "deemed to be approved" in the Prompt Pay Act are unclear as to whether this means approved and payable with no recourse of the payor to challenge the underlying claims or approved and payable as a shifting of who will hold the funds pending final resolution of the claims. I find that this issue was not clearly decided by the Tocci case, as the owner in that case had independent claims against the general contractor, whereas in this arbitration, Columbia's only current claims relate to recovery of funds paid to JCC for claims, which Columbia has always contested.

11. In view of the above, I find that Columbia is not foreclosed by the Prompt Pay Act or the rulings in the Tocci case from challenging the JCC claims following payment of such claims. To hold otherwise would prevent a party from contesting possible duplicative, fraudulent or for work that was never performed, although I am not suggesting that any of these descriptions apply to JCC's claims.
12. I also recognize the concern expressed by JCC's counsel that there may not have been adequate discovery on this issue. While the discovery period has lapsed, both parties had agreed to file dispositive motions, and I do not know if both parties have been afforded the right to conduct full discovery regarding Columbia's defenses to the JCC's requests for change orders. I direct counsel to confer and either agree on a discovery schedule or to file separate proposals for same. I recognize that this may impact the current hearing dates, but I also appreciate that this is a unique circumstance, and my paramount concern is one of providing fairness and equity to all parties. I will continue to hold the hearing dates and request that the parties make every effort to do the same.

RULINGS

1. I rule that Columbia is not foreclosed by the Prompt Pay Act or by the rulings set forth in the Tocci case from challenging the merits of the change order requests submitted by JCC to Columbia in the total amount of $951,855.05, so that Columbia may seek to recover some or all of the principal amount of $951,855.05 paid by Columbia to JCC on September 9, 2022.

2. I rule that Columbia is not entitled to recover any of the interest in the amount of $85,015 paid by Columbia to JCC on September 9, 2022, as this represents interest on the funds wrongfully withheld by Columbia.

ORDER

Accordingly, I hereby Order as follows:

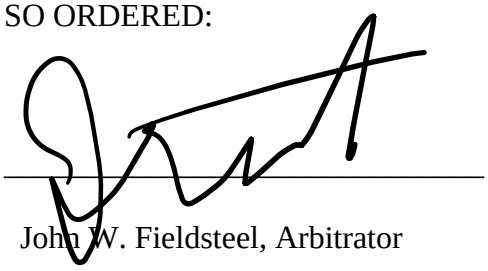
1. By on or before October 7, 2022, Columbia is hereby permitted to file its Amended Response to JCC's Demand for Arbitration, provided that it shall pay all applicable AAA filing fees relating to same;

2. JCC is ordered to file its response, if any, to Columbia's Counterclaim within fourteen (14) days of receipt of the notice of filing of same;

3. JCC and Columbia are ordered to confer and advise the Arbitrator by October 14, 2022, regarding whether they have reached agreement regarding whether any further discovery needs to be conducted and the schedule for same. Absent any such agreement, by on or before October 14, 2022, JCC and Columbia shall each file a proposed scope of discovery and the schedule for same.

SO ORDERED:

Dated: September 29, 2022



John W. Fieldsteel, Arbitrator

AMERICAN ARBITRATION ASSOCIATION
Construction Industry Arbitration Tribunal

J.C. Cannistraro, LLC

Claimant,

Case Number: 01-21-0002-3063

v.

Arbitrator: John W. Fieldsteel

Columbia Construction Co.

Respondent.

FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated and duly appointed in accordance with the arbitration agreement entered into between the above named parties and dated April 25, 2018, under the Construction Industry Arbitration Rules of the American Arbitration Association and as authorized and agreed to by Claimant J.C. Cannistraro, LLC ("JCC") and Respondent Columbia Construction Co., Inc. ("Columbia") (collectively "Parties"), have received and considered the evidence and legal arguments presented by the Parties during the hearings, which were conducted at the offices of the American Arbitration Association in Boston, Massachusetts on January 8, 9 and 10, 2024, and the further arguments set forth in the Post Hearing Briefs submitted by the Parties on March 8, 2024 and the Proposed Awards submitted by Columbia on March 8, 2024 and by JCC on March 11, 2024. JCC was represented at the hearings by J. Nathan Cole, Esq., and Anthony B. Fiorvanti, Esq., and Columbia was represented by James J. Barriere, Esq. and Seth M. Pasakarnis, Esq., hereby AWARD as follows:

PRIOR PROCEEDINGS

I have previously ruled in my August 9, 2022 Findings, Rulings and Interim Order on the Parties' Motions for Summary Judgment, a copy of which is attached hereto, made a part hereof and is marked as Exhibit A, that Columbia shall on September 9, 2022 pay JCC $951,855.05 plus interest at the rate of 4%. I further find that on September 9, 2022, Columbia duly paid JCC the sum of $1,036,870.05, which represents the principal sum of $951,855.05, plus interest at the rate of 4%, which I found to be a fair and equitable rate of interest, from June 15, 2020, when I determined that payment was due, to September 9, 2022. I find that Columbia made this payment. By my Findings, Rulings and Order on Respondent's Motion for Leave to Amend its Response to Cannistraro's Demand for Arbitration to Add a Counterclaim, I granted Columbia leave to file a Counterclaim. I hereby render this Final Award on the merits of Columbia's Counterclaim to recoup $951,855.05 previously paid to JCC.

FINDINGS

1. On February 3, 2017, Columbia entered into a contract with Siemens Healthcare Diagnostics, Inc. d/b/a Siemens Medical Solutions Diagnostics Corp. ("Siemens") for the construction and renovation of an office and manufacturing facility on real property located at 333 Coney Street, Walpole, Massachusetts ("Project"). The amount of the prime contract was in excess of $3,000,000.00. Accordingly, I find that the Project was subject to the provisions of the Massachusetts Prompt Pay Act, G.L. c. 149, §29E ("Prompt Pay Act").

2. I find that on April 25, 2018, JCC and Columbia entered into two separate subcontracts concerning the HVAC and Plumbing work on the Project. Said subcontracts were essentially in identical form with the exception of the scopes of work and schedules set forth in each.
3. I have found that Columbia violated the Prompt Pay Act, which I also find constituted a breach of the subcontracts between Columbia and JCC.
4. I find that as a result of Columbia's breaches of the subcontracts for HVAC and Plumbing work, Columbia is not entitled to rely upon the numerous contractual defenses and terms referenced in its pleadings. I also find that JCC did not waive its claims by executing the lien waivers required by Columbia in this case.
5. I do not, however, find that Columbia has waived its right to seek to recover the principal amount paid to JCC on September 9, 2022, if such amount does not fairly represent the fair and reasonable damages suffered by JCC. Consistent with my July 26, 2023 Order denying JCC's Second Motion for Summary Judgment, the scope of these hearings and this arbitration is to determine whether JCC's change order requests were not valid or were not valid in the total amounts sought by JCC. I also ordered that Columbia has the burden of proof on this issue.
6. In view of the above findings, I will determine in this Final Award the fair and reasonable damages incurred by JCC for which Columbia is responsible.
7. In order to decide this issue, I have carefully considered the testimony and exhibits presented at the hearings, including the fact testimony of Gregory Keller, David Doherty and Joshua Blake of Columbia, Michael Porreca, a retired employee of Siemans, and Joseph Mecke, Sean Foley, and Robert Martin of JCC. I have also

placed significant emphasis on the expert testimony of Michael F. D'Onofrio, P.E. ("D'Onofrio") on behalf of Columbia and Wayne M. Sheridan ("Sheridan") on behalf of JCC.

8. As a preliminary matter, I find that D'Onofrio and Sheridan are eminently qualified experts, who presented their opinions in a highly professional and persuasive manner. I also find that both experts were somewhat limited in their ability to determine the fair and reasonable damages incurred by JCC due to the lack of documentation primarily from JCC and to a lesser extent from Columbia regarding JCC's performance on the Project.

9. I find that JCC's initial claims for change orders (CEC 60-P and CEC 60-H) and Sheridan's expert opinions regarding the damages sustained by JCC were based on the Mechanical Contractors Association of America's Factors ("MCAA Factors") analysis, which was developed in 1971 and has remained largely unchanged since that date.

10. I find that D'Onofrio's opinions, while failing to set forth his views on the precise amounts of damages, if any, sustained by JCC, effectively demonstrated the weaknesses in both the accuracy of the MCAA Factors and the application of such Factors to JCC's claims.

11. While D'Onofrio conceded that the MCAA Factors are an industry accepted method for determining loss of productivity claims, I find that D'Onofrio correctly asserted that these Factors are not as precise and are more subjective than other methods, including the use of a measured mile. Unfortunately, in this case, I find that it was

not possible for either expert to perform a measured mile analysis due to the lack of available documentary information.

12. As to JCC's claims, I agree with D'Onofrio regarding the many errors in CEC 60-P and CEC 60-H, and I find that the JCC personnel responsible for preparing these claims admitted to a lack of experience in the utilization of the MCAA Factors. Conversely, I find that Sheridan is qualified to render opinions on the MCAA Factors and the utilization of these Factors to determine the fair and reasonable damages sustained by JCC.
13. D'Onofrio opined that Sheridan relied on overlapping MCAA Factors with the result that the damages calculations were inflated. Sheridan responded that had he relied on fewer factors he would have allocated a higher percentage to each factor.
14. I find that Sheridan relied on overlapping MCAA Factors. I do not find that eliminating the number of factors in this case would justify an increase in the percentages allocated by Sheridan to each factor, as I find that the impacts in general were less than asserted by JCC and were intermittent and not sustained throughout the duration of the Project. I further find that some of the impacts, including stacking of trades, were anticipated by JCC. Sean Foley testified that JCC anticipated trade stacking within reason based on the bid documents.
15. I find that there was almost no change order work during the first seven months of the Project during which time JCC's work proceeded with minimal impact from changes or alleged mismanagement by Columbia. I also find that some of the change orders on the Project were paid on a time and materials basis, which included payment for all inefficiencies associated with that work.

16. I find that a comparison of the schedule durations and order shown in Article III and Exhibit I to the JCC subcontracts with the contemporaneous schedule updates and as-built schedules demonstrates that such durations and order were changed during the Project. I further find that, contrary to D'Onofrio's opinion that JCC performed its work substantially matching the as-planned durations set forth in the JCC subcontracts, I agree with Sheridan that JCC was impacted by changes to the schedules of work for the Project, although I do not find that the extent of such impacts was as significant as alleged by Sheridan and JCC.
17. I find that the Plumbing work was more impacted than HVAC work due to change orders, including differing site conditions and significant changes to the design of the roof drains and leaders and by a lack of access to some plumbing work.
18. As to the impact of premium time on JCC's performance throughout the Project, I find that 43% of all Plumbing overtime work was performed by JCC in January 2019, and 27% of all HVAC overtime work was performed by JCC during December 2018 and January 2019. I find that Sheridan did not sufficiently account for the concentrated impacts to a very short duration in his analysis and overestimated JCC's damages caused by premium time.
19. I find that there was evidence presented through the testimony of Joshua Blake that he felt that JCC was understaffed and that in a conversation with JCC HVAC Pipe Fitting Foreman Mike Palm, which took place in approximately the end of 2018, Mr. Palm admitted that JCC was having issues with understaffing that required it to work overtime to maintain schedule. Other than this one item of anecdotal evidence, I find

that no persuasive evidence was presented to demonstrate the possible impact of such understaffing on JCC's damages.

20. Mr. Blake and other witnesses testified that JCC was a fine subcontractor, and I find that the evidence in this case supported that finding, including that there was no evidence that JCC was responsible for any significant work deficiencies.

21. I also find that while Sheridan was correct in allocating a percentage reduction to JCC's responsibility for self-inflicted delays and damages, including for discretely prices items of damages, his estimate of 10% for such self-inflicted damages was too low. While Sheridan's final 50% reduction to his calculation of JCC's damages relating to the HVAC work reflected a willingness to be flexible, it also reflected the extremely subjective nature of his analysis, which is inherent in the use of MCAA Factors.

22. I find that D'Onofrio and Columbia presented evidence regarding possible errors in JCC's bid and most notably the difference between the bid and subcontract amount for the Plumbing work. I have taken this evidence into account in my determination of damages in this matter to the extent it might have some impact on Sheridan's "should have spent" numbers in his calculation of JCC's damages.

23. With respect to quantifying the damages incurred by JCC in this matter, I appreciate that Sheridan found it necessary to engage in a highly subjective analysis, and for this reason, I have reduced his estimates to what I find to be fair and reasonable damages. In performing this exercise, I have also remained mindful that in the case of any doubts regarding the merits of the arguments raised by Columbia and JCC, Columbia bears the burden of proof in this hearing.

24. I find that JCC did incur damages due to Columbia's management of the Project, as I find that the use of two week look-ahead schedules in place of full critical path method schedules is a poor way to manage a complex construction project and caused JCC damages as it attempted to plan and perform its work.

25. I find that JCC's performance and efficiency were also impacted by some change orders initiated by Siemans or due to differing site conditions, errors and omissions and deficiencies by the design team, and lack of access for plumbing work.

26. Based on my above findings and on the evidence presented regarding the fair and reasonable value of damages sustained by JCC in this arbitration, I find that JCC incurred damages of $165,000.00 relating to its Plumbing scope of work and damages of $210,000.00 relating to its HVAC scope of work, for a total, including all mark-ups and other additions, of $375,000.00.

27. I find that Columbia is, therefore, entitled to recover from JCC the sum of $951,855.05 less $375,000.00 for a total of $576,855.05, together with interest at the rate of 4% per annum from September 9, 2022 to the date of payment.

28. I find that there was no evidence presented that supported a finding that Columbia violated Massachusetts General Laws Chapter 93A.

29. I find that all other claims asserted in this arbitration, including all claims by JCC under Massachusetts General Laws Chapter 93A, and all claims which could have been asserted in this arbitration, are hereby DENIED.

FINAL AWARD

Based upon the above Findings and considering all testimony, evidence and arguments offered by the Parties, I hereby make the following Final Award:

1. JCC is ordered to make payment to Columbia in the amount of $576,855.05 by on or before thirty (30) days from the date of this Final Award, together with interest at the rate of 4% from September 9, 2022 to the date of payment;

2. The administrative fees of the AAA totaling $22,850.00 and the compensation of the arbitrator totaling $72,017.27 shall be evenly borne by the Parties and have been paid. Each party shall bear its own costs, attorneys and experts fees and expenses associated with this arbitration proceeding.

3. This Final Award is in full and final resolution of all claims and counterclaims submitted in this Arbitration proceeding. All claims and counterclaims not expressly granted herein are hereby DENIED in their entirety.

Dated: April 3, 2024

John W. Fieldsteel, Arbitrator

EXHIBIT A

AMERICAN ARBITRATION ASSOCIATION

J.C. Cannistraro, LLC

Claimant,

v.

Columbia Construction Co.

Respondent.

Case Number: 01-21-0002-3063

Arbitrator: John W. Fieldsteel

FINDINGS, RULINGS, AND INTERIM ORDER ON MOTIONS FOR SUMMARY JUDGMENT OF THE PARTIES

I, THE UNDERSIGNED ARBITRATOR, having been designated and duly appointed in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association and as authorized and agreed to by Claimant J.C. Cannistraro, LLC ("JCC") and Respondent Columbia Construction Co., Inc. ("Columbia") (collectively "Parties"), and have received and considered the arguments set forth in the Parties' Motions for Summary Judgment and subsequent pleadings in support thereof and in opposition thereto, as well as the Joint Statement of Undisputed Material Facts agreed to by JCC and Columbia. I initially reserved my decision on said Motions in view of the pending decision of the Appeals Court in the case of Tocci Building Corp. v. IRIV Partners, LLC, which case presented similar issues as set forth in the Motions and Oppositions thereto. I have since considered the decision of the Appeals Court in Tocci Building Corp. v. IRIV Partners, LLC, No21-P-393 & 21-P-733, Mass. App. Ct. 2021, including the June 24, 2022 revision to said decision (collectively "Tocci case"), and the subsequent memoranda of the Parties relative to said decision. I find the decision in the Tocci

case to have precedential value and to be in many respects on point relative to the issues in this matter. In view of the above, I hereby find, rule and order as follows:

FINDINGS

1. On February 3, 2017, Columbia entered into a contract with Siemens Healthcare Diagnostics, Inc. d/b/a Siemens Medical Solutions Diagnostics Corp. for the construction and renovation of an office and manufacturing facility on real property located at 333 Coney Street, Walpole, Massachusetts ("Project"). The amount of the prime contract was in excess of $3,000,000. Accordingly, I find that the Project is subject to the provisions of the Massachusetts Prompt Pay Act, G.L. c. 149, §29E ("Prompt Pay Act").
2. I find that on April 25, 2018, JCC and Columbia entered into two separate subcontracts concerning the HVAC and Plumbing work on the Project. Said subcontracts were essentially in identical form with the exception of the scopes of work and schedules set forth in each.
3. I find that JCC submitted regular monthly requisitions to Columbia during the Project for its HVAC and Plumbing work.
4. I find that on January 8, 2020, JCC sent Columbia a letter requesting a change order to the Plumbing Subcontract totaling $391,550, and on January 23, 2020, JCC sent Columbia a letter requesting a change order to the HVAC Subcontract totaling $571,601.
5. I find that on February 5, 2020, Columbia responded in writing to the Plumbing and HVAC change order requests and purported to reject such requests.

6. I find that on April 9, 2020, JCC submitted its Application and Certificate for Payment No. 19 ("HVAC App.19") for HVAC work performed through April 30, 2020. As part of said HVAC App.19, JCC included a line item for "CEC 060-HR" in the amount of $569,238.77 for certain HVAC change order work.
7. I find that on April 9, 2020, JCC also submitted its Application and Certificate for Payment No. 22 ("Plumbing App. 22") for plumbing work performed through April 30, 2020. I find that in Plumbing App. 22, JCC included a line item "CEC 060" in the amount of $382,616.28 for certain plumbing change order work.
8. I find that in response to HVAC App.19 and Plumbing App. 22, Columbia by email dated April 24, 2020 responded to these claims, notified JCC that it was rejecting the referenced change orders contained in HVAC App. 19 and Plumbing App. 22, and attached the letters from Columbia to JCC dated February 5, 2020. In these responses, Columbia failed to include a certification that such rejections were made in good faith.
9. I find that in an email to JCC dated September 22, 2020, Columbia indicated for the first time that its rejections of HVAC App. 19 and Plumbing App. 22 were certified as being made in good faith.
10. There is no evidence that Columbia has paid any part of the subject claims set forth in HVAC App. 19 in CEC 060-HR in the amount of $569,238.77 and Plumbing App. 22 in CEC 060 in the amount of $382,616.28.
11. Columbia has not asserted any counterclaims in this arbitration.

RULINGS

G.L. c. 149, §29E requires that "every contract for construction shall provide reasonable time periods within which: (i) a person seeking payment under the contract shall submit written applications for periodic progress payments; (ii) the person receiving the application shall approve or reject the application, whether in whole or in part; and (iii) the person approving the application shall pay the amount approved." The Prompt Pay Act requires rejection within fifteen days at the prime contract level but allows an additional seven days for the rejection of a first-tier subcontractor's (such as JCC) application for payment, for a total of twenty-two days. Columbia, therefore, was required to provide a response in compliance with the Prompt Pay Act to JCC's April 9, 2020 HVAC App. 19 and Plumbing App. 22 by May 1, 2020.

If, in response to a proper application for a periodic progress payment, the payor does not provide a rejection in compliance with the Prompt Pay Act, the application will "be deemed to be approved unless it is rejected before the date payment is due." G. L. c. 149, § 29E (c). The statute requires that "rejection of an application for a periodic progress payment, whether in whole or in part, shall be made in writing and shall include an explanation of the factual and contractual basis for the rejection and **shall be certified as made in good faith**." Id. (emphasis added).

Notwithstanding any other alleged violations of the Prompt Pay Act, it is undisputed that Columbia failed to provide a written rejection, which included the required certification of good faith rejection of HVAC App. 19 and Plumbing App. 22, until September 22, 2020.

Under the Prompt Pay Act, Columbia had another forty-five days after the deemed approval of JCC's payment applications within which it could have issued a rejection that complied with the statute. This would have required Columbia to issue a written rejection that was certified as having been made in good faith by no later than June 15, 2020. Columbia did not

issue a rejection that complied with the requirements of the statute until September 22, 2020. By operation of law and pursuant to the provisions of the Prompt Pay Act, the unpaid portion of JCC's HVAC App. 19, in the amount of $569,238.77and the unpaid portion of JCC's Plumbing App. 22, in the amount of $382.616.28, for a total of $951,855.05, became due and payable on June 15, 2020.

The Tocci case clearly and unequivocally states that the Prompt Pay Act's requirement of a certification of good faith is part of the statutory requirements, is not a ministerial act (as argued by Columbia and by the defendants in the Tocci case), and the failure to provide such certification within the time frames required by the Prompt Pay Act renders the subject pay applications as deemed approved and, therefore, due and payable. The Court in the Tocci case further found that the "certification requirement is an essential component" of the provisions of the Prompt Pay Act.

Columbia, while recognizing the clear findings of the Tocci case, nevertheless attempts to distinguish that case by first arguing that Columbia only missed the certification requirement and later corrected such error and satisfied the other requirements of the Prompt Pay Act. The Tocci case makes it abundantly clear that all three requirements of the Prompt Pay Act must be satisfied in a timely manner, or the subject payment application is deemed to be approved.

Columbia also argues that the case of BRT Mgmt. LLC v. Malden Storage, LLC, No. CV 17-10005-FDS, 2021 WL 4133298, at *29 (D. Mass. Sept. 10, 2021) ("BRT case") is directly on point and supports Columbia's argument that any decision by the Arbitrator at this time of a violation of the Prompt Pay Act by Columbia is premature. I find that the BRT case, which was decided in the United States District Court for the District of Massachusetts, is not controlling.

The BRT case was decided before the Tocci case was decided, and the Court in the BRT case could not, therefore, consider the ruling of an appellate Massachusetts state court on this matter of interpretation of a Massachusetts statute. I also find that the fact pattern in the BRT case was distinguishable from the instant case, including findings in the BRT case, where the decision followed a trial on the merits, that the contractor had materially breached the contract and committed fraud.

INTERIM ORDER

Accordingly, where JCC's applications for payment were deemed approved on May 1, 2020, with payment to be made by no later than June 15, 2020, I hereby Order as follows:

1. Columbia is ordered to make payment to JCC in the amount of $951,855.05 by on or before September 9, 2022;

2. JCC is ordered to file its position on the calculation of interest due under this Interim Order by on or before August 16, 2022. Columbia shall submit is opposition, if any, to the award of interest, within seven days of the filing of JCC's submission on this issue;

3. JCC and Columbia are ordered to confer and advise the Arbitrator by September 10, 2022, as to whether Columbia has paid JCC $951,855.05, and as to what other claims, if any, need to proceed to arbitration.

SO ORDERED:

Dated: August 9, 2022

John W. Fieldsteel, Arbitrator

28.0

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2082-00738

J.C. CANNISTRARO, LLC

vs.

COLUMBIA CONSTRUCTION CO.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO VACATE ARBITRATION AWARD AND DEFENDANT'S MOTION TO CONFIRM ARBITRATION AWARD AND FOR ENTRY OF JUDGMENT

This case arises out of a dispute regarding plaintiff J.C. Cannistraro, LLC's requests for payments from defendant Columbia Construction Co. pursuant to their contracts for construction. The matter proceeded to arbitration. The arbitrator ordered the defendant to pay the plaintiff its requested payments and, after the defendant did so, the arbitrator issued a final award allowing the defendant to recoup a portion of the amount that it paid to the plaintiff. The case is before the court on the plaintiff's motion to vacate the award, and the defendant's motion to confirm it. For the reasons set forth below, the plaintiff's motion is **ALLOWED**, and the defendant's motion is **DENIED**.

BACKGROUND

In 2017, the defendant entered into a contract to construct and renovate an office and manufacturing facility in Walpole. The project was subject to the provisions of the Massachusetts prompt pay act, G. L. c. 149, § 29E (act), which, among other things, sets timelines and procedures for approving or rejecting applications for payments under certain construction contracts, and requires that rejections be certified as made in good faith.

In 2018, the plaintiff and the defendant entered into two separate subcontracts for the

plaintiff to perform heating, ventilation, and air conditioning (HVAC) and plumbing work on the project.

On January 8, 2020, the plaintiff requested from the defendant a change order totaling $391,500 regarding the plumbing subcontract. On January 23, 2020, the plaintiff requested from the defendant a change order totaling $571,601 regarding the HVAC subcontract. By letter dated February 5, 2020, the defendant purported to reject the plaintiff's change order requests.

On April 9, 2020, the plaintiff submitted an application for payment for HVAC work performed through April 30, 2020. The application included a line item in the amount of $569,238.77 for HVAC change order work. On the same date, the plaintiff submitted an application for payment for plumbing work performed through April 30, 2020. The application included a line item in the amount of $382,616.28 for plumbing change order work.

In response, by e-mail message dated April 24, 2020, the defendant notified the plaintiff that it was rejecting the change orders referenced in the April 9, 2020, applications for payment, and attached its letter dated February 5, 2020. The defendant failed to include a certification that its rejections were made in good faith. The defendant did not certify that its rejections were made in good faith until September 22, 2020.

On August 3, 2020, the plaintiff filed this case against the defendant, asserting breach of contract and other related claims. In its original answer filed on September 2, 2020, the defendant raised various defenses, including, among others, that the plaintiff inflated its claims. On February 12, 2021, the court ordered the parties to arbitrate their dispute and stayed the case.

On August 9, 2022, the arbitrator issued an interim order. In the interim order, the arbitrator found that following the plaintiff's April 9, 2020, applications for payment, the defendant failed to provide a timely, written rejection that was certified as made in good faith in

accordance with the act. Thus, the arbitrator concluded, under the act the total amount of the plaintiff's unpaid applications for payment, $951,855.05, was deemed approved on May 1, 2020, and became due and payable on June 15, 2020. The arbitrator ordered the defendant to pay $951,855.05, with interest, to the plaintiff by September 9, 2022.

On September 9, 2022, the defendant paid the plaintiff $1,036,870.05, which included the principal sum of $951,855.05 and interest.

The arbitrator subsequently allowed the defendant to file a counterclaim challenging the merits of the plaintiff's change order requests so that the defendant could seek to recover some or all of the principal amount of $951,855.05 that it paid to the plaintiff if that amount did not fairly represent the damages sustained by the plaintiff. The arbitrator then conducted further proceedings to determine the fair and reasonable damages incurred by the plaintiff for which the defendant was responsible.

On April 3, 2024, the arbitrator issued a final award (award). In the award, the arbitrator found that the defendant violated the act, which constituted a breach of its contracts with the plaintiff. Also, the arbitrator found that the plaintiff incurred damages totaling $375,000 relating to its HVAC and plumbing work. The arbitrator found that the defendant was therefore entitled to recover from the plaintiff "$951,855.05 less $375,000 for a total of $576,855.05, together with interest . . . ." Plaintiff's Memorandum of Law, Exhibit 1, par. 27. The arbitrator ordered the plaintiff to pay the defendant $576,855.05, with interest.

DISCUSSION

In Massachusetts, public policy favors arbitration. See *Kauders* v. *Uber Techs., Inc.*, 486 Mass. 557, 567 (2021). Accordingly, the court's review of an arbitration award is narrow. See *Katz, Nannis & Solomon, P.C.* v. *Levine*, 473 Mass. 784, 793 (2016). Upon the application of a

party, the court "shall confirm" an arbitration award unless "grounds are urged for vacating or modifying or correcting the award" as provided in G. L. c. 251, §§ 12 and 13. G. L. c. 251, § 11. See *Kauders*, 486 Mass. at 569-570. The court is otherwise "strictly bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent, or unsupported by the record at the arbitration hearing." *Katz, Nannis & Solomon, P.C.*, 473 Mass. at 790, quoting *City of Lynn* v. *Thompson*, 435 Mass. 54, 61 (2001), cert. denied, 534 U.S. 1131 (2002).

Here, the plaintiff contends that the court should vacate the award under the statutory ground that the arbitrator "exceeded [his] powers . . . ." G. L. c. 251, § 12(a)(3). Arbitrators exceed their powers "by granting relief beyond the scope of the arbitration agreement, by awarding relief beyond that to which the parties bound themselves, or by awarding relief prohibited by law" (citations omitted). *Plymouth-Carver Regional Sch. Dist.* v. *J. Farmer & Co.*, 407 Mass. 1006, 1007 (1990) (rescript). "Arbitration, it is clear, may not award relief of a nature which offends public policy or which directs or requires a result contrary to express statutory provision, or otherwise transcends the limits of the contract of which the agreement to arbitrate is but a part" (citations and quotations omitted). *City of Lawrence* v. *Falzarano*, 380 Mass. 18, 28 (1980).

The plaintiff argues that the arbitrator exceeded his powers because the award violates the prompt pay act, G. L. c. 149, § 29E (act). More specifically, the plaintiff argues that the act precludes the defendant from seeking recoupment of funds that it was required to pay to the plaintiff under the act. The court agrees.

The act, in essence, "requires that parties to a construction contract approve or reject payment within strict time limits and provides procedures for doing so. If the payor does not approve or reject a payment application within the act's set time limit, the application is 'deemed

to be approved.'" *Business Interiors Floor Covering Bus. Tr.* v. *Graycor Constr. Co. Inc.*, 494 Mass. 216, 217 (2024) (*Graycor*), quoting G. L. c. 149, § 29E(c). The act provides:

> "Every contract for construction shall provide reasonable time periods within which: (i) a person seeking payment under the contract shall submit written applications for periodic progress payments; (ii) the person receiving the application shall approve or reject the application, whether in whole or in part; and (iii) the person approving the application shall pay the amount approved."

G. L. c. 149, § 29E(c).

For approvals or rejections of applications for payment, "the time period is a maximum of fifteen days after submission of the application, though this time period 'may be extended by [seven] days' for 'each tier of contract below the owner of the project.'" *Graycor*, 494 Mass. at 221, quoting G. L. c. 149, § 29E(c). Payment generally is due forty-five days after an application for payment is approved. See G. L. c. 149, § 29E(c); *Graycor*, 494 Mass. at 221.

An application "which is neither approved nor rejected within the time period shall be deemed to be approved unless it is rejected before the date payment is due." G. L. c. 149, § 29E(c). A rejection of an application for payment "shall be made in writing and shall include an explanation of the factual and contractual basis for the rejection and shall be certified as made in good faith."[1] G. L. c. 149, § 29E(c).

Recently, in *Graycor*, the Supreme Judicial Court (SJC) addressed whether the act precludes a contractor from asserting common-law defenses to a breach of contract claim based on the failure to pay. See 494 Mass. at 225-228. The SJC held:

> "under the act, a party does not waive its defenses by failing to approve or reject an invoice within the strict time requirements established by the act. However, a party that neither approves nor rejects a payment application within the requisite time must first make the payment in order to pursue any defenses in a subsequent proceeding related to the invoices, as the invoices have been deemed 'approved.' The invoice payments must be made prior to, or contemporaneous with, the

[1] The act contains similar provisions regarding requests for increases in the contract price. See G. L. c. 149, § 29E(d).

raising of the defenses, or the defenses cannot be raised."

Id. at 217-218.

The SJC acknowledged that the act "does not . . . address common-law defenses." *Id.* at 225. However, it concluded that a "necessary implication" of the "deemed approved" provision in the act is that "payment of overdue approved invoices must be made prior to, or contemporaneous with, raising common-law defenses, or the defenses cannot be raised." *Id.* at 226-228.

Under *Graycor*, the act prohibits the defendant here from seeking recoupment of its payment to the plaintiff. As the arbitrator found, the plaintiff's applications for payments were "deemed to be approved" because the defendant failed to provide a timely rejection in accordance with the act. G. L. c. 149, § 29E(c). Thus, under the act, the defendant was required to "pay the amount due prior to, or contemporaneous with, the invocation of any common-law defenses in any subsequent proceeding regarding enforcement of the invoices." *Graycor*, 494 Mass. at 225. However, the defendant raised the defenses underlying its claim for recoupment in its answer filed on September 2, 2020, well before the defendant paid the plaintiff on September 9, 2022. Having failed to pay the plaintiff before, or contemporaneous with, raising its defenses, the defendant's defenses cannot be raised under the act. See *id.* at 226. Thus, by allowing recoupment, the arbitrator "award[ed] relief prohibited by law," *Plymouth-Carver Regional Sch. Dist.*, 407 Mass. at 1007, and exceeded his powers.[2, 3] Accordingly, the award shall be vacated.

[2] The court acknowledges that the arbitrator issued the award before the SJC's decision in *Graycor*. A finding that the arbitrator exceeded his powers is nevertheless appropriate because act itself was in effect at the time of the award.

[3] With this result, the court need not reach the plaintiff's other arguments regarding the availability of recoupment as a remedy generally.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that plaintiff J.C. Cannistraro, LLC's Motion to Vacate Arbitration Award is **ALLOWED** and defendant Columbia Construction Co.'s Motion to Confirm Arbitration Award and for Entry of Judgment is **DENIED**.

Keren E. Goldenberg
Justice of the Superior Court

Dated: 12-4-2024

Docket

3/5/25 310
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CLERK OF THE COURTS
NORFOLK COUNTY

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2082-00738

J.C. CANNISTRARO, LLC

vs.

COLUMBIA CONSTRUCTION CO.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION

In response to an adverse ruling on Plaintiff's Motion to Vacate Arbitration Award and Defendant's Motion to Confirm Arbitration Award, Defendant Columbia Construction has filed a motion for reconsideration pursuant to 9D of the Rules of the Superior Court. Columbia Construction asserts that the decision constituted "a particular and demonstrable error in the original ruling or decision."

After review of the filings, I find that Columbia Construction has presented disagreement and disappointment with my prior ruling but has not presented "a particular and demonstrable error in the original ruling or decision." If my decision was incorrect, I will humbly accept correction from a higher court.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendant Columbia Construction Co.'s Motion for Reconsideration is **DENIED**.

I attest that this document is a certified photocopy of an original on file
Deputy Assistant Clerk
3/5/25

(Goldenberg, J.)
Keren E. Goldenberg
Justice of the Superior Court

Dated: March 5, 2025

Att: Nancy J. Delaney
Asst. Clerk

33.0

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO: 2082CV00738

J.C. CANNISTRARO, LLC.,
Plaintiff

vs.

COLUMBIA CONSTRUCTION CO.,
Defendant

FINAL JUDGMENT

This action came before the Court, Keren E. Goldenberg presiding and upon consideration thereof it is **ORDERED** and **ADJUDGED** that the arbitration award dated April 3, 2025 is hereby **VACATED**. All interim awards issued by the Arbitrator in the course of arbitration, remain in full force and effect.

Keren E, Goldenberg
Justice of the Superior Court

DATE JUDGMENT ENTERED: April 8, 2025