

Rel: May 22, 2020

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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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**Russell Construction of Alabama, Inc.**

**v.**

**Christopher Peat**

**Appeal from Montgomery Circuit Court  
(CV-18-902291)**

SHAW, Justice.

Russell Construction of Alabama, Inc. ("Russell"), appeals from an order of the Montgomery Circuit Court vacating a judgment entered on an arbitration award in favor of Russell

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and against Christopher Peat. We affirm in part, reverse in part, and remand.

### Facts and Procedural History

In 2015, Russell and Peat entered into a contract pursuant to which Russell agreed to construct a residence for Peat on "a cost plus a fee basis." The documents executed in connection with the contract provided, in the event of a controversy or dispute, first for mediation and then for arbitration in accordance with the rules of the American Arbitration Association. The arbitration agreement further provided that "[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

Upon completion of the residence, a dispute arose between Russell and Peat regarding Russell's performance and the balance due Russell under the contract. In January 2018, Russell filed a formal demand for arbitration, seeking \$295,408 allegedly due from Peat for the construction of the residence. Peat counterclaimed, alleging breach of fiduciary duty and breach of contract and disputing his consent to costs

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incurred by Russell; Peat sought specific performance and an award of \$255,000 on his counterclaims. Thereafter, in May 2018, the parties reached, as a result of mediation, a settlement agreement. In essence, the settlement agreement required Russell to make certain repairs to the residence; required Peat to pay Russell \$245,408 on or before June 15, 2018, at which time Russell agreed to release its recorded lien; and required Peat to deposit into escrow an additional \$50,000 to ensure completion, by the end of August 2018, of a "punch-list" to the satisfaction of a third-party "Construction Consultant."

In July 2018, Russell, on the ground that Peat had failed to comply with the settlement agreement, moved that the arbitrator enter an award based on the terms of the settlement agreement. Peat moved either to reform or to rescind the settlement agreement based on disagreement with some of Russell's charged costs, on mistake and/or fraud, and on his own purported "economic duress." On July 25, 2018, the parties proceeded to an arbitration hearing to consider whether Peat was entitled to rescind or reform the settlement

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agreement, whether Peat had breached that agreement, and damages, if any.

On August 22, 2018, subsequent to the parties' submission of post-hearing filings, the arbitrator issued a "Partial Final Award" in which he concluded:

"The [settlement agreement] is enforceable. Peat breached the agreement by failing to pay Russell \$245,408.00 on June 15, 2018. Russell is entitled to an award in that amount plus interest at the agreed rate of 8%. While Peat also failed to pay \$50,000 into escrow, Russell is not damaged because it has not performed the completion/punch list work against which the \$50,000 was to be escrowed."

Noting that Peat's arguments for either rescission or reformation of the settlement agreement were legally unsupportable, the arbitrator's award further provided that "both parties, with advice of counsel, stipulated that they wanted the remaining provisions of the settlement agreement to remain in effect and binding on the parties" with the extension of certain deadlines provided in the agreement. That included Russell's completion of the remaining remedial work identified on the punch list and the related distribution of the funds to be placed in escrow. On September 5, 2018, the arbitrator entered a "Modified Partial Final Award" in which he identified a miscalculation in the Partial Final

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Award and revised the amount awarded to Russell to \$258,959.89, which amount included interest.

On December 19, 2018 -- well over 30 days after the issuance of the arbitrator's Modified Partial Final Award -- Russell filed in the Montgomery Circuit Court, pursuant to Rule 71C, Ala. R. Civ. P.,<sup>1</sup> a motion seeking entry of a

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<sup>1</sup>Rule 71C provides, in pertinent part:

"(a) Who May Enforce. Any party to an arbitration may seek enforcement of the award entered as a result of the arbitration.

"(b) When Filed. If no appeal has been filed pursuant to Rule 71B[, Ala. R. Civ. P.,] within thirty (30) days of service of the notice of the award, thereby resulting in a waiver of the right to review, the party seeking enforcement of the award may at any time thereafter seek enforcement of the award in the appropriate circuit court as set forth in paragraph (c) of this rule.

"(c) Where Filed. The motion for entry of judgment shall be filed with the clerk of the circuit court where the action underlying the arbitration is pending or if no action is pending in the circuit court, then in the office of the clerk of the circuit court of the county where the award is made.

"(d) What Filed. A party seeking enforcement of an award shall file a motion for entry of judgment, and shall attach to the motion a copy of the award, signed by the arbitrator, if there is only one, or by a majority of the arbitrators.

". . . .

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judgment in the amount of \$258,959.89 in accordance with the arbitrator's Modified Partial Final Award (case no. CV-18-902291). Russell submitted copies of the settlement agreement, the Partial Final Award, and the Modified Partial Final Award and further indicated that Peat had failed to pay the awarded amount. Russell specifically requested enforcement of the Modified Partial Final Award.

In February 2019, the parties attended a second arbitration hearing at which the arbitrator considered whether the parties' failure to perform remaining obligations under the settlement agreement amounted to another breach of the agreement and, if so, whether another award of damages was warranted. On March 7, 2019, the arbitrator entered what it called a "Final Award." In it, the arbitrator found that neither Russell nor Peat had performed their remaining obligations under the settlement agreement and, accordingly, "[made] an equitable allocation of the contract balance of \$50,000.00," which, based upon his findings as to the

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"(f) Procedure After Filing. The clerk promptly shall enter the award as the final judgment of the court. After service pursuant to paragraph (e) of this rule, the prevailing party may seek execution on the judgment as in any other case."

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respective fault of each, he awarded as follows: \$33,500 to Russell, which had been reduced by \$7,000 based on Russell's failure to make repairs to the concrete at Peat's residence, and \$16,500 to Peat. The Final Award "reaffirmed" the earlier Modified Partial Final Award, resulting in a total monetary judgment to Russell in the amount of \$295,305.80, which amount included interest.

On March 13, 2019, Peat filed an "answer" in the circuit court to Russell's prior Rule 71C motion seeking a judgment on the Modified Partial Final Award. In it, Peat both denied the allegations in the motion and asserted various affirmative defenses, including fraud. Peat's answer included no attachments.

The circuit court set the matter for a "bench trial." Russell then filed an "Amended Rule 71C Motion for Entry of Judgment by Clerk on Arbitration Award," notifying the circuit court of the arbitrator's Final Award, of Peat's failure to pay the amount required by either the Modified Partial Final Award or the Final Award, and of Peat's purported failure to appeal from the Final Award within the 30-day time frame

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provided in Rule 71B, Ala. R. Civ. P.<sup>2</sup> Russell sought entry of a judgment against Peat in the amount of \$295,305.80. The Final Award was included as an exhibit to the motion.

Thereafter, Russell filed a "Motion for Instructions to the Clerk of Court to Enter Judgment on Arbitration Award" in which it again cited Peat's alleged failure to pay or to appeal the Final Award within 30 days and requested that the circuit court "instruct the Clerk of the Court to immediately enter judgment on the Final Award pursuant to [Rule] 71C in the amount of \$295,305.80." On April 30, 2019, the circuit court granted that motion and instructed its clerk to enter judgment accordingly. On that same date, the clerk entered a "Final Judgment Pursuant to Rule 71C" in favor of Russell and against Peat in the amount of \$295,305.80.

On May 1, 2019, Peat filed, presumably pursuant to Rule 59, Ala. R. Civ. P., a "Motion to Set Aside and/or Vacate Order Done on April 30, 2019." Although conceding, as Russell

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<sup>2</sup>Rule 71B(b) provides that a notice of appeal from an arbitration award "shall be filed within thirty (30) days after service of notice of the arbitration award. Failure to file within thirty (30) days shall constitute a waiver of the right to review."



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alleged in its amended Rule 71C motion, that the arbitrator had, in fact, entered the Final Award on March 7, 2019,<sup>3</sup> Peat argued that his March 13 answer to Russell's Rule 71C motion on the Modified Partial Final Award had asserted various grounds as to why an award should not be enforced. More specifically, Peat alleged:

"[I]t is a long-standing principle of this court that substance shall prevail over form and that it is the true intent of the Answer and the defenses asserted to challenge the sufficiency of the arbitration award.

"... That the Answer was filed on March 13, 2019 and it was within 30 days of the Arbitration award, but it was not filed consistent with other sections of Rule 71B of the Ala.R.Civ.P.

"... [That he] was served with [Russell's] Rule 71C petition the same day of the final arbitration hearing, and thus ... was not given 30 days to properly file his Rule 71B motion before [Russell] filed its 71C petition to enforce the arbitration award."

Based on the foregoing, Peat sought a hearing in the circuit court "to determine if the arbitration award should be upheld." As discussed below, Peat contends that the March 13,

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<sup>3</sup>Peat did not claim below and does not argue on appeal that he was not timely served with either the arbitrator's Partial Final Award or the Modified Partial Final Award.

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2019, answer was, in effect, a notice of appeal of the arbitration award.

After a hearing, the circuit court entered an order, on July 25, 2019, granting Peat's motion to set aside the April 30, 2019, judgment. In its order, the circuit court explained that, pursuant to Peat's motion, it had been called on "to determine if the arbitration award should be upheld, and/or [whether to] allow [Peat] to cure defects in his answer and properly submit a Rule 71B Notice of Appeal from the arbitration award." On August 6, 2019, Peat filed a purported notice of appeal in which he alleged that the Final Award was "legally unjust" and requested that it be overturned. That notice was assigned a separate case number in the trial court (CV-19-901484); however, on Russell's motion, the two actions were consolidated under case number CV-18-902291. Russell filed its notice of appeal to this Court on August 27, 2019. See Rule 71B(g) ("An appeal may be taken from the grant or denial of any Rule 59[, Ala. R. Civ. P.,] motion challenging [an arbitration] award by filing a notice of appeal to the appropriate appellate court pursuant to Rule 4, Alabama Rules of Appellate Procedure.").

Standard of Review

"'In R.P. Industries, Inc. v. S & M Equipment Co., 896 So. 2d 460 (2004), this Court reviewed the trial court's order granting a motion to confirm an arbitration award and denying the opposing party's motion to vacate that award. We stated:

""Where parties, as in this case, have agreed that disputes should go to arbitration, the role of the courts in reviewing the arbitration award is limited. Transit Casualty Co. v. Trenwick Reinsurance Co., 659 F. Supp. 1346 (S.D.N.Y. 1987), affirmed, 841 F.2d 1117 (2d Cir. 1988); Saxis Steamship Co. v. Multifacs International Traders, Inc., 375 F.2d 577 (2d Cir. 1967). On motions to confirm or to vacate an award, it is not the function of courts to agree or disagree with the reasoning of the arbitrators. Application of States Marine Corp. of Delaware, 127 F. Supp. 943 (S.D.N.Y. 1954). Courts are only to ascertain whether there exists one of the specific grounds for vacation of an award. Saxis Steamship Co. A court cannot set aside the arbitration award just because it disagrees with it; a policy allowing it to do so would undermine the federal policy of encouraging the settlement of disputes by arbitration. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363

U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960); Virgin Islands Nursing Association's Bargaining Unit v. Schneider, 668 F.2d 221 (3d Cir. 1981). An award should be vacated only where the party attacking the award clearly establishes one of the grounds specified [in 9 U.S.C. § 10]. Catz American Co. v. Pearl Grange Fruit Exchange, Inc., 292 F. Supp. 549 (S.D.N.Y. 1968).'"

"'896 So. 2d at 464 (quoting Maxus, Inc. v. Sciacca, 598 So. 2d 1376, 1380-81 (Ala. 1992)). The standard by which an appellate court reviews a trial court's order confirming an arbitration award under the Federal Arbitration Act is that questions of law are reviewed de novo and findings of fact are reviewed only for clear error. See Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1289 (11th Cir. 2002).'

"Hereford v. D.R. Horton, Inc., 13 So. 3d 375, 378 (Ala. 2009)."

Terminix Int'l Co., L.P. v. Scott, 142 So. 3d 512, 519-20 (Ala. 2013).

#### Discussion

On appeal, Russell maintains, as it argued below, that the circuit court's order setting aside the clerk's entry of judgment on the arbitrator's award contravenes Rule 71B and is, therefore, erroneous. Specifically, Russell contends that

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Peat neither filed a notice of appeal nor, if his answer is construed as one, filed a notice of appeal within 30 days of service of the award as required by Rule 71B(b). Because, Russell argues, Peat indisputably failed to timely file a notice of appeal, it maintains that Peat has waived review of any challenges to the arbitrator's awards. Peat, however, contends that his answer was sufficient under Rule 71B to constitute notice that he disputed the validity of the arbitration awards.

Rule 71B, which became effective on February 1, 2009,<sup>4</sup> establishes the procedure for appealing an arbitration award to the circuit court. This Court has previously summarized the procedure as follows:

"(1) A party must file a notice of appeal with the appropriate circuit court within 30 days after service of the notice of the arbitration award; (2) the clerk of the circuit court shall promptly enter the award as the final judgment of the circuit court; (3) the aggrieved party may file a Rule 59, Ala. R. Civ. P., motion to set aside or vacate the

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<sup>4</sup>See Honea v. Raymond James Fin. Servs., Inc., 240 So. 3d 550, 557 (Ala. 2017) ("[The] rule ... provides the procedure for appealing an arbitration award and supersedes the procedures in § 6-6-15[, Ala. Code 1975]. See Committee Comments to Rule 71B.").

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judgment, and such filing is a condition precedent to further review by any appellate court; (4) the circuit court grants or denies the Rule 59 motion; and (5) the aggrieved party may then appeal from the circuit court's judgment to the appropriate appellate court."

Guardian Builders, LLC v. Uselton, 130 So. 3d 179, 181 (Ala. 2013).

To the extent that Peat argues that his March 13, 2019, answer to Russell's Rule 71C motion was, in substance, a notice of appeal, there is authority suggesting that the Court may construe other pleadings "as a notice of appeal for purposes of Rule 71B when the motion was in substance a notice of appeal." Alabama Psychiatric Servs., P.C. v. Lazenby, [Ms. 1170856, June 21, 2019] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. 2019) (citing Honea v. Raymond James Fin. Servs., Inc., 240 So. 3d 550, 559 (Ala. 2017), Uselton, 130 So. 3d at 182, and J.L. Loper Constr. Co. v. Findout P'ship, LLP, 55 So. 3d 1152 (Ala. 2010)). As to this issue, we have explained:

"This Court 'treat[s] a pleading and any other filing according to its substance, rather than its form or its style.' Ex parte Bender Shipbuilding & Repair Co., 879 So. 2d 577, 584 (Ala. 2003). A notice of appeal, in the context of the Alabama Rules of Appellate Procedure, 'shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is

taken.' Rule 3(c), Ala. R. App. P. Honea's January 14, 2008, motion to vacate specifies that information. Further, we note that this Court has construed a motion to vacate an arbitration award as a notice of appeal for purposes of Rule 71B, which superseded § 6-6-15. Guardian Builders, LLC v. Uselton, 130 So. 3d 179, 182 (Ala. 2013). See also J.L. Loper Constr. Co. v. Findout Partnership, LLP, 55 So. 3d 1152 (Ala. 2010). Thus, we conclude that, in substance, Honea's January 14, 2008, motion to vacate was a notice of appeal of the arbitration award."

Honea, 240 So. 3d at 559 (footnote omitted). The Court has nonetheless cautioned that "a party desiring appellate review of an arbitration award should follow the explicit procedure for appealing established by Rule 71B." Uselton, 130 So. 3d at 182.

First, as to the Modified Partial Final Award, it is unnecessary for us to determine whether Peat's answer "was in substance a notice of appeal," see Lazenby, supra, because it was, in any event, untimely. The Modified Partial Final Award resolving the parties contract-balance dispute was issued on September 5, 2018. As mentioned elsewhere, nothing before the Court suggests -- and, in fact, Peat does not claim -- that Peat was not promptly served with the award at that time.

Under Rule 71B, assuming Peat was dissatisfied with the terms of the Modified Partial Final Award, he was required to

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raise any challenge by timely filing his notice of appeal within 30 days of the entry of the award. It is undisputed that Peat did not do so; his answer was filed over six months too late. Accordingly, he failed to follow the explicit procedure for appealing the Modified Partial Final Award outlined in Rule 71B. See J.L. Loper Constr. Co. and Uselton, supra. We find no authority allowing a trial court to extend the time for filing the notice of appeal from an arbitrator's award beyond the deadline provided in Rule 71B or establishing exceptions thereto.<sup>5</sup> In consideration of the foregoing, we conclude that the circuit court erred in setting aside the judgment entered by the clerk in favor of Russell to the

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<sup>5</sup>Peat contends that the circuit court could vacate the award pursuant to Rule 60(b), Ala. R. Civ. P. However, Peat raises no grounds that could not have been raised in a timely appeal, and a Rule 60(b) motion cannot be used as a substitute for an appeal. See, e.g., Washington Mut. Bank, F.A. v. Campbell, 24 So. 3d 435, 442 (Ala. 2009) ("[D]espite the general discretion vested in trial courts to grant or deny relief from a judgment, a Rule 60(b) motion is not a substitute for appeal and "is not available to relieve a party from his failure to exercise the right of appeal."" (quoting Wal-Mart Stores, Inc. v. Pitts, 900 So. 2d 1240, 1245 (Ala. Civ. App. 2004), quoting in turn Morgan v. Estate of Morgan, 688 So. 2d 862, 864 (Ala. Civ. App. 1997))).



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extent that that judgment reaffirmed the arbitrator's Modified Partial Final Award.

As to the arbitrator's second, "Final Award" entered on March 7, 2019, which addressed subsequent breaches of the settlement agreement, we reach a different conclusion. Within one week of the entry of that award, Peat filed the answer to Russell's Rule 71C motion, which pleading Peat maintains was sufficient to have been deemed by the circuit court as satisfying the requirements of Rule 71B. Further, Peat's answer denied the enforceability of the award, sought a hearing, and included as stated defenses grounds for attacking the finality of the award, including fraud, as contemplated by § 6-6-14, Ala. Code 1975.<sup>6</sup> Thus, the circuit court could properly have treated Peat's answer as a timely notice of

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<sup>6</sup>Section 6-6-14 provides:

"An award made substantially in compliance with the provisions of this division is conclusive between the parties thereto and their privies as to the matter submitted and cannot be inquired into or impeached for want of form or for irregularity if the award determines the matter or controversy submitted, and such award is final, unless the arbitrators are guilty of fraud, partiality, or corruption in making it."

(Emphasis added).

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appeal to the extent that it provided notice that Peat was challenging the Final Award. See Honea, 240 So. 3d at 559.

Russell, on appeal, contends that Peat filed no notice of appeal sufficient to satisfy Rule 71B; however, other than quoting Rule 71B, Russell's brief includes no analysis or authority explaining why Peat's answer was substantively insufficient as a notice of appeal challenging the Final Award.

"Rule 28(a)(10), Ala. R. App. P., requires that arguments in an appellant's brief contain "citations to the cases, statutes, other authorities, and parts of the record relied on." Further, "it is well settled that a failure to comply with the requirements of Rule 28(a)(10) requiring citation of authority in support of the arguments presented provides this Court with a basis for disregarding those arguments." State Farm Mut. Auto. Ins. Co. v. Motley, 909 So. 2d 806, 822 (Ala. 2005) (citing Ex parte Showers, 812 So. 2d 277, 281 (Ala. 2001)). This is so, because "it is not the function of this Court to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument." Butler v. Town of Argo, 871 So. 2d 1, 20 (Ala. 2003) (quoting Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994))."

Prattville Mem'l Chapel v. Parker, 10 So. 3d 546, 560 (Ala. 2008) (quoting Jimmy Day Plumbing & Heating, Inc. v. Smith, 964 So. 2d 1, 9 (Ala. 2007)).

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Here, Peat's timely filed answer, in essence, challenges the arbitrator's Final Award. Russell does not include argument and authority establishing that, based on its contents, Peat's answer was insufficient to be deemed a notice of appeal. "It is the appellant's burden to refer this Court to legal authority that supports [his] argument." Madaloni v. City of Mobile, 37 So. 3d 739, 749 (Ala. 2009). Accordingly, Russell has waived this claim for purposes of appellate review. See City of Birmingham v. Business Realty Inv. Co., 722 So. 2d 747, 752 (Ala. 1998) ("When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research.").

With no explanation as to how Peat's answer failed to constitute sufficient notice of Peat's challenge below, we hold that the circuit court did not err to the extent that it set aside the judgment entered pursuant to the arbitrator's Final Award. Accordingly, we affirm the trial court's July 25, 2019, order to the extent that it vacated any judgment on the arbitrator's Final Award related to Russell's and Peat's

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breach of the provisions of the settlement agreement that remained in effect after the Modified Partial Final Award and the distribution of the outstanding \$50,000 at issue. We reverse that same order to the extent it purported to vacate any judgment on the Modified Partial Final Award of \$258,959.89 and remand this cause for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Parker, C.J., and Bryan, Mendheim, and Mitchell, JJ., concur.