

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED

PART 60

*Justice*

In the matter of the application of  
RSG CAULKING & WATERPROOFING, INC.,

**FBEM**

INDEX NO. 601738-2006

Petitioner,

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. \_\_\_\_\_

J.P. MORGAN CHASE & CO.,

Respondent.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

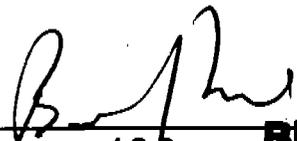
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION

Dated: 10/5/06

  
\_\_\_\_\_  
J.S.C. **BERNARD J. FRIED**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 60

**FBEM**

-----x  
In the matter of the application of  
RSG CAULKING & WATERPROOFING, INC.,

Petitioner,

-against-

Index No.  
601738/06

J.P. MORGAN CHASE & CO.,

Respondent.  
-----x

**APPEARANCES:**

For Petitioner:

Goetz Fitzpatrick LLP  
One Pennsylvania Plaza, Suite 4401  
New York, New York 10119-0196  
(Donald J. Carbone)

For Respondent:

J.P. Morgan Chase Legal  
Department  
One Chase Manhattan Plaza,  
26<sup>th</sup> Fl  
New York, New York 10081  
(Andrew R. Kosloff, Arthur  
Korzec)

**Fried, J.:**

Petitioner seeks an order confirming the Award of Arbitrators, received by the parties on May 10, 2006 (the Award), issued by a panel of arbitrators of the American Arbitration Association, in a proceeding captioned RSG Caulking & Waterproofing, Inc. v J.P. Morgan Chase & Co., No. 13 110 Y 01760 04. The Award grants the petitioner \$695,474.30 in damages, plus interest at 9% per annum from March 24, 2004 through April 24, 2006 in the sum of \$130,401.86, for a total award of \$825,876.16. Respondent cross-moves for an order

vacating the Award on the grounds that the arbitrators exceeded their powers, and the Award is irrational and in manifest disregard of the law.

The controversy underlying the Award arose over a contract between the parties in which petitioner agreed to do certain caulking and waterproofing work on a building owned by respondent. Petitioner filed claims against respondent with regard to respondent's purported cancellation of their contract, after delaying petitioner's attempts to start the work for over a year and a half, and after petitioner had mobilized its labor, equipment, and resources, which it had been holding in reserve and on standby to accommodate respondent. The Award was issued by a three-member panel, which conducted multiple days of hearings, with a number of witnesses and exhibits, and which deliberated for several weeks before issuing the Award. Respondent challenges the Award, arguing that it contradicts several express and unambiguous terms of the parties' contract, and ignores basic principles of contract law. Petitioner urges that the Award be confirmed, contending that the facts and issues of law were fiercely contested, and that respondent fails to satisfy its burden of proving that the arbitrators acted with egregious impropriety in finding that respondent breached, and in awarding petitioner consequential damages.

On May 28, 2002, petitioner, as contractor, entered into a contract with respondent to perform work, labor and services in connection with the caulking and cleaning of the exterior facade of the building located at One Chase Manhattan Plaza, New York, New York (the Contract) (Petition, ¶ 3). Petitioner had previously submitted a bid, and the parties had agreed that petitioner would perform the work for \$3,064,334 (Respondent's Memorandum of Law, at 2). Respondent drafted the Contract, and sent it to petitioner to sign. Petitioner

signed it, in or about May 2002, but respondent took several months before it signed it, in September 2002. The Contract contained an arbitration provision, in article 7.8.1, in which petitioner and respondent agreed that any claims or disputes between them arising out of or related to the Contract would be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (Exhibit A to Notice of Cross Motion, Contract 7.8.1, Bates 0025-26). The clause did not contain any express limitations on the powers of the arbitrators. The Contract also contained a provision, in article 1.1.1, which provided in part that the Contract could be amended or modified by a written amendment signed by both parties. Article 7, as amended, provided, in 7.4.1, that “[d]amages recoverable by [respondent] pursuant to the provisions of this Contract . . . shall include any and all consequential and punitive damages, . . . including but not limited to damages related to the loss of business and/or profits” (id., Contract 7.4.1, Bates 0039). The Contract sets forth certain termination provisions in Article 14, including termination for cause (14.2) and termination for convenience (14.3). In the termination for convenience clause, the Contract states that “[respondent] shall have the right to terminate this Agreement without cause at any time upon thirty (30) days prior written notice” (id., Contract 14.3). In Article 14.6, the Contract provides that in the event of “termination not the fault of [petitioner], [petitioner] shall be compensated for all Services performed and payments requested by [respondent] to the termination date” (id., 14.6). The term “Services” is not defined in that provision or anywhere else in the Contract.

Respondent did not sign the Contract until late September 2002 (Exhibit 1 to Affirmation of Donald J. Carbone, dated June 13, 2006, at 7). Petitioner’s owner and

president, Robert Guerrero, Jr., agreed with respondent in late 2002 to delay both phases of the project for one year, because it was too late in the 2002 season to begin caulking work. Guerrero agreed to complete the project in the 2003 and 2004 caulking season at the same 2002 contract price (Carbone Affirm., ¶ 6, and Exhibit 1 annexed thereto, at 7).

Petitioner contended at the arbitration that, in February 2003, it began to gear up for the project. On or about March 18, 2003, respondent requested that petitioner stop any work, because of security issues created by the war with Iraq (Exhibit 1 to Carbone Affirm., at 7). The security alert was lifted in or about May 9, 2003, and petitioner began requesting to resume work (*id.* at 8). Respondent requested that petitioner delay resumption of the project until 2004, and compress the completion into one caulking season at the 2002 price (*id.* at 8). According to petitioner, Mr. Guerrero testified that he agreed to respondent's demands, but only after obtaining respondent's promise not to cancel the project, or delay it any further (Carbone Affirm., ¶ 6). Petitioner contended at the arbitration that respondent's letter dated July 2, 2003, memorialized that promise by its statement that "[i]t is the intent of Chase to aggressively start and complete the caulking and cleaning . . . during the calendar year 2004 . . . . You[r] understanding over the past year has been appreciated" (*id.*). Mr. Guerrero testified that he confirmed his understanding of respondent's promise in a July 23, 2003 letter in which he stated that "[p]lease understand based on the direction from J.P. Morgan Chase and [your] commitment, [petitioner] . . . will use every effort to complete the project in 2004" (*id.*). Petitioner accommodated respondent, and began mobilizing its labor and resources for the work in 2004.

By letter dated March 25, 2004, Howard Shelkowsky, a Vice President of J.P. Morgan Chase, informed petitioner that a “management decision not to proceed with the exterior caulking has resulting [sic] in the cancellation of the above contract,” requesting that petitioner forward any outstanding invoices to it (Exhibit C to Notice of Cross Motion).

Petitioner then demanded arbitration before the American Arbitration Association in accordance with the arbitration clause in the Contract. It sought payment for un-reimbursed direct costs of \$67,378.35, and lost profits, including unabsorbed home office costs of \$1,170,775.80. Three arbitrators were duly selected. The arbitrators conducted hearings over a seven-day period, hearing testimony from several witnesses, including Mr. Guerrierio, for petitioner. Mr. Guerrierio testified at the arbitration that petitioner relied on respondent’s promise not to cancel the Contract, which caused it to remain in readiness to complete the project, and turn down other jobs (id.). He further testified that once respondent terminated the Contract, petitioner was forced to lay off skilled labor, which may be lost to its competitors (id.). Both petitioner and respondent offered evidence at the arbitration with regard to petitioner’s claimed damages (id.). At the conclusion of the arbitration hearings, the parties submitted post-hearing briefs and reply briefs (see Exhibit 1-4 to Carbone Affirm.). Petitioner argued in its briefs that the arbitrators could fashion a remedy which provides justice; respondent breached the Contract by failing to terminate in accordance with its provisions; respondent waived its right to terminate for convenience based on the letters and testimony; respondent breached the covenant of good faith and fair dealing; and petitioner was entitled to the claimed damages based on ambiguous language in the Contract (Exhibits 1-2 to Carbone Affirm.). Respondent argued that it appropriately terminated under

the termination for convenience provision, a clear and unambiguous provision, and that, under such provision, there is no inquiry by a court into the terminating party's good faith. It disputed the case law with regard to termination clauses relied upon by petitioner, arguing that the cases were not relevant. Respondent contended that the Contract did not permit oral amendments, and that the testimony did not support such amendment. Respondent contended that petitioner's evidence did not prove that the delay caused petitioner to remain on standby from September 2002 through March 2004. It further urged that petitioner was not entitled to recover lost profits and overhead, because those damages were not within the contemplation of the parties at the time of contracting, and were not reasonably foreseeable (Exhibits 3-4 to Carbone Affirm.). By letter dated April 12, 2006, the hearings were declared closed (Exhibit B to Petition).

On or about April 26, 2006, the arbitrators made their award in writing, and determined that petitioner was entitled to damages from respondent in the total amount of \$825,876.16 (\$695,474.30 plus interest of \$130,401.86). The Award broke down the damages as including \$633,345.95 for lost profit and overhead, and \$62,128.35 for unreimbursed expenses (Exhibit C to Petition). The Award includes no discussion of the evidence, or any reasoning by the arbitrators.

Respondent argues that the panel manifestly disregarded several express and unambiguous terms of the Contract, and ignored basic principles of contract law. It contends that the Contract entitled it to terminate the agreement without cause, and that the arbitrators ignored that provision by awarding petitioner lost profits and overhead. It urges that inasmuch as the arbitrators provided no explanation for the Award, there is no colorable

justification for their interpretation of the termination for convenience clause. Respondent also argues that the Award contradicts the provisions in the Contract which limit petitioner's recovery to the expenses it incurred as of the date of cancellation, that is, for "Services rendered and payments requested" under paragraph 14.6. Instead, respondent contends that the arbitrators awarded petitioner its purported lost profits and overhead. This, respondent asserts, contradicts the provision, in paragraph 7.4.1, which only provides that respondent is entitled to recover consequential damages. Respondent urges that the panel ignored the basic contract principles that to prevail on a breach of contract claim, the party must show a breach, that where there is a termination for convenience clause, the courts will not look to motive or whether the party terminated in good faith, and that a party may only recover damages that are within the contemplation of the parties at the time of contracting, or are reasonably foreseeable. Respondent claims that the Award leaves the termination for convenience clause, and the provision limiting damages to services performed and payments requested meaningless.

Petitioner responds by contending that both the facts and the issues of law underlying the arbitration were fiercely contested, and there was no agreement by either party on these issues. It contends that the arbitrators made their determination based on their findings with regard to the testimony and documents petitioner provided regarding the delays by respondent, respondent's agreement not to delay any further or to cancel, and the damages sustained by petitioner in mobilizing its resources and remaining open, available, and ready to perform, and turning down other work. Petitioner asserts that it argued that respondent breached the Contract by not terminating in accordance with the Contract by failing to give

30 days' written notice; breached the obligation of good faith by attempting to cancel after inducing petitioner to remain ready to perform; and breached the Contract by canceling it notwithstanding an agreement not to cancel. Petitioner further argued that respondent was responsible for petitioner's direct and consequential damages, because of respondent's breach or, alternatively, pursuant to the Contract provisions which provided that petitioner was entitled to recover for its "Services," an undefined term which included all costs and overhead relating to petitioner's mobilization and readiness. Petitioner contends that the arbitrators were not required to discuss how they arrived at their decision. It urges that the respondent does not demonstrate that the arbitrators knew of the proper law and refused to apply it, nor can respondent show that the parties agreed on the law or jointly instructed the arbitrators on it. Petitioner further argues that the law was not well-defined, explicit and clearly applicable to the facts as found by the arbitrators. Petitioner urges that the Contract did not contain a provision in which it waived any right to consequential damages, and it presented sufficient proof of such damages. At the least, petitioner argues, there is a barely colorable justification for the outcome reached.

The petition is granted, and the Award is confirmed. The cross motion to vacate is denied.

Respondent's arguments that the arbitrators manifestly disregarded the law are rejected. It is established law that judicial review of arbitration awards is extremely limited, and an award will be upheld so long as there is even a "barely colorable justification for the outcome" (Wjen & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d 471, 479 [2006], cert dismissed 75 USLW 3035 (Sept 19, 2006), quoting Matter of Andros Compania Maritima,

S.A. [Marc Rich & Co., A.G.], 579 F2d 691, 704 [2d Cir 1978]). A court should not vacate an award for the arbitrator's errors of fact and law, or substitute its judgment for that of the arbitrators (id. at 479-80).

The parties do not dispute that the Federal Arbitration Act (FAA) applies to this controversy. The FAA mandates the enforcement of arbitration agreements relating to transactions affecting interstate commerce (9 USC § 2; Diamond Waterproofing Systems, Inc. v 55 Liberty Owners Corp., 4 NY3d 247, 252 [2005]; Morgan Stanley DW Inc. v Afridi, 13 AD3d 248 [1<sup>st</sup> Dept 2004]). The transactions here affect interstate commerce.

The grounds set forth in the FAA itself for vacating an award (9 USC § 10 [a]), all involving fraud, corruption, and misconduct by the arbitrators, do not apply in this case. Thus, the Award may only be vacated if a manifest disregard of the law, a judicially created ground for vacatur under the FAA, is plainly evident from the record (Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d at 480; Morgan Stanley DW Inc. v Afridi, 13 AD3d at 250; Duferco Intl. Steel Trading v T. Klaveness Shipping A/S, 333 F3d 383 [2d Cir 2003]). This doctrine, however, is "'severely limited'" (Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d at 480, quoting Matter of Arbitration No. AAA13-161-0511-85 Under Grain Arbitration Rules, 867 F2d 130, 133 [2d Cir 1989]). Judicial review is highly deferential to the arbitral award (Duferco Intl. Steel Trading v T. Klaveness Shipping A/S, 333 F3d at 389). As the Court of Appeals in Wien & Malkin LLP v Helmsley-Spear, Inc. (6 NY3d 471, supra) stated, it is "a doctrine of last resort limited to the rare occurrences of apparent 'egregious impropriety' on the part of the arbitrators, 'where none of the provisions of the FAA apply'" (id. at 480-81, quoting Duferco Intl. Steel Trading v T. Klaveness Shipping A/S, 333 F3d at

389). In fact, since 1960, the Second Circuit Court of Appeals has vacated some or all of an award on this basis in only four out of at least 48 cases where the standard was applied (*id.*). The doctrine requires more than a simple error of law, a failure to understand or apply the law, or an erroneous interpretation of the law (Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d at 481; Duferco Intl. Steel Trading v T. Klaveness Shipping A/S, 333 F3d at 389; see Westerbeke Corp. v Daihatsu Motor Co., Ltd., 304 F3d 200, 208 [2d Cir 2002]). A court reviews an award only for a clear demonstration that the arbitrators intentionally defied the law (Duferco Intl. Steel Trading v T. Klaveness Shipping A/S, 333 F3d at 393).

The party seeking vacatur bears the burden of proving manifest disregard of the law (Westerbeke Corp. v Daihatsu Motor Co., 304 F3d at 209). To satisfy this burden, that party must prove both that "(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case" (Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d at 481, quoting Wallace v Buttar, 378 F3d 182, 189 [2d Cir 2004] [other citations omitted]). As to the first subjective element, the court must look to the knowledge actually possessed by the arbitrators. "In order to intentionally disregard the law, the arbitrator must have known of its existence and its applicability to the problem" (Duferco Intl. Steel Trading v T. Klaveness Shipping A/S, 333 F3d at 390; Roffler v Spear, Leeds & Kellogg, 13 AD3d 308 [1<sup>st</sup> Dept 2004] [must show arbitrator appreciates the existence of clearly governing legal principle and ignores it]). The second element involves consideration of whether the law allegedly ignored was clear, and explicitly applicable to the arbitration, and whether it was improperly applied, leading to an incorrect result ( Duferco Intl. Steel Trading v T.

Klaveness Shipping A/S, 333 F3d at 390). Even where an explanation for an award is deficient or non-existent, the award will be confirmed if a justifiable ground for it can be inferred from the facts (id.; see Lentine v Fundaro, 29 NY2d 382 [1972] [if a ground for the decision could be inferred from the facts of a case, the award should be confirmed]). In construing arbitral awards, the court must look only to a plausible reading, and not to probable readings of it (Duferco Intl. Steel Trading v T. Klaveness Shipping A/S, 333 F3d at 392).

Here, respondent fails to meet its heavy burden of demonstrating manifest disregard of the law. First, respondent has not satisfied the first prong of the two-prong test – it fails to show that the panel knew of a governing legal principle, and refused to apply it or ignored it (see Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d 481; cf. Sawtelle v Waddell & Reed, Inc., 304 AD2d 103, 113-14 [1<sup>st</sup> Dept 2003] [attorneys for both parties agreed on law and explained it to arbitrators who failed to adhere to it]). The panel did not include any discussion or explanation in the Award – they were not required to do so. Respondent does not present the transcript or any other explicit evidence in the record of the arbitration proceeding, that the arbitrators knew of the proper applicable law, according to petitioner "the law of contract interpretation," and the law with regard to termination for convenience clauses, and were not going to follow it (see Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d at 484; see also Campbell v Cantor Fitzgerald & Co., 21 F Supp 2d 341, 345 [SD NY 1998], affd 205 F3d 1321 [2d Cr 1999]). There is no evidence presented here that any of the arbitrators believed that certain principles of contract interpretation applied (see Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d at 484). The Award also does not exhibit

any deliberateness or willfulness that shows that the arbitrators intended to flout the law (id.). The alleged error is not “so obvious that it would be instantly perceived as such by the average person qualified to serve as an arbitrator,” such that this court could infer knowledge and intention on the part of the arbitrators ( see Duferco Intl. Steel Trading v T. Klaveness Shipping Shipping A/S, 333 F3d at 390). The parties did not agree on the applicable law. In fact, they fiercely contested which legal principles were relevant. It is plausible that the arbitrators made findings of fact based on Mr. Guerrerio’s testimony and the letters submitted, that respondent had agreed to amend the Contract and not to cancel it, which amendment was evidenced by those writings and by petitioner’s performance in mobilizing and having its resources on standby, and thereby determined that respondent breached the Contract in sending the March 25, 2004 letter. Such reasoning does not strain credulity. Under that determination of the factual evidence, the legal analysis relied upon by respondent with regard to termination for convenience clauses would not apply. If this analysis by the arbitrators demonstrates a misapplication of the parol evidence rule or an error of law, that is not a basis to set aside an arbitration award (see Lentine v Fundaro, 29 NY2d at 385). This court may not review the Award for a manifest disregard of the facts ( see Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d at 483), so long as a colorable basis exists for it.

On the issue of consequential damages, including lost profits, the arbitrators may have determined that the damages did not fall within section 14.6, because this was a breach by respondent, not a termination for convenience. Instead, plausibly, they could have found that the damages provision in section 7.4.1 was applicable. While this provision stated that respondent could recover all consequential damages, including lost profits, it did not

expressly preclude petitioner from obtaining such damages. Where a contract is silent on an issue, and, therefore, the resolution requires interpretation of ambiguous contract provisions, such task clearly is within the arbitrators' domain (see Siegel v Titan Indus. Corp., 779 F2d 891, 894 [2d Cir 1985]). The arbitrators may have taken note of the fact that respondent drafted the contract, in which case, ambiguities could then be construed against it (see 67 Wall St. Co. v Franklin Natl. Bank, 37 NY2d 245 [1975]). The arbitrators also could have determined that the Contract did not expressly preclude petitioner from recovering such damages upon respondent's breach, and that the damages were within the contemplation of the parties since they were provided for in section 7.4.1. Again, this is a justifiable ground for the Award (see Roffler v Spear, Leeds & Kellogg, 13 AD3d at 3009). Even if the arbitrators decided to award petitioner damages under section 14.6 for "Services performed and payments requested," the term "Services" was never defined in the Contract, and the arbitrators could have interpreted it to include the costs petitioner incurred in mobilizing, standing by ready to work, and turning down other jobs to remain available to do the work for respondent. Thus, respondent fails to present evidence of any rule of law being fully presented to the arbitrators, clearly applicable based on the facts as found by the arbitrators, and the arbitrators intentionally disregarding it.

On the second prong, respondent also fails to demonstrate that the law was well defined, explicit, and clearly applicable. In order to vacate an award based on a manifest disregard of a contract, the respondent must demonstrate that the award contradicts an express and unambiguous term of the contract, or that the award so far departs from the terms of the contract that it is not even arguably derived from the agreement (Wien & Malkin LLP

v Helmsley-Spear, Inc., 6 NY3d at 485, citing Westerbeke Corp. v Daihatsu Motor Co., 304 F3d 200, supra). Interpretation of contractual terms is within the province of the arbitrators, and their factual findings and contractual interpretation will not be overruled because a court disagrees with that interpretation (see Westerbeke Corp. v Daihatsu Motor Co., 304 F3d at 213-14; Yusuf Ahmed Alghanim & Sons v Toys "R" Us, Inc., 126 F3d 15, 25 [2d Cir 1997], cert denied 522 US 1111 [1998]; InterDigital Communications Corp. v Nokia Corp., 407 F Supp 2d 522, 530-31 [SD NY 2005]). Indeed, whether the arbitrator's interpretation of the parties' contract or the respondent's interpretation of it is correct, "[c]ourts do not have the power to review the merits of arbitrators' contract interpretations" ( InterDigital Communications Corp. v Nokia Corp., 407 F Supp 2d at 531 [citation omitted]).

As discussed above, respondent has failed to demonstrate that the governing law with regard to termination for convenience clauses clearly applied to the facts of this case as those facts were found by the arbitrators (see Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d at 484; Westerbeke Corp. v Daihatsu Motor Co., 304 F3d at 213). Where parties hotly dispute the applicable law and facts, as here, there is no well-defined, explicit, and clearly applicable law (see Matter of Fellus v A.B. Watley, Inc., 7 Misc 3d 1016 [A][Sup Ct, NY County 2005]). The Award does not so far depart from the terms of the Contract. Instead, as discussed above, it is arguably derived from a determination that respondent breached the Contract, and that there was not a termination for convenience. Simply because there is a termination for convenience clause does not mean that a party cannot be found to have breached the contract. With regard to the consequential damages awarded, they arguably were available under section 7.4.1, a provision which did not expressly and unambiguously

prohibit such recovery to petitioner. Thus, the Award is arguably derived from the terms of the Contract so that vacatur for manifest disregard of the Contract is not warranted.

Accordingly, respondent fails to meet its burden of proof for manifest disregard of the law.

To the extent that the FAA permits vacatur of an arbitration award on the ground that it is irrational (see Morgan Stanley DW Inc. v Afridi, 13 AD3d 248, supra), this court cannot say that the Award's finding that petitioner was entitled to damages, including lost profits, under the Contract was irrational. As discussed above, the arbitrators could have found that respondent breached the Contract by refusing to go forward with it, and that such damages were recoverable under their interpretation of the contractual damages provisions. Thus, respondent has failed to demonstrate a basis to vacate the Award.

Accordingly, it is

ORDERED that the petition to confirm the arbitration award is granted and the award in favor of petitioner is confirmed; and it is further

ORDERED that the cross motion to vacate is denied.

Submit Judgment.

Dated: October 5, 2006

ENTER:

  
J.S.C.  
**BERNARD J. FRIED**  
J.S.C.