UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1579

September Term, 2014

GRINDSTONE CAPITAL, LLC

v.

MICHAEL KENT ATKINSON

Kehoe,
Friedman,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: September 23, 2015

This is an appeal of a judgment of the Circuit Court for Howard County, the Honorable William V. Tucker presiding, confirming an arbitration award and entering judgment consistent therewith. The appellant is Grindstone Capital, LLC ("Grindstone"). The appellee is Michael Kent Atkinson. Atkinson was an employee of Raptor Detection Inc. ("Raptor"), a corporation doing business in Maryland which ceased operations owing him a substantial amount of unpaid salary. Grindstone is a corporation which obtained all of Raptor's assets when Raptor ceased operations. Grindstone subsequently transferred all of Raptor's assets to RDI Holdings, LLC ("RDI"), which is not a party to this appeal.

The arbitrator awarded Atkinson $328,330.15, plus prejudgment interest, for unpaid salary and $263,216.97 in attorney's fees and costs. He ordered that Grindstone and RDI were jointly and severally liable for the award. The circuit court confirmed the award, and ordered Grindstone to pay Atkinson's attorney's fees and costs associated with confirming the award. However, it has stayed its decision on the matter of attorney's fees and costs pending the resolution of this appeal. Grindstone presents three issues, which we have consolidated and re-worded:

> 1. Whether the arbitrator manifestly disregarded the law when he concluded that Grindstone was liable to Atkinson for the unpaid salary?
>
> 2. Whether the circuit court erred in ordering Grindstone to pay Atkinson's attorney's fees and costs associated with enforcing and confirming the arbitration award?

We answer "no" to the first question. Grindstone's contentions that the circuit court erred when it decided to award fees and costs incurred with confirming the award is not yet properly before us. We will affirm the judgment of the circuit court.

Analysis

I. Choice of Law and Standard of Review

Atkinson is a foreign national and so the arbitration clause in his employment agreement is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), which is codified as § 201 *et seq*. of the Federal Arbitration Act, 9 U.S.C. §§1 *et seq.* We will review the validity of the arbitrator's award under the FAA and federal law. However, state courts are not bound by the procedural provisions of the FAA and may apply their own procedures in actions seeking to confirm or vacate an award. *Walther v. Sovereign Bank*, 386 Md. 412, 423 (2005).

"On appeal from a district court's denial of vacatur, [an appellate court] 'review[s] *de novo* the court's legal rulings. . . . Any factual findings made by the district court in affirming such an award are reviewed for clear error.'" *Wachovia Securities v. Brand*, 671 F.3d 472, 478 (4th Cir. 2012) (quoting *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir.2007)). Review of an arbitration award in federal court "is severely circumscribed." *Wachovia Securities*, 671 F.3d at 478. "A court sits to 'determine only whether the arbitrator did his job—not whether he did it well, correctly, or reasonably, but

simply whether he did it.' " *Id.* (quoting *U.S. Postal Serv. v. Am. Postal Workers Union*, 204 F.3d 523, 527 (4th Cir.2000)).

> The FAA provides four specific grounds for vacatur of an arbitration award:
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> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

In addition to these statutory grounds, some federal circuits, including the Fourth Circuit, have held that an award may be vacated if the arbitrator "manifestly disregards" the law in arriving at his or her conclusions.[1] *Jones v. Dancel*, 792 F.3d 395, 401 (4th Cir. 2015);

[1] Atkinson argues that the manifest disregard standard for overturning an arbitrator's award was called into question by the Supreme Court in *Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). Currently, the circuits are split regarding the continued existence of the manifest disregard standard as an available basis for vacating an arbitrator's award. Some circuits have concluded that the manifest disregard standard is no longer available. *See, e.g., Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir.2009) ("In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.") Other circuits have concluded that the manifest disregard standard continues to exist as a "judicial (continued...)

see also Wachovia Securities, 671 F.3d at 483. the law. In order to determine whether an arbitrator has manifestly disregarded the law, federal courts employ a two-part test: (1) there must be an applicable legal standard that is clearly defined and not subject to reasonable debate, and (2) the arbitrator must have refused to heed that legal principle. *Wachovia Securities*, 671 F.3d at 483; *see also Long John Silver's Restaurants, Inc. v. Cole*, 514 F.3d 345, 350 (4th Cir. 2008). Under this standard we do not "review the merits of the underlying arbitration," nor do we determine whether the "arbitrator misconstrued or misinterpreted the applicable law." *Jones*, 792 F.3d at 402 (internal quotations omitted).

II. Grindstone as a "Successor" under the Payment Law

The Payment Law requires "employers" to pay wages and salaries to "employees," LE § 3-505,[2] and establishes a statutory cause of action for unpaid wages and salaries. *See*

[1](...continued)
gloss" of FAA § 10(a)(3) and (4). *See, e.g., Stolt–Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 93–94 (2d Cir.2008), *rev'd on other grounds by Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (Adopting the standard that "'manifest disregard,' reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards.") The Fourth Circuit has held that the manifest disregard standard continues to exist either "as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10." *Wachovia Securities*, 671 F.3d at 483.

[2]Section 3-505 states in relevant part:

> (a) Except as provided in subsection (b) of this section, each employer shall pay an employee . . . all wages due for work that the employee performed before the termination of employment . . . .

LE § 3-507.2(a)[3]. Section 3-501(b) of the Payment Law defines "employer" to include "any person who employs an individual in the State *or a successor of the person*." (emphasis added). There is no disagreement that Raptor violated the Payment Law when it failed to pay Atkinson, and is thus liable for Atkinson's unpaid salary. However, the parties disagree on whether Grindstone is also liable for Atkinson's unpaid salary as Raptor's successor.

Atkinson claims, and the arbitrator agreed, that Grindstone should be considered Raptor's successor under the Payment Law. Grindstone contends that it cannot be held liable for Atkinson's unpaid salary as Raptor's successor. It claims that the arbitrator's analysis contained two fundamental errors of law, either of which provides an independent basis for vacating the arbitrator's award. First, Grindstone asserts that the arbitrator manifestly disregarded binding caselaw when he used the "continuity of enterprise" or "substantial continuity" test[4] to determine whether Grindstone was Raptor's successor. Second, it contends that the arbitrator "pierced the corporate veil" when he concluded that both

[3]Section 3-507.2(a) states:

> (a) Notwithstanding any remedy available under § 3-507 of this subtitle, if an employer fails to pay an employee in accordance with § 3-502 or § 3-505 of this subtitle, after 2 weeks have elapsed from the date on which the employer is required to have paid the wages, the employee may bring an action against the employer to recover the unpaid wages.

[4]We will use the terms "continuity of enterprise" and "substantial continuity" interchangeably throughout this opinion.

Grindstone and RDI were jointly and severally liable to Atkinson. We will address each argument in turn.

A. The Arbitrator's Use of the Continuity of Enterprise Test

We find unpersuasive Grindstone's contention that the arbitrator manifestly disregarded binding caselaw when he applied the substantial continuity test to decide whether Grindstone should be liable for Atkinson's unpaid salary.

The general rule in Maryland is that a successor corporation is not liable for its predecessor's legal obligations, subject only to four exceptions.[5] Grindstone argues that the arbitrator ignored this binding principle of law when he applied a fifth exception—the continuity of enterprise test—in order to conclude that Grindstone was liable for the unpaid salary. Grindstone relies on two cases in support of its argument. The first is *Nissen Corp. v. Miller*, 323 Md. 613, 632–33 (1991), in which the Court of Appeals declined to adopt the continuity of enterprise exception to extend liability to a successor entity in a products

[5]These four exceptions are:

> (1) there is an express or implied agreement to assume the liabilities; (2) the transaction amounts to a consolidation or merger; (3) the successor entity is a mere continuation or reincarnation of the predecessor entity; or (4) the transaction was fraudulent, not made in good faith, or made without sufficient consideration.

Nissen Corp. v. Miller, 323 Md. 613, 617 (1991).

liability action. The problem with *Nissen* from Grindstone's perspective is that the Court's holding is clearly limited to products liability cases.[6]

Grindstone also directs us to this Court's decision in *Baltimore Luggage Co. v. Holtzman*, 80 Md. App. 282, 298–99 (1989), in which this Court concluded that an arms-length purchaser of corporate assets was not liable for unpaid fringe benefits due under a contract of employment under any of the four grounds set out in footnote 5 of this opinion. In fact, we did not discuss the continuity of enterprise test in that decision other than to observe, in a footnote, that a decision by the United States District Court for the District of Maryland had applied the continuity of enterprise exception to hold a successor entity liable in a products liability case. *Id.* at 296 n.10 (citing *Smith v. Navistar Transportation Corp*. 687 F. Supp. 201 (Md. 1988)).

Neither *Nissen* nor *Baltimore Luggage* addresses whether the continuity of enterprise exception should apply in the context of an action for unpaid salary under the Payment Law.

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[6]Specifically, at the conclusion of its opinion, the Court stated (emphasis added):

> For the reasons set forth in this opinion, we reject the continuity of enterprise theory of successor corporate liability. Like the majority of our sister states, *we adhere to the general rule of nonliability of successor corporations, with its four traditional exceptions, in products liability cases.*
>
> In conclusion, *our adoption of the cause of action for strict liability in tort does not abandon the fundamental principle that, in order to impose tort liability, there must be fault*.

323 Md. at 632–33 (citations omitted).

In addressing this issue, the arbitrator noted that (1) the Payment Law does not define the term "successor," and (2) there are no published Maryland decisions analyzing successor liability for violations of the Payment Law. Both of these observations are accurate. Thus, in the context of the issue before the arbitrator, *Nissen* and *Baltimore Luggage* can reasonably be characterized as persuasive but not binding. The arbitrator ultimately concluded that the remedial purpose of the Payment Law[7] supported his conclusion that it was appropriate to apply the continuity of enterprise test to decide whether Grindstone was a successor of Raptor. Without agreeing or disagreeing with the arbitrator's reasoning on this point, we cannot say that he "refused to heed" a clearly-defined legal principle of Maryland law in reaching his result. *Wachovia Securities*, 671 F.3d at 483.

B. Grindstone as a Successor Separate from RDI

Grindstone also argues that the arbitrator manifestly disregarded binding law by piercing the corporate veil and treating Grindstone and RDI as a "single entity" for liability purposes. Grindstone argues that the arbitrator only concluded that RDI was Raptor's successor under the continuity of enterprise test, but nevertheless pierced the corporate veil

[7]The Court of Appeals has consistently stated that the Payment Law is remedial in nature; thus encouraging the statute to be read and interpreted liberally in favor of employees seeking to recover unpaid wages. *See id.* at 518 ("[C]ourts should exercise their discretion liberally in favor of awarding a reasonable fee [under the Payment Law]"); *see also Peters v. Early Healthcare Giver, Inc*., 439 Md. 646, 663 (2014) ("[T]rial courts are encouraged to consider the remedial purpose of the WPCL when deciding whether to award enhanced damages to employees."); *see also Marshall v. Safeway Inc.*, 437 Md. 542, 560 (2014) ("[T]he two lower courts took much too narrow a view regarding the proper interpretation of LE § 3–507.2, one that is not at all consistent with the legislative intent.").

to hold both Grindstone and RDI jointly and severally liable as a single entity. We do not agree with Grindstone's characterization of the arbitrator's reasoning.

The doctrine of corporate veil piercing is well-established in Maryland. The doctrine essentially states that, under most circumstances, corporate shareholders will not be individually held liable for the debts or obligations of a corporate entity "except where it is necessary to prevent fraud or enforce a paramount equity." *Ramlall v. MobilePro Corp.*, 202 Md. App. 20, 30 (2011) (quoting *Bart Arconti & Sons, Inc. v. Ames–Ennis, Inc.*, 275 Md. 295, 310 (1975)). However, the existing binding law on corporate veil-piercing in Maryland is inapposite to the case before us. The arbitrator made no allusion to piercing the corporate veil, nor did he hold that Grindstone was liable because it was an equity owner of RDI. Instead, the arbitrator concluded that Grindstone was individually liable as a successor to Raptor under the substantial continuity test.

The arbitrator relied on *Lipscomb v. Technologies, Servs., & Info., Inc.*, 2011 WL 691605 (D. Md. Feb. 18, 2011), an unreported case from the District Court of Maryland, to analyze whether to treat Grindstone and RDI as Raptor's successors. *Lipscomb* employed a nine-factor test that primarily focused on whether "a successor had notice, a predecessor had the ability to provide relief, and the continuity of the business." *Id.* at *8; *see also EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir.1974). The arbitrator concluded that the majority of the factors were satisfied, and thus held that both Grindstone and RDI were Raptor's successors and were jointly and severally liable for Atkinson's

unpaid salary under the substantial continuity test. Critical to his conclusion was his finding that Grindstone accepted all of Raptor's assets and passed them on to RDI, which then continued Raptor's business.

Grindstone argues that under the nine-factor test discussed in *Lipscomb*, a corporation may only be treated as a successor if a majority of the factors applied to the corporation. However, it directs us to no binding caselaw in support of this proposition. It appears that Grindstone's real qualm with the arbitrator's analysis is not that the arbitrator pierced the corporate veil, but that the arbitrator misapplied the continuity of enterprise test to the facts of this case. Assuming for purposes of analysis that the arbitrator did indeed misapply the law, the FAA does not permit a court "to overturn an arbitral award just because it believes, however strongly, that the arbitrators misinterpreted the applicable law." *Wachovia Securities*, 671 F. 3d at 478 n. 5. Our role in this aspect of Grindstone's appeal ends with our conclusion that the arbitrator did not manifestly disregard clearly-established principles of Maryland law.

IV. Attorney's Fees

We decline to address Grindstone's contentions that the circuit court erred when it decided that Grindstone was liable for attorney's fees and costs associated with the confirmation and enforcement of the award because the circuit court has not yet entered an actual award. A judgment awarding an attorney's fee is not final until the counsel fee is determined. *See Mattvidi Associates Ltd. P'ship v. NationsBank of Virginia, N.A.*, 100 Md.

App. 71, 78 n.1 (1994) ("[J]udgment in this case was not final until judgment on the attorney's fees award was entered[.]"); *N. Assur. Co. of Am. v. EDP Floors, Inc.*, 311 Md. 217, 222 (1987) ("That breach of contract claim was not finally adjudiciated until the counsel fee was determined.").[8] Therefore, we will remand this case to the circuit court for further proceedings regarding Atkinson's request for fees and costs.[9]

THE JUDGMENT CONFIRMING THE ARBITRATION AWARD IS AFFIRMED AND THE CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

[8]Both *Mattvidi Associations* and *EDP Floors* pertained to a contractual right to attorney's fees and thus held that the entirety of the judgment—including the on the merits—was not final until the attorney's fees award was entered. Logic dictates that the same rule should apply when the issue of attorney's fees is collateral to the merits with regard to whether the court had entered a final judgment on the issue of attorney's fees.

[9]We note in passing that the lack of a final judgment on the matter of attorney's fees does not prevent this Court from issuing a decision on the merits of this case. Generally, a judgment is only final when it "adjudicates all claims against all parties." *Waterkeeper Alliance, Inc. v. Maryland Dep't of Agric.*, 439 Md. 262, 278 (2014). However, an exception applies to those issues which are "collateral" to the merits of the case. *Id.* at 286. A motion for attorney's fees, when the fees are requested pursuant to a Maryland Rule or statute, are considered collateral to the merits of a case. *Grove v. George*, 192 Md. App. 428, 435 (2010).