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FRASER LANE ASSOCIATES, LLC *v.* CHIP FUND 7, LLC

CHIP FUND 7, LLC *v.* FRASER LANE ASSOCIATES, LLC

(AC 45274)

Bright, C. J., and Cradle and Clark, Js.

Syllabus

The defendant appealed to this court from the judgments of the trial court confirming an arbitration award for the plaintiff and denying the defendant's application to vacate the arbitration award. The parties had entered into a power purchase agreement pursuant to which the defendant agreed, inter alia, to install solar panels on the roofs of condominiums that the plaintiff was developing. After delays in installation, the plaintiff demanded arbitration under the terms of the agreement. During a preliminary hearing, the arbitrator noted that the arbitration clause in the agreement required each party to submit a "last best offer" and that he would choose between the parties' proposals when issuing an award unless the parties agreed otherwise in writing. The defendant submitted a counterclaim to the arbitrator. Following an arbitration hearing, the parties submitted posthearing briefs and proposals. The plaintiff argued that a $200 per day liquidated damages provision agreed on by the parties was valid and reasonable and submitted a proposal of $210,000 to resolve its claim and $5348 to resolve the defendant's counterclaim. The defendant argued that the liquidated damages provision was an unenforceable penalty and submitted a proposal of $0 to resolve the plaintiff's claim and $294,211.49, with postjudgment interest, to resolve its counterclaim. The arbitrator issued a decision finding that the liquidated damages provision was enforceable under Connecticut law and selecting the plaintiff's proposal on the claim and counterclaim as the one most consistent with his findings. The defendant filed an application to vacate the award, and, in a separate action, the plaintiff filed an application to confirm the award. Thereafter, the court consolidated the two applications and, following a hearing, granted the application to confirm the award and denied the application to vacate, noting that the award was consistent with the submission and that the arbitrator acted in accordance with the parties' agreement. *Held*:

1. The defendant could not prevail on its claim that the arbitration award violated public policy because the award was made pursuant to an unenforceable liquidated damages provision and the plaintiff suffered no actual damages as a result of the defendant's breach: the defendant failed to submit to the trial court a sufficient record to prevail on its claim, as it did not provide the court with a copy of the liquidated damages provision, which was set forth in an email between the parties, or a transcript from the arbitration proceedings, which undisputedly were not transcribed; moreover, the defendant neither asked the arbitrator to articulate the basis for his conclusion that the liquidated damages provision satisfied the requirement for enforceability nor asked the court to order the arbitrator to make such an articulation, and the defendant failed to cite to any relevant authority in support of its argument that, in the absence of such findings by the arbitrator, the court was required or permitted to conduct an evidentiary hearing for the purpose of making its own findings of fact relative to the defendant's public policy challenge to the award; furthermore, the defendant could not prevail on its claim that the court improperly denied it the opportunity to submit the complete arbitral record, as the court issued an order that gave both parties sufficient opportunity to submit material from the arbitration and notice that the court would potentially decide the applications on the same date that it heard oral argument, the defendant's challenge to the liquidated damaged provision primarily relied on the testimony of witnesses during the arbitration, the proceedings of which were not transcribed, and the defendant did not provide the court with anything resembling an undisputed summary of the evidence before the arbitrator.

2. The defendant could not prevail on its claim that the arbitrator exceeded his authority under the arbitration provisions of the agreement: because there was no record of the defendant raising objections at the arbitration to the arbitrator's instruction to the parties to submit separate proposals for each claim, the defendant failed to produce sufficient evidence to invalidate the arbitrator's award on this ground; moreover, the defendant's claim that the plaintiff's arbitration demand failed to comply with the requirements set forth in the agreement was inadequately briefed and deemed abandoned, as the defendant's argument was devoid of any legal citation or analysis; furthermore, the defendant could not prevail on its claim that the arbitrator exceeded the scope of his powers by selecting a proposal that was outside the scope of the submission made to him, as the arbitrator, by selecting a party's proposal for the claim and counterclaim and awarding damaged accordingly, did precisely what the agreement required.

3. The defendant's claim that the arbitrator manifestly disregarded the law in selecting a proposal that was not supported by any legal or factual basis was inadequately briefed and deemed abandoned, as the defendant failed to cite to any legal authority in support of its claim or to provide any meaningful analysis.

Argued February 6—officially released August 29, 2023

Procedural History

Application, in the first case, to confirm an arbitration award and, in the second case, application to vacate an arbitration award, brought to the Superior Court in the judicial district of Fairfield, where the applications were consolidated and tried to the court, *Hon. Dale W. Radcliffe*, judge trial referee; judgments granting the application to confirm the award and denying the application to vacate the award, from which the defendant appealed to this court. *Affirmed*.

David C. Shufrin, for the appellant (defendant in the first case; plaintiff in the second case).

James J. Healy, with whom was *Brennen Maki*, for the appellee (plaintiff in the first case; defendant in the second case).

Opinion

CLARK, J. The defendant, Chip Fund 7, LLC, appeals from the judgments of the trial court confirming an arbitration award in favor of the plaintiff, Fraser Lane Associates, LLC, and denying the defendant's application to vacate an arbitration award.[1] On appeal, the defendant argues that the trial court erred because (1) the arbitration award violates public policy, (2) the arbitrator exceeded his authority under the arbitration agreement, and (3) the arbitrator manifestly disregarded the law. We disagree and, accordingly, affirm the judgments of the trial court.

The following undisputed facts and procedural history are relevant to our disposition of this appeal. In March, 2016, the parties entered into a power purchase agreement pursuant to which the defendant agreed to install, operate, and maintain solar panels on the roofs of twenty condominiums in a residential development that the plaintiff was in the process of developing, and the plaintiff agreed to pay the defendant for all the electricity that the panels produce for twenty years (agreement). Section 23 (c) of the agreement provides in relevant part that "[a]ny [d]ispute that is not settled to the mutual satisfaction of the [p]arties [through negotiation or mediation] shall . . . be settled by binding arbitration . . . ."

On September 30, 2020, the plaintiff filed a demand for arbitration with the American Arbitration Association pursuant to § 23 (c) of the agreement and served a copy of that demand on the defendant. The demand stated: "Installation of solar panel system on residential condominium development. After serious delays, [the defendant] agreed to a $200 per diem penalty for every day work was not completed after [January 28, 2018]. Work is still not completed."

The parties subsequently selected Attorney Louis R. Pepe as the arbitrator. At a preliminary hearing on December 7, 2020, the arbitrator noted that the arbitration clause in the agreement required each party to submit to him its "last best offer" to resolve the claims and required him to choose between the parties' proposals when issuing an award. He made clear that he would follow that procedure unless the parties agreed otherwise in writing.[2]

On January 15, 2021, the defendant filed an objection to the plaintiff's arbitration demand, arguing that the demand failed to comply with the procedure set forth in § 23 (c) (2) of the agreement.[3] On the same day, the defendant also submitted a counterclaim to the arbitrator, alleging that the plaintiff had failed to pay for the solar panels' electricity and that the plaintiff owed an ongoing obligation to pay for the electricity until the purchasers of each condominium executed a guarantee to assume the plaintiff's obligation. The

counterclaim asserted, inter alia, claims of breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment.

On July 12, 2021, a five day arbitration hearing commenced, during which the parties introduced evidence that included live witness testimony and exhibits. There is no transcript of the arbitration hearing. At the conclusion of the hearing, the arbitrator reminded the parties of the agreement's last best offer provision, made clear his intention to follow it, and suggested that they be strategic in submitting their respective proposals for resolution. The arbitrator also reminded the parties in his July 19, 2021 scheduling order that, in accordance with the parties' agreement, they should submit with their briefs a "last best offer" for resolution of the plaintiff's claim and the defendant's counterclaim.

On August 9, 2021, the parties submitted their respective posthearing briefs and proposals for resolution of the dispute. The plaintiff argued in its brief that the $200 per day liquidated damages provision, which the parties agreed to verbally and subsequently set forth in an email, was valid and reasonable because the potential damages stemming from the delay—buyers walking away, reputational damage, and condominiums being less marketable—were uncertain in amount and difficult to prove. The plaintiff submitted a proposal of $210,000 to resolve its claim and $5348 to resolve the defendant's counterclaim. The defendant argued in its brief that the liquidated damages provision was a penalty, and therefore unenforceable, because $200 per day was not commensurate with the anticipated damages and that, even if the provision itself did not constitute an unenforceable penalty, enforcement of the provision would violate public policy because the plaintiff suffered no actual damages. The defendant submitted a proposal of $0 to resolve the plaintiff's claim and $294,211.49 to resolve its counterclaim, with postjudgment interest at a rate of 10 percent.

On September 2, 2021, the arbitrator issued an award. Regarding the plaintiff's claim, the arbitrator found that the parties "amended [the agreement] to add a liquidated damages provision making [the defendant] liable for damages of $200 per day if the installation of [the] solar panels in question was not finished by an agreed-upon date." He also found "that the liquidated damages provision satisfies the requirements for enforceability under Connecticut law; that it required the solar panels in question to be installed and operable—not just installed; and that [the defendant] failed to meet its obligations thereunder." The arbitrator selected the plaintiff's proposal as "the one most consistent with [his] findings . . . ." Regarding the defendant's counterclaim, the arbitrator found that the plaintiff breached the agreement in one or more ways, but he ultimately selected the plaintiff's proposal for that claim as well

because he determined that "[the plaintiff's] proposal more closely approximates the resulting damages sustained by [the defendant]." Thus, the arbitrator awarded $210,000 to the plaintiff and $5348 to the defendant, both without interest. The parties were also ordered to split evenly the administrative fees associated with the arbitration and the arbitrator's compensation.

On October 4, 2021, the defendant filed an application to vacate the arbitration award with the Superior Court, asserting that the arbitrator manifestly disregarded the law and exceeded his powers and that the arbitration award violates public policy. The defendant attached to its application a copy of the agreement, the arbitration award, and the arbitrator's July 19, 2021 scheduling order. The defendant also requested a show cause hearing as to why the application should not be granted. On October 12, 2021, in a separate action, the plaintiff filed an application to confirm the arbitration award. On October 27, 2021, the plaintiff moved for judgment in its favor. The defendant objected to that motion on November 8, 2021.

On November 9, 2021, the trial court, *Stevens*, *J.*, issued an order consolidating the two separate actions. That order further stated: "The parties shall file briefs in support of their positions by December 3, 2021; the parties shall file reply briefs by December 17, 2021. Any surreply brief may be filed by January 14, 2022. Caseflow shall schedule the cases for oral argument for a date after January 14, 2022."

On November 12, 2021, the plaintiff filed a memorandum of law in support of its application to confirm the arbitration award, arguing that the arbitration had been conducted in accordance with the agreement and that, despite the defendant's claim in its application to vacate that the plaintiff failed to prove that it suffered the precise amount of damages that were awarded, a last best offer arbitration award does not need to reflect with precision the actual damages suffered. The plaintiff also argued that the defendant failed to articulate a basis for overturning the arbitrator's determination that the liquidated damages provision was enforceable. The appendix to the plaintiff's memorandum of law contained the agreement, each party's proposal for resolution, and the arbitration award.

On December 7, 2021, the defendant filed a memorandum of law in support of its application to vacate the arbitration award. The defendant argued that enforcement of the arbitration award would violate public policy because the liquidated damages provision of the agreement constituted an unenforceable penalty, the plaintiff suffered no actual damages and, even if the plaintiff had suffered some damages, the evidence did not support the amount that the arbitrator awarded the plaintiff. The defendant also argued that the manner in which the arbitrator solicited the parties' last best offers

was improper because the arbitration provision of the agreement called for each party to submit one proposal, but the arbitrator required the parties to make one proposal for the plaintiff's claim and another for the defendant's counterclaim. The defendant argued in the alternative that, if the court found that the arbitrator did not err by accepting separate proposals for each claim, the arbitrator should have required separate proposals for the two counts of the defendant's counterclaim.

The appendix to the defendant's memorandum of law contained the parties' posthearing arbitration briefs, the plaintiff's demand for arbitration, a letter from the plaintiff's attorney to the defendant's attorney summarizing the arbitration claims, the defendant's objection to the plaintiff's arbitration demand, the arbitrator's July 19, 2021 scheduling order, the defendant's counterclaim, and a copy of the agreement.[4] The defendant's memorandum of law also included a footnote stating that "[the defendant] requests the opportunity to submit to the court the appropriate arbitral record, including each of the exhibits that were entered into evidence at the arbitration hearing. To the extent necessary to preserve its rights, [the defendant] hereby incorporates by reference herein each and every pleading, order, and exhibit submitted in the arbitration as if attached hereto."

On January 19, 2022, the court, *Hon. Dale W. Radcliffe*, judge trial referee, held a hearing on the parties' respective applications. At that hearing, the defendant argued that the court should vacate the arbitration award because the award of $210,000 to the plaintiff had no basis in fact. The plaintiff countered that the precise amount of actual damages suffered was irrelevant because this was a last best offer arbitration and the arbitrator's sole obligation was to choose one of the two offers before him, which he did. The court ultimately agreed with the plaintiff, granting the application to confirm and denying the defendant's application to vacate. In so ruling, the court noted that the arbitrator "select[ed] the proposal submitted by the [plaintiff] . . . on the first proposal in the amount of $210,000. And he did not award, as is discretionary in any award, prejudgment interest or postjudgment interest but awarded the $210,000. On the counterclaim, he found for [the defendant] and did so in the amount of $5348. He also found administrative fees and arbitrator's compensation . . . . The court finds that the award of the arbitrator, without making any determination as to the rectitude of the award from a factual standpoint . . . is consistent with the [restricted] submission . . . . The arbitrator was limited to selecting one of the two proposals submitted and . . . he acted in accordance with . . . [§] 23 (c) [paragraph] 5 of the agreement between the parties. So . . . both the award and the award by way of counterclaim, along with the costs, are con-

firmed."

After the court ruled, the defendant's counsel asked the court for "a factual hearing on the de novo review of the . . . award for purposes of public policy." The court responded: "No, I'm not going to take up the de novo review of the award. That's the purpose of arbitration . . . to make an award, and the court is limited to determining whether [the award] is within the [scope of the] agreement. I've done that. . . . [I]t seems to me, after reading all of your briefs and the award itself, that the arbitrator has adhered to the arbitration [provision of the] agreement. He has adhered to the contract between the parties, which requires . . . a last best offer. And the court is not charged, in review of an arbitration proceeding, with a trial de novo on the issues that were fully and fairly litigated after many days by the arbitrator chosen mutually by the parties." This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the arbitration award violates public policy because the award was made pursuant to an unenforceable liquidated damages provision[5] and because the plaintiff suffered no actual damages as a result of the defendant's breach. Although the defendant failed to ask the arbitrator to clarify or articulate his finding "that the liquidated damages provision satisfies the requirements for enforceability under Connecticut law" and failed to submit to the trial court a complete record from the arbitration, including a transcript of the witness testimony on which it relies for its claims, it nevertheless contends that the court should have vacated the award on public policy grounds. In its view, the trial court erred by failing to undertake a de novo review of the arbitration award. The plaintiff counters that the defendant failed to demonstrate to the trial court that the award violates public policy and that, on appeal, the defendant relies entirely on evidence from the arbitration that was never submitted to the trial court. We agree with the plaintiff.

We first set forth our standard of review and the legal principles governing a claim that an arbitration award violates public policy. Our Supreme Court has "consistently stated that arbitration is the favored means of settling differences and arbitration awards are generally upheld unless an award clearly falls within the proscriptions of [General Statutes] § 52-418[6] . . . . A challenge of the arbitrator's authority is limited to a comparison of the award to the submission. . . . Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . .

"In spite of the general rule that challenges to an arbitrator's authority are limited to a comparison of the award to the submission, an additional challenge exists under § 52-418 (a) (4) when the award rendered is claimed to be in contravention of public policy. . . . This challenge is premised on the fact that the parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them. . . . When a challenge to the arbitrator's authority is made on public policy grounds, however, the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award. . . . Accordingly, the public policy exception to arbitral authority should be narrowly construed and [a] court's refusal to enforce an arbitrator's interpretation of [the contract] is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. . . . *The party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated.* . . . Therefore, given the narrow scope of the public policy limitation on arbitral authority, [*a party*] *can prevail* [*on that basis*] *only if it demonstrates that the* [*arbitrator's*] *award clearly violates an established public policy mandate.* . . .

"In *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 429, 747 A.2d 1017 (2000), [our Supreme Court] held that, where a party challenges a consensual arbitral award on the ground that it violates public policy, and where that challenge has a legitimate, colorable basis, de novo review of the award is appropriate in order to determine whether the award does in fact violate public policy. [It] also stated in *Schoonmaker*, however, that, [b]y no means should our decision be viewed as a retreat of even one step from our position favoring arbitration as a preferred method of dispute resolution. . . . [O]ur faith in and reliance on the arbitration process remains undiminished, and we adhere to the long-standing principle that findings of fact are ordinarily left undisturbed upon judicial review. . . . We conclude only that as a reviewing court, we must determine, pursuant to our plenary authority and giving appropriate deference to the arbitrator's factual conclusions, whether the [contract] provision in question violates those policies. . . . Thus, [the] court held that it would not substitute its judgment for the judgment of the arbitrator with respect to the meaning of the contract. . . .

"It is clear, therefore, that . . . *Schoonmaker* is in no way inconsistent with the principle that, [w]hen a

challenge to the arbitrator's authority is made on public policy grounds . . . the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award. . . . Thus, when the issue before the arbitrator involves the interpretation of [an] agreement, the court presumes the correctness of the arbitrator's interpretation, even when the award implicates some public policy. . . . Accordingly, the sole question that the court must decide, in the exercise of its plenary power to identify and apply the public policy of this state . . . is whether, under the arbitrator's presumptively correct interpretation of the contract, the *contract provision* violates a well-defined and dominant public policy. . . .

"The courts employ a two-step analysis . . . [in] deciding cases such as this. First, the court determines whether an explicit, well-defined and dominant public policy can be identified. If so, the court then decides if the arbitrator's award violated the public policy." (Citations omitted; emphasis altered; footnote added; internal quotation marks omitted.) *State* v. *AFSCME, Council 4, Local 391*, 309 Conn. 519, 526–29, 69 A.3d 927 (2013).

In this case, the arbitrator found that the liquidated damages provision satisfies the requirements for enforceability under Connecticut law. In the trial court and on appeal, the defendant argues that the arbitrator was wrong and that the award violates public policy because the liquidated damages provision constitutes an unenforceable penalty and the plaintiff suffered no actual damages. We disagree.

Although an arbitration award that enforces a penalty clause violates public policy; see generally *HH East Parcel, LLC* v. *Handy & Harman, Inc.*, 287 Conn. 189, 205, 947 A.2d 916 (2008); a liquidated damages clause is not an unenforceable penalty "if three conditions are satisfied: (1) The damage which was to be expected as a result of a breach of the contract was uncertain in amount or difficult to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable in the sense that it was not greatly disproportionate to the amount of the damage which, as the parties looked forward, seemed to be the presumable loss which would be sustained by the contractee in the event of a breach of the contract." (Internal quotation marks omitted.) Id. "In determining whether any particular provision is for liquidated damages or for a penalty, the courts are not controlled by the fact that the phrase 'liquidated damages' or the word 'penalty' is used." *Berger* v. *Shanahan*, 142 Conn. 726, 731–32, 118 A.2d 311 (1955).

The defendant argues that the liquidated damages provision at issue was an unenforceable penalty because the plaintiff's president testified during the arbitration that he wanted there to be a penalty for the

defendant if it continuously delayed installing the solar panels; the amendment "was the product of threats and verbal assaults that occurred more than a year and a half after the contract was signed"; the amount that the plaintiff's president proposed, $200 per day, was divorced from any calculation of potential damages; and the plaintiff "intended for the . . . penalty to continue even after [it] no longer owned any of the relevant condominium units . . . ." The plaintiff, on the other hand, contends that the defendant's claims are not reviewable because the defendant failed to provide the trial court with any transcripts of the arbitration testimony or a copy of the liquidated damages provision itself. The plaintiff argues that the defendant's claims also fail on the merits because the liquidated damages provision was not a penalty, arguing the damages resulting from the ongoing delay—reputational harm, loss of marketability of real estate, lower assessment of property values, and postsale customer dissatisfaction—were uncertain in amount at the time the parties amended the agreement.

As the party seeking to vacate the award on public policy grounds, the defendant bears the burden of demonstrating its claim that the award was made pursuant to an unenforceable penalty and that the plaintiff suffered no actual damages. See *State* v. *AFSCME, Council 4, Local 391*, supra, 309 Conn. 527 ("The party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated. . . . Therefore, given the narrow scope of the public policy limitation on arbitral authority, [a party] can prevail [on that basis] only if it demonstrates that the [arbitrator's] award clearly violates an established public policy mandate." (Internal quotation marks omitted.)). On the basis of our review of the record, it is clear that the defendant failed to submit to the trial court a sufficient record to prevail on its claim. It failed, for instance, to provide the court with a copy of the liquidated damages provision, which was set forth in an email between the parties. And, although it relies almost entirely on the testimony of witnesses who testified at the arbitration to support its claims, it failed to provide the court with a transcript from the arbitration proceedings. Indeed, it is undisputed that the proceedings were not transcribed.

On appeal, the defendant, in advancing its claim that the arbitration award violates public policy and that the trial court erred by failing to undertake a de novo review of the award, argues that the court erred when it denied (1) its request for an evidentiary hearing for the purpose of introducing new evidence, including live witness testimony, directly to the trial court; and (2) the opportunity to submit to the court the complete arbitral record. It also argues that, even in the absence of such evidence, there was sufficient evidence in the record for the court to have concluded that the award

violates public policy. We disagree and address each argument in turn.

First, the defendant argues that it was entitled to an evidentiary hearing in this case because the arbitrator made no subordinate findings of fact in connection with his conclusion that the liquidated damages provision "satisfies the requirements for enforceability under Connecticut law." This claim is unavailing. If the defendant intended to challenge the arbitrator's finding concerning the enforceability of the liquidated damages provision, it should have asked the arbitrator to articulate the basis for that conclusion. See, e.g., *Arvys Protein, Inc.* v. *A/F Protein, Inc.*, 219 Conn. App. 20, 26, 293 A.3d 899 (noting that arbitration award challenger "did not make any requests to the arbitrator to clarify or articulate the award"), cert. denied, 347 Conn. 905, 297 A.3d 198 (2023). Alternatively, it could have asked the trial court to order the arbitrator to make such an articulation. See, e.g., *Stutz* v. *Shepard*, 279 Conn. 115, 122, 901 A.2d 33 (2006) (trial court remanded award to arbitrator for articulation). The defendant did neither.

Moreover, the defendant fails to cite any relevant authority in support of its argument that, in the absence of such findings by the arbitrator, the trial court was required, or even permitted, to conduct an evidentiary hearing for the purpose of making its own findings of fact relative to the defendant's public policy challenge to the award. Our courts have made clear that a de novo review of an award in the context of a public policy challenge does not involve a trial court conducting an evidentiary hearing. See *HH East Parcel, LLC* v. *Handy & Harman, Inc.*, supra, 287 Conn. 201 n.11 ("[t]o the extent that the defendant claims that factual determinations by the arbitrators must be reviewed anew by a trial court reviewing a public policy claim . . . we already have rejected that proposition as an invitation to turn public policy challenges into the arbitration equivalent of a mulligan by inviting de novo factual review of illegal contract issues" (internal quotation marks omitted)). Rather, the court must conduct a de novo review of the arbitration award based on the record of the arbitration. See id., 201 ("[t]he legal determination of whether a particular award violates public policy *necessarily depends on the facts found by the arbitrator* during those proceedings" (emphasis in original; internal quotation marks omitted)). It is incumbent on the party challenging an award to furnish the court with an adequate record to resolve such a claim. See *Stutz* v. *Shepard*, supra, 279 Conn. 125.

The defendant's second argument—that the trial court improperly denied it the opportunity to submit the complete arbitral record—also fails. The court's November 9, 2021 order gave the defendant ample opportunity to submit the arbitral record in advance of oral argument.[7] That order required the parties to sub-

mit memoranda of law prior to oral argument. The defendant complied with that order and included a 202 page appendix with its memorandum. The order thus gave both parties sufficient opportunity to submit materials from the arbitration and notice that the court would potentially decide their respective applications on the same date that it heard oral argument. We therefore reject the defendant's claim that the court erroneously precluded it from supplementing the record with additional materials from the arbitral record.

In addition, on the basis of the defendant's claims in the trial court and on appeal, we conclude that, even if we assumed, arguendo, that the defendant was improperly precluded from submitting a complete record of the arbitration proceedings, any such error would be harmless. The defendant's challenge to the liquidated damages provision relies primarily on the testimony of witnesses during the arbitration. As already noted, however, it is undisputed that the arbitration proceedings were not transcribed. Thus, the defendant would still be incapable of proving the claims asserted.

Finally, the defendant cites *State* v. *AFSCME, Council 4, Local 391*, supra, 309 Conn. 519, for the proposition that, even in the absence of any transcripts, the record in this case was sufficient to support his claim. In *AFSCME, Council 4, Local 391*, the state, which was a party to the underlying arbitration proceedings, failed to provide the court with arbitration transcripts. Id., 536 n.12. Instead, it provided the court with a letter that it had sent to the Office of the Attorney General summarizing the testimony elicited at the arbitration; id., 535; and the parties did not dispute that the letter accurately described the testimony given at the arbitration. Id., 536 n.12. Our Supreme Court concluded that this letter set forth testimony that was presented to the arbitrator and that the letter, in conjunction with the arbitration award, created a sufficient record for the trial court to determine that the award violated public policy and, accordingly, to vacate it. Id.

This case is readily distinguishable from *AFSCME, Council 4, Local 391*. Unlike in *AFSCME, Council 4, Local 391*, where the party challenging the arbitration award provided a letter that accurately summarized the evidence presented to the arbitrator; id., 535–37 n.12; the defendant in this case did not provide the trial court with anything resembling an undisputed summary of the evidence before the arbitrator. Instead, the defendant made bare assertions to the trial court about the nature of the evidence from the arbitration and now repeats those same assertions in its appellate brief. The plaintiff also does not concede that the assertions the defendant relies on represent a complete and accurate record of the evidence that the arbitrator heard. On the contrary, the plaintiff contends that the record here is inadequate

to review that claim because the defendant failed to submit transcripts from the arbitration. The plaintiff also argues that, even if the court were to accept the defendant's representations of the evidence supporting its position, additional evidence was presented during the arbitration that supported the arbitrator's determination that the liquidated damages clause is enforceable. Under these circumstances, we conclude that the defendant's characterization of the evidence before the arbitrator is an insufficient substitute for the complete arbitral record. See *State* v. *Santangelo*, 205 Conn. 578, 585, 534 A.2d 1175 (1987) ("[r]epresentations of counsel . . . are not evidence upon which we can rely"); see also *Stutz* v. *Shepard*, supra, 279 Conn. 128 ("[W]e do not decide issues of law in a vacuum. In order to review an alleged error of law that has evidentiary implications, we must have before us the evidence that is the factual predicate for the legal issue that the appellant asks us to consider." (Internal quotation marks omitted.)).

In the absence of a record supporting the defendant's claim that the award violates public policy, we conclude that the court properly rejected that claim. As a result, the defendant's claim that the award violates public policy fails.

II

The defendant also claims that the arbitrator exceeded his authority under the arbitration provisions of the agreement because (1) the arbitrator instructed the parties to submit multiple proposals, (2) the plaintiff's arbitration demand did not conform to the requirements of the arbitration agreement, and (3) the arbitrator selected a proposal that was outside the scope of the submission. We address those claims in turn.

A

The defendant first argues that the arbitrator deviated from the procedures set forth in the agreement by allowing the parties to submit separate proposals for each claim. It argues that, "when the arbitrator instructed the parties to each submit two separate proposals, the [defendant] objected and demanded that the arbitrator follow the agreement's call for one proposal from each party. The arbitrator overruled the [defendant's] objection. In response, the [defendant] argued that it should, at the very least, have the right to submit separate proposals for each distinct count of its counterclaim. Again, the arbitrator overruled the [defendant's] objection—stating that the [defendant] would have to make the 'difficult' decision as to which claim it would be pursuing."

As with the defendant's public policy claim, this claim is predicated on bare and unsupported assertions in its appellate brief. "Representations of counsel, however, are not evidence upon which we can rely in our review of the [arbitrator's] conduct." *State* v. *Santangelo*,

supra, 205 Conn. 585. As discussed in part I of this opinion, the defendant failed to provide a record, including transcripts, of the arbitration proceedings to the trial court. Because there is no record of the defendant raising these objections at the arbitration, the defendant has failed to produce evidence sufficient to invalidate the arbitrator's award on this ground. See *Stutz* v. *Shepard*, supra, 279 Conn. 126–27 (in absence of transcripts from arbitration, plaintiff "failed to [produce] evidence sufficient to invalidate the arbitrator's award" (internal quotation marks omitted)).

B

The defendant next argues that the plaintiff's arbitration demand failed to comply with the requirements set forth in the agreement because it failed to set forth the facts and circumstances surrounding the dispute or the obligation that the defendant breached. We decline to consider this argument because it is inadequately briefed.

"[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 748, 183 A.3d 611 (2018); see also *Parnoff* v. *Stratford*, 216 Conn. App. 491, 506, 285 A.3d 802 (2022). Here, in its appellate brief, the defendant dedicated just two paragraphs to this argument, both devoid of any legal citations or analysis. Accordingly, we decline to review this claim because it has been abandoned by virtue of the defendant's failure to adequately brief it.

C

The defendant next argues that the arbitrator exceeded the scope of his powers by selecting a proposal that was outside the scope of the submission made to him.[8] We disagree.

The defendant argues that "[b]oth the [plaintiff's] demand for arbitration and its letter summarizing its claims limited the dispute to a claim for 'a $200 per diem penalty for every day work was not completed after [January 28, 2018].' In order to be within the scope of the submission, any damages award must have been the result of the application of the liquidated damages clause to a specified number of days determined by the evidence before the arbitrator."

The language of the agreement, however, does not support the defendant's claim. Although the defendant correctly notes that the plaintiff's demand focused on

the liquidated damages provision—namely, whether the defendant's inactions triggered the liquidated damages provision and, if so, the amount of damages to which the plaintiff was entitled—it ignores the terms of the agreement requiring the arbitrator to select "only one of the two proposals submitted by the [p]arties." After reviewing the arbitration award, we are satisfied that the arbitrator did not exceed the scope of his powers because he selected one of the two proposals before him on each of the claims. Specifically, the arbitrator selected the plaintiff's proposal for the claim and counterclaim and awarded damages accordingly. We therefore cannot conclude that the arbitrator exceeded the scope of his powers; the arbitrator did precisely what the agreement required.

III

The defendant's final claim on appeal is that the arbitrator manifestly disregarded the law in selecting a proposal that was not supported by any legal or factual basis. The plaintiff argues that the defendant failed to adequately brief this claim, noting that the defendant devoted less than one and one-half pages to the claim, cited no legal authority other than a case detailing the elements of manifest disregard, and provided only a cursory explanation of why those elements are met here. We agree with the plaintiff that the defendant's claim is inadequately briefed and, accordingly, deem this claim abandoned. See *MacDermid, Inc.* v. *Leonetti*, supra, 328 Conn. 748 ("[w]here a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned" (internal quotation marks omitted)).

The judgments are affirmed.

In this opinion the other judges concurred.

[1] As explained subsequently in this opinion, each party commenced a separate action in the judicial district of Fairfield. In docket number CV-21-6110418-S, Fraser Lane Associates, LLC, is the plaintiff, and Chip Fund 7, LLC, is the defendant. In docket number CV-21-6110217-S, Chip Fund 7, LLC, is the plaintiff, and Fraser Lane Associates, LLC, is the defendant. For convenience, we refer to Fraser Lane Associates, LLC, as the plaintiff and to Chip Fund 7, LLC, as the defendant.

[2] Section 23 (c) (5) of the agreement states: "Upon ten (10) days of completion of the hearing conducted by the [arbitrator], each [p]arty shall submit to the [arbitrator] its proposal for resolution of the dispute. The [arbitrator] in its award shall be limited to selecting only one of the two proposals submitted by the [p]arties. The award shall be in writing (stating the amount and reasons therefore) and shall be final and binding upon the [p]arties, and shall be the sole and exclusive remedy between the [p]arties regarding any claims and counterclaims presented to the [arbitrator]. The [arbitrator] shall be permitted, in [his] discretion, to add pre-award and post-award interest at commercial rates. Judgment upon any award may be entered in any court having jurisdiction."

[3] Section 23 (c) (2) of the agreement provides that "[t]he [p]arty initiating the [a]rbitration . . . shall submit such [d]ispute to arbitration by providing a written demand for arbitration to the other [p]arty . . . which demand must include statements of the facts and circumstances surrounding the dispute, the legal obligation breached by the other [p]arty, the amount in controversy and the requested relief, accompanied by all relevant documents supporting the [d]emand."

[4] These documents, along with the arbitration award that the defendant attached to its initial motion to vacate, are the only record of the arbitration proceedings that the defendant provided to the trial court. Nevertheless, when the defendant filed its appellate brief with this court, it included a 739 page appendix comprised of 55 items, most of which were never submitted to the trial court. On August 30, 2022, the plaintiff filed a motion to strike 39 exhibits—more than 500 pages—of the defendant's appendix on the basis that the defendant never submitted those documents in the trial court. This court granted that motion on October 5, 2022, and ordered the defendant to file a substitute brief and appendix.

[5] The arbitrator concluded that the liquidated damages provision, which the parties agreed to after entering into the original agreement, was an amendment to the agreement. Neither party challenged that conclusion in the trial court or in this appeal.

[6] General Statutes § 52-418 provides in relevant part: "(a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been 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 action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. . . ."

[7] We note that the defendant also could have appended the arbitration record to its initial application to vacate.

[8] On appeal, the defendant makes passing suggestions in its brief that the submission at issue was restricted, without explaining why that is material. We conclude that determining whether the submission is restricted or unrestricted would be a purely academic exercise in this case.

"The significance . . . of a determination that an arbitration submission was unrestricted or restricted is not to determine what [the arbitrator is] obligated to do, but to determine the scope of judicial review of what [he has] done." (Internal quotation marks omitted.) *LaFrance* v. *Lodmell*, 322 Conn. 828, 851–52, 144 A.3d 373 (2016). When a "submission is deemed restricted . . . [courts] engage in de novo review"; *Office of Labor Relations* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 288 Conn. 223, 229, 951 A.2d 1249 (2008); whereas, "[u]nder an unrestricted submission, the [arbitrator's] decision is considered final and binding; thus the courts will not review the evidence considered by the [arbitrator] nor will they review the award for errors of law or fact." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, 331 Conn. 524, 531, 205 A.3d 552 (2019). However, "[i]f a party specifically contends . . . that the arbitrator's award does not conform to an unrestricted submission in violation of § 52-418 (a) (4), we engage in what we have termed in effect, de novo judicial review." (Internal quotation marks omitted.) *Office of Labor Relations* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, supra, 229. Here, the defendant claims that the award exceeds the scope of the submission. "Therefore, regardless of whether we engage in a threshold inquiry of whether the submission is restricted or unrestricted, the standard of review of and considerations related to the ultimate issue are essentially the same." Id., 231. Accordingly, we need not determine whether the submission was restricted or unrestricted in this case because de novo review applies regardless. See id., 230 ("[i]n light of . . . the issue presented in this case . . . the typical threshold question of whether the submission is restricted or unrestricted is academic").