

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

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In the Matter of the Arbitration of Certain
Controversies Between

PETRY HOLDING, INC.,

Petitioner,

-against-

THE RURAL MEDIA GROUP, INC.,

Respondent.

Index No. 651578/11
Motion Date: 10/18/2011
Motion Seq. Nos.: 001, 002

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BRANSTEN, J.

Motion Sequence Nos. 001 and 002 are consolidated for disposition. Petitioner Petry Holding, Inc., (“Petry”) petitions the court in Motion Sequence No. 001 to confirm an arbitration award pursuant to CPLR § 7510. Respondent The Rural Media Group, Inc., (“Rural”) moves in Motion Sequence No. 002 to dismiss the petition to confirm the arbitration award and to vacate the award. Petry opposes.

I. Background

Rural is a media company that runs several television channels. On January 23, 2008, Rural and Petry entered into a “Representation Agreement” by which Rural hired Petry to sell Rural’s inventory of advertising time. Affidavit of John K. Crossman in Support of Motion to Dismiss Petition to Confirm Arbitration Award, and Vacate Award (“Crossman Aff.”), Ex. B (the “Agreement”), p. 1. The Agreement specified that “[a]ny dispute that cannot be resolved amicably shall be settled by final binding arbitration in accordance with

the rules of the American Arbitration Association.” *Id.* at p. 3.

A dispute arose between the parties regarding commissions that Petry claimed Rural owed it pursuant to the Agreement. Affidavit of Richard G. Tashjian in Opposition to Respondent’s Motion to Dismiss Petition and to Vacate Arbitration Award (“Tashjian Aff.”), p. 4. On or about August 18, 2010, Petry filed and served upon Rural a “Demand of Arbitration.” Verified Petition (“Petition”), Ex. D, p. 1.

Jeff Stevens was one of the individuals included on Rural’s list of witnesses for the arbitration hearing. Tashjian Aff., Ex. E, p. 1. Stevens was a former Petry employee who was closely involved with the negotiation and execution of the Agreement. Tashjian Aff., Ex. B, p. 1. According to Rural, “Mr. Stevens [was] one of the most valuable witnesses that could be called at [the arbitration] proceeding, since he is not only an eye-witness and a key participant in the central events – the signing of the Agreement and the addendum [thereto] – but he is a non-party with no personal stake in the outcome.” *Id.* at p. 2. As per common practice in arbitrations, Rural requested that the arbitration panel issue a subpoena for Stevens. Tashjian Aff., Ex. H, p. 1. The arbitration panel subpoenaed Stevens on May 5, 2011. *Id.*

Stevens was scheduled to testify for Rural on the final day of the arbitration hearing. Tashjian Aff., p. 6. That morning, Rural informed Petry that it did not intend to call Stevens as a witness. Tashjian Aff., Ex. I, p. 1. Petry responded that, if Rural declined to call Stevens, Petry wished to call him as a rebuttal witness. Crossman Aff., Ex. I, p. 6. The

chairman of the arbitration panel stated that, although Petry had decided not to call Stevens, “the panel would like to get Mr. Stevens’ testimony. We think that it might be significant. He was a central actor in things, and so we would like if at all possible to have him here.” *Id.* at p. 11. Rural then called Stevens to inform him that he was to testify before the arbitration panel. *Id.*

The arbitration panel called Stevens to testify. Rural conducted the direct examination of Stevens. Petry did not cross-examine. Tashjian Aff., p. 13; *see also* Tashjian Aff., Ex. G. The arbitration panel also briefly questioned Stevens following Rural’s direct examination. Tashjian Aff., p. 13; *see also* Tashjian Aff., Ex. G.

On January 3, 2011, the arbitration panel found in favor of Petry and awarded it \$1,948,186 plus interest.

Rural now seeks to vacate the arbitration award. Rural argues that the arbitration panel exceeded its authority under the American Arbitration Association (“AAA”) rules when it called Stevens to testify. Respondent’s Memorandum of Law in Support of Motion to Dismiss Petition to Confirm Arbitration Award, and Vacate Award (“Rural Memo.”), pp. 5-10.

II. Standard of Law

The court has limited power to overturn an arbitration award. *Azrielant v. Azrielant*,

301 A.D.2d 269, 275 (1st Dep’t 2002).

Unless the arbitration agreement provides otherwise, an arbitrator is not bound by principles of substantive law or by rules of evidence but may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and his award will not be vacated unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power. . . . Even where an arbitrator makes errors of law or fact, a court may not undertake to conform the award to its sense of justice. . . .

Consistent with the public policy in favor of arbitration, the grounds for vacating an arbitrator’s award as set forth in CPLR 7511 (b) are few in number and are narrowly applied. Only if a party’s rights were prejudiced by corruption, fraud or misconduct, bias, excess of power or procedural defects should an award be vacated.

Id.

III. Analysis

Rural claims that the arbitration panel committed a prejudicial procedural defect by calling Stevens as a witness. Rural argues that the panel’s actions violated the AAA Rules.

AAA Rule 31(a) provides that the parties “shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary.” Crossman Aff., Ex. C, p. 7. AAA Rule 31(d) states that “[a]n arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.” *Id.*

“[T]here is no question that arbitrators, who are entrusted with deciding an increasing number of disputes in our society, are among those who are statutorily authorized to issue subpoenas, whether ad testificandum or duces tecum.” *In the Matter of Reuters Limited v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 341 (1st Dep’t 1997). CPLR § 7505 provides that “[a]n arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas.”

The law is clear that an arbitration panel may subpoena a witness of its own accord or by request of a party, and that the parties are to produce all evidence the arbitration panel deems necessary to render its decision. Rural interprets Rule 31(d) as prohibiting the arbitration panel from independently issuing subpoenas. Rural contends that New York does not have a statute specifically granting arbitrators the power to call witnesses if the parties have not requested the arbitrators to do so. Tr. 21:20-26, 22:1-19.

The question of whether arbitrators have the power to independently subpoena witnesses under Rule 31(d) has not arisen in New York. Presumably, this is due to the fact that arbitrators have subpoena power under multiple provisions of the CPLR and under its predecessor, the Civil Practice Act. However, this issue has been addressed in states where arbitrators lack subpoena power. For example, prior to 1983, and in contrast to New York, Pennsylvania arbitrators presiding over common-law, as opposed to statutory, arbitrations had no power of subpoena. *The Sports*

Factory, Inc. v. Ridley Park Assoc., 31 Pa. D. & C.3d 16 (1983). Accordingly, common-law arbitrators in that state could not subpoena witnesses under AAA Rule 31(d). *Id.* Statutory arbitrators, on the other hand, could subpoena witnesses under Rule 31(d) because Pennsylvania's arbitration statute explicitly granted them subpoena power. *Id.*

Rural provides, and the court is able to find, no support or precedent aligned with Rural's reading of Rule 31(d) as prohibiting New York arbitrators from independently subpoenaing witnesses. Rule 31(d) states that arbitrators authorized by law to issue subpoenas may exercise that power independently or at the request of the parties. This reading of the rule comports with the actual language of the rule and with the broad powers with which the AAA Rules endow arbitrators. The AAA Rules exempt arbitrators from the rules of evidence that constrain judges, and permit arbitrators to require the parties to produce evidence "the arbitrator may deem necessary to an understanding and determination of the dispute." AAA Rule 31(a). Given that Rule 31(a) grants arbitrators the authority to independently demand the production of evidence not otherwise proffered by the parties, the most logical reading of Rule 31(d) is that it permits arbitrators to independently subpoena witnesses, provided that the arbitrators are "authorized by law" to issue subpoenas. In New York, arbitrators are authorized to issue subpoenas under CPLR § 7505.

Rural next argues that the arbitrators conducted a prejudicial and impermissible

“independent investigation” of the facts of the case. Rural is correct in that “[a]rbitrators may not base their award on ex parte discussions or independent investigation unless authorized to do so by the parties.” *Jelenevsky v. Leonakis*, 234 A.D.2d 548, 548 (2d Dep’t 1996). The arbitrators in this case, however, did not engage in ex parte discussions or independent investigation. Rural does not allege that the arbitrators based their decision on any facts adduced outside of the arbitration hearing. Furthermore, the arbitrators did not seek out Stevens. Rural included him on its witness list and insisted that Stevens’ testimony was indispensable. Rural, and not the arbitrators, conducted direct examination of Stevens. Rural has provided no facts that show the arbitrators conducted any improper investigations. Rural’s motion to dismiss the petition to confirm the arbitration award and to vacate the award is therefore dismissed.

IV. Conclusion

For the reasons set forth above, it is hereby

ORDERED that respondent The Rural Media Group, Inc.’s motion to dismiss the petition to confirm the arbitration award and vacate the award, Motion Sequence No. 002, is denied; and it is further

ADJUDGED that the petition to confirm the arbitration award, Motion Sequence No. 001, is granted and the award rendered in favor of petitioner and against respondent is confirmed; and it is further

ADJUDGED that petitioner Petry Holding, Inc., by and through its counsel, Tashjian & Padian, having an address at 15 West 36th Street, New York, NY 10018, do recover from respondent The Rural Media Group, Inc., by and through its counsel, Zuckerman Gore Brandeis & Crossman, LLP, having an address at 875 3rd Avenue, New York, NY 10022, the amount of \$ 1,948,186, plus interest at the statutory rate from the date of January 3, 2011, as computed by the Clerk in the amount of \$_____, together with costs and disbursements in the amount of \$_____ as taxed by the Clerk, for the total amount of \$_____, and that the petitioner have execution therefor.

Settle judgment.

Dated: New York, New York
April 25, 2012

ENTER:

/s/
Hon. Eileen Bransten, J.S.C.