

**Matter of C.G. Jung Inst. of N. Y. v C.G.
Jung Found. for Analytical Psychology, Inc.**

2008 NY Slip Op 30873(U)

March 24, 2008

Supreme Court, New York County

Docket Number: 0112657/2007

Judge: Kibbie F. Payne

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

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

In the Matter of the Application of
C.G. JUNG INSTITUTE OF NEW YORK

INDEX NO. 112657/07

MOTION DATE 11-14-07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

C.G. JUNG FOUNDATION FOR ANALYTICAL
PSYCHOLOGY, INC.,

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, the petition and cross-motion are to be decided as indicated.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: March 24, 2008


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 4

-----X
In the Matter of the Application of

C.G. JUNG INSTITUTE OF NEW YORK,

Petitioner,

Index No.: 112657/07

-against-

Judgment/Decision

C.G. JUNG FOUNDATION FOR ANALYTICAL
PSYCHOLOGY, INC.,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
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appear in person at the Judgment Clerk's Desk (Room
141B).

Respondent

KIBBIE F. PAYNE, J.:

C.G. Jung Institute of New York petitions this court,
pursuant to CPLR 7510, to confirm an arbitration award issued in
Matter of the Arbitration between C.G. Jung Foundation for
Analytical Psychology, Inc., Claimant, and C.G. Jung Institute of
New York, Respondent, AAA Case No. 13 115 E 01491 on July 12,
2007.

Respondent C.G. Jung Foundation for Analytical Psychology,
Inc. cross-petitions the court for vacatur of paragraph 3 of the
Award, a provision which prevents respondent from hiring
individuals who belong to the Jungian Psychoanalytic Association,
a rival organization of the petitioner, for programs held at the
building in which both parties jointly occupy. Respondent argues
that paragraph 3 of the Award must be vacated pursuant to CPLR
7511(b)(1)(iii), contending that the arbitrator placed an
irrational construction on the parties' Building Agreement and,

in effect, made a new contract for the parties. Respondent also argues that paragraph 3 of the Award is totally irrational because the provision ignores key and undisputed evidence adduced at the hearing, and will, if allowed to stand, compromise respondent's mission, threaten its financial viability. Finally, respondent contends that this provision of the Award violates public policy.

For the reasons stated herein, the petition is granted, the cross petition denied, and the Award confirmed in all respects.

The Jung Foundation (Foundation) is a not-for-profit corporation and the owner of a building located at 28 East 39th Street, New York, New York, known as the C.G. Jung Center (Center). The building also houses the respondent, Jung Institute (Institute), and three other organizations dedicated to the teaching of psychologist Carl Gustav Jung.¹ The Foundation's mission is to educate the general public about C.G. Jung's ideas by means of lectures, programs, courses and literature. The Institute is a not-for-profit educational institution chartered by the Board of Regents of the State of New York; its mission is to train individuals to be certified Jungian analysts and it

¹The three other organizations are the Archive for Research and Archetypal Symbolism which maintains a research library of art, the New York Association for Analytical Psychology, which is a professional organization for Jungian analysts, and the Analytical Psychology Club of New York, Inc., which also maintains a library at the Center.

operates a professional clinical training program in analytical psychology. Testimony at the arbitration hearing showed that outreach by each organization at the Center benefitted all, by attracting interest in Jungian thought and professional training.

In the Summer of 2003, a bitter dispute arose among members of the Institute, resulting in the departure of some members from that organization, who then created a rival Jungian training organization called the Jungian Psychoanalytic Association (JPA).

In the meantime, the five Jungian organizations located at the Center have been operating pursuant to a Building Agreement dated September 28, 1998 which provides, among other things, for the sharing of the costs of operating and maintaining the building. After this dispute arose between the Foundation and the Institute, and the latter stopped paying its allocable share of costs and expenses, the Foundation commenced arbitration against the Institute in June 2006. All of the other issues raised during the arbitration have now been resolved, leaving only the Foundation's objection to paragraph 3 of the Award.

Among the faculty the Foundation has been using for teaching its programs at the Center are analysts who left the Institute and are now members of the JPA. The Institute based one of its counterclaims in the arbitration on its objection to the Foundation's right to hire these JPA members to teach at the Center. The Institute argued that this practice violated the

following provision of the Building Agreement which provides, in relevant part:

12. Collaborative Program Committee

. . . All Parties agree not to undertake any activity or program that would compromise the integrity or mission of any of the individual organizations.

(Petitioner's Exhibit B at 2)

The arbitrator agreed with the Institute on this point, explaining her reasoning as follows:

With respect to the JPA faculty, I am persuaded that the Foundation's continued use of JPA members to teach courses at the Center does compromise the mission of the Institute, which is in competition with the JPA for applicants in an extremely small pool. The testimony at the hearing was persuasive, and common sense suggests, that JPA members teaching courses on Center soil will naturally inspire interest in their particular Jungian organization and become role models and sources of information for the students; the testimony established that this has in fact occurred. Although the Foundation's efforts to address the Institute's concerns were well-intended and not insubstantial, I conclude that they are not sufficient. Members of the JPA chose to sever their ties with the Institute and all of the benefits associated with it, including the Institute's synergistic relationship with the Foundation and the Center. Accordingly, JPA members have no entitlement to continued affiliation with the Foundation, and the [Building] Agreement mandates that the Foundation refrain from activity that is harmful to the Institute.

(Petitioner's Exhibit A at 2)

In objecting to paragraph 3 of the Award, the Foundation contends that a significant part of its income comes from people paying to attend its classes and workshops. The faculty chosen by the Foundation for its courses after the split include

analysts who had been members of the Institute, but are now associated with the JPA. These professionals have been teachers of Foundation programs for many years, and, in fact, the Foundation contended at the arbitration that approximately half of the pool of the Foundation's potential faculty are now members of the JPA. It further contended that among the JPA faculty members are some of the best teachers, i.e, those who have the largest draw, meaning that they offer the most successful programs and generate the most income for the Foundation. The Foundation's programs would allegedly be "much weaker" because it would lose half of its faculty, causing a "significant financial impact" because some of the JPA faculty are the most popular teachers, and thus compromising the integrity and mission of the Foundation.

The Foundation argues that nothing in paragraph 12 of the Building Agreement gives a signatory the right to impede another organization in a manner which compromises that organization's mission. Citing a document drafted by the president of the Foundation on May 23, 1997 to address concerns raised by dissenters regarding the meaning of paragraph 12, the Foundation contends that the signatories were told that "The other organizations have no more a veto over the Foundation's programs than the Foundation has over their programs." (Nachman Affirmation at 8) According to the Foundation, the arbitrator

added such a veto power to the Building Agreement and used it to allow the Institute to determine who can and cannot teach on behalf of the Foundation.

Finally, the Foundation contends that the arbitrator ignored key and undisputed evidence in reaching what it contends is a totally irrational conclusion that the Institute's mission is being compromised by the use of JPA members as teachers, because the two organizations are not true competitors and there was no hard evidence that the Institute has, since the split, lost potential analysands (patients) or students for its training program.

In response, the Institute contends that the relief the Foundation seeks to challenge was the very heart of the arbitration and the single, most important aspect of the relief the Institute obtained. The Institute further contends that the meaning of paragraph 12 of the Building Agreement was conceded -- each signatory was prohibited from taking any act that would compromise the mission or integrity of any other signatory organization. It further claimed that the Foundation did not seriously deny that its hiring of JPA members did compromise the mission of the Institute, but that it chose to defend the arbitration by claiming that not using the teachers would compromise its own mission, a claim that the Institute argues was not substantiated. Finally, the Institute contends that the

Foundation's cross-petition is based on a one-sided rehashing of its own self-serving testimony at the hearing, that every one of the alleged facts it claims the arbitrator failed to adopt was hotly contested, and that the Foundation has failed to articulate any constitutional, statutory or common law of this state or any identifiable public policy embodied in statute or decisional law that the Award violates.

An arbitration award may be set aside on the ground that the arbitrator "exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made." CPLR 7511(b)(1)(iii). An award will not be vacated "unless it is violative of a strong public policy, is totally irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power." (See Matter of Town of Callicoon (Civil Serv. Empls. Assn., Inc., Town of Callicoon Unit), 70 NY2d 907, 909 [1987]; see also Matter of United Fed. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of New York, 1 NY3d 72, 79 [2003]; Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York, 94 NY2d 321, 326-328 [1999]).

An arbitrator is charged with the interpretation and application of the parties' agreement (see New York City Transit Auth. v Transport Workers' Union of America, Local 100, AFL-CIO, 6 NY3d 332, 336 [2005]; Matter of Town of Callicoon, 70 NY2d at

909 [1987])). A court cannot substitute its judgment for that of the arbitrator simply because the court believes its interpretation of the contract is superior to that of the arbitrator, even where the latter has made errors of judgment or fact (see Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d 471, 479-81, cert dismissed 127 S Ct 34 [2006]; Matter of New York State Correctional Officers & Police Benevolent Assn., Inc., 94 NY2d at 326 [1999]; Albany County Sheriff's Local 775 of Council 82, AFSCME, AFL-CIO v County of Albany, 63 NY2d 654, 656 [1984])). The award can only be set aside by this court if the arbitrator exceeded her power by giving "a totally irrational construction to the contractual provision[] in dispute and, thus, makes a new contract for the parties." [see Riverbay Corp. v Local 32-E, 91 AD2d 509, 510 [1st Dept 1982]; see also National Cash Register Co. v Wilson, 8 NY2d 377, 383 [1960]]).

The Foundation argues that the arbitrator made a new contract for the parties which gives the Institute a veto power over who can and cannot teach on behalf of the Foundation. The court does not agree. The arbitrator's interpretation of paragraph 12 of the Building Agreement is not irrational. The Foundation's President, Maxson McDowell, conceded that this provision does place limits on its activities, that, for example, it prevents the Foundation from allowing a competitive organization to use the Center (Transcript at 143, 217-19, 233).

The arbitrator's determination that the Building Agreement prevented the Foundation from engaging in actions that would undermine the integrity of the Institute is supported by the contractual language and the evidence presented at the hearing, and does not violate public policy.

Likewise, the arbitrator's conclusion that the Institute's mission was being compromised by the Foundation's use of JPA faculty is not totally irrational, nor based merely on speculation and surmise. Rather, there was evidence that the JPA was a competitive organization and had taken steps to interfere with and compromise the Institute and its training mission. There was also evidence that the Foundation's classes were the single most fertile ground for the Institute to find applications for two critical aspects of its mission: student candidates and analysts.

The Foundation argues that the arbitrator ignored testimony from Maurice Krasnow, the executive director of the Institute and coordinator of its referral service, establishing that the Institute and the JPA are not true competitors, because only the Institute is registered with New York State and a graduate of its training program would automatically be licensed as a psychoanalyst (see Transcript at 803-08). While there are indeed differences in the two programs, it was not established, as the Foundation contends herein as a matter of logic, that a potential

student could never be persuaded to train with the JPA as opposed to the Institute after attending a Foundation program taught by a JPA faculty member. As discussed below, there was evidence that this indeed has occurred. In addition, on re-direct, Mr. Krasnow testified that the distinctions between the training programs offered by the Institute and the JPA have no effect on potential analysands (Transcript at 829).

Second, the Foundation contends that it would be unethical for Foundation faculty to recruit analysands from the students in their education programs. However, the testimony referred to on this point from Mr. Krasnow was that while it would be an ethical violation for a Foundation faculty member to have a dual role with a Foundation student as both student and patient, he believed that "students who come up to JPA teachers are going to get referrals to the JPA organization, even though the JPA instructor might not, in fact, take them themselves, or I hope they wouldn't" (Transcript at 743-44).

Third, the Foundation contends that there was no hard evidence that there has been a loss of student candidates from the Institute's training program. They cite the testimony of the Institute's Director of Admissions, Deborah Bazes, who allegedly testified, on cross-examination:

that in an 'average year you get four to six applications,' and in the end the Institute takes 'two or three people a year' into its training program. (Transcript at 298-9). While that number varies over

the years, Ms. Bazes did not believe that it had decreased after the JPA split. (Transcript at 331-32).

Nachman Affirm. ¶ 39. To the contrary, Ms. Bazes testified that she did not know whether the number of enrollees decreased after the split (Transcript at 332), and on re-direct, she testified that at least three applicants to the Institute ended up enrolling in the JPA program in 2003-2004 (Transcript at 341). Mr. McDowell also conceded on cross-examination that he learned secondhand that one person who took a course at the Foundation at some later date decided to train at JPA and that it was "possible" JPA faculty members would try to recruit Foundation students for the JPA training program (Transcript at 221-22).

Fourth, the Foundation argues that two steps it took in 2005, without consultation with the Institute, were sufficient to address the Institute's concerns. First, the Foundation required that all teachers in its programs at the Center sign an agreement which precluded them from recruiting students who attended their classes. Second, the Foundation omitted any reference to a teacher's membership in the JPA from its program literature. However, there was evidence supporting the arbitrator's conclusion that these steps, although "well-intended and not insubstantial," were not adequate. Mr. Krasnow and Ms. Bazes both testified that telephone calls they received from people who took classes with JPA faculty members at the Foundation, and who were enquiring about the JPA, had occurred recently and

continuously from the time of the split (Transcript at 295-96; 324, 738-42). Ms. Bazes testified that, in 2006, one person was misinformed by a JPA faculty member that she needed a particular degree to apply to the Institute (Transcript at 295-96). In addition, the Foundation's president, Mr. McDowell, testified that he had no way of knowing whether or not the "no solicitation" provision was being adhered to unless somebody happened to report it (Transcript at 253).

Finally, the Foundation's claim that not being able to use JPA members as faculty would compromise the mission of the Foundation and threaten its financial viability was contested by the Institute. There was evidence that enrollment statistics for Foundation programs were dependent, not just on the popularity and skills of the instructor, but on the content, length, timing and cost of the programs being offered (Transcript at 494-501, 511-520). In addition, although the issue of the JPA teachers had been addressed at meetings between the parties for over a year prior to the arbitration at which the parties stated their positions, the minutes of those meetings do not reflect that the Foundation ever raised any issue regarding an adverse financial impact (Transcript at 227-30). Finally, while the Foundation claims the testimony of Janet Careswell, the Executive Director of the Foundation, establishes that she tried, unsuccessfully, to recruit new instructors who were not members of the JPA (see

Transcript at 523-26, 674-75), there was conflicting testimony from Mr. McDowell that no special efforts were made to find anybody to replace the JPA teachers who taught for the Foundation because "[w]e never intended to give up the teachers we had" (Transcript at 248-49; 254).

There is no question that the arbitrator's decision has a sufficient evidentiary basis and meets the "barely colorable justification" necessary for confirmation (see Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d supra at 479-80). Accordingly, it is hereby

ADJUDGED that petition is granted and the cross-petition denied; and it further

ADJUDGED that the arbitration award issued in Matter of the Arbitration between C.G. Jung Foundation for Analytical Psychology, Inc., Claimant, and C.G. Jung Institute of New York, Respondent, AAA Case No. 13 115 E 01491 on July 12, 2007 is hereby confirmed in all respects.

The foregoing constitutes the decision and judgment of the court.

Dated: March 24, 2008

ENTER:


KIBBIE F. PAYNE
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).