

**Matter of MS Trading NY, Inc. v Universal Exports
Inc.**

2012 NY Slip Op 30763(U)

March 19, 2012

Sup Ct, Nassau County

Docket Number: 00714-12

Judge: Timothy S. Driscoll

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X

In the Matter of

TRIAL/IAS PART: 16

MS TRADING NY, INC.,

NASSAU COUNTY

Petitioner,

Index No: 00714-12

Motion Seq. Nos: 1 and 2

- against -

Submission Date: 2/21/12

UNIVERSAL EXPORTS INC.,

Respondent.

-----X

The following papers have been read on these motions:

- Notice of Petition, Petition and Exhibits.....X**
- Notice of Cross Petition, Affirmation in Support/Opposition
and Exhibits.....X**
- Affirmation in Opposition/Further Support and Exhibit.....X**
- Reply Affirmation and Attachment.....X**

This matter is before the Court for decision on 1) the petition filed by Petitioner MS Trading NY, Inc. ("MS" or "Petitioner") on January 20, 2012, and 2) the cross petition filed by Respondent Universal Exports, Inc. ("Universal" or "Respondent") on February 3, 2012, both of which were submitted on February 21, 2012. For the reasons set forth below, the Court 1) grants the petition, confirms the arbitration award and directs that judgment be entered thereon; and 2) denies the cross petition.

BACKGROUND

A. Relief Sought

Petitioner moves for an Order, pursuant to CPLR § 7510, confirming the award of the arbitrator and directing that judgment be entered thereon, together with attorney's fees, costs and disbursements.

Respondent cross moves for an Order, pursuant to CPLR § 3511, vacating the award of the arbitrator.

B. The Parties' History

The Petition, dated January 19, 2012, alleges as follows:

In or about June of 2011, a dispute ("Dispute") arose between Petitioner and Respondent when Respondent failed to perform on a contract entered into between the parties on February 11, 2011 ("Agreement") to purchase and deliver certain products on Petitioner's behalf to Petitioner's customer in India. The Agreement (Ex. B to Pet.) provides that any disputes or claims must be submitted to arbitration.

The Dispute was submitted to arbitration ("Arbitration") and proceeded to a hearing ("Hearing") before the arbitrator ("Arbitrator") on December 2, 2011. The Arbitrator issued an Arbitration Decision ("Award") (Ex. A to Pet.) in which the Arbitrator 1) outlined the testimony of the witnesses and documentary evidence received; and 2) found for Petitioner and awarded the sum of \$81,000.00 in damages. The Arbitrator's Conclusion reads as follows:

I find that a valid contract exists between MS Trading and Universal. I find that although the contract sets forth limited terms and requirements, the critical terms of the agreement are clear. Universal was to provide 100 metric tons of SBS board in varying weights. MS Trading was to pay \$81,000 .00 for these goods. Universal was to ship the goods within thirty days after payment. Based upon the evidence, it is clear that MS Trading paid for the goods by February 18, 2011. I find that for a variety of reasons Universal failed to perform its terms of the contract, has breached the contract, and is liable to MS Trading for damages. The evidence taken in the most favorable light to Universal indicates that at the earliest two of the shipments arrived in India at the end of June. The third shipment did not ship until August, 2011. In addition, Universal admits that it only shipped 82.5 percent of the order. I find that this inordinate delay violated the terms of the agreement. Moreover, even if this delay were to be disregarded, Universal failed to provide MS Trading and it[]s consignee with the proper documentation[] to inspect and collect the goods to this day. I find that there are too many inconsistencies in the testimony of Universal.

Universal alleges that it used a Telex Release instead of the original Bill of Lading. Yet, Universal cannot provide a copy of the Telex Release and admits it never provided it to MS Trading or its consignee. In addition, MS Trading requested on numerous occasions the original Bill of Lading and Universal never indicated it intended to use a Telex Release. I also find problematic, the three invoices reflecting shipment. These three invoices indicate an incorrect consignee. I find it extremely suspect that the incorrect consignee was a typographical error.

The Petition alleges, further, that the Arbitrator served a copy of the Award by mail on Petitioner and Respondent on December 12, 2011, and Petitioner served Respondent with a copy of the Award on January 12, 2012. Respondent has allegedly “failed or refused to abide by said award” (Pet. at ¶ 11).

In opposition, Respondent’s counsel submits that the Award should be vacated, pursuant to CPLR § 7511(b)(1)(iii) on the grounds that the Arbitrator “so imperfectly executed his power that a final and definite award upon the subject matter was not made” (McDonough Aff. in Supp./Opp. at ¶2). Respondent submits that 1) the Arbitrator’s reliance on the delay in shipment as grounds for finding a breach was inappropriate in light of the fact that there was no evidence presented at the hearing that time was of the essence in the transaction at issue; 2) the Arbitrator’s conclusion that Universal breached its contract with MS due to Universal’s failure to provide proper documentation to MST or its consignee to inspect and collect the goods is unfounded in light of the evidence reflecting the consignee’s refusal to pick up the order at the port at Nhava Sheva, as required by the “Proforma Invoice” (*id.* at Ex. B); and 3) in light of the evidence that Universal shipped 82.5% of the order, Universal substantially performed under the Agreement and MS is only entitled to 17% of the contract sum, or \$14,175.00.

In reply, Petitioner’s counsel submits that the Award was fully supported by the evidence. Petitioner disputes Respondent’s claim that the evidence established that Universal substantially complied with the Contract, and submits that it was “never established what, if anything, Universal actually shipped” (Betz Aff. in Opp./Further Supp. at ¶ 6). Petitioner also makes reference to a an action in the Supreme Court of Suffolk County, New York involving the principal of Universal who testified at the Hearing, and suggests that a decision in that action supports the conclusion that the principal of Universal creates corporations for the purpose of defrauding customers.

Respondent disputes Petitioner's argument that the evidence at the hearing did not establish what Universal shipped and submits that the evidence, including emails and invoices (*see* Exs. C-E to McDonough Reply Aff.), established that the goods were shipped pursuant to the Agreement. Moreover, Respondent contends, Petitioner failed to rebut the nature of the goods shipped by Universal, and failed to produce evidence in support of its claims that its consignee was unable to inspect the goods at the port of arrival. Respondent also submits that the Court should disregard, as improper, Petitioner's arguments regarding the action in Suffolk County.

C. The Parties' Positions

Petitioner seeks an Order confirming the Award and directing that judgment be entered thereon in favor of Petitioner and against Respondent in the amount of \$81,000, along with the costs of this motion and attorney's fees.

Respondent opposes Petitioner's motion and asks the Court to vacate the Award on the grounds that the Award was not supported by the evidence adduced at the Hearing.

RULING OF THE COURT

CPLR §§ 7510 and 7511 provide, in pertinent part, as follows:

§ 7510. **Confirmation of award**

The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.

§ 7511. **Vacating or modifying award**

(a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

(e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

An arbitration award may be vacated only upon proof that the underlying dispute was not arbitrable, that a party's rights were prejudiced by fraud or partiality of the arbitrator, that the arbitrator exceeded a specifically enumerated limitation on his or her power, that the award is violative of a strong public policy, or that the award is totally irrational. *Matter of IBK Enterprises, Inc. v. Onekey, LLC*, 70 A.D.3d 948, 949 (2d Dept. 2010). An award is irrational if there is no proof whatever to justify the award. *Matter of Jadhav v. Ackerman*, 62 A.D.3d 797, 798 (2d Dept. 2009), citing *Matter of NFB Inv. Servs. Corp. v. Fitzgerald*, 49 A.D.3d, 747, 748 (2d Dept. 2008), quoting *Matter of Peckerman v. D & D Assocs.*, 165 A.D.2d 289, 296 (1st Dept. 1991).

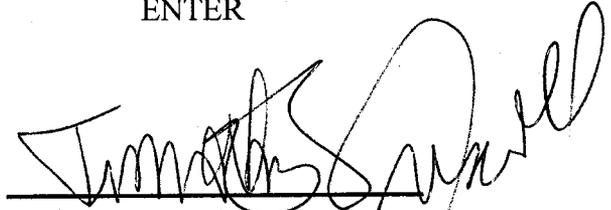
The Court grants the Petition, confirms the Award of the Arbitrator and directs that judgment be entered thereon. Petitioner has made its application within one year after the delivery of the Award, and the Court concludes that there is no basis to vacate or modify the Award upon a ground specified in CPLR § 7511. The Award reflects the Arbitrator's careful and reasoned consideration and analysis of the evidence and applicable legal principles, and the Court cannot conclude that the award is irrational, or otherwise subject to vacatur. The Court denies Petitioner's application for the costs of this motion and attorney's fees in light of the fact that Petitioner has not provided a legal basis for that relief.

In light of the Court's Order granting the Petition, the Court denies the Cross Petition.

All matters not decided herein are hereby denied.
This constitutes the decision and order of the Court.
Submit judgment on ten (10) days notice.

DATED: Mineola, NY
March 19, 2012

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

XXX

ENTERED
MAR 22 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE