

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the Matter of Application of

MARIQ J. MEHTA, individually and
as fifty percent shareholder of
New Creek Business, Inc.,

Petitioner,

DECISION AND ORDER

v.

Index # 2005/01362

NAVEED HUSSAIN,

Defendant.

Upon submission of a proposed order by Mr. Ryan, Mr. Larkin wrote a letter to the court objecting to the terms thereof on April 24, 2005, which provoked my e-mail of even date to both counsel. Thereafter, I received a letter from Mr. Ryan dated April 25, 2005, and Mr. Larkin e-mailed me another letter dated April 24th, which purported to be a 15 page single spaced letter/motion to renew and reargue what was contained in the court's e-mail (set forth in full, below). Finally, Mr. Larkin's April 25, 2005, letter came in announcing plans to file a formal motion to reargue/renew, and a second action against respondent, and it otherwise took issue with the proposed order and the court's treatment of it in the e-mail to counsel. The court views as simply astonishing the bulldog, steam rolling and scorched earth approach to this litigation taken by petitioner's counsel, particularly in view of his misconduct in connection with the original motion to confirm the arbitration award. What

has transpired since January in this case is reminiscent of Charles Dickens's Bleak House when considered on a relative scale to the amount in controversy in this litigation. It also reveals a quite thorough misunderstanding of the law concerning the issues that have been presented to the court by the motion to confirm the arbitration award, and respondent's motion to renew and/or reargue.

Set forth in full is the e-mail which provoked Mr. Larkin's 15 page single spaced submission which I will take, not as a motion but rather as a letter aiding settlement of the purposed order. Foley v. Roche, 68 A.D.2d 558, 566 (1st Dept. 1979):

I have Mr. Larkin's letter and the proposed order. Settlement of the order will be by these written submissions only.

I would prefer that the order/judgment, in addition to the decretal paragraphs drafted by Mr. Ryan, recite the terms of the arbitration award as set forth in Exhibit B and provide that the parties may have judgment accordingly, with the exception that the one week training paragraph be recited as having been waived in the chambers conference settling the prior order.

Further, Mr. Larkin's interpretation of paragraph two is without merit. The words "i.e., inventory will be as declared by Tops Market" fully qualifies and describes the meaning of the first clause of that paragraph. Paragraph 4 should be recited in the order/judgment with the figures set forth by Mr. Ryan at oral argument. Paragraph 5 should be recited with the 10 week date measured from the time of entry of the first order confirming the award, with interest running from the time of possession on the \$100,000, and interest running from the 10 week date on the balance of \$25,000, if not paid by then. Contrary to Mr. Larkin's argument, the diversion or mismanagement issues are not a part of this proceeding, and only

became a part of this proceeding by virtue of the January 11th letter procured by the wholly improper ex parte conference he had with the arbitrators, presumably to avoid having to file a separate proceeding to address these issues, if any there are indeed. Finally, Mr. Larkin's request for an order directing respondent to sign the tax returns is denied as outside the purview of the arbitration award, as is the request for disclosure made in paragraphs 3 and 4 of his letter. To the extent the prior orders of the court require disclosure of any kind, those decretal paragraphs were included by reason of the mistaken belief that the January 11th letter was part of the original arbitration award. Accordingly, the order/judgment should recite that the prior orders, etc., are vacated.

Mr Ryan, please prepare order/judgment accordingly. This is my decision; print out a copy herecf, attach as Exhibit C, and add a decretal paragraph that this e-mail "is hereby made a part hereof."

Thus, given the impropriety in confirming the January 11, 2005, letter as part of the December 30th arbitration award (more on this, below), it is incumbent upon the court, when a motion to confirm has been made by the petitioner, and no cross-motion to vacate, modify or remand has been made by the respondent, to "properly vacate it, leaving the original award extant." Matter of Newpault Central School District (Newpault United Teachers), 99 A.D.2d 907, 908 (3d Dept. 19884). See 5 N.Y. Jur.2d Arbitration and Award §187 ("the court is empowered to vacate the modified award and affirm the original award").

Petitioner now contends, for the first time and despite its original motion to confirm the award, that the original award is ambiguous to the point that a remand to the arbitrators is

required for clarification. This wholly new position is taken despite the "clear judicial policy of non-interference with arbitration awards, . . . , which should be confirmed and need not be remitted to the arbitrator for clarification unless it is demonstrated that the award is so ambiguous as to make it impossible to determine its meaning and content." Matter of International Service Agencies-State and Local (State Employees Federated Appeal Committee for the Albany Area), 170 A.D.2d 736, 737 (3d Dept. 1991) (emphasis supplied). Contrary to petitioner's current and newly found position, the original arbitration award in this case is not so ambiguous as to call for a remand to the arbitrators, even if one could be ordered to this arbitration panel which has been clearly tainted by petitioner's counsel's ex-parte dealings with them in early January. An ambiguity traced to a "poorly drafted sentence" is not grounds for modification or remand where the award is "otherwise clear, unambiguous, final and definite," particularly where the award confirmed is "consistent with . . . [a permissible] interpretation of the troublesome sentence." Matter of Vermilya (Distin), 157 A.D.2d 1030, 1031 (3d Dept. 1990).

As respondent contends, paragraph 2 of the award is unambiguous and makes no reference to treatment of corporate debt or putative improper withdrawals as petitioner would have it. Words were available to the arbitrators to express their intent

in regard to corporate debts and improper withdrawals, but not chosen, thereby making the intent of the arbitrators clear on the subject. Indeed, a special provision for the gas bill indicates quite clearly that what debts were to be considered part of the award would be specifically set forth in the award, and the gas debt was the only one so enumerated.¹ Petitioner's effort to infuse ambiguity in the original award by reason of the fact that the arbitration proceeding took place in the Urdu language, the national language of Pakistan, again a contention made for the first time in a post submission communication to the court following its decision on the motion to renew/reargue, cannot, on this record, be availing to petitioner. There was no suggestion in the original motion to confirm that the language issue infected the arbitration proceedings in any manner requiring clarification or remand. This sudden change of position is not to be countenanced.

If petitioner's current and newly found position in connection with the arbitration is credited, it would mean that

¹ This obvious point dispatches petitioner's contention that other bills, even from the same vendor, were intended to be included. There is no ambiguity at all, much less one so serious that it is impossible to divine the arbitrators' intent. That petitioner, for the first time, picks apart something so innocuous as the difference between "i.e.," and "i.e.," and couples it with a newly found challenge to the amounts specified in the award, belies petitioner's evident intention to do virtually anything to set up a roadblock to respondent's eventual realization of the arbitrators' award.

the original arbitrators' award stated an intention to condition payment on resolution of different disputes between the parties, for example concerning after acquired knowledge of corporate debt, waste, or alleged diversion. If such was the case, "the arbitrator would have so imperfectly executed her authority to fashion a remedy that a final and definite award was not made, which would require that the award be vacated." Matter of Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (Hinton), 223 A.D.2d 890, 891 (3d Dept. 1996). But petitioner did not move to vacate the award, and in any event the December 30th award cannot even remotely be described in this fashion. And petitioner, who moved to confirm the award, did not hint of such an infirmity in the award, even in his papers opposing the motion to renew, until now, after the court's decision on the motion to renew, in a letter anticipating settlement of the proposed order. The original petition did not contend that any issue be remanded to the arbitrator, nor did it contend that the original award was too vague, or otherwise imperfectly executed the arbitrators' authority. Id. 223 A.D.2d at 891 ("the order granted the relief requested in the petition, i.e., that the arbitration award be confirmed, [and] the petition did not request that any issue be remanded").

As respondent contends, the petitioner is "estopped from now asserting that . . . [the arbitration award of December 30, 2004,

should not be confirmed].” Matter of Mehta v. Mehta, 196 A.D.2d 841, 842 (2d Dept. 1993). “Furthermore, “[a] party may not use a motion to reargue as a vehicle to assert a new issue, particularly where the issue is contrary to the party’s earlier position.” Id. (quoting Lillard v. Carter, 167 A.D.2d 889). If a motion for “reargument [cannot] serve to provide a party an opportunity to advance arguments different from those tendered on the original application,” Foley v. Roche, 68 A.D.2d at 567-68, a fortiori a letter in aid of settling an order after the court has decided a motion cannot properly present such a contrary position. Id. (reargument “may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion”) (emphasis supplied); id. (renewal not “available where a party has proceeded on one legal theory . . . , and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application”). See also, Matter of Santoro v. Schreiber, 263 A.D.2d 953, 954 (4th Dept. 1999).

This is, clearly, a case “where the party . . . strategically withheld the newly presented position. First Bank of the Americas v. Motor Car Funding, Inc., 257 A.D.2d 287, 293 (1st Dept. 1999). Petitioner’s counsel is, as he states toward the end of his April 24th letter/e-mail opus, quite experienced in these matters, and has considerable litigation experience.

The rule is well settled that "[t]he discovery of new evidence after an award has been rendered is not ground for vacatur of the award under C.P.L.R. 7511(b)." In Re Instituto De Resseguros Do Brasil v. First State Ins. Co., 221 A.D.2d 266, 267 (1st Dept. 1995): adding that "'The purpose and nature of arbitration are wholly incompatible with the entertaining of motions for a re-hearing on the ground of newly discovered evidence' since 'the arbitration award would be the beginning rather than the end of the controversy and the protracted litigation which arbitration is meant to avoid would be invited.'" Id. 221 A.D.2d at 267 (quoting Matter of Mole (Queen Insurance Co.), 14 A.D.2d 1, 3). Petitioner's emphasis since moving for confirmation of the arbitration award has been what he has described as newly discovered evidence of corporate debts, etc., wrongfully incurred by respondent. In the face of the rule which prohibits vacating or modifying an award on the ground of newly discovered evidence, petitioner's counsel met with the arbitrators in violation of DR 7-110(B)(3); 22 N.Y.C.R.R. §1200.41(b)(3); see N.Y. State 742 (tribunal defined to include "all courts arbitrators and other adjudicatory bodies"), produced a writing which he had the arbitrators sign as if it was their own, which substantially modified the original December 30th award, and presented it only after the fact to the other side without any acknowledgment of the ex-parte conference or the manner in which the arbitrators

signed the January 11th modification.² This experienced counsel must also have known the, again, well settled rule that the courts "deplor[e]" the practice of submitting as part of the motion to confirm post award affidavits from the arbitrators as an explanation of the award. Dahlke v. X-L-O Automotive Accessories, Inc., 40 A.D.2d 666, 667 (1st Dept. 1972). See, Cavallaro v. Allstate Ins. Co., 124 A.D.2d 625, 626 (2d Dept. 1986) ("the consideration of statements of an arbitrator with respect to his intentions, or his interpretation of the award is a practice which has been disapproved in the past"); Matter of Etna Casualty Ins. Co. v. Jack, 156 A.D.2d 678 (2d Dept. 1989) ("the practice of submitting an affidavit of an arbitrator after entry of an award has been disapproved by the courts"); Matter of Weiner Co. (Freund Co.), 2 A.D.2d 341, 342-43 (1st Dept. 1956), affd. 3 N.Y.2d 806 (1957). Accordingly, if indeed,

² Petitioner's counsel's repeated efforts to suggest that the January 11th documents (exhibits 1 & 2 marked at oral argument of respondent's motion to renew), by their very nature, manifestly gave notice of the occurrence of the ex-parte conference is not well taken. An experienced counsel from a prestigious law firm must have known that his conduct, if revealed, would result in vacatur of the award, at least insofar as it modified the December 30th award. Matter of Goldfinger v. Lisker, 68 N.Y.2d 225 (1986); Matter of Cabbad v. TIG Ins. Co., 300 A.D.2d 584 (2d Dept. 2002). And a court, together with opposing counsel, faced with the motion to confirm from such an experienced lawyer, which included the January 11th letter, had every right to assume that petitioner's counsel had not violated his duty under DR 7-110(B)(2), had not infected the arbitral process, and was honestly presenting the January 11th documents as part of an untainted original arbitral award.

as petitioner's counsel contends, he did not intend to defraud the court by failing to disclose the ex parte proceedings resulting in the very document he urged on the court as part of the original award, his conduct could have been no better calculated to evade these well settled rules. If the January 11th letter would be rejected as a post award "affidavit" explaining the award, as the case law insists should be rejected, then the only way to secure its admission in the confirmation proceedings was to maintain that it was part of the original award. Indeed, the only way petitioner could, within the context of these confirmation proceedings under Article 75, obtain relief from respondent for what petitioner considered to be unreasonable corporate debt incurrence, would be to have the arbitrators execute a document which would be, as it was in the motion to confirm, passed off as an incident and part of the December 30th award. Fortunately, the truth came to light in time, but not before respondent was forced to hire new counsel and incur substantial expense and effort in connection with the motion to renew.³

Finally, petitioner's other objection to the proposed order are without merit. A court "may implement an award by suitable

³ I note that petitioner's emphasis on the alleged perjury of respondent is inapposite. The granting of the motion to renew, and on renewal to confirm the original award, and the settlement of this order, does not depend one wit on the perjury alleged.

provision in the judgment." Matter of Marfrak Realty Corp. v. Samfred Realty Corp., 140 A.D.2d 524 (2d Dept. 1988). See Bogard v. Paul, 242 A.D.2d 479 (1st Dept. 1997).

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: April 26, 2005
Rochester, New York