

THOMAS, WILLIAMS & SHEPHERD, LLC ,

Plaintiff,

v.

DECISION AND ORDER

Index #2005/0094

UNIVERSAL BUILDING SERVICES, INC.,

Defendant.

The plaintiff, Thomas, Williams & Shepherd, LLC (TWS), and the defendant, Universal Building Services, Inc. (Universal), entered into a subcontracting agreement pursuant to which TWS would provide painting services for a building in Buffalo, New York. A dispute arose and, pursuant to the contract, the matter was sent to arbitration. An arbitrator was assigned. Nothing in the record presented to the court demonstrates that any objection to the arbitrator was ever raised prior to, or during, the arbitration hearing. The matter was heard on December 13, 2004, and the arbitrator issued an award on December 22, 2004, in which he awarded TWS \$28,864.00 for work performed up to the date of termination and \$9,053.52 for lost profits on the balance of the contract. TWS has petitioned the court to confirm the arbitration award pursuant to CPLR §7510.

Discussion and Analysis

Universal opposes the petition and has also moved in Supreme

Court, Erie County, to vacate the award, or in the alternative, to modify it. In this proceeding, Universal has submitted the Erie County petition, and has asked this court to "[k]indly treat said Petition as a counter petition to . . . [the] Petition to confirm the award." Letter of Richard J. Steiner, Esq., dated January 25, 2005.¹ Universal maintains that the evidence before the arbitrator established that TWS performed the work in a shoddy manner, requiring much of it to be redone at considerable cost to Universal. Universal submits that the arbitrator ignored this proof and found for TWS because the arbitrator was personally prejudiced against Universal's attorney because that attorney recently won a very favorable outcome against a client of the arbitrator in a separate matter. In the alternative, Universal is seeking a modification of the award to reflect the amount of money it will take it to correct TWS's alleged defective work.

Universal' sole argument is that the arbitrator was prejudiced against its attorney due to this previous separate case between them. While a party can seek vacatur of an award on the ground of bias under CPLR §7511, the burden of proof in

¹ Universal raises no explicit objection to this court's hearing of the matter, although it points out in the January 25th letter that the Erie County petition was served before the Petition to Confirm was served. In light of the agreement to arbitrate, which mentions Monroe County, the court has heard the matter here. CPLR 7502(a)(i).

establishing that bias is on the moving party, and the bias must be proven by clear and convincing evidence. Namdar v. Mirzoeff, 161 A.D.2d 348 (2d Dept. 1990). It is well settled that a party who proceeds with an arbitration with actual knowledge of bias on the part of the arbitrator waives the objection if he proceeds with the arbitration. Id.; Meehan v. Nassau Community College, 243 A.D.2d 12, 18-19 (2d Dept. 1998) (collecting cases). See Seigel v. Lewis, 40 N.Y.2d 687 (1976); J.P. Stevens & Co. Inc. v. Rytex Corp., 34 N.Y.2d 123 (1974). See also Velasco v. Beth Israel Medical Center, 279 F. Supp.2d 333 (S.D.N.Y. 2003). Here, Universal's attorney agreed to use this arbitrator, or at the very least, made no objection to the arbitrator's qualifications to sit until after the award was published. The prejudice, if it existed, should have been known to him at the outset, and it was waived when he failed to raise an objection in a timely manner. Moreover, Universal did not present any evidence that the arbitrator was, in fact, improperly tainted by the prior interaction.

Furthermore, there is no evidence that the award should be modified, because Universal failed to prove that the award was not based on the arbitrator's view of the credible evidence in the case. See generally CPLR §7511; Azrielant v. Azrielant, 301 A.D.2d 269 (2d Dept. 2002).

Therefore, based upon the foregoing, the arbitrator's award

is confirmed in its entirety.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: February __, 2005
Rochester, New York