

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

INDEX NO. 12311/2007

PAVERS AND RAMMERMEN DISTRICT X
COUNSEL OF NEW YORK AND NEW JERSEY,
etc., et al.

SEQ. NO. 2

MOTION CAL. NO. 40

- against -

MOTION DATE: FEBRUARY 13,
2008

ROCCO CIANCIO, et al. X

BY: KITZES, J.

DATED: APRIL 22, 2008

The court deems this to be a motion by respondents Rocco Ciancio, David Montelle, and Luciano Falzone for an order vacating a judgment of this court dated January 25, 2008 based on an arbitration award and for an order pursuant to CPLR 7511 vacating the arbitration award.

The respondents are former members and officers of petitioner Pavers and Rammermen District Council of New York and New Jersey ("District Council") and/or petitioner Highway, Street, and Road Construction Laborers Local Union No. 1010 ("Local 110") and petitioner Sheet Asphalt Workers Local Union 1018 ("Local 1018"). The petitioners are affiliated with Laborers' International Union of North America (LIUNA). The respondents resigned their positions as members and officers of LIUNA and its affiliates in May 2005.

Approximately four months after their resignation, on

September 21, 2005, disciplinary charges were brought against them, and those charges concerned, inter alia, dual unionism, subversion of the union in collective bargaining, permitting a member of organized crime to exercise control or influence in the affairs of the union, and breach of fiduciary obligations. A disciplinary hearing was held on September 27, 2006, but none of the respondents appeared or was represented by an attorney at the hearing.

An arbitrator functioning as a LIUNA Independent Hearing Officer (IHO) issued an award dated November 29, 2006, finding that respondents, while members of LIUNA, had breached their duties as members, officers, and representatives of LIUNA and its affiliates and that they should be held responsible for the costs incurred by LIUNA resulting from their breaches of duty. The IHO also issued an arbitration award entitled "Omnibus Order and Memorandum Regarding Reimbursement of Costs," dated April 23, 2007. The IHO found the respondents to be jointly and severally liable in the amount of \$793,650.38 and respondent Luciano Falzone to be individually liable in the amount of \$145,379.00. The respondents allege that approximately 85% of the awards is for attorney's fees.

On or about May 11, 2007, the petitioners began this special proceeding to confirm the arbitration awards pursuant to CPLR 7510 and to enter judgment pursuant to CPLR 7514. On June 7, 2007, the respondents filed a notice of removal of this

proceeding to the United States District Court for the Eastern District of New York. The petitioners allege that they believed that this court had been notified of a proper removal of the proceeding, but, nevertheless, the petition to confirm the arbitrator's award was submitted on July 25, 2007. Pursuant to a memorandum dated July 27, 2007, this court granted without opposition the application by the petitioners for an order pursuant to CPLR Article 75 confirming the arbitration awards. The petitioners' attorneys allege that they were for a time unaware of the issuance of this decision. On December 11, 2007, the federal court ordered a remand to this court. On December 13, 2007, one of the petitioner's attorneys went to the office of the clerk of this court and allegedly learned for the first time about this court's decision dated July 27, 2007. A clerk allegedly informed the petitioners' attorney that the action had not been marked as removed to the federal court and that the court did not accept unstamped or uncertified federal orders. The notice of removal filed with this court was uncertified. The petitioners' attorneys prepared a proposed judgment which was filed with the court and served upon the respondents on December 28, 2007, and they made no opposition to it. The Clerk of this court returned the judgment for revisions, and a revised judgment was filed and served on the respondents on or about January 11, 2008. On or about January 18, 2008, the petitioners received from respondents a notice of motion to

vacate the arbitrator's award and judgment. On January 25, 2008, this court signed a judgment against the respondents jointly and severally in the amount of \$793,650.38 and against respondent Luciano Falzone individually in the amount of \$145,379.00.

The petitioners correctly contend that the respondents must first obtain the vacatur of the judgment dated January 25, 2008 before they can seek the vacatur of the arbitrator's awards. Although the respondents' notice of motion does not demand the vacatur of the judgment dated January 25, 2008 pursuant to CPLR 5015, the papers of both sides deal with the procedural snarl and misunderstandings that resulted from the respondents' removal of this proceeding to federal court. CPLR 2001 permits the court to disregard procedural defects if a substantial right of a party is not prejudiced (see, Niagara Mohawk Power Corp. v Town of Moreau Assessor, 46 AD3d 1147), and, in the case at bar, the failure of the respondents to expressly demand the vacatur of the judgment pursuant to CPLR 5015 in their notice of motion (see, CPLR 2214) can be disregarded. The petitioners will not be prejudiced since their memorandum of law discusses at length the possible grounds for seeking the vacatur of the judgment.

CPLR 5015, "Relief from judgment or order," provides in relevant part: "(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice

as the court may direct, upon the ground of: 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry;" (See, In re Precyse T., 13 AD3d 1113; Carrenard v Mass, 11 AD3d 501.) CPLR 5015(a)(1) authorizes a court to vacate a default where the moving party demonstrates both a reasonable excuse for the default and the existence of a meritorious cause of action or defense. (See, Abrams v City of New York, 13 AD3d 566; Lopez v Tierney & Courtney Overhead Door Sales Co., Inc., 8 AD3d 347; Goldman v Cotter, 10 AD3d 289; Ray Realty Fulton, Inc. v Kwang Hee Lee, 7 AD3d 772; Taylor v Saal, 4 AD3d 467.)

The court finds that the respondents' attorney has a reasonable excuse for defaulting on the motion to confirm the arbitrator's awards. The petitioners submitted their application to confirm the arbitrator's award after the respondents filed a notice of removal with this court. The respondents' attorney did not know that the uncertified notice of removal was unacceptable in this court. The respondents' attorney has shown a reasonable excuse based on the misunderstandings that arose from the filing of removal papers.

The court also finds that the respondents have a meritorious ground for seeking the vacatur of the arbitration awards to the extent that they make the respondents liable for

"consequential damages" to the union. A court may vacate an arbitrator's award where it violates a strong public policy or is irrational or where grounds exist pursuant to CPLR 7511. (See, New York State Correctional Officers and Police Benev. Ass'n, Inc. v State of New York, 94 NY2d 321; Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Ass'n, 78 NY2d 33; In re Travis (Masiello), 19 AD3d 1093; County of Nassau v Civil Service Employees Ass'n, Inc., 19 AD3d 414.) In the case at bar, LIUNA adopted an Ethical Practices Code and Ethics and Disciplinary Procedure (EDP) in 1996 in an attempt to eliminate the influence of organized crime. LIUNA's General Executive Board Attorney (GEB attorney) has the authority to bring disciplinary charges. The EDP states: "The GEB Attorney may recommend discipline, including, but not limited to, suspension, removal from Union Office, permanent expulsion from the Union, [etc]." The petitioners contend that the arbitrator's award imposing liability for damages has an adequate basis in this section of the EDP. The respondents argue that the arbitrator exceeded his powers when he awarded damages against them. These damages are substantially for attorney's fees incurred by the union in bringing federal actions and NLRB proceedings against the respondents or other unions. The arbitrator held the respondents liable for these attorney's fees upon finding that they were "directly attributable to the Respondents' actions." CPLR 7511(b)(1)(iii) provides that an

arbitration award may be vacated where the arbitrator "exceeded his power." (See, Matter of Manhattan and Bronx Surface Transit Operating Authority (Transport Workers Union of America, AFL-CIO, Local 100), 227 AD2d 995; Manhattan and Bronx Surface Transit Operating Authority v Transport Workers, 182 AD2d 624.) In the case at bar, the arbitrator exceeded his authority by modifying the EDP so as to give the union a remedy- the recovery of damages against union members-- not provided for therein. (See, Matter of Manhattan and Bronx Surface Transit Operating Authority (Transport Workers Union of America, AFL-CIO, Local 100), 227 AD2d 995; Manhattan and Bronx Surface Transit Operating Authority v Transport Workers, 182 AD2d 624.) The court is mindful that the disciplinary measures expressly listed in the EDP are not exclusive, but finds that the recovery of attorney's fees incurred in federal actions and NLRB proceedings is not an arbitrable disciplinary measure within the contemplation of the EDP. Moreover, "[w]hile, as a general rule, once a controversy is properly before the arbitrator he has wide discretion in his choice of remedies ..., the power to formulate flexible solutions cannot be used as a bootstrap for an unpredictable expansion of the parameters of arbitral authority." (Bowmer v Bowmer, 50 NY2d 288, 296.)

Accordingly, the respondents motion is granted to the following extent: The decision of this court dated July 27, 2007 and the judgment dated January 25, 2008 are vacated. Those

sections of the arbitrator's awards which concern the
"reimbursement of costs" or damages are vacated. The petition to
confirm the arbitrator's awards is otherwise granted.

Settle order.

J.S.C.