

Mordas v Hoag

1999 NY Slip Op 30000(U)

April 21, 1999

Supreme Court, New York County

Docket Number: 123362/98

Judge: Bruce Allen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50B

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LYNN MORDAS,

Petitioner,

-against-

Index No. 123362/98

Decision, Order and Judgment

SUSAN V. HOAG,

Respondent.

-----X
Both parties pro se
JUSTICE BRUCE ALLEN:

Respondent Hoag is an attorney. In June 1996, petitioner retained respondent to represent petitioner in a matrimonial action which had been filed in New York County. By November 1996, the relationship between petitioner and respondent had become strained and petitioner eventually retained new counsel. Respondent continued to send petitioner statements setting out money which respondent claimed petitioner owed her for past legal services. In September 1997 respondent informed petitioner that respondent would initiate a suit to recover these amounts unless petitioner exercised her right to submit the matter to arbitration.

Under the Rules of the Chief Administrator of the Courts regarding domestic relations matters, in the event of a fee dispute between attorney and client, the client may seek to resolve the dispute by arbitration. The request for arbitration is to be filed with the Administrative Judge in the judicial district which has jurisdiction over the marital dispute. A

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client who has filed a request for such arbitration has thirty days to withdraw the request. See, 22 NYCRR §136. Petitioner did eventually file a request for such arbitration in the First Judicial District.

Petitioner also filed grievances against respondent with the New York State Bar Association and the Departmental Disciplinary Committee. In addition to complaints of overbilling and incompetent representation, the grievances contended that respondent did not maintain an office in the State of New York and was not duly licensed in New York at the time she represented petitioner. (While the issue is not directly before this court, it should be noted that respondent's position throughout has been that she has been in full compliance with the office requirement. She also indicates that the question of her registration status was simply a matter of a missed registration fee; upon payment of the late fee she was restored retroactively to good standing.)

The arbitration hearing was held before a three-member panel in the First Judicial District on September 24, 1998. Both parties appeared and submitted evidence. On October 1, 1998, the panel issued its determination that respondent was entitled to \$20,000 (out of the \$30,000 she had claimed). The "STATEMENT OF REASONS" simply stated that the preponderance of evidence indicated that the above amount is reasonable. Petitioner now seeks to have the arbitration award vacated. Respondent seeks an order confirming the award.

The grounds on which an arbitration award can be vacated,

which are set out in CPLR §7511, are narrow. An award will not normally be set aside because of errors of law or fact by the arbitrators unless they render the award irrational. Sprinzen v. Nomberg, 46 N.Y.2d 623; Carty v. Nationwide Insurance Company, 212 A.D.2d 462 (1st Dept. 1995). The standard of review is less exacting in cases where the arbitration was voluntary rather than compulsory. Matter of Furstenberg, 49 N.Y.2d 757.

Petitioner attacks the actions of the arbitrators on a variety of specific grounds. The main gist of her complaint, however, is that the arbitrators refused to consider certain issues raised by petitioner - including the question of respondent's registration status and maintenance of an office in New York - which petitioner maintains go to respondent's right to collect any fee at all. Petitioner's position appears to be that the arbitrators should either have addressed these issues or should have declined to hear the case. Petitioner contends that the failure of the arbitrators to do either one or the other has resulted in an award so imperfectly executed that it leaves the parties unable to clearly determine their rights. The award specifies that the respondent is entitled to \$20,000 as the reasonable value of her legal services. However, petitioner contends that the continuing investigation of respondent by the Third Department Committee on Professional Standards could result in a finding that respondent was not entitled to collect any fees for legal work in the State of New York; however, that while that ruling would preclude respondent collecting fees, it would not

require her to refund to petitioner fees which petitioner has already paid her.

The problem with the petitioner's position is that it overlooks the fact that it was petitioner, and petitioner alone, who chose the forum. Respondent's claims against petitioner would presumably have been resolved in court except that petitioner exercised her exclusive right to require that the matter be submitted to arbitration.

At the outset of the arbitration proceedings, there was some discussion as to whether the First Judicial District was the proper geographical district for a fee arbitration. The arbitrators eventually decided that it was, because the underlying divorce proceeding was filed in the district. This clearly appears to be a proper ruling under 22 NYCRR §136.

There was also discussion of what issues would and would not be covered by the arbitration. The arbitrators informed the petitioner that they would determine only the reasonable value of the services performed by respondent and would not make any ruling on issues such as whether respondent was duly registered or maintained an office in New York. As one arbitrator stated to petitioner:

...we're only authorized to determine as best we can based on the evidence and testimony whether the fees that were charged were reasonable and the services that were done and should have been billed for accordingly. It's really all we have the authority to determine. This is not a grievance committee. This is not an ethics panel. This is not a malpractice panel... We are only empowered to determine whether

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the fee is reasonable for the services rendered and whether or not one person, the client has been overcharged or has overpaid or whether the attorney has not been paid the full amount they're entitled to receive. It's really all we're empowered to determine. So, I'm asking you now, are you asking us to hear our case?

It was not error for the arbitrators to limit the issues in this manner. The subject matter of fee arbitration under 22 NYCRR §136 is generally limited to the reasonableness of the fee in light of the amount of work performed and the rates set out in the retainer agreement. McNamee, Lochner, Titus & Williams, P.C. v. Killeen, 235 A.D.2d 17 (3rd Dept. 1997).

As petitioner notes, in McMahon v. Evans, 169 Misc.2d 509 (Sup. Ct., Broome County 1996), the court found that whether a fee could be charged and collected without a violation of the Code of Professional Responsibility was a factor which the arbitrators could consider in determining the reasonableness of the fee. The alleged violation in McMahon was the failure to provide a written retainer agreement. The court stated: "The Code effectively precludes an attorney from collecting any fee where there is no written retainer in any case where one is required under the matrimonial rules, and certainly, such a fee could not be reasonable if it were expressly precluded by court rule."

The situation here differs from that in McMahon. The alleged violation alleged in McMahon involved the specific work and retainer agreement with the individual client. Here, petitioner wished to raise issues pertaining to respondent's general fitness

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to charge for legal services in New York. Moreover, as petitioner informed the arbitrators, the allegations were the subject of an ongoing investigation by the Third Department Committee on Professional Standards, commenced at petitioner's behest. Given those circumstances, it clearly was not irrational for the arbitrators to decline to consider those issues.

Under 22 NYCRR §136.4, the administrative judge may decline to accept or continue to arbitrate a dispute in which substantial legal questions are raised in addition to the basic fee dispute. Petitioner contends that if the arbitrators were not going to consider the issues she raised, they should have sought a ruling from the administrative judge on whether to decline to hear the case. Petitioner also claims that she objected to going forward with the arbitration going forward at that point. However, the record does not support petitioner's claim. The transcript shows that after the petitioner was informed that the panel would not consider evidence on the alleged code violations by respondent, petitioner was given the opportunity to decline to proceed with the arbitration and pursue the case in whatever forum she desired. The arbitrators simply stated that if there was going to be a fee arbitration in the First Judicial District, it was to take place that day.

Petitioner argues that §136.4 should have been invoked based on the legal issues she raised. (It should be noted that she does not appear to have brought to the attention of the arbitrators the issue regarding refunding payments, which she now cites as

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critical.) It may well be that this is a case in which §136.4 could properly have been invoked as a matter of discretion. It does not follow that the course actually taken by the arbitrators was either improper or to petitioner's disadvantage. Again, fee arbitration is the right of the client. It is intended to provide the client with a forum in which fee disputes can be resolved in a streamlined and equitable manner. It is the forum which petitioner elected for this case. Declining to accept the case would have meant rejecting petitioner's choice of forum. What the arbitrators did instead was to inform petitioner what issues would not be covered and give her the choice of proceeding with the arbitration or seeking another forum. It is difficult to see how this leaves petitioner with cause for complaint.

Petitioner also contends that the arbitrators failed to allow her to present evidence as required by §136. However, her affidavit establishes only that the arbitrators cut her off at certain points of her presentation. §136 does not give the client the *unlimited* right to present evidence. Petitioner's affidavit indicates that, among other things, she was allowed to submit voluminous documentary evidence covering all the issues she wished to raise in her oral presentation. Her allegation that the arbitrators did not consider any of the documentary evidence is mere speculation and would require a presumption of irregularity that this court is not entitled to make. From the discussion shown on the transcript, it is apparent that the panel had read and carefully considered petitioner's submissions to that point.

Since I do not find grounds to vacate or modify the arbitration award, the petition's motion is hereby denied. Accordingly, under CPLR §§7510 and 7511(e), respondent's motion to confirm the award must be granted. Wherefore it is

ORDERED that the fee arbitration award dated October 1, 1998 is confirmed; and it is further

ORDERED and ADJUDGED that Susan Hoag, having an address at 325 Greenwich Avenue, Greenwich CT 06830 shall have judgment and recover against Lynn Mordas, having an address at Indian Lake Road, Millerton, NY 12546 in the amount of \$20,000.

This constitutes the decision, order and judgment of this court.

date: 4/21/99

Ben Ali
J.S.C.