

Fishman v Roxanne Mgt.

2004 NY Slip Op 30146(U)

January 15, 2004

Supreme Court, New York County

Docket Number:

Judge: Joan Madden

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S.C. Justice

PART 11

Fishman, Michael

. v .

Rozanne Management

INDEX NO. 106121/03
MOTION DATE 10-23-03
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this ^{petition} motion to/for confirm arbitration award + cross-petition to vacate.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	_____
Answering Affidavits – Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ^{petition} motion is decided in accordance with the ~~answer~~ answered memorandum Decision + order.

MOTION CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: January 15, 2004

J.S.C.

Check one: FINAL DISPOSITION NO FINAL DISPOSITION

N-FINAL I

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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MICHAEL FISHMAN (successor to Gus Bevona)
as President of Local 32B-32J
SERVICE EMPLOYEES INTERNATIONAL UNION,
AFL-CIO,

Index No. 106121/03

Petitioner,
- against -

ROXANNE MANAGEMENT.

Respondent.

-----x

JOAN A. MADDEN, J. :

Petitioner Michael Fishman as President of Local 32B-32J Service Employers International Union, AFL-CIO (hereinafter "the Union"), seeks to confirm the award of Contract Arbitrator Bernard Young, dated February 7, 2003. Respondent Roxanne Management ("Roxanne") opposes the petition and cross petitions to vacate the award.

This dispute arises out of the November 1, 1995 discharge of Juan Mendez ("Mendez"), a member of the Union, from his position as a doorman and porter at a building located at 215 West 90th Street in Manhattan ("the Building"). At the time of Mendez's discharge, the Building was owned by Reads Ventures Corp ("Reads"). Roxanne is a real estate company headed by Adam Katz, who is also the head of Reads. The Union submitted the matter to arbitration on behalf of Mendez and in accordance with a collective bargaining agreement with Reads. Roxanne was not a

party to the collective bargaining agreement but nonetheless proceeded to arbitration.

By Opinion and Award dated November 14, 1996, the arbitrator upheld the Union's claim for reinstatement of Mendez, and set the matter down for an inquest to determine the amount of back pay owed to Mendez. By two Implementation Awards, dated June 12, 1997 and June 24, 1997, the Arbitrator Young awarded Mendez full pay minus statutory deductions from December 15, 1996,¹ up to and including his date of reinstatement to his position at the Building. The arbitrator denied back pay for the period between his November 1, 1995 discharge through November 14, 1996, based on Mendez's failure to mitigate his losses by seeking further employment. Since December 1997, Mendez has been working at a union job at another building, and Roxanne never reinstated Mendez at the Building.

By decision, order and judgment dated December 8, 1998, Justice Elliot Wilk granted the Union's motion to confirm the arbitrator's award, denied Roxanne's cross-petition to vacate it, and ordered Roxanne to pay Mendez full back pay, less statutory deductions from December 15, 1996 up to and including the date of Mendez's reinstatement. Justice Wilk rejected Roxanne's argument that the award should be vacated because it did not require a set off of wages earned by Mendez at his new position.

¹The arbitrator implemented 30-day grace period between the its November 14, 1996 award directing Mendez's reinstatement and the December 15, 1996 date commencing the award of back pay.

On appeal, Roxanne argued inter alia, that the arbitrator exceeded his authority and committed misconduct, that the award constitutes punitive damages violative of public policy, and that the award was indefinite. The Appellate Division, First Department rejected these arguments and confirmed the award, but nonetheless modified the judgment and order below "to preclude back pay in addition to comparable salary." Bevona v Roxanne Management, 280 AD2d 254 (1st Dept 2001).

Following the First Department's decision, Roxanne moved to modify and amend order and judgment entered by Justice Wilk (i) to reduce the amount of back pay awarded in accordance with the decision and order of the First Department, and (ii) to vacate the direction that Mendez be reinstated on the ground that it is impossible for Roxanne to comply with this direction. In support of its position that compliance with the award was impossible Roxanne argued, inter alia, that since the award was issued, the Building had been transferred by Reads to Haroldon Court Condominium pursuant to a Condominium Offering Plan effective January 26, 2000, and the relevant collective bargaining agreement expired on April 20, 2000, so that there was no longer any contractual obligation to retain any employee at the Building.

In its decision and order dated April 17, 2002, this court found that there was no need to remand the matter to the arbitrator with respect to First Department's unambiguous

determination that the order and judgment should be modified to eliminate any award of back pay for the period after Mendez was employed at a comparable position.² However, the court held that the matter should be remanded to the arbitrator insofar as the award directed that Mendez be reinstated to his former position at the Building, but changed circumstances made compliance with this aspect of the award inappropriate. In doing so, the court rejected Roxanne's argument that it should be excused from its obligation to reinstate Mendez. Instead, noting that "Roxanne should not be rewarded for its noncompliance," the court directed the arbitrator to fashion an appropriate remedy in light of the expiration of the collective bargaining agreement and the transfer of the Building's ownership.³

The matter subsequently came on to be heard before Arbitrator Young on September 11, 2002 and October 28, 2002. Following the October 22 hearing. At the hearing an issue was raised as to whether Roxanne was able to reinstate Mendez in

'After this court's April 17, 2002 decision was issued, the parties stipulated as to the amount owed to Mendez for back wages, including interest.

³Roxane subsequently moved to reargue the April 17, 2002 decision and order on the grounds that (i) the matter was erroneously remanded back to the arbitrator whose authority purportedly ended after original award was issued, and (ii) the sole purpose of directing the arbitrator to fashion a remedy was to impose punitive damages since Mendez has already been fully compensated by the award of back pay. In its decision and order dated August 20, 2002, this court clarified that its prior decision did not direct the arbitrator to impose punitive damages and otherwise denied Roxanne's motion.

light of the transfer of ownership of the Building. The Union subpoenaed various documents to establish of the relationship of the new building owner, Reads, with Roxanne. The documents were not produced. However, the parties entered into a stipulation of facts dated October 28, 2002, under which Roxanne agreed to offer Mendez reinstatement to his former position and Mendez was given ten days to accept the position. Mendez timely accepted the offer, but was not reinstated.

On February 7, 2003, the arbitrator issued an award requiring Roxanne to pay (1) to the Union Fringe Benefit Funds \$27,326.39 in principal and \$40,335 in liquidated damages, and (2) to Mendez (i) \$1,195.26 in severance pay under XVII, Section 20 (b) of the collective bargaining agreement, based on Roxanne's assertion of a transfer of the building, (ii) \$2,390.52 in lost vacation accrual pay, under IX, Section 4 of the collective bargaining agreement, when the building was transferred to entity that had no collective bargaining agreement with the Union, (iii) \$2,390.52 in lost vacation lag pay, and (iv) \$15,538.38 for six months pay for not requiring the new Building owner to hire Mendez upon the transfer of the Building.

In the award, the Arbitrator concluded that Roxanne and Boshany Associates, Ltd., ("Boshany") which replaced Roxanne as the Building's managing agent, were controlled by the same person and constituted a "single employer" as the term is used under the National Labor Relations Act. The Arbitrator then ordered that

Roxanne require Boshany to reinstate Mendez to his former position at the Building at the same wage and benefit levels previously received by Mendez.

Roxanne argues that the Arbitrator's award is arbitrary, capricious and irrational and exceeds the limits imposed by this court on remand. The court concludes otherwise. This court's language that the Arbitrator should fashion an "appropriate remedy in light of building's transfer," encompassed the authority to decide whether Roxanne was in a position to reinstate Mendez despite the change in the building's ownership, and the effect of such a transfer on Mendez's rights under the collective bargaining agreement.

Next, contrary to Roxanne's position, the award was not irrational based on the alleged expiration of the collective bargaining agreement. In fact, the collective bargaining agreement provided that it continued in "full force and effect for an extended period until a successor agreement has been executed" and, in any event, the issue of whether the agreement expired is for the arbitrator and not the court to decide. See 31 West 47th Street Co. v Bevona, 215 AD2d 152 (1st Dept 1995).

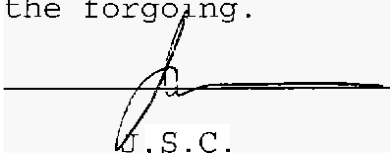
Furthermore, the arbitrator did not exceed his authority by awarding sums to the Fringe Benefit Funds. As Funds were not receiving fringe benefits on behalf of Mendez during the relevant period, such award is properly included in the arbitrator's

determination. Moreover, the award was rationally based on the stipulated facts, which indicated that in accordance with an attached printout, "[n]o contributions were remitted on behalf of Mendez from the January 1, 1996 quarter to the January 1, 1999 quarter. Thereafter contributions were made to the Health Fund, but not the other Funds through the July 1, 2000 quarter," and Roxanne provided no evidence to the contrary

Finally, the other amounts awarded to Mendez are consistent with his rights under the collective bargaining agreement and rationally based on the record and the stipulated facts of the parties. Accordingly, there is no basis for vacating the award, which should be confirmed.

Settle judgment in accordance with the forgoing.

DATED: January 15, 2004



J.S.C.