

**Matter of Henneberry v ING Capital Advisors, LLC**

2005 NY Slip Op 30267(U)

October 17, 2005

Supreme Court, New York County

Docket Number: 0103094/2005

Judge: Robert D. Lippman

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: Hon. Robert D. Lippmann  
Justice

PART 21

Index Number : 103094/2005

HENNEBERRY, VIRGINIA

vs

ING CAPITAL ADVISORS, LLC

Sequence Number : 1

VACATE OR MODIFY AWARD

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

CAL # 48

on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

**UNFILED JUDGMENT**  
No judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Upon the foregoing papers, It is ordered that the motion

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/17/05  
OCT 17 2005

Hon. Robert D. Lippmann  
HON. ROBERT D. LIPPMANN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 21

----- X

In the Matter of the Application of  
VIRGINIA HENNEBERRY,

Petitioner,

INDEX NO.  
103094/05

For a Judgment Vacating an Arbitrator's Award

-against-

ING CAPITAL ADVISORS, LLC, ING FURMAN SELZ  
ASSET MANAGEMENT LLC, ING INVESTMENT  
MANAGEMENT, ING ASSET MANAGEMENT and  
ING ALTERNATIVE ASSET MANAGEMENT,

Respondents.

----- X

**ROBERT D. LIPPMANN, J.:**

Petitioner brought this proceeding seeking to vacate an arbitrator's award (which she has failed to attach to the petition) and to remand the underlying employment termination dispute for a new arbitration hearing.

Petitioner argues that the arbitrator's award must be vacated because: (i) petitioner's counsel needed to withdraw in the middle of the proceedings due to health reasons, and the arbitrator refused to adjourn the arbitration for four weeks so petitioner's new counsel could familiarize himself with the matter and the proceedings had up to that point; (ii) approximately one month after the proceedings were concluded and the record closed, the arbitrator allowed respondents to introduce new evidence on the issue of attorney's fees, which had not been part of the proceeding, thereby foreclosing petitioner from addressing the issue; and, (iii) at the outset of

the proceedings, the arbitrator ruled that the burden of proof was on respondents and petitioner presented her case based on that premise, but in the written decision the arbitrator without notice reversed his ruling and shifted the burden of proof to petitioner, thereby depriving her of the opportunity to meet that burden.

Respondents counter that: (i) petitioner was on notice that burden of proof was an open issue because after ruling that respondents bore the burden of proof, the arbitrator allowed them to argue that the burden should be shifted to petitioner; (ii) the denial of an adjournment due to her counsel's medical condition did not prejudice petitioner because she did not change attorneys and her counsel, despite his medical condition, vigorously argued and presented her case; and, (iii) petitioner knew that respondents had asked for legal fees in their post-hearing submissions and did not object to the request as untimely or seek leave from the arbitrator to oppose respondents' fees request.

To prevail on any of the three grounds for vacatur asserted by her, petitioner must establish that the arbitrator wrongly deprived her of the opportunity to fully participate and present her evidence on material issues. Unlike judicial adjudications, where the court is obligated to follow the law in reaching its conclusion, "an arbitrator is not bound by principles of substantive law or by rules of evidence.... He may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be" (Matter of Jones Hirsch Connors & Bull [Friedman, Carney & Wilson], 166 AD2d 292, 292-293 [1st Dept 1990], lv den 77 NY2d 802 [1991]). "The only basis upon which an award can be vacated at the behest of a party who participated in the arbitration or was served with notice of intention to arbitrate is that the rights of that party were prejudiced by corruption, fraud or misconduct in procuring the award,

partiality of an arbitrator, that the arbitrator exceeded his power or failed to make a final and definite award, or a procedural failure that was not waived" (Matter of Silverman [Benmor Coats, Inc.], 61 NY2d 299, 307 [1984], rearg den Norris v. Cooper, 62 NY2d 803 [1984]).

"The failure of an arbitrator to grant an adjournment is an abuse of discretion constituting misconduct within the meaning of CPLR 7511(b)(1)(i) if it results in the foreclosure of the presentation of pertinent and material evidence" (Matter of Insurance Company of North America [St. Paul Fire & Marine Insurance Company], 215 AD2d 386, 387 [2d Dept 1995], citations omitted; Matter of Bevona [Superior Maintenance Co.], 204 AD2d 136, 139 [1st Dept 1994]; Harwyn Luggage, Inc. v. Henry Rosenfeld, Inc., 90 AD2d 747, 747-748 [1st Dept 1982], affd 58 NY2d 1063 [1983]). A mere denial of an adjournment does not constitute misconduct; a party who unsuccessfully seeks an adjournment from the arbitrators and avails itself of the alternative opportunity of submitting the evidence cannot meet its burden of proof to vacate the ensuing award (see Matter of Herskovitz [L.B. Kaye Associates, Ltd.], 170 AD2d 272 [1st Dept 1991], app diss 78 NY2d 899 [1991]). Here, it appears from Mr. Borstein's affirmation that the continued representation of petitioner in the lengthy arbitration proceedings occasioned by the arbitrator's denial of an adjournment was arguably detrimental to counsel's health. However, there is no evidence that petitioner herself was prejudiced, either by an inability to submit evidence or by ineffective assistance of counsel due to illness. Indeed, Mr. Borstein was a credit to the profession and should be commended for putting his client's interests ahead of his own.

Neither is there any evidence that petitioner was prevented by the arbitrator from objecting to the award of legal fees to respondents prior to the rendering of the award. By her own admission, petitioner made a conscious decision to not respond to respondents' fee request after extrapolating from a prior ruling by the arbitrator that her response would be futile

(Henneberry affidavit, ¶ 40). "Clearly, [petitioner] charted [her] own procedural course and cannot now be heard to complain" (Matter of Herskovitz, supra, 170 AD2d at 275).

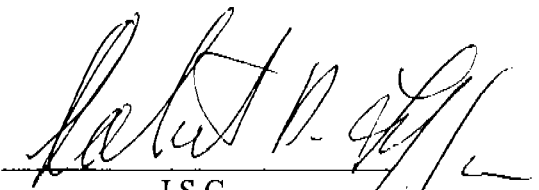
Similarly, petitioner acknowledges that she had the opportunity to present additional witnesses, but she "opted to forego these witnesses due to various strategic, timing, and cost-related considerations, reasoned with the goal of presenting the strongest case, in which Respondents'[sic] held the burden" (id., ¶ 27). Hindsight is not an acceptable ground for arbitrator misconduct; "it is the burden of the party seeking to avoid an arbitration award to demonstrate "by clear and convincing proof" that the arbitrator has abused his discretion in such a manner so as to constitute misconduct sufficient to vacate or modify an arbitration award" (Matter of Disston Company [Aktiebolag], 176 AD2d 679 [1st Dept 1991], lv den 79 NY2d 757 [1992], citations omitted). Petitioner has not met that burden. An arbitrator's "award will not be vacated even though the court concludes that his interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power" (Matter of Silverman [Benmor Coats, Inc.], supra, 61 NY2d at 308).

Accordingly, petitioner's application is denied and the petition is dismissed. Respondents' cross-petition is granted and the arbitrator's award (at respondents' exhibit G) rendered in favor of respondents and against petitioner is confirmed.

This decision constitutes the judgment of the court.

DATED: 10/17/2005

OCT 17 2005

  
\_\_\_\_\_  
J.S.C.  
**HON. ROBERT B. LIPPMANN**  
J.S.C.