

Odyssey Reinsurance Corporation v Ace Property & Casualty Insurance Co.

2006 NY Slip Op 30212(U)

August 7, 2006

Supreme Court, New York County

Docket Number: 0106193/2006

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB Justice

PART 15

Odyssey Reinsurance Corp.

INDEX NO. 106193/06

MOTION DATE _____

- v -
Ace Property & Casualty Ins. Co.

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied in accordance with the accompanying memoranda opinion.*

FILED

AUG 15 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/7/06

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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Odyssey Reinsurance Corporation, and
Odyssey American Reinsurance
Corporation,

Index No. 106193/2006
Motion Seq. 001

Petitioners,

-against-

ACE Property & Casualty Insurance Company,

Respondent,

-----x

WALTER B. TOLUB, J.:

By this motion, petitioner, Odyssey Reinsurance Corporation seeks an order vacating a part of an arbitral award on the basis that the arbitrator's exceed their power under the arbitration clause and more particularly by directing petitioner to pay a portion of the fee of the arbitrator appointed by respondent ACE Property & Casualty Insurance Company and ACE's share of the "umpire's fee". In addition, petitioner and respondent seek an order sealing the record, with access restricted only to the parties, their attorneys and Court personnel.

Facts

Petitioner Odyssey Reinsurance Corporation, renamed Clearwater Insurance Company since the arbitration proceeding, is

a reinsurance company with its principal office in Stamford, Connecticut. Respondent ACE is an insurance company with its principal office in Philadelphia, Pennsylvania. On December 30, 2004, respondent initiated an arbitration proceeding in New York County against petitioner by service of a Demand for Arbitration. The arbitration was brought pursuant to Article 23 of the Reinsurance Agreement between petitioner and respondent, which stated: "one arbitrator shall be chosen by each party and the two arbitrators shall, before instituting the hearing, choose an impartial third arbitrator who shall preside at the hearing" (Petitioner's Exhibit 2, p.11)

On or about February 1, 2006, respondent submitted a proposed draft award, providing that petitioner reimburse respondent's expenses, including "the costs of arbitration, panel fees, attorney's fees..." (Respondent's Verified Answer, Exhibit A, p.2). On or about February 6, 2006, petitioner submitted a proposed draft award, which stated "ACE is required to reimburse Odyssey Re's expenses in this matter, including the cost of this arbitration, Panel's fees, attorney's fees..." (Respondent's Verified Answer, Exhibit B, p.2).

The agreement states: "Each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the cost of the third arbitrator. The remaining costs of the arbitration shall be allocated by the panel. The

panel may, at its discretion, award such further costs and expenses as it considers appropriate, including but not limited to attorneys fees, to the extent permitted by law" (Petitioner's Exhibit 2, p.12). The arbitration panel awarded to ACE "all costs expenses and other attorneys' or other fees incurred in this matter by ACE, including ACE's share of the fees and costs of its arbitrator and the umpire, measured from the date Pre-Hearing briefs were filed (not including the prior costs, expenses and fees associated with such briefs or any earlier parts of this matter) to date of this award" (Petitioner's Exhibit 3, p.1). Petitioner's party-appointed arbitrator dissented from the foregoing provision of the Arbitral Award (Petitioner's Verified Complaint, p.2).

Petitioner claims that the arbitration panel exceeded its authority under Article 23 of the Reinsurance agreement in directing petitioner to pay respondent's share of the arbitration fees after the filing of the Pre-hearing Briefs, pursuant to Section 10(a)(4) of the Federal Arbitration Act¹ and CPLR § 7511(b)(1)(iii)². On March 6, petitioner paid what the panel required "under a full reservation of rights, including a payment

¹ Section 10(a)(4) reads that the award may be vacated "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." (9 U.S.C. § 10(a)(4)).

² CPLR § 7511(b)(1)(iii) provides that an award shall be vacated when "an arbitrator, or agency, or person making the award exceed their power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made."

of \$25,269.10 for ACE's party-appointed arbitrator's fee and ACE's share of the umpire's fee" (Petitioner's Verified Complaint, p.3). Petitioner seeks an order vacating the part of the arbitral award directing petitioner to pay a portion of the fee of the arbitrator appointed by respondent.

Discussion

It is well settled that 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 limitation³(*Albany County Sherriff's Local 775 of Council 82, AFSCME, AFL-CIO on Behalf of Hughes v. Albany County*, 63 NY2d 654, 656 [1984]). Only where an arbitration award is totally irrational or exceeds a specifically enumerated limitation on the arbitrator's power may it be vacated by the court (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin*, 1 AD3d 39, 43 [1st Dept. 2003]). An arbitrator's interpretation of parties' contract is not subject to judicial challenge even where the apparent or even plain meaning of words of contract has been disregarded. (*In re Etkin & Co. (Play It*

³While the parties do not explicitly argue that the New York standard of review for arbitration governs this matter, the arguments put forth by the parties appear to concede to its applicability.

Again Apparel, Inc.), 235 AD2d 264, 265 [1st Dept 1997]). The trial court gives deference to the arbitrator's interpretation of the contract. An arbitrator's interpretation is only deemed irrational when "arbitrators give the provisions in dispute a completely irrational construction and in effect make a new contract for the parties" (*Brown & Williamson Tobacco Corp. v. Chesley*, 2002 194 Misc 2d 540, 546 (N.Y. Sup. 2002), *revd* 7 AD3d 368 [1st Dept 2004] [holding that in reviewing an award, a court is bound by the arbitrator's factual findings and interpretation of the contract]).

The question that this court must therefore address is whether the arbitrators in the instant case gave the provisions in the contract a totally irrational construction (see, *Fisherman v. Roxanne Management*, 24 AD2d 365 [1st Dept 2005] [Arbitrator exceeds his power only when he ignores specific limitations on powers delegated to him in arbitration clause or gives completely irrational construction to provisions of parties' agreement thereby effectively rewriting it]). Petitioner alleges that the arbitrators exceeded their power under the arbitration clause by directing petitioner to pay a portion of the fee of the arbitrator appointed by respondent and respondent's share of the umpire's fee. The arbitration clause provides for each party to bear the cost of its own arbitrator and to pay an equal share of the third arbitrator. The agreement then states that "the

remaining costs of the arbitration shall be allocated by the panel" and that "the panel may, at its discretion, award such further costs and expenses as it considers appropriate, including but not limited to attorneys fees, to the extent permitted by law" (Petitioner's Exhibit 2, p.12) (emphasis added).

The final award issued by the arbitrators granted respondent "all costs, expenses and attorneys' or other fees incurred in this matter by ACE, including ACE's share of the fees and costs of its arbitrator and the umpire, *"measured from the date Pre-Hearing Briefs were filed (not including the prior costs, expenses, and fees associated with such briefs or any earlier parts of the matter) to the date of this award"* (Petitioner's Exhibit 3) (emphasis added). Review of the arbitration agreement and the aforementioned clauses lead this court to conclude that the arbitration panel could reasonably have read the phrase "the remaining costs of arbitration shall be allocated by the panel" and the next phrase "at its discretion" as modifying the first phrase regarding the splitting of the arbitration fees. The measurement of the fee awarded from the date that Pre-Hearing Briefs were filed also suggests that there were fees incurred and paid for by respondent before the arbitration began that will not be recovered. Additionally, it is this court's opinion that the panel could have reasonably concluded that the fees incurred after the filing of the "Pre-Hearing" Briefs constituted

"remaining costs of the arbitration" which were not covered under the equal share provisions of the Arbitration Agreement. Because the trial court must defer to the arbitration panel's interpretation of the contract between the parties, this court must deny petitioner's petition to vacate this portion of the arbitral award if the interpretation given the contract is rational.

Respondent argues that petitioner's submission of the issue of the panel fees to the court constitutes a waiver of the issue. Under New York law, parties can agree to arbitrate arbitrability through their conduct by voluntarily submitting the issue to arbitrators, vigorously debating it before them, and then completely failing during the proceedings to challenge their authority to decide the issue or otherwise preserving it for judicial resolution (*In Re Engel*, 193 Misc2d 91,100, [N.Y.Sup.2002]). The Second Circuit reasoned in *DiRussa v. Dean Witter Reynolds* that because the parties clearly submitted the issue of attorney's fees to the arbitration panel, they did not exceed their power pursuant to Section 10(a)(4). (*DiRussa v. Dean Witter Reynolds*, 121 F3d 818, 824 [2d Cir 1997]). The Second Circuit further held that its inquiry regarding whether the arbitrators had the power should focus on "the parties' submissions or the arbitration agreement...not whether the arbitrators correctly decided that issue" (121 F3d at 824). The

First Department has adopted the same line of reasoning in its arbitration cases (see, *Roffler v. Spear, Leeds & Kellogg*, 13 AD3d 310 [1st Dept 2004] [Both parties argued issue of petitioners' individual claims to panel and thus the panel had authority to arbitrate issue]). Further, if a party fails to object to consideration of a matter during arbitration, it is deemed to be acquiescence in submission of matters to the arbitrator (*Woldman v. Kent*, 244 AD2d 1008, 1009 [4th Dept 1997]).

In the case at bar, petitioner voluntarily submitted the issue of panel fees to the arbitrator and therefore granted the arbitration panel authority to consider the issue. Respondent therefore argues that "the panel did not exceed its authority because the parties, by their submissions mutually granted the arbitrators power to award "Panel fees." Indeed, the parties each provided the panel with a "proposed final award" and each party requested that the panel award "panel fees" in its favor" (Respondent's Memorandum of Law, p.5). In the absence of any evidence indicating that petitioner contested the consideration of panel fees during the arbitration process, the act of submitting the proposed final award seeking panel fees gives authority to the arbitrator to rule on the issue.

Even though respondent argued has argued that petitioner's submission of the panel fees to the arbitration panel constitutes


a waiver of the provision in the arbitration agreement, the court need not reach this issue in order to deny petitioner's motion. First, the arbitration clause could reasonably be construed to grant the arbitrators the authority to rule on the issue of the panel fees regardless of the alleged waiver of the arbitration provision. Second, New York law recognizes the authority of the arbitration panel to address issues submitted by both parties, such as the panel fees in the instant case. Thus, petitioner's motion to vacate the arbitral award should be denied.

Petitioner and respondent have moved, and stipulated that the court records are sealed concerning the petition to vacate an arbitral award that is before the court. Pursuant to the Uniform Rules for Trial Courts (22 NYCRR) § 216.1(a), the parties have not submitted sufficient evidence to demonstrate that sealing the records in this matter is in the interest of the public as well as of the parties (Uniform Rules for Trial Cts [22 NYCRR § 216.1(a); see, *Gryphon Domestic VI, LLC v. APP Intern. Finance*, 28 AD3d 322, 324 [1st Dept 2006] [Generally the courts are reluctant to allowing sealing of court records, even where both sides to the litigation have asked for such sealing]). A confidentiality agreement alone still requires the court to make an independent determination of good cause (see, *In re Will of Hofmann*, 284 AD2d 92, 93-94 [1st Dept 2001]). Inasmuch as neither party has demonstrated good cause for why sealing the

record in this matter is warranted, the portion of the instant application seeking to seal the record is denied without prejudice to the parties.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/7/06



HON. WALTER B. TOLUB, J.S.C.

FILED
AUG 15 2006
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NEW YORK