

**Fitzgerald v Fahnestock & Co., Inc.**

2006 NY Slip Op 30581(U)

December 12, 2006

Supreme Court, New York County

Docket Number: 112515/06

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Justice

Fitzgerald, Paul

INDEX NO. 112515/06

MOTION DATE 10/31/06

MOTION SEQ. NO. 001

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

- v -

Fahnestock + Co., Inc et al

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits \_\_\_\_\_

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

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

**UNFILED JUDGMENT**  
This 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 41B).

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

In accordance with the annexed Memorandum Decision, it is hereby

ORDERED that the petition is granted and the Award rendered in favor of petitioner and against respondents Fahnestock & Co., Inc. and Oppenheimer & Co., Inc. is confirmed; and it is further

ORDERED that the cross-petition for an order vacating and/or modifying the Award and denying the Petition to Confirm the Arbitration Award in its entirety, is denied; and it is further

ORDERED and ADJUDGED that petitioner PAUL FITZGERALD, having an address through his attorneys The Lax Law Firm at 470 Park Avenue South, New York, New York 10016, shall have judgment and recover against respondents Fahnestock & Co., Inc. and Oppenheimer & Co., Inc., having an address through their attorneys Winget, Spadafora & Schwartzberg, LLP at 45 Broadway, 19<sup>th</sup> Floor, New York, New York 10006, in the amount of \$444,175.00, plus interest at the rate of 9% per annum from the date of August 16, 2006, as computed by the Clerk in the amount of \$ \_\_\_\_\_, together with costs and disbursements in the amount of \$ \_\_\_\_\_ as taxed by the Clerk, plus \$1,000.00 as reimbursement of petitioner's hearing deposit, for the total amount of \$ \_\_\_\_\_ and that the petitioner have execution therefor.

Dated: 12/12/06

**HON. CAROL EDMEAD** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_  
PAUL FITZGERALD, X

Petitioner,

Index No. 112515/06

**DECISION/ORDER**

-against-

FAHNESTOCK & CO., INC. and  
OPPENHEIMER & CO., INC.

Respondents

**UNFILED JUDGMENT**  
This 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  
41B). X

\_\_\_\_\_  
EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Paul Fitzgerald ("petitioner") moves by order to show cause for an order directing the confirmation of a certain arbitration award in the matter entitled *Paul Fitzgerald v Fahnestock & Co., Inc. and Oppenheimer & Co., Inc.* (NYSE Docket No. 2004-015875) (the "Arbitration") in favor of Petitioner and against the respondents Fahnestock & Co., Inc. ("Fahnestock & Co., Inc.") and Oppenheimer & Co., Inc. ("Oppenheimer") (collectively "respondent"),<sup>1</sup> dated August 16, 2006 (the "Award"), and ordering judgment against respondent in the amount of \$444,175.00 plus interest at a rate of 9% accruing from August 16, 2006, plus the amount of \$1,000,00 as a return of petitioner's hearing deposit, plus attorney's fees, expenses and costs.

Respondent cross petitions for an order vacating and/or modifying the Award and denying the Petition to Confirm the Arbitration Award in its entirety.

<sup>1</sup>Fahnestock and Oppenheimer are named herein as separate entities; however, they are actually the same entity. In 2003, Fahnestock & Co., Inc., changed its name to Oppenheimer & Co., Inc. The name change occurred after Fahnestock acquired certain assets from CIBC World Markets Corp., including rights to the name "Oppenheimer & Co., Inc."

*Petitioner's Contentions*

On December 3, 2004, petitioner initiated the New York Stock Exchange ("NYSE") arbitration that is the subject of this claim by filing a Statement of Claim against respondent: the Arbitration. Petitioner alleged breach of contract and the covenant of good faith and fair dealing, unjust enrichment, *quantum meruit* and violation of New York Labor Law based on respondent's failure to pay petitioner wages and severance upon his termination. Petitioner sought damages of \$1 million dollars, punitive damages of \$2 million dollars and attorney's fees.

On January 31, 2005, respondent filed a Statement of Answer and Motion to Dismiss.

The Arbitration hearings occurred on the following dates: May 9, 11, 12, 2006, and June 19-20, 2006. On or about August 16, 2006, the arbitration panel, consisting of Frederick M. Joseph, Herbert W. Ackerman and J. Kirkland Grant, issued the Award. The petitioner was awarded the sum of \$445,175.00, representing \$436,000.00 as the award on the claim plus \$1,000.00 as a return of petitioner's hearing deposit and discovery sanctions in the amount of \$8,175.00. Simple interest was assessed on the sum of \$444,175.00 at the rate of 9% from the date of the Award until the Award is paid. The NYSE forum fees in the amount of \$10,000.00 were assessed against respondent. Costs in the amount of \$3,500.00 representing a pre-hearing conference in the amount of \$1,000.00 and two adjournment fees in the amount of \$1,000.00 and \$1,500.00, respectively, were also assessed against respondent. There was no award of attorney's fees.

*Respondent's Contentions*

The Award in this matter should be vacated because there is a pre-existing and valid General Release between the parties that unequivocally bars petitioner's claim in the Arbitration.

By ignoring the Release and awarding petitioner damages on his claim, the arbitration panel altogether vitiated the General Release, for which respondent paid valuable consideration in the amount of \$600,000. Permitting this Award to stand would upset the well-settled expectations of New York's business and legal communities that a release will be effective in barring future litigation between the parties.

Petitioner conceded during the Arbitration that the Settlement Agreement and Release is a valid and binding agreement; that it was not the product of fraud, duress or illegality; and that respondent performed its obligations under the Settlement Agreement and Release. Nevertheless, the arbitrators summarily denied a Motion to Dismiss based on the General Release that petitioner timely filed in the Arbitration, completely disregarded the General Release, and awarded petitioner the sum of \$436,000 on his claim. Apparently, the arbitration panel decided that the General Release was "ambiguous" based upon nothing more than self-serving testimony by petitioner to the effect that he did not *intend* for the General Release to apply to his secret and undisclosed employment contract.

Initially, the arbitration panel agreed to decide respondent's motion and if the motion was denied, to proceed with an evidentiary hearing. Thereafter, the arbitration panel reversed that ruling and decided to hear petitioner's case first and then permit respondent to move to dismiss. This unexpected about-face prejudiced respondent because it permitted petitioner to present self-serving, irrelevant testimony regarding his purported intent surrounding the otherwise clear and unambiguous General Release. This parol testimony should not have been permitted because petitioner's claims should have been dismissed, as a matter of law, upon respondent's motion at the hearing.

The arbitrators' refusal to allow respondent to argue the Motion to Dismiss at the outset of the proceedings was compounded by their subsequent refusal to allow respondent to present oral argument on the Motion to Dismiss at the conclusion of petitioner's case. The arbitrators unreasonably refused respondent's request, which was made at the close of petitioner's case, that they deliberate on the Motion to Dismiss and issue a written decision, and offered no rationale for refusing to do so.

The Chairman later explained that the reason for the denial was because the panel believed there was an ambiguity with respect to the scope of the General Release. In fact, petitioner offered no evidence that could support such a conclusion, and it is clear from the face of the General Release that it unambiguously releases any and all contracts and agreements known or unknown.

*Petitioner's Opposition to Respondent's  
Cross-Motion and Further Support of  
Petitioner's Motion*

The Petition to confirm the award must be granted because the evidence adduced before the Panel of the NYSE established the elements for several causes of action that were pled in the Statement of Claim, namely, breach of petitioner's employment agreement, dated August 6, 2001 (the "Employment Agreement"), *quantum meruit*, unjust enrichment, violation of the New York Labor Law, and the covenant of good faith and fair dealing.

The sole defense to the Employment Agreement on which respondent relies for purposes of its Cross-Petition is a Settlement Agreement and Release that the Panel explicitly found to be ambiguous as to its scope. The Panel reasonably could have found both from the fact of the Settlement Agreement itself and the surrounding circumstances that the parties never intended to

enter into a “general” release as respondent contended (or to discharge the Employment Agreement under any other interpretation of the Settlement Agreement) but only to dispose of an unrelated litigation.

*Respondent's Reply to Cross-Petition*

Petitioner cavalierly dismisses respondent’s public policy argument as a “red herring” on the notion that the recent policy favoring the finality of arbitration awards somehow trumps the age-old public policy of enforcing general releases that are part of settlement agreements and holding parties to their contractual obligations.

Petitioner concedes that the General Release contained in the Settlement Agreement is a valid and binding contractual obligation, and does not contend that it was a product of fraud, duress, illegality or mutual mistake, or that respondent breached the Settlement Agreement. Nor that the parties were well represented.

Petitioner’s only retort is that notwithstanding the plain language of the General Release, it was in fact only a limited release.

Analysis

It has long been settled that New York State public policy favors the enforcement of arbitration agreements (*Matter of Weinrott [Carp]* 32 NY2d 190, 199, 344 NYS2d 848 [1973]; *Matter of Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 49, 666 NYS2d 990 [1997]), for arbitration serves “as a means of conserving the time and resources of the courts and the contracting parties” (*Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95, 371 NYS2d 463 [1975], *see also Maross Constr., Inc. v Central N.Y. Regional Transp. Auth.*, 66 NY2d 341, 345, 497 NYS2d 321 [1985] [arbitration “is now well recognized as an

effective and expeditious means of resolving disputes between willing parties desirous of avoiding the expense and delay frequently attendant to the judicial process”]; *Matter of Siegel [Lewis]*, 40 NY2d 687, 689, 389 NYS2d 800 [1976] [“[i]t has long been the policy of the law to interfere as little as possible with the freedom of consenting parties to achieve that objective”]).

Judicial review of an arbitration award is limited, and an award will not be vacated “unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator's] power” (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308, 473 NYS2d 774 [1984]; see also *Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 83, 769 NYS2d 451 [2003]). Moreover, courts are obligated to give deference to the decision of the arbitrator (see *Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 629, 415 NYS2d 974 [1979] [“An arbitrator's paramount responsibility is to reach an equitable result, and the courts will not assume the role of overseers to mold the award to conform to their sense of justice”]). This is true even if the arbitrator misapplied the substantive law in the area of the contract (see *Matter of Associated Teachers of Huntington v Board of Educ., Union Free School Dist. No. 3, Town of Huntington*, 33 NY2d 229, 235, 351 NYS2d 670 [1973]; see also *Rochester City School Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 581, 394 NYS2d 179 [1977]).

So, even where the arbitrator makes a mistake of fact or law, or disregards the plain words of the parties' agreement, the award is not subject to vacatur “unless the court concludes that it is totally irrational or violative of a strong public policy” and thus in excess of the arbitrator's powers (*Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 155, 630 NYS2d 274 [1995]; see also *Maross Constr. v Central N.Y. Regional Transp. Auth.*, 66 NY2d

341, 346, 497 NYS2d 321 [1985]; *Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308, 473 NYS2d 774 [1984]; *Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 631, 415 NYS2d 974 [1979]; *Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 357, 386 NYS2d 831 [1976]).

While the term “irrationality” is oft bandied about in arbitration decisions and finds its way, almost inexorably, as the last of the losing litigator's long litany of laments in actions to vacate an arbitration award, there is precious little precedent to delineate in this context what “irrational” means (*Banc of America Securities v Knight*, 4 Misc 3d 756, 781 NYS2d 829 NY Sup 2004]).

The New York Court of Appeals recognizes “irrationality” as a non-statutory ground for setting aside an arbitral award under New York law. As recently as November 20, 2003, the Court of Appeals reiterated this principal in *United Federation of Teachers v Board of Education*, 1 NY3d 72, 79, 769 NYS2d 451 [2003]). In that case, the Court considered public policy grounds for the vacation of an arbitration award, and found such grounds not present in the case. In the course of its decision, however, the Court in listing the grounds for vacation of a New York arbitration award, again included “irrationality.”

An arbitrator's determination is “irrational” if it gives a completely baseless construction to the provisions of the parties' contract in dispute and, in effect, makes a new contract or misconstrues the contract agreed to by the parties (*see Matter of Pine Plains Cent. School Dist. v Kimball*, 272 AD2d 332, 333, 708 NYS2d 306 [2000], quoting *Matter of National Cash Register Co. [Wilson]*, 8 NY2d 377, 383, 208 NYS2d 951 [1960]).

To reiterate, an arbitration award may be vacated if it “violates a strong public policy, is

irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power”

(*Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]). These exceptions are to be narrowly read in light of the strong federal and New York public policies favoring resolution of employment disputes by arbitration. None of these exceptions warrant vacatur of the arbitration Award at issue.

A public policy whose violation warrants vacatur of an arbitration award must entail “strong and well-defined policy considerations embodied in constitutional, statutory or common law [that] prohibit a particular matter from being decided or certain relief from being granted by an arbitrator” (*New York State Correctional Officers & Police Benevolent Assoc.*, 94 NY2d 321, 326 [1999]). Alleged policies that are merely “general considerations of supposed public interests” are not sufficient grounds for vacatur (*W.R. Grace & Co. v Local Union 759, Intl. Union of United Rubber Workers*, 461 US 757, 766 [1983]; *see also United Paperworkers Intl. Union v Misco, Inc.*, 484 US 29 [1987]).

Respondent argues that the public policy supporting enforcement of an arbitration determination is challenged herein by the public policy encouraging enforcement of a General Release.

However, the public policy encouraging enforcement of a General Release is not in jeopardy in this action. There was no wholesale disregard of the General Release in the instant case. What occurred was an interpretation of the issue of the General Release before the Arbitration Panel, and, the arbitrator’s determination as to the import of the General Release, along with a plethora of other evidence before the arbitration panel. To repeat, in assessing

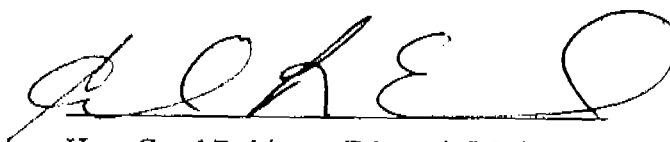
whether an arbitration award should be vacated, “[a] court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one....” (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326, 704 NYS2d 910; see *Matter of Town of Haverstraw*, 65 NY2d 677, 678, 491 NYS2d 616; *Matter of Sprinzen*, 46 NY2d 623, 629, 415 NYS2d 974).

The apparent reasoning on the part of the Arbitration Panel demonstrates that the Award was not irrational, since it was reasonable and justified by the evidence, or lack thereof, before them (see *Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296 [1991]). In light of the full record before the Arbitration Panel, it cannot be said that their determination was irrational or contrary to public policy.<sup>2</sup>

Based on the foregoing, the petition to confirm the Award is granted, and the cross-petition to vacate the Award is denied.

This constitutes the decision and order of the Court.

Dated: December 12, 2006



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**UNFILED JUDGMENT**  
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 obtain entry, counsel or authorized representative must  
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 41B).

<sup>2</sup> Notwithstanding the above, petitioner's request for attorney's fees is denied.