

Matter of Kalikow v Konner

2007 NY Slip Op 31768(U)

June 13, 2007

Surrogate's Court, Nassau County

Docket Number: 0340361/2007

Judge: John B. Riordan

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SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

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 In the Matter of the Application of Eugene Shalik, as
 preliminary Co-Executor of the Estate of

File No. 340361

PEARL B. KALIKOW,

Dec Nos. 380 and 417

Petitioner,

-against-

Dennis A. Konner, Edward M. Kalikow and Laurie Platt,

Respondents.

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This is a motion for an order disqualifying an arbitrator or, in the alternative, compelling disclosure of personal and business associations with an adverse party.

Respondent Dennis A. Konner was designated as an arbitrator in a partnership agreement dated January 3, 1980. The movant is Eugene Shalik, one of two preliminary executors of the estate of Pearl B. Kalikow. The other preliminary executor is Fr. James DeVita. The adverse parties are decedent's children Laurie Platt and Edward M. Kalikow. The dispute concerns the interpretation of the partnership agreement.

The executors previously brought on a motion returnable December 7, 2006 for an order disqualifying Konner as the arbitrator¹. Following a demand for arbitration, Konner scheduled an arbitration hearing and directed submissions.

Prior to the commencement of an arbitration hearing the preliminary executors moved for an order disqualifying Konner. The court held a hearing on the question of disqualification. The court concluded that Konner should be disqualified on the basis of his failure to make timely

¹ While both preliminary co-executors sought Konner's disqualification initially, it appears that the instant motion is brought by Shalik alone, although there is no indication that the other preliminary co-executor has reconsidered his opposition to Konner's serving as arbitrator.

disclosures of information which might have a bearing upon his qualification to serve. Further, the court found that Konner's conduct created an appearance of bias (*In re Matter of Arbitration between the Preliminary Co-executors of the Estate of Pearl B. Kalikow and Laurie Platt and Edward M. Kalikow*, 14 Misc 3d 1203A [2006]).

Thereafter, Laurie Platt and Edward M. Kalikow brought on a motion to renew and reargue the court's decision. The motion to renew was denied. The motion to reargue was granted, the court finding that it had applied the wrong standard of review for disqualification. The proper standard, the court concluded, is whether there is a "real possibility" or "probability" that injustice will result (*Shalik v Kalikow*, 15 Misc3d 1106A [2007]).

The court vacated its prior decision which disqualified Konner and directed the arbitrator to make the "requisite disclosures" within 21 days of the entry of the order.

Shalik now moves, alternatively, for: disqualification of Konner on the grounds that he failed to make the disclosures directed by the court; or compelling Konner to make the disclosure demanded by Fr. DeVita's attorney in his April 9, 2007 letter; or such other relief as the court deems appropriate.

In his affirmation of disclosure, the arbitrator portrays himself as a trusted adviser and friend of the entire Kalikow family. He recites the social and business functions that both he and his wife attended as guests of decedent and her husband, and Edward Kalikow and his wife. He does not disclose a date or event which estranged the relationship between decedent and her son, saying, somewhat vaguely, "as time passed" the decedent and her son had a "falling out."

He claims that, despite his extensive personal and business relationship with the family, "to this day" he does not know the circumstances of the estrangement and surmises that the decedent's cooled relationship toward him was the result of his continued relationship with decedent's son,

and not because of any confrontation or dispute between Konner and the decedent. Also, Konner avers that he only recently became aware that he and certain others had been excluded from serving as either executor or trustee under decedent's will and that he knows of no reason for decedent taking that action toward him.

In reply, Shalik, based on his "direct knowledge of the facts and circumstances surrounding [Konner's] relationship with Decedent," challenges the veracity of those statements. Shalik contends that Konner told him that he (Konner) had decided to terminate his relationship with the decedent Pearl Kalikow around the time of her husband's death in favor of respondent Edward Kalikow because he believed that Edward Kalikow was "the future" of the Kalikow businesses and that his alignment with Edward Kalikow would be in Konner's own business interests.

Shalik also contends that Konner has known for years that he had been excluded as either executor or trustee under the decedent's will and that Konner acknowledged as much in a conversation with Shalik in or about the year 2000. Finally, Shalik claims that Konner was well aware of the circumstances surrounding the estrangement between the decedent and her son, Edward, and advised Shalik in about the year 2000 that the estrangement was the result of the decedent's friendship with the other nominated executor, Fr. James C. DeVita.

Clearly, if Shalik's allegations are found to be credible, Konner's making of false statements in a written submission to the court would disqualify him from serving as arbitrator (*Astoria Medical Group v Health Ins. Plan of Greater New York*, 11 NY2d 128, 137 [1962]; *Matter of Excelsior 57th Corp.*, 218 AD2d 528, 531 [1st Dept 1995] [court may disqualify arbitrator for dishonesty]).

On the other hand, the demands for discovery by DeVita's counsel prior to a hearing are so overbroad that the inevitable explosion of motion practice would defeat the parties' probable intention in deciding to provide for arbitration in the first place, i.e., an expeditious and

inexpensive method of dispute resolution (*Soblosky v Edward S. Gordon & Co.*, 73 NY2d 133, 138 [1989]). Rule 21 of the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures provides, with respect to any document discovery sought incident to the arbitration hearing itself, that the arbitrator *may, consistent with the expedited nature of arbitration*, direct the production of documents or other information. The granting of any pre-hearing discovery is thus in the discretion of the arbitrator. While it is the court and not the arbitrator at this juncture who will decide discovery issues related to Konner's fitness to serve as arbitrator, the court recognizes the wisdom of permitting discovery only when consistent with the expedited nature of arbitration. It is clear to the court that the inevitable delay which would ensue upon the court's granting of the discovery sought by Shalik and DeVita is clearly *inconsistent* with the expedited nature of arbitration.

Accordingly, the motion is granted to the extent that this matter will appear on the court's calendar for hearing on Tuesday, June 26, 2007 at 9:30 a.m. The movants may examine Konner regarding the sufficiency and veracity of the disclosure he has provided, but will not be granted discovery in advance of the hearing. The court expects both Shalik and Konner to give testimony regarding the disputed allegations set forth above, so that the court will be in a position to determine the credibility of both.

The separate motion to stay the arbitration proceeding pending this court's determination of the instant motion to disqualify Konner is granted.

Settle order on five days' notice with five additional days if service is by mail.

Dated: June 13, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court

