

St. Ann's School v Fishman

2007 NY Slip Op 32563(U)

August 19, 2007

Supreme Court, New York County

Docket Number: 0108221/2007

Judge: Kibbie F. Payne

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ANNEXED ON 8/20/2007
* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 4

ST. ANN'S SCHOOL,

Petitioner,

against-

MICHAEL FISHMAN, PRESIDENT, LOCAL 32BJ,
SERVICE EMPLOYEES INTERNATIONAL UNION,

Respondent.

Index No. 108221/07

Motion Seq. No. 001

ORDER

FILED
AUG 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

KIBBIE F. PAYNE, J.:

In this special proceeding, petitioner moves pursuant to CPLR 7511 (b) for an order vacating an arbitration award rendered in favor of respondent on the ground that the arbitrator did not follow the procedure of CPLR article 75. Respondent makes no appearance on this application.

Petitioner St. Ann's School is a private coeducational school in Brooklyn, New York. Respondent Michael Fishman, President, Local 32 BJ, Service Employees International Union is the president of a labor organization (Union), which represents some of petitioner's employees. Petitioner and the Union are part of a collective bargaining agreement, which provides for arbitration of their disputes before the Office of the Contract Arbitrator. On November 21, 2006, petitioner terminated its employment of Anthony Rodriguez, a Union member, alleging that he failed to report to work. A dispute arose concerning the firing, and Anthony Rodriguez sought reinstatement to his former position

with full back pay, benefits and seniority. The parties submitted the grievance to arbitration, and the arbitrator scheduled the hearing for January 30, 2007.

Upon the Union's request, the arbitrator mailed a notice of adjournment that rescheduled the hearing for March 22, 2007 at 9:30 a.m. Thereafter, the arbitrator issued an amended notice of adjournment changing the time of the hearing from 9:30 a.m. to 1:15 p.m. on March 22, 2007. Petitioner's counsel made a written objection to the adjournment, contending that he had a "conflicting engagement in Court for the afternoon of March 22" and that the time for the arbitration was changed without his input. Thereafter, the arbitrator issued another notice of adjournment, setting the hearing date for April 11, 2007.

Petitioner's counsel contacted the arbitral tribunal and the Union concerning the arbitrator's failure to send counsel the notice of adjournment, which was mailed to petitioner only. On April 9, 2007, petitioner's counsel made a written objection to the adjournment and asked for another hearing date agreeable to all parties. Counsel forwarded the letter to the Union. That same day, the Union faxed correspondence to petitioner's counsel, indicating that a copy was also delivered to the arbitrator. The letter stated that proper notice of the hearing was mailed to petitioner and did not need to be mailed to petitioner's counsel.

On the day of the hearing, petitioner's counsel did not appear and petitioner presented no evidence. Respondent called two witnesses, including Anthony Rodriguez. On May 1, 2007, the arbitrator issued an award in favor of the Union, which directed petitioner to reinstate Anthony Rodriguez with three weeks' back pay. Petitioner commenced this proceeding to vacate the arbitration award for the arbitrator's failure to follow the procedure of CPLR article 75, which requires the arbitrator to serve petitioner's counsel with notice of the adjournment (see CPLR 7511 [b] [1] [iv]; see also CPLR 7506 [b], [d]). Respondent does not oppose this application, making no appearance.

"The arbitrator shall appoint a time and place for the hearing and notify the parties in writing personally or by registered or certified mail not less than eight days before the hearing" of its time and place (see CPLR 7506 [b]). Pursuant to CPLR 7506 (d) where "a party is represented by an attorney, papers to be served on the party shall be served upon his attorney." Except for the requirements set forth in CPLR 7506 (d), all requirements of section 7506 can be waived "by written consent of the parties and . . . is waived if the parties continue with the arbitration without objection" (see CPLR 7506 [f]).

Here, it is undisputed that the arbitrator never served petitioner's counsel with the notice of adjournment and counsel

made no attempt to waive such requirement. Further, respondent does not appear to dispute petitioner's argument that counsel may never waive notice of the adjournment. Thus, the court finds that the arbitrator failed to comply with its duties pursuant to CPLR 7506 (b), (d), warranting vacatur of the award (compare Bevona v Emsof Realty Co., 160 AD2d 463 [1st Dept 1990] [rejecting the petitioner's argument that the failure to serve his counsel with notice of the final hearing date constituted a failure to follow procedure as no record proof existed that the arbitrator was informed that the petitioner retained counsel]). Petitioner's remaining argument for vacating the award is rendered academic. Accordingly, it is

ORDERED that this application is granted; it is further

ORDERED that the arbitration award, dated May 1, 2007, in favor of respondent and against petitioner is vacated.

The foregoing constitutes the decision and order of the court.

DATE: August 9, 2007

FILED
 AUG 20 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

 Hon. Kibbie F. Payne,