

Matter of Comtex News Network, Inc. v Ellis
2007 NY Slip Op 34296(U)
December 19, 2007
Supreme Court, New York County
Docket Number: 0603569/2007
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EILEEN A. RAKOWER

PRESENT: _____ **J.S.C.**

Justice

PART Part 5

Index Number : 603569/2007

COMTEX NEWS NETWORK INC

VS.

ELLIS, STEVE

SEQUENCE NUMBER : 001

CONFIRM AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

_____ 1

_____ 2

_____ 3

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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 11B)

Dated: 12/19/07



EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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 5

-----X

In the Matter of the Arbitration
of Certain Controversies between
COMTEX NEWS NETWORKS, INC.,

Petitioner,

Index No.
603569/07

- against -

**ORDER AND
DECISION**

STEVE ELLIS,

Respondent.

Mot. Seq. 001

-----X

EILEEN A. RAKOWER, J.S.C. :

Steve Ellis (Ellis)became the Chairman and Chief Executive Officer (CEO) of Comtex News Networks, Inc. (Comtex), a publically traded corporation, on July 1, 2003. One of Ellis’s long time colleagues, Larry Schwartz, (Schwartz) was hired as Comtex’s Chief Financial Officer and President the same day. The parties entered into written Employment Agreements (the Agreement(s)), negotiated by Ellis with Comtex on behalf of Schwartz and himself, that governed their obligations toward one another.

Over the next few months, Ellis became increasingly dissatisfied with the power structure at Comtex. The minutes of the February 5, 2004, Board of Directors’ meeting reflect a disagreement between Ellis and others regarding the expanded responsibilities of a particular committee and whether that expansion of its duties usurped his authority as CEO. Those present offered to give Ellis an official vote of confidence as reassurance of their support for him but Ellis declined stating that the Board’s action signaled that something was wrong. The minutes state that Ellis read from prepared notes enumerating the various consequences for a public company if the CEO resigns. Discussion continued until Ellis stated that he was very unhappy with recent developments and therefore, he resigned. Ellis produced a typed letter, placed it on the table and walked out of the room. Ellis’s letter stated, “I hereby tender my resignation as Chairman of the Board and CEO and as a Director of Comtex News Network.” Immediately thereafter, Schwartz stood up, told those present that he too resigned, produced his own letter of resignation and walked out of the room.

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Schwartz's letter stated, "I hereby resign as President of Comtex, effective immediately."

The minutes reflect that the Board then entered into a "lengthy and detailed discussion of whether or not to immediately accept the resignations and the consequences for the company." The minutes note that Ellis had repeatedly threatened the Board with resignation over the previous months. The Board determined that it would accept Ellis resignation but one of its members would discuss with Schwartz whether or not he wished to continue with Comtex. To that end, a phone call was placed to Schwartz's cell phone and he put the call on "speaker" so Ellis could hear it. Schwartz was asked to stay with Comtex in some capacity. Schwartz asked about Ellis's future with Comtex but was told that Ellis "had to be gone." Schwartz declined Comtex's offer. Ellis avers that during this conversation Schwartz mentioned his and Ellis's obligation to stay with Comtex for at least one month, a reference to the thirty day notice of termination requirement in the Agreements.

Comtex appointed an interim CEO and Ellis approved a press release announcing his own resignation. Ellis wrote an e-mail on February 9, 2004, congratulating the new CEO and "reminding" the company of the obligations outlined in the Employment Agreement. His e-mail ended stating "in order to avoid any misunderstanding please be good enough to promptly communicate with me the intended actions of the Company relative to its termination obligations." On February 16, 2004, Ellis wrote a letter to the new CEO reiterating his desire for Comtex to clarify its intentions and meet its obligations under his Employment Agreement "to avoid a misunderstanding that will lead to enforcement of my rights under the subject contract" Ellis's February 16, 2004 letter was answered on March 2, 2004 by an attorney for Comtex who informed Ellis that his resignation was accepted by the Board of Directors at the February 5th meeting and it was considered to be "without good reason," as that term is defined in the Agreement. As such, Comtex had different obligations than it would have had if Ellis resigned for a "good reason." The letter spelled out with great detail what Comtex believed to be the obligations of the parties. The letter included a "Separation Agreement and Release" for both sides to sign.

In May, 2004, Ellis filed a demand for arbitration with the American Arbitration Association (AAA), Comtex responded, motion practice and discovery ensued and, after five days of hearings and the submission of briefs, the record was closed on August 27, 2007. Ellis's demand stated that, pursuant to his Employment Agreement,

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he was owed salary, vacation days, severance benefits, a cash bonus and stock options. Comtex's position was that it did not owe Ellis anything because he had materially breached his Employment Agreement by failing to give thirty days notice of his resignation and he breached his duties as a director and officer of Comtex by failing to diligently perform the duties of his office. By decision dated September 25, 2007, the Arbitrator ruled that Ellis did materially breach the Agreement by failing to give thirty days notice of his resignation, that he was owed nothing by Comtex as a result of his breach and Ellis owed Comtex \$21,225.00 as his part of the fees and expenses incurred by Comtex. The arbitrator did not address whether or not Ellis breached his duties to diligently perform as director.

Comtex now moves, pursuant to CPLR § 7510, to confirm the arbitrator's award and seeks the court to enter judgment in the amount of \$21,225.00, together with interest from September 25, 2007 to entry of judgment, and the costs and disbursements of this proceeding. Ellis cross- moves pursuant to CPLR § 7511 to vacate the award of the arbitrator, arguing that the decision is "wholly irrational" because he did not breach the notice requirement for resignation in his Employment Agreement, if he did breach of the notice requirement it was not a material breach and, lastly, Comtex should have been collaterally estopped from raising certain of its arguments regarding Ellis at the arbitration hearing because of the determination of another arbitrator in Schwartz's arbitration matter with Comtex.

CPLR § 7510 states, "The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511."

CPLR § 7511(b) states, in relevant part,

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who . . . participated in the arbitration . . . if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award;
or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by a confession; or

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(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter was not made . . .

An arbitrator need not abide by the rules of evidence or principles of substantive law unless the parties' arbitration agreement specifically calls for it. (*Silverman v. Benmor Coats, Inc.*, 61 NY2d 299 [1984]). Courts favor permitting consenting parties to submit their disputes to arbitration and "the law has adopted a policy of noninterference, with few exceptions, in this mode of dispute resolution." (*Sprinzen v. Nomberg*, 46 NY2d 623 [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." (*Id.* at 629). Additionally, an award will not be vacated because the arbitrator exceeded her authority "unless the limitation on the arbitrator's power is contained, explicitly or by reference, in the arbitration award itself, and the particular aspect of the award which, it is claimed, the arbitrator lacked power to make has been brought to the attention of the court requested to confirm (or vacate) the award, or it is clear that the opposing party has not been prejudiced by the failure to do so." (*Silverman v. Benmor Coats, Inc.*, *supra*, at 302-03). Additionally, an award will not be found "wholly irrational" absent a showing that there was "no proof whatever to justify the award." (*Peckerman v. D&D Associates*, 165 AD2d 289 [1st Dept. 1991]). However, the court may vacate an irrational award if it is clear that an arbitrator exceeded her power. (*Matter of National Cash Register Co. v. Wilson*, 8 NY2d 377 [1960]).

Article III of the agreement between Ellis and Comtex is entitled "TERMINATION OF EMPLOYMENT." The Article enumerates various scenarios for termination, however, as Ellis proceeded to arbitration claiming that he terminated his employment without good reason, the court will only address those terms.

Section 3.1(e) of the agreement states,

(e) WITHOUT GOOD REASON. The Executive may voluntarily terminate (resign) his employment during the Employment Term without Good Reason upon thirty (30) days notice to the Company and no further benefits or compensation will be due hereunder. (Emphasis added).

Section 3.2(a) of the agreement states, in pertinent part,

[6]

(a) NOTICE OF TERMINATION. Any termination . . . by the Executive for Good Reason or without Good reason shall be communicated by "Notice of Termination" to the other party. For purposes of this Agreement, Notice of Termination means a written notice which (i) indicates the specific termination provision in this Agreement relied upon, (ii) to the extent applicable, sets forth in reasonable detail the facts and circumstances claimed to provide a basis for termination of the Executive's employment under the provision so indicated, and (iii) if the Date of Termination (as defined below) is other than the date of the receipt of such notice, specifies the Date of Termination .

..

Section 5.2 of Ellis's employment agreement with Comtex is entitled "Arbitration" and it is a standard clause stating that any disputes that the parties may have shall be resolved by the rules of the American Arbitration Association, as amended. The arbitration clause does not place any special limitations on the arbitrator.

Ellis argues that the wording of his resignation letter demonstrates that he was attempting to open a dialog with Comtex. Specifically, he claims that his use of the word "tender" signals an offer to the company and he was expecting a counter-offer. He believes that Schwartz's phone conversation after the Board meeting indicated that Ellis understood his obligations to give thirty days notice to Comtex and he was waiting for them to respond. He argues that the arbitrator's decision created "non-existent legal duties and new obligations" for him. He states that the award "gave a completely irrational construction to the provisions in dispute and, in effect, made a new contract for the parties." (*Matter of National Cash Register Co. v. Wilson, supra*). He argues that "[t]he only way that Comtex could possibly contend that Ellis breached the Employment Agreement would be if Mr. Ellis's resignation was deemed to be effective immediately."

Comtex's March 2, 2004 letter clarifies that this is exactly what happened. The letter states "On February 5, 2004, the Board of Directors accepted the resignation letter you delivered during the Board meeting, dated February 5, 2004, in which you resigned as a director and officer." Ellis focuses on what he believes Comtex's obligations were to him in light of his one sentence "tender" of resignation but he fails

to note that he did not communicate his intentions relative to his termination obligations when he walked out of the February 5th Board meeting or in his February 9th e-mail or in his February 16, 2004 letter.

Ellis also argues that if he did breach his employment contract, it was not a material breach. Ellis states that the immediate appointment of an interim CEO assured that Comtex was not helmless. Therefore, he states that his breach of the Agreement was not material because it did not cause the company harm. He states again, that the arbitrator's decision which holds him to the terms spelled out in Articles 3.1(e) and 3.2 (a) of the Agreement "effectively re-writes the terms of the contract." Ellis cites to *Kings Park Classroom Teachers' Association v. Kings Park Central School District* (100 AD2d 929 [2nd Dept. 1984]) to support the proposition that the arbitrator here exceeded her authority. However, unlike *Kings Park, supra*, the arbitrator here did limit her decision to "the application and interpretation of the provisions of this agreement." (*Id.*)

Ellis also argues that the arbitrator was collaterally estopped from re-litigating issues from Schwartz's arbitration in the Ellis arbitration. He argues that the circumstances of Schwartz's resignation were "essentially identical" to his own resignation. He submits that they had "essentially identical" employment agreements and walked-out of the same Board meeting.

Collateral estoppel is "grounded in the facts and realities of a particular litigation, rather than rigid rules. Collateral estoppel precludes a party from re-litigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity." (*Buechel v. Bain*, 97 NY2d 295, 303 [2001]). There are two requirements that must be met for a party to invoke the doctrine of collateral estoppel 1) an "identity of issue which has necessarily been decided in the prior action" and 2) "there must have been a full and fair opportunity to contest the decision now said to be controlling." (*Id.*, citations omitted.) "The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity of a party." (*Id.* at 304).

In Schwartz's arbitration matter it was found that "Schwartz did not initially

give thirty(30) days notice of his decision to resign but his subsequent offer to Board Member Gilluly to continue working for the thirty (30) day period could be considered a technical compliance with this requirement.” Accordingly, the arbitrator in Schwartz’s matter found that he substantially complied with the Agreement he had with Comtex and, therefore, awarded him certain money, payment for unused vacation days and stock options.

The “facts and realities” of Ellis’s resignation differ substantially from Schwartz’s. Ellis’s February 5, 2004 resignation letter did not mention the thirty day notice requirement or any offer to stay at Comtex. Likewise, Ellis’s February 9, 2004 e-mail to Comtex did not mention his obligation to give Comtex thirty days notice. Finally, Ellis’s February 16, 2004 letter did not mention his obligations under the Agreement. The only evidence presented to the arbitrator that Ellis made any offer to Comtex to fulfill his obligation under the Agreement and aid with transition is Ellis’s own self serving testimony which states that when Schwartz noted his own obligation to stay at Comtex for a month, Schwartz was also speaking for Ellis. Therefore, it cannot be said that Ellis has demonstrated that the decisive issue in the prior proceeding was decided against Comtex and could not be re-litigated in Ellis’s arbitration proceeding. (*Buechel v. Bain, supra*).

The arbitrator noted that not only did Ellis breach his agreement in that he failed to give thirty days notice of his resignation but his letter of resignation also failed to identify the facts and circumstances that gave rise to his resignation as also required by the Agreement. The arbitrator specifically found that Ellis’s contacts with, and letter to Comtex failed to constitute the necessary level of compliance required by sections 3.1(e) and 3.2 (a) of the Agreement. With the facts presented here, the arbitrator was wholly within her authority to find that Ellis “cannot credibly argue” that he was in the middle of negotiations with Comtex to fulfill the obligations of the Agreement while at the same time approving the announcement of his resignation.

The arbitrator was also within her authority to find that Ellis’s breach was material. Citing to a decision provided by Ellis, the arbitrator agreed with a Delaware court which found that failure to perform under an employment agreement is a material breach and it is significant to the extent that the party failing to perform acts within the bounds of good faith and fair dealing. (*Eastern Electric and Heating, Inc, et al.,v. Pike Creek Professional Center, 1987 Del Super., LEXIS 1115*). Here, the

arbitrator heard days of testimony from Comtex Board members and executives, who testified that this abrupt resignation was ill-timed and shocking as it came at a time of fiscal crisis for the company. Ellis also testified and he agreed with the Comtex witnesses regarding the necessity for an orderly and seamless transition. Indeed, he testified that he thought that a thirty day transition period might not be long enough. Therefore, the arbitrator found that Ellis's behavior was so contrary to notions of good faith and fair dealing that she found his breach of the Agreement to be material.

Here, the arbitration clause of the Agreement placed no explicit limitations on the arbitrator. (*Silverman v. Benmor Coats, Inc.*, *supra*, at 302-03). The decision cannot be said to be "wholly irrational" as there is sufficient proof in the record to justify her decision. (*Peckerman v. D&D Associates*, *supra*). Nor can it be said that the arbitration decision sought to re-write the terms of the contract but rather the arbitrator sought to enforce them. (*Kings Park Classroom Teachers' Association v. Kings Park Central School District*, 100 AD2d 929 [2nd Dept. 1984]). Under the circumstances of this case, the arbitrator's finding that Ellis's abrupt action placed Comtex in such a precarious position that he is not entitled to any benefits under the Agreement is wholly rational. Therefore, the court will not assume the role of an overseer, and the award must be confirmed. (*Sprinzen v. Nomberg*, *supra*). Wherefore, it is hereby

ORDERED that the petition to confirm the arbitration award is granted and the award rendered in favor of petitioner and against respondent is confirmed; and it is further

ORDERED and ADJUDGED that petitioner Comtex News Network, Inc. shall have judgment and recover against respondent Steve Ellis, in the amount of \$21,225 plus interest at the rate of 9% per annum from the date of September 25, 2007, as computed by the Clerk in the amount of \$ _____, together with costs and disbursements in the amount of \$ _____ as taxed by the Clerk, for the total amount of \$ _____, and that the petitioner have execution therefor; and it is further

ORDERED respondent's cross-motion to vacate the arbitration award is denied.

All other relief requested is denied.

This constitutes the decision and judgment of the Court.

Dated: December 19, 2004



EILEEN A. RAKOWER, J.S.C.

UNFILED JUDGMENT

his 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 11B)