

Benedict P. Morelli & Assoc., P.C. v Shainwald

2007 NY Slip Op 34421(U)

January 18, 2007

Supreme Court, New York County

Docket Number: 604172/04

Judge: Herman Cahn

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

DECEASED: HERMAN CAHN
Index Number : 604172/2004

PART 49

MORELLI, BENEDICT P.

vs
SHAINWALD, SYBIL

INDEX NO. _____

Sequence Number : 012

MOTION DATE 10/23/06

VACATE OR MODIFY AWARD

MOTION SEQ. NO. 012

MOTION CAL. NO. 5

C

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

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

PAPERS NUMBERED

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

FILED
JAN 25 2007
NEW YORK COUNTY CLERK'S OFFICE

Dated: 11 18 107

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
BENEDICT P. MORELLI & ASSOCIATES, P.C.,
(NOW KNOWN AS MORELLI RATNER PC),

Petitioner,

-against-

Index No. 604172/04

SYBIL SHAINWALD, AND LAW OFFICES OF
SYBIL SHAINWALD, P.C.,

Respondent.

-----X
CAHN, J.

Motion sequences # 012 and # 013 are consolidated for disposition.

Petitioner and respondent cross-move respectively, to vacate or confirm an arbitration award entered by the American Arbitration Association.

Petitioner is a law firm and respondent is an attorney who have been engaged in a bitter dispute relating to their parting of their previous association.

The affirmation in support of the petitioner's motion to vacate the partial arbitration award alleges the following relevant facts: respondent Sybil Shainwald, Esq. (Shainwald) commenced its arbitration proceeding against petitioner Benedict P. Morelli & Associates, P.C. (Morelli) on December 9, 2004. The arbitrators issued a Partial Final Award on August 30, 2006, and a Final Award on November 13, 2006 (collectively referred to as the Arbitrators' Award). The agreement between the parties was entered into on October 19, 2001 (the Agreement).

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NEW YORK COUNTY

Nine days of hearings were held before the arbitration panel, in the spring of 2006, with both sides submitting pre-hearing and post-hearing briefs.

Unanimous consent of the parties was required for the arbitration panel to issue a "reasoned opinion." Morelli refused to agree to the issuance of a "reasoned opinion," and none was therefore issued. Rather, a brief decision was rendered.

Morelli claims that on October 19, 2001, the parties entered into the Agreement and, pursuant to the Agreement, Shainwald became "counsel" to Morelli. Morelli agreed to provide Shainwald with office space and legal and administrative support, and advance disbursements for Shainwald's cases. Shainwald agreed that her clients would become clients of the Morelli firm, which would become counsel of record in all "covered cases." Further, Shainwald would use her best efforts to generate legal matters for Morelli, would promote the firm's interests, and would not refer matters or clients to other firms without Morelli's prior approval.

Paragraph 7 of the parties' Agreement addresses the allocation of attorney's fees.

That paragraph states, in relevant part:

The Firm will pay Shainwald, a commission of 40% of net attorneys' fees generated on all pending files and matters except, it is understood that Shainwald has settled approximately 38 "DES Cases" prior to signing this agreement. The Firm shall not be entitled to any portion of the settlements on those cases. Shainwald shall be entitled to a commission of 33 1/3% on new matters brought to the Firm, or referrals by clients brought to the Firm by Shainwald. Additionally, Shainwald will be entitled to the return of any disbursements and expenses advanced by her in a particular file at the successful conclusion of that matter

prior to distribution of percentages. The firm will split attorneys' fees on (referring attorneys) [*sic*] on all new matters after paying the referring attorney.

Morelli seeks to vacate the Arbitration Award pursuant to the Federal Arbitration Act's (FAA) standard of "manifest disregard" of New York contract law by the arbitrators, and for irrationality under the standard enunciated in CPLR 7511. Morelli claims that it was entitled to a contractual splitting of fees from cases in Shainwald's possession, and that the arbitrators' failure to make such an award to it requires that the Arbitration Award be vacated. The arbitrators did not just interpret the Agreement, claims Morelli, but improperly rejected its express terms.

Morelli's entire claim rests on the allegation that it was entitled to contract damages even if it was in breach. In fact, there was no such provision in the contract and Morelli's witness, David Ratner, conceded as much in his testimony at the arbitration.

Q. In the event that the Morelli firm breaches the contract, it doesn't say that the Morelli firm is entitled to keep any money, does it?

A. There is no specific language to that effect in the agreement.

Krauss Aff., Oct. 16, 2006, Exh. H at 1082.

Shainwald alleges the following relevant facts: the parties have had a long, litigious history in this court, most recently resulting in the parties' claims proceeding to contractually agreed arbitration before: Hon. E. Leo Milonas, formerly a Justice of the Appellate Division, First Department; O. Peter Sherwood, formerly Solicitor General of

the State of New York and Corporation Counsel of the City of New York, and Alfred G. Feliu, Esq., a partner in a New York City law firm (the arbitration panel).

Pursuant to a request of this court, the arbitration panel initially considered a motion made by Shainwald regarding Morelli's failure and refusal to return to her files relating to certain breast implant cases, in which clients had requested that she continue as their counsel, or where she was listed as counsel of record. By decision dated October 24, 2005, the arbitration panel directed Morelli to return those files to Shainwald. Morelli unilaterally chose to return all of the breast implant cases he had to Shainwald.

The panel dismissed all of Morelli's contract claims, finding that Morelli failed to prove its claim that Shainwald either failed to use her best efforts to promote the interest of the firm or to generate legal matters for the firm. The panel found that Morelli failed to prove that Shainwald diverted files to another attorney, or wrongfully solicited clients.

The arbitration panel awarded Shainwald compensatory damages and imposed certain safeguards to assure that she would actually receive the amounts awarded. Shainwald was found to be entitled to: a stated percentage for certain identified cases in Morelli's possession; all fees already received by Morelli, with interest, to be paid within 30 days of the award; a full accounting of settled matters; and fees from future settlements. The parties were directed to agree to a Certified Public Accountant to review Morelli's records and provide audited statements of all payments and disbursements by Morelli.

The panel specifically held that Morelli was not entitled to any fees or compensation from Shainwald.

The arbitration panel retained jurisdiction to ensure Morelli's compliance with its order and entered a final arbitration order, dated November 13, 2006.

Judicial review of arbitration awards is limited and an award will be upheld so long as there is "even a barely colorable justification for the outcome." *Wien & Makin LP v Helmsmen-Spear, Inc.*, 6 NY3d 471, 479 (2006). The arbitrators are free to shape a remedy with unrestrained flexibility in order to achieve a just result. *Board of Ed. of Norwood-Norfolk Cent. School Dist. v Hess*, 49 NY2d 145 (1979).

The standard of "manifest disregard of law," urged by Morelli as the test, under the FAA, for measuring the propriety of the award, has been called a doctrine of last resort, and one limited to situations in which the arbitrators engage in an "egregious impropriety." *Wien & Makin LP v Helmsmen-Spear, Inc.*, 6 NY 3d at 480. The doctrine turns on a manifest disregard of the law by the arbitrators and requires more than a showing of a mere legal error. *Success Systems, Inc. v Maddy Petroleum Equipment, Inc.*, 316 F Supp 2d 93 (D Conn 2004). The party seeking to challenge the award bears a heavy burden of proving the arbitrators' manifest disregard of the law. *Heft v M.L. Group, Inc.*, 343 F3d 57 (2d Cir 2003). The challenging party "must prove that: '(1) the arbitrator[] knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator[] was well defined, explicit, and

clearly applicable to the case.” *Id.* at 69.

Even if the award is erroneous, it may be confirmed if a justifiable ground may be inferred from the facts. *Matter of Fellas v A.B. Gatley, Inc.*, 7 Misc 3d 1016(A) (Sup Ct, NY County 2005).

Further, the doctrine of “manifest disregard of law” is difficult, if not impossible to apply where the arbitrators did not issue a “reasoned opinion,” since there is no way of knowing how the arbitrators reached their opinion. *Heft v M.L. Group, Inc.*, 343 F 3d at 68 (“If the parties to an arbitration agreement want to know the arbitrator’s reasoning, they may request that he include it in his award”).

Nor does it apply where the arbitrators are interpreting contract terms, where the law and the facts are highly contested by the parties or where the court can glean a “barely colorable justification” for the award. *Success Systems, Inc. v Maddy Petroleum Equipment, Inc.*, 316 F Supp 2d at 100.

Since the arbitrators’ opinion is not “a reasoned one,” the standard of “manifest disregard of law” would be impossible to apply in this case. The highly contested nature of this dispute also makes this an inappropriate matter for applying this standard.

CPLR 7511 (b) specifies the grounds for vacating an award. These grounds include: corruption, fraud or misconduct; partiality or exceeding authority of the arbitrator; and failure to follow statutory procedures.

CPLR 7510 provides that an award must be confirmed unless it is vacated or

modified on one of the grounds listed in CPLR 7511.

Morelli's opposition to confirmation of the partial final award as untimely is denied as moot, based on evidence of the November 13, 2006 Final Arbitration Award.

Morelli takes exception to paragraph 6 of the arbitrators opinion, which states that all fees earned on matters in Shainwald's possession shall belong to Shainwald, and Morelli shall receive no payment or have any claim for fees or disbursements on those matters. Morelli argues that the arbitrators erroneously rejected the contract terms of apportionment of fees with this award to Shainwald.

The record reveals that the arbitrators enforced the express terms of paragraph 7 of the parties' agreement, by apportioning commissions to Shainwald in accordance with the contract term to fees received by Morelli in settlement of cases in Morelli's possession, and to future fees on cases in Morelli's possession which were open and unsettled. Whether the arbitrators' found the agreement to be silent on the issue of apportionment of fees on cases in Shainwald's possession, or had some other reason for awarding her 100% of the fees on files in her possession can not be stated since the opinion was not a "reasoned" one. At most, the court could guess as to how or why the arbitrators arrived at their decision. But such guessing is not the proper function of the court. The arbitrators are found to have exercised their discretion in fashioning a remedy that was appropriate, based on the record presented to them. The remedy thus fashioned rested on more than a "barely colorable justification," and is confirmed.

The motion to vacate the award is denied, and the cross motion to confirm the award is granted.

Accordingly, it is

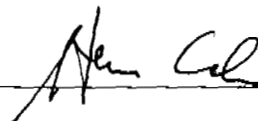
ORDERED that the petition to vacate the arbitration award is denied; and it is further

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

ORDERED that the clerk shall enter judgment accordingly.

Dated: January 18, 2007

ENTER:



J.S.C.

FILED
JAN 18 2007
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OFFICE