INDEX NO.11562-2006

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 004 MD

CASEDISPOSED

Present:
Hon. SANDRA L. SGROI

Adj'd Date: 4-3-08
Return Date: 2-13-08

CHRISTOPHER DORNEY,

Plaintiff,

-against-

CRC GROUP, LLC,

Defendant.

COLIN F. DORNEY, ESQ.
Attorney for the Plaintiff
141 Park Avenue
Williston Park, New York 11596

RIVKIN RADLER, LLP
Attorney for Defendant
926 Reckson Plaza
Uniondale, New York 11556-0111

Upon the following papers numbered 1 to 17 read on this Motion: Notice of Motion and supporting papers 1-9; Affidavit and affirmation in opposition and supporting papers 10-14; Reply Affirmation and supporting papers 15-17; it is,

ORDERED that the motion of the Plaintiff to renew and reargue a decision of this Court dated November 23, 2007, is denied; and it is further

ORDERED that this Court affirms the holdings in its prior order dated November 23, 2007.

On or about June 14, 2001, Roger Fox, Cynthia Fox and Christopher Dorney (the Plaintiff herein) organized a limited liability company to do business in New York State. Christopher Dorney, Roger Fox and Cynthia Fox entered into a written agreement, termed herein "the operating agreement" for the purpose of governing the functioning as a limited liability entity. The Articles of Organization for that company known as CRC Group, LLC (the Defendant hereinafter "CRC") were filed with the New York Secretary of State. Paragraph 13.14 of the operating agreement provides that any disputes between the parties or any disputes arising under the operating agreement that cannot be resolved between the parties to the agreement first shall be referred to a mediator and if the parties still cannot agree, the dispute must proceed to arbitration. The agreement states that this "shall be the exclusive legal remedies of the parties."[1]

The agreement to arbitrate disputes that the parties cannot resolve by mediation and then arbitration is clear, unambiguous and direct. This arbitration clause is a broad agreement between the parties that requires any unresolved dispute to be determined by a final arbitration after mediation.

When the action to compel arbitration was commenced in 2006 against CRC, the Plaintiff did not serve a Notice of Intention to Arbitrate against either Roger Fox or Cynthia Fox and did not add them as Defendants to this action. CRC and Dorney, the only parties before the Court at that time, proceeded to arbitration without appeal. The Plaintiff seeks to reargue a decision of this Court that refused to allow the Plaintiff to add these two individuals to this action.

On or about November 8, 2007, the Honorable Rolando T. Acosta, J.S.C., in an action brought by Cynthia Fox and Roger Fox pending in Manhattan, issued an order that stayed arbitration of any claims brought by Dorney against Cynthia Fox and Roger Fox pending mediation (see, ***Fox and Fox v. Dorney***, Index No. 602688-2007, Honorable Rolando T. Acosta, J.S.C., Decision dated 11/26/07). That decision addressed the issue presently before this Court and it requires that Dorney, Roger Fox and Cynthia Fox proceed to mediation prior to arbitrating the controversies in issue.

Both State and Federal statutes express a policy favoring the resolution of disputes through mediation and arbitration, if that is called for in a contract previously agreed to by the persons who have a dispute (see,

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[1]The written agreement signed by the Plaintiff provides that :
Any disputes between the parties or any disputes arising hereunder which the parties cannot resolve between themselves using good faith shall be referred to a *court certified mediator* of the Supreme Court in the County of the principal office of the Company, and any medication (sic) and or arbitration shall be held in the County of the principal office of the Company, and shall be the exclusive legal remedies of the parties. The parties shall share equally in the cost of said mediation. *In the event that said dispute is not resolved in mediation, the parties shall submit the dispute to an arbitrator certified by the Supreme Court in the County of the principal office of the Company. The decision of the arbitrator shall be final and binding.* (italics supplied by the Court).

Matter of Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 214 N.Y.S.2d 353, 174 N.E.2d 463; ***Kessner & Rabinowitz, Inc. v. Winchester Textiles, Inc.***, 46 A.D.2d 239, 361 N.Y.S.2d 933). Arbitration is considered to be an appropriate forum to resolve disputed issues involving partnerships and other business arrangements between persons or other entities (see, ***Silverberg v Schwartz,*** 81 AD2d 640, 438 NYS2d 143). The liability of Cynthia Fox and Roger Fox, if any, must first be resolved through mediation and then arbitration, pursuant to the express terms of the written agreement between the parties and the decision of Justice Rolando T. Acosta, J.S.C.

In addition to asking that the Court review its order denying the joinder of Cynthia Fox and Roger Fox, the Plaintiff also has sought re-argument of the decision of this Court to the extent that it refused to confirm the arbitrator's decision and remanded the matter for another hearing

In the prior arbitration proceeding to which only Dorney and CRC were parties, CRC had alleged that the Plaintiff was not due any distributions from its earnings and profits. On April 12, 2007, as part of the discovery process in that arbitration, the attorney for the Plaintiff received a copy of the Income Tax Return for CRC. According to the attorney for the Plaintiff, this Income Tax Return indicates that the Plaintiff is owed the amount of $1,400,434.00 as distributions of profit. After receiving this document, the Plaintiff sought an order from the Arbitrator for a preliminary payment of the distributions from the year 2006 in order to make the payments necessary to address the Plaintiff's alleged Federal and State tax liabilities. The attorney for the Plaintiff stated in his affirmation "[t]he respective taxing authorities are aggressively seeking these payments from both the plaintiff and his spouse." At the request of Dorney, the arbitrator issued a interim decision on this matter on June 25, 2007, after hearing oral argument from both counsels for the Plaintiff and for the Defendant. The interim arbitration award granted Dorney's request for an immediate distribution of cash from CRC, declaring that Dorney is entitled to a distribution of $91,243.00 for 2005 and $1,705,171.00 for 2006 for a total distribution of $1,796,414.00 for those years.

Pursuant to ***CPLR*** 7511(b)(1), an arbitration award may be vacated by the Court under limited circumstances including where the arbitrator exceeded his powers so that no final and definite award was made or where the arbitrator failed to follow the procedures mandated by ***CPLR*** Article 75 (see, ***Matter of Wicks Constr. v. Green***, 295 A.D.2d 527, 528, 744 N.Y.S.2d 452). The award will not be vacated "unless it is violative of a strong public policy, is totally irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (***Matter of Town of Callicoon [Civil Serv. Empls. Assn. Town of Callicoon Unit]***, 70 N.Y.2d 907, 909, 524 N.Y.S.2d 389, 519 N.E.2d 300).

The arbitration award provided for a fixed sum to be paid in resolution of both of the parties' claims (see, ***Hausknecht v. Comprehensive Medical Care of New York, P.C.***, 24 A.D.3d 778, 809 N.Y.S.2d 85; ***Matter of Civil Serv. Empls. Assn. v. County of Nassau***, 305 A.D.2d 498, 759 N.Y.S.2d 540; ***Matter of Mohiuddin v. Khan***, 197 A.D.2d 578, 602 N.Y.S.2d 664). In order for any arbitration award to be valid in New York, it must be final. The award is considered final if "the award provides for a fixed sum to be paid in resolution of both of the parties' claims" (***Hausknecht v. Comprehensive Medical Care of New York, P.C.***, 24 A.D.3d 778, 809 N.Y.S.2d 85).

The ***CPLR*** provides that an award may be vacated where an arbitrator so imperfectly executed his or her

power that a "final and definite" award upon the subject matter submitted was not made (see, ***CPLR*** 7511 (b)). An arbitration award is final when it leaves nothing to be done to dispose of the entire matter in controversy except ministerial acts or arithmetic calculations. Although an award which disposes of the controversy submitted to arbitration is not rendered non-final by the fact that the arbitrator retains jurisdiction to resolve any disputes which may arise as the parties undertake to execute the award (see, ***Meisels v Uhr*** 79 NY2d 526, 583 NYS2d 951, 593 NE2d 1359), an arbitration award is not final if it leaves open loopholes for future disputes and litigation, is incomplete and uncertain or indefinite as to any item, or is not full and final on all points submitted. Stated succinctly, an arbitration award is fatally deficient if (1) it leaves the parties unable to determine all of their rights and obligations, (2) it does not resolve the entire controversy submitted, or (3) it creates a new controversy (see, ***Meisels v Uhr,*** supra; ***Civil Service Employees. Ass'n, Local 1000 ex rel. Hinton v State*** 223 AD2d 890, 636 NYS2d 234).

CPLR 7506 guarantees certain minimum procedural due process protection to parties involved in the arbitration process. Although arbitrators are not bound by the New York rules of evidence applied by Courts at trials when a hearing is conducted, the parties are guaranteed the right to have their concerns heard, to present evidence to the tribunal and to cross-examine any witnesses (see, ***Travelers Property Cas. Co. v. Place Transp., Inc.,*** 270 A.D.2d 352, 706 N.Y.S.2d 877; ***Coty Inc. v. Anchor Constr.***, 2003 N.Y. Misc. LEXIS 13, 2003 NY Slip Op 50013U, aff'd 7 A.D.3d 438, 776 N.Y.S.2d 795). These due process protections do not preclude an arbitrator from making a decision on the basis of written submissions where that is appropriate (see, ***Wise v. Marriott Int'l, Inc.***, 2007 U.S. Dist. LEXIS 55611, application denied 2007 U.S. Dist. LEXIS 70512, S.D.N.Y. Sept. 24, 2007).

As Judge Colleen McMahon held in ***Yonir Techs., Inc. v. Duration Sys. Ltd.***, 244 F. Supp. 2d 195, 203 (S.D.N.Y. 2002):

> It does not violate due process to issue a decision based on a written submission. An arbitrator has the discretion to choose not to hold oral hearings, as long as his decision based on other evidence is reasonable and not fundamentally unfair . . . . [T]he lack of a formal, oral hearing does not violate F.A.A. 10(a) (3) and is not fundamentally unfair . . . .
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> Thus, it can hardly be the case that an arbitral award made on a written submission, where the parties had discretion to present the arbitrators with any information they thought relevant, including written sworn testimony if they wished, violates due process or denies fundamental fairness.

However here, the Defendant's attorney alleged that he was not given the opportunity to submit any evidence to the arbitrator contrary to the Plaintiff's written evidence and there is no indication that the Defendant had any opportunity to submit written, sworn testimony or cross examine witnesses or the allegations of witnesses. Further, there is no indication in the record before this Court that the Defendant's attorney consented to waive submission of testimony or the right to challenge submissions of the Plaintiff.

Although it is permissible for an arbitrator to conduct telephonic hearings instead of face to face proceedings, an arbitrator is not bound by traditional rules of evidence or principles of substantive law. The arbitrator may exclude evidence or witnesses and may deny adjournments but the arbitration proceeding still must comply with due process and the parties must be afforded the opportunity to produce and cross examine witnesses (see, ***Kingsley v. Redevco Corp.***, 61 N.Y.2d 714, 472 N.Y.S.2d 610, 460 N.E.2d 1095). The Court adheres to its previous decision because the record indicates that CRC did not have the opportunity to produce and confront witnesses before the arbitrator issued his decision.

The arbitrator's decision states that it is an "interim" award and provides that the hearing has been left open for the purpose of receiving additional submissions. Further, although the decision states that it is not a final decision, it essentially decided all of the contested matters between the parties when the Plaintiff was awarded the sum of $1,796,414.00 with an immediate distribution of $898,207.00. The only matters left open to decide after the issuance of the arbitrators's "interim" award were additional penalties, professional fees and interest. Therefore, it is appropriate that the Court address these issues at this time.

Where, as here, the proceeding before the Court involved challenges to the arbitrator's exercise of powers and the legality of his decision, it is not an abuse of discretion to remit matter to a different arbitrator (see, ***East Ramapo Cent. School Dist. v. East Ramapo Teachers Ass'n***, 108 A.D.2d 717, 484 N.Y.S.2d 882).

Dated: 5/2/08

SANDRA L. SGROI, J. S. C.